Preface

The first three volumes of the World Court Digest cover the periods 1986 to 1990, 1991 to 1995 and 1996 to 2000. We are happy to issue the fourth volume, covering the period from 2001 to 2005. We hope that this new Digest will be welcome to all those interested in the case law of the International Court of Justice.

We are, of course, aware that nowadays the decisions of the Court are easily accessible through electronic data systems. However, there is no systematic analysis available in the form presented by the World Court Digest. Therefore, the Digest will be useful for those who wish to find the most recent position of the Court on a particular issue of international law. As the three previous volumes, also this fourth volume will be made available through electronic data on the homepage of the Max Planck Institute for Comparative Public Law and International Law.

The first five years of the new century have been a busy period for the Court due to its continuing heavy caseload. The cases concerned a variety of legal issues reaching from the use of force and self-defence to questions of land and maritime boundary delimitation, immunity, consular matters, revision of judgments and the effect of provisional measures. The parties to the cases were States from all parts of the world demonstrating the general acceptance of the Court.

The Digest has been prepared by a working group at the Max Planck Institute composed of Petra Minnerop, Karin Oellers-Frahm, Frank Schorkopf, Christian Walter and Annette Weerth.

The present volume will be devoted to the remembrance of Carl-August Fleischhauer, former Judge at the International Court of Justice.

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Directors of the Institute

2. SOURCES OF INTERNATIONAL LAW

*** 2.1. General Questions**

* 2.1.1. Formation of Rules of International Law

* 2.1.2. Historic Rights

* 2.1.3. Rules of International Law of Regional and Local Application

2.1.4. *Ius cogens* / obligations *erga omnes*

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, p. 136

[pp. 199-200] 55. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self–determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the East Timor case, it described as "irreproachable" the assertion that "the right of peoples to self–determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self–determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the

United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ..."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ ...", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court’s view, these rules incorporate obligations which are essentially of an erga *omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self–determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an

obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

[pp. 231-232 **S.O. Kooijmans**] 39. Although the Court beyond any doubt is entitled to do so, the request itself does not necessitate (not even by implication) the determination of the legal consequences for other States, even if a great number of participants urged the Court to do so (para. 146). In this respect the situation is completely different from that in the *Namibia* case where the question was exclusively focussed on the legal consequences for States, and logically so since the subject-matter of the request was a decision by the Security Council.
In the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the *Namibia* case is insufficient.

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40. (Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.)
> 2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."

Paragraph 3 of Article 41 is a saving clause and of no relevance for the present case.

41. I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument's sake I start from the assumption that the consequences of the violation of such obligations are identical.

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states "What is called for in the face of serious breaches is a joint and co-ordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "co-operation ... in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court's finding in operative subparagraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which - virtually without exception - take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination", the annexation of Manchuria by Japan and of Kuwait by Iraq, South-Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (res. ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125.)

Case Concerning Armed Activities
on the Territory of the Congo
(Democratic Republic of Congo v. Uganda)
Judgment of 19 December 2005

[pp. 349-350 **S.O. Simma**] 38. Let me conclude with a more general observation on the community interest underlying international humanitarian and human rights law. I feel compelled to do so because of the notable hesitation and weakness with which such community interest is currently manifesting itself vis-à-vis the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed "war" on international terrorism.

39. As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, "[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable '*erga omnes*', since they may be regarded as the codification of accepted principles"[1]. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257,

para. 79). Similarly, in the *Wall* Advisory Opinion, the Court affirmed that the rules of international humanitarian law "incorporate obligations which are essentially of an *erga omnes* character" (*I.C.J. Reports 2004*, p. 199, para. 157).

40. As the Court indicated in the *Barcelona Traction* case, obligations *erga omnes* are by their very nature "the concern of all States" and, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). In the same vein, the International Law Commission has stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts, that there are certain rights in the protection of which, by reason of their importance, "all States have a legal interest ..." (A/56/10 at p. 278)[2].

41. If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.

* 2.1.5. Relation between the Sources of International Law

2.2. Customary International Law

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1 Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, J.S. Pictet (ed.), 1985,, p. 48.

2 Concerning the specific question of standing in case of breaches of obligations *erga omnes* the Institute of International Law, in a resolution on the topic of obligations of this nature adopted at its Krakow Session of 2005, accepted the following provisions:

"Article 3

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

Article 4

The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation."

2.2.1. Formation of Customary International Law

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)
Judgment of 14 February 2002

[p. 21-22] 53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 *(a)*, of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

[pp. 144-145 **D.O. Van den Wyngaert**] 13. In the present case, there is no settled practice *(usus)* about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current[3] or former Heads of State[4] in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions[5]. Why this is so is a matter of speculation. The question, however, is what to infer from this "negative practice". Is this the expression of an *opinio juris* to the effect that international law prohibits criminal proceedings or, concomitantly, that Belgium is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical

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3 Cour de Cassation (Fr.), 13 Mar. 2001 (*Qaddafi*).

4 *R. v. Bow Street Metropolitan Stipendiary Magistrate and others*, ex parte *Pinochet Ugarte*, 25 Nov. 1998, [1998] 4 All ER 897.

5 Only one case has been brought to the attention of the Court: *Chong Boon Kim* v. *Kim Yong Shik and David Kim*, Circuit Court (First Circuit, State of Hawaii), 9 Sep. 1963, 58 *AJIL* 1964, pp. 186–187. This case was about an incumbent Foreign Minister against whom process was served while he was on an *official visit* in the United States (see para. 1 of the "Suggestion of Interest Submitted on behalf of the United States", *ibid.*). Another case where immunity was recognised, not of a Minister but of a prince, was in the case of *Kilroy* v. *Windsor (Prince Charles, Prince of Wales*), US District Court for the N.D. of Ohio, 7 Dec. 1978, *International Law Reports*, Vol. 81, 1990, pp. 605–607. In that case, the judge observes: "The Attorney–General ... has determined that the Prince of Wales is immune from suit in this matter and has filed a 'suggestion of immunity' with the Court ... [T]he doctrine, being based on foreign policy considerations and the Executive's desire to maintain amiable relations with foreign States, applies with even more force to live persons representing a foreign nation *on an official visi*t." (Emphasis added.)

concerns and lack of extraterritorial criminal jurisdiction[6]. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law.

[pp. 154-156 **D.O. Van den Wyngaert**] 27. ... In legal doctrine, there is a plethora of recent scholarly writings on the subject. Major scholarly organizations, including the International Law Association[7] and the Institut de droit international have adopted resolutions[8] and newly established think tanks, such as the drafters of the "Princeton principles"[9] and of the "Cairo principles"[10] have made statements on the issue. Advocacy organizations, such as Amnesty International[11], Avocats sans Frontières[12], Human Rights Watch, The International

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6 In some States, for example, the United States, victims of extraterritorial human rights abuses can bring civil actions before the Courts. See, for example, the *Karadzic* case (*Kadic* v. *Karadzic*, 70 F. 3d 232 (2d Cir. 1995)). There are many examples of civil suits against incumbent or former Heads of State, which often arose from criminal offences. Prominent examples are the *Aristeguieta* case (*Jimenez* v. *Aristeguieta*, ILR 1962, p. 353), the *Aristide* case (*Lafontant* v. *Aristide*, 844 F. Supp. 128 (EDNY 1994), noted in 88 AJIL 1994, pp. 528–532), the *Marcos* cases (*Estate of Silme G. Domingo* v. *Ferdinand Marcos*, No. C82–1055V, AJIL 1983, p. 305: *Republic of the Philippines* v. *Marcos and Others* (1986), ILR 81, p. 581 and *Republic of the Philippines* v. *Marcos and others*, 1987, 1988, ILR 81, pp. 609 and 642) and the *Duvalier* case (*Jean–Juste* v. *Duvalier*, No. 86–0459 Civ (US District Court, SD Fla.), 82 AJIL 1988, p. 596), all mentioned and discussed by Watts (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", Recueil des Cours de l'Académie de droit international, 1994, III, pp. 54 et seq.). See also the American 1996 Antiterrorism and Effective Death Penalty Act which amended the Foreign Sovereign Immunities Act (FSIA), including a new exception to State immunity in case of torture for civil claims. See J. F. Murphy, "Civil liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", 12 *Harvard Human Rights Journal*, 1999, pp. 1–56.

7 International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, 2000.

8 See also the *Institut de droit internationa*l's Resolution of Santiago de Compostela, 13 Sep. 1989, commented by G. Sperduti, "Protection of human rights and the principle of non–intervention in the domestic concerns of States. Rapport provisoire", *Yearbook of the Institute of International La*w, Session of Santiago de Compostela, 1989, Vol. 63, Part I, pp. 309–351.

9 Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdictio*n, 23 July 2001, with a foreword by Mary Robinson, United Nations High Commissioner for Human Rights, http://www.princeton.edu/~lapa/unive_jur.pdf. See M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International La*w, 2001, Vol. 42, pp. 1–100. Sep. 2001, AI Index IOR 53/2001.

10 Africa Legal Aid (AFLA), *Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective*, Cairo, 31 July 2001, http://www.afla.unimaas.nl/ en/act/univjurisd/preliminaryprinciples.htm.

11 Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, Sep. 2001, AI Index IOR 53/2001.

Federation of Human Rights Leagues (FIDH) and the International Commission of Jurists[13], have taken clear positions on the subject of international accountability[14]. This may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in formation of customary international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions[15]. Well–known examples are the 1968 Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[16], which can be traced back to efforts of the International Association of Penal law, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, probably triggered by Amnesty International's Campaign against Torture, the 1997 Treaty banning Landmines[17] , to which the International Campaign to Ban Landmines gave a considerable impetus[18] and the 1998 Statute for the International Criminal Court, which was promoted by a coalition of non–governmental organizations.

28. The Court fails to acknowledge this development, and does not discuss the relevant sources. Instead, it adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the – wrongly postulated – rule of immunity for incumbent Ministers under customary international law (Judgment,

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12 Avocats sans frontières, "Débat sur la loi relative à la répression des violations graves de droit international humanitaire", discussion paper of 14 Oct. 2001, available on http://www.asf.be.

13 K. Roth, "The Case For Universal Jurisdiction", *Foreign Affair*s, Sep./Oct. 2001, responding to an article written by an ex–Minister of Foreign Affairs in the same review (Henry Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affair*s, July/Aug. 2001).

14 See the joint Press Report of Human Rights Watch, the International Federation of Human Rights Leagues and the International Commission of Jurists, "Rights Group Supports Belgium's Universal Jurisdiction Law", 16 Nov. 2000, available at http://www.hrw.org/press/2000/11/world–court.htm or http://www.icj.org/press/press01/ english/belgium11.htm. See also the efforts of the International Committee of the Red Cross in promoting the adoption of international instruments on international humanitarian law and its support of national implementation efforts (http://www.icrc.org/eng/ advisory_service_ihl; http://www.icrc.org/eng/ihl).

15 M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International La*w, 2001, Vol. 42, p. 92.

16 Convention on the Non–Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 Nov. 1968, *ILM* 1969, p. 68.

17 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti–personnel Mines and on their Destruction, Oslo, 18 Sep. 1997, *ILM* 1997, p. 1507.

18 The International Campaign to Ban Landmines (ICBL) is a coalition of non–governmental organisations, with Handicap International, Human Rights Watch, Medico International,

para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent former Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

* 2.2.2. Evidence of Customary International Law

*** 2.3. Treaties**

2.4. General Principles of Law

LaGrand Case
(Germany v. United States of America)
Judgment of 27 June 2001

[p. 503] 103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance, is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

> "the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J, Series A/B, No. 79*, p. 199).

Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented (see *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 106; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 142; *Frontier*

Mines Advisory Group, Physicians for Human Rights, and Vietnam Veterans of America Foundation as founding members.

Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 9, para. 18, and p. 11, para. 32, point 1 A; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 23, para. 48, and p. 24, para. 52 B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 349, para. 57, and p. 350, para. 61 (3); *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, pp. 22–23, para. 41, and p. 24, para. 49 (1)).

2.5. Unilateral Acts

Case Concerning Armed Activities
on the Territory of the Congo
(Democratic Republic of Congo v. Uganda)
Judgment of 19 December 2005

[p. 266] 293. The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru *(Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247-250, paras. 12-21). Similarly, the International Law Commission, in its commentary on Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts, points out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal" *(ILC report, doc. A/56/10, 2001*, p. 308). In the Court's view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime.