



INTERNATIONAL LAW  
FELLOWSHIP PROGRAMME

The Hague, The Netherlands  
22 June – 31 July 2015

**THE LAW OF TREATIES**  
**PROFESSOR PIERRE BODEAU-LIVINEC**

Codification Division of the United Nations Office of Legal Affairs



**THE LAW OF TREATIES**  
**PROFESSOR PIERRE BODEAU-LIVINEC**

**Outline**

9

**REQUIRED READINGS** (*printed format*)

**Legal instruments and documents**

1. Vienna Convention on the Law of Treaties, 1969  
For text, see *The Work of the International Law Commission*, 8th ed., vol. II, United Nations Publication, 2012, p. 116
2. Guide to Practice on Reservations to Treaties, 2011 (without commentaries)  
For text, see *The Work of the International Law Commission*, 8th ed., vol. II, p. 452
3. United Nations Depository Notifications concerning the accession of the State of Palestine to the Rome Statute of the International Criminal Court: C.N.13.2015, C.N.57.2015, C.N.63.2015, C.N.64.2015, C.N.103.2015, C.N.120.2015, C.N.125.2015 12
4. Situation in Palestine, International Criminal Court, Office the Prosecutor, Decision of 3 April 2012 18

**Case law**

5. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, paras. 19-22 20
6. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, paras. 92-115 22
7. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, paras. 195-199, 247-268 30
8. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, paras. 71-117 36



# LAW OF TREATIES – SELECTED ISSUES

## *Outline*

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### 1. The Making of Treaties

- The capacity to conclude treaties
  - The *Cameroon-Nigeria* Case (2002)
- Formulating Reservations to treaties
  - The *Guide to Practice on Reservations to Treaties* (ILC, 2011), a brief overview

### 2. The Life of Treaties

- Treaty Interpretation
  - The *Namibia* Advisory Opinion (1971)
- Treaty Implementation
  - The *Belgium-Senegal* Case (2012)

### 3. The End of Treaties

- Causes for Suspension or Termination of Treaties
  - The *Gabčíkovo-Nagymaros* Case



**United Nations Depositary Notifications concerning the accession of the  
State of Palestine to the Rome Statute of the International Criminal Court:  
C.N.13.2015, C.N.57.2015, C.N.63.2015, C.N.64.2015, C.N.103.2015,  
C.N.120.2015, C.N.125.2015**

Reference: C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

ROME, 17 JULY 1998

STATE OF PALESTINE: ACCESSION

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 2 January 2015.

The Statute will enter into force for the State of Palestine on 1 April 2015 in accordance with its article 126 (2) which reads as follows:

“For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.”

6 January 2015



Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned. Depositary notifications are issued in electronic format only. Depositary notifications are made available to the Permanent Missions to the United Nations in the United Nations Treaty Collection on the Internet at <https://treaties.un.org>, under "Depositary Notifications (CNs)". In addition, the Permanent Missions, as well as other interested individuals, can subscribe to receive depositary notifications by e-mail through the Treaty Section's "Automated Subscription Services", which is also available at <https://treaties.un.org>.

Reference: C.N.57.2015.TREATIES-XVIII.10 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

ROME, 17 JULY 1998

CANADA: COMMUNICATION 1

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 16 January 2015.

(Original: English)

“The Permanent Mission of Canada to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the Rome Statute of the International Criminal Court and the Secretary-General's communication of 6 January 2015, C.N.13.2015.TREATIES-XVIII.10, relating to that treaty. The Permanent Mission of Canada notes that this communication was made pursuant to the Secretary-General's capacity as Depositary for the Rome Statute of the International Criminal Court. The Permanent Mission of Canada notes the technical and administrative role of the Depositary, and that it is for States Parties to a treaty, not the Depositary, to make their own determination with respect to any legal issues raised by instruments circulated by a depositary.

In that context, the Permanent Mission of Canada notes that 'Palestine' does not meet the criteria of a state under international law and is not recognized by Canada as a state. Therefore, in order to avoid confusion, the Permanent Mission of Canada wishes to note its position that in the context of the purported Palestinian accession to the Rome Statute of the International Criminal Court, 'Palestine' is not able to accede to this convention, and that the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada's treaty relations, with respect to the 'State of Palestine'.”

23 January 2015



<sup>1</sup> Refer to depositary notification C.N.13.2015.TREATIES-XVIII.10 of 6 January 2015 (Accession: State of Palestine).

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Reference: C.N.63.2015.TREATIES-XVIII.10 (Depositary Notification)

Reference: C.N.64.2015.TREATIES-XVIII.10 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT  
ROME, 17 JULY 1998

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT  
ROME, 17 JULY 1998

ISRAEL: COMMUNICATION<sup>1</sup>

UNITED STATES OF AMERICA: COMMUNICATION<sup>1</sup>

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 16 January 2015.

The above action was effected on 16 January 2015.

(Original: English)

(Original: English)

"The Permanent Mission of Israel to the United Nations presents its compliments to the Secretary-General of the United Nations, in his capacity as depositary to the Rome Statute of the International Criminal Court, and refers to the communication by the depositary, dated 6 January 2015, regarding the Palestinian request to accede to this Statute (Reference number C.N.13.2015.TREATIES-XVIII.10).

"The United States Mission to the United Nations presents its compliments to the United Nations and refers to the U.N. Secretary-General's depositary notification C.N.13.2015.TREATIES-XVIII.10, dated January 6, 2015, regarding the purported accession of the 'State of Palestine' to the Rome Statute of the International Criminal Court, done at Rome July 17, 1998 (the Rome Statute).

'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid Statute under general international law, as well as under the terms of the Rome Statute and of bilateral Israeli-Palestinian agreements.

The Government of Israel does not recognize 'Palestine' as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider 'Palestine' a party to the Statute and regards the Palestinian request for accession as being without any legal validity or effect."

The Government of Israel does not recognize 'Palestine' as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider 'Palestine' a party to the Statute and regards the Palestinian request for accession as being without any legal validity or effect."

The Government of the United States of America does not believe the 'State of Palestine' qualifies as a sovereign State and does not recognize it as such. Accession to the Rome Statute is limited to sovereign States. Therefore, the Government of the United States of America believes that the 'State of Palestine' is not qualified to accede to the Rome Statute."

23 January 2015

23 January 2015



<sup>1</sup> Refer to depositary notification C.N.13.2015.TREATIES-XVIII.10 of 6 January 2015 (Accession: State of Palestine).

<sup>1</sup> Refer to depositary notification C.N.13.2015.TREATIES-XVIII.10 of 6 January 2015 (Accession: State of Palestine).

Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned. Depositary notifications are issued in electronic format only. Depositary notifications are made available to the Permanent Missions to the United Nations in the United Nations Treaty Collection on the Internet at <https://treaties.un.org>, under "Depositary Notifications (CNs)". In addition, the Permanent Missions, as well as other interested individuals, can subscribe to receive depositary notifications by e-mail through the Treaty Section's "Automated Subscription Services", which is also available at <https://treaties.un.org>.

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Reference: C.N.103.2015.TREATIES-XVIII.10 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT  
ROME, 17 JULY 1998

STATE OF PALESTINE: COMMUNICATION <sup>1</sup>

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 6 February 2015.

(Original: English)

The Permanent Observer of the State of Palestine to the United Nations presents his compliments to the Secretary-General of the United Nations, in his capacity as Depositary, and has the honor to refer to depositary notification C.N.57.2015.TREATIES-XVIII.10, dated 23 January 2015, conveying a communication of Canada regarding the accession of the State of Palestine to the Rome Statute of the International Criminal Court, dated 17 July 1998.

The Government of the State of Palestine regrets the position of Canada and wishes to recall United Nations General Assembly resolution 67/19 of 29 November 2012 according to which Palestine is a non-member observer State status in the United Nations. In this regard, Palestine is a State recognized by the United Nations General Assembly on behalf of the international community.

As a State Party to the Rome Statute of the International Criminal Court, which enters into force on 1 April 2015, the State of Palestine will exercise its rights and honor its obligations with respect to all States Parties. The State of Palestine trusts that its rights and obligations will be equally respected by its fellow States Parties.<sup>1</sup>

9 February 2015



<sup>1</sup> Refer to depositary notification C.N.57.2015.TREATIES-XVIII.10 of 23 January 2015 (Communication: Canada).

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Reference: C.N.103.0312.TR5.ATI5S-E.XIII.13 (Depositary Notification)

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STAT5 VF PAH5STINS: CVMUNICATIVN <sup>1</sup>

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 6 February 0312.

(Original: English)

The Permanent Observer of the State of Palestine to the United Nations presents his compliments to the Secretary-General of the United Nations, in his capacity as Depositary, and has the honor to refer to depositary notification C.N.G.0312.TR5.ATI5S-E.XIII.13, dated 07 January 0312, conveying a communication of Israel regarding the accession of the State of Palestine to the Rome Statute of the International Criminal Court, dated 11 July 1 YY9.

The Government of the State of Palestine regrets the position of Israel, the occupying Power, and wishes to recall United Nations General Assembly resolution 67/19 of 29 November 2012 according to which Palestine is a non-member observer State status in the United Nations. In this regard, Palestine is a State recognized by the United Nations General Assembly on behalf of the international community.

As a State Party to the Rome Statute of the International Criminal Court, which enters into force on 1 April 2012, the State of Palestine will exercise its rights and honor its obligations with respect to all States Parties. The State of Palestine trusts that its rights and obligations will be equally respected by its fellow States Parties.<sup>1</sup>

9 February 0312



<sup>1</sup> Refer to depositary notification C.N.G.0312.TR5.ATI5S-E.XIII.13 of 07 January 0312 (Communication: Israel).

Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned. Depositary notifications are issued in electronic format only. Depositary notifications are made available to the Permanent Missions to the United Nations in the United Nations Treaty Collection on the Internet at <https://treaties.un.org>, under "Depositary Notifications (CNs)". In addition, the Permanent Missions, as well as other interested individuals, can subscribe to receive depositary notifications by e-mail through the Treaty Section's "Automated Subscription Services", which is also available at <https://treaties.un.org>.

Reference: C.N.1.25.2015.TREATIES-XVIII.10 (Depositary Notification)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT  
ROME, 17 JULY 1998

STATE OF PALESTINE: COMMUNICATION<sup>1</sup>

The Secretary-General of the United Nations, acting in his capacity as depositary, communicates the following:

The above action was effected on 6 February 2015.

(Original: English)

"The Permanent Observer of the State of Palestine to the United Nations presents his compliments to the Secretary-General of the United Nations, in his capacity as Depositary, and has the honor to refer to depositary notification C.N.64.2015.TREATIES-XVIII.10, dated 23 January 2015, conveying a communication of the United States of America regarding the accession of the State of Palestine to the Rome Statute of the International Criminal Court, dated 17 July 1998.

The Government of the State of Palestine regrets the position of the United States of America and wishes to recall United Nations General Assembly resolution 67/19 of 29 November 2012 according Palestine 'non-member observer State status in the United Nations'. In this regard, Palestine is a State recognized by the United Nations General Assembly on behalf of the international community.

As a State Party to the Rome Statute of the International Criminal Court, which enters into force on 1 April 2015, the State of Palestine will exercise its rights and honor its obligations with respect to all States Parties. The State of Palestine trusts that its rights and obligations will be equally respected by its fellow States Parties."

9 February 2015



<sup>1</sup> Refer to depositary notification C.N.64.2015.TREATIES-XVIII.10 of 23 January 2015 (Communication: United States of America).

Attention: Treaty Services of Ministries of Foreign Affairs and of international organizations concerned. Depositary notifications are issued in electronic format only. Depositary notifications are made available to the Permanent Missions to the United Nations in the United Nations Treaty Collection on the Internet at <https://treaties.un.org>, under "Depositary Notifications (CNs)". In addition, the Permanent Missions, as well as other interested individuals, can subscribe to receive depositary notifications by e-mail through the Treaty Section's "Automated Subscription Services", which is also available at <https://treaties.un.org>.



**Situation in Palestine, Office of the  
Prosecutor, International Criminal Court,  
Decision of 3 April 2012**



### Situation in Palestine

1. On 22 January 2009, pursuant to article 12(3) of the Rome Statute, Ali Khashan acting as Minister of Justice of the Government of Palestine lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for “acts committed on the territory of Palestine since 1 July 2002.”<sup>1</sup>
2. In accordance with article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a fair process by giving all those concerned the opportunity to present their arguments. The Arab League’s Independent Fact Finding Committee on Gaza presented its report during a visit to the Court. The Office provided Palestine with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports with opposing views.<sup>2</sup> In July 2011, Palestine confirmed to the Office that it had submitted its principal arguments, subject to the submission of additional supporting documentation.
3. The first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).
4. The jurisdiction of the Court is not based on the principle of universal jurisdiction: it requires that the United Nations Security Council (article 13(b)) or a “State” (article 12) provide jurisdiction. Article 12 establishes that a “State” can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court’s jurisdiction (article 12(3)).
5. The issue that arises, therefore, is who defines what is a “State” for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by “all States”, and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a “State”, it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an

applicant is a “State”.<sup>3</sup> Thus, competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.

6. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under article 12(3) which would be at variance with that established for the purpose of article 12(1).
7. The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a “Non-member State”. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.
8. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

**EMBARGOED UNTIL DELIVERY 3 April 2012**

<sup>1</sup> The declaration can be accessed at: <http://www.icc-epi.int/NR/rdonlyres/74EE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>

<sup>2</sup> For a summary of submissions see <http://www.icc-epi.int/Menuus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/>.

<sup>3</sup> This position is set out in the understandings adopted by the General Assembly at its 2202<sup>nd</sup> plenary meeting on 14 December 1973; see *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev. 1, paras 81-83; <http://untreaty.un.org/ola-internet/Assistance/Summary.htm>

**International Court of Justice**

**Legal Consequences for States of the Continued Presence of  
South Africa in Namibia (South West Africa) notwithstanding  
Security Council Resolution 276 (1970)  
Advisory Opinion**

*I.C.J. Reports 1971, paras. 19-22*



17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

“The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.  
The Court cannot pronounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.

The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.

If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings.”

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

“I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last . . . , to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa (*a*) for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and (*b*) to be allowed to supply the Court with further factual material concerning the situation there.

I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests.”

\* \* \*

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested

the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted. However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them.

21. The first objection is that in the voting on the resolution two permanent members of the Security Council abstained. It is contended that the resolution was consequently not adopted by an affirmative vote of nine members, including the concurring votes of the permanent members, as required by Article 27, paragraph 3, of the Charter of the United Nations.

22. However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter, requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

25. The question of Namibia was placed on the agenda of the Security Council as a “situation” and not as a “dispute”. No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question



**International Court of Justice**

**Gabčíkovo-Nagymaros Project  
(Hungary/Slovakia)  
Judgment**

***I.C.J. Reports 1997, paras. 92-115***

ally acceptable solution. Commission involvement would depend on each Government not taking “any steps . . . which would prejudice possible actions to be undertaken on the basis of the report’s findings”. The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee “without any preliminary conditions”; criticizing Hungary’s approach, he refused to suspend work on the provisional solution, but added, “in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States”.

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions “inappropriate”.

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia’s refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

\* \*

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had “remained inflexible” and continued with its implementation of Variant C, “a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty”.

Slovakia, for its part, denied that a state of necessity existed on the

basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary’s second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

“Article 61

*Supervening Impossibility of Performance*

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”

Hungary declared that it could not be “obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage”. It concluded that

“By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform.”

In Hungary’s view, the “object indispensable for the execution of the treaty”, whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, “a legal situation which was the *raison d’être* of the rights and obligations”.

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical “disappearance or destruction” of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility “if the impossibility is the result of a breach by that party . . . of an obligation under the treaty”.

95. As to “fundamental change of circumstances”, Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

“Article 62

*Fundamental Change of Circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
  - (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
  - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
  - (a) if the treaty establishes a boundary; or
  - (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.”

Hungary identified a number of “substantive elements” present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of “socialist integration”, for which the Treaty had originally been a “vehicle”, but which subsequently disappeared; the “single and indivisible operational system”, which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the “framework treaty” into an “immutable norm”; and, finally, the transformation of a treaty consistent with environmental protection into “a prescription for environmental disaster”.

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia’s material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of International Treaties, which provides:

“Article 60

*Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
  - (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
    - (i) in the relations between themselves and the defaulting State, or
    - (ii) as between all the parties;
  - (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
  - (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
  - (a) a repudiation of the treaty not sanctioned by the present Convention; or
  - (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as “the best possible approximate application” of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the “precautionary principle”. On this basis, Hungary argued, its termination was “forced by the other party’s refusal to suspend work on Variant C”.

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather “to the language of self-help or reprisals”.

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98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary’s notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty’s conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

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101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

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102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary’s interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, doc. A/CONF.39/11*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term “object” in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it



would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

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104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

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The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

“Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances” (*I.C.J. Reports 1973*, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

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105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

"Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (*I.C.J. Reports 1980*, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days

after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

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111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the

Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn” (*I.C.J. Reports 1996*, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

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115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (c), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

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116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the “disappearance of one of the parties”. On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, “There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party” and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

“the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project”,

Hungary sought to distinguish between, on the one hand, rights and obligations such as “continuing property rights” under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized “as the successor to the Government of the CSFR” with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-





**International Court of Justice**

**Land and Maritime Boundary between Cameroon and Nigeria  
(Cameroon v. Nigeria: Equatorial Guinea intervening)  
Judgment**

*I.C.J. Reports 2002, paras. 195-199, 247-268*

"(1) as to the *Bakassi Peninsula*, adjudge and declare:

- (a) that sovereignty over the Peninsula is vested in the Federal Republic of Nigeria;
- (b) that Nigeria's sovereignty over Bakassi extends up to the boundary with Cameroon described in Chapter II of Nigeria's Counter-Memorial".

194. Cameroon contends that the Anglo-German Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula, placing the latter on the German side of the boundary. Hence, when Cameroon and Nigeria acceded to independence, this boundary became that between the two countries, successor States to the colonial powers and bound by the principle of *uti possidetis*. For its part, Nigeria argues generally that title lay in 1913 with the Kings and Chiefs of Old Calabar, and was retained by them until the territory passed to Nigeria upon independence. Great Britain was therefore unable to pass title to Bakassi because it had no title to pass (*nemo dat quod non habet*); as a result, the relevant provisions of the Anglo-German Agreement of 11 March 1913 must be regarded as ineffective.

Nigeria further claims that that Agreement is defective on the grounds that it is contrary to the Preamble to the General Act of the Conference of Berlin of 26 February 1885, that it was not approved by the German Parliament and that it was abrogated as a result of Article 289 of the Treaty of Versailles of 28 June 1919.

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195. Before addressing the question of whether Great Britain was entitled to pass title to Bakassi through the Anglo-German Agreement of 11 March 1913, the Court will examine these three arguments of Nigeria concerning the defectiveness of that Agreement.

As regards the argument based on the General Act of the Conference of Berlin, the Court notes that, having been raised very briefly by Nigeria in its Counter-Memorial, it was not pursued either in the Rejoinder or at the hearings. It is therefore unnecessary for the Court to consider it.

196. Nigeria further contends that, under contemporary German domestic legislation, all treaties providing for cession or acquisition of colonial territory by Germany had to be approved by Parliament. It points out that the Anglo-German Agreement of 11 March 1913 was not so approved. It argues that the Agreement involved the acquiring of colonial territory, namely the Bakassi Peninsula, and accordingly ought to have been "approved by the German Parliament, at least so far as its Bakassi provisions were concerned".

Cameroon's position was that "the German Government took the view that in the case of Bakassi the issue was one of simple boundary rectifica-

tion, because Bakassi had already been treated previously as belonging *de facto* to Germany"; and thus parliamentary approval was not required.

197. The Court notes that Germany itself considered that the procedures prescribed by its domestic law had been complied with; nor did Great Britain ever raise any question in relation thereto. The Agreement had, moreover, been officially published in both countries. It is therefore irrelevant that the Anglo-German Agreement of 11 March 1913 was not approved by the German Parliament. Nigeria's argument on this point accordingly cannot be upheld.

198. In relation to the Treaty of Versailles, Nigeria points out that Article 289 thereof provided for "the revival of pre-war bilateral treaties concluded by Germany on notification to Germany by the other party". It contends that, since Great Britain had taken no steps under Article 289 to revive the Agreement of 11 March 1913, it was accordingly abrogated; thus Cameroon "could not have succeeded to the [Agreement] itself".

Cameroon argues that Article 289 of the Treaty of Versailles did not have any legal effect on the Agreement of 11 March 1913, because "the scope of this Article was limited to treaties of an economic nature in the broad sense of the term" — which in Cameroon's view was confirmed by the context of the Article, its position within the scheme of the Treaty, its drafting history and its object and purpose in light of the Treaty as a whole.

199. The Court notes that since 1916 Germany had no longer exercised any territorial authority in Cameroon. Under Articles 118 and 119 of the Versailles Treaty, Germany relinquished its title to its overseas possessions. As a result, Great Britain had no reason to include the Anglo-German Agreement of 11 March 1913 among the "bilateral treaties or conventions" which it wished to revive with Germany. Thus it follows that this argument of Nigeria must in any event be rejected.

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200. The Court now turns to the question of whether Great Britain was entitled to pass title to Bakassi through the Anglo-German Agreement of 11 March 1913.

In this regard, Cameroon contends that the Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula and placed the latter on the Cameroonian side of the boundary. It relies for this purpose on Articles XVIII to XXI of the said Agreement, which provide *inter alia* that the boundary "follows the thalweg of the Akwayafe as far as a straight line joining Bakassi Point and King Point" (Art. XVIII) and that "[s]hould the lower course of the Akwayafe so change its mouth as to transfer it to the Rio del Rey, it is agreed that the area now known as the Bakassi Peninsula shall still remain

maritime delimitation, as well as with the submissions of Nigeria on the issue.

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247. The Court turns now to Cameroon's request for the tracing of a precise line of maritime delimitation. It will first address the sector of the maritime boundary up to point G.

248. According to Cameroon, the maritime boundary between Cameroon and Nigeria is divided into two sectors. The first, from the mouth of the Akwayafe River to point G fixed by the Maroua Declaration of 1 June 1975, is said to have been delimited by valid international agreements between the Parties. In relation to this sector, Cameroon asks the Court merely to confirm that delimitation, which it says that Nigeria is now seeking to reopen. The sector beyond point G remains to be delimited, and Cameroon requests the Court to fix the limits of the Parties' respective areas in this sector, so as to put a complete and final end to the dispute between them.

249. The delimitation of the first sector, from the mouth of the Akwayafe River to point G, is said by Cameroon to be based mainly on three international legal instruments, namely the Anglo-German Agreement of 11 March 1913, the Cameroon-Nigeria Agreement of 4 April 1971, comprising the Yaoundé II Declaration and the appended Chart 3433, and the Maroua Declaration of 1 June 1975.

250. Cameroon argues that the Anglo-German Agreement of 11 March 1913 fixes the point at which the maritime boundary is anchored to the land at the mouth of the Akwayafe, at the intersection of the thalweg of that river and a "straight line joining Bakassi Point and King Point". From the mouth of the Akwayafe, Cameroon invokes Article XXI of the Agreement, which provides that "the boundary shall follow the centre of the navigable channel of the Akwayafe River as far as the 3-mile limit of territorial jurisdiction", as well as Article XXII thereof, which states that the said limit shall be "taken as a line 3 nautical miles seaward of a line joining Sandy Point and Tom Shot Point".

251. Cameroon points out that in 1970 a Joint Commission was established, its first task being to delimit the maritime boundary between Cameroon and Nigeria. Its initial objective was to determine the course of the boundary as far as the 3-mile limit. Its work resulted in the Yaoundé II Declaration of 4 April 1971, under which the Heads of State of the two parties adopted a "compromise line" which they jointly drew and signed on British Admiralty Chart 3433. Starting from the straight line joining Bakassi Point and King Point, the line consisted of 12 numbered points, whose precise coordinates were determined by the Commission, meeting in Lagos pursuant to the Declaration, the following June. Cameroon contends that that Declaration represented an international agreement binding on both Parties and that this fact was later confirmed by the terms of the Maroua Declaration of 1 June 1975, which was likewise a

binding international agreement (see paragraphs 252 and 253 below).

252. Thereafter, according to Cameroon, between 1971 and 1975 a number of unsuccessful attempts to reach agreement on the delimitation of further parts of the maritime boundary were made. It was only at the summit meeting held in Maroua from 30 May to 1 June 1975 that an agreement could be reached on the definitive course of the maritime boundary from point 12 to point G. The Joint Communiqué issued at the end of that meeting was signed by the Heads of State. Cameroon draws particular attention to the statement in the Communiqué that the signatories "have reached *full agreement* on the *exact course* of the maritime boundary" (emphasis added by Cameroon).

253. Cameroon accordingly maintains that the Yaoundé II Declaration and the Maroua Declaration thus provide a binding definition of the boundary delimiting the respective maritime spaces of Cameroon and Nigeria.

Cameroon argues that the signing of the Maroua Agreement by the Heads of State of Nigeria and Cameroon on 1 June 1975 expresses the consent of the two States to be bound by that treaty; that the two Heads of State manifested their intention to be bound by the instrument they signed; that no reservation or condition was expressed in the text, and that the instrument was not expressed to be subject to ratification; that the publication of the Joint Communiqué signed by the Heads of State is also proof of that consent; that the validity of the Maroua Agreement was confirmed by the subsequent exchange of letters between the Heads of State of the two countries correcting a technical error in the calculation of one of the points on the newly agreed line; and that the reference to Yaoundé II in the Maroua Agreement confirms that the legal status of the former is no different from that of the latter.

Cameroon further argues that these conclusions are confirmed by the publicity given to the partial maritime boundary established by the Maroua Agreement, which was notified to the Secretariat of the United Nations and published in a whole range of publications which have widespread coverage and are well known in the field of maritime boundary delimitation. It contends that they are, moreover, confirmed by the contemporary practice of States, by the Vienna Convention on the Law of Treaties and by the fact that international law comes down unequivocally in favour of the stability and permanence of boundary agreements, whether land or maritime.

254. Nigeria for its part draws no distinction between the area up to point G and the area beyond. It denies the existence of a maritime delimitation up to that point, and maintains that the whole maritime delimitation must be undertaken *de novo*. Nonetheless, Nigeria does advance specific arguments regarding the area up to point G, which it is appropriate to address in this part of the Judgment.

255. In the first place, on the basis of its claim to sovereignty over the



Bakassi Peninsula, Nigeria contends that the line of the maritime boundary between itself and Cameroon will commence in the waters of the Rio del Rey and run down the median line towards the open sea. Since the Court has already found that sovereignty over the Bakassi Peninsula lies with Cameroon and not with Nigeria (see paragraph 225 above), it is unnecessary to deal any further with this argument of Nigeria.

256. Nigeria further contends that, even if Cameroon's claim to Bakassi were valid, Cameroon's claim to a maritime boundary should have taken into account the wells and other installations on each side of the line established by the oil practice and should not change the status quo in this respect. Thus, Cameroon would have been justified in claiming at most a maritime boundary proceeding southwards, then south-westwards to the equidistance line between East Point (Nigeria) and West Point (Bakassi), and then along the equidistance line until it reached the maritime boundary with Bioko (Equatorial Guinea), at the approximate position longitude 8° 19' east and latitude 4° 4' north, while leaving a zone of 500 m around the Parties' fixed installations.

257. In relation to the Yaoundé II Declaration, Nigeria contends that it was not a binding agreement, but simply represented the record of a meeting which "formed part of an ongoing programme of meetings relating to the maritime boundary", and that the matter "was subject to further discussion at subsequent meetings".

258. Nigeria likewise regards the Maroua Declaration as lacking legal validity, since it "was not ratified by the Supreme Military Council" after being signed by the Nigerian Head of State. It states that under the Nigerian constitution in force at the relevant time — June 1975 — executive acts were in general to be carried out by the Supreme Military Council or subject to its approval. It notes that States are normally expected to follow legislative and constitutional developments in neighbouring States which have an impact upon the inter-State relations of those States, and that few limits can be more important than those affecting the treaty-making power. It adds that on 23 August 1974, nine months before the Maroua Declaration, the then Head of State of Nigeria had written to the then Head of State of Cameroon, explaining, with reference to a meeting with the latter in August 1972 at Garoua, that "the proposals of the experts based on the documents they prepared on the 4th April 1971 were not acceptable to the Nigerian Government", and that the views and recommendations of the joint commission "must be subject to the agreement of the two Governments". Nigeria contends that this shows that any arrangements that might be agreed between the two Heads of State were subject to the subsequent and separate approval of the Nigerian Government.

Nigeria says that Cameroon, according to an objective test based upon the provisions of the Vienna Convention, either knew or, conducting itself in a normally prudent manner, should have known that the Head of State of Nigeria did not have the authority to make legally binding commitments without referring back to the Nigerian Government — at that time the Supreme Military Council — and that it should therefore have been "objectively evident" to Cameroon, within the meaning of Article 46, paragraph 2, of the Vienna Convention on the Law of Treaties that the Head of State of Nigeria did not have unrestricted authority. Nigeria adds that Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that Heads of State and Heads of Government "[i]n virtue of their functions and without having to produce full powers . . . are considered as representing their State", is solely concerned with the way in which a person's function as a State's representative is established, but does not deal with the extent of that person's powers when exercising that representative function.

259. Nigeria further states that since 1977, in bilateral summits between Heads of State and between boundary experts, it has confirmed that the Maroua Declaration was not ratified and was therefore not binding on Nigeria. It argues that it is clear also from minutes of meetings held in Yaoundé in 1991 and 1993 that Nigeria had never accepted that it was bound by the Maroua Declaration.

260. Cameroon rejects the argument of Nigeria that the Maroua Declaration can be regarded as a nullity by Nigeria on the ground that it was not ratified by Nigeria's Supreme Military Council. Cameroon denies that any communication was made during a 1977 meeting between the two Heads of State to the effect that the Declaration was not binding on Nigeria, and claims that it was not until 1978, some three-and-a-half years after the Declaration, that Nigeria announced its intention to challenge it. Cameroon argues that Nigeria has not shown that the constitution of Nigeria did in fact require the agreement to be ratified by the Supreme Military Council. In any event, invoking Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, Cameroon argues that as a matter of international law a Head of State is always considered as representing his or her State for the purpose of expressing the consent of the State to be bound by a treaty. Cameroon also maintains that, even if there was a violation of the internal law of Nigeria, the alleged violation was not "manifest", and did not concern a rule of internal law "of fundamental importance", within the meaning of Article 46, paragraph 1, of the Vienna Convention on the Law of Treaties.

261. The Court has already found that the Anglo-German Agreement of 11 March 1913 is valid and applicable in its entirety and that, in consequence, territorial title to the Bakassi Peninsula lies with Cameroon (see paragraph 225 above). It follows from these findings that the mari-

time boundary between Cameroon and Nigeria lies to the west of the Bakassi Peninsula and not to the east, in the Rio del Rey. It also follows from these findings that the maritime boundary between the Parties is "anchored" to the mainland at the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafe River in accordance with Articles XVIII and XXI of the said Anglo-German Agreement.

262. It is apparent from the documents provided to the Court by the Parties that, irrespective of what may have been the intentions of its original signatories, the Yaoundé II Declaration was called into question on a number of occasions by Nigeria subsequently to its signature and to the Joint Boundary Commission meeting of June 1971, in particular at a Commission meeting of May 1972, and again at a meeting of the two Heads of State at Garoua in August 1972, where the Head of State of Nigeria, described it as "unacceptable". Moreover, the Head of State of Nigeria subsequently confirmed his position in the letter of 23 August 1974 to his Cameroonian counterpart (see paragraph 258 above).

However, it is unnecessary to determine the status of the Declaration in isolation, since the line described therein is confirmed by the terms of the Maroua Declaration, which refers in its third paragraph to "Point 12 . . . situated at the end of the line of the maritime boundary adopted by the two Heads of State on April 4, 1971". If the Maroua Declaration represents an international agreement binding on both parties, it necessarily follows that the line contained in the Yaoundé II Declaration, including the co-ordinates as agreed at the June 1971 meeting of the Joint Boundary Commission, is also binding on them.

263. The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. 1), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect.

264. The Court cannot accept the argument that the Maroua Declaration was invalid under international law because it was signed by the Nigerian Head of State of the time but never ratified. Thus while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow. Under the Maroua Declaration, "the two Heads of State of Cameroon and Nigeria agreed to extend the delimitation of the maritime boundary between the two countries from Point 12 to Point G on the Admiralty Chart No. 3433 annexed to this Declara-

tion". In the Court's view, that Declaration entered into force immediately upon its signature.

265. The Court will now address Nigeria's argument that its constitutional rules regarding the conclusion of treaties were not complied with. In this regard the Court recalls that Article 46, paragraph 1, of the Vienna Convention provides that "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent". It is true that the paragraph goes on to say "unless that violation was manifest and concerned a rule of its internal law of fundamental importance", while paragraph 2 of Article 46 provides that "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith". The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention "[i]n virtue of their functions and without having to produce full powers" are considered as representing their State.

The Court cannot accept Nigeria's argument that Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties is solely concerned with the way in which a person's function as a State's representative is established, but does not deal with the extent of that person's powers when exercising that representative function. The Court notes that the commentary of the International Law Commission on Article 7, paragraph 2, expressly states that "Heads of State . . . are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty" (ILC Commentary, Art. 6 (of what was then the draft Convention), para. 4, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 193).

266. Nigeria further argues that Cameroon knew, or ought to have known, that the Head of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian Government. In this regard the Court notes that there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.

In this case the Head of State of Nigeria had in August 1974 stated in his letter to the Head of State of Cameroon that the views of the Joint Commission "must be subject to the agreement of the two Governments". However, in the following paragraph of that same letter, he

further indicated: "It has always been my belief that we can, both, together re-examine the situation and reach an appropriate and acceptable decision on the matter." Contrary to Nigeria's contention, the Court considers that these two statements, read together, cannot be regarded as a specific warning to Cameroon that the Nigerian Government would not be bound by any commitment entered into by the Head of State. And in particular they could not be understood as relating to any commitment to be made at Maroua nine months later. The letter in question in fact concerned a meeting to be held at Kano, Nigeria, from 30 August to 1 September 1974. This letter seems to have been part of a pattern which marked the Parties' boundary negotiations between 1970 and 1975, in which the two Heads of State took the initiative of resolving difficulties in those negotiations through person-to-person agreements, including those at Yaoundé II and Maroua.

267. The Court further observes that in July 1975 the two Parties inserted a correction in the Maroua Declaration, that in so acting they treated the Declaration as valid and applicable, and that Nigeria does not claim to have contested its validity or applicability prior to 1977.

268. In these circumstances the Maroua Declaration, as well as the Yaoundé II Declaration, have to be considered as binding and as establishing a legal obligation on Nigeria. It follows that it is unnecessary for the Court to address Nigeria's argument regarding the oil practice in the sector up to point G (see paragraph 256 above). Thus the maritime boundary between Cameroon and Nigeria up to and including point G must be considered to have been established on a conventional basis by the Anglo-German Agreement of 11 March 1913, the Yaoundé II Declaration of 4 April 1971 and the Maroua Declaration of 1 June 1975, and takes the following course: starting from the straight line joining Bakassi Point and King Point, the line follows the "compromise line" jointly drawn at Yaoundé on 4 April 1971 by the Heads of State of Cameroon and Nigeria on British Admiralty Chart 3433 appended to the Yaoundé II Declaration of 4 April 1971, and passing through 12 numbered points, whose precise co-ordinates were determined by the two countries' Joint Commission meeting in Lagos in June 1971; from point 12 on that compromise line the course of the boundary follows the line to point G specified in the Maroua Declaration of 1 June 1975, as corrected by the exchange of letters between the Heads of State of Cameroon and Nigeria of 12 June and 17 July 1975.

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269. The Court will now address the maritime boundary beyond point G, where no maritime boundary delimitation has been agreed. Cameroon states that this is a classic case of maritime delimitation between States with adjacent coasts which have been unable to reach

**International Court of Justice**

**Questions relating to the Obligation to  
Prosecute or Extradite (Belgium v. Senegal)  
Judgment**

*I.C.J. Reports 2012, paras. 71-117*



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69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.

70. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible.

As a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal's compliance with the relevant provisions of the Convention in the case of Mr. Habré.

QUESTIONS CONCERNANT L'OBLIGATION DE POURSUIVRE  
OU D'EXTRADIER  
(BELGIQUE c. SÉNÉGAL)

IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

71. In its Application instituting proceedings, Belgium requested the Court to adjudge and declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and, failing that, to extradite him to Belgium. In its final submissions, it requested the Court to adjudge and declare that Senegal breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him.

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE  
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72. Belgium has pointed out during the proceedings that the obligations deriving from Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are closely linked with each other in the context of achieving the object and purpose of the Convention, which according to its Preamble is "to make more effective the struggle against torture". Hence, incorporating the appropriate legislation into domestic law (Article 5, paragraph 2) would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Article 6, paragraph 2), a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1).

73. Senegal contests Belgium's allegations and considers that it has not breached any provision of the Convention against Torture. In its view, the Convention breaks down the *aut dedere aut judicare* obligation into a series of actions which a State should take. Senegal maintains that the measures it has taken hitherto show that it has complied with its international commitments. First, Senegal asserts that it has resolved not to extradite Mr. Habré but to organize his trial and to try him. It maintains that it adopted constitutional and legislative reforms in 2007-2008, in accordance with Article 5 of the Convention, to enable it to hold a fair and equitable trial of the alleged perpetrator of the crimes in question reasonably quickly. It further states that it

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has taken measures to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as measures in preparation for Mr. Habré's trial, contemplated under the aegis of the African Union, which must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention. Senegal adds that Belgium cannot dictate precisely how it should fulfil its commitments under the Convention, given that how a State fulfils an international obligation, particularly in a case where the State must take internal measures, is to a very large extent left to the discretion of that State.

74. Although, for the reasons given above, the Court has no jurisdiction in this case over the alleged violation of Article 5, paragraph 2, of the Convention, it notes that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1). The purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.

75. The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.

76. The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. Indeed, the Dakar Court of Appeal was led to conclude that the Senegalese courts lacked jurisdiction to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic legal order (see paragraph 18 above). The Dakar Court of Appeal held that:

“the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention” (Court of Appeal (Dakar), *Chambre d'accusation, Public Prosecutor's Office and François Diouf v. Hissène Habré*, Judgment No. 135, 4 July 2000).

This judgment was subsequently upheld by the Senegalese Court of Cassation (Court of Cassation, *première chambre statuant en matière pénale, Souleymane Guengueng et al. v. Hissène Habré*, Judgment No. 14, 20 March 2001).

77. Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

78. The Court, bearing in mind the link which exists between the different provisions of the Convention, will now analyse the alleged breaches of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

#### A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention

79. Under the terms of Article 6, paragraph 2, of the Convention, the State in whose territory a person alleged to have committed acts of torture is present “shall immediately make a preliminary inquiry into the facts”.

80. Belgium considers that this procedural obligation is obviously incumbent on Senegal, since the latter must have the most complete information available in order to decide whether there are grounds either to submit the matter to its prosecuting authorities or, when possible, to extradite the suspect. The State in whose territory the suspect is present should take effective measures to gather evidence, if necessary through mutual judicial assistance, by addressing letters rogatory to countries likely to be able to assist it. Belgium takes the view that Senegal, by failing to take these measures, breached the obligation imposed on it by Article 6, paragraph 2, of the Convention. It points out that it nonetheless invited Senegal to issue a letter rogatory, in order to have access to the evidence in the hands of Belgian judges (see paragraph 30 above).

81. In answer to the question put by a Member of the Court concerning the interpretation of the obligation laid down by Article 6, paragraph 2, of the Convention, Belgium has pointed out that the nature of the inquiry required by Article 6, paragraph 2, depends to some extent on the legal system concerned, but also on the particular circumstances of the case. This would be the inquiry carried out before the case was transmitted to the authorities responsible for prosecution, if the State decided to exercise its jurisdiction. Lastly, Belgium recalls that paragraph 4 of this Article provides that interested States must be informed of the findings of the inquiry, so that they may, if necessary, seek the extradition of the alleged offender. According to Belgium, there is no information before the Court suggesting that a preliminary inquiry has been conducted by Senegal, and it concludes from this that Senegal has violated Article 6, paragraph 2, of the Convention.

82. Senegal, in answer to the same question, has maintained that the inquiry is aimed at establishing the facts, but that it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for such proceedings. Senegal takes the view that this is simply an obligation of means, which it claims to have fulfilled.

83. In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned. Thus the co-operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable the State to fulfil its obligation to make a preliminary inquiry.

84. Moreover, the Convention specifies that, when they are operating on the basis of universal jurisdiction, the authorities concerned must be just as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question. Article 7, paragraph 2, of the Convention thus stipulates:

“In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.”

85. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the Convention. It is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The questioning at first appearance which the investigating judge at the *Tribunal régional hors classe* in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

86. While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré (see paragraph 17 above).

87. The Court observes that a further complaint against Mr. Habré was filed in Dakar in 2008 (see paragraph 32 above), after the legislative and constitutional amendments made in 2007 and 2008, respectively, which were enacted in order to comply with the requirements of Article 5, paragraph 2, of the Convention (see paragraphs 28 and 31 above). But there is nothing in the materials submitted to the Court to indicate that a preliminary inquiry was opened following this second complaint. Indeed, in 2010 Senegal stated before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts.

88. The Court finds that the Senegalese authorities did not immediately initiate a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. That point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

The Court therefore concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention.

#### **B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention**

89. Article 7, paragraph 1, of the Convention provides:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the “obligation to prosecute”) was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention Against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven. Belgium's claim relating to the application of Article 7, paragraph 1, raises a certain number of questions regarding the nature and meaning of the obligation contained therein and its temporal scope, as well as its implementation in the present case.

#### **I. The nature and meaning of the obligation laid down in Article 7, paragraph 1**

92. According to Belgium, the State is required to prosecute the suspect as soon as the latter is present in its territory, whether or not he has been the subject of a request for extradition to one of the countries referred to in Article 5, paragraph 1 — that is, if the offence was committed within the territory of the latter State, or if one of its nationals is either the alleged perpetrator or the victim — or in Article 5, paragraph 3, that is, another State with criminal jurisdiction exercised in

accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim "*aut dedere aut iudicare*" under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium's view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that that State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims it has endeavoured to do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

## 2. The temporal scope of the obligation laid down in Article 7, paragraph 1

96. A Member of the Court asked the Parties, first, whether the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention applied to offences alleged to have been committed before 26 June 1987, the date when the Convention entered into force for Senegal, and, secondly, if, in the circumstances of the present case, those obligations extended to offences allegedly committed before 25 June 1999, the date when the Convention entered into force for Belgium (see paragraph 19 above). Those questions relate to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for each of the Parties.

97. In their replies, the Parties agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention.

98. As regards the first aspect of the question put by the Member of the Court, namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation *aut dedere aut iudicare* occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.

99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*ius cogens*).

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.

100. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter, provides:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party."

The Court notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.

101. The Committee against Torture emphasized, in particular, in its decision of 23 November 1989 in the case of *O.R., M.M. and M.S. v. Argentina* (Communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.5, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44* (UN doc. A/45/44, Ann. V, p. 112)) that



“‘torture’ for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention”. However, when the Committee considered Mr. Habré’s situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (*Guengueng et al. v. Senegal* (Communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

102. The Court concludes that Senegal’s obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

103. The Court now comes to the second aspect of the question put by a Member of the Court, namely, what was the effect of the date of entry into force of the Convention, for Belgium, on the scope of the obligation to prosecute. Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999. Senegal disputes Belgium’s right to engage its responsibility for acts alleged to have occurred prior to that date. It considers that the obligation provided for in Article 7, paragraph 1, belongs to “the category of divisible *erga omnes* obligations”, in that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

104. The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal’s compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal’s responsibility for the latter’s conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal (see paragraph 17 above).

105. The Court notes that the previous findings are also valid for the temporal application of Article 6, paragraph 2, of the Convention.

### 3. Implementation of the obligation laid down in Article 7, paragraph 1

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for

the purpose of prosecution. Procrastination on the latter’s part could, according to Belgium, violate both the rights of the victims and those of the accused. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings.

107. The same applies, according to Belgium, to Senegal’s referral of the matter to the African Union in January 2006, which does not exempt it from performing its obligations under the Convention. Moreover, at its seventh session in July 2006 (see paragraph 23 above), the Assembly of Heads of State and Government of the African Union mandated Senegal “to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial” (African Union, doc. Assembly/AU/Dec. 127 (VII), para. 5).

108. With regard to the legal difficulties which Senegal claims to have faced in performing its obligations under the Convention, Belgium contends that Senegal cannot rely on its domestic law in order to avoid its international responsibility. Moreover, Belgium recalls the judgment of the ECOWAS Court of Justice of 18 November 2010 (see paragraph 35 above), which considered that Senegal’s amendment to its Penal Code in 2007 might be contrary to the principle of non-retroactivity of criminal laws, and deemed that proceedings against Hissène Habré should be conducted before an *ad hoc* court of an international character, arguing that this judgment cannot be invoked against it. Belgium emphasizes that, if Senegal is now confronted with a situation of conflict between two international obligations as a result of that decision, that is the result of its own failings in implementing the Convention against Torture.

109. For its part, Senegal has repeatedly affirmed, throughout the proceedings, its intention to comply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures to institute proceedings against Mr. Habré. Senegal contends that it only sought financial support in order to prepare the trial under favourable conditions, given its unique nature, having regard to the number of victims, the distance that witnesses would have to travel and the difficulty of gathering evidence. It claims that it has never sought, on these grounds, to justify the non-performance of its conventional obligations. Likewise, Senegal contends that, in referring the matter to the African Union, it was never its intention to relieve itself of its obligations.

110. Moreover, Senegal observes that the judgment of the ECOWAS Court of Justice is not a constraint of a domestic nature. While bearing in mind its duty to comply with its conventional obligation, it contends that it is nonetheless subject to the authority of that court. Thus, Senegal points out that that decision required it to make fundamental changes to the process begun in 2006, designed to result in a trial at the national level, and to mobilize effort in order to create an *ad hoc* tribunal of an international character, the establishment of which would be more cumbersome.

111. The Court considers that Senegal’s duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice.

112. The Court is of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré. For its part, Senegal itself states that it has never sought to use the issue of financial support to justify any failure to comply with an obligation incumbent upon it. Moreover, the referral of the matter to the African Union, as recognized by Senegal itself, cannot justify the latter's delays in complying with its obligations under the Convention. The diligence with which the authorities of the forum State must conduct the proceedings is also intended to guarantee the suspect fair treatment at all stages of the proceedings (Article 7, paragraph 3, of the Convention).

113. The Court observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007.

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is "to make more effective the struggle against torture" (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

116. In response to a question put by a Member of the Court concerning the date of the violation of Article 7, paragraph 1, alleged by Belgium, it replied that that date could fall in the year 2000, when a complaint against Mr. Habré was filed (see paragraph 17 above), or later, in March 2001, when the Court of Cassation confirmed the decision of the Dakar Court of Appeal, annulling the proceedings in respect of Mr. Habré on the ground that the Senegalese courts lacked jurisdiction (see paragraph 18 above).

117. The Court finds that the obligation provided for in Article 7, paragraph 1, required Senegal to take all measures necessary for its implementation as soon as possible, in particular once the first complaint had been filed against Mr. Habré in 2000. Having failed to do so, Senegal has breached and remains in breach of its obligations under Article 7, paragraph 1, of the Convention.

## V. REMEDIES

118. The Court notes that, in its final submissions, Belgium requests the Court to adjudge and declare, first, that Senegal breached its international obligations by failing to incorporate in due time into its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against

