SEPARATE OPINION OF JUDGE KOROMA

I have voted in favour of most of the operative part of the Judgment, principally because I concur with the Court's finding, in response to the questions submitted to it in the Special Agreement, that Hungary was not entitled to suspend and subsequently to abandon in 1989 the works on the Nagymaros Project and on the part of the Gabčíkovo Project on the Danube river for which it was responsible under the 1977 Treaty, that the Treaty continues to be in force and consequently governs the relationship between the Parties.

In making such a finding the Court not only reached the right decision in my view, but reached a decision which is in accordance with the 1977 Treaty, and is consistent with the jurisprudence of the Court as well as the general principles of international law. Foremost among these principles is that of *pacta sunt servanda* which forms an integral part of international law. Any finding to the contrary would have been tantamount to denying respect for obligations arising from treaties, and would also have undermined one of the fundamental principles and objectives of the United Nations Charter calling upon States "to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained", and "to achieve international co-operation in solving problems of an economic, social . . . character".

When Czechoslovakia (later Slovakia) and Hungary agreed by means of the 1977 Treaty to construct the Gabčíkovo-Nagymaros barrage system of locks on the Bratislava-Budapest sector of the river for the development and broad utilization of its water resources, particularly for the production of energy, and for purposes connected with transport, agriculture and other sectors of the national economy, this could be seen as a practical realization of such objectives, since the Danube has always played a vital part in the commercial and economic life of its riparian States, underlined and reinforced by their interdependence.

Prior to the adoption of the Treaty and the commencement of the Project itself, both Czechoslovakia and Hungary had recognized that whatever measures were taken to modify the flow of the river, such as those contemplated by the Project, they would have environmental effects, some adverse. Experience had shown that activities carried on upstream tended to produce effects downstream, thus making international co-operation all the more essential. With a view to preventing, avoiding and mitigating such impacts, extensive studies on the environment were undertaken by the Parties prior to the conclusion of the Treaty. The Treaty itself, in its Articles 15, 19 and 20, imposed strict obligations regarding

the protection of the environment which were to be met and complied with by the contracting parties in the construction and operation of the Project.

When in 1989 Hungary, concerned about the effects of the Project on its natural environment, suspended and later abandoned works for which it was responsible under the 1977 Treaty this was tantamount to a violation not only of the Treaty itself but of the principle of *pacta sunt servanda*.

Hungary invoked the principle of necessity as a legal justification for its termination of the Treaty. It stated, *inter alia*, that the construction of the Project would have significantly changed that historic part of the Danube with which the Project was concerned; that as a result of operation in peak mode and the resulting changes in water level, the flora and fauna on the banks of the river would have been damaged and water quality impaired. It was also Hungary's contention that the completion of the Project would have had a number of other adverse effects, in that the living conditions for the biota of the banks would have been drastically changed by peak-mode operation, the soil structure ruined and its yield diminished. It further stated that the construction might have resulted in the waterlogging of several thousand hectares of soil and that the groundwater in the area might have become over-salinized. As far as the drinking water of Budapest was concerned, Hungary contended that the Project would have necessitated further dredging; this would have damaged the existing filter layer allowing pollutants to enter nearby water supplies.

On the other hand, the PHARE Report on the construction of the reservoir at Čunovo and the effect this would have on the water quality offered a different view. The Report was commissioned by the European Communities with the co-operation of, first, the Government of the Czech and Slovak Federal Republic and, later, the Slovak Republic. It was described as presenting a reliable integrated modelling system for analysing the environmental impact of alternative management régimes in the Danubian lowland area and for predicting changes in water quality as well as conditions in the river, the reservoir, the soil and agriculture.

As to the effects of the construction of the dam on the ecology of the area, the Report reached the conclusion that whether the post-dam scenarios represented an improvement or otherwise would depend on the ecological objectives in the area, as most fundamental changes in ecosystems depended on the discharge system and occurred slowly over many years or decades, and, no matter what effects might have been felt in the ecosystem thus far, they could not be considered as irreversible.

With regard to water quality, the Report stated that groundwater quality in many places changed slowly over a number of years. With this in mind, comprehensive modelling, some of which entailed modelling impacts for periods of up to 100 years, was undertaken and the conclu-

sion reached that no problems were predicted in relation to groundwater quality.

The Court in its Judgment, quite rightly in my view, acknowledges Hungary's genuine concerns about the effect of the Project on its natural environment. However, after careful consideration of the conflicting evidence, it reached the conclusion that it was not necessary to determine which of these points of view was scientifically better founded in order to answer the question put to it in the Special Agreement. Hungary had not established to the satisfaction of the Court that the construction of the Project would have led to the consequences it alleged. Further, even though such damages might occur, they did not appear imminent in terms of the law, and could otherwise have been prevented or redressed. The Court, moreover, stated that such uncertainties as might have existed and had raised environmental concerns in Hungary could otherwise have been addressed without having to resort to unilateral suspension and termination of the Treaty. In effect, the evidence was not of such a nature as to entitle Hungary to unilaterally suspend and later terminate the Treaty on grounds of ecological necessity. In the Court's view, to allow that would not only destabilize the security of treaty relations but would also severely undermine the principle of *pacta sunt servanda.*

Thus it is not as if the Court did not take into consideration the scientific evidence presented by Hungary in particular regarding the effects on its environment of the Project, but the Court reached the conclusion that such evidence was not sufficient to allow Hungary unilaterally to suspend or terminate the Treaty. This finding, in my view, is not only of significance to Slovakia and Hungary — the Parties to the dispute — but it also represents a significant statement by the Court rejecting the argument that obligations assumed under a validly concluded treaty can no longer be observed because they have proved inconvenient or as a result of the emergence of a new wave of legal norms, irrespective of their legal character or quality. Accordingly, not for the first time and in spite of numerous breaches over the years, the Court has in this case upheld and reaffirmed the principle that every treaty in force is binding upon the parties and must be performed in good faith (Article 26 of the Vienna Convention on the Law of Treaties).

Nor can this finding of the Court be regarded as a mechanical application of the principle of *pacta sunt servanda* or the invocation of the maxim *summun jus summa injuria* but it ought rather to be seen as a reaffirmation of the principle that a validly concluded treaty can be suspended or terminated only with the consent of all the parties concerned. Moreover, the Parties to this dispute can also draw comfort from the Court's finding in upholding the continued validity of the Treaty and enjoining them to fulfil their obligations under the Treaty so as to achieve its aims and objectives.

I also concur with the Court's findings that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine its final decision. On the other hand, I cannot concur with the Court's finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992. The Court reached this latter conclusion after holding that Hungary's suspension and abandonment of the works for which it was responsible under the 1977 Treaty was unlawful, and after acknowledging the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to abandon the greater part of the construction of the System of Locks for which it was responsible under the Treaty. The Court likewise recognized that huge investments had been made, that the construction at Gabčíkovo was all but finished, the bypass canal completed, and that Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect by completing work on the tailrace canal. The Court also recognized that not using the system would not only have led to considerable financial losses of some $2.5 billion but would have resulted in serious consequences for the natural environment.

It is against this background that the Court also reaffirmed the principle of international law that, subject to the appropriate limitations, a State party to a treaty, when confronted with a refusal by the other party to perform its part of an agreed project, is free to act on its own territory and within its own jurisdiction so as to realize the original object and purpose of the treaty, thereby limiting for itself the damage sustained and, ultimately, the compensatory damages to be paid by the other party.

As the Judgment recalled, Article 1 of the 1977 Treaty stipulated that the Gabčíkovo-Nagymaros Project was to comprise a "joint investment" and to constitute a "single and operational system of locks", consisting of two sections, Gabčíkovo and Nagymaros. According to Article 5, paragraph 5, of the Treaty, each of the contracting parties had specific responsibilities regarding the construction and operation of the System of Locks. Czechoslovakia was to be responsible for, *inter alia*:

"(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;
(2) the head-water canal of the by-pass canal, in Czechoslovak territory;
(3) the Gabčíkovo series of locks, in Czechoslovak territory;
(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;
(5) restoration of vegetation in Czechoslovak territory."

Hungary was to be responsible for, *inter alia*:

"(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;
(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;
(3) the Dunakiliti dam, in Hungarian territory;
(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;
(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;
(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;
(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;
(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;
(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;
(10) the Nagymaros series of locks, in Hungarian territory;
(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;
(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;
(13) restoration of vegetation in Hungarian territory."

In accordance with the Treaty and the concept of joint investment, some of those structures, such as the Dunakiliti weir, the bypass canal, the Gabčíkovo dam and the Nagymaros dam were to become joint property, irrespective of the territory on which they were located.

As noted in the Judgment, by the spring of 1989 the work on Gabčíkovo was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo), and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete. This was not the case in the Nagymaros sector where, although the dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

When Hungary, on 13 May 1989, decided to suspend works on the Nagymaros part of the Project because of alleged ecological hazards and later extended this to the Gabčíkovo section, thereby preventing the scheduled damming of the Danube in 1989, this had a considerable,

negative impact on the Project — which was envisaged as an integrated project and depended on the actual construction of the planned installations at Nagymaros and Gabčíkovo. Hungary's contribution was therefore considered indispensable, as some of the key structures were under its control and situated on its territory.

Following prolonged and fruitless negotiations with Hungary regarding the performance of their obligations under the Treaty, Czechoslovakia proceeded, in November 1991, to what came to be known as the "provisional solution", or Variant C. This was put into operation from October 1992 with the damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory with resulting consequences on water and the navigation channel. It entailed the diversion of the Danube some 10 kilometres upstream of Dunakiliti on Czechoslovak territory. In its final stage it included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was designed to have a smaller surface area and provided approximately 30 per cent less than the storage initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, flood water to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old course of the Danube). The supply of the water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures on the bypass canal at Dobrohošt and Gabčíkovo. Not all problems were solved: a solution was to be found for the Hungarian bank, and the question of lowering the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained.

In justification of the action, Slovakia contended that this solution was as close to the original project as possible and that Czechoslovakia's decision to proceed with it was justified by Hungary's decision to suspend and subsequently abandon the construction works at Dunakiliti, which had made it impossible for Czechoslovakia to attain the object and purpose contemplated by the 1977 Treaty. Slovakia further explained that Variant C represented the only possibility remaining to it of fulfilling the purposes of the 1977 Treaty, including the continuing obligation to implement the Treaty in good faith. It further submitted that Variant C for the greater part was no more than what had already been agreed to by Hungary, and that only those modifications were made which had become necessary by virtue of Hungary's decision not to implement its obligations under the Treaty.

In spite of what appeared to me not only a cogent and reasonable explanation for its action but also an eminently legal justification for

Variant C, the Court found that, though there was a strong factual similarity between Variant C and the original Project in its upstream component (the Gabčíkovo System of Locks), the difference from a legal point of view was striking. It observed that the basic characteristics of the 1977 Treaty provided for a "joint investment", "joint ownership" of the most important construction of the Gabčíkovo-Nagymaros Project and for the operation of this "joint property" as a "co-ordinated single unit". The Court reasoned that all this could not be carried out by unilateral action such as that involving Variant C and that, despite its physical similarity with the original Project, it differed sharply in its legal characteristics. The Court also found that, in operating Variant C, Slovakia essentially appropriated for its own use and benefit between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river downstream of Gabčíkovo. This act, in the Court's view, deprived Hungary of its right to an equitable share of the natural resources of the river, this being not only a shared international watercourse but an international boundary river.

In the light of these findings, the Court concluded that Czechoslovakia, by putting into operation Variant C, did not apply the Treaty, but, on the contrary, violated certain of its express provisions and in so doing committed an internationally wrongful act. In its reasoning, the Court stated that it had placed emphasis on the "putting into operation" of Variant C, the unlawfulness residing in the damming of the Danube.

This finding by the Court calls for comment. In the first place, it is to be recalled that the Court found that Hungary's suspension and unilateral termination of the Treaty was unlawful. Secondly, the Court held that a State party confronted, as Czechoslovakia was, with a refusal by the other party to perform its part of an agreed project is entitled to act on its own territory and within its own jurisdiction so as to realize the object and purpose of the treaty. This notwithstanding, the Court took exception to the fact that Variant C did not meet the requirements of Articles 1, 8, 9 and 10 of the 1977 Treaty regarding a "single and operational system of locks", "joint ownership" and "use and benefits of the system of locks in equal measure". In its view, "by definition all this could not be carried out by unilateral measure". This stricture of Variant C is not, in my respectful opinion, warranted. The unilateral suspension and termination of the Treaty and the works for which Hungary was responsible under it had amounted not only to a repudiation of the Treaty; it frustrated the realization of the Project as a *single* and operational system of works, *jointly* owned and used for the benefit of the contracting parties in equal measure. As a result of Hungary's acts, the objective of the original Project could only have been achieved by Slovakia alone operating it; according to the material before the Court, Variant C constituted the minimum modification of the original Project necessary to enable the aim and objective of the original Project to be

realized. It should be recalled that but for the suspension and abandonment of the works, there would have been no Variant C, and without Variant C, the objective of the act of Hungary which the Court has qualified as unlawful would have been realized thus defeating the object and purpose of the Treaty. In my view Variant C was therefore a genuine application of the Treaty and it was indispensable for the realization of its object and purpose. If it had not proceeded to its construction, according to the material before the Court, Czechoslovakia would have been stranded with a largely finished but inoperative system, which had been very expensive both in terms of cost of construction and in terms of acquiring the necessary land. The environmental benefits in terms of flood control, which was a primary object and purpose of the Treaty, would not have been attained. Additionally, the unfinished state of the constructions would have exposed them to further deterioration through continued inoperation.

Variant C was also held to be unlawful by the Court because, in its opinion, Czechoslovakia, by diverting the waters of the Danube to operate Variant C, unilaterally assumed control of a shared resource and thereby deprived Hungary of its right to an equitable share of the natural resources of the river — with the continuing effects of the diversion of these waters upon the ecology of the riparian area of the Szigetköz — and failed to respect the degree of proportionality required by international law.

The implication of the Court's finding that the principle of equitable utilization was violated by the diversion of the river is not free from doubt. That principle, which is now set out in the Convention on the Non-Navigational Uses of International Watercourses, is not new.

While it is acknowledged that the waters of rivers must not be used in such a way as to cause injury to other States and in the absence of any settled rules an equitable solution must be sought (case of the *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*), this rule applies where a treaty is absent. In the case under consideration Article 14, paragraph 2, of the 1977 Treaty provides that the contracting parties may, without giving prior notice, both withdraw from the Hungarian-Czechoslovak section of the Danube, and subsequently make use of the quantities of water specified in the water balance of the approved Joint Contractual Plan. Thus, the withdrawal of excess quantities of water from the Hungarian-Czechoslovak section of the Danube to operate the Gabčíkovo section of the system was contemplated with compensation to the other party in the form of an increased share of electric power. In other words, Hungary had agreed within the context of the Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube). Accordingly, it would appear that the normal entitlement of the Parties

to an equitable and reasonable share of the water of the Danube under general international law was duly modified by the 1977 Treaty which considered the Project as a *lex specialis*. Slovakia was thus entitled to divert enough water to operate Variant C, and more especially so if, without such diversion, Variant C could not have been put into productive use. It is difficult to appreciate the Court's finding that this action was unlawful in the absence of an explanation as to how Variant C should have been put into operation. On the contrary, the Court would appear to be saying by implication that, if Variant C had been operated on the basis of a 50-50 sharing of the waters of the Danube, it would have been lawful. However, the Court has not established that a 50-50 ratio of use would have been sufficient to operate Variant C optimally. Nor could the Court say that the obligations of the Parties under the Treaty had been infringed or that the achievement of the objectives of the Treaty had been defeated by the diversion. In the case concerning the *Diversion of Water from the Meuse*, the Court found that, in the absence of a provision requiring the consent of Belgium, "the Netherlands are entitled . . . to dispose of the waters of the Meuse at Maestricht" provided that the treaty obligations incumbent on it were not ignored (*Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 30). Applying this test in the circumstances which arose, Variant C can be said to have been permitted by the 1977 Treaty as a reasonable method of implementing it. Consequently Variant C did not violate the rights of Hungary and was consonant with the objectives of the Treaty régime.

Moreover the principle of equitable and reasonable utilization has to be applied with all the relevant factors and circumstances pertaining to the international watercourse in question as well as to the needs and uses of the watercourse States concerned. Whether the use of the waters of a watercourse by a watercourse State is reasonable or equitable and therefore lawful must be determined in the light of all the circumstances. To the extent that the 1977 Treaty was designed to provide for the operation of the Project, Variant C is to be regarded as a genuine attempt to achieve that objective.

One consequence of this finding by the Court is its prescription that unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the wrongful suspension and abandonment by Hungary of the works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia.

While this finding would appear to aim at encouraging the Parties to negotiate an agreement so as realize the aims and objectives of the Treaty, albeit in a modified form, it appears to suggest that the Court considered the wrongful conduct of the Parties to be equivalent. This somehow emasculates the fact that the operation of Variant C would not

have been necessary if the works had not been suspended and terminated in the first place. It was this original breach which triggered the whole chain of events. At least a distinction should have been drawn between the consequences of the "wrongful conduct" of each Party, hence my unwillingness to concur with the finding. While Article 38, paragraph 2, of its Statute allows the Court to decide a case *ex aequo et bono*, this can only be done with the agreement of the parties to a dispute.

The Judgment also alluded to "the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz". It is not clear whether by this the Court had reached the conclusion that significant harm had been caused to the ecology of the area by the operation of Variant C.

In the light of the foregoing considerations, I take the view that the operation of Variant C should have been considered as a genuine attempt by an injured party to secure the achievement of the agreed objectives of the 1977 Treaty, in ways not only consistent with that Treaty but with international law and equity.

In his separate opinion in the case concerning the *Diversion of Water from the Meuse*, Judge Hudson stated that

> "[W]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals, . . ." (*Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 76).

He went on to point out that

> "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are . . .; 'He who seeks equity must do equity.' It is in line with such maxims that 'a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' (13 *Halsbury's Laws of England* (2nd ed., 1934), p. 87). A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, 'neither could compel the other to perform unless he had done, or tendered, his own part' (Buckland, *Text Book of Roman Law* (2nd ed., 1932), p. 493)." (*Ibid.*, p. 77.)

Judge Hudson took the view that:

> "The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be

thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness." (*P.C.I.J., Series A/B, No. 70*, p. 77.)

Judge Hudson continued,

"Yet, in a particular case in which it is asked to enforce the obligation to make reparation, a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles." (*Ibid.*, p. 78.)

It is my view that this case, because of the circumstances surrounding it, is one which calls for the application of the principles of equity.

The importance of the River Danube for both Hungary and Slovakia cannot be overstated. Both countries, by means of the 1977 Treaty, had agreed to co-operate in the exploitation of its resources for their mutual benefit. That Treaty, in spite of the period in which it was concluded, would seem to have incorporated most of the environmental imperatives of today, including the precautionary principle, the principle of equitable and reasonable utilization and the no-harm rule. None of these principles was proved to have been violated to an extent sufficient to have warranted the unilateral termination of the Treaty. The Court has gone a long way, rightly in my view, in upholding the principle of the sanctity of treaties. Justice would have been enhanced had the Court taken account of special circumstances as mentioned above.

(Signed) Abdul G. KOROMA.