DISSENTING OPINION OF JUDGE RANJEVA

[Translation]

I find it difficult to subscribe to the conclusion in the Judgment that: "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" and "Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution'" (para. 155 (1) (B) and (C)).

From the point of view of logic, these two propositions, even separated, are incompatible. The construction of public works has as its ultimate purpose their operation. How then is it possible to reconcile the lawfulness of constructing Variant C with the unlawfulness of putting it into operation?

Here I cannot subscribe to the analysis by the majority of the Members of the Court on the true role of the wrong done by Hungary, which is the subject-matter of the first paragraph of the *dispositif*, in the chain of intersecting wrongs to which the Court has, rightly, drawn attention in paragraph 150 of its reasoning.

The unlawfulness of the Hungarian decision to suspend, then abandon, the works may not, in law, be called in question. Hungary has not fully performed its obligations under the Budapest Treaty. Furthermore, the chronology of events is unfavourable to the Hungarian cause. However, the situation in fact and in law is not as simple as it appears on reading the Court's analysis of it.

By favouring the chronological option in considering the facts, the majority of the Court seems to give too simple an analysis of the sequence of events. The structure of the questions set out in Article 2 of the Special Agreement has not helped the Court in its task by disinclining it to attach any importance to the legal effects of the intersecting wrongs which form the cornerstone of the dispute that it had to decide.

The dual purpose of the Court's task under the terms of Article 2 of the Special Agreement is the subject of an excellent analysis in paragraphs 130 and 131 of the present Judgment. My disagreement, though, relates to the place of the intersecting wrongs which, in the eyes of the majority of the Members of the Court, is pertinent only to the prescriptive part of the Judgment, whereas in my opinion it constitutes the cornerstone of the declaratory part.

The question which the Court could, or even should, have asked itself is whether in the absence of Hungary's first act of unlawfulness in 1989, the subsequent wrongs would have occurred and in particular whether the decision to abandon the works would have been taken in November

1991. That question, a hypothetical one, should have been raised, in so far as at no point does the Court consider the point of determining whether the Hungarian wrong caused a sufficiently proven risk which forced the Czech and Slovak Federal Republic to repair the damage by the construction and putting into operation of Variant C — an issue which should have led the Court to say whether one of the wrongs could have been absorbed by another, so that the subsequent course of wrongful acts had only one true cause.

That hypothetical question should have been asked *in limine* given the risk of confusion built into the structure of Article 2, paragraph 1, of the Special Agreement. Because of the classification of the facts relevant to the case into two blocks of questions *(a)* and *(b)*, combined with the Hungarian decision of 1989 being taken as the starting-point for the sequence of events, a bilaterally comprehensive approach to the issues was encouraged to the detriment of an overall vision of the relationship between the two Parties, since the bilaterally comprehensive view produced the illusion of a quasi-mechanistic relationship between their respective conduct. Such an analysis would have been well founded if the blocks *(a)* and *(b)* of facts described in the question were on the one hand isolated and on the other hand instantaneous in effect. Points *(a)* and *(b)* describe, within an overall set of facts, the different acts which are imputable, respectively and on different dates, to Hungary and to the Czech and Slovak Federal Republic. That binary classification does not relate the sequence of events.

In the present case, an analysis of the facts cannot be undertaken without reference to the unbroken stream of acts and conduct of an ambiguous nature that developed. The Project gives the impression of having been, *ab initio*, the victim of a number of incidents and dogged by bad luck. Thus, as the Court acknowledges, each of the Parties has committed distinct wrongs. However, contrary to the observation of the majority of the Court, I consider that each wrong played the role of catalyst for the other. This is not a case of a single wrong committed at the same time by the two Parties, nor of two successive wrongs, but of distinct wrongs which together led to the existence of the situation currently before the Court. Each Party contributed to creating a wrong which progressively helped to cause the situation which is the subject-matter of the present dispute in its entirety. It was necessary to put the interwoven nature of the conduct and the wrongs in that light since, given the dual task of the Court under Article 2 of the Special Agreement, the reciprocal nature of the wrongs raises the problem of causality in the present dispute as a whole.

The general scheme of this Judgment is based on the idea that the Hungarian wrong is the *causa prima* in law of the dispute. However, contrary to my opinion, the majority of the Members of the Court sees its scope as limited solely to the obligation of reparation: the intersecting nature of the wrongs enables the Court to recommend "the zero option"

as far as reparation of the damage is concerned, as it emerges from operative paragraph 2 D in the terms the Court has chosen[1].

With all the respect I have for the Court, I do not believe that the obligation of reparation is the only area on which the intersecting nature of the wrongs has had a bearing. The concept of violation of a norm, by the commission of unlawful acts, is meaningless in absolute terms; it is only meaningful in relation to the rights of each Party under the 1977 Treaty and to the discretionary power of subjective characterization by a party itself which is ascribed to it in law. The idea of violation thus enables each party to infer the consequences from a course of conduct which it has characterized as unlawful beforehand, in a discretionary manner. These considerations lead on the one hand to consideration of the consequences of the Hungarian wrong (para. 155 (1) (A)) for the sequence of events and on the other hand to criticism of paragraph 155 (1) (B) of the present Judgment.

No peremptory conclusion can be formulated as to the sequence of facts which make up the conduct of each Party. The concept of original cause may only be established, in the present case, on two conditions: first, that of its appearance *ex nihilo* in the chain of events and, second, that of its effectiveness as far as the actual genesis of the events is concerned. In order to satisfy these requirements, it would have been necessary for the wrong committed by Hungary to have borne no relation whatsoever to any conduct on the part of Czechoslovakia. But, in the present case, given the chaotic nature of the relations between the two Parties in dispute, it is difficult to seek to introduce a more or less undifferentiated mechanistic analysis into this discussion. Contrary to the requirements inherent in the law of liability in domestic law, the case is not about finding at all costs who is liable, nor about making a finding of unlawfulness *per se* which is not the cause of the sequence of respective actions of the Parties. Evidence of unlawfulness is not sufficient to establish a link of direct causality between the Hungarian conduct and the Czechoslovak reaction.

The historical and technical details show that projects for regulating the Danube in that portion of the river's course had been envisaged since the end of the Second World War. In the framework of such programmes of co-operation, each party was pursuing objectives which were not necessarily the same of those of its partner. Thus the Czech and Slovak Federal Republic expressed a particular interest in hydroelectricity and

[1] The zero option is linked to a certain interpretation of the rule of Pomponius according to which "Quod si quis ex culpa sua sentit, non intelligitur damnum sentire" (*Digest*, *"De regula juris"*, 50, 17). In other words, a claimant is deprived of his right to reparation if he can be accused of wrongdoing, whether or not it is the cause of the loss he has suffered. The proposition of Pomponius was ruled out by canon law as individualization of liability for fault gradually developed and mechanisms for presuming liability weakened.

in navigation. The Nagymaros works were designed to be put into operation when the installations at Gabčíkovo were operating in peak-load time. And it is apparent from the various earlier projects that, for many a year, the possibility of constructing the works on Czechoslovak territory alone had not been ruled out. Those details, relating to the context of both the Project and the present dispute, explain what was at stake, without however constituting a justification of the Hungarian decision. From the legal point of view, the conclusion of the Budapest Treaty renders these discussions nugatory. The only certainty stems from the fact that the Hungarian decision to suspend took shape in an atmosphere of much suspicion and mistrust and was a well-premeditated act.

In my opinion, the Hungarian decision did not constitute the cause, but the ground or motive taken into consideration by the Czech and Slovak Federal Republic in order to justify its subsequent conduct. Can it for all that, in law, be considered as being the source from which the subsequent wrongs came into being? A reply to that question must take into account the strategy of raising the stakes in the context of the pressure/negotiations game. First of all, the factual chronology is unfavourable to Hungary if one considers the sequence of events in terms of linear succession. However, with the passage of time, the links of causality with the initial wrong fade and weaken whereas the conduct of each side escalates more and more. Thus, in the present case, there was reason to determine the causal nature of the unlawfulness inherent in the Hungarian conduct described in paragraph 1 A of the *dispositif.* If we consider the question which forms the subject-matter of the second paragraph in terms of the relations between the two Parties, it is the facts and wrongs seen as a whole that should be taken into consideration; it is therefore difficult, in the absence of a presumption of responsibility, to consider the unlawfulness of the commissioning of Variant C as the direct consequence of the Hungarian decision of 1989. It seemed necessary to me however to dispose of this preliminary question as a matter of logic; that being so, the intersection of wrongs was the crux of the second question.

The inconsistent nature of the conclusion reached by the Court, in operative paragraphs 1 B and 1 C (para. 155), shows, if it needs demonstrating, the artificial nature of the distinction between "proceeding to the provisional solution" and its "putting it into operation". This distinction might be justified if the theory of approximate application or that of damage limitation were based on treaty law. The Court rightly rejected the arguments based on these principles, which may find their place in constructs of domestic law within a system of presumption of liability.

Once, though, the Court has accepted the intersecting nature of the wrongs committed by the Parties, the distinction between the construction of Variant C on the one hand and putting it into operation on the other is purely artificial in the context of the pressure/negotiations relationship game.

The divisibility of Czechoslovakia's conduct according to the Judgment is said to be based on the use in the Special Agreement of the copulative conjunction "and" in order to express the link between the two stages of process of accomplishment of its decision. However, the link ensured by the conjunction, from a grammatical point of view, is characterized by the fact that the elements of the process are of the same nature, and also by the immediacy of their succession. In those circumstances, contrary to what the majority of the Court presumes, and the consistent attitude of Czechoslovakia bears this out, there has never been, in its plans, any question of not putting Variant C into operation once the decision to proceed to it had been taken. A continuing act seems the most relevant characterization, both as regards the general sequence of events (see above) and the overt behaviour of Czechoslovakia and then of Slovakia.

For in order that the distinction made in the Judgment be founded, there must actually exist in advance an equipollence between "proceeding to the provisional solution" and "putting it into operation". That is in order to avoid one of the elements being absorbed by the other. However, the Czechoslovak decision is neither meaningful nor significant unless the subsequent course of events leads to a single result: the putting into operation of Variant C, the so-called "provisional solution".

On consideration, and contrary to the analysis in the Judgment, the unlawfulness of Czechoslovakia's conduct cannot be limited to the mere putting into operation of the "provisional solution" because of the status of the Danube in international law. I cannot subscribe to the idea that territorial sovereignty confers on a State the faculty of altering unilaterally the use of an international watercourse whose legal régime has formed the subject-matter of an international treaty. In these circumstances, it is not the construction or the non-construction of works on the territory of one or the other Party *per se* nor solely the diversion of the course of the Danube which constitute the only breaches of the obligations under the 1977 Treaty. The fact of substituting and implementing a national project in place of a joint international project is a serious contravention of the provisions of the Treaty of Budapest. Limiting the sanction for unlawfulness to the factual consequences of the breach of international obligations but not to the breach itself represents "a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda*" (see Judgment, para. 114). These considerations explain the validity of the proposition in Article 25, paragraph 1, of the International Law Commission Draft Articles on State Responsibility, on unlawfulness of a continuing character:

> "The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation."

In the final analysis, how can one justify the unlawfulness of Variant C solely in terms of its being put into operation, when there is no legal foundation in the 1977 Treaty for this solution, in the opinion of the Judgment, once the Court has dismissed the arguments of approximate application and obligation to limit damage, as well as the proportionality between the wrong committed by Hungary and the commissioning of Variant C?

(Signed) Raymond RANJEVA.
