DISSENTING OPINION OF JUDGE HERCZEGH

[Translation]

I am most regretfully unable to share the position of the majority of Members of the Court as expressed in this Judgment, and I find myself obliged to draft a dissenting opinion to set out the facts and reasons which explain the different conclusions I have reached.

The subject of the dispute between Hungary and Czechoslovakia, and later Hungary and Slovakia, was the construction of a system of locks on the Danube (hereinafter called "the G/N Project") intended to enhance "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube . . .". According to the Treaty concluded in Budapest on 16 September 1977,

> "the joint utilization of the Hungarian-Czechoslovak section of the Danube will . . . significantly contribute to bringing about the socialist integration of the States members of the Council for Mutual Economic Co-operation . . .".

The Project seemed in other respects likely to have a considerable impact on the environment. The Court, called upon by the Parties to resolve the dispute, was thus confronted with not only the implementation of the law of treaties, but also the problems raised by protection of the environment, and with questions concerning the international responsibility of States.

In its Advisory Opinion given to the General Assembly on 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court declared that it recognized

> "that 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. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*I.C.J. Reports 1996*, pp. 241-242, para. 29.)

This Judgment of the Court cites that passage and stresses the importance of respecting the environment, but then does not take due account of the application of that principle to the construction and operation of the G/N Project.

The Court only grants a very modest place to ecological considerations

in the "declaratory" part of its Judgment. As a judicial organ, the Court was admittedly not empowered to decide scientific questions touching on biology, hydrology, and so on, or questions of a technical type which arose out of the G/N Project; but it could — and even should — have ruled on the legal consequences of certain facts alleged by one Party and either admitted or not addressed by the other, in order to assess their respective conduct in this case.

Before determining the facts which could thus be pertinent, I must make a few preliminary observations on the characteristics of the G/N Project. The Project was an audacious scheme, in a class of its own and the first to be designed as a system of locks for the exploitation in peak mode of the hydroelectric resources of the Danube. The locks built on the German and Austrian sections of the Danube do not operate in peak mode; moreover, the dams on the Rhine operating in that mode are much more modest works.

That mode of operation involved and involves risks which were not altogether unknown to those responsible for drawing up the plans for the G/N Project, but its designers reasoned within the confines of what was known in the 1960s and 1970s — and that way of thinking is today considered outmoded, and rightly so. They accordingly minimized the risks, whilst at the same time having an imperfect understanding of the damage they could cause, and therefore of the possible solutions. To give just one example, the fact that the Joint Contractual Plan only provided for a discharge of 50 cubic metres per second in the old channel of the Danube during the months of March to November shows clearly that the most basic ecological considerations were not accorded the weight they deserved. The original Project was criticized not only by the Hungarian party, but also by the Czechoslovak leaders. Paragraph 38 of the Judgment quotes the Czechoslovak President, Mr. Havel, as saying that the G/N Project was a "totalitarian, gigomaniac monument which is against nature" (Counter-Memorial of Hungary, Vol. 3, Ann. 88), together with part of a statement made by the Czechoslovak Minister for the Environment, Mr. Vavroušek, for whom "the G/N Project was an old, obsolete one", and who went on to say that "there is no doubt that if we could turn the course of time, we would never approve the original project . . ." but that even though there were "many reasons to change, modify the Treaty . . . it [was] not acceptable to cancel the Treaty . . . and negotiate later on" (Memorial of Slovakia, Vol. IV, Ann. 97, pp. 248-249).

Given the declarations of the Czechoslovak leaders, it is somewhat surprising that the Court adopted the approach that the ecological risks listed by Hungary in 1989 were already known when the Treaty was concluded but remained uncertain, and the provisions of Articles 15, 19 and 20 covered the protection of the natural environment, water quality, and

so forth, whereas it could and should have concerned itself with the problems which the interpretation and implementation of these provisions might raise in the field. However, the Judgment merely mentions the aims of the Project and the advantages it was presumed to offer.

Unfortunately, that picture is a far cry from reality. It is difficult to see otherwise why the Minister, Mr. Vavroušek, would have considered the G/N Project contained in the 1977 Treaty to be "old", of an "obsolete" character, and needing to be "changed" or "modified", and so on. Moreover, the key question is not whether the Treaty contained certain provisions protecting the environment, but whether those provisions had been effectively implemented during the construction of the G/N Project.

Since the negotiations which led to the conclusion of the 1977 Treaty, ecological knowledge has become considerably broader and deeper whilst international environmental law has also progressed. In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court found that:

> "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years . . . have brought important developments . . . In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." (*I.C.J. Reports 1971*, pp. 31-32, para. 53.)

What held good for the Mandate system of the League of Nations also holds good for the duty to safeguard the natural environment, the only difference being that instead of a 50-year period, we have to look at a 20-year period in this case. Under Article 19 of the 1977 Treaty,

> "The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

The original Hungarian wording uses, instead of the word "obligations", the word "requirements", but that does not in any way affect its essential scope: the protection of nature was to be ensured in a manner commensurate with the requirements of the day, that is to say, in 1989, in accordance with the requirements of 1989, and not those that might have prevailed in 1977. Likewise, and in so far as it is accepted, as it is by the majority of the Members of the Court, that the Treaty still applies as it stands, the same would hold good for 1997, and it is in accordance with

present-day requirements that the scope of the Parties' treaty obligations with regard to protection of the environment should be defined.

The Court, in the "prescriptive" part of its Judgment, states:

> "Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past." (Para. 140.)

It is regrettable that the Court did not follow this principle even in the reasoning which led to its reply to the first question put to it in the Special Agreement.

To have perceived the shortcomings of a project — to avoid using the word "error" — and to recognize that one is the source of those shortcomings are two very different things which may sometimes be very far apart. The principal argument put forward, in 1991, by the Czechoslovak party in favour of the G/N Project, was based on the fact that the Project was almost completed. By the acceleration of the works laid down in the Protocol of 6 February 1989, certain Hungarian leaders wanted to do the same thing — to claim that a point of no return had been reached — in order to deal with increasing opposition and resistance. Political changes during that year prevented them from achieving that aim.

The crucial problem posed by the G/N Project was that of peak mode operation, for which the 1977 Treaty makes no provision. Slovakia confirmed repeatedly that there was no agreement between the contracting parties with regard to the peak mode operation of the system of locks. It maintained that the operational rules relating to peak mode operation had still not been established at the start of 1989, and that without the agreement and co-operation of the parties no plan to operate in peak mode could be implemented. In its Reply (Vol. II, pp. 8-9), Slovakia states "the Gabčíkovo plant would have operated at a level of maximum peak mode operation that was never agreed between the Treaty parties" and "Czechoslovakia offered its pledge to limit or exclude [that mode of operation] in October 1989 *if justified by subsequent studies*" (emphasis added). A few lines further on, it reaffirms that:

> "no agreed method or level of peak mode operation had been reached prior to 1989 . . . The focus on peak mode operation here is therefore misplaced, for it assumes a mode of operation that was neither agreed nor certain to be adopted in any form." (*Ibid.*, p. 9.)

It is the Joint Contractual Plan which describes peak mode operation, thus demonstrating that the 1977 Treaty and the Joint Contractual Plan do not have the same legal character since Slovakia would not otherwise have denied the existence of an agreement as to mode of operation.

It is true that the Preamble to the Special Agreement mentions the Treaty on the Construction and Operation of the Gabčikovo-Nagymaros Barrage System and related instruments ("the Treaty") but, despite the linking of the "related instruments" to the term *treaty*, it is absolutely incorrect to conclude that all those instruments — including the Joint Contractual Plan — are of the same nature and carry the same legal weight as the Treaty itself.

Moreover, the Special Agreement does not define the concept of "related instruments" at all and a list of the instruments was not appended to the Special Agreement or to the other documents lodged at the Court by the Parties, for the simple reason that they disagreed as to the material content of that expression. The references made by the Parties to the "related instruments", both in the written proceedings and in the hearings, were vague, ambiguous and often contradictory. Since the file submitted to the Court was insufficient to clarify what was meant by that expression, the Court should have avoided using it in its reasoning and especially in the operative part. Unfortunately, it did not follow this course, and this was detrimental to the necessary precision of its Judgment.

To return to the problem posed by the mode of operation of the system of locks, the above statements by the Slovak party show, moreover, that Czechoslovakia itself had certain doubts and certain reservations about the peak mode of operation. However, Slovakia emphasized during the hearings that the Parties had to resolve the problem of defining "the modalities of (and limitations to) the production of electricity in peak mode" (CR 97/15, p. 50, Pellet), yet without specifying the treaty basis of such a claim.

In any event there was an obvious contradiction between a project designed for peak mode operation and the absence of an agreement between the parties as to this mode of operation. The Court did not attempt to resolve that contradiction, but was unable to remain entirely silent as to the doubts it had regarding that mode of operation. In paragraph 134 of the Judgment, the Court concluded that there had been an "*effective* discarding by both Parties of peak power operation" (emphasis added). In paragraph 138, it states that Czechoslovakia "was willing to consider a limitation or even exclusion of operation" in peak power mode.

Between 1977 and 1989 Hungarian experts became aware of the ecological dangers potentially caused not only by the peak mode operation of the system of locks, but also by the construction of certain works of the system which had been designed with a view to such a mode of operation: more particularly the Nagymaros dam and the storage reservoir at

Dunakiliti as initially designed, that is, with an enormous surface area of 60 square kilometres, neither construction being indispensable or even of use if the Gabčíkovo power plant were to be operated in run-of-the-river mode. Slovakia recognizes that the Nagymaros dam was intended, "first, to compensate fluctuating water levels caused by peak operation of Gabčíkovo" (Memorial of Slovakia, para. 2.51), that "One of the functions of the Nagymaros section was to utilize the Danube waters so as to permit peak power production at Gabčíkovo" (*ibid.*, para. 7.13) or, to reiterate the words used by the agent of Slovakia during the hearings, that "to produce peak power electricity at Gabčíkovo required the existence of the Nagymaros weir" (CR 97/7, p. 15, Tomka).

It is therefore difficult to understand why Czechoslovakia insisted with some vigour that Hungary had to continue with the construction of the Nagymaros dam — when its primary purpose was to allow peak mode operation of the Gabčíkovo power station — if the mode of operation, as Slovakia expressly concedes, was never the subject of an agreement between the Parties. There was therefore no legal obstacle to prevent the G/N Project from being modified for adaptation to a less dangerous mode of operation. Slovakia, for its part, has repeatedly stated that

> "The 1977 Treaty and the international agreements linked to it were highly flexible . . . there were continuing studies of problems emerging during construction, which led to modifications related, *inter alia,* to the environment and water quality." (CR 97/7, p. 14, Tomka.)

In that case, the danger which the construction of the Nagymaros dam posed for Budapest's drinking water supply — a point I shall return to later — was a sufficient ground for amending the 1977 Treaty and the international agreements linked to it, as Hungary suggested in its Note Verbale dated 3 November 1989 (Memorial of Hungary, Vol. 4, Ann. 29).

Before replying to the question "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project" for which it was responsible, it should be noted that that question covers several actions taken by the Hungarian Government which must be assessed individually. Those actions are the following:

— in May 1989, the suspension of work on the Nagymaros dam;
— in July 1989, the suspension of work at Dunakiliti;
— in October 1989, the abandonment of work at Nagymaros.

At the same time, it should be noted that, towards the end of 1991, Hungary carried on with and even completed the work relating to the

downstream section of the bypass canal, on Czechoslovakian territory, between Gabčíkovo and Szap, for which it was responsible under Article 5, paragraph 5 *(b)* (4), of the 1977 Treaty, and that it did so because it did not consider that part of the G/N Project to threaten the environment. That is symptomatic of its attitude towards the 1977 Treaty. The allegation that Hungary repudiated or rejected the 1977 Treaty as such in 1989 or in 1990 is therefore groundless.

In order to justify its conduct, Hungary put forward various grounds and these included, *inter alia*, a state of necessity, the main and decisive reason. A state of necessity does not have the effect of extinguishing or suspending a treaty, but it is a circumstance exonerating the State from the responsibility it incurs in committing an act not in conformity with its international obligations.

Article 33, paragraph 1, of the Draft of the International Law Commission on the International Responsibility of States, considered as expressing the rules of customary international law and cited by the Court in its Judgment, stipulates the following:

> "1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
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> *(a)* the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
>
> *(b)* the act did not seriously impair an essential interest of the State towards which the obligation existed."

The state of necessity is "the situation of a State" — according to the International Law Commission Report —

> "whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 34, para. 1).

The "deliberate nature of the conduct, the intentional aspect of its failure to conform with the international obligation" — according to the Report —

> "are not only undeniable but in some sense logically inherent in the justification alleged; invoking a state of necessity implies perfect awareness of having deliberately chosen to act in a manner not in conformity with an international obligation" (*ibid.*, p. 34, para. 3).

State of necessity is a very narrow concept in general international law. In the course of the International Law Commission's work on the codification of State responsibility, the great majority of its members were of the view "that any possibility of the notion of state of necessity being

applied where it is really dangerous must certainly be prevented, but that this should not be so in cases where it is and will continue to be [a] useful . . ." "The imperative need for compliance with the law must not be allowed to result in situations so aptly characterized by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31). Thus the International Law Commission, expressing an almost general approach and conviction, stressed that the situation had to involve an "essential" interest of the State in question. That "essential" character naturally depends upon the circumstances in which a State finds itself, which cannot be defined beforehand, in the abstract. The peril threatening the essential interest must be extremely grave and imminent, and it must have been avertable only by means conflicting with an international obligation. In a state of necessity, there is a

> "grave danger to the existence of the State itself, to its political or economic survival, the maintenance of conditions in which its essential services can function, the keeping of its internal peace, the survival of part of its population, the ecological preservation of all or some of its territory . . ." (*ibid.*, p. 35, para. 3).

Invoking a state of necessity is not a way to terminate treaty obligations lawfully, that is, to terminate an international treaty. However, the party in question will be released from the consequences of the violation of international law, since it acted in a state of necessity. The state of necessity is a circumstance which exonerates from responsibility: in other words, it exonerates the author of the unlawful act from that international responsibility. Hence the problem has not been resolved — and cannot be resolved — by the law of treaties, but pertains to the provisions of the international law of State responsibility.

The question is therefore whether the criteria for a state of necessity are fulfilled in relation to the construction of the Nagymaros dam? It should be noted in this context that more than 500 bank-filtered wells which satisfy about two-thirds of Budapest's drinking water requirements are situated on the island of Szentendre, downstream of Nagymaros. The water from those wells is fit for consumption without any purification procedure being necessary. *The provision of drinking water for the Hungarian capital* — which has two million inhabitants (that is, one-fifth of the country's population) —, *qualitatively and quantitatively, certainly constitutes an essential interest* for Hungary. Hungary had to protect the branches of the Danube, on either side of the island, against any erosion endangering the production of drinking water from those wells.

The dredging of the bed of the Danube in the two branches around the island of Szentendre — as laid down by Article 1, paragraph 3 *(c)*, of the 1977 Treaty — had already caused serious damage. After the water services of the Hungarian capital had raised the alarm, those works

were not only suspended, but abandoned in 1980, resulting in a natural improvement of the state of the river bed. Since the construction of the Nagymaros dam would have had the same harmful effects downstream as those of the dredging, and in particular the erosion of the river bed, that construction constituted a grave peril.

The expression "grave peril" refers to the existence of a strong likelihood that detrimental effects and very extensive damage will occur. It is true that the damage in connection with Nagymaros would not occur overnight, but after a lapse of time. The Judgment cites the International Law Commission's commentary to the effect that the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time". That does not rule out, the Court adds,

> "that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable" (para. 54).

Unfortunately, the Court has not drawn the obvious conclusion from that definition as far as the construction of the Nagymaros dam is concerned. There could be no doubt that the erosion of the bed of the Danube downstream of Nagymaros would be the certain and inevitable consequence of the dam. These were not "uncertainties", as could be claimed in relation to other ecological consequences of the G/N Project, but certainties as to the foreseeable effects of the construction of the dam. If the Court did not want, in this respect, to rely solely on Hungary's arguments, it could have used the information provided by Slovakia. According to Slovakia,

> "the construction of water projects and hydropower plants upstream in Germany and Austria had the effect of dramatically reducing the quantities of sediments transported downstream to the Slovak-Hungarian section . . . dredging coupled with erosion began to exceed the annual deposition of sediment from upstream, the Danube river bed started to deteriorate in the region between Devín Gate and Sap (Palkovičovo) and the erosion processes caused by 'hungry water' commenced." (Memorial of Slovakia, para. 1.42.)

The Memorial of Slovakia cites the Report of 2 November 1993 of the European Communities Working Group of Experts that:

> "The main channel has been significantly lowered due to erosion caused by a combination of several man-made factors:
>
> — dam construction in Austria in the last decades resulting in a sediment (in particular bed load) deficit . . ." (*Ibid.*, para. 1.57.)

The Nagymaros dam could only have had the same effects, downstream, on the bed of the Danube, as the dams built in Austria had had

on the sector of the Slovak capital: the erosion of the river bed. As a result of such erosion, the production of drinking water from the bank-filtered wells on the banks of the island of Szentendre could only diminish, and the quality deteriorate. *Certus an incertus quando.* It was impossible to predict exactly that that diminution would amount to such-and-such a percentage of the former production of those wells, and whether it would occur over five or ten years, but it was certain that the quantity of water would diminish and its quality deteriorate in the relatively near future.

The imminence of the peril in question depended on the construction of the Nagymaros dam: without the dam, there would be no grave peril, either imminent or long-term; once the dam had been constructed, it would no longer have been appropriate to speak of a peril, but rather of grave and permanent damage occurring for so long as the dam existed — a dam built by the very State whose population and territory would have been its victims. To claim that the suspension of works on the Nagymaros dam was not justified by a state of necessity, since the peril was not imminent, means in reality that Hungary should have completed the dam and waited for the bank-filtered wells on the island of Szentendre to dry out because of the erosion of the river bed and for the supply of drinking water to the Hungarian capital to be called critically into question. The Court, in deciding the case, ought to have taken account of the damage that would have occurred if the Party in question had not taken the necessary preventive measures. States are under an obligation of prevention and not merely of reparation.

Slovakia did not deny that the effectiveness of the wells would be reduced, but it claimed that they would not be entirely lost and suggested measures designed to deal with such a situation, but without taking account of the cost of such measures (see Slovakia's reply, dated 7 May 1997, to the question asked by the Vice-President (CR 97/15, p. 64). Indeed, the surface waters could have been purified and rendered fit for human consumption; however, that would have been enormously expensive in view of the requirements of a city of two million inhabitants. The other solution proposed, namely the discharging of large quantities of gravel into the river bed, did not seem very realistic: both branches of the Danube around the island of Szentendre, taken together, are 1,000 metres wide and 70 kilometres long. How much gravel would therefore have been necessary to counteract the erosion of the river bed caused by the Nagymaros dam? The third solution raised, the construction of a second dam downstream of Budapest, would have cost no less and, in the end, a third dam would have been needed, at Paks or at Mohacs, not to mention the potential consequences of such a series of dams on the Yugoslav sector of the Danube. *In theory,* all three solutions were possible — the argument of impossibility does not stand up — but the implementation of these measures would have radically transformed the scope of Hungary's remaining obligations under the Treaty. Such a solution denotes a fundamental change of circumstances which may be relied

upon as a ground for terminating the Treaty, as prescribed in Article 62, paragraph 1 *(b)*, of the 1969 Vienna Convention on the Law of Treaties. The Court expressed itself as follows in its Judgment of 2 February 1973 in the case concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland)*:

> "International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty." (*I.C.J. Reports 1973*, p. 18, para. 36.)

Instead of taking into consideration the consequence of the changes thus operated on the scope of Hungary's remaining obligations under the Treaty, the Court, in this Judgment, merely states that "the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique" (para. 55). The costs of discharging gravel into the river and those of constructing a second dam were not given serious consideration, any more than was the radical transformation of the scope of the obligations assumed.

As far as a fundamental change in circumstances is concerned, it should be noted that he who can do the most can do the least. Hungary did not rely on the Treaty having lapsed or on the suspension of the Treaty as such, but it did suspend performance of one of its obligations — the construction of the Nagymaros dam — on the basis of a state of necessity, a ground for setting aside unlawfulness resulting from the failure to implement a treaty provision. In this case, it was a matter of safeguarding an essential interest against a peril which was grave and imminent — that is, certain and inevitable. The taking of other measures to counteract that grave peril would have radically transformed the scope of the obligations to be performed by Hungary under the Treaty.

Since the Court has not adopted a position on the question whether the suspension and abandonment of the construction at Nagymaros impaired an essential interest of the other Party, I shall merely observe that the Gabčíkovo power plant operates normally today, as a run-of-the-river power station, without a dam at Nagymaros, where the Danube flows naturally in its bed. Boats use the bypass canal, so that navigation has not been affected, and there is no danger of flooding which could have been caused by the present state of the works. Accordingly, the suspension and subsequent abandonment of the construction works has not impaired an essential interest of the other contracting party.

However, the Court finds as follows:

> "even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in

order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about" (para. 57).

That is a surprising conclusion, implying that Hungary should have finished the construction of the Nagymaros dam, which in reality would have helped to aggravate the state of necessity already existing as a result of the start of the works, by causing irreparable damage to the drinking water supply to its capital city. In that case, it would have had only itself to blame, since it alone would have been the cause of the catastrophic situation that would have ensued.

The suspension of the works at Dunakiliti is to be seen in a somewhat different context. The suspension of those works was intended to safeguard an essential interest of Hungary, that is, principally the protection of the aquifer situated below the Szigetköz and the surrounding area. The risk of damage to the aquifer arose from the size of the storage reservoir at Dunakiliti (oversized were Gabčíkovo to be operated as a run-of-the-river power station) and from the polluting effect of its stagnant waters. The national report of the Czech and Slovak Republic to the Rio Conference showed that Gabčíkovo constituted a threat to the environment:

> "Example of disturbance of the unique water and rural ecological systems due to large water works are the reservoirs in Nové Mlyny in Czech Republic and the Gabčíkovo water works on the Danube river in the Slovak Republic. In the first example the mead forest with its unique flora and fauna were seriously damaged, in the second example, the huge and unique volume of underground water is threatened and the systems of mead forests and river tributaries are drastically affected." (P. 92.) (See file of documents relating to the second round of oral arguments of Hungary, 10-11 April 1997, Ann. III-5.)

The suspension of the works at Dunakiliti certainly impaired the interests of Czechoslovakia inasmuch as they related to the commissioning of the almost completed Gabčíkovo power plant; the dykes which were already constructed had to be protected, and a supply of water from the Danube was essential in order to operate the plant even as a run-of-the-river power station. There was therefore a conflict of interests between the two States. Czechoslovakia could rely on the provisions of the Treaty which the two Parties considered to be valid, whereas Hungary referred to the ecological damage which would occur, as far as Dunakiliti — unlike Nagymaros — was concerned, in the more distant future. However, the interests of Czechoslovakia were of a financial nature, theoretically easy to compensate, whereas those of Hungary related to the safeguarding of its ecological balance and the difficult and uncertain struggle against damage to its environment. *In dubio pro natura.*

The G/N Project had other consequences for the environment, the details of which were discussed at length by the Parties, which presented

them in diametrically opposed ways. That detailed and conflicting presentation did not ease the Court's task and made it harder for it to determine the facts not denied or challenged by one or the other of the Parties.

The Court held that the state of necessity, as a ground for precluding the wrongfulness of an act not in conformity with an international obligation, can only be accepted on an exceptional basis and, referring to the relevant International Law Commission Report, added that

> "the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (para. 51).

I entirely concur with that approach, but I cannot accept the conclusions drawn in this case by the Court. It has concluded that, with respect to both Nagymaros and Gabčíkovo,

> "the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they 'imminent'; and . . . Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted" (para. 57).

This is absolutely not the case. As far as Hungary was concerned, what was at stake was the safeguarding of an essential interest against a peril which was grave and imminent, that is to say certain and inevitable, and any measures taken to counteract that peril would have radically transformed the scope of the obligations to be performed under the Treaty. By suspending and abandoning the works at Nagymaros, Hungary has not impaired an essential interest of Czechoslovakia, and it is precisely by constructing the dam at Nagymaros that it would have contributed to an unequalled state of necessity and to a situation catastrophic for its capital. The existence of the peril alleged by Hungary was recognized — at least in part — by the other Party, and Hungary therefore did not act in an arbitrary manner.

The first question asked in the Special Agreement was whether the Republic of Hungary was entitled to suspend certain works for which it was responsible under the 1977 Treaty. The Vienna Convention on the Law of Treaties is silent as to the state of necessity. However, international law — and particularly the law of responsibility — recognizes it. The state of necessity exists not only in theory, but also in reality. In the present case, even the strictest criteria applied cumulatively prove that, as far as the construction of the Nagymaros dam is concerned, Hungary was entitled to rely on that ground precluding its responsibility for not having fulfilled one of its obligations under the 1977 Treaty. It was therefore entitled to suspend and subsequently abandon the works at Nagymaros. As far as the suspension of the works at Dunakiliti is concerned, the existence of a state of necessity is debatable, but Hungary's anxieties

regarding the ecological risks occasioned by the reservoir — and partially recognized by Czechoslovakia itself — should not have been taken lightly, and still less categorically refuted. That latter measure of suspension was undoubtedly provisional (the installations at Dunakiliti have been maintained in good condition by Hungary up to the present day). Although the circumstances prevailing on that site do not entirely relieve Hungary of its responsibility, they do nonetheless provide some mitigation which the Court should have taken into account.

The Court, whilst refusing to accept that Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the G/N Project relating to Nagymaros, recognizes — albeit indirectly — that Hungary's position is well founded, when it manages to assert, in the "prescriptive" part of its Judgment, that the Nagymaros dam should not be built: "with the effective discarding by both Parties of peak power operation, there is no longer any point in building it" (para. 134); "the construction of the Nagymaros dam would have become pointless" (para. 138). Moreover, it must be acknowledged that the ecological considerations that now weigh against the dam are the same as those holding in 1989. If it has finally been concluded that the dam should not have been built in 1997, this is because in reality it should not have been built in 1989, either.

The dispute between the two Parties is very much the result of their geographical situations. The harmonization of the interests of the countries upstream and downstream is the crucial problem of the law governing international watercourses. During the work done by the United Nations on the Draft Convention on the Law of the Non-Navigational Uses of International Watercourses, the upstream countries complained that the provisions of the draft limited their right to use and develop the resources of those watercourses, whereas the downstream countries criticized the provisions of the draft by maintaining that they failed to protect their interests adequately and even allowed significant damage to be inflicted upon them. As far as the course of the Danube is concerned, Slovakia is an upstream country and Hungary a downstream country. In this Judgment the Court should have maintained a balance, admittedly hard to achieve, between the interests of the upstream and the downstream countries, and have ensured that harmonious progress in enhancement of the natural resources would be carefully organized to prevent the long-term disadvantages from outweighing the immediate advantages. Unfortunately, in the present case, it has not succeeded in doing so.

I have found it necessary to stress this question since the position to be taken, in particular, on whether Hungary was entitled to suspend and subsequently abandon the works at Nagymaros, and to suspend those at Dunakiliti, to a large extent determines the replies, or at least the reasoning, for the questions which follow.

* * *

I now come to the second question asked in the Special Agreement, that is, "whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the provisional solution and to put into operation from October 1992 this system . . .".

Since Slovakia has consistently maintained that the 1977 Treaty was extremely flexible and essentially open-ended, the contracting parties were entitled to propose that it be adapted to the requirements of environmental protection — having regard to new information and experience gained — and even modified, in order that the Treaty might match those requirements. The abandonment of the construction of the Nagymaros dam, whose main function would have been to allow the use of the Gabčíkovo power plant in peak mode (a use for which there had been no prior agreement between the parties), has not called in question the accomplishment of the object and purpose of the Treaty.

In September 1991, Mr. Vavroušek, the Czech Minister for the Environment, declared to the Hungarian Parliament:

> "I believe there is the only practicable way, a traditional one, that is being used not only in case of international treaties, but also when new acts are adopted. It simply means to prepare a new treaty and to incorporate into the last paragraph provisions that would cancel obsolete parts of the 1977 Treaty." (Memorial of Slovakia, Vol. IV, Ann. 97, p. 249.)

In other words, that would have involved the conclusion of a treaty taking the place of the old one, by modifying or abrogating those provisions that are out of date.

Between Mr. Vavroušek's visit to Budapest and the recourse to the "provisional solution" in November 1991, only two months elapsed. That is an extremely brief interval when one considers that the 1977 Treaty took two decades to prepare.

The Report of the Special Rapporteur on the Law on the Non-Navigational Uses of International Watercourses noted the importance of the parties' duty to negotiate by citing the Judgment delivered by the Court in the *North Sea Continental Shelf* cases. That obligation flows from the very nature of the respective rights of the parties. It

> "merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations . . ." (*I.C.J. Reports 1969*, p. 47, para. 86).

From all these considerations, the Rapporteur concludes:

> "there is a general principle of international law that requires negotiations among States in dealing with international fresh water resources . . . [and they also have the obligation] to negotiate the apportionment of the waters of an international watercourse" (*Year-*

book of the International Law Commission, 1980, Vol. II, Part. 2, pp. 116-117, paras. 31 and 34).

The Articles of the Draft Convention on the Law of the Non-Navigational Uses of International Waterways, adopted very recently by the General Assembly of the United Nations, are prompted by exactly the same principles.

The Court, in its Judgment (para. 141), reaffirms what it stated in the *North Sea Continental Shelf* cases:

> "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports 1969,* p. 47, para. 85).

It is difficult to accept that during the two months in question, the contracting parties to the 1977 Treaty exhausted all the possibilities of reaching an agreement with respect to a mutually acceptable modification of that instrument. However, the Czechoslovak Government decided to change unilaterally the state of affairs established in the Treaty and openly to breach it. Under the cover of a "provisional" measure, it undertook works which related to a permanent construction and were not authorized by the Treaty, thereby making it impossible to attain its object and purpose. Instead of negotiating in order to reach an agreement, it opted for a policy of "faits accomplis", having recourse to unilateral measures when the negotiations were still under way. The opportunity of a solution agreed between the Parties nonetheless still existed.

The Parties do not agree as to when and how the decision was taken. On 31 August 1989 the Czechoslovak Prime Minister, Mr. Adamec, raised the possibility of "unilateral measures" to ensure the operation of the Gabčíkovo dam. In its representation of 30 October 1989, Czechoslovakia indicated that:

> "In the event that the Republic of Hungary fail to fulfil its obligations the Czechoslovakian party would be obliged to implement a provisional technical solution . . . consisting in diverting, for the Gabčíkovo works, the volumes of Danube water agreed in the original treaty . . ."

In a work by Egil Lejon, copies of which were made available to Members of the Court during the Slovak stage of the site visit, the following is stated:

> "January 17, 1991: Based on the report, the Slovak Government decides to start preparations of the temporary solution, i.e. 'Variant C', not depending on Hungarian co-operation, however not excluding the possibility of returning to the Treaty conditions in the future." (*Gabčíkovo-Nagymaros, Old and New Sins,* 1994 (English ed., 1996), p. 86.)

Furthermore, Bratislava newspapers reported that work had actually started on 2 April 1991.

Those various dates are only pertinent in the event that it has to be decided whether the parties negotiated in good faith. However, the Court was not called upon to pronounce on the Parties' responsibility for the failure of the negotiations. In any event, it does not appear to be necessary to proceed with an examination of the different dates relevant to the recourse to the "provisional solution" — namely Variant C — since the important one is that appearing in the Special Agreement.

Variant C differs in several respects from the original Project included in the 1977 Treaty. Its Phase I includes nine features unrelated to the 1977 Project, and Phase II has three. Instead of the dam at Dunakiliti and its installations, another dam and its additional installations were built, 10 kilometres upstream, in Czechoslovak territory, making it possible to divert waters from the Danube into the bypass canal leading to Gabčíkovo. The storage reservoir at Čunovo has 30 per cent less surface area as compared with the original Dunakiliti project, which has certainly reduced the risks of damage that polluted water retained by its dykes could have caused to the groundwater. However, at the same time, Variant C has enabled the Danube to be diverted from its old bed, over a 40-kilometre section instead of the 30 provided for in the original Project, and this has had a significant impact on the environment of the Szigetköz region.

It is not, however, the range of new installations that puts Variant C quite at odds with the original Project and renders it contrary to the 1977 Treaty and to general international law, but the fact that its construction is the result of acts undertaken unilaterally by Czechoslovakia, without the agreement of the directly interested party, Hungary. Variant C was built despite repeated protests from Hungary and the fact that its operation was going to have direct and significant consequences on the territory of Hungary.

Slovakia claims that Hungary acquiesced in the original plan to divert the Danube, and that it was therefore not entitled to protest against the diversion carried out under Variant C. It is true that, under the 1977 Treaty and the related Joint Contractual Plan, the Parties were to build the Dunakiliti reservoir and divert the Danube waters into the bypass canal leading to Gabčíkovo, and from there to Szap. However, that part of the original Project did not deprive Hungary of control over its border waters and did not expose the ecology of one of its regions to the effects of uncontrollable activity by its neighbour. On the basis of the original Project, Hungary was able to defend its own interests directly, and Variant C deprived it of that possibility. Hungary no longer commanded the means made available to it by Article 14, paragraph 1, of the 1977 Treaty in respect of its ability to withdraw water from the Danube in excess of the specified quantities, in order to protect its essential interests regarding the environment of the Szigetköz. Only Slovakia is in a position to with-

draw water from the Danube at its own convenience. The old project, with all its drawbacks and defects, was a joint enterprise under the joint control of both parties. Variant C no longer had or has anything in common between the two parties, as a result of the exclusive control exercised by Czechoslovakia — now Slovakia — and was never given any kind of approval by Hungary.

According to the well-known maxim *sic utere tuo ut alienum non laedas,* one's property may not be used in such a way as to cause significant damage to another. Furthermore, in the present case, Czechoslovakia did not, and Slovakia today does not use its property in an unlawful manner, but it has appropriated — and this is one of the key factors in the dispute — something which did not belong to it, namely almost all the waters of the Danube. It follows from Article 3 of the 1976 Agreement on Boundary Waters that the Parties to the dispute "are entitled, unless otherwise agreed, to one-half of the natural discharge of water not augmented by technical means". The Parties have not agreed otherwise, since there has been no agreement between them as to Variant C. Variant C is therefore a grave breach both of the 1977 Treaty and of the 1976 Treaty on Boundary Waters.

In its Judgment the Court has rejected the doctrine of "approximate application" on which Slovakia based its reasoning in order to justify the construction of Variant C. I concur with the conclusion and reasoning of the Court on that point: "In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics." (Para. 77.)

Thus, I shall not labour the point. I am moreover in agreement with what the Court states in its Judgment as regards the justification of Variant C as a countermeasure:

> "an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.
>
> . . . . . .
>
> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.
>
> . . . . . .
>
> the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate" (paras. 85 and 87).

That observation, however, implies a need for certain additional conclusions. We are not dealing simply with "intersecting wrongs" on the part of both Parties to the dispute. The Court has not taken care to distinguish between the "wrongs", and has declared, *inter alia,* "that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty". It referred to the existence of "reciprocal wrongful conduct" and "reciprocal non-compliance" (para. 114) as the consequence of "the fact that the Treaty has not been fully implemented by either party for years" (para. 133). What should have been done was assess how serious the unlawful conduct attributed to both Parties was in order to make the necessary inferences.

Hungary, by abandoning the construction of the Nagymaros dam, ruled out the peak mode operation of the Gabčíkovo power plant, a mode of operation on which there was no prior agreement between the Parties, and, by suspending the works at Dunakiliti, it delayed the commissioning of the Gabčíkovo power plant. As a result, it inflicted financial losses on its partner whereas Czechoslovakia, later Slovakia, by building on its territory a dam unilaterally diverting the waters of the Danube, violated a provision essential to the accomplishment of the object and purpose of the Treaty, as laid down in Article 60, paragraph 3, of the Vienna Convention on the Law of Treaties.

The construction of Variant C infringed several essential provisions of the 1977 Treaty: not only those to be found in Articles 15, 19 and 20, but above all those concerning the joint use and control of the plant built under the Treaty. The Agent of Slovakia admitted this expressly during the hearings: "a joint operation was of the very essence of the Project under the 1977 Treaty" (CR 97/7, p. 16, Tomka). Variant C therefore infringed the object and purpose of the 1977 Treaty itself, and that serious infringement is tantamount to a rejection of the Treaty by Czechoslovakia.

The Court, in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, referred to General Assembly resolution 2145 (XXI), when stating:

> "The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship." (*I.C.J. Reports 1971*, p. 47, para. 95.)

The object and purpose of the 1977 Treaty (the "socialist integration" of the States Members of COMECON, included in its preamble, having in the event become obsolete) consisted in joint utilization of the natural resources of the Danube. The unilateral diversion of these waters and their exclusive utilization by Slovakia were undoubtedly a breach of a provision essential to the accomplishment of the object and purpose of

the Treaty, whereas the conduct of Hungary simply delayed but did not preclude the commissioning of the power plant; Hungary did not destroy "the object and purpose" of the treaty relationship.

I disagree with the Judgment of the Court when it concludes that Czechoslovakia was entitled, in November 1991, to carry out Variant C (para. 88), given that:

> "between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken" (para. 79) .

I cannot agree with that explanation for the following reasons:

The fact that the work on Variant C was only carried out on Czechoslovak territory does not preclude its unlawfulness. A State can quite well use its own territory to breach its international obligations, and there are numerous examples which could show this to be the case. The fact that the works "could have been halted" is not a convincing argument either and, in any event, work on Variant C was not stopped, as requested by Hungary — not even for a limited time.

The constructions of Variant C could not be considered to be "works preparatory" to the diverting of the Danube waters. Only the design and plans for Variant C may be so described, but not the actual recourse to that Variant, namely the construction of works — dykes, dams — intended for the diversion. The Judgment refers (in paragraph 79), to the commentary of the International Law Commission on the Draft Articles on State Responsibility. However, that commentary expressly mentions the following:

> "With regard to the timing of any claim for cessation on the part of the injured State or States, it is obvious that no such claim could be lawfully put forward unless *the wrongful conduct had begun,* namely unless the threshold of unlawfulness had been crossed by an allegedly wrongdoing State's conduct." *(Yearbook of the International Law Commission,* 1993, Vol. II, Part 2, p. 57, para. 14; emphasis added.)

Since Variant C, as such, constituted a breach of the 1977 Treaty, the unlawful conduct of Czechoslovakia began when it proceeded to the construction of those works necessary for the unilateral diversion of the Danube waters. It is completely arbitrary and inconsistent to separate that conduct of Czechoslovakia — unlawful in my opinion — from its result — unlawful according to the Court.

Accordingly, I conclude that Czechoslovakia acted unlawfully when, in November 1991, it embarked on the provisional solution. In other

words, it was no more entitled to do so than to commission it in October 1992.

* * *

I feel obliged to express a dissenting opinion in respect of the reply to the third question put to the Court, namely: "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary?" In other words, did the 1977 Treaty remain in force?

On 19 May 1992, the Government of Hungary notified the Government of Czechoslovakia that it would consider the 1977 Treaty to have been terminated as from 25 May of that same year. Diplomatic exchanges show that it was Czechoslovakia's categoric refusal to suspend the work on Variant C, even for a limited time, which determined the date of the Government of Hungary's decision to terminate the Treaty. The main reason for that decision was a wish to respond to the rejection of the Treaty by Czechoslovakia, constituted by the construction of Variant C. Article 60 of the Vienna Convention on the Law of Treaties authorizes a contracting party to act in this way, as will be shown later.

The Hungarian Government took its decision on the basis of the following considerations: *(a)* state of necessity; *(b)* impossibility of performance; *(c)* fundamental change of circumstances; *(d)* substantial breach of the Treaty by the other party; and, finally, *(e)* protection of the environment which had become mandatory in international law.

As a preliminary, I would observe that in reality one does not often see "pure" or unequivocal cases, in the sense that they require only one single abstract type of legal settlement or solution. More often than not, the legal situation in which the parties find themselves falls within the ambit of several rules of international law at the same time.

I shall not examine all the arguments put forward by Hungary. Its main argument to justify termination of the 1977 Treaty is clearly that the construction of Variant C constituted a breach of that Treaty, for the reasons given before the Court. Hungary described the grave breach constituted by Variant C as a "repudiation" by Czechoslovakia of the Treaty, constituting a fundamental change of circumstances (CR 97/13, p. 42, Crawford). The aforementioned concepts and expressions reflect the situation which prevailed in May 1992, viewed from different angles. Hungary further contended that that situation could be characterized as a case of impossibility of performance and, of course, that the development of international environmental law ought to be taken into consideration in this context.

From among these different approaches, I shall select the one which seems to me to be the most adequate and the result of which best reflects the legal points characterizing the situation. That will render superfluous

the examination of the other arguments put forward, which I do not think do more than "reorganize" those points differently and less precisely.

Article 60, paragraph 1, of the Vienna Convention on the Law of Treaties provides:

> "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."

Article 60, paragraph 3, provides as follows:

> "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."

Variant C constituted a violation of the provisions of the 1977 Treaty and other rules of international law, since Hungary was deprived of the Danube waters which belonged to it. As joint operation was the very essence of the Project provided for by the Treaty, the unilateral diversion precluded the accomplishment of the object and purpose of the Treaty. Notwithstanding the ecological effects that the diversion of the Danube is alleged to have had, predictably, on Hungary, the mere fact of a unilateral diversion — taken on its own — was so serious that it justified termination of the Treaty. The main and decisive reason for the termination is to be found in the construction of Variant C and its unlawfulness, which must be described as a fundamental violation within the meaning of Article 60, paragraph 3 *(b)*, of the Vienna Convention. The question falls clearly within the ambit of the law of treaties. All the other reasons put forward are merely subsidiary.

If Variant C truly constituted a grave breach, a fundamental violation of the Treaty — which the Court itself has noted — Hungary was entitled to terminate the Treaty.

Was Hungary's decision premature?

It is true that the diversion of the waters of the Danube had not yet been completed in May 1992, but the grave breach of the Treaty had already begun — as I have shown earlier — when Czechoslovakia started constructing Variant C in November of the preceding year. It is difficult to accept that Hungary should have passively awaited completion of the construction of Variant C. Czechoslovakia had on several occasions stated that it was determined to implement the "provisional" solution. The bilateral negotiations were deadlocked; work on Variant C was progressing well and Czechoslovakia made no secret of its intention to carry out a unilateral diversion of the Danube waters at Čunovo on the planned date, while refusing, even for a strictly limited time, to suspend the works whose objective was no longer a mystery.

When implementing Variant C, Czechoslovakia always described it, in so far as it was a measure designed to attain the purpose of the 1977 Treaty, as an "approximate application" of that Treaty. In an attempt to stop construction work, Hungary sought to deprive Variant C of its alleged justification, and hence it announced its termination of the Treaty. Work on Variant C was undertaken and completed on Czechoslovak territory alone. Termination of the 1977 Treaty was the only means available to Hungary to prevent Czechoslovakia from diverting the Danube waters in the sector where both banks of the river belong to that country. On 19 May 1992, it notified Czechoslovakia that it would consider the Treaty to be terminated as from 25 May of that year. The period of notice was certainly very short but Article 65, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides for a three month time-limit, contains — as it should be emphasized — the following exception: "except in cases of special urgency". In such a case the time-limit may be less than three months. In May 1992, in the face of very visible progress in the building of Variant C, Hungary was manifestly in such a situation "of special urgency".

Recourse to termination of the 1977 Treaty proved ineffectual: Czechoslovakia's decision was taken, and it was to remain irreversible. In fact, construction had started up and work was not suspended for a single moment; it carried on, even after Hungary had notified its partner that it considered the Treaty to be terminated. In any event, the unilateral diversion of the Danube was completed on 26 October 1992, and the grave breach of the 1977 Treaty was complete. Even if Hungary's Note of 19 May could — as the Court holds — have been considered premature, it took effect, at the latest, when the diversion of the Danube waters was completed.

Did Hungary, as a result of the alleged violations of its international obligations, forfeit its right to terminate the 1977 Treaty?

In the first part of my dissenting opinion, I showed that, when suspending and then abandoning the works at Nagymaros, Hungary acted out of a state of necessity, for which the criteria — which do not need to be repeated here — were all met. The state of necessity exonerated Hungary from the responsibility incurred on account of its failure to comply with certain provisions of the 1977 Treaty. As far as the suspension of the works at Dunakiliti is concerned, the majority of the criteria for a state of necessity were also met, but it is true that Czechoslovakia had an essential interest in the continuation of these works. Hungary, for its part, completed the construction of the dykes downstream of Gabčíkovo for which it was responsible under the Treaty and it offered to compensate Czechoslovakia for such losses as that State might have sustained. There are therefore, in Hungary's favour, circumstances exonerating it from responsibility and certain mitigating circumstances, since the conduct for which it can be reproached is not as serious as that constituted by

Czechoslovakia's construction of Variant C. The Treaty did not survive the joint effect of the serious breach constituted by the diversion of the Danube and Hungary's notification of its termination. The question of State succession to the Treaty is therefore irrelevant.

As far as the expression "related instruments" is concerned, it should be noted that with the disappearance of the Treaty, the fundamental text which could hold all the instruments together no longer exists. That expression subsequently lost any legal significance. That does not mean that all the instruments whose provisions could have a certain relationship to those of the 1977 Treaty have become obsolete. Their fate should be decided separately, having regard to the relevant rules of international law.

* * *

The Court in its Judgment has taken the view, however, that the 16 September 1977 Treaty remained in force and that the Slovak Republic, as successor State to the Federal Czech and Slovak Republic, became a party to the Treaty as from 1 January 1993. With regard to the legal consequences of the Judgment, including the rights and obligations for the Parties which the Court was asked to determine under Article 2, paragraph 2, of the Special Agreement, the Court, in paragraph 2 of the operative part of the Judgment, states at point B that

> "Hungary and Slovakia must . . . take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon".

For its part, point C of paragraph 2 of the operative part uses the words "in accordance with the Treaty", and point E the expression "in accordance with the relevant provisions of the Treaty".

By deciding that the 1977 Treaty is still in force, the Court made its own task more difficult and did nothing to ease that of the Parties since they have to reach an agreement on the resolution of questions over which they have been in dispute. According to its reasoning,

> "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 . . . might be unilaterally set aside on grounds of reciprocal non-compliance." (Para. 114.)

I must observe that the expression "reciprocal non-compliance" does not adequately reflect the cause or causes of the termination of the treaty. However, that is not my essential objection regarding that part of the Judgment; rather am I concerned at the divergences — not to say contradictions — between its "declaratory" part and its "prescriptive" part. The Court, while maintaining the Treaty in force, wanted to avoid being

set against the maxim *summum jus summa injuria*, and it recognized that the 1977 Treaty, *in its original form*, did not apply. I will cite the pertinent passages of the Judgment *in extenso*:

> "133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.
>
> . . . . . .
>
> What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.
>
> 134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Čunovo, and that the plant is operated in a run-of-the-river mode and not in peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it."

The reasoning of the Court in that context is based above all on the role of the time factor — the eight years that have elapsed between 1989 and 1997: "What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997." (One should not forget, in this context, that Hungary proposed, as early as November 1989, that the disputes which the parties could not resolve themselves should be decided by arbitration or by recourse to the International Court of Justice.) In my opinion, however, the approach limiting the impact of the time factor to the period that has elapsed since the dispute arose does not enable the Court, against the background of a complex case, to incorporate all of its relevant aspects.

Time passed, not only between 1989 and 1997, but also between 1977

and 1989. The 1977 Treaty — a bilateral treaty — was concluded in a specific political context, that of the bid to promote socialist integration of the States Members of the Council for Mutual Economic Assistance, which was radically transformed in 1989. The economic climate prevailing in 1977, marked by the economic system known as the command economy, was overturned in a no less radical manner when the advent of the market economy modified all expectations as to the cost and viability of the G/N Project. Furthermore, since the signature of the Treaty, ecological knowledge and requirements have evolved rapidly. The Parties both admitted that the Treaty was out of date: Hungary by proposing to amend it in November 1989; and Czechoslovakia in September 1991, by recognizing that the obsolete parts of the Treaty should be cancelled (Memorial of Slovakia, Vol. IV, Ann. 97, p. 249). The sudden recourse to Variant C, the so-called "provisional solution", prevented the Parties from finding a mutually acceptable solution to the problems raised by the Treaty. The facts, which I need not repeat at this juncture, that argue for modification of the Treaty and require the conclusion of a new agreement already existed in 1989, and do not derive from the period subsequent to that date as consequences of the unlawful conduct of the Parties.

The Judgment of the Court puts those Parties back in the context of an "old", "out-of-date" Treaty, whilst prescribing sensible, reasonable and even essential changes: to exclude definitively the peak mode operation of the Gabčíkovo power plant; not to build the Nagymaros works since "there is no longer any point in building [them]"; and, with regard to environmental protection, to take "new norms" into consideration and to assess "new requirements" appropriately, "not only when States contemplate new activities but also when continuing with activities begun in the past" (para. 140).

Those norms would be more effective and the Parties to the dispute could apply them more easily without the references to the 1977 Treaty. The Court could and should have founded the prescriptive part of its Judgment not upon an obsolete Treaty which could not be implemented — and which in my opinion had been terminated — but on the uncontested rules of general international law and on other treaties and conventions in force between the Parties, in order to resolve the problems they had inherited from the old G/N Project.

One may be certain that the termination of the 1977 Treaty would not have left the Parties to the dispute in a legal vacuum. Their "relationship", as the Court noted,

> "is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility" (para. 132).

The preamble to the Special Agreement concluded by Slovakia and Hungary states that the Slovak Republic is the "sole successor State" of the

Czech and Slovak Federal Republic "in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project". The rights and obligations created by the performance of the 1977 Treaty before it was terminated are not affected by the termination of the Treaty. Under Article 70, paragraph 1, of the Vienna Convention on the Law of Treaties:

> "Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> *(a)* releases the parties from any obligation further to perform the treaty;
>
> *(b)* *does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*" (Emphasis added.)

The installations constructed in good faith in fulfilment of the 1977 Treaty — such as Gabčíkovo and Dunakiliti — are not affected by the ultimate fate of that Treaty. Slovakia may therefore keep up and use the Gabčíkovo power plant in a manner not causing significant damage to its neighbour, that is to say, in particular, by operating it in run-of-the-river mode. As to the problems resulting from construction of the Čunovo dam and the diversion of the Danube waters, they should be settled in accordance with other treaties in force between the Parties, in particular the 1976 Boundary Waters Convention, and with the other principles and rules of international law in force between the Parties and placing them under certain binding obligations. It follows that each of the Parties is obliged to refrain from any act or any conduct having harmful effects on the environment and causing significant damage to the other Party.

The most important point in that regard is the equitable and reasonable sharing of the Danube waters. The Judgment of the Court cites Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

> "Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to co-operate in the protection and development thereof, as provided in the present Convention." (Para. 147.)

That principle, which may rightly be deemed to express a general rule of international law in force, is relevant to the settlement of the dispute in this case. The unlawfulness of Variant C lay in the appropriation by Czechoslovakia, then by Slovakia, of almost all the Danube waters, a shared natural resource. That unilateral use must cease as soon as possible and definitively. That aim can be achieved by "associating Hungary, on an equal footing, in the operation and management, and the

benefits" of the works built to date in fulfilment of the 1977 Treaty or outside and against it, and that by way of the agreed utilization of the natural resources of the Danube in the sector in question. This would provide a remedy for the breach of international law constituted by Variant C, and the *de facto* status would be transformed into a régime of law. That is the direction and spirit expressed by the Court in paragraph 146 of it its Judgment. I concur with the essence of the message contained in that paragraph, whilst considering myself obliged to express it differently in order to take account of the reasons which I have attempted to set out above.

Finally, I reiterate my conclusion that the 1977 Treaty was lawfully terminated and that it is no longer in force. The prescriptive part of the Judgment of the Court would, in my opinion, have been more logical and more convincing if the Court had not based it on the 1977 Treaty but rather on the rules of general international law and on the other treaties and conventions binding on the Parties.

These considerations forced me to vote against points A, B and D of paragraph 1 of the operative part.

As regards the points of paragraph 2 of the operative part, it goes without saying that, having voted against point D of the first paragraph, I had to vote against point A of the second paragraph. I am firmly convinced that Hungary and Slovakia must negotiate in good faith, on the basis of the international law in force, to implement the rights and obligations relating to the shared natural resources of the Danube. These shared resources should be exploited jointly and in accordance with mutually agreed arrangements. However, the fact that point B of paragraph 2 refers expressly to the objectives of the Treaty of 16 September 1977, point C to a joint operational régime in accordance with that Treaty, and point E to the relevant provisions of the said Treaty — which Treaty in my opinion, and having regard to the arguments put forward above, is no longer in force — prevented me from voting in favour of these points. At the same time, I voted in favour of point D on the reciprocal compensation of Slovakia and Hungary — unless the Parties otherwise agree — for the damage they have sustained on account of the construction of the System of Locks, since I considered that point to be fair and in accordance with the relevant rules of international law.

(Signed) Géza HERCZEGH.