DISSENTING OPINION OF JUDGE VERESHCHETIN

I regret that I cannot associate myself with those parts of the Judgment according to which Czechoslovakia was not entitled to put the so-called Variant C ("provisional solution") into operation from October 1992 (Judgment, para. 155, point 1 C) and:

> "Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia" (para. 155, point 2 D).

I firmly believe that Czechoslovakia was fully entitled in international law to put into operation Variant C as a countermeasure so far as its partner in the Treaty persisted in violating its obligations. Admittedly, Slovakia itself advanced this defence as "an alternative legal argument" and did not fully develop it. The logic is very clear and has been repeatedly explained by Slovakia. It does not believe Variant C to be a wrongful act, even prima facie, while any countermeasure, viewed in isolation from the circumstances precluding its wrongfulness, is a wrongful act in itself.

Slovakia takes the view that Variant C was a lawful, temporary and reversible solution necessitated by the action of its partner and prefers to defend its decision on the basis of the doctrine of "approximate application". However, a subjective view or belief of Slovakia cannot preclude the Court from taking a different view on the matter. The Court is bound by the questions put to it by the Parties in the Special Agreement, but not by the arguments they advanced in their pleadings.

In this regard a very pertinent comment can be found in the International Law Commission's Commentary to the Draft Articles on State Responsibility:

> "Whether a particular measure constitutes a countermeasure is an objective question . . . It is not sufficient that the allegedly injured State has a subjective belief that it is (or for that matter is not) taking countermeasures. Accordingly whether a particular measure in truth was a countermeasure would be . . . a matter for the tribunal itself to determine." (United Nations, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 162-163.)

The Parties requested the Court to decide:

> "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 . . ." (Special Agreement, Art. 2, para. 1 *(b)*; emphasis added).

Since the Court has decided that "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (Judgment, para. 155, point 1 B), I shall further focus my observations on the entitlement of Czechoslovakia to put this system into operation from October 1992.

Entitlement to respond by way of proportionate countermeasures stems from a prior wrongful act of the State which is the target of the countermeasures in question. According to the Court's jurisprudence, established wrongful acts justify "proportionate countermeasures on the part of the State which ha[s] been the victim of these acts . . ." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 127, para. 249). Entitlement to take countermeasures is circumscribed by a number of conditions and restrictions.

The most recent and authoritative attempt to codify the rules relating to countermeasures was made by the International Law Commission within the framework of its topic on State Responsibility (United Nations, *Official Records of the General Assembly, Fifty-first Session, Supplement. No. 10* (A/51/10)). Some of the provisions formulated by the ILC in this regard may be viewed as not merely codifying, but also developing customary rules relating to countermeasures (formerly known as reprisals). Therefore, I do not think that the Court in its assessment of the putting into operation of Variant C as a countermeasure may be overreaching the requirements established by the ILC draft for a countermeasure to be lawful.

Thus, to require that Variant C should have been the only means available in the circumstances to Czechoslovakia would amount to applying to countermeasures the criterion which the ILC considers to be indispensable for the invocation of "the state of necessity", but does not specifically mention in the text of the Articles dealing with countermeasures.

But even assuming this criterion should be applied to countermeasures as well, what other possible legal means allegedly open to Czechoslovakia could there be apart from countermeasures? Since the Court has found that Czechoslovakia was not entitled to put Variant C into operation, it should in all fairness have clearly indicated some other legal option or options whereby Czechoslovakia could effectively have asserted its rights under the Treaty and induced its partner to return to the performance of its obligations. In my analysis of the case, I have been unable to find any such effective alternative option available for Czechoslovakia in 1991 or 1992.

Certainly one of the legal means according to Article 60 of the Vienna Convention on the Law of Treaties could be the termination of the 1977 Treaty, in response to the material breach committed by the other party. But for Czechoslovakia would this not have amounted to bringing about by its own hand the result which Hungary had sought to achieve by its unlawful actions?

Another conceivable legal means might have been the formal initiation of a dispute settlement procedure under Article 27 of the 1977 Treaty. This Article stipulates that:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

At the time of the proceeding to Variant C (November 1991), "the matters in dispute" had long been in the hands of the Governments of the contracting parties. Therefore, no settlement could realistically be expected through a procedure at a much lower level when all the attempts to reach a settlement at the highest possible intergovernmental level had failed.

Would it be any more legally correct or, for that matter, realistic to insist that Czechoslovakia should have come to the Court before putting Variant C into operation in October 1992? Apart from the fact that Czechoslovakia was not legally bound to do so, it should be recalled that more than four years elapsed between the filing of the Application in the present case and the commencement of the hearings. One can easily imagine the amount of economic and environmental damage as well as the damage relating to international navigation that could have been caused by such a delay.

What should be borne in mind, however, is the fact that Czechoslovakia respected the obligation to negotiate prior to taking countermeasures. The time between the first suspension of works by Hungary in May 1989 and the proceeding to Variant C in November 1991 and subsequently putting this system into operation in October 1992 was replete with fruitless negotiations at different levels aimed at finding a resolution of the dispute (see paragraphs 61-64 of the Judgment). The history of these negotiations clearly shows that, at least from the end of 1990, the sole purpose of these negotiations for Hungary was the termination of the Treaty and the conclusion of a new agreement dealing only with the consequences of this termination, while for Czechoslovakia the purpose of negotiations was the continuation and completion of the Joint Project in some agreed form within the Treaty framework. Hungary's gradual withdrawal from the Joint Project in defiance of the 1977 Treaty led to the putting into operation of Variant C.

The basic conditions for the lawfulness of a countermeasure are (1) the presence of a prior illicit act, committed by the State at which the countermeasure is targeted; (2) the necessity of the countermeasure; and (3) its proportionality in the circumstances of the case. Certain kinds of acts are entirely prohibited as countermeasures, but they are not relevant to the present case (these acts being the threat or use of force, extreme economic or political coercion, infringement of the inviolability of diplomatic agents, derogations from basic human rights or norms of *jus cogens*).

I believe all the above-mentioned conditions were met when Czechoslovakia put Variant C into operation in October 1992. As to the first condition, it has been satisfied by the Court's findings that Hungary was not entitled to suspend and subsequently abandon the works relating to the Project or to terminate the Treaty (Judgment, para. 155, points 1 A and D). The unilateral suspension of the works by Hungary at Nagymaros and at Dunakiliti (initial breaches of the 1977 Treaty by way of non-performance) and later the abandonment of the work on the Project occurred before November 1991 — the date when, according to the Special Agreement, Czechoslovakia proceeded to the "provisional solution". The illicit termination of the Treaty by Hungary (19 May 1992) preceded the date when Czechoslovakia put Variant C into operation (October 1992 according to the Special Agreement).

Countermeasures may be seen as "necessary" only if they are aimed at bringing about the compliance of the wrongdoing State with its obligations and must be suspended once the illicit act has ceased. This requirement therefore presupposes that countermeasures are reversible by nature.

In the course of the pleadings Slovakia stated and repeated over and over again that Variant C was conceived as a provisional and reversible solution, as an attempt to induce Hungary to re-establish the situation which existed before its wrongful act. Significantly, the Working Group of Independent Experts of the Commission of the European Communities, in its report of 23 November 1992, did not deny the technical feasibility of the return to the Treaty Project:

> "In principle, the ongoing activities with Variant C could be reversed. The structures, excluding some of the underground parts like sheet piling and injections, could in theory be removed. The cost of removing the structures are roughly estimated to at least 30 per cent of the construction costs." (Memorial of Hungary, Vol. 5, Part II, Ann. 14, p. 434.)

This statement confirms that, at least at the time of the damming of the Danube, Variant C was a reversible measure and a return to some agreed joint scheme of the Treaty Project was possible.

The contention of Hungary regarding Czechoslovakia's hidden inten-

tions to act unilaterally — intentions which allegedly already existed in the past and still do — may be of scant relevance to the issue of the reversibility of Variant C.

The existence of such intentions at the governmental level and the readiness to realize them would hardly be compatible with Czechoslovakia's conduct after the suspension of works under the Treaty by Hungary. The Government of Czechoslovakia did not seize upon the opportunity which had emerged to terminate the 1977 Treaty and to complete the Project unilaterally, but instead tried to persuade its Hungarian counterpart to return to the performance of its treaty obligations. At the same time, the Government of Czechoslovakia expressed its willingness to meet many of Hungary's environmental concerns, proposing in October 1989 negotiations on agreements relating to technological, operational and ecological guarantees as well as to the limitation or exclusion of the peak mode operation of the Gabčíkovo-Nagymaros Barrage System. In any event, the veracity and fairness of the public commitments of Czechoslovakia and Slovakia to return to the Joint Project may not be refuted on the basis of mere conjectures, but could be tested only by the response of Czechoslovakia and Slovakia to the positive actions by Hungary.

It remains for us to examine one more basic condition for the lawfulness of a countermeasure, namely its proportionality in the circumstances of the case. It is widely recognized, in both doctrine and jurisprudence that the test of proportionality is very important in the régime of countermeasures and at the same time it is very uncertain and therefore complex.

To begin with, according to the ILC:

> "there is no uniformity . . . in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed" (United Nations, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), p. 146).

The ILC also observes that "reference to equivalence or proportionality in the narrow sense . . . is unusual in State practice" (*ibid.*, p. 147). That is why in the literature and arbitral awards it is suggested that the lawfulness of countermeasures must be assessed by the application of such negative criteria as "not [being] manifestly disproportionate", or "clearly disproportionate", *"pas hors de toute proportion"*[1], "not out of proportion", etc. The latter expression ("not out of proportion") was employed by the ILC in its most recent draft on State Responsibility. The text of the corresponding Article reads:

[1] In French in the original text.

"any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State" (Art. 49).

In its Commentary the Commission says that "proportionality" should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the "seriousness of the breach" (United Nations, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), pp. 147-148).

If we take this approach which, in my view, adequately expresses State practice and jurisprudence, we should weigh the importance of the principle *pacta sunt servanda* breached by Hungary and the concrete effects of this breach on Czechoslovakia against the importance of the rules not complied with by Czechoslovakia and the concrete effects of this non-compliance on Hungary. The "degree(s) of gravity" in both cases need not necessarily be equivalent but, to use the words of the Air Services Agreement Award, must have "some degree of equivalence" (*International Law Reports*, Vol. 54, p. 338), or in the words of the ILC must "not be out of proportion".

The task is not an easy one and may be achieved only by way of approximation, which means with a certain degree of subjectivity. Weighing the gravity of the prior breach and its effects on the one hand, and the gravity of the countermeasure and its effects on the other, the Court should, wherever possible, have attempted in the first place to compare like with like and should have done so with due regard to all the attendant circumstances against the background of the relevant causes and consequences. Following this approach, the Court should have assessed by approximation and compared separately:

(1) the economic and financial effects of the breach as against the economic and financial effects of the countermeasure;
(2) the environmental effects of the breach as against the environmental effects of the countermeasure; and
(3) the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.

All these assessments and comparisons should have specifically been confined to the span of time defined by the question put to the Court by the Parties, namely November 1991 to October 1992. It should not be forgotten that the very idea and purpose of a countermeasure is to induce the wrongdoing State to resume performance of its obligations. The sooner it does so the less damage it will sustain as a result of the countermeasure.

On the first point of comparison, according to Slovakia "by May 1989, a total of US$2.3 billion (CSK 13.8 billion) had been spent by Czechoslovakia on the G/N Project" (Memorial of Slovakia, para. 5.01). These figures, which naturally do not include the loss of energy production and the cost of the protection, maintenance and eventual removal of the existing structures, give the idea of the economic and financial losses which would inevitably have been sustained by Czechoslovakia in the event of a complete abandonment of the Project.

For its part, Hungary did not, either in its written pleadings or in its oral arguments, give any concrete figures evincing in monetary terms the amount of actual material damage sustained as a result of Czechoslovakia's resort to Variant C. Hungary claimed its entitlement to the payment by Slovakia of unspecified sums in compensation for possible future damage, or potential risk of damage, which might be occasioned by Variant C. Although it is true that "[n]atural resources have value that is not readily measured by traditional means" (Reply of Hungary, Vol. 1, para. 3.170), uncertain long-term economic losses, let alone the mere potential risk of such losses, may not be seen as commensurable with the real and imminent threat of having to write off an investment of such magnitude.

In terms of comparative environmental effects, Variant C could be seen as advantageous against the originally agreed project, due to a smaller reservoir and the exclusion of peak mode operation. On the other hand, in the event of the total abandonment of the project, the waterless bypass canal and other completed but idle structures would have presented a great and long-lasting danger for the environment of the whole region. As stated in the Judgment

> "It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission . . ., that not using the system . . . could have given rise to serious problems for the environment." (Para. 72.)

Also, it is necessary to compare the gravity and the effects of the breach of the 1977 Treaty by Hungary with the gravity and the effects of the response by Czechoslovakia in terms of their respective rights to the commonly shared water resources. Hungary and Czechoslovakia had agreed by treaty on a scheme for common use of their shared water resources, which use they evidently considered equitable and reasonable, at least at the time when this agreement was reached. Both States had made important investments for the realization of the scheme agreed upon. At the time when one of the States (Czechoslovakia) had completed 90 per cent of its part of the agreed work, the other State (Hungary) abruptly refused to continue discharging its treaty obligations. Due to the technical characteristics of the project, Hungary thereby deprived Czechoslovakia of the practical possibility of benefiting from the use of its part of the shared water resources for the purposes essential for

Czechoslovakia, clearly defined in the Treaty and expressly consented to by Hungary.

In response to this illicit act, Czechoslovakia likewise failed to act in accordance with its obligations under the 1977 Treaty. By putting into operation Variant C, it temporarily appropriated, on a unilateral basis and essentially for its own benefit, the amount of water from which originally, according to the Treaty and the Joint Contractual Plan, both States were entitled to benefit on equal terms. At the same time, Czechoslovakia reiterated its willingness to return to the previously agreed scheme of common use and control provided that Hungary ceased violating its obligations. The possibility of a revision by agreement of the original joint scheme was not excluded either.

In those circumstances and as long as Hungary failed to perform its obligations under the 1977 Treaty and thus, of its own choosing, did not make use of its rights under the same Treaty, Czechoslovakia, in principle, *by way of a countermeasure* and hence on a provisional basis, could channel into the Gabčíkovo structure as much water as had been agreed in the Joint Contractual Plan. Moreover, Article 14 of the 1977 Treaty provided for the possibility, under a certain condition, that each of the Parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan (see Judgment, para. 56).

Let it be assumed, however, that in view of all the attendant circumstances and the growing environmental concerns Czechoslovakia, as a matter of equity, should have discharged more water than it actually did into the old river bed and the Hungarian side-arms of the Danube. This assumption would have related to only one of the many aspects of the proportionality of the measure in question, which could not in itself warrant the general conclusion of the Court that Czechoslovakia was not entitled to put Variant C into operation from October 1992.

For the reasons stated above, I could not vote for paragraph 155, point 1 C, of the Judgment. Nor could I support paragraph 155, point 2 D, in so far as it does not, regrettably, differentiate between the obligation of the State which had committed a prior illicit act and that of the State which responded by way of a countermeasure. It goes without saying that my negative vote on paragraph 155, point 2 D, as a whole must not be understood as a vote against the first part of this paragraph.

(Signed) Vladlen S. VERESHCHETIN.