

DECLARATION OF JUDGE REZEK

[Translation]

1. Although in my opinion the 1977 Treaty is no longer in force, I am able to accept the conclusions of the majority of the Members of the Court as to the main points, that is to say, the practical consequences of this Judgment and the programme of measures which it invites the States in dispute to implement.

My opposition to the majority is based primarily on theoretical convictions relating to the nature of the 1977 Treaty and to the effects upon a bilateral commitment in course of performance (and not yet exhibiting the territorial effects that it was intended one day to produce) of the collective wrongfulness embodied in the existence, on the part of both the States involved, of attitudes denoting that the *animus contrahendi* which supposedly united them in the past has now disappeared.

2. A commitment such as the bilateral 1977 Treaty cannot be subject to ordinary denunciation during performance; however, the Hungarian notification of 19 May 1992 was not an ordinary denunciation. It was made after both Parties had failed to fulfil their mutual obligations, Hungary by abandoning works for which it was responsible, Czechoslovakia by adopting Variant C. I consider the Note of 19 May 1992 to be the formal act of termination of a treaty which, for different reasons and on more than one previous occasion, each of the Parties had already repudiated. I therefore see here an unorthodox type of abrogation.

3. In my opinion, the rule *pacta sunt servanda* means that the treaty creates reciprocal rights between the parties on the basis of a convergence of interests, a pooling of sovereign wills which in all probability will continue to coincide over time. When, on both sides of the treaty process, there is a lack of rigour in doing what has been agreed, the commitment weakens and becomes vulnerable to formal repudiation by one of the parties, irrespective of the question of which party was the first to neglect its duties, and it hardly matters that the parties lacked rigour in different ways. Treaties derive their force from the will of the States which conclude them. They do not have an objective value which makes them sacred regardless of those common intentions.

4. I consider that the 1977 Treaty is no longer in existence, having been abrogated by the attitude of both parties. From that conclusion, however, I infer consequences similar to those which the majority infers from the continued existence of the Treaty. First, there is what has been accomplished, and accomplished in good faith. There is, also and above

all, the very principle of good faith which must lead here to the fulfilment of reciprocal duties remaining from a treaty which has not been applied through the joint fault of the parties.

(Signed) Francisco REZEK.
