the law of genocide, the principle of racial non-discrimination,[50] crimes against humanity, and the rules prohibiting trade in slaves and piracy.[51] In the *Barcelona Traction* case (Second Phase),[52] the majority judgment of the International Court, supported by 12 judges, drew a distinction between obligations of a state arising *vis-à-vis* another state and obligations 'towards the international community as a whole'. The Court said:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Other rules which probably have this special status include the principle of permanent sovereignty over natural resources[53] and the principle of self-determination.[54]

The concept of *jus cogens* was accepted by the International Law Commission and incorporated in the final draft of the Vienna Convention on the Law of Treaties in 1966, Article 50, which provided that: '... a treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' The Commission's commentary makes it clear that by 'derogation' is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of general international law. Thus an agreement by a state to allow another state to stop and search its ships on the high seas is valid, but an agreement with a neighbouring state to carry out a joint operation against a racial group straddling the frontier which would constitute genocide, if carried out, is void since the prohibition with which the treaty conflicts is a rule of *jus cogens.* After some controversy, the Vienna Conference on the Law of Treaties reached agreement on a provision (Art 53) similar to the draft article except that, for the purposes of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is defined as 'a norm accepted and recognised by the international community of states as a whole and which can be modified only by a subsequent norm of general international law having the same character'. Charles de Visscher[55] has pointed out that the proponent of a rule of *jus cogens* in relation to this article will have a considerable burden of proof.

Apart form the law of treaties the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence: prescription cannot

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50 Judge Tanaka, diss op, *South West Africa* cases (Second Phase) [1966] *ICJ Rep* at 298; Judge Ammoun, sep op, *Barcelona Traction* case (Second Phase) [1970] *ICJ Rep* at 304; Judge Ammoun, sep op, *Namibia* opinion [1971] *ICJ Rep* at 78–81. The principle of religious non-discrimination must have the same status as also the principle of non-discrimination as to sex.

51 This statement in the third edition of the work (p 513) was quoted by the Inter-American Commission of Human Rights in the *Case of Roach and Pinkerton*, Decision of 27 March 1987 (OAS General Secretariat) 33–36.

52 [1970] *ICJ Rep* at 3 at p 32. See also *In re Koch*, ILR 30, 496 at 503; *Assessment of Aliens* case, ILR 43, 3 at 8; *Tokyo Suikosha* case (1969) 13 *Japanese Ann of IL* 113 at 115.

53 Declaration on Permanent Sovereignty over Natural Resources, Un GA Res 1803 (XVII) of 14 December 1962 adopted by 87 votes to 2 with 12 abstentions.

54 Judge Ammoun, sep op, *Barcelona Traction* case (Second Phase) [1970] *ICJ Rep* at p 304.

55 *Théories et réalistes en droit international*, 4th edn, 1970, Paris: Pedane at pp 295–96.

> purge this type of illegality. Moreover, it is arguable that *jus cogens* curtails various privileges, so that, for example, an aggressor state would not benefit from the rule that belligerents are not responsible for damage caused to subjects of neutral states by military operations. Many problems remain: more authority exists for the category of *jus cogens* than exists for its particular content, and rules do not develop in customary law which readily correspond to the new categories. However, certain portions of *jus cogens* are the subject of general agreement, including the rules to the use of force by states, self-determination, and genocide. Yet even here many problems of application remain, particularly in regard to the effect of self-determination on the transfer of territory. If a state uses force to implement the principle of self-determination, is it possible to assume that one aspect of *jus cogens* is more significant than another. The particular corollaries of the concept of *jus cogens* are still being explored.[56]

4.9.7 The effect of invalidity

Article 69 of the VCT 1969 provides that where the invalidity of a treaty is established, the treaty is void and its provisions have no legal effect. If acts have been performed in reliance on a void treaty then states may require other parties to establish, as far as possible, the position with regard to their mutual relations that would have existed if the acts had not been performed. Acts performed in good faith in reliance on a treaty before its invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty. Article 71 deals with the specific consequences arising where a treaty conflicts with *jus cogens.* In such a situation the parties to the void treaty are under an obligation to bring their mutual relations into conformity with the peremptory norm. Where the treaty becomes void and terminates as a result of the development of a new rule of *jus cogens* under Article 64, the parties are released from any obligations further to perform the treaty, but rights and obligations created through the treaty prior to its termination are unaffected provided that such rights or obligations do not themselves conflict with the new peremptory norm.

The answer to one question remains unclear: when a cause of invalidity arises, does it operate automatically, in the sense that anyone called upon to apply the treaty may judge whether or not it is valid, or is an international act of denunciation required on the part of the state that seeks to invoke the invalidity. The position at customary international law seems to be that where the invalidity results from error or fraud then an act of denunciation is required, but on questions of coercion or violation of *jus cogens* there seems to be no real agreement. In practice, however, it will usually be the case that the question of invalidity will arise when a party to the treaty wishes to absolve itself from the obligations contained in it. It is therefore likely that some public act of denunciation will occur. Article 65 of the VCT 1969 provides that a party which seeks to impeach the validity of a treaty must notify the other parties and, providing no objection is received within three months of giving notice, that party may consider the treaty as void. If objections are made there is a duty on the disputants to reach a peaceful settlement. The issue of peaceful settlement of disputes is dealt with in Chapter 12.

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56 Brownlie, *Principles of Public International Law*, 4th edn, 1990, Oxford: Oxford University Press at pp 512–15.

4.10 Termination, suspension of and withdrawal from treaties

4.10.1 By consent

Articles 54 to 59 of the VCT 1969 provide for various situations where a treaty may be terminated or suspended or where a party may withdraw from a treaty by consent. The most straightforward situation will arise where the treaty either makes provision for termination, denunciation or withdrawal or where all parties consent to a change. Where a treaty makes no provision for termination, denunciation or withdrawal then the rule is that withdrawal and denunciation will not be allowed unless it is established that the parties intended to admit its possibility, or a right of termination and denunciation can be implied by the nature of the treaty. In such a case a party wishing to denounce or withdraw from a treaty should give a minimum of 12 months' notice. The operation of a treaty may be suspended if provided for in the treaty or if all parties consent. In the case of multilateral conventions, two or more parties may conclude an agreement to suspend the treaty as between themselves provided such suspension is not prohibited by the treaty and provided that it is not incompatible with the object and purpose of the treaty. If such an agreement to partially suspend a treaty is concluded there is a duty on the two or more states to inform the other parties to the treaty.

4.10.2 Material breach

It has always been a rule of customary law that the breach of an important provision of a treaty by one party entitles the other parties to regard that agreement as at an end. The main question that arises is how important a breach needs to be before it will justify the termination of a treaty. A material breach will entitle the other parties to a treaty to terminate or suspend a treaty in whole or in part. In the case of multilateral treaties, those not in breach might decide to terminate or suspend the treaty only in respect of the party in breach. It is clear that a party responsible for a material breach cannot itself rely on that breach to terminate a treaty.

4.10.3 Supervening impossibility of performance

Article 61 of the VCT 1969 introduces a rule analogous to the doctrine of frustration in municipal contract law. If a treaty becomes impossible to perform as a result of the permanent disappearance or destruction of an object indispensable for the execution of the treaty, that impossibility may be invoked as a reason for terminating or suspending the treaty. Where the impossibility is only temporary, it may only be invoked as a ground for suspension of the treaty. An example of the operation of Article 61 would be the case of a treaty governing rights pertaining to a river. The treaty could be terminated if the river dried up permanently. The impossibility of performance cannot be invoked by a party, where the impossibility results form the conduct of that party.

Linked to impossibility of performance is the doctrine of *force majeure*. The doctrine will be discussed in more detail in Chapter 9 since it can provide a

general defence to international responsibility. The requirements of *force majeure* are that it must be irresistible, unforeseeable and external to the party relying on it. It may therefore exist under conditions which fall short of absolute material impossibility of performance. At the Vienna Conference on the Law of Treaties Mexico proposed that *force majeure* should be included in Article 61 but the proposal was rejected. It therefore seems to be the case that although *force majeure* may provide a defence for states accused of breaching treaty obligations, it will not result in the termination of the treaty. However, since a material breach of a treaty can result in the termination of that treaty, it may be argued that the ultimate effect of *force majeure* will be the same as a material impossibility of performance.

4.10.4 Fundamental change of circumstances

A fundamental change of the circumstances existing at the time the treaty was concluded has traditionally been a ground for withdrawal or termination. The rule is often referred to as the doctrine of *rebus sic stantibus*. Before the First World War a number of treaties were brought to an end by states relying on fairly minor changes. Since that time the law has been tightened up and it is clear that any change must be such as to alter radically the circumstances on the basis of which a treaty was concluded. In the *Fisheries Jurisdiction* case (1973) the ICJ declared that:

> ... 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. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject ...[57]

The conditions and exceptions which are indicated by Article 62 are that the change of circumstances must not have been foreseen at the time of the conclusion of the treaty; the existence of the circumstances must have constituted an essential basis of consent and the effect of the change is to transform radically the nature and extent of the obligations still to be performed under the treaty. A fundamental change of circumstances may not be invoked with regard to a treaty establishing a boundary, nor if the change is the result of a breach of any international obligation owed to any other party to the treaty by the party invoking it.

4.10.5 Other possible grounds

Article 63 of the VCT 1969 provides that severance of diplomatic relations will not in itself affect treaty relationships, unless of course it amounts to a fundamental change of circumstances. There are a number of views as to the effect on a treaty of the outbreak of war. The VCT 1969 contains no provision relating to war, and it is certain that treaties governing war and peace, for

57 [1974] *ICJ Rep* 3.

example the UN Charter and the Geneva Conventions 1949 are not terminated or suspended by war. The most sensible view seems to be that expressed by the New York state Court of Appeals in *Techt v Hughes* (1920): '... treaty provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected'.

4.10.6 The effect of termination or suspension

Article 70 of the VCT 1969 provides that termination of a treaty releases the parties form any obligation further to perform the treaty but does not affect rights and obligations or situations created prior to termination. The effect of suspension is to release the parties from their obligations for the period of suspension.

CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA)[58]

The case concerned a dispute between Hungary and Slovakia (successor state to Czechoslovakia) arising from a 1977 treaty between Hungary and Czechoslovakia which provided for the two states to undertake a joint project for the construction of a system of locks, flood protection schemes and hydroelectric plants on the river Danube. The project had the aims of improving navigation, producing of electricity and protecting against flooding. The parties also undertook to ensure that the quality of the water in the Danube was not impaired as a result of the project. Following the political changes in Eastern Europe and the growth of environmental concern, particularly in Hungary, the parties agreed to slow down the speed of work on the project in 1983. In 1989, Hungary decided to abandon all work on the project and the dispute commenced. In the course of its judgment the ICJ had to consider a number of important aspects of the law relating to treaties as well as issues of state responsibility and environmental protection.

> 92 During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.
>
> 93 On the first point, Hungary stated that, as Czechoslovakia had 'remained inflexible' and continued with its implementation of Variant C, 'a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty'.
>
> Slovakia, for its part, denied that a state of necessity existed on the basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

58 Judgment of 25 September 1997 available at: http://www.icj-cij.org/idocket/ihs/ihsframe.htm.

94 Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

Article 61 Supervening impossibility of performance

1 A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2 Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.'

Hungary declared that it could not be 'obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage'. It concluded that:

By May 1992 the essential object of the Treaty – an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly – had permanently disappeared, and the Treaty had thus become impossible to perform.

In Hungary's view, the 'object indispensable for the execution of the Treaty', whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, 'a legal situation which was the *raison d'être* of the rights and obligations'.

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that para 1 of that Article clearly contemplated physical 'disappearance or destruction' of the object in question, and that, in any event, para 2 precluded the invocation of impossibility 'if the impossibility is the result of a breach by that party ... of an obligation under the treaty'.

As to 'fundamental change of circumstances', Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

Article 62 Fundamental change of circumstances

1 A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2 A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3 If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Hungary identified a number of 'substantive elements' present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of 'socialist integration', for which the Treaty had originally been a 'vehicle', but which subsequently disappeared; the 'single and indivisible operational system', which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both states into a market economy; the attitude of Czechoslovakia which had turned the 'framework treaty' into an 'immutable norm'; and, finally, the transformation of a treaty consistent with environmental protection into 'a prescription for environmental disaster'.

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96 Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach

1 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.

2 A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting state, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state;

(c) any party other than the defaulting state to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3 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.

4 The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5 Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular

to provisions prohibiting any form of reprisals against persons protected by such treaties.

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as 'the best possible approximate application' of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97 Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another state had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'. On this basis, Hungary argued, its termination was 'forced by the other party's refusal to suspend work on Variant C'.

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather 'to the language of self-help or reprisals'.

98 The question, as formulated in Article 2, para 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99 The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both states ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see para 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the parties, too, were broadly in agreement.

100 The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable regime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

101 The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a treaty; the treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but – unless the parties by mutual agreement terminate the Treaty – it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

102 Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, para 1, requires the 'permanent disappearance or destruction of an object indispensable for the execution' of the Treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Doc A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole at pp 361–65). Although it was recognised that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating states were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103 Hungary contended that the essential object of the Treaty an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term 'object' in Article 61 can also be understood to embrace a legal regime as in any event, even if that were the case, it would have to conclude that in this instance that regime had not definitively ceased to exist. The 1977 Treaty and in particular its Articles 15, 19 and 20 actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, para 2 of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

104 Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see para 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case ([1973] *ICJ Rep* at p 63, para 36), it stated that:

> Article 62 of the Vienna Convention on the Law of Treaties, ... may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the Treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

105 The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106 As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the Treaty itself, by a state party to that treaty, which entitles the other party to rely on it as a ground for terminating the Treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured state, but it does not constitute a ground for termination under the law of treaties.

107 Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to

> adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party. The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108 Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in para 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109 In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (in which case the Vienna Convention did not apply):

> Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith.' ([1980] *ICJ Rep* at p 96, para 49.)

The termination of the Treaty by Hungary was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110 Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of