The Gabčíkovo-Nagymaros Case and Water Law

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Abstract

The Gabčíkovo-Nagymaros case is one of leading cases in international law, which has crystallized and evolved knowledge in many areas of international law. This case is also immensely important and instrumental for the development of water law. The ICJ observed the importance of a common right and cooperation in the shared resource and has laid down the foundation of the further development of modern water law. The ideas, which have originated in this case were later fully developed and unpacked in other cases of the ICJ dealing with water law, such as the Pulp Mills and Costa Rica/Nicaragua cases. The Court has emphasized the importance of the management of shared water resources and linked it to general environmental law. It has also supported and relied on the principle of equitable utilization. The ICJ confirmed the right of Hungary to an equitable and reasonable share of the resources of an international watercourse and supported the concept of common utilization of shared water resources. The ICJ adopted a very forward-looking approach to water law. It has taken into consideration the provisions of the 1997 Convention which was in force at the time, as codifying the principles of water law and shared water resources, such as equitable utilization principle and the no-significant harm rule. It may be said that the Gabčíkovo-Nagymaros case is a direct continuation and development of the River Oder case, which has laid down the foundations of contemporary international water law.

Keywords: water law, equitable utilization, no-significant harm rule, shared resource, Gabčíkovo-Nagymaros case.

1. Introduction

In *Gabčíkovo-Nagymaros*[1] the ICJ faced most challenging questions of international law, including the classical issues of the law of treaties; the law of state responsibility (including the interface between the two) while also dealing with and analyzing emerging and still evolving areas of international law, *i.e.* international environmental law and the law of international watercourses.

All these issues were closely related and, it may be said, have constituted a Gordian Knot of international law that was resolved by the ICJ. Not surprising, this case has generated an enormous body of literature, addressing all

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1 ICJ, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, judgment, ICJ Reports 1997, p. 7.

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international law dilemmas raised by this case.[2] All aspects of this case were carefully analyzed, with a focus on classical international law themes.[3] The general view that has been expressed is that the ICJ has clarified many outstanding questions of international law, but equally has left many of them open and even missed the opportunity to provide definitive answers, in such matters as the uneasy relationship between the law of treaties and the law of state responsibility.[4] The ICJ has also dealt with international environmental law and water law, issues of which have formed the substantive fabric of the case.[5] The parts of the judgment which focused on the questions of the international environmental law and the law of international watercourses are particularly innovative, for at that time, many rules of both of these areas were evolving and in *statu nascendi*. Therefore, the ICJ was faced with a complex task of delving into issues in which there was very little judicial practice at the time, and whose fundamental principles were not fully formed and undisputed in substance, but

2 *See* in particular: Serena Forlati *et al.* (eds.), *The Gabčíkovo-Nagymaros Judgment and its Contribution to the Development of International Law,* Brill/Nijhoff, 2020.

3 *See e.g.* René Lefeber, 'The Gabčíkovo-Nagymaros Project and the Law of State Responsibility', *Leiden Journal of International Law*, Vol. 11, Issue 3, 1998, pp. 609-623; Phillippe Weckel, 'Convergence du droit des traités et du droit de la responsabilité internationale à la lumiére de l'Arret du 25 septembre 1997 de la Cour internationale de Justice relatif au projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)', *Revue Générale de droit International Public,* Vol. 102, 1998, pp. 647-684; Daniel Reichert-Facilides, 'Down the Danube: The Vienna Convention on the Law of Treaties and the Case Concerning the Gabčíkovo-Nagymaros Project', *International & Comparative Law Quarterly,* Vol. 47, Issue 4, 1998, pp. 837-854; Malgosia Fitzmaurice, 'The Gabčíkovo-Nagymaros Case: The Law of Treaties', *Leiden Journal of International Law,* Vol. 11, Issue 2, 1998, pp. 321-344; Jean D'Aspremont, 'Canonical Cross-Referencing in the Making of the law of International Responsibility', *in* Forlati *et al.* (eds.) 2020, pp. 22-40; Christina Binder & Jane Hofbauer, 'The Pacta Sunt Servanda Principle or the limits of Interpretation in the Gabčíkovo-Nagymaros Case Revisited', *in* Forlati *et al.* (eds.) 2020, pp. 58-77; Panos Merkouris, 'Termination of Treaties: Contribution of the Gabčíkovo-Nagymaros Judgment', *in* Forlati *et al.* (eds.) 2020, pp. 78-97; Serena Forlati, 'The Relationship between the Law of Treaties and the Law of State Responsibility', *in* Forlati *et al.* (eds.) 2020, pp. 109-130; Pierre Bodeau Livinec 'Circumstances Precluding Wrongfulness', *in* Forlati *et al.* (eds.) 2020, pp. 131-144; Loris Marotti & Paolo Palchetti, 'Of Restoring Compliance, *Lex Specialis* and Intersecting Wrongs: The Question of "Remedies" on Gabčíkovo-Nagymaros', *in* Forlati *et al.* (eds.) 2020, pp. 145-159.

4 Karel C. Wellens, 'The Court's Judgment in the Case Concerning Gabčíkovo-Nagymaros (Hungary/Slovakia): Some Preliminary Reflections', *in* Karel C. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy,* Martinus Nijhoff Publishers, 1998, pp. 765-799.

5 On the question of international environmental law *see e.g.* Johann G. Lammers, 'The Gabčíkovo-Nagymaros Case Seen in Particular from the Perspective of the Law of International Watercourse and the Protection of the Environment', *Leiden Journal of International Law*, Vol. 11, Issue 2, 1998, pp. 287-320; Leslie-Anne Duvic-Paoli, 'Vigilance and Prevention: The Contribution of the Gabčíkovo-Nagymaros Judgment', *in* Forlati *et al.* (eds.) 2020, pp. 193-206. On the water law, *see* Owen McIntyre, 'Environmental Protection of International Rivers', *Journal of Environmental Law*, Vol. 10, Issue 1, 1998, pp. 79-91; Charles B. Bourne, 'The Case Concerning the Gabčíkovo-Nagymaros Project: An Important Milestone in International Water Law', *Yearbook of International Law*, Vol. 8, Issue 1, 1997, pp. 6-12; Stephen Stec & Gabriel Eckstein, 'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project', *Yearbook of International Environmental Law,* Vol. 8, Issue 1, 1997, pp. 50.

were merely the contours of emerging norms (or principles) with incipient content and uncertain legal force.

As noted above, all core issues in this case were entangled and it is not an easy task to separate them, focusing only on the one theme. However, since all aspects of the judgment were extensively analyzed elsewhere, I will confine myself to primarily dealing with the law of international watercourses in this case. This analysis will be further linked to other case-law of the ICJ dealing with the question of shared water resources. It must be mentioned that this aspect of the case (*i.e.* international watercourse law) is the least explored and analyzed in the vast literature devoted to this case.

2. The Background

The Danube River basin is the Europe's second largest river basin, with a total area of 801,463 km2. The Upper basin extends from the source of the Danube in Germany to Bratislava in Slovakia. The Middle basin is the largest of the three sub-regions, extending from Bratislava to the dams of the Iron Gate Gorge on the border between Serbia and Romania. The lowlands, plateaus and mountains of Romania and Bulgaria make up the Lower Basin of the River Danube. Finally, the river divides into three branches, forming the Danube Delta, which covers an area of about 6,750 km2. It has a unique biodiversity with about 2000 vascular plants and more than 5,000 animal species, including over 40 mammals, about 180 breeding birds, around 100 fish species, a dozen reptiles as well as amphibians. Changes to the river geography following such as the construction of dams, dikes, weirs and canals, disturb the aquatic environment, especially when it comes to migratory species, which cannot reach their spawning grounds.[6]

The River Danube was a subject of many international treaties, concluded before and after World War I and during the communist regime.[7] These, however, had very limited or no environmental provisions at all. The Gabčíkovo-Nagymaros project originated in 1951 and reflects another monumental construction of the Stalinist era. After many negotiations, the treaty's main objective emerged as energy production, with the secondary objectives of flood control and navigability. The first round of negotiations started in 1964 and resulted in the signing of the Rajka-Gonyu Agreement in 1968. By 1976, the Governments of Czechoslovakia and Hungary accepted a Joint Development Agreement for the project. These two states signed a treaty in 1977 in order to divert the course of the Danube through a series of dams and reservoirs. The Gabčíkovo-Nagymaros Project provided, *inter alia,* that "the Contracting Parties shall ensure [...] that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks"[8] and to "take

6 Malgosia Fitzmaurice, 'The Gabčíkovo-Nagymaros Project: the Background of the Case', *in* Forlati *et al.* (eds.) 2020, p. 14.

7 On the history and the background of the dispute, *see* Id. pp. 14-15.

8 Article 15 of the 1977 Treaty.

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appropriate measures for the protection of fishing interests."[9] The treaty provided for completion in the period between 1986-1990.[10] According to the treaty provisions, the Danube was to have been diverted between river km 1842 and 1811 near Dunakiliti by a dam and a relief sluice from the original riverbed into an artificial canal on Czechoslovakian territory. Next to Gabčíkovo, a hydroelectric power plant with eight turbines and a capacity of 720 megawatts (MW) was to be erected. Beginning at the confluence of the canal into the original course of the Danube at river km 1811 until 1794, the riverbed was to have been deepened and its course regulated. Near Nagymaros at river km 1696, the treaty provided for a second, smaller power plant with an output of 158 MW, which was primarily to balance the fluctuation of the waterline. This would have been necessary, because the plant at Gabčíkovo was conceived as a peak-load electricity generation plant and would therefore have caused uneven water flow. The treaty foresaw a joint ownership of the main structure, comprising Dunakiliti Dam, the by-pass canal, the locks at Gabčíkovo-Nagymaros and provided for joint operation. The erection of the system was to be divided equally.[11] Hungary was supposed to perform all the construction in its own territory and 12 percent of the project value in Czechoslovakia.[12] The territorial scope of project was the area of 34 km of the Danube valley (Bratislava to Nagymaros),[13] with a reservoir positioned outside Bratislava. At Dunakiliti, a weir would divert water from the reservoir sending 90 percent of the flow through a diversion canal to the territory of Czechoslovakia and returning a small percentage of water to the original riverbed.[14] The diversion canal was an overground concrete construction, about 25 km long and over eighteen meters high, 274, to 70 meters wide. The canal would feed water through the 720 megawatt Gabčíkovo power plant before returning it to the Danube about 8.5 kms downstream.[15] The power plant in Gabčíkovo was supposed to operate in periodic surges, which would power the 160 megawatt power plant in Nagymaros.[16] The Nagymaros Dam was also designed to raise the water level in the 110 km area between Nagymaros and the diversion canal.[17]

3. The Judgment in the Gabčíkovo-Nagymaros Case and the Development of Water Law

As noted above, the questions of general international law (the law of treaties) concerning the continuing existence (or not) of the Treaty between the Slovak Republic and Hungary and the legality of the so-called Variant 'C' are closely

9 Article 20 of the 1977 Treaty.
10 Article 4(4) of the 1977 Treaty.
11 Article 1(1) of the 1977 Treaty.
12 Article 5(5) of the 1977 Treaty.
13 Articles 1(1) and 1(2) of the 1977 Treaty.
14 Article 1(2)(c) of the 1977 Treaty.
15 Article 1(2)(d) of the 1977 Treaty.
16 Article 1(3)(b) of the 1977 Treaty.
17 Fitzmaurice 2020, pp. 19-20.

intertwined with substantive issues of international environmental law and international watercourse law (shared water resources). The separation of these questions is very difficult and in many relevant publications they were analyzed jointly.[18] However, from the ICJ's judgment I will try to distil the questions pertaining exclusively to the water law in this case, which will be followed by short presentation of the ICJ's more recent pronouncements in this area. The reason for such this approach is that the questions of water law in the *Gabčíkovo-Nagymaros* judgment as a separate subject-matter attracted the least attention by scholars, which in view of the ICJ's ongoing jurisprudence in this field, should be accorded more significance; meanwhile, the issues of general international law (the law of treaties and state responsibility) have been the main focus for international lawyers. It may be said that while the ICJ's views on international environmental law and sustainable development have been extensively analyzed, the law of international watercourses were mostly included as a part of environmental law analysis, not as an independent subject.

Suffice it to say that the ICJ has upheld the existence of the treaty and its binding force for Hungary and Slovakia (as the successor of Czechoslovakia). The pertinent treaty obligations binding on the parties derived from Articles 15, 19, and 20 which imposed respectively a duty of: ensuring non-impairment of the water quality of the Danube River; the protection of nature; and the protection of fishing interests. The ICJ has given guidance to the Parties to the dispute as to what are the objectives of the negotiations to be entered into on the basis of the Judgment. First, the parties were obliged to consider "in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled".[19] These objectives were the production of hydroelectric energy and the improvement of the navigability of the Danube, flood control, the regulation of ice-discharge, and the protection of the natural environment. Importantly, all these objectives were of the equal value, thus, "none of these objectives has been given absolute priority over the other."[20] Bourne drew interesting and far reaching conclusions from the ICJ's lack of differentiated treatment of the objectives of the 1977 Treaty. He argued, correctly, that the parity among them meant that the environmental protection was not accorded preferential treatment, despite Hungary's argument that "the previously existing obligation not to cause substantive damage to the territory of another state had [...] evolved into an *erga omnes* obligation of prevention of damage pursuant to the 'precautionary principle'."[21] The analysis of the above statements of the ICJ, has evidenced in his view that the causing of significant harm in relation to the utilization of international watercourses was not treated by the ICJ as lawful and that the ICJ followed the provisions of the 1997 UN Convention on Non-Navigational Uses of International Watercourses (Watercourses Convention).[22]

18 *See e.g.* McIntyre 1998, Lammers 1998.
19 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 139.
20 Id. para. 135.
21 Id. para. 97; Bourne 1997, p. 7.
22 UNTS 2999; Bourne 1997, pp. 7-8.

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Bourne further argued that by not according priority to environmental protection, the ICJ has not at all referred to Articles 20 and 21 (the protection of the riparian environment) of the Watercourses Convention. He suggested that in these Articles

> "the words of Articles 20 and 21, which deal with ecology, the environment, and pollution, still echo the 'no significant harm' rule. It is doubtful, however, that these articles were intended to incorporate this rule, and the ICJ seems not to have interpreted them as doing so."[23]

The lack of supremacy accorded by the ICJ to international environmental law in its judgment does not mean, however, that the ICJ's judgment lack significance in this respect. As it was explained by Duvic-Paoli, in this judgment the ICJ consolidated its previous mention of international environmental law in the *Advisory Opinion in the Nuclear Weapons*[24] by the relying on the principle of prevention and situating international environmental law within the paradigm of sustainable development.[25] The ICJ has not elaborated on these aspects, nonetheless the judgment constituted a starting point for the ICJ's further elucidation of the principle of prevention and the due diligence obligation in relation to water law in *Pulp Mills*[26] and *Nicaragua/Costa Rica*.[27] Duvic-Paoli presented a nuanced analysis of the threshold of harm in the judgment. She observed that the ICJ failed to differentiate between two separate thresholds: the first one applicable to determine whether Hungary was facing the state of necessity, which is a circumstance precluding wrongfulness in the law of state responsibility; and the second one, applicable within the framework of international environmental law, to assess the applicability of the obligation of prevention. Therefore, the ICJ did not distinguish between the criteria applicable under state responsibility and international environmental law. The legal consequences of such an omission are quite significant. The threshold applicable in the realm of state responsibility is higher in defining the gravity and imminence of risk mandatory for the invoking of the state of (ecological) necessity than it is in relation to prevention. Therefore, even though the threshold was not met in relation to state responsibility, it might suffice regarding the avoidance of environmental harm, a scenario which, as Duvic-Paoli explained, the ICJ had "overlooked".[28]

In relation to the use of the Danube (the shared resource), the ICJ relied on the principle of equitable utilization. The ICJ confirmed Hungary's right "to an

23 Bourne 1997, p. 8.
24 ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports 1996, p. 226, para. 29.
25 Duvic-Paoli 2020, pp. 199-206.
26 ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay),* judgment, ICJ Reports 2010, p. 14.
27 ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica),* judgment, ICJ Reports 2015, p. 665.
28 Duvic-Paoli 2020, p. 202, and pp. 201-202.

equitable and reasonable sharing of the resources of an international watercourse", and "the concept of common utilization of shared water resources".[29] It stated that Slovakia, unilaterally assuming control of "a shared resource", had deprived Hungary of "its right to an equitable share of the natural resources of the Danube", and had thus "failed to respect the proportionality which is required by international law".[30] The purpose of the required negotiations was to find "an agreed solution that takes account of the objectives of the [1997] Treaty [...] as well as the norms of international environmental law and the principles of the law of international watercourses."[31] During the negotiations conducted in good faith, parties should discharge their obligations by implementing, *inter alia,* "the use, development and protection of the watercourse [...] in an equitable and reasonable manner".[32]

There is no doubt that it is in *Gabčíkovo-Nagymaros* that the ICJ made the most fundamental statement concerning the principle of sustainable development. The principle of equitable and reasonable utilization concerns the allocation of rights for the use and benefit of shared water resources based on the distributive concepts of equity, taking into account all relevant factors.[33] It should be noted that the principle of equitable utilization has been confirmed by the ICJ in the *Gabčíkovo-Nagymaros* and *Pulp Mills* cases as a fundamental principle of international watercourse cooperation.[34] In *Pulp Mills* this principle was linked directly to the concept of sustainable development, where the ICJ had stated that the "interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection [...] is the essence of sustainable development."[35]

4. Some Reflections on the Fundamental Principles of the Watercourse Law and the Case Law of the ICJ

This section will be devoted to the analysis of the principle of equitable utlilization and the related principle of non (significant) harm. These principles are inexorably linked to due diligence, which will also be discussed. These principles will be illustrated by the ICJ's case law in relation to international watercourses, which developed these principles, first raised in its jurisprudence by *Gabčíkovo-Nagymaros*.

Without doubt the principle of equitable utilization of international watercourses is of fundamental nature. The Court derived it from the 1929 *River Oder* case where it stated as follows:

29 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 78.
30 Id. para. 85.
31 Id. para. 141.
32 Id. para. 150.
33 Owen McIntyre, 'Substantive Rules of International Law', *in* Alistair Rieu-Clarke *et al.* (eds.), *Routledge Handbook of Water Law and Policy,* Routledge, London, 2017, p. 238.
34 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 147; ICJ, *Pulp Mills*, judgment, para. 170.
35 ICJ, *Pulp Mills*, para. 177.

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> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of al1 riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."[36]

The modern development of international law extended this principle to non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses.

The above statement of the ICJ emphasized several very important issues. It expressed the view that the principle of equitable utilization is derived from a community of interest in a river, which in turn is the basis of a common legal right, characterized by the equality of all riparian states. As McIntyre explains, "the existence of this community of interest requires an 'equitable and reasonable' balancing of State interests which accommodates the needs and uses of each State."[37] He also correctly states that the principle of equitable utilization has been widely recognized as a fundamental principle of watercourse cooperation both by scholars and in the practice of states.[38]

The Watercourse Convention further crystallized the principle of equitable utilization, stating, *inter alia*, in Article 5 that: "Watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof [...]." Article 6 provides a non-exhaustive list of factors relevant to equitable and reasonable utilization.[39] McIntyre observed that "to permit flexibility, the concept of 'equitable and reasonable' is necessarily vague and can only be determined in each case in the light of all relevant factors."[40]

The other fundamental principle of the use of international watercourses is the principle of no (significant) harm (see above), which is incorporated in Article 7 of the Watercourse Convention. The additional factor concerning water cooperation, which was not mentioned in the *Gabčíkovo-Nagymaros* judgment but analyzed in *Pulp Mills* and *Costa Rica v Nicaragua* cases, is due diligence, in

36 PCIJ, *Territorial Jurisdiction of the International Commission of the River Oder,* Judgment No. 16, 1929, PCIJ, Series A, No. 23, p. 27.

37 McIntyre 1998, p. 86.

38 Id.

39 "*(a)* Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; *(b)* The social and economic needs of the watercourse States concerned; *(c)* The population dependent on the watercourse in each watercourse State; *(d)* The effects of the use or uses of the watercourses in one watercourse State on other watercourse States; *(e)* Existing and potential uses of the watercourse; *(f)* Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; *(g)* The availability of alternatives, of comparable value, to a particular planned or existing use.'

40 McIntyre 1998, p. 86.

connection with equitable utilization.[41] Due diligence in international watercourse law reflects the interplay amongst the two most fundamental principles: *(i)* the principle of equitable utilization; and *(ii)* the principle of no significant harm. They define the core of international watercourse law, that is, the relationship between upper and lower riparian states. The upper riparian states have supported the principle of equitable utilization, as adhering to this principle and acting diligently would release them from liability for environmental harm. Lower riparian states have been advocating for the principle of no significant harm, as it would allow them to seek remedies in cases of environmental harm, even if upper riparian states acted in observance of the principle of due diligence. Hence, the International Law Commission and the Sixth Legal Committee have decided to include Article 7(2) in the 1997 Watercourse Convention to grant lower riparian states some compensation in such situations. Where significant harm is nevertheless caused to another watercourse state, the states whose use caused such harm shall, in the absence of an agreement prior to such use, take all appropriate measures – having due regard for the provisions of Articles 5 and 6 and in consultation with the affected state – to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[42] In the *Costa Rica v Nicaragua* cases, the ICJ has made an important link between the due diligence obligation of conducting the environmental impact assessment (EIA) in general international environmental law and water law, which squarely falls under the category of all activities, which require such a procedure in the event of potentially causing significant adverse impact in a transboundary context. Due diligence in such a case also triggers a procedural obligation to carry out an EIA, notifying and consulting the potentially affected state if the EIA confirms there is a risk of significant harm.[43] Conversely, based on experts' opinion in Nicaragua, dredging activities did not carry such a risk, thus, there was no duty to conduct the EIA, notification or consultation *vis-à-vis* Costa Rica.[44] This case has not solved all issues which may rise in relation to shared water resources and the carrying out of the EIA (substantive and procedural obligations). The ICJ, it is argued, could have been more transparent in clarifying which activities require carrying out an EIA and what is the threshold of risk involved.[45] Further complexity is added with the application of the standard of due diligence to procedural obligations, which was expressly confirmed by the ICJ in *Pulp Mills*. In this case, the ICJ made certain statements that related to the substance of the duty of due diligence in relation to a shared watercourse. The ICJ stated that

41 Malgosia Fitzmaurice, 'Due Diligence in the Use of International Watercourses', *in* Heike Krieger *et al.* (eds.), *Due Diligence in the International Legal Order,* Oxford University Press, Oxford, 2020, p. 129.

42 Id. p. 130.

43 ICJ, *Costa Rica v Nicaragua cases*, judgment, para. 104. *See also* Rumiana Yotova, 'The Principle of Due Diligence and Prevention in International Environmental Law', *Cambridge Journal of International Law,* Vol. 75, Issue 3, 2016, p. 446.

44 Id. p. 446.

45 Id. p. 448.

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> "a State is thus obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state",[46]

thus reaffirming the general obligation of prevention.[47] In *Pulp Mills* the ICJ confirmed the principle of prevention, which is based on due diligence and constitutes a core principle of international environmental law. This principle had initially been acknowledged in *Corfu Channel*,[48] then included in the *Nuclear Weapons Advisory Opinion*,[49] and relied upon in the ILC Articles on Prevention.[50] The ICJ specifically referred to the obligation of due diligence in protecting the shared river:

> "both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river."[51]

The exercise of due diligence entails the adoption of appropriate rules and measures; a certain level of vigilance in their enforcement; the exercise of administrative control applicable to public and private operators; careful consideration of the technology to be used; the commission of an EIA; and notification informing and consulting potentially affected states.[52] Significant statements of the ICJ in this case concerned the legal character of due diligence, which was defined by it as an obligation of rather conduct than result (in accordance with general international law and the law of state responsibility).[53] The ICJ also observed that the obligation to carry out the EIA had become a requirement under international general law, in the case of activities which may have a significant adverse effect on the environment.[54] The ICJ, however, further stated that the scope and substance of the EIA are not specified by general international law. Each party must determine individually on a case-by-case basis what is required, while "having regard to the nature and magnitude of the proposed development and its likely adverse impact".[55]

According to the ICJ, two types of obligations – namely substantive and procedural – were laid down in the 1975 Statute of the River Uruguay and as the

46 ICJ, *Pulp Mills,* judgment, para. 101.
47 On the principle of prevention in general, *see* Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law*, Cambridge University Press, Cambridge, 2018; *see also* Alan Boyle, *Pulp Mills Case: A Commentary*, 2010, at www.biicl.org/files/5167_pulp_mills_case.pdf.
48 ICJ, *Corfu Channel Case (United Kingdom v Albania),* judgment, ICJ Reports 1949, p. 22.
49 ICJ, *Legality of the Threat or Use of Nuclear Weapons,* para. 29.
50 UN International Law Commission, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf.
51 ICJ, *Pulp Mills,* judgment, para. 187.
52 Id. para. 223.
53 Id. para. 182.
54 Id. para. 204.
55 Id. para. 205.

Court stated they "complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1".[56] As it was noted above, the ICJ was of the view that these obligations were not contingent upon each other[57] and that the substantive aspect of the due diligence obligation does not impose an absolute duty to prevent harm. Instead, it is based on the due diligence principle, that is to say, states must meet the requirements of due diligence. The ICJ stated that a failure to meet the procedural obligation does not automatically amount to a violation of substantive obligations (such as the duty to prevent harm). The ICJ was of the view that

> "nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones",[58]

and

> "the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so."[59]

It may be observed that the ICJ's approach and reasoning regarding both substantive and procedural obligations in relation to shared watercourses and the EIA, appears to be opaque and not quite entirely convincing.[60] There is a host of questions relating to the relationship of these types of obligations, such as procedural obligations sequential to the substantive ones; does the duty of due diligence also pertain to substantive obligations; what are the type of activities which involve an obligation to carry out an EIA.[61] These uncertainties were not resolved by the *Costa Rica/Nicaragua* cases.

However, it may be argued that in light of the recent case law of the ICJ, procedural obligations pertaining to the management of the shared water resources have gained prominence. Cases decided by the ICJ also highlighted that many water agreements, concluded some time ago, contained such procedural obligations. An instructive example is *Pulp Mills* based on the interpretation of the 1975 Statute between Uruguay and Argentina. The Statute provided that, *inter alia*, through procedural obligations of information, consultation and negotiations, the state parties achieve the optimum and rational utilization of

56 Id. para. 77.
57 Id. paras. 77-78.
58 Id. para. 78.
59 Id.
60 *See e.g.* Jutta Brunnée, 'Procedure and Substance in International Environmental Law: Confused at Higher Level?', *European Society of International Law Reflections,* Vol. 5, Issue 6, 2016, p. 2, at http://esil-sedi.eu/?p=1344.
61 Id. p. 4.

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their shared watercourse.[62] The ICJ was clear in pointing out that Uruguay violated obligations of notification and consultation by not informing the joint administrative commission regarding the planned works. The ICJ also stated that in relation to the duty to negotiate, the unilateral authorization by Uruguay of pulp mills before the expiry of the negotiation period set out by the treaty, indicated a disregard for such a cooperative mechanism amounting to a breach of procedural obligations.[63]

The host of problems which the ICJ faced in the *Pulp Mills* and *Costa Rica/Nicaragua* cases are very illustrative to problems encountered in the management of shared water recourses. Taken holistically, the approach to the joint management of such resources should have a due regard to the interdependence among recourses, habitats and ecosystems. Therefore, as it was stated in cases regarding shared mutual resources, "courts are expected to pay due regard to the shared interest in certain natural resources, and where necessary, the interests of the international community as a whole."[64] It is not at all surprising that an integrated approach to the management of the Danube River is an even more daunting task than in the bilateral context. The Danube flows through ten States: Germany, Austria, Slovakia, Hungary, Serbia, Romania, Bulgaria, Moldova, and Ukraine, and then discharges into the Black Sea. Therefore, the implementation of all the underlying water law principles (substantive and procedural) is a very complex matter, as according to the integrated approach, the interests of all riparian states should be considered, thus implying that a conflict resolution between the most directly concerned states should be conducted and resolved with a due regard to these other riparian states' interests and in a holistic manner. Pineschi emphasizes that there are a vast number of human activities conducted in the area of the entire Danube basin, potentially cumulatively affecting the entire region. Based on the data produced by the International Commission for the Protection of the River Danube, she states that a total of 59 dams were built along the Danube's first 1,000 km (from the sources to Gabčíkovo), which amounts to the Upper Danube being interrupted every 16 km on average. Therefore, it can hardly be characterized as fully free flowing.[65] Taking into consideration the common right of all riparian states, the principle of prevention must be applied to protect the environment across the whole river and for all riparian states. That was the premise on which Hungary based the application, invoking the principle of prevention, which was conceptualized as an *erga omnes* principle:

> "The main principle of international environmental law is that environmental degradation must be prevented. This principle of prevention which forms the

62 Laurence Boisson de Chazournes, *Fresh Water in International Law,* Oxford University Press, Oxford, 2nd edition, 2021, p. 270.

63 Id. ICJ, *Pulp Mills,* judgment, para. 149.

64 Laura Pineschi, 'Introduction to Part 2', *in* Forlati *et al.* (eds.) 2020, p. 51.

65 Id.

> basis of all environmental law must be considered an *erga omnes* obligation."[66]

The view that ecological questions are of a multilateral character (operating *erga omnes*) rather than in a bilateral nature (operating *inter partes*) was shared by Judge Weeramantry.[67] The ICJ itself has not dwelt on the arguably special character of norms of international environmental law, noting that it was not necessary to pronounce on these issues as neither of the parties raised the question of the emergence of a new norm of international environmental law of a peremptory character since the conclusion of the 1977 Treaty.[68] As Pineschi observes, this very brief statement of the ICJ has been met with very mixed comments by scholars. Some of them have found the attitude of the ICJ very elusive; others agreed with its pragmatic approach, as there is only a remote possibility of any norm of international environmental law acquiring the status of a peremptory norm of international law.[69] However, it is undisputable that environmental prevention (also including water cooperation) involves a fine balancing of interests, in particular in the integrated approach. It was observed that in *Gabčíkovo-Nagymaros*, the ICJ has indeed moved from the no-harm principle of international environmental law towards the principle of prevention.[70] As Pineschi stated the same standards must be followed in the application of the principle of cooperation (which is based on procedural requirements) in cases of significant transboundary effect.[71]

5. The Judgment in the Gabčíkovo-Nagymaros Case and the Community of Interests

As it was referred to above, the ICJ relied on the notion of the community of interests of riparian states, which was introduced by the PCIJ in *River Oder*. The same case was mentioned by the Arbitral Tribunal in the *Rhine Chlorides Arbitration*. Therein, the Arbitral Tribunal added that "Solidarity between bordering states is undoubtedly a factor in their community of interests."[72]

It is often forgotten that community of interest and interests and solidarity in a common river was also expressed by the PCIJ's *Oscar Chin Case*, not only in

66 ICJ, *Memorial of the Republic of Hungary*, Vol. I, 2 May 1994, para. 6.63, pp. 200-201, cited in Pineschi 2020, p. 52.
67 ICJ, *Gabčíkovo-Nagymaros,* Separate Opinion of Judge (Vice-President) Weeramantry, paras. 88, and 118; Pineschi 2020, p. 52.
68 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 112.
69 Pineschi 2020, p. 53.
70 Laurence Boisson de Chazournes, 'Introduction to Part 4', *in* Forlati *et al.* (eds.) 2020, p. 264.
71 Pineschi 2020, p. 54.
72 The Rhine Chloride Arbitration Concerning the Auditing the Accounts (Netherlands-France), Award of 2004, para. 4, cited in Boisson de Chazournes 2021, p. 316.

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River Oder.[73] Judge van Eysinga commented on the legal character of the 1885 General Act of Berlin, which he describes as follows:

> "It will be seen from this survey that the Berlin Act presents a case in which a large number of states, which were territorially or otherwise interested in a vast region, endowed it with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of 'all nations' as well as those of the natives, appeared to be most satisfactorily guaranteed. [...] The General Act of Berlin does not create a number of contractual relations between a number of states, relations which may be replaced as regards some of these states by other contractual relations; it does not constitute a *jus dispositivum,* but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. An inextricable legal tangle would result if, for instance, it was held that the régime of neutralization provided for in Article II of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others."[74]

In the same case, Judge Schückling agreed fully with the aforementioned opinion of Judge van Eysinga. He added that

> "It is beyond doubt that the signatory states of the Congo Act desired to make it absolutely impossible, in the future, for some of their number only to amend the Congo Act, seeing that any modifications thus introduced would have been a danger to their vested rights in that vast region."[75]

Since then, international law has evolved towards the conceptualization of what has been defined as an international community by many scholars, such as Bruno Simma, progressing from bilateral relations towards a more 'socially conscious order', which is an amalgamate of the interests of the community and also of these states.[76] These developments have been reflected on a practical level by the 2001 Responsibility of States for Internationally Wrongful Acts (ARSIWA), *i.e.* Article 48, which allows the invocation of state responsibility by other than the directly affected state,[77] in protection of the collective interest, deriving from

73 PCIJ, *The Oscar Chin Case (United Kingdom v Belgium)* [1934] PCIJ Series A/B No. 63, 65. *See also* PCIJ, *Case of SS Wimbledon (Great Britain and Others v Germany)* [1923] PCIJ Series A No. 1, 15.

74 PCIJ, Individual Opinion of Judge van Eysinga, p. 133 and 134.

75 PCIJ, Separate Opinion of Judge Schückling, pp. 18-49.

76 Bruno Simma, 'From Bilateralism to Community Interest in International Law', *Collective Courses of the Hague Academy of International Law,* Vol. 250, 1994, p. 234.

77 *See also* James Crawford *et al.*, 'The ILC's Articles on State Responsibility Adopted For Internationally Wrongful Acts: Completion of the Second Reading', *European Journal of International Law,* Vol. 12, Issue 5, 2001, pp. 963-991; James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on State Responsibility of States for Internationally Wrongful Acts', *in* Ulrich Fastenrath *et al.*, *From Bilateralism to Community Interest,* Oxford University Press, Oxford, 2011, pp. 224-240.

obligations *erga omnes* and *erga omnes partes*.[78] This Article is a departure from classical, international law, based on bilateral relations between states which allows standing to the state which is directly injured, as envisaged in Article 42 of ARSIWA to enforce to their vested rights in that vast region.

It was aptly observed that the ICJ has not explicitly applied the *erga omnes* (or *erga omnes partes*) dimension to environmental disputes. Such an example is the *Whaling in Antarctic* case, which has been brought by Australia (with New Zealand intervening), on, it may be said, the basis of the *erga omnes partes* principle, which was never mentioned in the judgment.[79] However, Australia in its pleadings claimed to be doing so, for which it was credited. According to Crawford, Australia invoked Japan's responsibility *erga omnes partes*.[80] During the proceedings, Australia claimed to act exclusively in the general interest. It argued that notwithstanding the fact that some of Japan's hunting activities have taking place in its territorial waters, it was not a directly injured state. It argued that every party has some interest in ensuring compliance by every other party with its obligations under the 1946 Whaling Convention. Accordingly, it claimed to be seeking to uphold the collective interest. Tams expressed the view that perhaps the *Whaling* case is a logical follow up to the 2011 judgment in *Belgium v Senegal* (see above). In that case, the ICJ surprised commentators by going out of its way to accept the applicant's standing to endorse a multilateral treaty protecting collective interests.[81] In this case, views were expressed that the current ecosystem approach and the notion of common heritage of humankind may be considered by states as matters that give rise to obligations *erga omnes* and *erga omnes partes* and, thus give rise to redress pursuant to Article 48 of the ARSIWA.[82]

We can see that was a little-known case before the PCIJ relating to the status of an international river, which also significantly contributed to the discourse on the community of interests.

6. Conclusions

There is no doubt that *Gabčíkovo-Nagymaros* is one of the leading cases in international law, which has crystallized and evolved knowledge in many areas of international law. The areas of international law, which are considered to be elucidated in the judgment are international environmental law; the law of

78 Crawford 2001, p. 976.

79 ICJ, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening),* judgment, ICJ Reports 2014, p. 226; Pineschi 2020, p. 55.

80 Crawford 2011, p. 236.

81 Christian Tams, 'Roads not Taken, Opportunities Missed. Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment', *in* Malgosia Fitzmaurice & Dai Tamada (eds.), *Whaling in the Antarctic. Significance and Implications of the ICJ Judgment,* Brill/Nijhoff, Leiden, 2015, pp. 201-207.

82 Simone Borg, 'The Influence of International Case Law on Aspects of International Law Relating to Conservation of Living Marine Resources beyond National Jurisdiction', *Yearbook of International Environmental Law,* Vol. 23, Issue 1, 2017, pp. 57-71.

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treaties; and law of state responsibility. However, by writing this article, I have tried to demonstrated that this case is also immensely important from the perspective of the development of water law. The ICJ has noted the importance of a common right and cooperation in the shared resource laying, down the foundations for the further development of modern water law, which it continued in the above-mentioned and analyzed cases. The ICJ has also concluded that the 1977 Treaty has constituted a territorial regime within the meaning of Article 12 of the Vienna Convention on Succession in Respect of Treaties in line with the ILC's view that treaties concerning navigation rights on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties which are unaffected by the succession of states.[83] The ICJ has demonstrated that principles such as prevention, sustainable development are of importance for water law. It may be stated that *Gabčíkovo-Nagymaros* has fomented further studies of water law and has had great practical significance. As such, it has proved to have an ever-lasting legacy in various areas of international law, including the water law.[84]

83 Lammers 1998, p. 319.

84 Attila Tanzi, 'Concluding Remarks. The Legacy of Landmark Case', *in* Forlati *et al.* (eds.) 2020, p. 229.