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The 25th Anniversary of the Gabčíkovo-Nagymaros Case

The Potential and Limits of International Law in Environmental Protection*

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Abstract

The article deals with the Gabčíkovo-Nagymaros case as one of the first true 'environmental cases' considered by the ICJ. On the basis of the ICJ's findings in the case, it examines the potential and limits of the traditional 'tool-box' of general international law when dealing with environmental concerns. Drawing on the ICJ's findings in the Gabčíkovo-Nagymaros case, the article more particularly argues that the circumstances precluding wrongfulness in the law of state responsibility (the necessity defence) and termination grounds of the law of treaties (supervening impossibility and fundamental change of circumstances) are most limited instruments to respond to the growing need for environmental protection. At the same time, a dynamic interpretation of treaty obligations offers certain opportunities to incorporate subsequent developments in environmental knowledge and to respond to environmental concerns. Finally, the article contextualizes these findings in a broader mise-en-perspective in light of the last 25 years, from three sides: a case-specific perspective, an institutional/ICJ perspective and through the lens of more recent jurisprudence of the ICJ in environmental matters.

Keywords: international environmental law, necessity defence, state responsibility, treaty termination, Gabčíkovo-Nagymaros judgment.

1. Introduction

The *Gabčíkovo-Nagymaros* case is one of the first true 'environmental cases' considered by the ICJ. It relates to a dam project on the Danube as agreed upon by Hungary and (then) Czechoslovakia in a bilateral treaty of 1977 and ecological concerns raised in particular by Hungary in relation to the project.[1] *Gabčíkovo-*

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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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Nagymaros's features of a 'typical' environmental case include developments in ecological knowledge and law relating to the environment subsequent to the conclusion of the 1977 Treaty, which led to a reconsideration of the project in Hungary.

The ICJ's findings of *Gabčíkovo-Nagymaros* evidence some of the challenges encountered when dealing with environmental protection within existing international legal frameworks. Indeed, international environmental law (IEL) is a comparatively new field of international law in rapid development and evolution. To account for these developments is demanding for general international law and its institutions, in this case, the ICJ. It is even trickier in view of the complexity of many environmental problems, which frequently require protection from future harm, despite a certain level of scientific uncertainty regarding the consequences of activities perceived as harmful to the environment. This is reflected in the partly disputed nature and scope of certain of IEL's key concepts such as the precautionary principle or sustainable development. The question indeed arises how to account for the specific challenges of environmental protection in the horizontally structured system of international law in lack of centralized institutions.

All this played a role in *Gabčíkovo-Nagymaros*, which explains the case's interest to examine the potential and limits of traditional public international law when dealing with environmental concerns. 25 years later, the *Gabčíkovo-Nagymaros* judgment merits an appraisal as to where we stand, especially in view of significant advancements in the field of IEL. Often, the question is posed on how the 'toolbox' of international law works when confronted with specific issues relating to the environment. Are the institutions and instruments of the general international law of treaties and state responsibility able and equipped to deal with ecological concerns? What can be learned from *Gabčíkovo-Nagymaros* in this respect? What is the legacy of the judgment 25 years on?

Such investigation seems particularly pertinent since the *Gabčíkovo-Nagymaros* case has been evaluated from opposite ends in literature as regards the ICJ's recognition of environmental concerns. While some commentators have positively assessed how the ICJ dealt with environmental protection in the case and welcomed the ICJ's clarification of relevant concepts,[2] others were more

2 *See e.g.* Makane Mbengue, 'On Sustainable Development: a Conversation with Judge Weeramantry', *in* Serena Forlati *et al.* (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law*, Brill Nijhoff, 2020, pp. 166 *et seq.* "pioneering in respect to the recognition of the environment". As stated by Laurence Boisson de Chazournes: "The ICJ has contributed to clarify concept or principle of sustainable development in international law and contributed to the progressive development of a *corpus* of norms and principles relating to environmental law." Laurence Boisson de Chazournes, 'Introduction to Part 4', *in* Forlati *et al.* (eds.) 2020, p. 163.

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critical, referring to a "missed opportunity"[3] or maintaining that the case has, if not slowed down, at least not advanced the development of IEL.[4]

Against this background, I start with a brief description of the key features of the case and the challenges encountered when it comes to environmental protection in international law (Section 2). Then I give an overview of the relevant instruments of international law in view of their potential to alleviate environmental concerns (Section 3). On that basis, I examine the ICJ's findings in *Gabčíkovo-Nagymaros* (Section 4). Finally, a broader *mise-en-perspective* contextualizes the case in light of the developments over the last 25 years (Section 5).

2. The Gabčíkovo-Nagymaros Case and the Environment

2.1. Background of the Gabčíkovo-Nagymaros Case[5]

As noted above, *Gabčíkovo-Nagymaros* concerns the use of the Danube by a joint dam project on which Czechoslovakia and Hungary had agreed in 1977 in a bilateral treaty, and the ensuing environmental degradation due to extensive use of water resources. The dam project provided for in the 1977 bilateral treaty envisaged a system of locks, in Gabčíkovo (then Czechoslovakia, today Slovakia) and Nagymaros (Hungary). The project stemmed from a time characterized by limited environmental considerations.[6] Still, in terms of the environment, the 1977 Treaty between (then) Czechoslovakia and Hungary already contained certain (broad) provisions envisaging the project's ecological consequences [commitment to uphold standards of water quality in the Danube (Article 15)]. The parties also committed themselves to "compliance with the obligation [imposed by international law] for the protection of nature arising in connection with the construction and operation of the System of Locks." (Article 19). More detailed measures to protect the ecology of the Danube were to be incorporated in a joint contractual plan. The Treaty did not contain a provision on termination.

With growing civic resistance to the project *inter alia* due to ecological concerns, Hungary suspended the works in 1989. In May 1992 it formally notified Czechoslovakia that the 1977 Treaty was terminated. More specifically,

3 *See* Mari Nakamichi's critical statement: "[The *Gabčíkovo-Nagymaros* case] was brought at a time of growing international concern for the environment. As such, the ICJ was presented with the opportunity to set a new standard for environmental protection in the next century, putting the spirit of countless international environmental agreements and conventions into effect. It explicitly declined to do so." Mari Nakamichi, 'The International Court of Justice Decision Regarding the Gabčíkovo-Nagymaros Project', *Fordham Environmental Law Journal*, Vol. 9, 1998, p. 363.

4 *Cf.* Brian McGarry: "[…] the terminologies of the Gabčíkovo-Nagymaros Judgment have – if not slowed – then at least failed to accelerate the clarification of general international environmental law." Brian McGarry, 'Norms, Standards, and the Elusive Nomenclature of the Gabčíkovo-Nagymaros Judgment', *in* Forlati *et al.* (eds.) 2020, p. 227; *see also* Laura Pineschi, 'Introduction to Part 2', *in* Forlati *et al.* (eds.) 2020, p. 43.

5 Tim Stephens, International Law and Environmental Protection, Cambridge University Press, Cambridge, 2009, pp. 177 *et seq.*; Nakamichi 1998.

6 *See* in general Stephens 2009, p. 175.

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Hungary relied on the one hand, on a "state of ecological necessity".[7] It also argued with impossibility of performance, declaring 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",[8] concluding 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."[9]

Hungary likewise argued a fundamental change of circumstances (Article 62 VCLT) *inter alia* due to a change of elements present at the conclusion of the 1977 Treaty which made that the Treaty had been transformed into a "prescription of environmental disaster".[10]

In a fourth argumentative strand, Hungary relied on the obligation of harm prevention and the principle of precaution.[11] At stake was thus the protection of the environment through the traditional means of international law, and related questions such as the scope and legal quality of key concepts of IEL.

2.2. The Gabčíkovo-Nagymaros Case and Environmental Protection in International Law

The protection of the environment in international law as emphasized in Hungary's arguments faces numerous, multidimensional challenges.

First, the environmental problems relied predominantly upon were in the future. There was thus a time gap between the argument and their materialization linked to the question of how to measure future damage, as such tainted with a level of uncertainty.[12] Expert knowledge and scientific studies were accordingly of fundamental relevance. More generally, the rapidly evolving knowledge on the environment and related legal developments posed challenges as regards their incorporation into the rather static/conservative field of general international (treaty) law.

This touched upon more fundamental questions of international (treaty) law: the focus on treaty stability which crystallizes in the pacta sunt servanda rule and 'freezes' law at the moment of a treaty's adoption which stands in an obvious

7 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 40.
8 Id. para. 94.
9 Id.
10 Id. para. 95.
11 Id. para. 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."
12 It was mainly prognosis-based, highly complex, relying on scientific evidence. *See e.g.* Counter Memorial of the Republic of Hungary, 5 December 1994.

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tension to the need to incorporate change/subsequent developments. In this respect, a balance between substance and procedure is at stake: substantive treaty rules and their possible (procedural) adaptation through interpretation or negotiations.

Moreover, while the conflict between Hungary and Slovakia is based on a classical bilateral treaty, from a broader perspective, Hungary's arguments transgress the bilateral/reciprocal dimensions of the dispute and relate to common concerns (environmental protection), *i.e.* community interests. Further questions concern therefore how best to account for these: how well equipped is the traditional toolbox of public international law to deal with environmental protection as a community interest?

3. The Toolbox of General International Law and Environmental Concerns

3.1. Termination and Non-Performance under the Laws of Treaties and State Responsibility as Substantive/Static Tools

The termination grounds of the law of treaties have inherent limitations when applied to environmental concerns. In light of the need to uphold the stability of treaty relations, conditions for successful invocation are very demanding. First, the substantive criteria for applying Articles 61 and 62 VCLT are restrictive and establish a high threshold of reliance.[13] Article 61 VCLT (supervening impossibility of performance) requires the permanent disappearance of an object indispensable for the performance of a treaty.[14] The latter must accordingly become impossible. Article 62 VCLT (fundamental change of circumstances)[15] is framed as a double negative – "may not be invoked […] unless". It establishes the following demanding conditions: to successfully rely on Article 62, it is *inter alia* necessary that the circumstances which have changed have been unforeseen, an essential basis for the parties' consent to be bound by the treaty, and radically transform the extent of future obligations still to be performed under the treaty. It is worth noting that state practice and jurisprudence illustrate the most limited reliance on the grounds of treaty termination which have been so restrictively

13 Note that while Articles 61 and 62 VCLT are not directly applicable, they codify customary international law.

14 Article 61 VCLT: "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. […]"

15 Article 62 VCLT: "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. […]"

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formulated that they have – with one exception – never been accepted by an international tribunal.[16]

This high threshold of application will prevent reliance on these provisions for environmental protection considerations in the overwhelming majority of cases. Indeed, the general grounds of treaty termination appear of limited use to account for environmental concerns where dangers have often not sufficiently materialized to meet the demanding conditions required to successfully rely on the law of treaties' termination grounds.

Even in case of a successful reliance on Articles 61 and 62 VCLT, the legal consequences seem ill-suited for environmental protection since they only provide for termination (or suspension). Re-negotiation or an adaptation of the treaty to the new circumstances are not foreseen. This is based on an "all or nothing" approach and a static view, rather than a possible dynamic adaptation of a treaty in light of the changes. It does not sufficiently reflect the necessarily dynamic nature of environmental concerns in the context of inter-state cooperation.

Likewise, reliance on the necessity defense of the law of state responsibility (Article 25 of the ILC Articles on State Responsibility[17])[18] poses problems when it comes to ecological concerns. Also Article 25 is formulated as a double negative ("may not be invoked [...] unless"). It requires that an essential interest of a state be threatened by a grave and imminent peril; in this case, that the non-performance of the treaty be the only way to safeguard that interest, and that the state relying on necessity has not contributed to the situation (of ecological distress). Again, these demanding requirements are reflected in international

16 Christina Binder, 'The VCLT over the Last 50 Years: Developments in the Law of Treaties with a Special Focus on the VCLT's Rules on Treaty Termination', *Austrian Review of International and European Law*, Vol. 24, Issue 1, 2019, pp. 89-120. The exception is Judgment of 16 June 1998, *Case C-162/96, Racke,* ECLI:EU:C:1998:293, where the CJEU accepted the European Communities' reliance on Article 62 VCLT to justify the suspension of a cooperation agreement with the former Yugoslavia because of the ongoing war.

17 ILC, Responsibility of States for Internationally Wrongful Acts, General Assembly resolution 56/83 of 12 December 2001.

18 Article 25 of the ILC Articles on State Responsibility: "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: *(a)* is the only way for the State to safeguard an essential interest against a grave and imminent peril; and *(b)* does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: *(a)* the international obligation in question excludes the possibility of invoking necessity; or *(b)* the State has contributed to the situation of necessity." To be precise, at stake in *Gabčíkovo-Nagymaros* was Article 25's "predecessor", Article 33 of the Draft Articles which contains the same elements. The state of necessity codifies customary international law.

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jurisprudence: reliance on necessity has only exceptionally been accepted by international tribunals.[19]

Moreover, the legal consequences in case of a successful reliance on necessity are problematic from the perspective of enduring environmental protection. On the one hand, successful reliance on necessity as a circumstance precluding wrongfulness only provides for temporary non-performance for the duration of the necessity. After the situation of necessity lapses, performance of the obligation must be resumed (Article 27 of the ILC Articles on State Responsibility).[20] This may pose problems in the context of ecological concerns, which are frequently characterized by indeterminate duration. A state of ecological necessity may thus put a treaty in a limbo. Another challenge is how to deal with compensation for the period of non-performance. The open formulation "without prejudice to [...] the question of compensation for any material loss [...]" of the pertinent Article 27 of the ILC Articles does not provide a clear answer.

In summary, the termination and non-performance grounds of general international law seem of limited use to respond to ecological concerns. They are, with their focus on treaty stability, highly restrictive in substantive terms and also end (or at best suspend) the treaty relationship. The options are thus binary, black and white, all or nothing, continuation in the established treaty framework or termination.

3.2. Evolutionary Interpretation as Procedural/Dynamic Tool

The toolbox of international law also disposes of more dynamic and procedural elements. Most importantly, treaty interpretation may be a means to incorporate subsequent changes in the treaty framework at hand. It may keep a treaty alive in light of rising ecological concerns.[21] Especially evolutionary interpretation [as read into Article 31(1) VCLT] and the principle of systemic integration [Article 31(3)(c) VCLT] are means to keep a treaty up-to-date in light of

19 *See* in particular the cases brought against Argentina before international investment tribunals, where Argentina consistently relied on the necessity defense to shield itself against claims brought by foreign investors in the context of the country's financial crisis 2001-2. For further reference *see* Christina Binder, 'Circumstances Precluding Wrongfulness', *in* Marc Bungenberg *et al.* (eds.), *International Investment Law – A Handbook,* Beck/Hart/Nomos, 2015, pp. 442-480.

20 Article 27 of the ILC Articles on State Responsibility: "Consequences of invoking a circumstance precluding wrongfulness: The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: *(a)* compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; *(b)* the question of compensation for any material loss caused by the act in question."

21 Article 31 VCLT (General rule of interpretation): "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [...] 3. There shall be taken into account, together with the context: *(a)* any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; *(b)* any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; *(c)* any relevant rules of international law applicable in the relations between the parties. [...]"

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subsequent developments, including those in environmental law.[22] I will discuss both in turn.

First, the evolutionary interpretation of a treaty serves to interpret a treaty in light of subsequent changes. More particularly, an evolutionary interpretation enables the parties or a judge to "redefine the meaning of a treaty without altering its nature".[23] While the concept of evolutionary interpretation is inherently vague, it has been frequently employed by international dispute settlement bodies to incorporate evolutionary elements in relation to the protection of the environment or human rights. This, even at the price of overshadowing the original intent of the parties.[24] The framework of the treaty may be broadened, from merely reciprocal obligations to the incorporation of common interests/environmental considerations. The principle of evolutionary interpretation has thus considerable potential for the incorporation of environmental concerns.

As regards developments in IEL, the principle of systemic integration [Article 31(3)(c) VCLT] may likewise prove to be helpful, insofar that it states that "any relevant rules of international law applicable in the relations between the parties" may be taken into account for interpretation. This gives room to refer to established rules of IEL (such as the no-harm rule). There is thus some potential to do justice to subsequent developments for the benefit of the environment.

At the same time, there are also limits to the incorporation of subsequent changes in environmental knowledge and law through treaty interpretation. First, the treaty text must allow for it.[25] The ultimate limit of evolutionary interpretation and systemic integration are always the provisions of the treaty. As stated in *Laguna del Desierto*, interpretation is "a judicial function, whose purpose is to determine the precise meaning of a provision, but which cannot change it."[26] Moreover, for the principle of systemic integration to apply, and to incorporate *e.g.* evolving rules of environmental law, the rules must be "applicable between the parties", *i.e.* they must be part of the established body of international law (as treaty law, customary law or general principles). This may pose limits to the incorporation of principles of IEL (such as the precautionary principle or the concept of sustainable development) which have not been codified in treaty law (or customary international law) yet,[27] and thus cannot be considered as "rules applicable between the parties" in accordance with Article 31(3)(c) VCLT by means of interpretation. At the same time, the clarification of the scope and

22 Another means might also be a reference to subsequent agreements or practice [Article 31(3)(a) and (b) VCLT].

23 *See* for further reference, Christina Binder & Jane Hofbauer, 'The *Pacta Sunt Servanda* Principle or the Limits of Interpretation: The *Gabčíkovo-Nagymaros* Case Revisited', *in* Forlati *et al.* (eds.) 2020, p. 70.

24 Id. p. 74.

25 This was, as likewise acknowledged by the ICJ, quite clearly the case for the 1977 Treaty. *See* below, Section 4.3.

26 *Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy. 'Laguna del Desierto' (Argentina v Chile)*, 21 October 1994, 113 ILR p. 1, at 45 (para. 75).

27 Note that the principle of harm prevention, conversely, arguably codifies customary international law and could be relied upon in the context of Article 31(3)(c) VCLT.

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"hardening" of concepts and principles of IEL is an ongoing process. Ideally, the case law of the ICJ, shall contribute to this development.

3.3. Appreciation

The above demonstrates the difficulty to square the need for environmental protection with the classic framework of general international law and to apply the (restricted) toolbox of international law with the main options of termination/suspension and (limited) dynamic interpretation to address ecological concerns in an existing treaty framework (such as the 1977 Treaty). This evidences the tension between substance and procedure; the oscillation between the end of the treaty relationship (or cooperation in a project) and the latter's dynamic adaptation to subsequent changes.[28] In any case, to make international (treaty) law more responsive to the needs of environmental protection remains demanding. Certain answers are offered, at least initially, by the ICJ in *Gabčíkovo-Nagymaros*.

4. The Gabčíkovo-Nagymaros Judgment and the ICJ's Approach to Environmental Concerns

The *Gabčíkovo-Nagymaros* case is an excellent "show case" and "laboratory" as of how to live up to environmental needs, in particular in hindsight, 25 years after the judgment. There are various dimensions to this, including the recognition and further clarification of environmental concepts; the applicability of the toolbox of international law to ecological concerns; and the viability of further options.

4.1. Environmental Concepts and Values

In *Gabčíkovo-Nagymaros*, the ICJ recognized environmental concepts and ecological values to varying degrees and explicitness. First, positively, *the ICJ referred to the environment as value in itself:*

> "The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to the respect for the environment, not only for States but also for mankind: 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law

28 An even further going turn to procedure might be positive – either by deferring to the treaty parties (negotiations, mediation) or, more long term, by means of institutionalization. *See* below Sections 4.3 and 5 for details.

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> relating to the environment.' (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, para. 29.)"[29]

Also, though broadly, *the no-harm rule is arguably affirmed by the ICJ*.[30] More indirect is the ICJ's reference to the precautionary principle: the ICJ did not explicitly take up Hungary's reference to the principle but only implicitly recognized it through its reference to vigilance and due diligence.[31] Furthermore, the ICJ referenced the concept of sustainable development,[32] all while leaving open the concept's exact features, scope and legal quality, *i.e.* whether it codifies customary international law.[33] Finally, an obligation of cooperation to manage the risks of environmental damage derived from the principle of good faith may be read into the ICJ's findings in *Gabčíkovo-Nagymaros*.[34]

It becomes clear from the above that the ICJ acknowledged the value and need for environmental protection at least broadly. At the same time, the ICJ's findings remained rather in the abstract, did not define the legal quality and exact scope of concepts such as sustainable development[35] and omitted referencing other instruments for environmental protection, such as the obligation to conduct an environmental impact assessment.

4.2. Non-Performance and Treaty Termination

The *Gabčíkovo-Nagymaros* judgment moreover shed light on the limits of the application of the necessity defense in the law of state responsibility and the termination grounds of the law of treaties.

As far as state responsibility is concerned, the judgment confirmed the high threshold of ecological necessity. While recognizing the environment as an

29 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 53. At the same time, the ICJ adopted an anthropocentric approach and assessed the environment only in terms of the value the environment has for human beings: "[…] Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks. It is all the more important to do this because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn' (ICJ Reports 1996, p. 241, para. 29; *see also* paragraph 53 above)." Id. para. 112.

30 *See* Anne Duvic-Paoli: "[…] the principle of prevention applies when two conditions are met relative to 1. The likelihood that harm will occur, and 2. Its magnitude. However, the Court did not engage in a full evaluation of the scientific evidence put to it regarding the quantitative and qualitative effects of the river diversion." Leslie-Anne Duvic-Paoli, 'Vigilance and Prevention: the Contribution of the Gabčíkovo-Nagymaros Judgment', *in* Forlati *et al.* (eds.) 2020, pp. 201, and 206. *See also* Boisson de Chazournes 2020, p. 164.

31 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 140: "[…] The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. […]".

32 Id.; *see also* the reference to precautionary measures in para. 113,

33 Duvic-Paoli 2020, p. 197.

34 ICJ, *Gabčíkovo-Nagymaros,* judgment, paras. 17 and 140.

35 Note that it may be doubted whether such a complex/multidimensional concept such as sustainable development is at all suitable of further definition and sufficiently precise for codification.

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essential interest, the ICJ did not accept Hungary's ecological concerns as constituting a grave and imminent peril. It found that the ecological concerns were not sufficiently established in 1989, not imminent in the meaning of immediacy; and not the only way to deal with the danger, since Hungary could implement other mitigation measures without abandoning the work on the dam.[36]

In light of the ICJ's findings, the demanding threshold for a state of ecological necessity appears *de facto* impossible to meet. This largely precludes a due consideration of the precautionary principle. According to one commentator:

> "Several aspects of the Court's reasoning here are open to criticism. Although the Court stated that it was not necessary to reach a view as to which party's scientific evidence was better founded, the Court did in fact engage in a relatively detailed assessment of the gravity and imminence of the ecological risks asserted by Hungary. Moreover, in evaluating the evidence the Court effectively required Hungary to establish the alleged risks to a very high degree of scientific certainty, an approach which effectively precluded the operation of the precautionary principle. While this may well have been justified given the exceptional character of the necessity defense, the Court made no attempt to explain the relationship between the law of state responsibility and developing rules of international environmental law."[37]

Along similar lines, the ICJ's findings confirm the narrow framing of the VCLT's grounds of treaty termination (Articles 61 and 62 VCLT), which are ill-equipped to do justice to environmental concerns.[38] First, the ICJ left it open whether a legal regime (here: an economic joint investment which was consistent with environmental protection) was at all within the scope of Article 61 VCLT (impossibility of performance).[39] Moreover, the ICJ stated that as long as there was a means to "safeguard" the object (*i.e.* negotiations as foreseen in the 1977 Treaty), the application of Article 61 VCLT was precluded.[40] On that basis, the ICJ affirmed Article 61 VCLT's most restrictive (substantive) scope.

Similar conclusions may be drawn in relation to Article 62 VCLT. The findings of the ICJ in *Gabčíkovo-Nagymaros* illustrate the provision's most restrictive criteria of application.[41] The ICJ indeed rejected Hungary's reliance on Article 62 VCLT in view of the provision's high threshold (applicability only in

36 ICJ, *Gabčíkovo-Nagymaros,* judgment, paras. 55 and 57. *See* Stephens 2009, p. 178 for further reference.

37 Id.

38 For the sake of completeness, as regards a possible termination in view of the emergence of new requirements for the protection of the environment precluding the performance of the 1977 Treaty, the ICJ noted that neither of the parties had contended that new peremptory norms of environmental law had emerged subsequently to the adoption of the 1977 Treaty, and thus declined to consider it in the context of Article 64 VCLT. ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 112; *see also* Nakamichi 1998, p. 362, for further reference.

39 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 103.

40 Id.

41 Id. para. 104.

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exceptional cases), that the change had not radically transformed the extent of the obligations still to be performed to accomplish the project and, also, by reason of the fact that the change was not entirely unforeseen.[42] What is more, once again, the ICJ drew the attention of the parties to procedural means to accommodate change in the framework of the 1977 Treaty (Articles 15, 19 and 20).[43]

In the judgment, the ICJ also hinted on the legal consequences of a successful reliance on Articles 61 and 62 VCLT: termination, which is diametrically opposed to the stability of treaty relations and the *pacta sunt servanda* rule, as a pillar of treaty law. The ICJ affirmed the importance of the *pacta sunt servanda* rule and rejected Hungary's reliance on the VCLT's termination provisions. It thus ultimately confirmed that treaty termination and non-performance grounds of general international law are of limited use to acknowledge environmental concerns.

4.3. Treaty Interpretation and Negotiations

As regards the potential of more procedurally focused techniques, *i.e.* treaty interpretation and negotiations, *Gabčíkovo-Nagymaros* offers light and shadow. On the one hand, the case highlights the techniques' potential to acknowledge ecological concerns. Concerning treaty interpretation, the ICJ indeed relied on dynamic considerations and referred to open elements as already provided in the framework of the 1977 Treaty.[44] For example, the ICJ observed that

> "newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. [...]".[45]

The ICJ likewise held that "[the Treaty was] not static but open to adapt to emerging norms of international law."[46] The broad terms of the 1977 Treaty contributed to achieving this result.[47] In particular, Separate Opinions to the judgment (see *e.g.* Vice-President Weeramantry's Opinion) highlighted the value of dynamic/evolutionary interpretation for incorporation of environmental concerns, with special reference to the long-term nature of the dam-project:

42 Id.

43 Id.

44 *See also* the Separate Opinion by Judge Bedjaoui: "Article 15, 19 and 20 of the 1977 Treaty are fortunately drafted in extremely vague terms (in them, reference is made to 'protection' – without any further qualification – of water, nature or fishing). In the absence of any other specification, respecting the autonomy of will implies precisely that provisions of this kind are interpreted in an evolutionary manner, in other words, taking account of the criteria adopted by the general law prevailing in each period considered." ICJ, *Gabčíkovo-Nagymaros,* judgment, Separate Opinion of Judge Bedjaoui, para. 7.

45 ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 112.

46 Id.

47 Id. para. 140. *See* generally Laura Pineschi, 'Introduction to Part 2', *in* Forlati *et al.* (eds.) 2020, p. 45.

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> "If the Treaty was to operate for decades into the future, it could not operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into. This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment [...] Environmental concerns are life and continuing concern whenever the project under which they arise may have been inaugurated."[48]

While broadly, *Gabčíkovo-Nagymaros* thus positively acknowledged the need to go with the dynamism in the development of IEL and knowledge.[49]

At the same time, the case also pointed to the limits of interpretation as means to read subsequent developments in IEL and knowledge into a treaty. By maintaining that there was no such thing as the approximate application of a treaty,[50] the ICJ affirmed that any interpretation had to remain within the treaty text.[51] Indeed, a further-reaching interpretation would constitute a revision and require the mutual consent of both parties.[52]

Moreover, the ICJ did not venture far in the interpretation of the 1977 Treaty's provisions.[53] Rather, the Court referred quite open-endedly to procedural obligations such as consultations and negotiations to incorporate evolving environmental norms. According to the ICJ,

> "[w]hat is required in the present case by the rule *pacta sunt servanda,* as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty. [...]".[54]

48 Separate Opinion of Vice-President Weeramantry, p. 88 at .113-4

49 *See e.g.* Stephens 2009, pp. 186 *et seq.* "[...] Most important, however, were the Court's pronouncements on the impact of recent environmental norms upon an existing treaty regime. The judgment asserts the legitimacy of environmental concerns influencing the operation of a treaty concluded in the late 1970s, which did not have a strong focus on environmental protection. The Court effectively held that the parties could and should update this treaty framework in order to bring the joint dam project into conformity with contemporary international environmental standards."

50 The principle of approximate application, as put forward by Slovakia in the *Gabčíkovo-Nagymaros* case, relates back to the Separate Opinion of Sir Hersch Lauterpacht in *Admissibility of Hearings of Prisoners in South West Africa* who maintained: "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally [...] it must [...] be applied in a way approximating most closely to its primary object. To do that is to give effect to the instrument - not to change it." ICJ, *Admissibility of Hearing of Prisoners in South West Africa*, Advisory Opinion of 1 June 1956, Separate Opinion of Sir Hersch Lauterpacht, ICJ Reports 1956, p. 46. *See* for details Binder & Hofbauer 2020, pp. 65 *et seq.*

51 In relation to Slovakia's variant 'C', the ICJ stated: "It is not necessary for the Court to determine whether there is a principle of international law or general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. [...]" ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 76.

52 Binder & Hofbauer 2020, p. 68.

53 Only once, the ICJ refers to third party involvement in view of the parties' disagreement. ICJ, *Gabčíkovo-Nagymaros,* judgment, para. 113.

54 Id. para. 142.

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This is reiterated in the operative part of the judgment, where the ICJ called on the parties to "negotiate in good faith" to "ensure the achievement of the objectives of the [1977 Treaty]" in light of the situation at hand.[55] The ICJ thus gave limited indications to the parties which are left "on their own" and fell short of exploring the full potential of evolutionary interpretation, as it could have done by drawing on the concept of sustainable development or Article 31(3)(c) VCLT, therewith guiding the parties in their application of the 1977 Treaty.

4.4. Appreciation

Overall, the *Gabčíkovo-Nagymaros* case is a realistic reflection of how environmental concerns were accounted for at the end of the last century, as concerns the 'classic' instruments of general international law (as discussed in Section 2). It points to insufficiencies; and shows, most importantly, the difficulties of applying the necessity defense and the grounds of treaty termination (Articles 61 and 62 VCLT). At the same time while the ICJ's push for negotiations between the parties rightly introduced a dynamic and procedural element, a somewhat further reaching guidance as to how negotiations should be conducted might have prevented the present stalemate in *Gabčíkovo-Nagymaros* which is still pending. Thus, the flexibility of a strong reliance on procedural means – in the absence of further guidance by the ICJ – proved to be a two-edged sword: promising to account for the inherent dynamism in (international) environmental law and knowledge, challenging when parties are unable to agree on how to proceed.

Also more generally, the *Gabčíkovo-Nagymaros* case throws light on the limitations of public international law in responding to ecological concerns. First, as a contentious case, it depended on party submissions. The need for environmental protection, common interests, were reflected upon only insofar as they coincided with the interests of a party to the dispute (here, Hungary's).[56] This points to the limits of environmental protection as "common interest" in these constellations. The protection of the environment in international law is even more demanding when it comes to "true" global concerns, such as climate change where the gap between reciprocal/*inter partes* and common interests increases.

Another challenge for the ICJ were its inherent institutional limitations, its lack of specialization/expertise in environmental matters and the necessary

55 Id. para. 155.

56 *See* for further reference Pineschi, 2020, pp. 54 *et seq.*; *see* generally Jutta Brunnée, 'International Environmental Law and Community Interests Procedural Aspects', *in* Eyal Benvenisti & Georg Nolte (eds.), *Community Interests Across International Law*, Oxford University Press, Oxford, 2018, p. 151; Jutta Brunnée, *Procedure and Substance in International Environmental Law*, The Hague Academy of International Law, Brill-Nijhoff 2020.

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reliance on outside independent scientific assessment.[57] A related issue is the difficulty of how to assess future environmental harm.[58]

In any case, *Gabčíkovo-Nagymaros*, as one of the first "true environmental cases" considered by the ICJ, was a stepping-stone for future developments in environmental matters. This calls for a broader perspective.

5. The Gabčíkovo-Nagymaros Case in Perspective

In retrospect, the *Gabčíkovo-Nagymaros* case may be considered from three perspectives on its 25th anniversary: a case-specific, an institutional/ICJ perspective and through the lens of subsequent case law/the development of environmental standards.

Firstly, *Gabčíkovo-Nagymaros* referred to broader questions of procedure versus substance, which is particularly relevant in IEL.[59] Procedures are tools to dynamically incorporate subsequent developments, increases in knowledge and environmental concerns. They are also important to flexibly respond to complex (future) situations and environmental problems where it may be difficult to be overly concrete in terms of substantive obligations. Still, too little guidance/substance and an exclusive reliance on procedures (negotiations) may also lead to a stalemate as has been the case in the *Gabčíkovo-Nagymaros* dispute so far. In view of the parties' stalemate, further proposals to join procedure and substance have been made. Concretely, a push to institutionalization has been argued for in academic literature in relation to the dispute.[60] It was held, that a Commission, such as the Danube Commission, could (have been) established to regulate and deal with contested environmental issues. Drawing on past experiences, factors for the success of such Commissions included the *(i)* independent agency of technical experts (not groups of government agents); *(ii)* a mandate of ongoing investigation, monitoring and dispute resolution; and *(iii)* a function as a central and ongoing coordinating institution.[61] In hindsight, such an institutionalized solution may have supported the parties (Hungary and Slovakia) in reaching an

57 *See* Pineschi 2020, pp. 55 *et seq.*; *see also* McGarry 2020, p. 227: "In Gabčíkovo-Nagymaros [...] preparations were made for a site visit by the Court between the first and second rounds of oral proceedings, in which setting the Court received 'technical explanations given by the representatives who had been designated for the purpose by the parties [...] Yet despite adding this site visit to what [the ICJ] viewed as an impressive amount of scientific evidence placed on record by the parties [...] the Court referenced this evidence only briefly in its judgment."

58 *See* generally UN, Gaps in international environmental law and environment-related instruments: towards a global pact for the environment, Report of the Secretary-General, A/73/419, 30 November 2018, p. 38: "In *Gabčíkovo-Nagymaros*, the International Court of Justice faced the difficult task of weighing the rights of parties under circumstances where the likelihood and extent of environmental harm remained unknown. This highlighted the paucity of rules or principles addressing unrealized harm, which is a problematic *status quo* in the light of the often-significant gap in time between acts and their effects on the environment." *See also* Nakamachi 1998, p. 364.

59 Brunnée 2018, p. 175.

60 Nakamachi 1998, pp. 366 *et seq.*

61 Id. pp. 370 *et seq.*

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agreement on the common dam project and the question of how to manage arising environmental concerns. More generally speaking, institutionalization through the establishment of joint Commissions may help address the usually technically and politically sensitive problems in projects with lasting environmental implications, such as the one at hand.

Secondly, from the *ICJ perspective* and in light of the ICJ's institutional limitations when dealing with complex environmental matters, several attempts to increase the ICJ's environmental expertise have been made. This seems even more important since an increasing number of cases brought before the Court concern environmental issues.[62] While the environmental chamber of the ICJ has never taken up its work and environmentally specialized judges were considered but dismissed as impractical,[63] especially subsequent case-law has shown the ICJ's progress in dealing with environmental expertise in complex scientific matters.[64] The ICJ has streamlined and professionalized its reliance on experts. This is a welcome development since well-chosen experts and considered reliance on expert opinion may counterbalance the ICJ's institutional deficits in environmental cases. Conversely, an issue which remains to be resolved and which the Court has considered only marginally so far, is the question of compensation/damage calculation in cases of environmental degradation/pollution.[65]

Thirdly, and more broadly speaking, the ICJ's approach to environmental problems has developed over the past 25 years. True, subsequent cases have not dealt as clearly with the traditional toolbox of international law and their application to environmental problems, as *Gabčíkovo-Nagymaros*. However, techniques (such as treaty interpretation) have been applied and the ICJ has further clarified concepts and principles of IEL. For example, the obligation to conduct an environmental impact assessment as a customary law obligation is affirmed in *Pulp Mills* (2010).[66] In *Whaling in the Antarctic* (2014),[67] an obligation

62 ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay),* judgment, ICJ Reports 2010; 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; ICJ, *Whaling in the Antarctic (Australia v Japan, New Zealand intervening)*, judgment, ICJ Reports 2014, p. 226. *See also* the (albeit discontinued) *Pesticides* case which deals with transboundary environmental harm, including the impact on indigenous peoples. ICJ, *Case Concerning Aerial Herbicide Spraying (Ecuador v Colombia)*, Order of 13 September 2013, ICJ Reports 2013, p. 278.

63 *See* Cymie R. Payne, 'Judicial Development', *in* Lavanya Rajamani & Jacqueline Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd edition, Oxford University Press, Oxford, 2020, p. 454; *see also* generally Brunnee 2018, p. 167.

64 *See e.g. Whaling in the Antarctic,* 2014; *see also Certain Activities and Construction of a Road,* 2015; *see* however also the shortcomings noted in the UN Report 2018, p. 38.

65 *See* in particular, ICJ, *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua)* on Compensation owed by Nicaragua to Costa Rica of 2 February 2018, ICJ General List No 150; *see also* ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* judgment, ICJ Reports 2005, p. 168. *See* generally Jason Rudall, *Compensation for Environmental Damage under International Law*, Routledge, 2020, p. 5.

66 ICJ, *Pulp Mills,* judgment.

67 ICJ, *Whaling in the Antarctic,* judgment.

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to cooperate in good faith was confirmed[68] (although the preservation of the ecosystem as a general interest of the international community as a whole was not yet established).[69] The issue of compensation/damages calculation in case of environmental degradation, not at stake in *Gabčíkovo-Nagymaros*, has been an issue in *Armed Activities on the Territory of the Congo* (2005)[70] and in *Certain Activities carried out by Nicaragua in the Border Area* (2018).[71]

In summary, we can conclude that environmental matters are increasingly brought before the ICJ whose case law is in ongoing evolution. The ICJ is indeed uniquely placed to develop international law on the matter.[72] It thus seems safe to maintain that while *Gabčíkovo-Nagymaros* is a starting point, it is not the end of the story. Over the past 25 years, important developments have taken place, reflecting an incremental, albeit not revolutionary change in environmental protection.[73] Therein, *Gabčíkovo-Nagymaros* remains a landmark. This is also demonstrated by the references to this case made by other international tribunals. Especially the IACtHR has extensively referred to the ICJ's case law, including to *Gabčíkovo-Nagymaros*, in its Advisory Opinion on the Environment and Human Rights.[74] So, the toolbox of international law, while limited, is in ongoing development with more and more voices joining and adding to the chorus.

68 *See* generally Akiho Shibata, 'Good faith', *in* Lavanya Rajamani & Jacqueline Peel (eds.), *The Oxford Handbook of International Environmental Law*, 2nd edition, Oxford University Press, Oxford, 2020, pp. 376 *et seq.*

69 ICJ, *Whaling in the Antarctic,* judgment. Moreover, it was held that the *Whaling* case signalled an acceptance of standing in case of *erga omnes partes* obligations as environmental concerns. For further reference, *see* Christian J. 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, 2016, pp. 210-211; Brunnée 2020, pp. 139 *et seq.*

70 ICJ, *Armed Activities on the Territory of the Congo*, judgment.

71 ICJ, *Certain Activities and Construction of a Road,* compensation. *See* generally Payne 2020, pp. 457 *et seq.*; Rudall 2020, pp. 25 *et seq*.

72 The ICJ is indeed in a unique position to consider environmental protection with an authoritative voice. *See* Pineschi 2020. *See also* the criticism voiced in the Joint Dissenting Opinion of Judges Al-Khasawneh and Simma as regards the insufficient use of experts in *Pulp Mills*, ICJ Reports 2010, p. 108, para. 13: "[The use of scientific experts] would [...] have given the Court the opportunity of combining the rigour of the scientific community with the requirements of the courtroom – a blend which is indispensable for the application of the international rules for the protection of the environment and for other disputes concerning scientific evidence."

73 Payne 2020, p. 456.

74 IACtHR, *The Environment and Human Rights*, Advisory Opinion No 23/17 of 15 November 2017.

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