The Gabčíkovo-Nagymaros Judgment after a Quarter Century

Transcending Jurisdictions to Advance Environmental Law

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Abstract

In 1997, the ICJ issued its judgment in the Gabčíkovo-Nagymaros case. Accompanied by the separate opinion issued by Judge Weeramantry, the Gabčíkovo-Nagymaros decision provided clarifications regarding treaty interpretation questions that are foundational to the ways in which international law is applied. Beyond this, however, the Gabčíkovo-Nagymaros decision has assumed a significant place in the development of environmental law at the international, regional and national levels. This article examines the Gabčíkovo-Nagymaros decision in light of the recent line of environmental rights cases, including those based in the emerging field of climate justice, in order to trace the ways in which the decision has transcended the limitations of time and geography to become a bedrock of environmental law. The article addresses the ways in which the Gabčíkovo-Nagymaros decision has transcended the context of a transboundary water rights claim between Hungary and Slovakia to become an element of emerging cases across the world. To this end, the article chronicles the ways in which the essential elements of the Gabčíkovo-Nagymaros decision are translated into and expanded by cases at the regional level and the national level. Ultimately, the article connects the nuanced fashion in which the Gabčíkovo-Nagymaros decision has grown to transcend the ICJ's jurisdiction in the case and become a truly internationalized base for the development of environmental laws and environmental rights. Finally, the conclusion of the article notes the potential for the Gabčíkovo-Nagymaros decision to continue transcending its initial application to a new generation of environmental concerns.

Keywords: sustainable development, transboundary consultation, environmental impact assessment, climate litigation, Gabčíkovo-Nagymaros judgment.

1. Introduction

In 1997, the ICJ issued its judgment in the *Gabčíkovo-Nagymaros* case. Accompanied by the separate opinion issued by Judge Weeramantry, the

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Gabčíkovo-Nagymaros decision provided clarifications regarding treaty interpretation questions that are foundational to the ways in which international law is applied. Beyond this, however, the *Gabčíkovo-Nagymaros* decision has assumed a significant place in the development of environmental law at the international, regional and national levels. Issued a mere five years after the international community came together to adopt the Rio Declaration alongside the UN Framework Convention on Climate Change, the UN Convention on Biological Diversity, and the UN Convention to Combat Desertification, the *Gabčíkovo-Nagymaros* decision was among the first in which the ICJ was asked to address environmental harms and impacts. In the quarter century that followed, international constructs of environmental law, environmental rights, and climate change related harms have grown exponentially and yet the *Gabčíkovo-Nagymaros* case continues to form the foundation upon which many of these concepts have been constructed.

This article examines the *Gabčíkovo-Nagymaros* decision in light of the recent line of environmental rights cases, including those based in the emerging field of climate justice, in order to trace the ways in which the decision has transcended the limitations of time and geography to become a bedrock of environmental law. The article begins by highlighting the critical elements of the *Gabčíkovo-Nagymaros* decision, including Judge Weeramantry's opinion, from the perspective of environmental law and rights. This discussion illuminates the ways in which the ICJ includes environmental impacts and harms as within the potential ambit of the doctrine of necessity in the state responsibility context.

Although there was ultimately a finding against Hungary's invocation of the doctrine based on the facts at issue, the explanation of environmental harms as sufficient in other circumstances was an important step for solidifying the place of environmental law as part of international law *per se*. The issue of transboundary harm and environmental damage as a continuous construct which requires ongoing consultation and information sharing between states is also discussed for its profound impact on how states are required to interact on environmental issues. Further, it describes the role of Judge Weeramantry's separate opinion as creating support for the evolution of environmental principles such as the principle of continuing environmental impact assessment, the principle of prevention, the principle of sustainable development, and the precautionary principle.

Building upon these discussions, the article then addresses the ways in which the *Gabčíkovo-Nagymaros* decision has transcended the context of a transboundary water rights claim between Hungary and Slovakia to become an element of emerging cases across the world. To do this, the article chronicles the ways in which the essential elements of the *Gabčíkovo-Nagymaros* decision are translated into and expanded by cases at the regional level and the national level. At the regional level, it focuses on the *Marangopoulos Foundation for Human Rights v Greece* decision from the European Committee of Social Rights, the *Advisory Opinion on the Right to a Healthy Environment* from the IACtHR, and the *Duarte Agostinho & Others v Portugal et al.* complaint currently before the ECtHR. These cases demonstrate the ways in which regional law has developed around many

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tenets from *Gabčíkovo-Nagymaros*, as well as the ways in which these tenets might be expanded in the future. At the national level, the article focuses on the *Urgenda Foundation v The Netherlands* case from the Dutch Supreme Court, the *Friends of the Irish Environment v Government of Ireland* case from the Irish Supreme Court, and the *Lamu et al. v Kenya* case from the Kenyan National Environmental Tribunal. These cases cut across issues and geography to demonstrate the evolution of *Gabčíkovo-Nagymaros* tenets through national court systems.

Following these discussions, the article connects the nuanced fashion in which the *Gabčíkovo-Nagymaros* decision has grown to transcend the ICJ's jurisdiction in the case and become a truly internationalized base for the development of environmental laws and environmental rights development. It notes the evolution of law regarding transboundary harm, the role of environmental law and rights, and the incorporation of the precautionary principle, the principle of prevention, the principle of sustainable development, and the principle of environmental impact assessment over the past quarter century. Finally, the conclusion of the article notes the potential for the *Gabčíkovo-Nagymaros* decision to continue transcending its initial application to a new generation of environmental concerns.

2. Critical Background from Gabčíkovo-Nagymaros

At a time when the world is faced with the increasingly urgent climate crisis, the short-term and long-term impacts of the COVID-19 pandemic, and the uncertainty caused by Russian actions in Ukraine, the *Gabčíkovo-Nagymaros* case serves a critical role for interpreting the future of international, regional and national law. Indeed, 25 years ago the ICJ gave the international community a decision – and separate opinion by Judge Weeramantry – which still serves as a vital guide for treaty interpretation and contractual agreements as well as state obligations to each other and the importance of environmental concerns. The articles throughout this volume of the Hungarian Yearbook of International Law and European Law pay *homage* to the many avenues in which the *Gabčíkovo-Nagymaros* case has provided key precedents. In this section, the focus will be largely on the elements of the case linked to environmental concerns, however the fulsome nature of the decision must be emphasized.

One of the essential arguments offered to justify the Hungarian actions was that of necessity.[1] In this context, the assertion was that the abrogation of the 1977 Treaty upon which the project was predicated was necessary in light of concerns regarding the impacts of the dam on the natural environment in the region.[2] From the outset, the ICJ reiterated the nature of the state of necessity as a customary international law principle that does not negate the wrongfulness of certain conduct at the state level but rather functions as an acceptable excuse for

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

2 Id. paras. 40-58.

this conduct in light of exceptional circumstances.[3] In recognizing the customary elements of the necessity defense, the ICJ drew support from the work of the International Law Commission's (ILC) suggested requirements that govern the invocation of necessity as set out in Article 25 of the statement in Responsibility of States for Intentionally Wrongful Acts:

> "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."[4]

While addressing these claims, the ICJ established that it had "no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected [...] related to an 'essential interest'" within the parameters of the necessity test elaborated by the ILC and adopted by ICJ jurisprudence.[5] Indeed, the ICJ highlighted and agreed with the ILC's articulation that "ecological preservation of all or some of [the] territory [of a state]" was an accepted aspect of necessity and that environmental concerns were increasing in legal spheres in the decades prior to *Gabčíkovo-Nagymaros*.[6] Further, the ICJ reiterated the statements of the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* regarding "the great significance that it attaches to respect for the environment, not only for the states but also for the whole of mankind."[7] These considerations were not deemed to be sufficient in the abstract or with only partial information available to the state invoking necessity. However, the ICJ held that the ways in which Hungary asserted the potential negative impacts of the project as implemented were insufficiently asserted in terms of gravity and temporality at the time they were invoked in 1989.[8]

The ICJ's opinion next addressed the legality of various actions and remedial efforts undertaken by then-Czechoslovakia, including the contested Variant 'C' in the damming process, in relation to the Danube as an international waterway.[9] Set against this backdrop, the ICJ found that

3 Id. para. 51.
4 Id.
5 Id. para. 53.
6 Id.
7 Id.
8 Id. para. 54.
9 Id. para. 78.

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> "the suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse."[10]

It went on to provide that the shared and equitable nature of watercourses is applicable to non-navigable waterways in the international context as well, thus further extending the transboundary concept of rights.[11] Using this understanding, the ICJ found that the then-state of Czechoslovakia had overreached the ability to claim proportionality in its responses to the Hungarian abrogation of the 1977 Treaty.[12]

Ultimately, the ICJ recognized the need for the States Parties to continue their negotiations regarding the implementation of the project and the parameters this should include as appropriate for establishing the environmental elements of project and potential negative impacts resulting from it.[13] As the ICJ explained:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river."[14]

10 Id.

11 Id. para. 85; Mara Tignino & Christian Brethaut, 'The role of international case law in implementing the obligation not to cause significant harm', *International Environmental Agreements: Politics, Law and Economics,* Vol. 20, 2020, p. 639; Ibrahim Kaya, 'Implications of the Danube River Dispute on International Environmental Law', *Review of International Law and Politics*, Vol. 4, Issue 15, 2008, p. 97.

12 ICJ, *Gabčíkovo-Nagymaros*, judgment, para. 85.

13 Id. paras. 140-142; *see also* Nicolas Bremer, 'Post-environmental Impact Assessment Monitoring of Measures or Activities with Significant Transboundary Impact: An Assessment of Customary International Law', *Review of European, Comparative & International Environmental Law,* Vol. 26, Issue 1, 2017, p. 88.

14 ICJ, *Gabčíkovo-Nagymaros*, judgment, para. 140.

In this way, the *Gabčíkovo-Nagymaros* can be seen as representing an endorsement of the need for meaningful consultations and discussions between states in which the current and future state of the environment and associated entities is at the heart of the determination. Thus, the case is a statement regarding the need to balance the interests of sovereignty with the interests of the environment as an entity that transcends boundaries and sovereignty.

Further to the majority opinion, then-Vice-President Weeramantry provided an impactful and stirring separate opinion that is centered on environmental and sustainability concerns raised in the case.[15] In this opinion, Judge Weeramantry discussed and provided the basis for entrenchment of the principle of sustainable development and, in his words, "the principle of continuing environmental impact assessment."[16] In articulating sustainable development as a legal principle, Judge Weeramantry envisioned a more robust legal ground for the incorporation of sustainable development in international law than the majority opinion, which considered it to be a "mere concept."[17] Indeed, Judge Weeramantry noted that this was the first case in which the ICJ was presented with assertions grounded in sustainable development tenets and highlighted the need for additional pronouncements because it would become an increasingly important legal and policy tool moving forward.[18] To emphasize this point, Judge Weeramantry detailed the origins of sustainable development in law and practice as well as the ways in which it increasingly developed into an accepted element of international treaty regimes and customary practice.[19]

As noted in the separate opinion, Judge Weeramantry had previously advocated for the idea of the principle of continuing environmental impact assessment in the nuclear testing and weapons cases.[20] In *Gabčíkovo-Nagymaros*, Judge Weeramantry broadened the scope of his articulated view of the principle to

> "clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring. The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be expected, in a matter so

15 Kaya 2008.
16 ICJ, *Gabčíkovo-Nagymaros*, judgment, para. 88.
17 Id. para. 85.
18 Id.
19 Id. paras. 85-95.
20 Id. para. 107.

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> complex as the environment, to anticipate every possible environmental danger."[21]

In tracing the evolution of the principle, Judge Weeramantry emphasized that the initial underpinnings began with the *Trail Smelter* case holdings regarding continuous monitoring and grew to include all phases of project development and implementation.[22] To achieve these goals and implement the *Gabčíkovo-Nagymaros* judgment, the separate opinion stresses the importance of national court systems to the implementation process.[23]

Thus, the ICJ's main decision in *Gabčíkovo-Nagymaros* and the separate opinion of Judge Weeramantry provide the platform for the protection of the environmental resources of both Hungary and Slovakia. At the same time, the precedent established by *Gabčíkovo-Nagymaros* was far deeper and broader than the dam, the river or the two states involved, as it provided international law with an understanding of how necessity can be successfully invoked with respect to environmental concerns and exigencies. Additionally, Judge Weeramantry's pronouncements in the separate opinions have established the groundwork for entrenching sustainable development, the precautionary principle, the principle of prevention and the use of environmental impact assessments as stable requirements of international law and practice.

3. Evolution of National and Regional Case Law

After 25 years, the lessons of the *Gabčíkovo-Nagymaros* case have truly become entrenched in the understanding of environmental issues and their evolution at the international, regional and national levels. Indeed, as the growth of environmentally based court challenges has accelerated across all levels of jurisprudence, the holdings and lessons of *Gabčíkovo-Nagymaros* continue to inform litigants and court systems as they seek to address complex claims which have bearing on current and future generations around the world.

The below discussion examines the ways in which various courts have applied the tenets of *Gabčíkovo-Nagymaros* in different jurisdictions, claims and allegations of harms. While not exhaustive of the entirety of case law which has been influenced by *Gabčíkovo-Nagymaros*, the cases discussed are typically prominent and have in many instances been used by other courts as sources of guidance and support in addressing similar claims. Perhaps the most obvious example of this is the *Urgenda Foundation v The Netherlands* case from the Dutch Supreme Court, which, while decided less than three years ago, has generated a spate of similar claims in countries around the globe. These cases demonstrate the diversity of venues in which *Gabčíkovo-Nagymaros* continues to serve as a tireless and persuasive source in name and in spirit. Not all of the cases below are as well known, yet the decision to include them was purposeful in that these are

21 Id.
22 Id. paras. 107-108.
23 Id. para. 113.

typically cases from developing states that often do not attract as much global legal attention and yet are the site of significant environmental law claims.

3.1. Regional Cases

3.1.1. Marangopoulos Foundation for Human Rights v Greece

In 2007, the European Committee of Social Rights issued its decision on the merits in the *Marangopoulos Foundation for Human Rights v Greece* complaint.[24] The core questions raised by the complaint related to the Greek State's continued and expanded allowance of lignite mining within its territory as not properly regulated for potential environmental harms as well as public health threats.[25] The Committee applied international harm standards to address the issues raised in terms of environmental harms, particularly endorsing the findings of the ILC on the existence and gravity of state breeches of international obligations.[26]

Similar to the idea of continuing obligations in the fashioning of environmental standards and oversight from *Gabčíkovo-Nagymaros*, the Committee emphasized that

> "the Charter is a living instrument, whose purpose is to protect rights not merely theoretically but also in fact [...] [The Committee] therefore interprets the rights and freedoms set out in the Charter in the light of current conditions."[27]

Indeed, the Committee went further by seizing the opportunity to provide its opinion on the idea of interlinkages between human rights and environmental rights, especially the emerging concept of the right to a health environment.[28] This is an area of continued growth over the past 25 years, further allowing the *Gabčíkovo-Nagymaros* tenets to be expanded into cross-cutting realms featuring environmental issues.

The analysis necessary here merged considerations of health impacts from pollution and environmental damage associated with lignite mining in Greece and neighboring areas.[29] In this regard, the Committee stressed that

> "overcoming pollution is an objective that can only be achieved gradually. Nevertheless, States Party to the ECHR must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal."[30]

24 ECSR, *Marangopoulos Foundation for Human Rights v Greece*, Complaint No. 30/2005 (7 June 2007).
25 Id. para. 1.
26 Id. para. 193.
27 Id. para. 194.
28 Id. paras. 195-196.
29 Id. paras. 197-204.
30 Id. para. 204.

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In conducting its analysis, the Committee noted that there were efforts to ensure some level of public participation, or at the very least information, regarding plans for lignite mining activities, however these measures were insufficient in terms of creating legally meaningful efforts at fulfilling national, EU and international law requirements.[31] As a result, the Committee determined that Greece was in violation of its obligations under the ECHR, as well as other nationally and internationally accepted legal norms.[32]

The *Marangopoulos Foundation* complaint created a legal space in which to expand the parameters of rights and obligations under the ECHR, particularly in terms of the expansion of environmental rights. Concomitantly, this extended the obligations of the state as well as the rights expectations of its citizens. In recognizing this, the Committee was then able to address questions of public participation in environmental impact and similar forms of assessment. That the process used in this instance was insufficient was not as impactful to the understanding of how far *Gabčíkovo-Nagymaros*'s effects can be seen, as was the fact that the Committee assumed the requirement of public participation based on appropriate information. Given the emerging nature of the nexus between health and environmental rights, this is a critical way in which *Gabčíkovo-Nagymaros* has transcended the context of water and associated biological diversity concerns.

3.1.2. Advisory Opinion on the Environment and Human Rights

The IACtHR had the occasion to express its findings on the parameters of the environment and human rights under various human rights treaties adopted under the auspices of the Organization of American States in 2017.[33] These findings were the result of a request for an advisory opinion on the topic by Colombia.[34] Given the IACtHR's jurisdictional parameters under the advisory opinion function, the IACtHR made the decision to expand the scope of the inquiry slightly in order to address "the interrelationship between human rights and the environment, and *(b)* the human rights affected by environmental degradation, including the right to a healthy environment" for context.[35] Thus, from the perspective of the ability to enjoy human rights enshrined at the international and regional levels, the IACtHR stressed that environmental rights and protections are critical.[36] In this way, the IACtHR stressed that it was part of a continuing spectrum of case law from the European and African human rights contexts in which similar connections were also recognized as a matter of law.[37] The IACtHR then went on to discuss the interrelationship between environmental concerns, human rights and sustainable development as

31 Id. paras. 197-216.
32 Id. para. 221.
33 IACtHR, *Advisory Opinion OC-23/17, The Environment and Human Rights* (15 November 2017).
34 Id.
35 Id. para. 46.
36 Id. Section VI(A).
37 Id. para. 50.

established at the international level from the Stockholm Declaration onward to the Sustainable Development Goals.[38]

Through the Advisory Opinion, the IACtHR highlighted that the concept and application of the right to a healthy environment has shared and individual elements, and that the shared elements "constitutes a universal value that is owed both to present and future generations."[39] Overall, the IACtHR stressed that "[e]nvironmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind."[40] Critically, the IACtHR specifically extended the right to a healthy environment to include natural resources as rights holders, such as lakes, rivers and mountains,

> "not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right."[41]

This, in practice, reflects what has been seen as a growing trend within global jurisprudence to officially recognize a variety of natural resources, such as rivers and mountains, as holding rights as a matter of law and designating certain Indigenous or other communities as representatives to speak for these resources in judicial and regulatory settings.

In establishing the parameters of the right to a healthy environment, the Advisory Opinion also emphasized the dichotomy between the substantive elements of the right, which cluster around individually held rights, and the procedural rights, which are inherently considered more systemic.[42] The latter rights include elements of public participation, transparency, and access to information.[43]

Critically, the Advisory Opinion directly addresses the role of obligations regarding transboundary and extraterritorial environmental damage.[44] Indeed, the extension of jurisdiction in this area to include extraterritoriality was noted as supported by existing case law in the Inter-American context.[45] The IACtHR stressed that the core obligation not to cause harm in the territory of another state is an accepted tenet of international law and that this was translatable to the environmental harms context.[46] The Advisory Opinion states that

38 Id. paras. 51-53.
39 Id. para. 59.
40 Id.
41 Id. para. 62.
42 Id. para. 63.
43 Id.
44 Id. Section VI(C).
45 Id. para. 95.
46 Id. paras. 96-98.

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> "The Court considers that states have the obligation to avoid transboundary environmental damage that can affect the human rights of individuals outside their territory. For the purposes of the American Convention, when transboundary damage occurs that effects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the state of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory."[47]

In cases of transboundary damage, the exercise of jurisdiction by a state of origin is based on the understanding that it is the state in whose territory or under whose jurisdiction the activities were carried out that has the effective control over them and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory."[48]

As the IACtHR observed, these obligations apply irrespective of the legality or foreseeability of the damaging state's conduct at issue, provided the state had the opportunity to warn of the threat and/or prevent it where possible.[49] Thus, the Advisory Opinion can be seen as creating a variant on strict liability for transboundary environmental harms in that it applies regardless of fault or liability for the conduct as long as the threat of transboundary harm exists and there is a failure to advise the potentially impacted states.[50]

The Advisory Opinion then delved into issues of incorporating the precautionary principle, prevention and procedural aspects of enforcing environmental protection in general.[51] Regarding prevention, the IACtHR found that it should be the most influential and impactful driver of state practices as they relate to environmental concerns, noting the parameters of extraterritorial jurisdiction for harm responsibility and prevention requirements.[52] As the IACtHR explained,

> "any harm to the environment that may involve a violation of the rights to life and to personal integrity, in accordance with the meaning and scope of those rights as previously defined [...] must be considered significant harm. The existence of significant harm in these terms is something that must be determined in each specific case, based on the particular circumstances."[53]

It further amplified that circumstances are also important in assessing the level of protection involved, with the requirements increasing as the fragility of the environmental resources potentially impacted by state actions increases as well.[54]

47 Id. para. 101.
48 Id. para. 102.
49 Id. para. 103.
50 Id. paras. 102-103.
51 Id. para. 125.
52 Id. Section V(B)(B.1.a).
53 Id. para. 140.
54 Id. para. 142.

To achieve the required elements of prevention at the state level, the IACtHR has recognized the existence of certain obligations, including the duty to regulate, encompassing environmental impact assessment procedure and conduct,[55] the duty to supervise and monitor, including environmental impact assessments initially as well as the oversight of their terms and implementation throughout the process,[56] the duty to require environmental impact assessments as a matter of law and policy,[57] the duty to develop a contingency plan,[58] and the duty to mitigate in the event of environmental damage.[59] These themes relate to the broadly articulated duty of states to cooperate in environmental issues that the IACtHR recognizes for the scope of state interactions overall.[60] Included in the ambit of this concept of duty is the state duty to notify when there are potential environmental issues that will have transboundary impacts,[61] the duty to negotiate with impacted states as well as consult directly with them[62] and to do so in good faith.[63]

Further, the Advisory Opinion stressed the fundamental nature of public participation in environmental decision-making processes.[64] As the Advisory Opinion explains,

> "this Court considers that the state obligation to ensure the participation of persons subject to their jurisdiction in decision-making and policies that could affect the environment, without discrimination and in a fair, significant and transparent manner, is derived from the right to participate in public affairs and, to this end, states must have previously ensured access to the necessary information."[65]

Thus, in the Advisory Opinion the IACtHR furthered the advancement of environmental rights and the duties of states to recognize them as part of their national and international obligations. This view is very much a furtherance of the *Gabčíkovo-Nagymaros* statements regarding the need to incorporate current and future impacts of activities on the environment. The Advisory Opinion also stresses the ways in which human rights and environmental rights have begun to coalesce in core judicial fora, allowing for an understanding of how environmental harms function *in toto* rather than as a compartmentalized viewpoint. It further underscores the role of *Gabčíkovo-Nagymaros* by including sustainable development in the connections between human rights and environmental law.

55 Id. paras. 146-151.
56 Id. paras. 152-155.
57 Id. paras. 156-161.
58 Id. para. 171.
59 Id. paras. 172-173.
60 Id. paras. 181-186.
61 Id. paras. 187-190.
62 Id. para. 197.
63 Id. paras. 201-205.
64 Id. paras. 226-228.
65 Id. para. 231.

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Additionally, the Advisory Opinion's pronouncements regarding transboundary and extraterritorial environmental damage assessment can be seen as reflecting the tenets of *Gabčíkovo-Nagymaros* and extending them to the broader extraterritorial concept. The inclusion of the precautionary principle and its intersection with the constructs of transboundary and extraterritorial environmental harms further advances and echoes in *Gabčíkovo-Nagymaros*. Similar connections exist with the enshrinement of the prevention principle and duties regarding the conduct and transparency of environmental impact assessments.

3.1.3. Duarte Agostinho & Others v Portugal et al.

In 2021, a group of youths from Portugal ended the drought of cases relating to climate issues at the ECtHR level by filing a claim against Portugal and 32 other State governments for damage to the environment due to climate change.[66] The claimants centered the focus of their claims on the continued, and indeed increasingly intense, forest fires occurring in Portugal each summer as a result of heatwaves that have registered historical levels from 2018 onward.[67] The claims are supported by scientific research projecting a dramatic increase in the number of heatwaves in Portugal between the date of filing and 2100, and attributing this increase to projections regarding global temperature rise.[68] The claimants also use scientific research to support assertions that global warming and increases in incidents of heat waves and forest fires have and will continue to have significant impacts on the health of current and future generations.[69] While the claimants are Portuguese and do allege wrong-doing by the Portuguese State, they also allege that each of the named respondent States are responsible for emissions contributing to global warming, climate change and, as a result, the environmental impacts experienced in Portugal.[70]

Much of the fundamental bases of the case are grounded in the Paris Agreement on Climate Change (Paris Agreement), as well as the overall UN Framework Convention on Climate Change (UNFCCC) system through which it was adopted.[71] Critical from the perspective of understanding how the core elements of the *Gabčíkovo-Nagymaros* case can be seen as transcending boundaries and influencing the growth of international law, the Paris Agreement contains requirements for a consistent cycle of reporting by State Parties on efforts taken to meet their obligations under the treaty regime on a 5-year basis, as well as a global stocktake requirement following each of these reporting cycles.[72] The purpose of the global stocktake is to ensure that there is a continually refreshed understanding of how the terms of the Paris Agreement are functioning, as well

66 *See* in general: Id.
67 ECtHR, *Duarte Agostinho & Others v Portugal et al.*, Application form, para. 16.
68 Id. para. 17.
69 Id. paras. 18-23.
70 Id. Annex para. 20.
71 *See* in general UN Framework Convention on Climate Change (1992); Paris Agreement on Climate Change (2015).
72 Article 4 Paris Agreement.

as the gaps and challenges that exist for full implementation.[73] These lessons are intended to inform the development of future international law and policy, as well as the generation of responsive national laws and policies.[74] They are also transparent in the sense that they are open to the public for review.[75]

In framing their arguments before the ECtHR, the claimants stressed the ways in which the named states have been responsible for the overall global issues of emissions and associated climate change through their nations as sovereigns of the territories and actors under their jurisdiction.[76] Specifically, the claimants argued that

> "State contribute to climate change by *inter alia (a)* permitting release of emissions within national territory and offshore areas over which they have jurisdiction; *(b)* permitting export of fossil fuels extracted on their territory; *(c)* permitting import of goods the production of which involves release of emissions into the atmosphere; and *(d)* permitting entities within their jurisdictions to contribute to the release of emissions overseas, *e.g.* through their extraction of fossil fuels overseas or by financing such extraction."[77]

Although this case was filed within the last year and is not yet the subject of a full judicial opinion yet, it is mentioned here because it demonstrates a high-water mark in terms of where the environmental, sustainable development and transboundary elements of the *Gabčíkovo-Nagymaros* case have moved the discussion over the course of the past 25 years.

3.2. National Cases

3.2.1. Urgenda Foundation versus The Netherlands

As previously noted, one of the most influential decisions in the climate justice context was the 2019 decision of the Dutch Supreme Court in the *Urgenda Foundation versus The Netherlands* case.[78] In *Urgenda*, the Supreme Court was asked to decide whether the Netherlands was improperly carrying out its emissions reduction commitments under international and national laws by attempting to alter the reduction targets as had previously been established by the Dutch government.[79] These claims were brought under the terms of the ECHR as well as Dutch national law which, as the Supreme Court emphasized, is required in instances where environmental harms in one state threaten the broader welfare of other states.[80]

73 Id.
74 Id.
75 Id.
76 ECtHR, *Duarte Agostinho & Others v Portugal et al.*, Application form, paras. 9-10.
77 Id. para. 9.
78 *See* in general *Urgenda Foundation v The Netherlands*, No. 19/00135 (20 December 2019).
79 *See* in general Id.
80 Id. para. 5.5.3.

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In *Urgenda*, the Supreme Court recognized the importance of ensuring limitations on the global rate of temperature rise by 2050, stressing that all States have obligations in this regard and that the Netherlands, as a historically high-level source of emissions, has a high burden.[81] Further, the Supreme Court stressed that the climate obligations ascribed to the Netherlands and other States through their membership in the UNFCCC system – particularly the pronouncements of the various Conferences of the Parties – included the overall enshrinement of the 'no harm principle.'[82] The Supreme Court opinioned that this principle of international law could be extended to the climate context and that

> "this means that they can be called upon to make their contribution to reducing greenhouse gas emissions. This approach justifies partial responsibility: each country is responsible for its part and can therefore be called to account in that respect."[83]

By directly recognizing the connections between climate change, transboundary harm and State responsibility, echoes of the *Gabčíkovo-Nagymaros* tenets can be heard throughout the Dutch Supreme Court's ruling in *Urgenda*. These connections are further advanced in the component of the *Urgenda* decision addressing the incorporation of the no harm principle as a matter of state obligation in the environmental context.

3.2.2. Friends of the Irish Environment versus Government of Ireland

In July 2020, the Irish Supreme Court issued the *Friends of the Irish Environment versus Government of Ireland* decision.[84] The case originated in claims regarding the ways in which the Government of Ireland proposed and planned to implement requirements for periodic reporting regarding and updates to statutorily required plans for carrying out climate change related laws.[85] One of the fascinating aspects of the case, which embraces the understanding of environmental law as fundamental and evolving in international law, that was articulated by Judge Weeramantry in the *Gabčíkovo-Nagymaros* separate opinion, is that all sides of the issue and the Court agreed on the existence and importance of climate change.[86] Indeed, the Court devoted the opening section of its opinion to a discussion of the scientific basis for climate change and efforts to create laws and regulations to address it.[87]

This discussion is not, however, limited to climate change impacts in Ireland but rather extends to the global pressures faced as a result of climate degradation, and devoting a great deal of attention to the current and projected results in

81 Id. at paras. 4.5-4.7.
82 Id. para. 5.7.5.
83 Id.
84 *Friends of the Irish Environment v Government of Ireland*, Appeal No. 205/19 (31 July 2020).
85 *See* in general Id.
86 *See* in general Id.
87 Id. Section 3.

developing states.[88] As the Court noted, "[w]hile it is widely acknowledged that urgent action is required in order to address climate change, urgency is assessed differently within the global community."[89] Further, the Court stressed that, in a somewhat novel situation,

> "[i]t can, however, safely be said that the consequences of failing to address climate change are accepted by both sides as being very severe with potential significant risk both to life and health throughout the world but also including Ireland. While the severity of that situation is not disputed, a number of commentaries on the likely impact of global warming were established in evidence before the High Court."[90]

In terms of content requirements and, vitally, fulfillment requirements for the Plan of implementation promulgated by the Government of Ireland, the Court was called upon to decide whether the intent was to create quantifiable benchmarks that necessitated accomplishment or to generate a set of aspirations.[91] While the Court noted that efforts to meet these obligations were partially achieved by adopting EU standards in the appropriate areas, it also stressed that this was not sufficient for full accomplishment without more in light of the needs and obligations of Ireland.[92]

When further examining the terms contained in the Plan, the Court noted that it was ostensibly intended to be implemented over the course of 33 years (from 2017 to 2050) and that there was a requirement for the Plan to be 5 years in duration at the outset but that, contrary to the Government's assertions, this was not the only period during which specific benchmarks had to be made.[93] Instead, the Court asserted that there was a continuing obligation over the full 33 year duration and that this required publication and public participation requirements for the Plan and continuing updates.[94] Specifically, the Court stated

> "it seems [...] that key objectives of the statutory regime are designed to provide both for public participation and for transparency around the statutory objective which is the achievement of the NTO by 2050."[95]

In establishing the compliance of the Plan with the Government's obligations under the Act creating it and statutory interpretation principles, the Court explained "

88 Id. Section 3.3.
89 Id. Section 3.4.
90 Id. Section 3.6.
91 Id. Section 4.
92 Id. Section 4.5-4.6.
93 Id. Section 6.20.
94 Id. Section 6.21.
95 Id. Section 6.22.

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> the Plan falls a long way short of the sort of specificity which the statute requires. I do not consider that the reasonable and interested observer would know, in any sufficient detail, how it really is intended, under current government policy, to achieve the NTO by 2050 on the basis of the information contained in the Plan. Too much is left to further study or investigation. In that context it must, of course, be recognized that matters such as the extent to which new technologies for carbon extraction may be able to play a role is undoubtedly itself uncertain on the basis of current knowledge. However, that is no reason not to give some estimate as to how it is currently intended that such measures will be deployed and what the effect of their deployment is hoped to be. Undoubtedly any such estimates can be highly qualified by the fact that, as the technology and knowledge develops, it may prove to be more or less able to achieve the initial aims attributable to it."[96]

Ultimately, the Court held that the Plan and the intention for Governmental updates to it fell short of the legal requirements in the Act and under existing Irish law.

In *Friends of the Irish Environment*, the recognition of environmental law's importance, as was articulated so clearly in the main *Gabčíkovo-Nagymaros* decision and in Judge Weeramantry's separate opinion, is notably accepted without hesitation as a matter of science and law. The case is also an important vehicle to understanding how the *Gabčíkovo-Nagymaros* tenets regarding responsibility of states for transboundary harms extend to the context of climate change responsibility and the contributions of states to global carbon emissions as well as reductions in emissions. Additionally, *Friends of the Irish Environment* demonstrates the ongoing requirement for the evaluation of the impacts of state actions, as enshrined in *Gabčíkovo-Nagymaros*, albeit in the context of a climate-related emissions reduction plan, rather than the implementation of damming proposals.

3.2.3. Lamu et al. versus Kenya

In the 2016 *Lamu et al. versus Kenya* case, the Kenyan National Environmental Tribunal addressed issues raised in connection with the national Kenya Vision 2030 initiative and its use of several coal fired power plants as part of methods to accomplish increased energy production.[97] Although an Environmental and Social Impact Assessment (ESIA) had been conducted as part of the requisite elements of national law, there was a challenge to the sufficiency of the ESIA.[98] The issues raised, and the Tribunal's certification of them on appeal, evinced a broad understanding of the procedural and substantive requirements for valid ESIA proceedings.[99] From the outset, the Tribunal established that

96 Id. Section 6.46.
97 *See* in general *Lamu et al. v Kenya*, Tribunal Appeal No. NET 196 of 2016 (2016).
98 *See* in general Id.
99 *See* in general Id.

> "the purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests."[100]

In crafting the parameters of required public participation, the Tribunal began with the Rio Declaration and then moved outward from that point to international law and national legal and regulatory provisions.[101]

When applying these rules to the case at hand, the Tribunal explained the extent and purpose of the ESIA process as something that balances the interests of humanity with the interests of development and recognizes the inherent concerns of private individuals in this context.[102] Specifically, it provided that

> "Human beings are justifiably concerned about the environmental impacts of projects to their location and especially where those projects are novel in nature. These environmental impacts are not restricted to the ecological effects alone but extend to other wider areas that affect their lives like the health impacts to them and their families, to their livelihood and economic opportunities, socio-cultural heritage and traditions. Being concerned about all these environmental effects of a project the people most affected by a project must therefore have a say on each and every aspect of the project and its impact. In carrying out a consultative process, it is not a must that every person must support the project nor can a proponent address every unreasonable demand and suggestion, but it is vital that even the most feeble of voices be heard and views considered."[103]

In light of this understanding and a noted lack of transparency or provision of information to the public sufficient for it to generate informed comments during the requisite portion of the ESIA procedure, the Tribunal found that the ESIA was indeed improperly executed.[104] The Tribunal clearly explained that

> "it is important to point out that is imperative that those in administration be keen when faced with objections to projects, where objectors hold the view that the project may compromise the environment. This Tribunal cannot permit authorities to deal so nonchalantly with such objections. Such objections need to be taken seriously and need to be considered. Public

100 Id. para. 16.
101 Id. paras. 23-26.
102 Id. para. 50.
103 Id.
104 Id. paras. 69, and 75.

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> participation especially when it comes to EIAs are extremely critical and cannot be treated as a formality or inconvenience. It is at the very core of any EIA exercise. The EIA public participation process cannot be a mechanical exercise but a vibrant and dynamic activity where affected persons are engaged in a fair and reasonable manner."[105]

Further, the Tribunal addressed the adequacy of the mitigation efforts set out in the ESIA for the coal fired power plant operations and found them in part to be severely lacking.[106] It also found that efforts to apply the precautionary principle as part of the ESIA process were improperly implemented due to a lack of clarity.[107]

The *Lamu et al. versus Kenya* case demonstrates the power of a specialized court to incorporate the terms of the *Gabčíkovo-Nagymaros* decision in highly regulated contexts to ensure that the use of environmental impact assessments is enshrined in law and, at the practical level, is fully and meaningfully carried out.

4. Transcending Themes in Jurisprudence

The above review of the ways in which tenets from the *Gabčíkovo-Nagymaros* decision demonstrates the variety in geography and subject application of core elements such as recognition of the need to protect environmental concerns as a legitimate state interest and the requirement that states inform other states of potential transboundary impacts. These findings highlight the critical nature of the *Gabčíkovo-Nagymaros* decision across borders and within jurisdiction. Additionally, these cases highlight the ways in which principles of environmental impact assessment necessity, no harm, precaution, prevention and sustainable development have been developed from the *Gabčíkovo-Nagymaros* decision onward and are now foundational elements of international, European and national laws. Beyond this, however, these cases coalesce around several critical trends regarding the ways in which the fundamental legal principles of the *Gabčíkovo-Nagymaros* decision have been able to transcend time and place through judicial expansion and refinement.

Perhaps the most significant area of expansion is in the interrelationship between environmental rights, and concomitant requirements for environmental protections in law and practice, and other critical rights that have been recognized at the international, regional and national law levels. When the *Gabčíkovo-Nagymaros* decision was issued, the legal position of environmental rights and protections was still very much emerging, rendering the principles and tenets espoused all the more critical. After 25 years, the idea of environmental rights and the need for associated environmental protections being elements of state responsibility is enshrined in international treaty regimes as well as decisions of multiple courts at all levels. Further, these courts, as discussed above,

105 Id. para. 72.
106 Id. paras. 120-121.
107 Id. paras. 137-139.

have recognized the interrelated – if not in fact interdependent – ties between environmental rights and human rights, as well as health-related rights. The decisions also make it clear that regional and national courts are increasingly recognizing environmental rights and the principle of sustainable development as inextricably linked as a matter of law.

The connections between environmental rights and human rights have also become clearly articulated in the evolutions of understanding transboundary impacts and state legal obligations. A vital aspect of the *Gabčíkovo-Nagymaros* decision, it will be recalled, was the obligation of a state regarding actual or potential transboundary harm generally, and transboundary harm in the environmental context in particular. What has emerged over the course of 25 years is the understanding that, as a matter of science and law, environmental harms and the threat of environmental damage extends beyond the transboundary context and is extraterritorial in reach. This is a critical distinction because it then allows the various courts to address broader questions of emissions reductions and impacts in the extraterritorial context, recognizing the global reach of pollution, rather than being limited to the transboundary context of environmental impacts in shared water or other resources. Such a shift in legal understandings of science as well as the contours of the law itself has formed the bedrock foundation upon which many climate justice cases have been, and continue to be brought in international, regional and national court systems. Regardless of the future success of these cases, this shift must be recognized as tied directly to the *Gabčíkovo-Nagymaros* decision and the legacy it has left.

Additionally, the extension of transboundary harms and impacts to extraterritorial harms and impacts has resulted in an increased willingness of courts to recognize that human rights issues are linked to environmental issues stemming from the extraterritoriality of environmental actions. As noted above, this shift can be seen in the changed understanding of fault and liability in instances of transboundary or extraterritorial harms. Indeed, as the scope of potential state obligations has expanded from transboundary to extraterritorial constructions, the elements necessary to establish liability can be argued to have decreased to nearly strict liability in some instances.

In terms of the no harm principle, the quarter century since the *Gabčíkovo-Nagymaros* decision has seen the entrenchment of this concept as a core element of international law obligations. Similarly, the principle of prevention has become a fundamental element in international law as well as regional and national laws across multiple jurisdictions. Overall, this correlates to the expansion of concepts of legal protections for natural resources and those who guard them as a matter of regional and national law.

Finally, a significant amount of growth has been seen over the past 25 years of jurisprudence regarding the role of environmental impact assessments and related concepts of public participation, public access to information and transparency in the governmental decision-making process. Whereas the principle of environmental impact assessment was identified in Judge Weeramantry's separate opinion as a guiding element of state decision-making, this was not included by the main opinion and remained very much persuasive

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authority. Courts at all levels have taken up this mantle, however, and some, such as the IACtHR, recognize this as a critical element of procedural law. While procedural law classification might lack some of the fundamental import of substantive rights, the designation of environmental impact assessments and associated elements as procedural elements vests them with an indelible place in the conduct of state decision-making. It also provides current and future generations a legal avenue through which to challenge decisions of the state in a concrete and measurable fashion. When used in cases that seek to expand the construct of environmental rights and state responsibility, the availability of a solid claim based on these types of procedural rights can be essential to chances of affecting change as a matter of law.

5. Conclusion

After a quarter century, the *Gabčíkovo-Nagymaros* decision has proven to be one of the most durable of ICJ decisions, transcending the parameters of its binding application as a matter of law to form the bedrock upon which the expansion of environmental rights and environmental law has occurred. While the issues at the heart of the case might still be the source of contention between Hungary and Slovakia after more than two decades, the precedent from *Gabčíkovo-Nagymaros* is far more deeply entrenched in the evolution of the way law views environmental protection, transboundary harms, and multiple principles.

While it is impossible to predict the future, the rapid increase in climate justice cases filed in jurisdictions across the world combined with the significant willingness of many courts and tribunals to hear and rule on these cases, indicates that environmental rights are becoming entrenched through case law even when the legislature fails to act. Indeed, the *Urgenda* case has seemingly served as a catalyst for many similar cases and has been cited by courts rendering decisions. Although *Urgenda* and the cases discussed in this article represent significant steps in entrenching environmental law and rights throughout international, regional and national law, it must be remembered that these cases would not be possible without the groundwork of the *Gabčíkovo-Nagymaros* decision. As cases continue to evolve along with the understanding of the contours for environmental law and related questions, the legacy and foresight of the *Gabčíkovo-Nagymaros* decision will continued to be reaffirmed for decades to come.