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The *Gabčíkovo-Nagymaros* Judgment and Its Contribution to the Development of International Law

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CHAPTER 1

The *Gabčíkovo-Nagymaros* Case: a Personal Recollection

*Alain Pellet**

I am embarrassed and you will be disappointed! For at least two reasons.[1]

First, I usually do not speak publicly about the cases in which I have been involved. Since I have been deeply involved in the case concerning the *Gabčíkovo-Nagymaros Project* (I will use the shortened name '*Gabčíkovo*') as counsel, I should not be here if I were to stick to my principles. In effect, I consider that, generally speaking, counsel are not scientifically credible when they comment on the judgments given in their own cases: whether they criticise or praise the judgment, they are at risk of inhabiting their past role and appreciating the decision of the judges in view of what they have pleaded as the representatives of one of the parties. It is only following the kind insistence of Professors Serena Forlati and Makane Mbengue (and also because I have always enjoyed very much being in Ferrara!) that I have accepted to say a few words of introduction to this very promising colloquium. However, I will abstain from taking subjective positions on the Judgment itself. And this joins the second reason justifying your disappointment.

Second, the programme of this Conference very completely covers all the aspects of this complex case, which resulted in what is certainly one of the most interesting judgments ever rendered by the International Court of Justice (ICJ) since, as aptly noted by the organisers, it covers three large fields on which it gives many useful clarifications: treaty law, sustainable development and State responsibility. It is also worth noting that this case is unique in the sense that a responsibility issue was handed over from a predecessor State to a successor State. Moreover, the only aspects on which I could give some information – that is, the litigation strategy – overlap with chapters by Jean

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1 The present remarks essentially reproduce my intervention at the opening of the Ferrara Conference on 'The *Gabčíkovo-Nagymaros* Judgment' (6–7 December 2017). I would like to thank very much Péter Kovacs, Vaclav Mikulka and Peter Tomka for reviewing the manuscript of this contribution, which was greatly enriched by their comments and memories, compared to mine, of our participation in the case of the *Gabčíkovo-Nagymaros Project*. I also thank Serigne-Mbaye Diop for his precious assistance in preparing this brief paper.

d'Aspremont, who will comment on 'The judicial behaviour of the Court' with a rather mysterious title, and Malgosia Fitzmaurice who will reveal 'The background of the case'. I wonder what is left to me? And therefore, I am given no choice but to tread a bit on everybody's contributions and to make some very brief comments on virtually all of these various topics or to confine myself to a more anecdotal presentation based on my knowledge of the case observed from the Slovak team. This is the bias I have taken: I will try to introduce you to the backstage of the Slovak legal team (and in part, from the Hungarian side as well – I will revert to this oddness in a moment).

Procedurally speaking, the *Gabčíkovo* case is a very simple one. The case was introduced in conformity with the provisions of Article 6 of a special agreement between the two States of 7 April 1993 (which entered into force on 28 June of that same year), and was notified to the Registrar of the ICJ by a joint letter of the parties. This resulted four years later in the Judgment of 25 September 1997 – not a speed record for a case without procedural difficulties. But it is to be noted that the special agreement had requested the Court to order *three* rounds of simultaneous written pleadings. This is not incompatible with Article 46 of the Rules of the Court, which envisages in principle only two rounds of pleadings but gives priority to the provisions of the special agreement, and which expressly envisages that 'if the parties have not subsequently agreed on the number and order of pleadings [the parties] shall each file the Memorial and Counter-Memorial, within the same time limits'. Notably, Practice Direction I adopted in October 2001 provides that '[t]he Court wishes to discourage the practice of simultaneous deposit of pleadings in cases brought by special agreement'. Although this is hardly compatible with Article 46 of the Rules, it is sensible. Generally speaking, I disapprove of Practice Directions which are a hypocritical way for the Court to change the Rules without frankly saying so; however, in this precise case I do think that the Rules are ill-conceived and that the parties should be encouraged to agree on successive presentations, without prejudging that one of them is the Applicant and the other the Respondent. In any case, I very frankly believe that both positions have their advantages and inconveniences which, in fact, are well-balanced. In any case, simultaneous proceedings gain relatively little time when three rounds are provided for.

However, in the *Gabčíkovo* case, three rounds were all the more useful since Hungary had submitted its technical and scientific evidence called 'Scientific Evaluation of the Gabčíkovo-Nagymaros Barrage System and Variant C' (covering more than 250 pages) only with its Counter-Memorial.[2] As a result, the

2 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Counter-Memorial of the Republic of

written phase took slightly less than two years to be completed (between 2 July 1993 and 20 June 1995). The Court however was not quick to organize hearings, partly due to the fact that it was contemporaneously dealing with the *Nuclear Weapons* Advisory Opinions and jurisdiction in the *Genocide* and *Oil Platforms* cases. The *Gabčíkovo-Nagymaros* Project had to wait almost 20 months for a hearing, which commenced on 3 March 1997.

This said, I think that I can make some disclosures concerning the preparation of the special agreement, and first one concerning myself. I might be the only counsel who can confess with a straight face to having worked successively for each party in the same single case. It happened that sometime during the year 1992, I had contacts with the Hungarian Embassy – especially with my now very good friend Péter Kovacs, who is currently a Judge at the International Criminal Court but who was at the time, as far as I can remember, the First Secretary in charge of legal affairs at the Hungarian Embassy in Paris. I was asked for some preliminary advice on the possibility, absent a special agreement, to unilaterally sue Czechoslovakia as it then was[3] before the ICJ. From my point of view, the answer was quite uncertain.

However, the question became moot with the signature of the 1993 Special Agreement between the Republic of Hungary and the Slovak Republic. But in the meantime, I had been fired from the Hungarian legal team, or at least so I thought after a telephone call from Péter Kovacs (who, slightly embarrassed, had told me that unfortunately I could not be retained anymore by Hungary). No explanation, but I guess that they had realised that the case was partly, if not essentially (at least from Hungary's perspective) centred on environmental law which, I must admit, was not my cup of tea. They considered that I was dispensable enough that they had also offered retainer to my good friend and colleague Pierre-Marie Dupuy who, indeed, was more oriented toward environmental law. Budgetary considerations were probably not unrelated to the decision. However, within the next 24 hours, and apparently by pure coincidence, I received a phone call from Rosalyn Higgins who (together with Derek Bowett) was acting as counsel for Slovakia and asking me whether I would be available to plead for this country. Admittedly, this was rather embarrassing. I rushed to my phone, called Péter Kovacs and asked him whether I could accept a retainer from Slovakia while I had previously worked for Hungary (even though I had not been paid for my small work). I will always remember his answer: 'We are so embarrassed with what happened that I am sure there will

Barrage System and Variant C, 256 pages, <https://www.icj-cij.org/files/case-related/92/10951.pdf> accessed 22 October 2019.

be no objection on our side'. There was none – except that, some days later, Péter came back to me explaining that there had been a regrettable misunderstanding within the Hungarian team and that I would be welcomed back if I were still available. I was not. However, some years later, I received a doctorate *honoris causa* from the Hungarian University of Miskolc...

This change of camp was an occasion to meet another Peter, Peter Tomka, the Agent of Slovakia. He is well-known to all of you and needs no introduction but, at the time, he was the very young Agent for the even younger State of Slovakia. However, in spite of the (then) recent occurrence of the split from the Czech Republic, there is no exaggeration in saying that the real team leader was Václav Mikulka, officially listed as 'co-agent, counsel and advocate'. This was an interesting duo, both 'psychologically' and 'historically' speaking if I may say so.

Psychologically, because they were – and have remained – the best friends in the world. I already knew Václav Mikulka since he was my much-valued and liked neighbour in the International Law Commission (ILC), of which I had been a member since 1990 and in which he was elected in 1992. Before the split of Czechoslovakia, Václav had been the bright, nervous, anxious and unquiet head of the Office of legal affairs in the Czechoslovak Ministry of Foreign Affairs while Peter Tomka was the Legal Advisor of the Czechoslovak Permanent Mission to the United Nations. But after the decommunisation process and the split of Czechoslovakia, Václav, who is Czech (while Peter is Slovak), left the Ministry. Very fortunately, this did not prevent him from being appointed as Co-Agent by Slovakia, which had become the successor State of Czechoslovakia in regard with the Gabčíkovo/Nagymaros project. The sharing of the tasks between the two men (who have both become close friends of mine) was a bit mysterious but worked well. Mikulka, being the ever-anxious, not to say tormented, intellectual leader of the team, and Tomka, as the indisputable lead for all administrative matters with an incredibly precise knowledge of everything in international law, including books, authors and case-law. He knew (and still knows) everything, together with being a very talented organiser.

Now, both had at times to show some leadership since the team members had quite strong personalities and, although they got along very well, the discussions between them (especially between Rosalyn Higgins and myself) were sometimes a little 'friendly heated'. The team was rather prestigious. So was the opposite side with James Crawford as team leader, Pierre-Marie Dupuy, Alexandre-Charles Kiss (a Franco-Hungarian specialist of environmental law), Philippe Sands, and several Hungarian professors. Their Agent was the able head of the international law department of the Ministry of foreign affairs in Budapest, Ambassador György Szénási. The composition of their team bears

witness to the importance Hungary gave to the environmental aspects of the case.

This was less so on our side and I must say, anticipating the outcome, that I think we were right in considering that it was first of all a treaty law case. Indeed, our team included a rather militant Professor of hydrology at the University of Bratislava, Igor Mucha, and after some time we had the benefit of having with us Stephen McCaffrey, a Professor at McGeorge School of Law of the University of the Pacific in Sacramento, who had briefly been my colleague at the ILC (where he sat from 1982 to 1991 and which he had chaired with distinction, when he was very young, during the 1987 session). However, while he was very knowledgeable in the law of the environment, he was more a specialist of river law. And neither our wonderful lead counsel, Derek Bowett, nor Rosalyn Higgins, nor Sir Arthur Watts (who replaced Judge Higgins on the team following her election to the ICJ in 1995, and who, from my point of view, was probably the best pleader before the ICJ I ever met), nor myself, were specialised in environmental law.

Another specificity of our Team was that Slovakia had retained a British law firm, Frere Cholmeley (which ultimately merged with Eversheds), which served to considerably increase the expenses for the case. In any event, this situation resulted in the 'creation' of a new star in the invisible bar: Sam Wordsworth. He was a very junior member in the team as an assistant to a senior partner in Frere Cholmeley, but he had proved during all the proceedings his remarkable skills in international law and a great efficiency, and both Derek Bowett and I insisted that he should plead orally instead of his boss (who was a very capable lawyer but not a very talented pleader). My confidence in Sam Wordsworth was so high that I delegated to him the task to shorten my speeches – with the exception of the jokes. He proved an outstanding speaker and he subsequently amply confirmed his talents.

The main procedural particularity of the case has been the four-day site visit from 1 to 4 April 1997. This was a grand *première* for the ICJ, only preceded by a site visit by the PCIJ in 1937 in the case concerning the *Diversion of Water from the Meuse*. Although both parties eventually agreed to invite the Court to do so, the initiative came from Slovakia, whose Agent made the proposal as early as June 1995, going so far as to propose to unilaterally fund the Court's visit. In our mind the main advantage of such a visit would be to convince the Court that the famous 'Variant C' could not be called into question in principle (nor the resulting installations destroyed). The Variant C has been described by the Court as an alternative solution chosen by Czechoslovakia when confronted with the abandonment by Hungary of the works incumbent upon it and consisting in 'a unilateral diversion of the Danube [by Czechoslovakia] on its

territory'[4] (consisting of reducing the reservoir by fencing the Danube on Slovak territory, a few kilometres upstream of the fence provided for in the 1977 Treaty, where the Danube forms the border), thus depriving Hungary of the possibility to control the flow of the river.

Without much enthusiasm, the Agent of Hungary indicated, twelve days later, that 'his Government would be pleased to co-operate in organizing it'.[5] Therefore, after exchanges of views with the President of the Court, Mohammed Bedjaoui, 'with a view to proposing to the International Court of Justice the arrangements for the visit *in situ* in this case',[6]

> [b]y a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ*; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement.[7]

The visit took place from 1 to 4 April 1997 in the middle of the hearings, between the first and the second round of oral arguments.

For Slovakia the dates of this visit were of primary importance. We had two main worries: first, that the visit take place before the hearings, or at least in time for the Judges to take it into consideration at the time of the drafting of their notes, and second, that it be either during spring or autumn but not during winter due to meteorological considerations (namely, the risk of poor visibility due to fog and dangerous driving conditions for the Court's bus, and in order not to create a bad and grey impression of the canal on the second hand). We only partially succeeded in both respects. First, the Court took its decision very late (the Court's Order was adopted on 5 February 1997, which probably shows that even though the Order was adopted unanimously, the invitation by the parties was seen as rather controversial by the Judges) and only after having received a letter dated 15 November 1996 from the Slovak Prime Minister, Mr Mečiar, at which point the dates of the hearings had already been fixed for 17 February 1997. The start of the hearings was subsequently delayed by two

4 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para 23.
5 Ibid para 10.
6 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Order of 5 February 1997, I.C.J. Reports 1997*, 3.
7 *Gabčíkovo-Nagymaros* (Judgment) (n 4) para 10.

weeks following health problems for Derek Bowett, which led Slovakia to hire Sir Arthur Watts in order to reinforce the pleading team, and it was decided that the visit would take place between the two rounds of the oral pleadings. The opening of the hearings took place on 3 March 1997; Slovakia's first round did not follow immediately, but rather after a two-week break, on 24 March 1997.

The modalities of the visit, which had been carefully discussed by the parties, insured complete equality between them, including financially since the expenses were entirely covered by them on a 50–50 basis. The Judges seemed to rather enjoy the tour, which was limited to technical visits and technical explanations, although two counsel from each side were present.

Now, was it useful? It is difficult to assess this; however, from Slovakia's view at least, the Court reached the decision which we were expecting – in particular when it notes at paragraph 136 of the Judgment:

> it would be an administration of the law altogether out of touch with reality if the Court were to order [the obligations of performance of the treaty] to be fully reinstated and the works at Čunovo [the place of the bifurcation of the waters of the Danube] to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

This is precisely the impression Slovakia was hoping to create with its proposal of an on-site visit. Now, as aptly noted by a commentator, '[c]ertes, la Cour aurait peut-être eu exactement le même raisonnement si elle avait dû juger "sur pièces". Mais on peut penser que la vision, en grandeur nature, du site en cause l'aura au minimum facilité'.[8] And since I participated in the visit, I can assure you that this was indeed my own impression, even though it probably suffices to have a look at the photo on the programme of this conference to clearly understand why demolishing these works would have been inappropriate.

I have already spoken too long and other speakers will comment on the contribution of the Judgment to several fields of international law and perhaps its limited and debatable aspects more skilfully and scientifically than I could.

Let me only make three brief additional remarks.

First, in contrast with the firmly established previous usage, several Judges (Vice-President Weeramantry, the German Judge Fleischhauer, the Malgasi

8 J-M Thouvenin, 'La descente de la Cour sur les lieux dans l'affaire relative au projet Gabčíkovo-Nagymaros' (1997) 43 AFDI 333, 340.

Judge Ranjeva and the Russian Judge Vereschetin) asked questions at the end of the pleadings, notably on rather technical (and non-legal) aspects. This was the start of a (limited) new trend which deserves a mention.

Second, I draw your attention to the subtle division made by the Court in the *dispositif* of its Judgment between the issues respectively dealt with under Sections (1) B and (1) C:

> B. By nine votes to six,
>
> *Finds* that Czechoslovakia was entitled to proceed, in November 1991 to the 'provisional solution' as described in the terms of the Special Agreement;
>
> [...]
>
> C. By ten votes to five,
>
> *Finds* that Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution'.[9]

I understand from some (*ex post*) indiscretions from the Bench that this splitting of the issues relating to proceeding to Variant C on the one hand and putting it into operation on the other hand was the result of Judge *ad hoc* Skubiszewski's insistence. It just goes to show that judges *ad hoc* – at least some of them – are less useless, or 'innocuous' than it is sometimes said. I have also been informed that, interestingly enough, the very first version of questions for inclusion in the special agreement proposed by Czechoslovakia, during a meeting held in Prague in fall 1992, envisaged two questions on Variant C: one concerning the construction of variant C, the other concerning putting Variant C into operation. However, following the request of the Hungarian delegation to shorten the list of questions, the two original questions on Variant C were merged into one single question (still, it is true, spelling out both elements of construction and operation).[10]

9 *Gabčíkovo-Nagymaros* (Judgment) (n 4) para 155.

10 Hungary's main focus during the *travaux préparatoires* was on shortening the list of questions concerning Gabčíkovo and Nagymaros, where Czechoslovakia was originally proposing four questions – namely, whether Hungary was entitled to (a) suspend the works on Nagymaros, (b) abandon these works, (c) suspend the works on Gabčíkovo, (d) abandon these works. The Hungarian side believed that it was too detailed. Accordingly, these questions were redrafted in the manner reflected in the special agreement. So was the question on Variant C. I want to make it clear, however, that Judge Skubiszewski could not have knowledge of this negotiating history: I have been assured that no Slovak representative ever spoke to him – before or after the Judgment – and having known rather well President Skubiszewski, I have no doubt that he would have repelled any attempt to approach him.

A third and last (but not least) remark: on the Court's website, one will notice that the *Gabčíkovo-Nagymaros Project* is still listed as the first and most ancient 'pending case'. Apparently, it is so for technical reasons in spite of the decision of the Court to place on record the discontinuance of the procedure initiated by Slovakia's request of 1998 for an additional judgment.[11] Besides the fact that I am not convinced by the existence of technical reasons justifying the maintenance of the *Gabčíkovo-Nagymaros* case on the General List, I consider that this maintenance is debatable not to say ridiculous, and I maintain that the Court should use its inherent power to decide that it had fulfilled its function and to authoritatively remove it from the list – even though I do not overlook the 'interest' it has in seeming to have a very long and heavy list of pending cases....

This being said, in reality, *Gabčíkovo-Nagymaros* should not be considered as a pending case: there is no real dispute between the parties as to the project. It works well, including under Variant C, and the environmental catastrophe predicted by Hungary has not taken place, while the flow of the Danube has probably been better regulated. And even if I will probably shock some (or many) of you, I find here not only the confirmation of the wisdom and the soundness of the 1997 Judgment, but also a confirmation of my fixed opinion according to which, in environmental matters, activists are not always right (even though the opposite side – *à la Trump* – is certainly not right at all!). I think that the Judges should be careful not to believe too lightly the siren calls in these matters in order to reach their decision and for the further sake of looking 'progressive'. In the *Gabčíkovo-Nagymaros* case, I have doubts that the 'progressive' side was the one which vociferously proclaimed itself as the champion of the defence of the environment....

11 *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), ICJ Press release 98/28, 3 September 1998 <https://www.icj-cij.org/files/case-related/92/092-19980903-PRE-01-00-EN.pdf> accessed 22 October 2019.