The Gabčíkovo-Nagymaros Project and the Law of State Responsibility

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Abstract: In the *Gabčíkovo-Nagymaros* proceedings, the parties, viz. Hungary and Slovakia, defended their conduct, amongst others, with arguments derived from the relationship between the law of treaties and the law of state responsibility, and from the law of state responsibility itself. In its judgment, the International Court of Justice disentangled the mixture of arguments derived from the law of treaties and the law of state responsibility advanced by Hungary, and drew a clear line between these two branches of international law. Second, it rejected several circumstances that were advanced by the parties to preclude the wrongfulness of their conduct. On both these accounts, the author opines that the declaratory *dicta* of the Court have contributed to the development of the law of state responsibility. Third, the Court decided on the legal consequences of the intersecting internationally wrongful acts committed by Hungary and Slovakia. According to the author, the Court erred in its reasoning on this account by confusing the award of cessation of the internationally wrongful acts with the award of reparation for these acts.

1. INTRODUCTION

On 25 September 1997, the International Court of Justice (ICJ) rendered its judgment in the case concerning The Gabčíkovo Nagymaros Project (Hungary/Slovakia).[1] In this case, the Court considered the legal intricacies of a dispute between Hungary and Slovakia with respect to the operation of a barrage system in the Danube. Arrangements for this project have been laid down in a treaty between the former Czechoslovakia and Hungary, viz. the 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks.[2] The project involved, *inter alia*, the construction of a canal, a barrage, and hydro-electric power stations as well as the creation of a reservoir. As a result of the project, part of Hungarian ter-

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1. *See* The Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, not yet published. For an elaborate statement of facts, *see* J.G. Lammers, *The Gabčíkovo-Nagymaros case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment*, 11 LJIL 287, at 290-297 (1998).
2. *See* 32 ILM 1247 (1993).

11 Leiden Journal of International Law 609-623 (1998)

ritory would be inundated and the course of the river diverted. The proclaimed aim of the mutually beneficial project was to forestall flooding, to facilitate navigation, and to increase energy supply. However, in addition to these beneficial effects and anticipated adverse environmental effects, the project was later found to have unforeseen adverse significant environmental effects as well. Since these adverse environmental effects could allegedly not be overcome by a technical correction of the project, Hungary eventually took the position that the project and, hence, the 1977 Treaty, should be abandoned. It decided to stop work on the project on 13 May 1989, then pushed for renegotiation of the 1977 Treaty in vain, and subsequently unilaterally terminated it as of 25 May 1992. Faced with the Hungarian refusal to continue its participation in the project, Slovakia decided to unilaterally modify the project and to proceed with it accordingly.

The case was brought before the Court on the basis of a compromise between Hungary and Slovakia of 7 April 1993.[3] The Court was asked to decide:

1. whether Hungary was entitled to suspend and subsequently abandon the project;
2. whether Slovakia was entitled to proceed with the project as modified; and
3. what the legal effects were of the notification of the termination of the 1977 Treaty by Hungary.

In its judgment, the Court addresses a variety of legal issues, including salient issues of international environmental law, the law of the non-navigational uses of international watercourses, the law of state succession, the law of treaties, and the law of state responsibility or liability *ex delicto*.[4] This article will focus on the Court's *dicta* on the law of state responsibility.

2. The Relationship Between the Law of Treaties and the Law of State Responsibility

The relationship between the law of treaties and the law of state responsibility has always been controversial. Lengthy arguments have been devoted in doctrine and also by the parties in the present case to the relationship be-

3. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 2.
4. For an analysis of issues of international environmental law and the law of non-navigational uses of international watercourses, *see* Lammers, *supra* note 1; the law of treaties, *see* M. Fitzmaurice, *The* Gabčíkovo-Nagymaros *case: The Law of Treaties*, 11 LJIL 321 (1998); and the law of state succession, *see* J. Klabbers, *Cat on a Hot Tin Roof: The World Court, State Succession, and the* Gabčíkovo-Nagymaros *Case*, 11 LJIL 345 (1998).

tween these two branches of international law.[5] It has been suggested that the 1969 Vienna Convention on the Law of Treaties (Vienna Convention)[6] contains alternative circumstances precluding the wrongfulness of an internationally wrongful act (Articles 61 and 62) and/or regulates the legal consequences of an internationally wrongful act (Article 60). The absence of a reference to these articles or their contents in the 1996 ILC Draft Articles on State Responsibility, however, is an indication that they serve a different purpose and cannot be transposed to the law of state responsibility, at least not automatically.[7]

The objective of Article 60 of the Vienna Convention is to regulate the *long-term* future treaty relationship between the parties to a treaty following a material breach of the treaty by one of its parties, and not the legal consequences of an internationally wrongful act. The right of a state to suspend or terminate a treaty in response to a material breach of that treaty by another state is clearly distinct from the right to resort to countermeasures.[8] The latter right only enables a state to secure cessation and/or reparation for an internationally wrongful act and does not provide a state with a legal instrument to regulate a long-term treaty relationship.[9] For this reason, it cannot be assumed too lightly that the *termination* of a treaty can be justified by the right to resort to countermeasures, if at all. The material breach of a treaty may not even have amounted to an internationally wrongful act, as the wrongfulness of such an act may have been precluded by one of the circumstances precluding wrongfulness recognized in the law of state responsibility. Yet, in such a case, a state has the right to suspend or terminate a treaty

5. *See, e.g.*, Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Counter-Memorial of the Republic of Hungary, Vol. I, 201-207 (1994); and Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Reply submitted by the Slovak Republic 85-100 (1995). *See also* Rainbow Warrior II (New Zealand *v.* France), Arbitral Award, 82 ILR 499, at 548-551, paras. 73-75 (1990). For doctrine, *see* G. Arangio-Ruiz, *Third Report on State Responsibility*, YILC 1991, Vol. II (Part One), at 13-14, paras. 33-35, and 22-25, paras. 69-83; D. Bowett, *Treaties and State Responsibility*, *in* Le droit international au service de la paix, de la justice et du développement, Mélanges M. Virally 137 (1991); W. Riphagen, *Fourth Report on the Content, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)*, YILC 1983, Vol. II (Part One), at 17, para. 93, and remark made in the ILC, YILC 1983, Vol. I, at 86, para. 5, L-A. Sicilianos, *The Relationship Between Reprisals and Denunciation or Suspension of a Treaty*, 4 EJIL 341 (1993); and P. Šturma, *Law of Treaties Reflected in State Responsibility Rules*, 19 Thesaurus Acroasium 563 (1992).
6. *See* 1155 UNTS 331.
7. *See* the exhaustive list of circumstances precluding wrongfulness in Draft Arts. 29-34 of the 1996 ILC Draft Articles on State Responsibility, UN Doc. A/CN.4/L.533 and Add.1 (1996).
8. *See also* W. Riphagen, *Fourth Report on the Content, Forms and Degrees of State Responsibility (Part 2 of the Draft Articles)*, YILC 1983, Vol. II (Part One), at 17, para. 92.
9. *See* Draft Art. 47 of the 1996 ILC Draft Articles on State Responsibility, *supra* note 7; *see also* R. Lefeber, Transboundary Environmental Interference and the Origin of State Liability 143 (1996).

in response to a material breach by another state, but surely not the right to resort to countermeasures.

The objective of Articles 61 and 62 of the Vienna Convention on supervening impossibility of performance and fundamental change of circumstances respectively is likewise to regulate the long-term *future* treaty relationship between the parties to a treaty, and not to provide a state with a defence to preclude the wrongfulness of a *past* failure to perform that treaty. In this respect, it is interesting to note that the International Law Commission (ILC) has considered that situations in which a supervening impossibility of performance is *temporary*

> might be regarded simply as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance of the treaty. But it considered that, when there is a continuing impossibility of performing recurring obligations of a treaty, it is desirable to recognize, *as part of the law of treaties*, that the operation of a treaty may be suspended temporarily.[10]

Thus, the ILC has clearly placed a plea of supervening impossibility of performance in conformity with Article 61 of the Vienna Convention outside the ambit of the law of state responsibility. However, a supervening impossibility of performance can only be invoked if the impossibility results from "the permanent disappearance or destruction of an object indispensable for the execution of the treaty" (Article 61(1)). Hence, the restrictive text of Article 61 reveals that not all cases of *force majeure* and fortuitous event can be invoked to suspend or terminate a treaty on the basis of a supervening impossibility of performance. A Mexican proposal to this effect has been rejected at the 1969 UN Conference on the Law of Treaties.[11] In other cases of *force majeure* and fortuitous event, a state must have recourse to the law of state responsibility to defend that the wrongfulness of its acts has been precluded by a situation of *force majeure* and fortuitous event.

The possibility to have recourse to the law of treaties instead of the law of state responsibility is not a matter of legal theory only. In spite of a valid plea of *force majeure* and fortuitous event to evade liability *ex delicto*, a state may still be held liable *sine delicto* for such failure. Article 35 of the 1996 ILC Draft Articles on State Responsibility envisages the payment of compensation for damages, even if the wrongfulness of the breach of an international obligation, such as the failure to perform a treaty, has been precluded by *force majeure* and fortuitous event. In this context, it is noteworthy that Hungary has expressed its willingness to pay compensation for

10. Commentary to Draft Art. 58 of the 1966 ILC Draft Articles on the Law of Treaties, YILC 1966, Vol. II (Part Two), at 256, para. 3.
11. *See* Commentary to Draft Art. 31 of the 1996 ILC Draft Articles on State Responsibility, YILC 1979, Vol. II (Part Two), at 124-125, para. 10.

damage incurred by the former Czechoslovakia as a result of the termination of the 1977 Treaty.[12] However, it is not clear whether Hungary would have been legally compelled to make such an offer to the extent that it can justify its non-performance of the 1977 Treaty on the basis of the law of treaties, i.e. a supervening impossibility of performance or a fundamental change of circumstances.

The above analysis shows that the Vienna Convention only contains rules on the law of treaties (primary norms), and not on the law of state responsibility (secondary norms). This conclusion finds support in the specific provision of the Vienna Convention that deals with the relationship between the law of treaties and the law of state responsibility. Article 73 provides that the provisions of the Vienna Convention do not prejudge any question that may arise from the law of state responsibility. The insertion of this provision in the Vienna Convention was suggested by the ILC "to prevent any misconception from arising as to the interrelation between the rules governing [the law of state responsibility] and the law of treaties".[13]

Hungary, in particular, has advanced before the Court a strange mixture of arguments based on the law of treaties and the law of state responsibility.[14] The Court disentangled these arguments, which were conceptually misconceived, and either treated them as arguments based on the law of treaties or arguments based on the law of state responsibility. It confirmed that the law of treaties and the law of state responsibility are distinct in scope and that

> [a] determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of a State which proceeded to it, is to be made under the law of State responsibility.[15]

Accordingly, the ICJ – and rightly so – did not consider the arguments of Hungary based on the law of state responsibility, viz. the existence of a state of necessity, as arguments to justify the termination of the 1977 Treaty.[16] Likewise, the ICJ – and again rightly so – did not consider the arguments of Hungary based on the law of treaties, viz. the applicability of Articles 60 to

12. *See, e.g.*, Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Memorial of the Republic of Hungary, Vol. I, at 58, 61, 64, 72, and 267 (1994).
13. *See* Commentary to Draft Art. 69 of the 1966 ILC Draft Articles on the Law of Treaties, *supra* note 10, at 267, para. 1.
14. *See especially* Hungarian Memorial, *supra* note 12, at 258 *et seq.*
15. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 47.
16. *Id.*, para. 101.

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62 of the Vienna Convention, as arguments precluding its liability *ex delicto*.[17]

3. THE PLEAS OF CIRCUMSTANCES PRECLUDING WRONGFULNESS

3.1. Introduction

As for the law of state responsibility, the highlights of the judgment are the pleas of circumstances precluding wrongfulness advanced by Hungary and Slovakia to justify their acts that were found not to be in conformity with the 1977 Treaty, other treaties, or general international law. The Court, however, rejected all these pleas (*see* Sections 3.2 to 3.5 *infra*) and concluded to the existence of intersecting wrongs. Hungary had committed an internationally wrongful act by its unilateral abandonment of the project in 1989 and its unilateral termination of the 1977 Treaty in 1992. Slovakia had committed an internationally wrongful act by the implementation of the 1977 Treaty as unilaterally modified by it.

It is interesting to point to the distinction drawn by the Court between the actual damming of the Danube by Slovakia and the preparatory actions for such damming. It found that Slovakia was entitled to unilaterally proceed with such preparatory actions, because these actions did not amount to the actual commission of an internationally wrongful act. The wrongfulness of Slovakia's actions was only brought about by the actual damming of the Danube as it has been this damming that infringed Hungary's right to an equitable and reasonable use of the river.[18] Hence, Hungary could not require Slovakia to cease any wrongful conduct before the actual damming of the Danube as it could not derive any rights from the preparatory actions.[19]

Yet, having regard to the declarations, dissenting opinions, and separate opinions of judges, this issue seems to have divided them most.[20] They have, however, drawn different conclusions from their difficulties with the distinction made by the Court. Thus, Judges Schwebel, Bedjaoui, Ranjeva, Herczegh, and Fleischhauer rejected the distinction made by the Court opining that both the preparatory actions and the actual damming of the Da-

17. *Id.*, para. 106.
18. *Id.*, para. 79; *see also* para. 108.
19. *See also* Commentary to Draft Art. 41 (Art. 6 of Part Two) of the 1996 ILC Draft Articles on State Responsibility, YILC 1993, Vol. II (Part Two), at 57-58, para. 14.
20. *See also* Lammers, *supra* note 1, at 315-316, who also has difficulties with the distinction drawn by the Court.

nube by Slovakia were wrongful.[21] In addition, Judges Schwebel, Herczegh, and Fleischhauer found that Hungary was entitled to unilaterally terminate the 1977 Treaty in response to its material breach by Slovakia. In contrast, Judges Koroma, Oda, Vereschetin, and Parra-Aranguren did not oppose so much to the distinction drawn by the Court, but to the legal consequences attached to it.[22] They opined that Slovakia was not only entitled to proceed with the preparatory actions for damming, but also to proceed with the actual damming of the Danube.

3.2. The Hungarian plea of state of necessity

Hungary has invoked the existence of state of an 'ecological' necessity as a circumstance precluding the wrongfulness of its acts, i.e. the abandonment of the project in 1989 and the termination of the 1977 Treaty in 1992.[23] The Court recognized that a state of necessity indeed precludes wrongfulness and also that the conditions laid down law in Draft Article 33 of the 1996 ILC Draft Articles on State Responsibility reflect customary international law.[24] Accordingly, the state of necessity must relate to an 'essential interest' of the state which has not acted in conformity with its international obligations; this interest must have been threatened by a 'grave and imminent peril'; the act being challenged must have been the 'only means' to safeguard the interest; the act being challenged must not have seriously impaired an essential interest of the state towards which the obligation existed; and the state which has not acted in conformity with its international obligations must not have contributed to the occurrence of the state of necessity.

The Court acknowledged that the Hungarian concerns with respect to its natural environment relate to an 'essential interest' within the meaning of Draft Article 33[25] and, thus, confirmed that the existence of a state of 'ecological' necessity could be a valid reason for a state not to act in conformity with its international obligations.[26] However, the Court found in this case that the peril, without prejudging on its gravity, was not 'imminent' and also

21. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, not yet published (Judge Schwebel, Declaration; Judge Bedjaoui, Separate Opinion; Judge Ranjeva, Dissenting Opinion; Judge Herczegh, Dissenting Opinion; and Judge Fleischhauer, Dissenting Opinion).
22. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, not yet published (Judge Koroma, Separate Opinion; Judge Oda, Dissenting Opinion; Judge Vereschetin, Dissenting Opinion; and Judge Parra-Aranguren, Dissenting Opinion).
23. *See* Hungarian Memorial, *supra* note 12, at 266 *et seq.* and 283 *et seq.*, respectively. For an elaborate discussion of the facts related to the existence of a state of necessity, *see* Lammers, *supra* note 1, at 297-298.
24. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 52.
25. *Id.*, paras. 53-54.
26. *See also* Commentary to Draft Art. 33 of the 1996 ILC Draft Articles on State Responsibility, YILC 1980, Vol. II (Part Two), at 35, para. 3, and 39, paras. 14 and 15.

that the suspension and abandonment of the project was not the 'only means' to respond to the peril at that time.[27] It said that 'imminence' is synonymous with 'immediacy' or 'proximity' and goes far beyond the concept of 'possibility'.[28] Although the extremely grave and imminent peril must have been a threat to the interest at the actual time, the Court envisaged the possibility that

> a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[29]

However, as noted above, the perils invoked by Hungary were, in the opinion of the Court, neither sufficiently established nor imminent when Hungary decided to abandon the project in 1989; furthermore, it concluded that Hungary had other means at its disposal to respond to the perceived perils than the abandonment of the project.[30] Therefore, the Court, with a dissent of the Hungarian Judge Herczegh, ruled that Hungary was not entitled to suspend and subsequently abandon the project in 1989 and had committed an internationally wrongful act by doing so.[31] As a result of the Court's strict separation of the arguments of Hungary based on the law of treaties and those based on the law of state responsibility, it did not consider whether the termination of the 1977 Treaty in 1992 could be justified by a state of necessity.

3.3. The Slovak plea of mitigation of damages

As noted, the Court found that not only Hungary, but also Slovakia had committed an internationally wrongful act. Slovakia was, according to the Court, not entitled to put into operation the project as unilaterally modified by it, because the unilateral damming of the Danube by Slovakia constituted an infringement of the right of Hungary to an equitable and reasonable use of the river. Slovakia argued to no effect before the Court that the unilateral damming of the Danube was not wrongful, because it only proceeded with

27. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 57.
28. *Id.*, para. 54.
29. *Id.*
30. *Id.*, para. 57; and Judge Herczegh, *supra* note 21.
31. The rejection of this argument was already predicted in this *Journal* by E. Hoenderkamp, *The Danube: Damned or Dammed?, The Dispute Between Hungary and Slovakia Concerning the Gabčíkovo-Nagymaros Project*, 8 LJIL 287, at 294-296 (1995); *see also* Lammers, *supra* note 1, at 299-303.

such damming to mitigate damages resulting from the Hungarian non-performance of the 1977 Treaty.[32]

Pursuant to the general principle of international law to mitigate damages, injured states must adopt preventive measures, i.e. any reasonable measures taken after an incident to prevent or minimise loss or damage. According to the Court, however, the principle that a state is not entitled to compensation which it could have avoided only provides a basis for the calculation of the amount of compensation, but cannot be invoked as a circumstance precluding wrongfulness.[33] In other words, the principle to mitigate damages is only relevant in the context of the determination of the legal consequences of an internationally wrongful act and not in the context of the establishment of an internationally wrongful act itself.

3.4. The Slovak plea of countermeasures

In response to Slovakia's plea of countermeasures as a circumstance precluding the wrongfulness of the unilateral damming of the Danube by it, the Court enumerated the conditions for the resort to such measures. It is noteworthy that the Court did not state that Draft Article 30 of the 1996 ILC Draft Articles on State Responsibility reflects customary international law, but only referred to Draft Articles 47-50 as one of the sources of the conditions which a countermeasure must meet for it to be justifiable. According to the Court, a countermeasure must be taken in response to a previous wrongful act of another state and must be directed against that state; the injured state must have asked that state to no effect to cease its wrongful act or to provide reparation for it; and the effects of the countermeasure must be commensurate with the injury suffered, taking account of the rights in question (requirement of proportionality).[34]

The Court, with a dissent of Judge Vereschetin, found that Slovakia's conduct failed to meet the test of proportionality. This finding was only based on the observation that Slovakia had assumed unilateral control of the shared resource and, thereby, deprived Hungary of its right to an equitable and reasonable share of the natural resources of the Danube.[35] Judge Vereschetin accepted that the requirement of proportionality must be met for a resort to countermeasures to be lawful, but disagreed with the Court that it had not been met in this case. Although he admitted that the task of testing the proportionality of a countermeasure is not an "easy one and may be

32. *See* Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Memorial submitted by the Slovak Republic, Vol. I, at 290-291 (1994).
33. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 80; *see also* Lammers, *supra* note 1, at 305-306.
34. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, paras. 83-85.
35. *Id.*, para. 85.

achieved only by way of approximation, which means with a certain degree of subjectivity", he criticized the Court for not having attempted "to compare like with like [...] with due regard to all the attendant circumstances against the background of the relevant causes and consequences". [36] According to Judge Vereschetin, the Court should have weighed the financial and economic effects of the breach against those of the countermeasure, the environmental effects of the breach against those of the countermeasure, and the effects of the infringement of the right to equitable utilization of the watercourse against the effects of the countermeasure on such right. From the Judgment it is not clear how the Court arrived at its conclusion that the requirement of proportionality had not been met. The observations of Judge Vereschetin, however, enhance the impression that it has not examined in depth the operation of the requirement of proportionality in the present case.[37]

3.5. The Hungarian plea of countermeasures

Hungary has argued out of court that the termination of the 1977 Treaty was to be seen as a countermeasure in response to the unilateral modification and subsequent implementation of it by Slovakia.[38] As noted, before the Court, Hungary advanced a strange mixture of arguments based on the law of treaties and the law of state responsibility.[39] To justify the termination of the 1997 Treaty, it did not only invoke the material breach of that treaty by Slovakia, but also the violation of environmental obligations under general international law.[40] Hungary, thus, confused its right to terminate the 1977 Treaty in response to a material breach of Slovakia with its right to resort to countermeasures in response to the internationally wrongful act of Slovakia. Faced with the mixture of arguments based on the law of treaties and the law of state responsibility in this respect, the Court discarded the Hungarian plea of countermeasures without paying any attention to it. It disentangled the Hungarian arguments based on the law of treaties and the law of state responsibility and said that

> [a]s to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the

36. *See* Judge Vereschetin, *supra* note 22.
37. For a critical review of the Court's reasoning in this respect, *see also* Lammers, *supra* note 1, at 306-307.
38. *See* Hungarian declaration concerning the termination of the treaty, 32 ILM 1259 (1993), at 1285-1288, para. 5; *see also* Lefeber, *supra* note 9, at 144. *Cf.* Slovak Memorial, *supra* note 32, at 343-347, for arguments in defense of a Hungarian plea of countermeasures.
39. *See* Section 2, *supra*.
40. *See* Hungarian Memorial, *supra* note 12, at 316-317 and 317-319, respectively.

> other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.[41]

The Court, however, did not proceed to examine whether the violation of the rules of the 1977 Treaty, any other treaty rules, or rules of general international law justified the resort to countermeasures, and in particular not whether such a resort would have justified the termination of the 1977 Treaty under the law of state responsibility.

It is unlikely that the outcome would have been different if the Court had explicitly entertained the Hungarian arguments based on the law of countermeasures. The acceptance of a Hungarian plea of countermeasures would have been complicated by the occurrence of intersecting wrongs, as was its plea of material breach. According to the Permanent Court of International Justice (PCIJ), it is

> a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.[42]

This principle became one of the arguments for the Court to reject the Hungarian plea of material breach in this case of intersecting wrongs.[43] Likewise, it can be argued that a state is not entitled to enter a plea of countermeasures if the preceding internationally wrongful act of another state is a response to an internationally wrongful act of the first state. In this case, the abandonment of the project by Hungary in 1989 would thus have prevented it from a lawful resort to countermeasures in response to the unilateral modification and subsequent implementation of the 1977 Treaty by Slovakia.[44]

Judge Fleischhauer, however, disagreed with the Court on this point. He argued that in the case of disproportionate intersecting wrongs,

> the corrective element does not lie in the loss of the first offending State of the right to defend itself against the second offence by way of termination, but in a

41. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 106.
42. The Factory at Chorzów (Claim for Indemnity) (Germany *v.* Polish Republic), Jurisdiction, Judgment No. 8 of 26 July 1927, PCIJ (Ser. A) No. 9 (1927), at 31.
43. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 110; for the other arguments, *see* Fitzmaurice, *supra* note 4, at 334-338.
44. *Id.*, para. 110; *see also* Lefeber, *supra* note 9, at 144.

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> limitation of the first offender's – here Hungary's – right to claim redress for the second offence.[45]

Since the Court rejected the Slovak plea of countermeasures for failure to meet the proportionality requirement, it was apparently also of the opinion that the intersecting wrongs were disproportionate. However, in spite of this and in contrast to Judge Fleischhauer, it concluded that Hungary, by its own conduct, had prejudiced its right to terminate the 1977 Treaty and that this would even have been the case if it had violated a provision essential to the accomplishment of its object or purpose.[46] In view of its reasoning, it is not likely that the Court would have treated this circumstance of disproportionate wrongs differently under the law of state responsibility as it did under the law of treaties.

The Hungarian plea of countermeasures would probably have failed for other reasons as well. Firstly, a valid plea of countermeasures would only have permitted Hungary to preclude the wrongfulness of the termination of the 1977 Treaty in 1992 and not of the abandonment of the project in 1989, because the unilateral modification and implementation of the 1977 Treaty by Slovakia in 1992 did not precede the abandonment of the project by Hungary in 1989. In contrast to a valid plea of state of necessity, a valid plea of countermeasures could therefore only partly preclude the wrongfulness of Hungarian's conduct towards Slovakia. Secondly, it is recalled that the resort to countermeasures is only permitted to secure cessation and/or reparation for an internationally wrongful act, is not a legal basis for the regulation of the long-term future treaty relationship, and will normally not justify the termination of a treaty.[47] In this case, the Hungarian plea of countermeasures would probably not have justified the termination of the 1977 Treaty as the termination of it did clearly aim at its complete disappearance.

4. The Cessation of the Internationally Wrongful Acts and Their Legal Consequences

As for the legal consequences of the internationally wrongful acts committed by Hungary and Slovakia, the Court follows the well-established principle in the *Chorzów Factory* case that

45. *See* Judge Fleischhauer, *supra* note 21.
46. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 110.
47. *See* Section 2, *supra*.

> reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[48]

In this case, the Court observes, the consequences of the intersecting wrongs will be wiped out as far as possible if Hungary and Slovakia

> resume their co-operation in the utilisation of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner.[49]

The Court has phrased this *dictum* as a mode of reparation. However, it does not fall within one of the established modes of reparation identified by the ILC in its 1996 Draft Articles on State Responsibility, viz. restitution in kind (Art. 43), compensation (Art. 44), satisfaction (Art. 45), or assurances and guarantees of non-repetition (Art. 46). On closer scrutiny, it appears that this *dictum* of the Court does not provide for reparation, but for the cessation of the intersecting wrongs, i.e. the abandonment of the project in 1989 and the subsequent unilateral termination of the 1977 Treaty by Hungary and the unilateral modification and subsequent implementation of it by Slovakia. This may also be inferred from the Court's treatment of the 1977 Treaty as a living instrument. It points to the special procedure in the 1977 Treaty for its modification which enables Hungary and Slovakia to take into account the changed circumstances and requires them to negotiate in good faith to achieve the objectives of the 1977 Treaty.[50] On 5 February 1998, the Hungarian government indeed decided to resume its participation in the project and seemed willing to conclude an agreement on the construction of a new dam in the Danube on Hungarian territory.[51] However, according to the Slovak government, the Hungarian government postponed the approval of a draft agreement on 5 March 1998 and has meanwhile disavowed it.[52] As agreement was not reached on the implementation of the Court's judgment within the six months time limit provided for in the original compromise,[53] the Slovak government applied to the Court on 3 September 1998 for a new judgment in order to secure its implementation without further delays.[54]

48. The Factory at Chorzów (Claim for Indemnity) (Germany *v.* Polish Republic), Merits, Judgment No. 13 of 13 September 1928, PCIJ (Ser. A) No. 17 (1928), at 47.
49. Gabčíkovo-Nagymaros Project, *supra* note 1, para. 150.
50. *Id.*, para. 155.
51. *See* NRC Handelsblad, 6 February 1998 and 2 March 1998; *see also* Lammers, *supra* note 1, at 319-320.
52. *See* ICJ Communiqué No. 98/28 of 3 September 1998.
53. *See* Art. 5(3) of the special agreement of 7 April 1993, reproduced *in* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 2.
54. *See* ICJ Communiqué No. 98/28, *supra* note 52.

Although cessation is often considered in connection with restitution in kind or other modes of reparation, the ILC has warned that "cessation is not part of reparation", but "is targeted towards the wrongful conduct *per se*, irrespective of its consequences".[55] According to the ILC, the cessation of internationally wrongful acts is future-oriented, as is the Court's order to Hungary and Slovakia to resume their cooperation in the use of the water resources of the Danube. The Court thus seems to have neglected the well-reasoned distinction that was only made by the ILC after long debates.[56]

The Court did not provide for restitution in kind, as it did not require Slovakia to remove the dam in the Danube and restore the original water flow. Although it has not expressly said so, it apparently considered such an award in this case of intersecting wrongs as "a burden out of all proportion to the benefit which the injured State [Hungary] would gain from obtaining restitution in kind instead of compensation".[57] Moreover, since the internationally wrongful act of Hungary consists of the unilateral termination of a treaty, the award of restitution in kind for the internationally wrongful act committed by Hungary was not materially possible.[58] It could only require Hungary to resume its performance of the 1977 Treaty.

Having discarded the idea of restitution in kind in an implicit manner, the question of reparation was actually confined to the award of compensation for the intersecting wrongs. In this respect, the Court held that, in view of the intersecting wrongs, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to compensation.[59] According to the Court, the issue of compensation could best be resolved by renouncing or cancelling all claims in the framework of the overall settlement that would result from the obligation incumbent on the parties to resume their cooperation in the equitable and reasonable use of the Danube.[60]

5. CONCLUSION

In the *Gabčíkovo-Nagymaros* case, the Court faced some suspicious arguments of the parties on the relationship between the law of treaties and the law of state responsibility, and on the law of state responsibility itself. However, the Court has never had the opportunity to express itself on these legal

55. Commentary to Draft Art. 41 (Art. 6 of Part Two) of the 1996 ILC Draft Articles on State Responsibility, YILC 1993, Vol. II (Part Two), at 56, para. 7.
56. *See* Lefeber, *supra* note 9, at 129.
57. Draft Art. 43(c) of the 1996 ILC Draft Articles on State Responsibility, *supra* note 7. For a different view, *see* Slovak Memorial, *supra* note 32, at 359.
58. *Cf.* Draft Art. 43(a) of the 1996 ILC Draft Articles on State Responsibility, *supra* note 7.
59. *See* Gabčíkovo-Nagymaros Project, *supra* note 1, para. 152.
60. *Id.*, para. 153.

issues and, hence, it was up to this case not beyond any doubt that the Court would rule as it did. First, it disentangled the strange mixture of Hungarian arguments based on the law of treaties and the law of state responsibility, and shed some light on the relationship between these two branches of international law. Second, it rejected the pleas of the parties with respect to circumstances precluding wrongfulness. Although these pleas were deemed to fail, it did not reason very well its rejection of the Slovak plea of countermeasures. On these accounts, the declaratory *dicta* of the Court have contributed to the development of the law of state responsibility. However, in my opinion, it erred in its reasoning on the legal consequences of the intersecting internationally wrongful acts by confusing the award of cessation of the internationally wrongful acts with the award of reparation for these acts.

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