THE American Journal of Humanities and Social Sciences Research (THE AJHSSR) 2025
E-ISSN: 2581-8868
Volume-08, Issue-06, pp-177-183
www.theajhssr.com Crossref DOI: https://doi.org/10.56805/ajhssr
Research Paper Open Access

THE FUNCTIONAL SEPARATION OF THE LAW OF TREATIES FROM THE RULES OF STATE RESPONSIBILITY, AS IT CONCERNS JUSTIFICATION FOR NON-PERFORMANCE OF TREATY OBLIGATIONS

Dr. Oluwateniola Solape Akinbodewa
SJD International Law
Golden Gate University, San Francisco, CA

ABSTRACT

This paper explores the functional separation between the Law of Treaties and the Law of State Responsibility in regulating the justification for non-performance of treaty obligations. Drawing on key cases such as the Rainbow Warrior, and the Gabcikovo- Nagumaros cases, it evaluates how breaches of treaty obligations are treated under the Vienna Convention of the Law of Treaties (VCLT), and the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). The study analyzes doctrines including supervening impossibility to perform, fundamental change of circumstances, force majeure and necessity, highlighting how their overlapping applications obscure the boundaries between the two legal frameworks. It argues that while the VCLT governs the validity and performance of treaties, and ARSIWA governs the consequence of wrongful acts, both frameworks frequently intersect in practice. Ultimately, appropriate legal regime for justifying non-performance depends on the specific facts and contexts of each case.

The assertion is that when there is a breach of treaty, i.e. non-performance of a treaty obligation, what set of rules in international law should regulate this non- performance particularly when such non-performance is justified or excused. In the rainbow warrior case,[1] Article 26 of the Vienna convention on the Law of treaties,[2] which stipulates that treaties must be performed in good faith, is the fundamental provision applicable to the first part of the prayer of France. This provision is what is applicable to the determination of whether there have been violations of the principle of *pacta sunt servanda* and whether these violations rise to the status of material breaches which is a provision of treaty law according to article 60 of the VCLT.[3] On the other hand, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.[4] *This way, we can conclude that these two institutions exist separately.*

It appears that in contemporary international law, the often-acclaimed responses to a breach of treaty happen to be countermeasures regulated by the rules of state responsibility, and termination and suspension under Article 60 of the VCLT. Other justifications for non-performance as codified in Articles 61 and 62 of the VCLT, as well as the ARSIWA on "circumstances precluding wrongfulness" are not grounded exclusively in the internal dynamics of the duty- relationships existing between states. They depend instead upon invocations of some

[1] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements*, concluded on 9 July 1986 between the two states and which related to the problems arising from the rainbow warrior affair, XX RIAA 215-284.
[2] Vienna Convention on the Law of treaties (23 May 1969). 1155 UNTS 331; 8 ILM 679
[3] Ibid
[4] Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/CN.4/L.602/Rev.1 (2001).

additional facto or contingency, external to this relationship, such as a change in circumstance or collateral impact upon essential interests not explicitly envisaged by the particular duties in issue.[5]

In the *air service agreement case between the Unites States of America and the republic of France,*[6] the Unites States basically indicated that termination or suspension of a bilateral treaty should be the ultimate response to the breach of a treaty:

"If a trivial or a non-material breach gave the aggravated party an excuse to terminate all treaty obligations, the rule of *pacta sunt servanda* would be seriously impaired. However, where the sanction to be invoked is a simple reciprocal withdrawal of rights, the rule of proportionality provides an adequate safeguard.[7] This confirms that when it comes to wrongdoing as it pertains to treaty performance, there must be several penultimate steps to be taken, before the issue of termination or suspension of treaty should be seriously considered.

This reference suggests that the question of proportionality, which is a requirement for a lawful countermeasure, considers the use of countermeasures as an appropriate response in the event of a breach of treaty. The tribunal in this case did confirm the legality of countermeasures under international law:

"If a situation arises which, in one states view, results in the violation of an international obligation by another state, the first state is entitled to affirm its right through countermeasures."[8]

The arbitral tribunal decided that the law relating to treaties was relevant, but that the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary law of state responsibility.[9] Without limiting the terms of the agreement that the Parties signed, or the applicability of some significant provisions of the Vienna Convention on the Law of Treaties, the conclusion that should be drawn, is that the existence of circumstances excluding wrongfulness in this case, as well as questions regarding the appropriate remedies, should be addressed in the context of and in light of the customary Law of State Responsibility.

Despite knowing the boundaries of the law of treaties and that of state responsibility, it is evident from state practice that there's much contemplation in relation to what legal arguments to rely on, in case of a breach of treaty. Should we rely on material breach as articulated in article 60 of the VCLT, which would lead to suspension or termination of the treaty, Or should we rather rely on countermeasures, which has its own requirements but should not necessarily render the treaty suspended or terminated, as enshrined in the rules of State responsibility?

Between the law of treaties and that of state responsibility, there still are other "exceptions" that exist in form of justification for non-performance of treaty whether temporarily or permanently. We find these provisions in Article 61 and 62 of the VCLT, and Article 23 and 24 of the ARSIWA. These "exceptions" are sort of "spread out" between the two institutions of international law, and breach of treaty might fall between the two institutions depending on the unique facts of the case.

Article 61 of the VCLT

According to Article 61 of the VCLT titled "Supervening Impossibility of Performance", "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it, if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty."

[5] Bowman, M., & Kritsiotis, D. (Eds.). (2018). *Conceptual and Contextual Perspectives on the Modern Law of Treaties*. Cambridge: Cambridge University Press. doi:10.1017/9781316179031 p.786

[6] Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, XVIII RIAA 417-493.

[7] The memorial of the U. S. dept. of State Publication No. 9162 (1980), p. 772

[8] Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, XVIII RIAA 417-493. P. 420 para 4

[9] ibid., p. 428 para. 17

This doctrine is one that is very similar to other justifications of non-performance of treaties found in the law of treaties and that of state responsibility alike.[10] Examples of the application of this doctrine would normally involve the extinction of a physical object, which was related to the treaty. For example, the disappearance of a natural resource that was indispensible to carrying out a treaty, could render the treaty non performable automatically. States could therefore go ahead and terminate or suspend such a treaty. An example of the application of this rule was in the case concerning the payment in Gold of the Brazilian federal loans.[11] The merits of the case were such that Brazil offered loans to France, which were supposed to be paid back in gold francs. Unfortunately, gold francs ceased to be in existence in 1914, before the loans were repaid.

Obviously from this description of supervening impossibility of performance, a treaty could be permanently terminated if there occurs a permanent disappearance of an object indispensible to the execution or performance of the treaty, except the impossibility is temporary, which could lead to a suspension of the treaty. Also, the doctrine almost refers to an event that is "natural" or "uncontrollable" "unpreventable" and also "unforeseeable". The relevant question that could come up include: If such an event could be foreseeable at the time of the establishment of the treaty, wouldn't it have been better for this rule to be under article 62[12] of the VCLT which regulates "fundamental change of circumstance? It is understandable why this rule isn't associated with breach of a treaty since the causal action that could lead to the invocation of this exception cannot be accrued as the "fault" of any of the parties? Article 61 (2) of the VCLT already eliminates the possibility of a breach in invoking this rule as a ground for non-performance of the treaty.[13], meaning if this provision were to be invoked, the result would not technically be a breach of the treaty, but technically a circumstance precluding wrongfulness, which is regulated by the Law of State responsibility. The VCLT doesn't give us a definition of what a breach is, but I believe a breach refers to violation of obligation. Since there is no actual violation for this rule to be invoked, the rule is more compatible only as a justification or exception for non-performance of treaty obligation.

The ILC attempted to make a significant distinction between the law of treaties and the rules of state responsibility on the question of supervening impossibility of performance, but that attempt rather proved inconclusive.[14] Instead, supervening impossibility to perform was seen in the light of force majeure, putting this doctrine in the category of rules of state responsibility rather than the law of treaties.[15]

Since we cannot really say that supervening impossibility to perform is as a result of a breach of treaty, which should be exclusively resolved under the law of treaties, should we associate this rule more with the law of responsibility since it has more to do with performance of treaty instead? However, in so far as it concerns the continued performance of an international treaty and its invocation would have weakened the stability of treaties, I agree that this provision has its place in the law of treaties. In light of these, "supervening impossibility to perform" should be regulated independently by both the Law of Treaties and the rules of State responsibility

Article 62 of the VCLT

Article 62 of the VCLT is titled fundamental change of circumstances. This article provides the following:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

[10] ILC Report, Yearbook of the International law Commission (1966-II), 254 (paragraph 5)

[11] Case concerning the payment in gold of the Brazilian federal loans: France v. Brazil, 1929 PCIJ, series A, No. 21.

[12] This Article refers to fundamental change of circumstance as a ground for the termination or suspension of a treaty.

[13] The second part of the provision states that: Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty

[14] G.G Fitzmaurice, second report on the law of treaties, Yearbook of the International Law Commission (1957-II), 16-50.

[15] H. Waldock, second report on the Law of treaties Yearbook Of the International Law Commission (1963-II), 78 Para. 1.

(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) If the treaty establishes a boundary; or

(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

The doctrine of fundamental change of circumstances is known in international law as *rebus sic stantibus.* It is a provision of customary international law, which is not only codified in the VCLT, but also backed up by sufficient examples in state practice[16] and *opinio juris.* The properties of this rule include, that the fundamental change of circumstance must be unforeseen and the existence of the circumstance at the time of the treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the treaty. This kind of change doesn't refer to frivolous changes in the performance of the obligation of the treaty, which the parties to the treaty believe they cannot control, but a change that could not have been put into consideration at the time of the conclusion of the treaty, as a result of being completely unexpected.

In the *Gabcikovo-Nagmaros case*, Hungary claimed fundamental change of circumstances as a ground excusing its breach of treaty. Some of Hungary's claims in this regard included: that there was a change in the attitude of Czechoslovakia towards the treaty itself, leading to the transformation of a treaty formerly consistent with environmental protection into a treaty which wasn't compatible with the goal of protecting the environment. This was as a result of the fact that the construction of the dam and locks, which was to constitute a single and divisional operation system had now been substituted for a unilateral operation by Slovakia.[17] The court rejected Hungary's claims stating that the changed circumstances outlined by Hungary were not such that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the project, and that the negative and conditional wording of Article 62 of the VCLT is a clear indication that the plea of fundamental change of circumstances be applied only in exceptional cases.[18]

Therefore, the premise of the provision of fundamental change of circumstances is that the circumstances that have changed are fundamental enough to change the underlying premise for the parties' agreement to a treaty, which may then cause a treaty to be terminated or suspended. Though the principle is a recognized one, it is bound by several limitations, which cause its application to be very narrow. The negative form in which the article is cast is also an indication that it wasn't intended to allow for unilateral breach or non-performance of treaty obligations.[19]

Also, the application of the doctrine of fundamental change of circumstances is restricted to cases where the change in circumstance constitutes an essential basis of the consent of the parties in establishing the treaty, and the change of circumstance must result in a radical transformation of the extent of the obligations. Also, treaties establishing boundaries are always exempted from the invocation of claims on the ground of fundamental change of circumstances.

Just like with Article 61, when a fundamental change of circumstance causes a party to terminate its treaty obligations, it cannot be said that a breach has occurred, since technically there has been no violation. This is the case if all things remain equal and all other rules and protocols surrounding the invocation of this rule are duly observed, such as timely appraisal of other parties to the treaty and so on.

[16] *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*(1997) ICJ Rep.7 p.64, fisheries jurisdiction case

[17] *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*(1997) ICJ Rep.7 pp. 13-2, p.60

[18] Ibid.

[19] The article doesn't state a general rule that certain changes in the circumstances existing after the conclusion of a treaty could be invoked as grounds for termination or withdrawal but instead says that a fundamental change of circumstances may not constitute a legal ground for ending performance of treaty obligations unless various conditions are fulfilled.

However, it is expedient to differentiate a wrong or wrongful act from a breach. ARSIWA defines a wrongful act as conduct attributable to a party and which constitutes a breach of an obligation. However in other legal systems, the understanding of "wrongfulness" of an act include "harm" apart from the components recognized by international law. This means a conduct is also wrongful when it causes harm or loss to another, among other components. Termination of treaty due to a fundamental change of circumstance, although not a breach, may still cause irreparable loss or harm to one or other parties of a treaty. This evokes the thought that a fundamental change of circumstance though not a breach of treaty could still be regarded as "wrongful", at least to the treaty itself or perhaps to the integrity of treaty systems. The aim is to see as many treaties as possible being fulfilled, thereby creating more opportunities for the implementation of international law. If that is the case, fundamental change of circumstances may be considered as a provision of the rules of state responsibility. However, based on contemporary international law alone, Article 62 is properly situated in the Law of treaties as it distinctly differs from the nature of the circumstances precluding wrongfulness in the Law of State responsibility.

Article 23 ARSIWA

According to Article 23 of the Article on the responsibility of states for internationally wrongful acts, the wrongfulness of an act of a State not in conformity with an international obligation of that states is precluded if the act is due to force majeure, that us the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state. This provision of force majeure concerns incidence of natural phenomena such as floods, earthquake, extreme weather conditions etc. Some refer to such natural occurrences as "acts of God". Generally, they are on the premise of occurrences that cannot be attributed to man's fault and are natural in nature. These occurrences must rise above the threshold of ordinary burdensome or difficult situations[20], but must rise to an act of a superior and irresistible force that is extra ordinary and uncontrollable.

For example, a force majeure situation could be an extreme weather condition that forces a civilian airplane to land on a military base where landing would be otherwise disallowed. In the rainbow warrior case, France argued that the law of state responsibility recognizes the doctrine of force majeure and so even if its action were not in conformity with the terms of the agreement, its wrongdoing could be excused. France relied on this plea on the evacuation of the two agents from the island of Hao. One agent had to be moved because of an emergency medical condition, which could not be treated, on the island, while the other had to be moved because she was pregnant and she needed to urgently see her dying father. The court in its decision didn't quite agree with France that a situation of force majeure had exonerated its wrongdoings, stating that within international law, force majeure was cast in absolute terms and only applied where compliance with an international obligation was rendered impossible due to an external natural force.[21]

Furthermore, another component of a force majeure is that, to justify non-performance of treaty obligations, the party invoking the force majeure must not have contributed to the circumstance leading to the force majeure in the first instance. All these come together to constitute a legal situation of force majeure on which a party may rely to terminate or suspend its treaty obligations.

Again, we must explore how this provision closely relates with supervening impossibility of performance regulated by the law of treaties, which is also another ground for the termination of a treaty obligation. A force majeure refers typically to issues resulting as a force of nature, while supervening impossibility of a performance refers to a disappearance of an object that is essential to performing the treaty. Can the object in question be a natural phenomenon or a tangible object of nature that unforeseeably and uncontrollably forces a party to conduct itself wrongfully? Where then do we draw the line between the utilization and invocation of these two provisions? These two provision, although regulated by two different institutions of international law seem superfluous, and may easily be used in place of one another if not applied with caution and deep theoretical insight.

[20] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3),pp.252-253, para. 77

[21] ibid

Article 25 ARSIWA
Article 25 of the Articles on the responsibility of States for internationally wrongful acts states that:
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:
1. (*a*) the international obligation in question excludes the possibility of invoking necessity; or
2. (*b*) the State has contributed to the situation of necessity.

Again as was the case in the wording of the rule on fundamental change of circumstances, the rule on necessity is also formulated negatively, suggesting its limited application and usage. Similarly, as in the case with force majeure, the party invoking necessity as a circumstance precluding the wrongfulness of its action must not have contributed to the situation of necessity one way or the other. Furthermore, as in the case with the rule on fundamental change of circumstances,[22] the rule on necessity may not be invoked if the international obligation in question excludes the invocation of necessity.

Traditionally, the invocation of necessity was limited to situations that pose a grave danger to the very existence of the state.[23] However, in contemporary international law, the important elements of this rule have come up as points of varying opinions in state practice. One of these elements is the clause of "essential interest". Thoughts as to what should be referred to as "essential interests" of state may vary from state to state but the threshold for deciding if the necessity invocation was really to protect an essential interest of a state is quite limitative. Whatever the case may be, an essential interest refers to a "major interest" of all states. This normally would include issues that have to do with national security of a state, or other certain *erga omnes* obligations of states. In the *Gabcikovo nagymaros ca*se, the essential interest Hungary referred to were issues that had to do with environmental concerns that could affect the nation, such as a threat of water pollution, which could now go ahead and affect the land, agriculture, and food production e.t.c.[24] Another element is that of a threat of "a great and imminent peril" which normally connotes a fear of risk or great loss that surpasses the meaning of a material damage. Such risk must also be imminent, that is duly established at the time of the invocation of necessity.

The judgment of the court confirmed the stringent conditions that must be applied to the invocation of necessity as an exception to non-performance. The court did not seem to agree that Hungary's suspension and termination of the treaty was the only method of safeguarding Hungary's essential interest against a great and imminent peril. The court viewed the dangers alleged by Hungary as being of an uncertain character and saw no grave and imminent peril at the time of the abandonment of the works.[25]

The clean hands doctrine
It is important to note that one thing that is common and cuts across the aforementioned exceptions to non-performance of treaty obligations is the clean hands doctrine. This is a legal principle that only a party that has done "nothing wrong" can bring a claim against another party. Both in the law of treaties and in the rules of state responsibility, we see that the party invoking the exception must not have participated to the issue or situation that caused the exception to be invoked in the first place. Surely the burden of proof usually rests on the claimant who has to show that its actions have not contributed to the breach of treaty, but this doctrine is still acknowledged by many subjects of international aw.

Conclusion

[22] A fundamental change of circumstance cannot be invoked on treaty obligations that come from treaties that establish boundaries.
[23] Draft Articles by the international law commission at its 25th session: YbILC (1980-II)
[24] *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*(1997) ICJ Rep.7 pp. 13-21
[25] Bowman, M., & Kritsiotis, D. (Eds.). (2018). *Conceptual and Contextual Perspectives on the Modern Law of Treaties*. Cambridge: Cambridge University Press. doi:10.1017/9781316179031 p.786

Although the link between the two sets of rules is generally evident in theory, its application in practice occasionally acts in a way that undermines or erodes that clarity. It is difficult to differentiate between the application of certain provisions of the VCLT that pertains to breach of treaty (like impossibility of performance and fundamental change of circumstances.) and certain provisions of the rules of state responsibility. For example, necessity often terminates a treaty in practice. Also in practice responses to breach of treaty can be met with either the circumstances precluding wrongfulness as well as defenses under the law of treaties. An instance where the claims of circumstances precluding wrongfulness and provisions on treaty termination were overlapped is the Rainbow Warrior Case. The French view that the treaty breach could be justified under the general law of state responsibility was recognized by the tribunal, notwithstanding the fact that there had been no grounds to terminate the treaty under the law of treaties. Why should a state that wants to evade its commitments under a treaty give the stricter grounds and processes applicable under the law of treaties any consideration if it can justify breaking the treaty by using the entire range of defenses available under the law of state responsibility?[26]

Ultimately, in light of the difficulties concerning the clear division between these two institutions of international law, it appears that the mechanisms to apply will depend on the case at hand. The incontrovertible conclusion is that the law of state responsibility including the defense to non- performance applies to an alleged breach of an obligation under international law, irrespective of the source of obligation.[27]

[26] Y*earbook of the ILC 1959*, document A/CN.4/120, vol. II, p. 41.
[27] F.I Paddeu, A genealogy of force majeure in international law, BYIL, 82 (2011), p .467