



Research Article

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Breach of a treaty as a cause for its termination and the ratio with international responsibility

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Abstract

Treaties as instruments for establishing legal relations between the subjects of international law are acts which can both create a relationship and extinguish it. On the other hand, despite the fact that the parties to a treaty enter into this relationship with the good will that it will last in time and the treaty will be implemented, for various reasons it may happen that the parties are no longer interested in being bound by this treaty. For this reason, the Vienna Convention on the Law of Treaties has provided for ways to terminate the legal force of a treaty. One of these foreseen ways is the breach of the treaty by one of the parties, which must be said, is a way that has found application and is being implemented even today.

This paper aims that, relying on a qualitative methodology, based on research in literature and relevant legislation, to analyze the breach of the treaty as a reason for its termination, the types of breaches and the systems proposed by the 1969 Vienna Convention as well as the consequences of breaches of the treaty and a comparative overview with international responsibility.

As an expected result of this research, is the conclusion that not every breach of a treaty is a cause for the termination of its legal force and that there are differences between the consequences of the termination of the treaty as a result of a breach by the parties and the reactions to breaches by the point of view of international responsibility.

Keywords: treaty, violation, termination, party, responsibility.

1. Introduction

The law of treaties is a branch of public international law which explains the procedure of concluding a treaty and other issues related to that, such as reservations, amendment, modification or termination of its legal force.

Of course, like any other branch of international law, it has already been codified for many years now, as a result of the work done by the International Law Commission

within the UN, that for about 23 years worked to draft the Vienna Convention “On the law of treaties” (Villiger, 2009). Although it was not easy to draw up “a treaty for treaties”, this Convention remains today after 43 years, the main act on which states rely to bind their legal relations.

The basic principle on which the Convention develops the entire process of binding and implementing the treaty is precisely the principle of the free will of the parties entering into an international legal relationship. However, precisely because of this principle, the Convention enables the parties, to have the opportunity to terminate a treaty in the same way that with free will it was created. In this context, the law of treaties provides several ways of terminating the treaty and depending on which of them was used in a specific case, are determined the legal consequences, if any, for the parties.

2. General considerations regarding the termination of a treaty

The termination of the legal power of a treaty is an important moment, since this is precisely the moment when the rights and obligations created through the treaty cease to exist (Shqarri, 2016). In this regard, it should be said that, the most important moment of the termination is the settlement of the legal consequences between the parties, and how the previous rights and obligations that functioned on the basis of reciprocity will be extinguished, as well as starting from the way of termination, if there will be consequences for any of the parties or not in terms of international responsibility.

The reasons for concluding a treaty between the parties can be of different natures and sometimes they can be of fundamental importance in terms of consequences and in other cases they can be completely peripheral. Thus, if the termination of the treaty comes as a result of the clause *rebus sic stantibus* or as a result of the impossibility to fulfill the rights and obligations of the treaty, of course the reasons are important, but if the termination of the treaty comes as a result of its violation, as we will see below, the reasons are not of interest in terms of consequences. One of the causes that can lead to the termination of the treaty and which is actually a delicate problem to solve is the conflict between the treaties, since while one party is implementing a treaty, it may be violating another that may have provisions contrary to it (Shqarri, 2016).

On the other hand, the cases of breaches of the treaty as a reason for its termination are important not only because they are among the most frequent even today, but also because of the fact that settling the consequences and sanctioning the violators is often not an easy process.

3. Breach of the treaty as a reason for its termination according to the Vienna Convention, the nature and types of breaches

The law of treaties, the procedure of concluding and implementing the treaty, follows certain principles, such as the principle of free will mentioned above, the equality of the parties, reciprocity, etc., but the most important principle of this legal body

of norms is the principle *pacta sunt servanda*. According to this principle provided by Article 26 of the Vienna Convention,¹ treaties concluded by the parties must be applied. An interpretation that the Constitutional Court of Albania makes in its decision 15/10, explains that this principle serves and applies to cases where a treaty has passed all the stages for its entry into force. According to the Convention itself, if this principle is not applied by one party, then the other parties also have the right not to apply this treaty with that party.²

From this provision, arises the question whether is it necessary to not perform or terminate the legal force of a treaty if none of the parties wants it? Of course, as long as the conclusion and functioning of the treaty is based on the will of the parties, if they agree they can continue to perform the treaty relationship even after the breach, otherwise they have a legal reason to terminate it. However, not wanting the parties to have the option of non-implementation of the treaty for any breach and in any case, the Vienna Convention has limited this option by defining conditions for the type of breaches that may be the reason for terminating the treaty.

According to the Convention, only those breaches which are considered material nature constitute a cause. As material breaches, the Convention considers those related to the non-implementation or violation of the provisions related to the fulfillment of the object and purpose of the treaty or its non-implementation not foreseen in the treaty. The interpretation and determination of whether or not we have a breach of that category when the termination of the treaty is claimed becomes somewhat difficult and challenging at a time when we do not have any specific criteria or specify which provisions are related to the fulfillment of the object and purpose of the treaty and this remains to be assessed case by case.

Such a provision may be the one that affects the essential elements of the treaty or the reason for which it was created or drafted. While in order to evaluate a provision that deals with the purpose and object of a treaty that contains many interdependent rights and obligations, one must take into account both the interdependence and the degree of importance that the provision has in the general spirit of the treaty as well as the degree of impact that its breach has over the treaty (ILC, 2011).

However, we cannot rely only on the breached provision since the breach itself or how serious it is, must be important to determine if we are in the conditions of termination of the treaty (Kirgis, 1989). The breach must be of such importance that it can damage the implementation of all provisions related to the object and purpose, so minor breaches cannot be cause of termination.

From what we discussed above, it seems that we are dealing with the objective side of the situation and it may seem worth discussing whether there is a role in the breach that can bring the termination of the treaty, the attitude that the violator has towards it or the purpose and motives that have led them to the breach of the treaty.

According to Dominique (1999), the attitude of the state which has violated the material provisions of the treaty does not seem to have any special importance

¹ Article 26 of the VC: "Each treaty in force is binding on the parties to it and must be performed by them in good faith".

² They can continue to apply it between them, as will be explained below.

regarding the conclusion of the treaty between the parties. So, it is not necessarily required that the breach was committed intentionally or with any special purpose for the other parties to have the right to claim termination of the treaty, no fault is required and it is also not required that any concrete damage has been caused by the breach of the treaty by the offending state (Dominique, 1999). On the other hand, the motives and the purpose that the subject had for committing this violation seem to be completely irrelevant.

Article 60 of the Convention explains material breaches of bilateral and multilateral treaties in various provisions. The reason for this differentiation becomes clear if we consider that in bilateral treaties the breaches by one of the states would make the continuation of the relationship between the two parties impossible or rather meaningless, while in the case of multilateral treaties, the breach by one of the parties does not mean that the other parties will not implement the treaty between them. Even in this case a situation is created, that requires determining how the relationship between the offending party and the other parties will work (Shqarri, 2016).

According to Article 60/1 of the Convention, a material breach of a bilateral treaty by one of the parties entitles the other party to consider the breach as a reason to terminate or suspend the operation of the treaty. Termination or suspension of the treaty may be complete or partial depending on the will of the non-violating party (there may be cases when this party decides to suspend only the provisions that have been violated). So, it always depends on the judgment of this party whether it wants to terminate or suspend the treaty and on the other hand to assess whether the termination will be complete or partial.

As for multilateral treaties, we can argue that a material breach by one of the parties does not necessarily lead to the termination of the legal force of the treaty itself, but may lead to the termination of the treaty for the offending party. In case the parties terminate the legal force of the treaty between them and the offending state, then the decision must be taken unanimously. The Convention in this case suggests that the parties either completely terminate the treaty both between themselves and with the breaching party or decide to terminate the treaty with the breaching party while it remains in force between them.

Meanwhile, if the violation of the treaty by one of the parties to a multilateral treaty has specifically damaged only the interests of a certain party, then the latter may decide to partially or fully suspend the treaty in relation to the offending state. This provision in the first place seems to seek to simplify to some extent the relations created between the offending state and other states in multilateral treaties, because if we compare the paragraph we discussed above, it is evident that the unanimous decision-making of all states is completely avoided in those cases where the breach specifically affects a state. On the other hand, we see a new specificity that in this case the breach does not constitute a reason for terminating the operation of the treaty, but only for its suspension, and we think that the legislator in this case wanted to eliminate the excessive fragmentation of relations between the parties to the treaty (Shqarri, 2016).

The provision of the option of full or partial termination/suspension, with the

presumption that the partial one affects only the violated provisions creates a confusion in its application, because a material breach could be the breach of a provision that prevents the implementation of the object and purpose of the treaty, how would it be possible to suspend the application of the provisions relating to the object and purpose and in the meantime continue to be in force for the rest? However, in this case, the purpose of the partial suspension may refer to the implementation of the principle of reciprocity and proportionality, that aims to apply in the relationship with the offending party only the provisions that it also mutually applies, while the suspension is proportional, that fits the breach and its measure, but again as far as we explained this remains somewhat unclear (Kirgis, 1989).

The opposite of this situation, the suspension when the breach does not affect the interests of only one party but affects the interests of every party related to the fulfillment of the treaty, is provided for in paragraph c of Article 60 of the Vienna Convention: *“(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty”*. The Vienna Convention is the generally applicable law in terms of the regulation of relations arising from the conclusion of international treaties between the parties, but of course the parties are free to establish other provisions different from this convention.

Thus, regarding the termination or suspension in case of breach of the treaty, the convention states that the provisions we mentioned do not limit the parties to provide in the treaties other ways of behavior in case of its breach by one of the parties (it is enough that these provisions do not fall contrary to international norms).

The Convention introduces a two-layer system to respond to the breaches of treaties and to regulate relations between non-violating states and the violating state: the system created by the treaty itself or the system created by the law of treaties and the convention.

In the last point, Article 60 seems to limit the right to terminate or suspend a treaty in cases of its violations, for all those treaties which are concerned with the protection of human rights and those with a humanitarian character that prohibit any form of attack against the individual. So, this provision recognizes once again that the treaties themselves that deal with human rights are not characterized by reciprocity but give their effects to the individuals of the state parties, therefore it limits the right to suspend or terminate the treaty, necessarily required that individuals avoid any kind of “revenge” or coercion from the state affected by the violation of the treaty.

Despite the fact that the rights and obligations derived from international treaties are permeated by the principle of reciprocity, the convention does not agree to set human rights treaties, which are claimed to establish rights of a general character from which they cannot be allowed avoidance, on the same level as other treaties.

As for the right of the state or states affected by a breach of the treaty to request its termination, a limitation is also set by Article 45 according to which *“A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the*

operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.". This means that if a state even after ascertaining the breach of the treaty by the offending state reached a consensus to continue the treaty or continued to implement the treaty, then it loses the right to request the termination of the treaty or its suspension (Klabbers, 2011).

4. The relationship between breach of the treaty and international responsibility

The breach of treaties is today one of the most debated issues also for the consequences it causes in the relations between the parties, since although the termination or suspension as a result of the breach is dealt with by the law of treaties, the consequences of the violation of treaties or the response to violations are regulated by international responsibility (Sicilianos, 1993). Although both of these branches of international law, the law of treaties and international responsibility, are two different branches, it seems that the breach of the treaty as the reason for their termination meets them to one point, since there are two types of reactions to the violation of treaties: termination or suspension of the treaty according to the law of treaties and charging with international legal responsibility due to non-fulfillment of obligations of an international character (Simma and Tams, 2020).

There is a similarity between the reactions or measures taken against a breaching state and the termination of the treaty due to its breach, because the reactions themselves may be caused by the breach made of the obligations arising from the treaty, while the termination of the operation of the treaty or its suspension may have been used as a protective measure to balance the relationship between the affected state and the offending state (Shqarri, 2016)

However, these two branches and the consequences that come depending on whether one corpus of norms or the other is used are completely different.

If we look at them from a comparative point of view, we would say that the first difference between them lies in the act that causes the responsibility. Thus, the breach of a treaty is specifically related to this concrete treaty, while the measures taken within the framework of the breach of the treaty as a result of international responsibility are general and refer to every treaty (Sicilianos, 1993).

Another difference is related to the subject that can initiate or implement a reaction, since in the context of the law of treaties, the termination or suspension of the treaty as a cause of the breach can only be requested by the parties involved in the dispute, while reactions within the framework of international responsibility can be undertaken by a wider category of subjects.

In the same way, there are changes in terms of the purpose, since the purpose of the reactions is usually either to sanction or punish the offending states or to stop the breach, while the purpose of terminating or suspending the treaties is mainly the termination of the relations established on the basis of the treaty and the release

of the other parties from the duty to implement the obligations arising from it and balancing to some extent on the basis of reciprocity of these rights and obligations.

Another important difference is related to the nature of the breach committed, since as we explained above, only material breaches can be the reason for terminating the treaty, while the measures taken within the framework of the responsibility for treaty breaches can be directed against any violation of the treaty. Reactions as a result of responsibility do not necessarily require the reaction be related only to the treaty in question or directly respond to the breaches committed.

In terms of the breadth of the measures taken as a result of the breaches, we can say that the termination of the treaty, the injured state will be limited not to implement the specific treaty that was breached by the offending party, while within the framework of the measures taken as a sanction, we argue that the injured state may decide not to implement all or some of the treaties with the offending state despite the fact that they are not the concretely breached act.

5. Conclusion

Breach of treaties from the point of view of treaty law and international responsibility have important differences between them, and it must be said that from the point of view of the first, the parties to a treaty can only undertake the sanction of suspension or termination of a treaty, while from the point of view of international responsibility sanctions can be much wider.

Breach of treaties is not in every case a cause for their termination, as this always depends on the type of breach and its degree or importance. On the other hand, a very important element that is taken into consideration to qualify for this is the breached provision itself, which must always be of substantial importance for the realization of the treaty.

The Vienna Convention, as the main act that regulates the termination of the treaty as a result of the violation, has several provisions that may create ambiguity or abuse at the time of implementation, such as determining which provisions are related to the object and purpose of the treaty and how it should continue to apply in cases of partial suspensions.

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