



Material Breach and its Exception: An Analysis of a 'Humanitarian Character'

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Abstract

This essay first deals with the definition and the object and purpose of a material breach under Article 60 of the Vienna Convention by exploring its development from the principle *inadimplenti non est adimplendum* to 'fundamental' and 'material' breaches. It then identifies the way material breach works in practise, including its scope, the kinds of breaches made and procedures to be followed, by analysing decisions by international courts and tribunals and the *travaux préparatoire* of the Vienna Conferences. This essay ends with an analysis of the exclusion of 'humanitarian character' to prevent the entitlement of Article 60, proposing some observations to treaties that might involve a humanitarian character, especially human rights treaties.

1. Introduction

States have the right to suspend or terminate a treaty under the circumstances of its breach. Under Article 60 of the 1969 Vienna Convention on the Law of Treaties ('VCLT'),¹ a material breach authorises such a ground for states to request this entitlement. With regard to this Article 60 scheme, there are two types of the material breach, 'repudiation' and 'violation of a provision essential to the accomplishment of the object and purpose of the treaty'.² This essay explores the general idea of object and purpose of its provision, the way it has worked in practise, as well as its exceptions concerning distinguishing treaties, especially humanitarian and human rights treaties to be excluded from the suspension or termination of a treaty.³

2. Material Breach and its Object and Purpose

Before analysing the rule and the exception of the material breach under Article 60 of the VCLT, this section attempts to understand of the notion of material breach by exploring its development from the ancestor 'fundamental breach' adopted by rapporteurs of the International Law Commission ('ILC'), together with some reflections on the main concept of invalidity and termination of treaties.

2.1 From 'Fundamental' to 'Material' Breach

Before the provision of the breach of treaties was drafted, the principle *inadimplenti non est adimplendum* has been applied as customary international law.⁴ This principle allows a State party to

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

² *ibid*, art 60(3)(a) and (b).

³ While determining the whole concept of invalidity, termination and suspension of the operation of treaties, this essay limits its scope to not refer to nonmaterial breach application which might fall outside the scope of Article 60.

⁴ Bruno Simma and Christian J. Tams, 'Article 60 Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary Volume II* (OUP 2011) 1355.

not respect the obligations if other party ignores them,⁵ which the idea become the principle *pacta sunt servanda*. The principle *inadimplenti non est adimplendum* was cited in several cases under the international courts and tribunals jurisdiction. In the *Diversion of Waters from the Meuse* case, the Belgium claimed that the Netherlands violated the treaty on the use of river reciprocally; even though the Permanent Court of International Justice ('PCIJ') refused this argument⁶, but it shows how this principle is applied. Another significant case can be found from the International Court of Justice ('ICJ') in the *Namibia* Advisory Opinion where the Court mentioned that the rules concerning material breach 'may in many respects be considered as a codification of existing customary law on the subject'.⁷ This illustrates that a ground for termination or suspension of treaties has existed for a long time.

With regards to the work of ILC, Fitzmaurice in his reports on the law of treaties clearly distinguished three obligations of treaties: 'reciprocal', 'integral' and 'interdependent nature'. Reciprocal obligations of multilateral treaties provide for 'a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually'.⁸ Integral obligations are those 'where the force of the obligation is self-existent, absolute and inherent for each party'.⁹ This is exemplified by the 1948 Genocide Convention, which is an integral type of a treaty.¹⁰ Last, interdependent treaties are described as 'the participation of all the parties is a condition of the obligatory force of the treaty'.¹¹

Fitzmaurice also highlighted the relationship between reciprocal and integral obligations in terms of the termination and suspension of treaties. In his second report, he believed that reciprocal treaties might lead to a termination or suspension status; this is called a 'fundamental breach'.¹² At the same time, integral treaties might not be terminated or suspended by other parties from the breach.¹³ Interdependent treaties, on the other hand, might be entirely terminated by other parties due to fundamental breach, because, as he argued, the parties' performance depends on the performance of other parties.¹⁴

The term 'fundamental' breach was changed to 'material' breach in the proposal of Waldock in his ILC report in 1963. Waldock, in contrast with Fitzmaurice, argued that using the term 'fundamental' set too high of a standard for a breach.¹⁵ He compared the breach of a treaty with making a reservation when concluding a treaty.¹⁶ He further added that the breach uses same criteria of object and purpose in deciding the breach.¹⁷ Thus, rules concerning reservations should be applied for breaches of a treaty. In this sense, there is no error in Fitzmaurice' idea; however, Waldock developed this concept dynamically in order to comply with other rules in the Vienna Convention.

2.2 Some reflections on Invalidity and Termination of Treaties

Even though a material breach is a ground to terminate or suspend a treaty, it is not only provision dealing with invalidity and termination of treaties, however. Article 42 of the VCLT is a general provision controlling the stability and status of the relationship in a treaty.¹⁸ In this regard,

⁵ Humphrey Waldock, Second Report, Yearbook of the International Law Commission ('YILC'), 1963, vol II, 73.

⁶ *Case concerning the Diversion of Waters from the Meuse (Netherlands v Belgium)* PCIJ Rep Series A/B No 70.

⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 47.

⁸ Gerald Fitzmaurice, Third Report, YILC, 1958, vol II, art 18.

⁹ *ibid*, art 19.

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

¹¹ Gerald Fitzmaurice, Second Report, YILC, 1957, vol II, art 29.1(iii).

¹² *ibid*, art 19.

¹³ *ibid*, art 19(iv).

¹⁴ *ibid*, art 19.1(ii)(b).

¹⁵ Waldock (n 5) 76.

¹⁶ *ibid*.

¹⁷ *ibid*.

¹⁸ Shabtai Rosenne, *Breach of Treaty* (Cambridge Grotius Publications Limited 1985) 31.

Rosenne introduced the idea of the connection of substantive grounds, such as the material breach and its procedures that might be requirements for the invalidity or the termination of treaties.¹⁹

Regarding the relation between the ground for invalidity and the procedural complement, the ICJ in the *Fisheries Jurisdiction* case between the United Kingdom and Iceland, involving boats fishing in expanded territorial waters of Iceland, held that 'the procedural complement to the doctrine of changed circumstances is already provided for in the 1961 Exchange of Notes, which specifically calls upon the parties to have recourse to the Court in the event of a dispute relating to Iceland's extension of fisheries jurisdiction'.²⁰ This confirms the existence of a ground for termination of treaties in the Court's context. Another example can be found in the *Namibia* case, where the Court referred to a ground for termination of treaties under Article 60 of the VCLT. In this regard, the ICJ referred to the General Assembly Resolution 2145(XXI) that 'The resolution in question is therefore to be viewed as the exercise of the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship'.²¹ However, Fitzmaurice refused this judgment by providing the dissenting opinion that to oppose and to repudiate the existence of an obligation are not the same thing and may not necessitate the same legal remedy in this case.²² This debate thus illustrates the development of analysis on Article 60 concerning the grounds for terminating treaties.

In a case involving the aforementioned principle *inadimpleti non est adimplemdum*, the ICJ in the *ICAO Council* case between India and Pakistan, especially in the Judge De Castro's separate opinion, where he stated he believed that responsibility, obligations and sanctions stemming from *exceptio inadimpleti non est adimplemdum* led to the invalidity or termination of treaties.²³ This idea confirms that injured State parties have the right to request the termination or suspension of treaties, a right derived from the idea of *pacta sunt servanda*, that States parties have obligations to respect treaties. Thus, if one party does not perform in accordance with rules under an agreement, other parties that might be affected by that performance can call for the termination or suspension of that treaty.

This section has reviewed some objects and purposes of material breach, which shows its development from before the adoption of rules in the Vienna Convention to after its amendment by ILC special rapporteurs as well as the practice of international courts. Furthermore, it provided the necessary reminder that material breach also falls under grounds for the general provision of invalidity and terminations of treaties of Article 42 of the VCLT.

3. Material Breach and its Exception

The section below describes the two core substances of material breach. Beginning with general concept of Article 60 of the VCLT, it analyses how material breach applies in different types of treaties. Then, it examines the exception to material breaches under Article 60 paragraph 5, those of a 'humanitarian character', an ambiguous term that is variously interpreted among international legal scholars and international jurists.

3.1 Its Rule

(a) Scope of a material breach

As mentioned earlier, there are two types of material breach: (1) 'a repudiation of the treaty not sanctioned by the present Convention' under Article 60, paragraph 3(a), and (2) 'the violation of a

¹⁹ *ibid.*

²⁰ *Fisheries Jurisdiction Case (United Kingdom v Iceland)* (Judgment) [1973] ICJ Rep 3, para 45.

²¹ *Namibia* (n 7) 47.

²² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Dissenting Opinion of Judge Sir Gerald Fitzmaurice) [1971] ICJ Rep 16, 223.

²³ *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (Separate Opinion of Judge De Castro) [1972] ICJ Rep 46, 128.

provision essential to the accomplishment of the object and purpose of the treaty' under paragraph (3)(b).

Even though there is no official definition of 'repudiation', Simma and Tams state that under the Vienna Conference the term involves 'all means by which a party intends to relieve itself from its obligations under a treaty'.²⁴ They add that applications of invalidity, termination or suspension of treaties under Article 46 to 64 establish no material breaches, but only paragraph 3 (b) leads to material breach.²⁵ This issue is controversial in this regard because the term 'material' does not clarify in itself to what level the breach must rise. Paddeu also points out that there is no explanation of the quality or degree of the breach.²⁶ However, at least a 'substantial' violation of an essential provision is required to constitute a material breach, thus a trivial breach of essential provision thus may not be interpreted as a material breach.²⁷

Paddeu raises an interesting point relating to the entitlement of a material breach, that is, whether the breach shares the same notion of an internationally wrongful act under the law of responsibility.²⁸ This is exemplified in the ICJ *Gabčíkovo-Nagymaros* case, which held that repudiation under paragraph 3(a) is the wrong avenue to approach a material breach in accordance with Article 60.²⁹ While paragraph 3(b) shares a connection with the law of responsibility, the term 'violation' refers to some level of wrongfulness.³⁰ However, Paddeu argues that the law of treaties and the law of responsibility function differently; while the former focuses on the invalidity of treaties, the latter considers the breached obligations.³¹ Paddeu's opinion seems to be true; however, there might be some further reflections derived from this idea. Even though the function of each law is different, a material breach leading to the suspension or termination of treaties should be referred to the act of a State within the scope of the law of responsibility, because the existence of a breach must be constituted by a breach in a treaty obligation. Thus, one component of a material breach to invoke Article 60 is a wrongful act of a State.³²

Another case showing the vagueness of paragraph 3(b) of the Vienna Convention can be found in the *Nicaragua* case, when the ICJ considered several acts done by the United States. The Court interpreted the direct attack on Nicaraguan ports and oil installations and the mining of ports as material breaches of the 1956 Friendship, Commerce and Navigation Treaty.³³ Thus, there is no doubt that an obvious action done by a State can be considered as a material breach under paragraph 3(b).

(b) Types of treaties to entitle the suspension and termination

Besides the interpretation of material breach under paragraph 3, another important requirement to entitle Article 60 is the type of treaty, which can be separated into two categories: bilateral and multilateral treaties.

Paragraph 1 of Article 60 clearly states the situation and procedure for parties in bilateral treaties to suspend or terminate treaties. According to the rule, if a party violates such a treaty in such a way that it rises to a material breach, the other affected party can invoke Article 60 for suspension or termination of that treaty. However, there are some exceptions stated in paragraph 5 of Article 60 and Articles 65 to 68, which will be discussed in the next section.

²⁴ Simma and Tams (n 4) 1358; and Mohammed M. Gomaa, *Suspension or Termination of Treaties on Grounds of Breach* (Brill 1996) 26.

²⁵ Simma and Tams, *ibid*.

²⁶ Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge University Press 2018) 73.

²⁷ Waldock (n 5) 73; Simma and Tams (n 4) 1359 and Paddeu, *ibid*.

²⁸ Paddeu, *ibid* 74.

²⁹ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1977] ICJ Rep 7 [46–47].

³⁰ Rosenne (n 18) 6–7.

³¹ Paddeu (n 26) 75.

³² Bruno Simma, 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law' (1970) 20 *Österreichische Zeitschrift für öffentliches Recht* 5, 38.

³³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Judgment) [1986] ICJ Rep 14, para 275.

With regards to paragraph 2 of Article 60, the entitlement of material breach of a multilateral treaty is complex because they involve more than two State parties. Simma and Tams refer to the debate of the ILC that the treatment of all multilateral treaties does not share a common ground; in the other word, there are two main acts that a contracting party can do in the fact of a breach, collective and individual reactions.³⁴

Collective reactions are less complex than the latter. Paragraph 2(a) gives entitlement of suspension or termination of a treaty to all other parties because of a material breach by one party. This seems like the case as with bilateral treaties, however, there is a requirement of unanimous decision of all parties besides the defaulting party. Simma and Tams believes that this requirement can be met either by official or unofficial assent by the member States.³⁵

While individual responses are allowed in specific situations in accordance with paragraph 2(b) and (c), a party only has the right to suspend its obligations to maintain the stability of a treaty. The specific term in subparagraph b, the term 'specially affected parties' means all parties who are affected by a defaulting State under two circumstances: a material breach of 'multilateral consular or diplomatic conventions' and of 'standard-setting conventions aimed at protecting common goals of treaty members and requiring parallel, independent conduct of its parties'.³⁶ Therefore such a specially affected party can invoke a suspension of a treaty in the relation of itself and the defaulting party. Another term in paragraph c refers to all parties whether or not they are specially affected parties, excluding the defaulting State. They are entitled the suspension of a treaty if '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'.³⁷ This type of treaty includes treaties relating to disarmament, anti-use of particular weapons or non-acquisition of territory.³⁸

(c) Procedures to be followed

In order to complete the whole process of a material breach, it is important to give an overview of procedural requirements to be followed with respect to the suspension or termination of treaties under Article 65. The provision obligates the invoking State to notify other parties to the treaty of its claim for the stability of treaty's enforcement among all contracting States. An example can be found in the *Arbitral Award between Croatia and Slovenia* when the Permanent Court of Arbitration ('PCA') compared the Arbitration Agreement and its Optional Rules with Article 65 of the VCLT and stated that:

With respect to the question of jurisdiction, the Tribunal concluded that it "has jurisdiction under the provisions of the Arbitration Agreement and Article 21, paragraph 1 of the PCA Optional Rules, and in conformity with Article 65 of the Vienna Convention, to decide whether Croatia, acting under Article 60 of the Convention had validity proposed to Slovenia to terminate the Arbitration Agreement and had validity ceased to apply it."³⁹

This means that the Article 60 relating to the entitlement of suspension or termination of treaties is also applied to the process of international arbitration. However, this normally takes the use of Article 66–68 to fully operate the whole procedure for suspension or termination of treaties.

The ICJ in the *Gabčíkovo-Nagymaros* case referred to Article 65, which "if not codifying customary law, at least generally reflect[s] customary international law and contain certain procedural principles which are based on an obligation to act in good faith".⁴⁰ It can be interpreted from the

³⁴ Simma and Tams (n 4) 1361.

³⁵ *ibid* 1362.

³⁶ Bruno Simma, 'From Bilateralism to Community Interest in International Law' *Recueil des Cours de L'Académie de Droit International* 1994-IV, vol 250, 351.

³⁷ VCLT (n 1) art 60, paragraph 3 (c).

³⁸ Simma and Tams (n 4) 1365.

³⁹ *Arbitral Tribunal Final Award (Croatia v Slovenia)* (2017) Permanent Court of Arbitration, para 198.

⁴⁰ *Gabčíkovo-Nagymaros* (n 29), para 109.

decisions of the *PCA Award between Croatia and Slovenia* and the ICJ *Gabčíkovo-Nagymaros* that Article 65 is customary international law.⁴¹

3.2 An Introduction to Humanitarian Treaties and other Exclusions

There are two applications excluding the suspension or termination of treaties under provisions in paragraphs 1 to 3 of Article 60 of the VCLT, these exclusions include treaties relating to humanitarian characters and other exclusions of international law.

(a) Humanitarian character

According to paragraph 5, a provision concerning 'the protection of the human person contained in treaties of a humanitarian character...' is excluded from any suspension or termination. Simma and Tams support the idea that there is an objective to protect beneficiaries of this type of treaty from being deprived of their rights in further conflicts between States parties.⁴² Another reason behind this is the need to respect and safeguard human beings protected under general concepts of international law. This paragraph, together with the Geneva Conventions relating to protection of war victims, refugees, slavery and genocide, was proposed by the representative of Switzerland during the Vienna Conference.⁴³ However, there were several debates on the Swiss proposal that it went beyond the concept of 'humanitarian character' under paragraph 5.⁴⁴ This issue will be analysed in the following section.

In ICJ's *Namibia* case, the Court considered humanitarian character to be defined by customary international law,⁴⁵ resulting in that all treaties relating to humanitarian causes were excluded from material breach application under Article 60 of the VCLT. This raises a problem to the ambiguity of interpretation concerning the type of treaties categorised as humanitarian characters, as well as mixed agreements supporting both community and humanitarian interests.⁴⁶ These two controversial issues will be addressed in detail in the next section.

(b) Other exclusions under international law

Fitzmaurice mentioned that it was rare to have the only specially affected party by a material breach invoking Article 60 because the idea of the entitlement of this Article is based on its reciprocity.⁴⁷ Bruno and Tams support the concept of 'specially affected party' in standard-setting conventions, and that they should be excluded from Article 60 because these conventions does not refer to reciprocal obligations.⁴⁸ Thus, it can be determined that Article 60 grants other exclusions outside the ostensible scope of its text.

Even though other exclusions fall outside Article 60, they also share some concepts leading to the exclusion of suspension and termination of treaties. Deriving from the practice of international law, there are two potential exclusions, peremptory norms or *jus cogens* and the obligations of diplomatic relations.

With reference to *jus cogens*, no treaties breaching such norms are permitted. The ILC referred to the concept of obligations imposed by international law independently of a treaty under Article 43 of the VCLT that the suspension or termination of treaties cannot be completely done

⁴¹ Heike Krieger, 'Article 65' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 1134.

⁴² *ibid* 1366.

⁴³ Proposal by Mr. Bindschedler (Swiss Delegate) in United Nations, 'Official Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' United Nations Conference on the Law of Treaties (First Session) (Vienna, 26 March–24 May 1968), A/COND/39/11, 354.

⁴⁴ *ibid*.

⁴⁵ *Namibia* (n 7) 47.

⁴⁶ Simma and Tams (n 4) 1367–1368.

⁴⁷ Egon Schwelb, 'Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach' (1967) 7 *Indian Journal of International Law*, 321–326; René Provost, 'Reciprocity in Human Rights and Humanitarian Law' (1994) 65 *British Yearbook of International Law*, 401.

⁴⁸ Simma and Tams (n 4) 1369.

without the observation of States parties as a general principle of international law.⁴⁹ For example, in the field of diplomatic relations, the ICJ in the *Hostages* case claimed that the inviolability of diplomatic law creates a self-contained regime under international law, resulting in the exclusion of Article 60 entirely.⁵⁰ This regime is considered as a minimum obligation in the diplomatic relationship between States.

To conclude this section, rules and exceptions of a material breach under Article 60 of the VCLT are identified and discussed above. While the scope of material breach, as well as the types of treaties to invoke the suspension or termination of treaties has been determined and developed by practice of international courts, the ILC itself and several international scholars, exclusions to the entitlement of Article 60 are still controversial and need further clarification. The next section thus describes and analyses the problem systematically.

4. Analysis of the Exclusion of Treaties of 'Humanitarian Character'

As briefly described in the previous section, this section analyses types of treaties of humanitarian character that exclude an entitlement of suspension or termination under Article 60 of the VCLT. In this regard, it first explores humanitarian treaties considered as humanitarian character by their nature. Then, the section examines a related type of humanitarian treaty, human rights treaties, and whether this type falls under the definition of a humanitarian character under paragraph 5 of Article 60.

4.1 Humanitarian Treaties

Article 60, paragraph 5 states that: 'Paragraphs 1 to 3 do not apply to provisions relating to the protection of human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.' This paragraph raises a clear concept of an inability to claim a material breach as a ground for suspension or termination of treaties containing a humanitarian character because of their nature that aims to protect human beings. In other words, such humanitarian rights are protected under this provision and no other States, not even injured States have reciprocal rights to the defaulting State.

Here comes the problem of what classifies as 'a humanitarian character'. From the *travaux préparatoire* of the working committee on the law of treaties, it was found that Mr. Bindschedler, a Swiss representative stated that there should be some exclusion to such grounds.⁵¹ He then proffered humanitarian reasons, giving examples of the Geneva Conventions concerning 'the protection of war victims ... , the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general'.⁵² Leaving aside the idea of 'the protection of human rights in general' (which will be discussed in the following sub-section) several countries, including Costa Rica, Denmark, Brazil, Israel, Finland, Italy and El Salvador, supported the idea to make an exclusion to humanitarian reasons proposed by Swiss delegation at the second session of the Vienna Conference.⁵³

However, as there is no clear definition of what 'humanitarian character' is, the following examples might be taken into consideration as to whether they fall under the scope of humanitarian character.

⁴⁹ Waldock (n 5) 94. The same idea applies to the international responsibility of States under Article 26, 40, 41 and 50 of the ILC's Draft Articles on State Responsibility.

⁵⁰ *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Judgment) [1980] ICJ Rep 3, para 83.

⁵¹ Bindschedler (n 43) 354.

⁵² *ibid.*

⁵³ United Nations, 'Official Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' United Nations Conference on the Law of Treaties (Second Session) (Vienna, 9 April to 22 May 1969), A/COND/39/11/Add.1, 112.

(a) General rules of international law

Proposed by Greece at the Second Session of the Vienna Conference, humanitarian character links to the concept of general rules of international law because a number of provisions relating to a humanitarian character are part of general international law.⁵⁴ This interpretation reflects some points in limiting the scope of humanitarian character because not all general international law characterise humanitarian character and, *vice versa*, not all humanitarian characters are general international law. Some humanitarian provisions, such as provisions in the Hague and Geneva Conventions are customary international law as decided by the ICJ in *Nuclear Weapons Advisory Opinion*⁵⁵, not general rules of international law.

However, it is undeniable that some humanitarian characters are general rules of international law, but it might be difficult to detail all humanitarian treaties that are general international rules. Therefore, defining all general rules of international law as humanitarian characters is not absolutely correct, it thus should be limited to the actual general rules of international humanitarian law instead.

(b) Purpose of a humanitarian character

The exclusion of a humanitarian character is applied to allow human persons to claim their rights regardless of any conflict arising in the future. However, this exclusion might lead to misuse of the provision for the protection of a violating State. According to an example provided by a representative of Tanzania during the Vienna Conference, a situation where 'a party which violated a humanitarian treaty knew that the other parties would apply its provisions to its nationals, it might perhaps be encouraged to violate the treaty, believing itself to be protected against any sanction.'⁵⁶ This seems to leave a gap for a violating State to avoid sanction when acting against a humanitarian character; however, this is not true because the real purpose of paragraph 5 of Article 60 is to help State parties maintain their treaty obligations of a humanitarian character in the face of material breaches by other parties.

Simma and Tams refer to the operation of paragraph 5 of Article 60 that the exclusion is operated only in the circumstances that a material breach under paragraph 1 to 3 is achieved.⁵⁷ They add that the nature of humanitarian treaties, as the exclusion of paragraph 1 to 3, do not expect 'the parallel adoption of common standards by the parties but involve the performance of obligations in bilateral constellations.'⁵⁸ Thus, the exclusion of humanitarian treaties from material breach provisions in order to protect humanitarian rights has been fulfilled.

(c) Integral agreements

Treaties with integral structure are easily identified, especially for humanitarian treaties. These treaties are excluded from the entitlement of the suspension or termination of treaties under Article 60, paragraph 1 to 3. For example, the Genocide Convention is an example of an integral treaty. According to the preamble of the Convention, it states that: 'at all periods of history genocide has inflicted great losses on humanity'.⁵⁹ Tams supports that the Convention protects 'fundamental rights of individuals, it is particularly important to avoid temporal 'gaps' in the system of protection'.⁶⁰ The ICJ in several cases confirmed that the provisions of the Genocide Convention are moral and humanitarian principles that should be respected by States.⁶¹ This confirms that the Genocide

⁵⁴ Proposal by Mr. Eustathiades (Greek Delegate) in United Nations, *ibid*, 113.

⁵⁵ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 79 and 82.

⁵⁶ Proposal by Mr. Seaton (Tanzanian Delegate) in United Nations (n 53) 114.

⁵⁷ Simma and Tams (n 4) 1367.

⁵⁸ *ibid* 1368.

⁵⁹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 1021 UNTS 1951.

⁶⁰ Christian Tams 'Article XI' in Christian Tams, Lars Berster and Björn Schiffbauer (eds.) 'Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary' (Bloomsbury Publishing 2014) Article XI.

⁶¹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Judgment) [1996] ICJ Rep 595, para 23 and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 [24].

Convention is one of integral humanitarian treaties serving as an exclusion from invoking any suspension or termination of treaties under Article 60.

(d) Mixed agreements

Mixed agreements, frequently concluded among States, cover not only humanitarian matters but also community interests. The mixed agreements can be found in several multilateral treaties, such as the 1972 Biological Weapons Convention, the 1993 Chemical Weapons Convention and the 1997 Anti-Personnel Mine Ban Convention.

In this sense, Gomma believes that such a disarmament agreement serves a humanitarian objective;⁶² for example the 1997 Anti-Personnel Mine Ban Convention in its preamble states that: 'Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children ...'⁶³ It is clearly seen that even though this Convention serves the community purpose, but at the same time, does touch on the humanitarian matters. Thus, this mixed agreement falls under the concept of a humanitarian character.

Another example can be found in the 1925 Geneva Protocol for the Gas Prohibition in War, which states that: 'whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices, has been justly condemned by the general opinion of the civilised world [...]'.⁶⁴ For this mixed agreement, even though no humanitarian purpose is clearly written, Baxter and Buergenthal state that its purpose is to protect humanitarian rights as a humanitarian treaty.⁶⁵ This means that to interpret a mixed treaty as having a humanitarian character, not only identifying its purpose as derived from its preamble and context, but also considering its hidden object and purpose from extracting the intention of drafters should be taken into consideration.

(e) Humanitarian character under the concept of the ILC's Draft Articles on State Responsibility

It seems that the ILC's Draft Articles on State Responsibility falls under the concept of an integral agreement, resulting in an exclusion of a ground to suspend or terminate treaties. However, even the Draft Article involves an internationally wrongful act, but there are a number of considerations to be reviewed, especially obligations *erga omnes*.⁶⁶

According to Article 50, paragraph 1 of the ILC's Draft Articles, it states that:

Countermeasures shall not affect:

- (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) Obligations for the protection of fundamental human rights;
- (c) Obligations of a humanitarian character prohibiting reprisals;
- (d) Other obligations under peremptory norms of general international law.

This Draft Articles refer to the integral treaties under the concept of a material breach under Article 60 of the VCLT. The Commentary of the Draft Articles, it explains that:

An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State if its obligations ...

⁶² Gomma (n 24) 110–111.

⁶³ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211.

⁶⁴ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 7 September 1929) 2138 LNTS 67.

⁶⁵ R. R. Baxter and Thomas Buergenthal, 'Legal Aspects of the Geneva Protocol of 1925' (1970) 64(5) *American Journal of International Law* 853, 872.

⁶⁶ ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2011) *Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10)*, art 50, paragraph 1.

to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.⁶⁷

Pauwelyn believes that provisions of paragraph 1(c) in Article 50 of the Draft Articles and the exclusion of treaties in relations to a humanitarian character under paragraph 5 of Article 60 of the Vienna Convention shows that a mutual notion is shared between them.⁶⁸ This might be true because even the requirement to entitle countermeasures under Article 50 of the Draft Articles also includes bilateral obligations and collective obligations which are as same as the entitlement of suspension and termination of treaties under Article 60 of the VCLT.

Also, relating to the exclusion of a humanitarian character, both the Draft Articles and the Vienna Convention comply with integral obligations, but the Draft Articles also cover *jus cogens* obligations which are not directly stated in Article 60, paragraph 5 of the Vienna Convention. The VCLT recognises it outside Article 60, but *jus cogens* is considered as another exclusion under international law, which has been addressed earlier in this essay.⁶⁹ Thus, the suspension or termination of integral obligations of a humanitarian character is not permitted in both the VCLT and the Draft Articles.

4.2 Human Rights Treaties

Sometimes it is difficult to distinguish between humanitarian and human rights; this problem is also applied to the exclusion of treaties with a humanitarian character, in terms of whether human rights can be considered as humanitarian. With regards to the Swiss proposal in the first meeting of the Vienna Conference, he mentioned including '... the protection of human rights in general' as a humanitarian character.⁷⁰ This definition might exceed the limit of the 'humanitarian' concept. To determine what is considered as a humanitarian character in the field of human rights, there are several observations discussed below.

(a) Standard-setting treaties

Simma and Tams argue that: 'parties are normally not entitled to suspend standard-setting treaties in the field of human rights, as the mere violation of these treaties does not 'specially affect' them in the sense of paragraph 2(b)'.⁷¹ This means that in some specific situations State parties are entitled to suspend or terminate standard-setting treaties. Such events may ensue if, for example, there are collective performance by States in accordance with paragraph 2 (a), affected parties suffer from the defaulting State under paragraph 2(b) or there are reactions to a material breach of bilateral treaties.⁷²

Some causal link of humanitarian and human rights in standard-setting treaties is also found in the preamble of the Vienna Convention itself, it states that: 'Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of ... the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all'.⁷³ This illustrates how the drafters' intentions aim to cover some concepts of human rights under the scope of humanitarian matters.

(b) Human rights under the concept of ILC's Draft Articles

It was previously stated that Article 50, paragraph 1(b) of the Draft Articles treats 'fundamental human rights' as one of exclusions from invoking countermeasures.⁷⁴ As humanitarian character is an obligation that States cannot entitle countermeasures against under the concept of Article 50,

⁶⁷ *ibid* 333.

⁶⁸ Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature' (2003) 14(5) *European Journal of International Law* 907, 918.

⁶⁹ Simma and Tams (n 4) 1369.

⁷⁰ Bindschedler (n 43) 354.

⁷¹ Simma and Tams (n 4) 1367–1368.

⁷² *ibid* 1369.

⁷³ VCLT (n 1) preamble.

⁷⁴ ILC (n 66) art 50, paragraph 1 (b).

paragraph 1(c), this means that the concept of human rights is applied differently from the Vienna Convention. In other words, the humanitarian character obligation under the Draft Articles does not cover the protection of human rights because it has its own context in accordance with its subparagraph b.

However, the different approach of the Draft Article does not lead interpretation of 'humanitarian character' under paragraph 5 of Article 60 of the VCLT to exclude human rights perspectives out of 'humanitarian character'. This is because the drafters might find an ambiguity in the term 'humanitarian character' under Article 60 of the Vienna Convention, the rules after the conclusion of the Vienna Convention are thus written more clearly to prevent any confusion in the application of the exclusion. In a contrary, the direction to make clear of exclusion of countermeasures under Article 50, paragraph 1 of the Draft Articles support the interpretation of humanitarian character instead. This is because the drafters had as their purpose to include another type of exclusion as ground for not invoking countermeasures, which means that the exclusion to entitle the suspension or termination of treaties applies the same rule as the Draft Articles, resulting in the situation that humanitarian character under the VCLT includes fundamental human rights.

For example, in the Advisory Opinion of the Inter-American Court of Human Rights ('IACHR'), the Court stated that:

human rights treaties ... "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states"; rather "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting states".⁷⁵

This leads to the clarification of the purpose of human rights treaties as law for protection of basic rights. It thus notes that human rights treaties share the similar idea of humanitarian treaties which aim to protect human person.⁷⁶

(c) Example of human rights: right to own property

As mentioned in the Commentary, one interesting type of human right is the right to own property.⁷⁷ A material breach invoking the suspension or termination of treaties leads to the end of the right to own assets by foreigners, however this is taken into consideration whether this type of human right falls under the humanitarian character category. Analysing this issue in detail, the purpose of the right of foreigners to own property involves the relationship between countries, thus this violation should be considered under the idea of countermeasures under the ILC's Draft Articles instead.⁷⁸ This guideline should be applied with any other types of human rights by focusing on their aim; if the right intends to protect human persons considered as humanitarian matter, Article 60 paragraph 5 of the VCLT then applies; however if the right has purpose to maintain the relationship among countries, the exclusion process of countermeasures under Article 50 paragraph 1 of the Draft Articles then applies.

(d) Interests of international community

According to Waldock, States should not be permitted to suspend or terminate any human rights treaties easily because of several reasons, including the interests of the international community.⁷⁹ Craven mentions that human rights treaties intend to protect the interests of individuals, which shares the same notion with humanitarian treaties; however, he also adds that human rights treaties serve their role in other fields to protect the international community as a whole, such as labour rights under the ILO conventions safeguarding the right relating to work or diplomatic and

⁷⁵ Inter-American Court of Human Rights (Advisory Opinion) *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)* OC-3/83 (1983), para 50.

⁷⁶ Pauwelyn (n 68) 933.

⁷⁷ Simma and Tams (n 4) 1368.

⁷⁸ *ibid.*

⁷⁹ Humphrey Waldock, First Report, YILC, 1966, vol I, 68.

consular treaties aiming to protect interrelation among States.⁸⁰ This shows that it cannot estimate the framework of human rights treaties whether they have as larger or smaller scope than humanitarian character. In other words, not all human rights are humanitarian and *vice versa*.

The Human Rights Committee described that human rights treaties 'are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place save perhaps in the limited context of reservations to declarations on the Committee's competence under Article 41'.⁸¹ This illustrates the attempt of the Committee to define human rights treaties to serve their object and purpose best; because treaties concerning human rights aim also to protect basic rights of individual human being for every nationality, not only some State parties. Thus, the existence of human rights treaties supports the interests of the international community as a whole.

In summary, this section began by describing the concept of a humanitarian character under humanitarian treaties by focusing on some distinctions, including: (a) *general rules of international law*, which shows that only general rules of international humanitarian law fall under the concept of humanitarian character, while other rules can also be classified as exclusions to the entitlement of suspension or termination of treaties; but not as humanitarian character; (b) *purpose of a humanitarian character*, which confirms the requirement of the protection of humanitarian rights as a component to serve the purpose of humanitarian character; (c) *integral agreements*, which show that they are clearly identified as humanitarian character excluding the entitlement of Article 60; (d) *mixed agreements*, which serve more than a purpose of humanitarian matter but cover some other field, such as community interest, thus, there is a need to identify the whole treaty's object and purpose, preamble and context whether it serves the purpose for humanitarian matters; and (e) *humanitarian character under the concept of ILC's Draft Articles*, which shares mutual ideas with Article 60 of the Vienna Convention.

Then, this section went on to analyse human rights treaties in relation to their humanitarian character and also proposed some considerations: (a) *standard-setting treaties*, which link to the intention of drafters whether they determine to include humanitarian matters; (b) *human rights under the concept of ILC's Draft Articles*, which has a separate sub-paragraph relating to fundamental human rights; (c) *examples of human rights: right to own property*, which falls outside the concept of humanitarian character under Article 60, paragraph 5 of the VCLT; and (d) *interests of international community*, which are supported by human rights treaties and might lead to fall under the scope of humanitarian character.

5. Conclusion

Material breach, as a performance conducted by a State, can lead to the entitlement of suspension or termination of treaties in accordance with Article 60 of the Vienna Convention. However, not all treaties can be brought into this process. There are some treaties that exclude termination or suspension even if a material breach is found: 'humanitarian character' treaties. Defining the term 'humanitarian character' still has problems in practice, whether, for example, human rights treaties fall under the scope of the concept of humanitarian character. This paper has extended some observations that help to clarify these matters to some extent.

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⁸⁰ Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11(3) *European Journal of International Law* 489, 497.

⁸¹ UN Human Rights Committee, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para 17.