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Exceptional Circumstances and Treaty Commitments

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Introduction

Much of the existing law of treaties promotes the stability and security of treaty relations. The fundamental principle *pacta sunt servanda* reflects this idea by requiring that parties must perform their obligations in good faith for all valid treaties in force. But the law of treaties does not favour stability and security exclusively. Escape valves do exist, permitting parties to terminate or suspend their obligations for various reasons. In some cases, the law of treaties does so to promote consent, such as where termination or suspension occurs in conformity with the parties’ own agreement, whether in the treaty itself or some later instrument. In a different set of cases—those involving material breach—the behaviour of other parties provides an alternative basis for a State to abrogate the treaty or suspend its own performance.

This chapter deals with a third condition—the existence of ‘exceptional circumstances’—that States can invoke to avoid (or remove) their treaty obligations. The following doctrines that may serve this purpose are analysed: (i) supervening impossibility of performance; (ii) fundamental change of circumstances; and (iii) necessity.

The first two grounds are codified in Articles 61 and 62 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Necessity belongs to the realm of State responsibility (namely, Article 25 of the International Law Commission’s Articles on State Responsibility (ASR)). As with the broader relationship between the law of treaties and the law of State responsibility, the doctrine of necessity’s relationship with the law of treaties remains unclear and, despite certain case law, it is one of the most taxing areas of international law.

I. Supervening Impossibility of Performance

The doctrine of supervening impossibility of performance is an uncontroverted basis for States to terminate or suspend their treaty obligations. Article 61 of the VCLT expresses the fundamental elements of the rule:

1. 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.

2. 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.

Unlike other bases for terminating or suspending a treaty, however, the doctrine of impossibility has gone largely un-theorized. Moreover, practically speaking, it has proven extraordinarily difficult for States to invoke.

As a threshold matter, the doctrine on supervening impossibility of performance needs to be distinguished from the exception of non-performance. The exception of non-performance purports to relieve a party from the obligation to perform where the other party has failed to perform the same or a related obligation. The legal basis for this exception, however, has not received sufficient analysis. It was not included in the VCLT nor—despite extensive
discussion—the codification of the 2001 ASR. Some viewed the exception of non-performance as ‘a circumstance precluding wrongfulness’ or a kind of countermeasure for another State’s wrongful act or omission. Others, however, now view it as a rule of treaty interpretation, rather than a secondary rule suitable for the ASR.8

(p. 607) Today, there remain many unresolved questions concerning the exception of non-performance, such as its relationship with force majeure (a circumstance precluding wrongfulness) and, generally, the principle of pacta sunt servanda. As a result, it is easy to see this exception’s potential confusion with the doctrine of impossibility, particularly where one party’s wrongful behaviour makes it impossible for the other party to perform its obligations. But, there are at least two differences between these concepts. First, the exception of non-performance need not be limited to cases where a party cannot possibly perform; its wider meaning encompasses cases where a party may not perform because it is unfair to require performance because the other party has not performed its own (reciprocal) obligations. Moreover, the functions of the two doctrines are distinct. The exception of non-performance conditions a State’s legal responsibility for its acts or omissions; the doctrine of impossibility provides a basis for terminating or suspending the treaty itself. Termination or suspension of a treaty may, of course, have consequences for a party’s obligation to perform, but that is not their focus, which lies instead with whether there are treaty obligations at all. Thus, more careful analysis is required of the relationship between the institutions of termination and suspension of treaties and exceptions to performance obligations, whether as part of the law of treaties or the law of State responsibility.9

A. Views of the International Law Commission

Within the broad issue of termination or suspension of treaties, supervening impossibility of performance has been analysed less than other doctrines such as fundamental change of circumstances. However, it was extensively discussed during the codification process of the VCLT by the International Law Commission (ILC). And even, prior to this, Fitzmaurice had already made some pertinent observations on what circumstances would make performance impossible.10 Fitzmaurice’s examples referred to the extinction of the physical object to which the treaty relates, such as: the disappearance of an island owing to subsidence in the seabed; the drying up of the bed of a river permanently; the destruction of a railway by an earthquake; the destruction of a plant, installation, canal, lighthouse, etc. He also noted that under certain circumstances the legal character of this exception may generate difficulties in interpretation. The question may arise to what extent granting rights in respect of an object involves a guarantee to maintain the object itself, or to refrain from all action liable to interfere with it. As an example, Fitzmaurice posed the question whether granting fishery rights in a river implies an obligation not to divert the water or impair the fisheries. According to him, answering such questions must depend on the interpretation of the treaty. Fitzmaurice also noted that certain authors wanted to divide the impossibility doctrine into physical and juridical impossibilities. However, he believed that allowing juridical impossibility would present inherent difficulties because a State (p. 608) would always be able to obtain release from its treaty obligations by entering into other incompatible obligations.11

Fitzmaurice was more open, in contrast, to recognizing supervening impossibility of performance for treaty regulations due to the disappearance of the treaty field of action. Examples would include: treaties regulating certain matters regarding a system of capitulatory rights (after the disappearance of the system) and treaties concerning certain matters arising from a customs union after the disappearance of such a union. Fitzmaurice believed termination or suspension of such obligations could be based either on the doctrine of supervening impossibility of performance or fundamental change of circumstances, revealing the inherent difficulties in achieving clean-cut differences between various doctrines aimed at releasing a State from its treaty obligations. Indeed,
Fitzmaurice explained that in these types of cases, it is not so much that performance has become impossible, but:

rather that performance would, even if possible, be absurd, inappropriate and meaningless, and that it is really no longer a question of performance, because there is no longer any sphere or field of action to which the treaty relates, or in which performance can take place.\textsuperscript{12}

Sir Humphrey Waldock made similar observations in his own reports on the law of treaties.\textsuperscript{13} His comments on draft Article 21 (supervening impossibility of performance) took the view that the doctrine of supervening impossibility needed to be understood very strictly to separate cases falling under its remit and those falling under the doctrine of \textit{rebus sic stantibus} (fundamental change of circumstances). Waldock, however, did not offer any precise guidance on the boundaries separating these two doctrines. He also disagreed with Fitzmaurice on whether the disappearance of one of the parties fell under the law of treaties or larger questions of State succession.\textsuperscript{14}

The ensuing ILC discussion addressed how widely to define impossibility, how to distinguish it from fundamental change of circumstances, and how to differentiate it from the law of State responsibility. Mr De Luna thought the doctrine should include practical or relative impossibility, together with its incontrovertible application to factual impossibility of performance of an absolute character, which involves the disappearance or destruction of an object of a treaty. However, such a broadening of the scope of the applicability of this doctrine would, as observed by Fitzmaurice, undermine the principle \textit{pacta sunt servanda}. De Luna also admitted that relative impossibility of performance could prove troublesome regarding a clear-cut distinction from the doctrine of fundamental change of circumstances, which according to him was applicable where the treaty lost all its meaning. For De Luna, the difference between these two doctrines was primarily based on the premise that, according to the doctrine of supervening impossibility, (p. 609) performance without being totally impossible has been rendered extremely difficult due to supervening circumstances.\textsuperscript{15}

In addition to discussing what conditions could generate supervening impossibility of performance, the ILC discussion also evidenced unresolved difficulties in separating the law of treaties and the law of State responsibility. Tunkin viewed the reasons for a State’s non-fulfilment of its obligations and its resulting responsibilities as separate issues belonging to the topic of State responsibility. He maintained that for State responsibility to arise from non-performance of a treaty there must be a valid treaty in operation; however, the ILC draft Article (43(1) and (2)) provided for the treaty’s suspension or termination due to the supervening impossibility of performance. Therefore, Tunkin believed that in those circumstances there would be no treaty in operation.\textsuperscript{16}

The ILC’s attempt to make a significant distinction between the law of treaties and the law of State responsibility regarding supervening impossibility of performance was ultimately inconclusive. Mr De Arechaga distinguished two substantively different types of responsibility to clarify the issue: the first type derives from the treaty (analogous to liability \textit{ex contractu} in private law) and the second type arises in certain cases outside the treaty.\textsuperscript{17} The dilemma of separating these two areas (the law of treaties and the law of State responsibility), was also reflected in the views of the Special Rapporteur, Waldock. He argued that certain cases should be treated as cases of \textit{force majeure}, particularly where a substantial doubt existed as to the permanence of the impossibility since that situation ‘might simply be treated as a case where \textit{force majeure} could be pleaded as a defence exonerating a party from liability for non-performance’.\textsuperscript{18} In general, the Commission
viewed impossibility under the topic of *force majeure* as belonging to the realm of State responsibility rather than the law of treaties.

Mr Ago also questioned whether the physical impossibility of carrying out a treaty necessarily always means that the legal obligation created by the treaty ceases to exist. He contrasted two distinct situations. The first arises when impossibility supervenes without any fault on the invoking State’s part such that it might not only be factually impossible to carry out the treaty, but the State could decide that it is no longer legally bound to implement that treaty. The second arises when the State *is* responsible, in whole or in part, for creating the conditions of impossibility of performance, such that the State might find it impossible to execute the treaty, but could not declare itself free from having to implement that treaty. This later limit on impossibility ended up being reflected in paragraph 2 of Article 61. During the VCLT Diplomatic Conference, additional proposals were made to broaden Article 61’s scope, such as instances of impossibility to make certain payments due to financial difficulties. The participating States chose not to do this, but recognized that such a situation may be treated as a circumstance precluding wrongfulness.\(^19\)

**B. The relevant case law**

Supervening impossibility of performance was pleaded in two early cases before the Permanent Court of International Justice (PCIJ), but the Court rejected the claims in both instances.\(^20\) In 1991, the *Libyan Arab Foreign Investment Company v Burundi Arbitration* case faced the question of impossibility raised under a plea of *force majeure*.\(^21\) The Arbitral Tribunal declined, however, to accept this plea, because ‘the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility was a result of a unilateral decision of a State’.\(^22\)

Undoubtedly, the most relevant case applying the doctrine of supervening impossibility of performance was the *Gabčikovo-Nagymaros* case.\(^23\) The case originated from a dispute regarding the implementation of the 1977 Treaty Concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks between Czechoslovakia and Hungary. The 1977 Treaty provided for construction of two series of locks at Gabčikovo (situated in Czechoslovak territory) and Nagymaros (situated in Hungarian territory) to establish ‘a single and indivisible operational system of works’.\(^24\) In its Judgment, the International Court of Justice (ICJ) emphasized the project’s integrated character, ‘with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works’.\(^25\) The Court also noted that the 1977 Treaty provided for a flexible framework and that the Parties in practice acknowledged it.\(^26\) In terms of its functions, one purpose of the Treaty was to provide energy, but it also sought improvement of the navigability of the Danube, flood control, regulation of ice discharge, and the protection of the natural environment.\(^27\)

In 1989, Hungary unilaterally suspended and subsequently sought to terminate the Treaty with the Slovak Republic (which became a Party after the so-called ‘Velvet Revolution’ that created separate Czech and Slovak Republics). The Slovak (p. 611) Republic started to put into operation a unilateral alternative locks system, the so-called ‘Variant C’ solution and submitted the dispute to the ICJ.

As Johann Lammers observed, this case created a host of issues relating to the law of treaties and the law of State responsibility.\(^28\) The first group of issues related to Hungary’s various grounds for justifying termination of the 1977 Treaty (eg supervening impossibility of performance, fundamental change of circumstances, material breach, reciprocal non-compliance), while the second group of issues related to questions of State responsibility...
and its relationship to the law of treaties (eg whether a state of necessity served as a circumstance precluding the wrongfulness of any Hungarian act).

In terms of supervening impossibility of performance, Hungary specifically sought to rely on VCLT Article 61. Hungary argued that the essential object of the 1977 Treaty—namely the joint economic investment undertaken by two Parties, which was compatible with environmental protection—had permanently disappeared and that ‘the Treaty had thus become impossible to perform’. The Court, however, decided that Hungary’s interpretation of impossibility was not in conformity with either the terms of its formulation in Article 61 or the intentions of the Diplomatic Conference that adopted the VCLT. The Court decided not to engage in the discussion (originally suggested by Fitzmaurice) as to whether the term ‘object’ in Article 61 can encompass disappearance of a legal regime. It found ‘even if that were the case, it would have to conclude that in this instance that regime had not definitively ceased to exist’. The Court pointed out (as it did repeatedly throughout the Judgment) that the 1977 Treaty included provisions enabling the Parties to make necessary adjustments between economic and environmental issues. Moreover, the Court observed that the impossibility of joint exploitation was in fact caused by Hungary’s failure to carry out most of the work for which it was responsible under the Treaty. The Court relied on Article 61(2) of the VCLT to prohibit Hungary from invoking impossibility of performance when it results from a party’s own breach of an obligation stemming from a treaty.

C. State practice

Just because international tribunals have rarely relied on supervening impossibility of performance to terminate or suspend a treaty, does not mean that State practice does not rely on the doctrine. Although harder to document and still relatively rare, States have invoked supervening impossibility in situations not subject to judicial settlement. For example, impossibility might arise for defence treaties among militaries when one State (such as Costa Rica or Panama) abolishes its military (although other States might challenge that claim in accordance with Article 61(2) because the State’s acts create the conditions leading to impossibility of (p. 612) performance). Aust notes a further example in British attempts to invoke supervening impossibility to justify housing Argentina POW’s on its ships in violation of the fourth Geneva Convention where its tents had been destroyed.

Finally, it is also worth recalling that even if there is an undoubted supervening impossibility of performance, the doctrine does not terminate or suspend treaties automatically. To invoke the doctrine, a State must notify the other party per specific procedures for termination or suspension laid out in the VCLT.

D. Conclusions on the supervening impossibility of performance

There are a host of other questions about the impossibility doctrine that remain open, including the difference between factual and legal impossibility and the role of fault. Thus, although the final text of Article 61 codifies the fundamental issues concerning supervening impossibility of performance, outstanding issues remain subject to interpretation by States and international courts and tribunals. It must be observed that, somewhat surprisingly, the majority of scholars do not perceive this doctrine to be in any way controversial or giving rise to unresolved issues. For example, Nahlik in his seminal essay noted that ‘[t]here can hardly be any objection to the inclusion of “supervening impossibility of performance” among the causes of the termination of treaties’, this doctrine originates from an ancient concept of civil law, and it has always been considered to be a principle admitted by the general law of nations. However, the formulation of Article 61 and the approach of the Court in the Gabčíkovo-Nagymaros case clearly indicate that States can only invoke supervening impossibility as a ground for exiting treaty commitments in exceptional circumstances more often identified in theory than in practice. Even then, the applicability of this doctrine is problematic due to the unresolved issues about its relationship to the law.
of State responsibility and what exactly qualifies as the ‘permanent disappearance or destruction of an object indispensable for the execution of the treaty’, which may lead to misunderstanding and confusion in practice.

II. Fundamental Change of Circumstances

The notion that a State may terminate or suspend its treaty obligations if circumstances have changed fundamentally since the treaty entered into force (rebus sic stantibus) has received extensive attention from scholars, courts, and States. Today, it is considered part of customary international law and codified in Article 62 of the VCLT. Nevertheless, although recognizing the doctrine’s existence, international tribunals have rarely applied it. At the same time, its negative formulation in Article 62 means that, in practice, it remains difficult for States to assert as a basis for terminating or suspending treaties.

A. Views of the International Law Commission

The doctrine of clasula rebus sic stantibus is a well-established principle in contract law, dating back to the early commentaries of Thomas of Aquin. Gentili transferred the idea to international law, asserting that a treaty did not have to be observed if the conditions of affairs changed, providing that the change was unforeseeable. Vattel voiced a similar view; where the promise of an engagement was given dependent on certain circumstances, a change in those circumstances would result in exemption from the engagement, provided that those circumstances were essential for the promise that otherwise would not have been made. Grotius, however, had a more restrictive view, denying that continuation of present conditions is a tacit condition of promises. In practice, the rebus sic stantibus doctrine gained importance especially as States increasingly invoked it in their attempts to escape treaty obligations during the nineteenth century and in the inter-war period.

An analysis of this doctrine constituted a substantive part of the work by Rapporteurs Fitzmaurice and Waldock. Their analysis and the ensuing discussion within the ILC and during the Diplomatic Conference contributed to what became initially draft Article 59 and finally Article 62 of the VCLT. In broad brushstrokes, both Rapporteurs and the ILC were aware of the dangers of such a provision to the stability of treaties. The majority of the Commission viewed this rebus sic stantibus principle as operating in tension with that of pacta sunt servanda. Fitzmaurice noted that the doctrine of rebus sic stantibus had a long tradition in law in general and should, in some way, be included in the text of the VCLT. He advanced three theories that could establish the juridical basis for this doctrine. The first theory rested on the implied intention of the parties: the presumption that the parties to a treaty expected the continued existence of the circumstances that formed the fundamental basis of their agreement. They had an implicit intention by which the treaty would come to an end in the event of an essential change of those circumstances. The second theory was based on the premise that international law contains an objective rule allowing the parties to a treaty to require its termination due to an essential change of circumstances. The third theory was a combination of the first two, implying a condition into every treaty for termination or suspension if there is an essential change of circumstances, but basing this implication on an objective rule of law, regardless of the intention of the parties. Both Fitzmaurice and Waldock supported the second of these theories. As Waldock phrased it, ‘the rebus sic stantibus doctrine is an objective rule of law rather than a presumption as to the original intention of the parties to make the treaty subject to an implied condition’.

The discussion within the ILC stressed the exceptional character of this doctrine. It had been suggested by some members that a provision on fundamental change of circumstances should have procedural safeguards, requiring, for example, the exhaustion of negotiations or even a jurisdictional clause to protect parties to a treaty against threats to its stability.
These suggestions were not included in the VCLT, but they evidence the ILC’s great caution in drafting this provision.

The ILC and the Diplomatic Conference strove to introduce in draft Article 59 a proper balance between stability and change. To this end, it was decided that this fundamental change of circumstances doctrine does not bestow an automatic right to repudiate the treaty but only a right to request that other parties to the treaty release the State from its obligations. The prevailing, albeit, reluctant view was also that this doctrine was a principle of general international law and that in contemporary practice its application was not confined, as some had argued, only to so-called perpetual treaties. The restrictive character of this doctrine was maintained by the Commission’s negative phrasing of the article and the exclusion from it of any treaty establishing a boundary, as a defence against this doctrine becoming a source of tensions if applied in that context. The ILC also relied on the principle of international law that a party cannot take advantage of its own wrong-doing. As a result, the fundamental change of circumstances doctrine may not be invoked if the changes are brought about by a treaty breach by the party invoking the doctrine or by that party’s breach of an international obligation owed to the other parties to the treaty.

In its final form, Article 62 of the VCLT contains the following conditions for a treaty’s termination or suspension based on a fundamental change of circumstances: (i) change with regard to circumstances existing at the time of the treaty’s conclusion (unforeseen by the treaty parties) in principle must not be invoked as a ground for the treaty’s termination, unless (ii) the existence of those circumstances constituted an essential basis for the parties’ consent to be bound by a treaty, and (iii) the effect of the change radically transforms the extent of obligations still to be performed under the treaty. The ILC, however, provided no guidance as to the meaning of the terms ‘radically’ or ‘extent’.

B. Relevant case law and other instances of this doctrine’s application

Unlike supervening impossibility of performance, the change of circumstances doctrine has been invoked in a number of cases. However, courts are very cautious; while admitting the doctrine’s existence as matter of principle, the majority of cases have not found sufficient grounds for its actual application.

1. The Free Zones case

Although the PCIJ did not rule on rebus sic stantibus in its Judgment, this case is noteworthy for the Parties’ pronouncements on the conditions for applying this doctrine, pronouncements that the ILC considered while drafting Article 62. Both the French and Swiss Governments invoked rebus sic stantibus as a basis for terminating a treaty. France argued, however, that this principle did not permit the unilateral denunciation of a treaty that was allegedly out of date. The Swiss Government pleaded that there were differing views regarding the rebus sic stantibus doctrine, and disputed the existence in international law of a right that could be enforced through the decision of a competent tribunal regarding treaty termination due to changed circumstances. Switzerland further argued that: (i) the circumstances that allegedly changed were those upon which the treaty Parties had entered, provided those conditions continued; (ii) in any event, the doctrine does not apply to treaties creating territorial rights; and (iii) France allowed too long a period to lapse after the alleged changes of circumstances had manifested themselves before making its plea.
2. The Fisheries Jurisdiction cases

These are important cases as the ICJ dealt with the subject matter of the fundamental change of circumstances doctrine soon after the VCLT’s signing. The ICJ relied on VCLT Article 62’s formulation of this doctrine, indicating that it ‘may in many respects be considered as a codification of existing customary law on the subject’. Regarding the doctrine’s application, the Court had to analyse a 1961 Agreement between Iceland and the United Kingdom that allegedly came to an end as result of (i) changes in fishing techniques and (ii) the international law on fisheries. The Court applied the conditions for invoking this principle very strictly regarding both alleged grounds of its applicability. The Court stated as follows:

in order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.

In rejecting the fundamental change of circumstances claim, the Court emphasized the importance of the non-foreseeability criterion embodied in Article 62(1) of the VCLT, which disavows the doctrine’s application if the change of circumstances was foreseen by the Parties at the time of the Agreement’s conclusion. The Court also attached great importance to the VCLT’s procedural requirement that a third party determine if the particular situation merited the operation of the doctrine of fundamental change of circumstances, since that process helps preserve the stability of treaties. Such a procedural requirement was already included in the compromisory clause referring the case to the ICJ. Briggs, in particular, noted the Court’s cautious attitude in applying this doctrine and its punctilious emphasis on the fulfilment of all relevant conditions (including the procedural ones).

(p. 617) 3. The Gabčikovo-Nagymaros case

In addition to claiming supervening impossibility of performance, Hungary also identified several substantive elements that allegedly had fundamentally changed at the time it notified the Czechoslovak Government about the 1977 Treaty’s termination. These elements included: (i) the notion of ‘socialist integration’ for which the 1977 Treaty was initially a vehicle, had since ceased to exist; (ii) the ‘single and indivisible operational system’, which was substituted by a unilateral scheme; (iii) the fact that the basis of the planned joint investment had been frustrated by the emergence of both States as market economies; (iv) the change in Czechoslovakia’s attitude, which turned the framework treaty into an immutable form; and finally (v) the transformation of a Treaty consistent with ‘environmental protection’ into ‘a prescription for environmental disaster’. Slovakia argued that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those initially undertaken, so Hungary was not entitled to terminate the Treaty.

The Court reiterated that Article 62 of the VCLT reflected customary international law, albeit again with the qualification ‘in many respects’. The Court found that the political situation was relevant to the 1977 Treaty’s conclusion. However, the treaty’s object and purpose, namely a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube, were not so closely linked to political conditions that changes in those conditions would radically alter the extent of the obligations still to be performed. Thus, the collapse of the communist regime and the aim of strengthening communist economic cooperation were not viewed by the Court as sufficiently fundamental as to constitute valid grounds for the termination of the 1977
Treaty. The Court expressed the view that even though the project’s profitability had diminished by 1992, it had not done so to the extent as to ‘radically’ transform the Parties’ obligations. Likewise, the new developments in environmental knowledge were not completely unforeseen; Articles 15, 19, and 20 of the 1977 Treaty allowed the Parties, according to the Court, to consider such changes and accommodate them when implementing provisions of the 1977 Treaty. The Court summed up its analysis as follows:

The changed circumstances advanced by Hungary are, in the Court’s view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances 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. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication (p. 618) moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.66

From this case (and the Fisheries Jurisdiction cases), it appears that the ICJ will treat the plea of fundamental change of circumstances in the most restrictive manner, according absolute priority to the stability of treaties, a principle which appears to trump the invocation of the doctrine of fundamental changes. The present author has doubts if at any time this doctrine will gain more currency in the Court’s practice. Until the present, it has remained only a theoretical possibility for treaty termination or suspension.

4. Racke v Hauptzollamt Mainz67

Uniquely, in this European Court of Justice (ECJ) case, the plea of fundamental change of circumstances succeeded. The case arose from the suspension by the Council of Ministers of the European Communities (EC) of a Cooperation Agreement between the EC and Yugoslavia in 1991 following the outbreak of hostilities in the region. An importer of Yugoslav wines who became liable for higher import duties as a result of the suspension litigated the case before the German courts. The ECJ gave a preliminary ruling concerning the validity of the suspension in which it listed two conditions for successfully claiming fundamental change of circumstances. First, the Court identified the essential basis for the Parties’ consent, finding it necessary that there was ‘a situation of peace in Yugoslavia, indispensable for neighbourly relations, and the existence of institutions capable of ensuring implementation of the cooperation envisaged by the Agreement throughout the territory of Yugoslavia’. The ECJ found that these conditions were no longer the case on the facts. Second, the ECJ emphasized that the fundamental change of circumstances must radically transform the extent of obligations undertaken by the Parties. In this respect, the ECJ ruled that it was sufficient that no purpose was served by continuing to grant preferences with a view to stimulating trade where Yugoslavia was breaking up, since ‘the customary international law rules in question [do] not require an impossibility to perform obligations’. Accordingly, the plea of fundamental change of circumstances was upheld, provided that no ‘manifest error of assessment’ existed in the Council’s appreciation of the situation and its invocation of the plea.68

It may be noted that the ECJ was not as strict as the ICJ in applying the doctrine of fundamental change of circumstances.69 Commentators have observed that this case’s special features, such as the fact of persistent war in a neighbouring country (p. 619) (in spite of a ceasefire agreement, the Resolution of the Security Council determined that the war constituted a threat to international peace and security), influenced the decision of the ECJ and the Council.70 It was also observed that the ECJ adopted perhaps a more lenient stand due to the fact that an individual (as opposed to an EC organ) pleaded the fundamental change of circumstances, raising the issue of whether an individual can even
rely on customary international law to challenge the validity of EC law. More importantly, the ECJ’s observations on the doctrine of fundamental change of circumstances were not at the core of its Judgment, which was a matter of judicial review of the Council of Ministers’ decision. The importance of the ECJ’s statements on applying the doctrine of fundamental change of circumstances may thus be limited to this particular case, which is how the ECJ viewed its own role.

Even though Article 73 of the 1969 VCLT specifically excludes the outbreak of hostilities from its scope, Racke also illustrates how questions may still arise as to whether such a situation qualifies as a fundamental change of circumstances. Doctrinal views on this subject are inconclusive and the practice is not uniform. Some authors view the effect of armed conflict on treaties as similar or even coterminous with a fundamental change of circumstances, accepting that a treaty can be suspended or terminated on this basis. But there are few examples of State reliance on this theory. US President Franklin D Roosevelt invoked *rebus sic stantibus* to suspend American obligations under the International Load Line Convention of 1930, but his move engendered much criticism. Briggs characterized it as against the treaty’s provisions, while Rank suggested Roosevelt had not fulfilled the necessary conditions for invoking that doctrine (although Rank accepted that, under the right conditions, a State might terminate or suspend a treaty because of a situation of armed conflict).

5. *Fundamental change of circumstances and State practice: the ABM Treaty*

The Load Line Convention example reveals that, although courts have only occasionally applied the fundamental change of circumstances doctrine, States can still invoke it outside the judicial context. The Netherlands, for example, apparently relied on *rebus sic stantibus* in 1982 to suspend a development assistance agreement with Surinam when the government the Netherlands had agreed to assist was overthrown in a *coup d’etat* with a rash of accompanying human rights violations.

States may also address the potential for fundamental changes in circumstances in advance in the treaty itself. Since fundamental change of circumstances is not regarded as *jus cogens*, parties can confirm, modify, or even waive its application in their treaties. Thus, in the bilateral 1972 Anti-Ballistic Missile Treaty (ABM Treaty) between the United States and the Soviet Union, the Parties included a termination clause that contained a variation on the fundamental change of circumstances rule. Article XV(2) allowed each Party ‘in exercising its national sovereignty’ to withdraw from the Treaty ‘if it decides that extraordinary events related to the subject matter of this Treaty have jeopardised its national interests’. In 2001, US President George W Bush announced US withdrawal from the treaty, noting that the circumstances affecting US national security had changed fundamentally and the United States faced different types of threats than those it faced during the Cold War. According to President Bush, the ABM Treaty imposed on (p. 621) the United States such conditions as to generally impair its homeland security. Some commentators argued that the existence of Article XV(2) precluded US reliance on the doctrine of fundamental change of circumstances to terminate that treaty. Others, including the author, believe that the US termination may be viewed both as an issue of the proper interpretation of Article XV(2) as well as an independent claim for fundamental change of circumstances.

It may be argued that some, but not all, conditions imposed by the VCLT for invoking a fundamental change of circumstances were met in this instance. The VCLT requirement of change relative to the circumstances existing at the time of conclusion of the treaty (a temporal issue) was satisfied. In other words, the United States had a valid argument that circumstances which led to this treaty no longer existed. But the requirement that this be a ‘fundamental’ change is more difficult to assess, as there is no definition of this term and what can be described as ‘fundamental’ will depend on the circumstances in question.
this case, the end of the Cold War and the emergence of new threats from so-called ‘rogue’ States would be the main ‘fundamental’ change of circumstance. In the Gabčikovo-Nagymaros case, the Court confirmed that a change of political circumstances was ‘certainly relevant’. The political circumstances surrounding the conclusion of the ABM Treaty appear to be even more compelling than those in Gabčikovo-Nagymaros, therefore giving credibility to the US argument and satisfying that requirement of Article 62 of the VCLT. On the other hand, a host of other considerations in the ABM analysis sets it apart from Gabčikovo-Nagymaros. The latter analysis was done by the ICJ (a third party adjudicator) in a formal and legal setting, whereas the ABM Treaty termination issues were discussed at political and diplomatic levels. The facts of the case and the Parties’ arguments might have differed if they had occurred before a third party in a judicial setting. Likewise, the Russian view that the US rebus sic stantibus argument was not compelling would have been perhaps assessed differently in a more formal process.

Next there is the requirement that the change must not be foreseen by the Parties. In this instance, the question is whether the United States and the Soviet Union did foresee that the Cold War might end one day or that threats might arise from an actor not a Party to the Treaty. On this point, Article XIII of the ABM Treaty provides that:

1. To promote the objectives and implementation of this Treaty, the Parties shall establish promptly a Standing Consultative Commission within the framework of which they will: ...

    (d) consider possible changes in the strategic situation which have bearing on provisions of this Treaty;

The Standing Consultative Commission was established in 1972 by a Memorandum of Understanding and was used regularly by both Parties for various purposes, including five-year periodic reviews of the Treaty required by its Article XIV(2). These Articles provided room for the ABM Treaty to accommodate change of the kind that arose and allegedly gave rise to the issue of fundamental change of circumstances here; namely, changes in the strategic situation. That strategic situation was clearly at the heart of the conclusion of the ABM Treaty; but, Articles XIII and XIV(2) render the argument that any such changes were not foreseen in the Treaty lacking in credibility. The provisions in question gave an opportunity for the Parties to both modify (Article XIII/XIV(2)) and terminate (Article XIV) the Treaty.

The last requirement to be fulfilled is that the effect of the change must radically transform the ‘extent’ of the remaining obligations to be fulfilled under the treaty. For the ABM Treaty, the issue is whether the perceived threats to the United States in 1972 and 2001 changed radically, as they were no longer coming from the Soviet Union but from ‘rogue’ States. This is a matter of extensive disagreement, with varying views that: the threat posed by ‘rogue’ States is not real; that actual threats can be dealt with by technologies; and that diplomacy aimed at dealing with the missile proliferation problem was preferred, rather than abrogating the ABM Treaty. The argument can be made, however, that the new type of threats, coming not from the Soviet Union but from the ‘rogue’ States, has transformed radically the US commitment to control its nuclear weapons, due to the fundamental change of circumstances (unforeseen by the Parties at the time of the Agreement’s conclusion). Therefore, it can be argued that the original obligation has changed radically, and the United States faces a new type of a threat.

In such a sensitive case concerning national security, moreover, these arguments are only speculative, since not all the arguments are known. This case is thus different from an invocation of the doctrine of fundamental change of circumstances in a judicial context,
where all the facts have to be argued and presented to other Parties and a third party
adjudicator.

**6. Procedural requirements for the application of the doctrine of fundamental
change of circumstances**

Article 65(1) to (3) of the VCLT lays out a certain procedural requirement for applying
the doctrine of fundamental change of circumstances. Its legal character, however, remains
unclear. In particular, two issues can be identified: (i) whether this requirement is a norm of
customary international law and (ii) whether it is an indispensable element of the doctrine
as formulated in Article 62 of the VCLT.

(p. 623) In the *Fisheries Jurisdiction* case, the ICJ attached great importance to the
‘procedural complement to the doctrine of changed circumstances’. It did not expressly
say, however, that customary law required claims under the doctrine be submitted to a third
party. Briggs, however, considered the Court’s finding to be ‘an essential part of the
document’. In contrast, in the *Racke* case, the ECJ stated that Article 65 was not binding on
the Council (which had not complied with its procedural requirements) on the basis that it
was not a part of customary international law and the EC was not a party to the VCLT. As
regards the ABM Treaty, it may be said that the VCLT was not binding on Russia (the Soviet
Union acceded to the VCLT in 1986) and the United States is not a party. At any rate,
since the United States followed the ABM Treaty’s own termination procedure, it can hardly
be said that that this case depended solely on the operation of the doctrine of fundamental
change of circumstances as a ground for the treaty’s termination.

Article 65 remains important, however, particularly as its existence indicates a shift from
subjective auto-interpretation to the possibility of a more objective legal ruling on
‘fundamental change of circumstances’ claims. Under the auto-interpretative subjective
document, the State wishing to withdraw from a treaty is the sole arbiter of whether a
fundamental change of circumstances has occurred. The announcement of this would be
sufficient, and most importantly, other parties would have no part in the termination of the
treaty. Such a situation clearly does not contribute to maintaining the stability of treaty
relations between States. At the other end of the spectrum, international law could require
third-party adjudication in all cases where fundamental change of circumstances is invoked.
The VCLT took a middle way, including elements of decision-making by the other parties to
the treaty, and in extreme cases, requiring the involvement of a third-party adjudicator. If a
party to a treaty notifies other parties of its wish to withdraw or terminate the treaty, there
are two possible scenarios: (i) either no party raises any objection; or (ii) one or more other
parties objects, and they must seek a solution through the means indicated in Article 33 of
the UN Charter.

There is a consensus in the literature that a plea of fundamental change of circumstances
titles a party with the legal right to demand either that: (i) the parties or a competent
international tribunal should declare the termination or suspension of the treaty, or (ii) the
parties should negotiate for its revision in good faith with a view to resolving the dispute.

It has been suggested that where the rights to negotiate or submit to third-party
adjudication are invoked, the other party (or parties) to the treaty are under a
corresponding obligation to comply and if that corresponding obligation is not fulfilled, the
State invoking the plea is entitled (p. 624) to terminate or suspend the treaty’s operation.

However, neither the VCLT nor any other agreement includes a conventional obligation to
submit the case to the ICJ or another third party. It would appear that negotiations in good
faith are the only requirement. The question then left is the legal position if those
negotiatiations do not produce a solution, either in the form of an agreement that a treaty
should be terminated, or an agreement to modify it (both of which are consensual solutions,
rather than a separately and distinctly identifiable consequence of the legal doctrine of fundamental change of circumstances).

C. Conclusion on the fundamental change of circumstances doctrine

Many theoretical and practical aspects of the requirements of the doctrine of fundamental change of circumstances remain not yet fully explored. The lack of extensive State practice makes further analysis mainly speculative. Nevertheless, the legal construct of Article 62 of the VCLT has shifted the doctrine’s focus from a unilateral, subjective process into an objective procedure where other treaty parties may participate in assessing pleas of fundamental change of circumstances.

The relevant ICJ case law leads to the conclusion that, although the Court in principle affirms the existence of this doctrine, in practice, difficulties arise even when it is invoked. The Court has jointly evaluated all elements of this doctrine and applied them to the cases at hand very restrictively. The doctrine’s application in the ECJ’s Racke case was less restrictive but, as explained above, many extra-legal considerations may have contributed to that outcome. It may thus be said that the doctrine of fundamental change of circumstances is an exception in international law, used very sparingly by States and treated with great circumspection by the ICJ.

As to the procedural requirements for applying this doctrine, this topic remains largely unexplored both from the theoretical and practical points of view. It would be purely speculative to predict whether its status will change or remain the same.

III. The State of Necessity and Treaty Obligations

A. General introduction

The state of necessity is not part of the law of treaties but belongs to the law of State responsibility and forms one of the circumstances precluding wrongfulness, codified in Article 25 of the 2001 ASR (formerly draft Article 33). Like a fundamental change of circumstances, the doctrine of necessity takes a negative formulation; it may not be invoked unless the act done out of necessity is the ‘only way for the State to safeguard an essential interest against grave and imminent peril; and 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’. Similarly, it cannot be invoked if the international obligation in question excludes invoking necessity or the State contributed to the situation of necessity. A state of necessity frequently constitutes a separate ground for States attempting to terminate (or suspend) their treaty obligations, as evidenced by the Gabčikovo-Nagymaros case. In doing so, it exemplifies the troublesome relationship between the law of treaties and the law of State responsibility, which are at times almost impossible to distinguish.

B. The relevant case law

The most instructive illustration of cross-fertilization between the law of treaties and the law of State responsibility (specifically, the plea of necessity) is the aforementioned Gabčikovo-Nagymaros case. It is a classical case not only regarding its treatment of necessity in international environmental law, but also in its general approach to international law. There, the ICJ analysed not only the general aspects of this plea, but also the relationship between a state of necessity (and generally the law of State responsibility) and the law of treaties.

Hungary justified its termination of the 1977 Treaty by suggesting that act safeguarded its essential interests, specifically the health and vital interests of the population, particularly in the Szigetköz region. Hungary further argued that the ecological dangers posed by the 1977 Treaty were: (i) of an ‘exceptional’ character and threatened a ‘major interest’ of the State; (ii) ‘imminent’; and (iii) impossible to avert by means other than termination. The
exceptional character of the interests involved severe pollution, a threat to the quality of drinking water, agriculture, and the essential interest of Hungary in maintaining its natural environment. Hungary also emphasized the imminent nature of the peril, particularly after Czechoslovakia put into operation ‘Variant C’. Finally, Hungary stressed the unavoidable character of its decision to terminate the project:

The termination of the 1977 Treaty was the last possible legal reaction to Czechoslovakia’s illegitimate and persistent refusal of meaningful negotiations, which was only underscored by Czechoslovakia’s perseverance with Variant C in spite of Hungary’s urgent invitations to discontinue work as highly damaging and incompatible with the 1977 Treaty.

Hungary stressed that it did not contribute to the occurrence of the state of necessity. The Slovak Republic presented a vigorous reply to Hungarian assertions of a state of necessity. Further, it argued that an ‘ecological state of necessity’ did not exist either at the time of suspending the works, or at the time of Hungary’s termination notice. Slovakia even expressed some doubts as to whether there could be an ‘ecological state of necessity’, since such a plea would seriously undermine the stability of the law of treaties. In any case, the Slovak Republic suggested that when the Treaty was concluded, the best possible evidence of the project’s expected environmental impact was offered. It also claimed that Hungary did not believe that a state of necessity existed when it unlawfully suspended, abandoned, and terminated its performance under the 1977 Treaty. The Slovak Memorial argued: ‘[t]o invoke a State of ecological necessity, a State must believe it exists. And it must have held that deep and genuine belief at the moment it decided to act contrary to its international obligations’. The Slovak Republic asserted that Hungary’s actions were dictated by financial difficulties and its own perceptions of its energy needs rather than a state of necessity. Finally, it argued that in invoking the state of necessity, Hungary ignored the provisions of the 1977 Treaty, which had its own dispute settlement procedure based on objective data and its own built-in mechanism for constant monitoring of environmental conditions. The Slovak position was that:

[full use of such mechanisms therefore precluded the unobserved development of any situation which could be characterised as a state of necessity and any negative developments could be resolved within the 1977 Treaty framework.

Thus, the Slovak Republic introduced two elements to necessity not found in draft Article 33 or the final Article 25. First, Slovakia adopted ‘a subjective approach’, ie requiring the true belief of a State (Hungary) that the necessity exists. Second, it suggested that the dispute settlement procedure contained in the Treaty could preclude the emergence of a situation of necessity. In doing so, the Republic of Slovakia revealed the complexities of this institution and the lack of any agreement by States as to what constitutes a plea of necessity.

The Court itself analysed the state of necessity against the background of Article 33 of the ILC 1980 draft Articles, ascertaining that it is a circumstance precluding wrongfulness recognized by international customary law. The Court confirmed that the state of necessity was not confined to the traditional grounds for its invocation, such as a grave danger to the existence of the State itself. The Court, following the ILC’s findings, also acknowledged that safeguarding the ecological balance could be considered an ‘essential interest’ of all States. However, the Court confirmed the exceptional character of necessity as a circumstance precluding wrongfulness and the stringent conditions attached to its invocation.
For its part, the Court questioned the existence in 1989 of the threat of ‘a grave and imminent peril’ and whether Hungary’s suspension and termination of the 1977 Treaty and the abandonment of the works were the only method of safeguarding its essential interest against this peril. Regarding the erection of the Gabčikovo-Nagymaros barrage system, the Court stated that ‘[t]he Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity’. The Court further explained that ‘peril’ in the context of a state of necessity ‘certainly evokes the idea of “risk”; that is precisely what distinguishes “peril” from material damage’. A state of necessity can only exist with a ‘peril’, ‘duly established’ at ‘the relevant point of time’. Further, the Court added ‘the mere apprehension of a possible “peril” could not suffice’ to establish the state of necessity. This follows from the requirement that a ‘peril’ must at the same time be ‘grave’ and ‘imminent’. The Court analysed the notion of ‘imminence’ as synonymous with ‘immediacy’ or ‘proximity’. According to the ILC, an ‘extremely grave and imminent peril’ must be a threat to a State’s interest at the actual time. The Court added, however, that in its view a ‘peril’ appearing over a long period of time might be considered ‘imminent’ ‘as soon as it is established at the relevant point of time; that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable’. Against this background, the Court analysed the Gabčikovo-Nagymaros system of locks and barrages. As to the Nagymaros portion of the project, the Court viewed the dangers alleged by Hungary as of an uncertain character and therefore saw no ‘grave and imminent’ peril at the time of the suspension and abandonment of the works by Hungary. The ICJ observed, moreover, that the peril invoked by Hungary had already been present before 1989 and could not entirely be ascribed to work on the Nagymaros dam. The Court stressed that even if the system’s erection would have created serious risks, Hungary had at its disposal other means besides the project’s suspension and abandonment. The use of such, more costly techniques, according to the Court, was ‘not determinative of the state of necessity’. The Court invoked similar reasoning to deny Hungary’s plea of necessity in relation to the quality of certain ground and surface water and the effects on fauna and flora.

As with fundamental change of circumstances, a separate, vital issue for determining the existence of the state of necessity is: who can authoritatively make such a factual assessment, the State claiming necessity or a third party? It may be inferred from the judgment in the Gabčikovo-Nagymaros case that:

the current position is that the assessment must indeed be determined by a State, but that such an assessment may be scrutinized by affected parties, the international community as a whole and, as seen from case law, international legal bodies to which the case may be rendered. The very idea behind regime building efforts in the field of state responsibility builds upon the desire not to give much latitude to States, as regards the circumstances under which they may deviate from their international undertakings.

Finally, the Court stated that even if it had been established that there was a state of necessity in 1989 linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity as it had helped, by act or omission, to bring it about. All told, the ICJ decision confirmed several legal characteristics of the state of necessity. First, the Court incontrovertibly reiterated that ecological concerns can give rise to the invocation of the plea of necessity. It clarified the question of who decides on the factual existence of necessity and it came up with a two-tiered test; the first tier comprises a subjective test, ie the State itself decides on the existence of a state of necessity. However, it cannot be the sole judge thereof; therefore, a second, objective tier is introduced and is applied by other States (the community of States) or judicial bodies. The Court also
analysed the notion of ‘imminence’ as synonymous with ‘immediacy’ or ‘proximity.’ According to the ILC, an ‘extremely grave and imminent peril’ must be a certain and inevitable threat to the State’s interest at the actual time.\textsuperscript{117}

Other issues about necessity were not fully resolved. In the view of the present author, the Court did not deal in a persuasive manner with fundamental differences between the law of treaties and the law of State responsibility. Additionally, some of the Court’s legal analysis of the elements of necessity (such as the above-mentioned notion of ‘imminence’) was very complicated and it is difficult to envisage how such a definition will be reflected in State practice. It may also be noted that although it cited, on several occasions, its reliance on customary international law regarding necessity and draft Article 33, it introduced elements that were not essential parts of those constructs, including ‘a subjective approach’, that is, the true belief of a State that the necessity exists.

\textbf{IV. Distinguishing Supervening Impossibility of Performance, Fundamental Change of Circumstances and the Law of State Responsibility (Including the Plea of Necessity)}

As mentioned above, the relationship between (i) the law of treaty doctrines on supervening impossibility of performance and fundamental change of circumstances and (ii) the law of State responsibility doctrines of \textit{force majeure} (Article 23 (p. 629) of the ASR) and the plea of necessity (Article 25 of the ASR), remain, in the view of the present author, unresolved. Certain commentators have promoted the view that there is a fast and clear distinction between the realm of the law of treaties and that of State responsibility by relying on the two systems’ different objectives. As crafted in Articles 61 and 62, impossibility and fundamental change of circumstances regulate the future of any treaty relationship between the Parties. In contrast, the law of State responsibility does not terminate or suspend the treaty; rather, it provides a State with a defence to preclude the wrongfulness of a past failure to perform that treaty.\textsuperscript{118} The idea of a clear distinction is further supported by the possibility of a temporary suspension of treaty relations as a part of the law of treaties.\textsuperscript{119}

There is, however, a more elaborate explanation regarding the relationship between Article 61 and \textit{force majeure} (Article 23). It is based on the premise that \textit{force majeure} embraces supervening impossibility of performance but is a wider concept, meaning that \textit{force majeure} operates even when there is no impossibility of performance.\textsuperscript{120} Verhoeven argued that a supervening impossibility ‘necessarily constitutes \textit{force majeure}, at least when it does not result from a breach by the State invoking it of its obligations’.\textsuperscript{121} He operates from the premise that:

\begin{quote}

it seems reasonable to consider that the impossibility of performance that justifies the termination of the treaty under Article 61 of the Vienna Convention is fulfilled when \textit{force majeure} under Article 23 is definitive, even if it is true that this leads to a particularly flexible interpretation of the notion of ‘object indispensible for the execution of the treaty’.\textsuperscript{122}
\end{quote}

Verhoeven’s views are confusing, however, as the invocation of circumstances precluding wrongfulness (such as \textit{force majeure} or the state of necessity) only follows from the commission of an internationally wrongful act. It cannot be invoked in other circumstances, which do not involve wrongfulness, but prima facie resemble factually the circumstances that allow the invocation of some of the circumstances precluding wrongfulness (eg supervening impossibility, which can arise without wrongful acts by any State).\textsuperscript{123}
Verhoeven’s views are inconsistent, moreover, with the Court’s adoption in *Gabčikovo-Nagymaros* of a strict division between the law of treaties and the law of State responsibility. The Court said as follows:

A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.\(^{124}\)

The Court gave no guidance on how to assess the extent to which State responsibility is involved. The general gist of the Court’s statement, however, is that the non-performance of a treaty under Article 61 should be assessed on the basis of the law of treaties not the law of State responsibility.

These differences of opinion demonstrate the problematic (and still unclarified) relationship between the law of treaties and the law of State responsibility. The borders between the two areas of law are often blurred. Attempts to distinguish them are not fully convincing and leave the possibility for confusion. The *Rainbow Warrior* Arbitration provides a useful example.\(^{125}\) In 1985 the ‘Rainbow Warrior’ was sunk in New Zealand waters by two secret service French agents. The dispute was initially resolved via a 1986 Agreement which prescribed that these agents were to be transferred to the remote island of Hao for the period of three years, with any earlier release requiring the mutual consent of both governments. However, later in 1986, before this period expired, France removed them from Hao and transferred them to France on the basis of ill health and pregnancy without the agreement of New Zealand. In the ensuing arbitration (required under the terms of the 1986 Agreement), France invoked *force majeure* and distress (circumstances precluding wrongfulness) as justifying its non-compliance with the Agreement’s terms.\(^{126}\) New Zealand strenuously objected to such an explanation, relying exclusively on the law of treaties. It argued that in cases of a breach of a treaty, the only excuses available under the law of treaties were acceptable grounds to suspend, terminate, or invalidate treaties. Thus, France could only invoke supervening impossibility of performance under Article 61 to terminate its 1986 treaty commitments; but here the conditions for its invocation were not met. The Tribunal, however, accepted the French position and reasoned that the breach of a treaty can be justified on the grounds of a general law of State responsibility (even where there was no ground to terminate the treaty according to the law of treaties). As Susan Marks argued, this ‘puts into question the continued operation of the provisions of the Vienna Convention relating to the termination, suspension and invalidity of treaties’.\(^{127}\) She explained further that:

\[
\text{(p. 631) [i]f a state wishing to avoid its obligations under a treaty can justify breaching the treaty by reference to the full range of excuses known to the law of state responsibility, why should it pay any heed to the stricter grounds and procedures applicable under the law of treaties?}^{128}\]

States cannot freely choose the rules applicable in cases of breach of an international obligation. Non-compliance with treaty provisions should result in the application of the VCLT’s relevant rules. Indeed, the different spheres of the law of treaties and the law of State responsibility were emphasized by the ILC during its codification of the rules of State responsibility several times, particularly in discussing countermeasures and material
breach of a treaty. However, several scholars favour the approach adopted by the Arbitral Tribunal in the *Rainbow Warrior* case and argue that:

> [t]he circumstances precluding wrongfulness cannot logically be precluded by the existence of provisions concerning termination, suspension or impossibility of performance, as circumstances precluding wrongfulness cancelled not the operation of the treaty, but only liability for what was unquestionably illegal conduct. The regimes are to be considered as complements to one another: a state whose act of termination or suspension is incompatible with the law of treaties may still escape responsibility if it can rely on the general excuses under the law of state responsibility.\(^{129}\)

Such an argument, although logical and neat, cannot be fully supported by theory, the practice of States or the relevant jurisprudence, especially the *Gabčíkovo-Nagymaros* case.

Fundamental change of circumstances gives rise to similar confusion and misconceptions regarding the state of necessity. The predominant view is that the invocation of a state of necessity does not terminate treaty relations but only justifies non-compliance; rules of State responsibility such as necessity could be treated as emergency rules that do not affect treaty relations between States and are temporary in character.\(^{130}\) But such a distinction does not conform to State practice or the case law (e.g. the *Gabčíkovo-Nagymaros* case); necessity is often pleaded as a ground for the termination of treaties, which are primary rules. Even if we adhere to the view that under the law of treaties, the treaty remains operative, rules of State responsibility like necessity excuse the wrongfulness of a State’s non-performance of its treaty commitments and prevent the liability of a State. In doing so, they defeat to a certain extent the stability of treaties and the fundamental principle of *pacta sunt servanda*.\(^{131}\)

Crawford explained that circumstances precluding wrongfulness:

> operate more as a shield than a sword. While they may protect the State against an otherwise well-founded accusation of wrongful conduct, they do not strike down the obligation, and the underlying source of the obligation, the primary rule, is not affected by them *as such*.\(^{132}\)

(p. 632) As the Special Rapporteur reminds us, this issue was already raised by Fitzmaurice in 1959, during the ILC’s work on the codification of the law of treaties.\(^{133}\) The difficulties regarding the clear-cut distinction between these two regimes may be due to the fact that although each set of norms to some degree regulates the same fields and the same situations:

> the law of State responsibility is separate from the law treaties ... Nevertheless, international practice has confirmed that whenever State responsibility is incurred, the State has a right to invoke the circumstances precluding wrongfulness, as well as defenses under the law of treaties.\(^{134}\)

**General Conclusions**

Supervening impossibility of performance and fundamental change of circumstances constitute classical means of suspending and terminating treaty obligations. The relevant provisions of the VCLT adopt a very restrictive approach to the invocation of any grounds that would undermine the stability of treaties, especially fundamental change of
circumstances. Such a restrictive approach is further strengthened by the existence of procedural rules to accompany any invocation of exceptional circumstances.

The relevant case law, particularly that of the ICJ, upholds such strict application of exceptional circumstances. The ECJ was less exacting in one instance, but as suggested in the literature, that may have been caused by several circumstances peculiar to that case. The case of the ABM Treaty, moreover, indicates that where international adjudication is absent, the application of fundamental change of circumstances may not strictly follow the requirements of VCLT Article 62 but instead rely to a great degree on extra-legal factors.

Finally, it must be noted that these exceptional circumstances are frequently confused with the rules on State responsibility, such as those concerning the state of necessity as a circumstance States may invoke to preclude liability for conduct that would otherwise be wrongful. In the case law, it is quite noticeable that States are unsure which set of rules to apply in cases of attempts to exit a treaty. Various explanations presented in the relevant literature are unconvincing as how to differentiate among the potentially applicable doctrines. Similarly, State practice indicates that there is a lack of certainty as to how and when to apply particular (p. 633) provisions. At present, moreover, as noted in the Gabčíkovo-Nagymaros case, it appears that rules of State responsibility precluding wrongfulness such as necessity may undermine the stability of treaties and the universality of pacta sunt servanda.

Finally, as observed above, recourse to the State responsibility regime may be more lenient than the law of treaties in nullifying the relevant rules of the law of treaties regarding treaty termination or suspension.

**Recommended Reading**

M Agius, ‘The Invocation of Necessity in International Law’ (2009) 56 Netherlands Intl L Rev 95
G Haraszti, ‘Treaties and the Fundamental Change of Circumstances’ (1975) 146 RcD 1
Footnotes:

1 VCLT Art 26 (‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’).

2 See Chapter 25, Part II, 641 et seq.

3 See Chapter 23, Part II, 582 et seq.

4 Although not the focus of this chapter, the VCLT also permits treaty termination or suspension if: (i) all the parties to a treaty conclude a later treaty that they intended to govern or the provisions of the later treaty are so incompatible with the earlier treaty that the two cannot apply at the same time; or (ii) if the treaty conflicts with a new pre-emptory norm of general international law. VCLT Arts 59 and 64. In addition, the VCLT makes clear that certain external developments do not give cause for termination or suspension. Thus, a reduction in the number of parties below that necessary for entry into force does not offer a basis for termination unless the treaty otherwise provides. Ibid Art 55. Similarly, the severance of diplomatic or consular relations does not affect treaty relations unless the existence of such relations is indispensable for the treaty’s application. Ibid Art 63.


7 Crawford and Olleson (n 5) 56.

8 The ASR is an attempt to codify ‘secondary rules’, that is the conditions under which international legal responsibility arises and the legal consequences that flow therefrom, as distinct from codifying the ‘primary rules’, which are the actual conventional and customary obligations of international law. J Crawford, ‘Third Report on State Responsibility’, UN Doc A/CN.4/507/Add.1-4 (2000); Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries [2001] YBILC, vol II(2) (UN Doc A/56/10, as corrected) (‘ASR’).

9 Crawford and Olleson (n 5) 73.


11 Ibid 50–1 [97]–[99].

12 Ibid 51 [101].


14 Ibid 78.

15 ILC, ‘Summary record of the 697th meeting’ (1966) UN Doc A/CN.4/SR.697, [4]–[12].

16 Ibid [3].

17 Ibid [22]. De Arechaga did not specify what cases outside the treaty would entail responsibility, noting:

If the Commission wished to cover both types of responsibility, it could say that there was always a responsibility for certain forms of conduct, independently of the obligations under the treaty. In consequence of the recent developments of public international law, and more particularly of the law of treaties, the duty to make reparation and the duty to be vigilant were becoming generalized.
18 Ibid [23].
20 Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Yugoslavia) PCIJ Rep Series A No 20 (July 12) [83]; Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil) PCIJ Rep Series A No 21 (July 12) [83].
22 Ibid [53].
23 Gabčikovo-Nagymaros case (n 6).
25 Gabčikovo-Nagymaros case (n 6) [20].
26 Ibid [138].
27 Ibid [135].
29 Gabčikovo-Nagymaros case (n 6) [103].
30 Ibid [102].
31 Ibid [103].
33 VCLT Arts 65–8.
36 De Jure Belli Liberi Tres, 1598. See Sinclair (n 35) 192.
39 In particular, Russia invoked this doctrine to justify its assertion in 1870 that the provisions of the 1956 Treaty on neutralization of the Black Sea were no longer binding upon it. Later, this doctrine was abused as a result of its indiscriminate invocation by States in the period preceding the First World War to escape from inconvenient treaty obligations. See Sinclair (n 35) 193.
However, there were also different views. For example, Mr Stuyt of the Netherlands suggested that:

> once a treaty came into existence, it had to be executed in good faith; otherwise it remained a dead letter. But whether or not the treaty remained binding, despite a fundamental change of circumstances, was an entirely different matter. It was a practical problem and could not be solved merely by referring to the logical principle of good faith.

Vienna Conference, First Session (n 19) 367 [18].


Ibid [146]-[148].

Waldock, Second Report (n 13) 83.

ILC, ‘Summary record of the 835th meeting’ UN Doc A/CN.4/SR.835 [3].

Vienna Conference, First Session (n 19) 369–70 [35]-[40].


Case Concerning the Frontier Dispute (Burkina Faso v Mali) (Judgment) [1986] ICJ Rep 554 [17] (viewing this exclusion to cover ‘both delimitation treaties and those ceding or attributing territory’).

Case Concerning the Factory at Chorzów (Germany v Poland) (Jurisdiction) [1927] PCIJ Rep Series A No 9 141–2 [87].


Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland) [1932] PCIJ Rep Series A/B No 46.

The PCIJ said that:

> as the French argument fails on the facts, it becomes unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the method by which effect can be given to the theory if recognised, and the question whether it would apply to treaties establishing rights.

Ibid 186.


Ibid 463–76.

UK Fisheries Jurisdiction Case (n 56) [36].

Ibid [43].

Sinclair (n 35) 195.


For the statement of facts see text accompanying nn 23–7.

Gabčikovo-Nagymaros case (n 6) [95].

Ibid.

Ibid [42].

Ibid [104].

Ibid.


Racke (n 67) [53]-[57].

Klabbers (n 67) 59.

Ibid; Elias (n 67) 21-2.

As Klabbers noted:

This focus on the individual’s position, tuning the Court’s mind to the needs and interests of individuals, may have caused the Court to misconstrue the case as one in which the trader invoked the rebus sic stantibus doctrine ... [I]t transpires that the opening up of international actors may well have consequences for the application of the law of treaties. One may wonder whether the Court would have come up with such a relaxed version of rebus sic stantibus had the case been brought by one of the Community institutions ... and it seems questionable that the Council would have argued it with fervour had Yugoslavia complained against the suspension.

Klabbers (n 67) [59].

The ECJ opined that:

[B]ecause of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules

Racke (n 67) [52]. See also Aust (n 32) 299.
For recent discussion of armed conflicts and treaties generally, see ILC Secretariat, ‘The Effect of Armed Conflict on Treaties: an Examination of Practice and Doctrine’ (2005) UN Doc A/CN.4/550, 68–71 [120]–[126] (‘ILC Memorandum’).


ILC Memorandum (n 73) 68–9 [121] (citing B Conforti and A Labella, ‘Invalidity and Termination of Treaties: Role of National Courts’ (1990) 1 EJIL 44; Restatement (Third) of the Foreign Relations Law of the United States (1987) §336(e); SH McIntyre, Legal Effects of World War II on Treaties of the United Nations (Martinus Nijhoff, The Hague, 1958) 25; I Brownlie, Principles of Public International Law (6th edn OUP, Oxford 2003) 592). The Italian Court of Cassation reached a similar result, holding that armed conflict ‘cannot bring about the extinction of treaties, but may contribute to a supervening impossibility and perhaps to a change in the circumstances (rebus sic stantibus)’. Lanificio Branditex v Società Azais e Vidal (1975) Italian Ybk Intl L 232–3.

In 1939, the French Foreign Ministry argued that war was a changed circumstance to terminate its acceptance of compulsory jurisdiction of the PCIJ. A Kiss, ‘L’extinction des traités dans la pratique française’ (1959) 5 AFDI 784, 795.


Briggs (n 77) 96; Rank 2 (n 77) 338–9, 340–1; ILC Memorandum (n 73) 69–71 [123]–[124], [126].

Villiger (n 6) 772.

Ibid 771. Examples of such clauses can be found in Section VI of this Volume.


Vamvoukos (n 40) 200–6.


Gabčikovo-Nagymaros case (n 6) [104].

Fitzmaurice and Elias (n 83) 188.


UK Fisheries Jurisdiction case (n 56) [45].

Briggs (n 60) 68.

According to Art 4 of the VCLT, it does not apply to treaties such as the ABM Treaty that entered into force before the VCLT.

91 Vamvoukos (n 40) 206-14.

92 Ibid.


94 ASR (n 8) Art 26.

95 Ibid Art 25.

96 For the statement of facts see text accompanying nn 23–7.


98 Ibid 291.

99 Ibid.


101 Slovak Republic, ‘Memorial Submitted to the ICJ for the Case Concerning the Gabčikovo-Nagymaros Project’ (2 May 1994) vol I, 324.

102 Ibid 325.

103 Ibid 332.

104 Slovakia could also have argued that Art 25(2)(a) precludes the possibility of relying on the plea of the state of necessity as ‘the international obligation in question excluded the possibility of invoking necessity’, which may (albeit implicitly) indicate that the relevant existing treaty obligation precludes reliance on the plea of necessity.

105 Gabčikovo-Nagymaros case (n 6) [51].

106 Ibid [53].


109 Gabčikovo-Nagymaros case (n 6) [54].

110 Ibid.

111 Ibid.

112 Ibid.

113 Ibid [55].

114 Ibid [56].
As Sørensen explained regarding the state of necessity:

There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed ...; in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated ... In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress.


Gabčíkovo-Nagymaros case (n 6) [47].


Ibid.

Ibid.

Agius, NILR (n 93) 113.


Gabčíkovo-Nagymaros case (n 6) [46]–[47].


J Crawford, ‘Second Report on State Responsibility (3rd Addendum, 1 April 1999)’ UN Doc A/CN.4/498/Add.3, 27–33; [1999] YBILC, vol II(2), 82–4; Fitzmaurice also stated as follows:

some of the grounds justifying non-performance of a particular treaty obligation are identical with some of those causing or justifying the *termination* of a treaty. Yet ... the two subjects are quite distinct, if only because in the case of termination ... the treaty ends altogether, while in the other [situation] ... it does not in general do so, and (if a paradox is permissible) the non-performance is not only justified, but 'looks
towards’ a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present.


134 Agius, LLM dissertation (n 93) 43.