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THE EXPULSION OF A PERMANENT MEMBER OF THE UNSC FROM THE UN: A CATCH 22 OR A GORDIAN KNOT

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The Russian aggression on Ukraine has triggered a complex question: could Russia, as one of five permanent members of the UNSC, be expelled from the UN regardless of Article 6 of the UN Charter? This Article provides that a UN member state which has persistently violated the principles from the Charter may be expelled from the UN by the General Assembly upon the recommendation of the UNSC. Since this recommendation of the UNSC requires unanimity of all its permanent members, it seems that the international community has been faced with a seemingly unsolvable situation. Nevertheless, there are maneuvers based on the rules of customary international law embodied in the Vienna Convention of the Law of Treaties, that could be exercised. Those maneuvers would not be something unseen in the history of UN law; however extreme and severe consequences would arise this time.

Key words: *expulsion form the UN, permanent members of the UNSC, customary international law, Vienna Convention of the Law of Treaties.*

1. INTRODUCTION

Article 6 of the UN Charter (hereafter: Charter) provides that a member of the United Nations (hereafter: UN) which has persistently violated the principles of the Charter may be expelled from the UN by the General Assembly upon the recommendation of the Security Council (hereafter: UNSC). According to Article 27 of the Charter, the recommendation mentioned above shall be made by an affirmative vote of nine members including the concurring votes of the permanent members. Simple textual approach of treaty interpretation,[1] would render expulsion of the permanent member of the UNSC from the UN impossible, putting the hypothetical voluntary removal aside.

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[1] Crnić-Grotić, V., *Pravo međunarodnih ugovora*, Pravni fakultet Sveučilišta u Rijeci, Rijeka. 2002, p.112.

This paper tackles the available avenues for exercising the expulsion of the permanent member of the UNSC from the UN in case of a breach of the Charter's purposes and principles expressed in Articles 1(1) and 2(4) of the Charter considering the Charter's silence about the question.

These possibilities derive from the teleological interpretation of Article 6 of the Charter based on the Vienna Convention of the Law of Treaties (hereafter: VCLT) provisions which reflect the customary international law. Customary international law codified in Articles 60 and 62 of the VCLT could be recognized as another solution although a less enforceable one. The paper will explore these solutions.

2. VCLT'S TREATY INTERPRETATION RULES – TELEOGICAL METHOD

Article 31(1) of the VCLT which codifies customary international law[2] provides that treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaties in their context and in the light of their object and purpose. This 'principle of interpretation' is in accordance with subjective as well as teleological approach to treaty interpretation. Those approaches establish the intentions of the states that signed treaties and object and purpose of the treaties as signposts in interpretation process.[3]

The intention of UN member states is expressed in the Charter's preamble which is, included in the context of a treaty, according to Article 31(2). The Charter's preamble states: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind… and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institutions of methods, that armed force shall not be used, save in the common interest… have resolved to combine our efforts to accomplish these aims'.

The intentions of the member states are also pronounced in Articles 1 and 2 of the Charter which define its purpose and principles. By virtue of Article 1(1) one of the purposes of the UN is 'to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means; and in conformity with the principles

[2] Dörr, O., *Article 31 General rule of interpretation* in: Dörr, O. and Schmalenbach, K. (eds.), Vienna Convention on the Law of Treaties: A Commentary, Springer, Berlin, 2018, p. 561.

[3] Jacobs F. G., *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, The International & Comparative Law Quarterly, 18, 2/1969, p. 318; Dothan, S.,, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, Fordham International Law Journal, 42, 3/2019, p. 766.

of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

Article 2 of the Charter provides principles in accordance with which the UN and its member states shall act 'in pursuit of the Purposes stated in Article 1'. One of those principles is principle of the sovereign equality of all its members. Another one is the obligation of member states to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' This provision is undoubtely a factor of enormous significance in light of which the whole Charter has to be interpreted.

Furthermore, due to its status of customary international law, Article 2(4) has to be taken into account by virtue of Article 31(3)c of VCLT. This Article stipulates that any relevant rules of international law aplicable in the relations between the parties shall be taken into account with the context in the process of treaty interpretation. These rules of international law without any doubt include customary international law, one of the sources of international law according to Article 38 of the Statute of the ICJ. 'The pivotal role of Article 31(3)c in this process'[4] has been recognized by ICJ in the Oil Platforms (Islamic Republic of Iran v. United States of America) where the status of a 'general rules of treaty interpretation'.[5]

Given the cited VCLT rules it is safe to presume that Carswell is right when he states that 'the Charter is not a static instrument and must be interpreted in such a way as to further its essential object and purpose'.[6]

This Charter's feature was emphasized by the ICJ and demonstrated by the development of the UN law as a whole. The glaring example of the dynamic character of the Charter's interpretation is General Assembly Resolution 377 (V) Uniting for Peace resolution[7] (Ufp). The UfP emerged as a result of the UNSC blockade orchestrated by the USSR. USSR, by using its veto power, disabled UNSC from achieving any measures which would protect the Republic of Korea against aggression from North Korea.[8] Consequently, UfP provided a new mechanism according to which when 'the UNSC, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately to make appropriate recommendations to

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[4] Mclachlan, C., *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, The International & Comparative Law Quarterly, 53, 2/2005, p. 309.

[5] *Oil Platforms (Islamic Republic of Iran v. United States of America)* case, 41, https://www.icj-cij.org/public/files/case-related/90/090-20031106-JUD-01-00-EN.pdf, accessed 2 November 2022,

[6] Carswell, A.J., *Unblocking the UN Security Council*, Journal of Conflict and Security Law, 18, 3, 2013, p. 462.

[7] Resolution adopted by the General Assembly, Uniting for peace 377(V), 3 November 1950, http://www.un-documents.net/a5r377.htm, accessed 3 November 2022.

[8] Tomuschat, C., *Uniting for Peace, General Assembly resolution 377 (V)*, Audiovisual library of Intrnational Lawa, https://legal.un.org/avl/ha/ufp/ufp.html, accessed 3 November 2022.

Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in an emergency special session within twenty-four hours of the request.. Such emergency special session shall be called if requested by the UNSC on the vote of any seven members, or by a majority of the Members of the United Nations.'[9]

The provided mechanism is actually in breach of at least two Charter provisions. Firstly, the UfP could be criticized for being contradictory to Article 12 of the Charter.[10] This Article prohibits the General Assembly from making any recommendation concerning the dispute or situation, while the UNSC is exercising the functions assigned to it by the Charter in respect of that same dispute or situation. The only exemption prescribed by that Article is the request addressed to the General Assembly by the UNSC itself. Consenquently, the expanded General Assembly's competence provided by UfP had no legal basis provided in the Charter.[11] The issue was settled by the ICJ. When convening an emergency session by the virtue of the UfP, since the UNSC, due to the USA's veto, could not reached a consensus over the legality of an Israeli wall in the West Bank, the General Assembly requested an advisory opinion from the ICJ.[12] The ICJ has concluded that the 'interpretation of Article 12 has evolved subsequently' and that 'there has been an increasing tendency over time for the General Assembly and the UNSC to deal in parallel with the same matter concerning the maintenance of international peace and security'.[13] So the obstacle for the General Assembly action emboded in Article 12 of Charter has been overcome by the practice of the General Assembly.

Given the aforementioned ICJ's judgements it could be argued that they prove the existence of a 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. The UfP itself represents a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' embodied in General Assembly resolution which gives a different meaning to Articles 12 and 24 of the Charter. These sometimes overlaping notions,[14] are provided as guidelines for treaty interpretation by Article 31(3)a i b of the VCLT.

So apparently, the ICJ as well as the General Assembly itself did not hesitate to use the teleological interpretation of the Charter.

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[9] Resolution adopted by the General Assembly, Uniting for peace 377(V), 3 November 1950, http://www.un-documents.net/a5r377.htm, accessed 3 November 2022.

[10] For more see Carswell, *op. cit.*, note 8.

[11] Lapaš, D., *Pravo međunarodnih organizacija*, Narodne novine, Zagreb, 2008, p. 187.

[12] Koester, C., *Looking Beyond R2P for an Answer to inaction in the Security Council*, Florida Journal of International Law, 27, 3/2015, p. 393.

[13] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, 17; https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf, accessed 3 November 2022, see also Carswell, *op. cit.*, note 8, p. 469, Scharf, M.P., *Power Shift: The Return of the Uniting for Peace Resolution*, Case Western Reserve Journal of International Law 55, forthcoming 2023, p. 10.

[14] Dörr, *op. cit.*, note 2, p. 594.

3. INTERPRETATION OF ARTICLE 6 OF THE CHARTER

In its dissenting opinion, Judge Alvarez noticed: 'The text must not be slavishly followed. If necessary, it must be vivified to harmonize it with the new conditions of international life. When the wording of a text seems clear, that is not sufficient reason for following it literally, without taking into account the consequences of its application."[15] Furthermore, as well as the ICJ did in the same case, he cited the Permanent Court in the case concerning the Polish Postal Service in Danzig (P.C.I. J., Series B, No. II, P. 39) which has stated: 'It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.'[16] So, to interpret the provision in accordance with the ordinary meaning to be given to the terms, in their context and in the light of their object and purpose would mean to read Article 6 as not excluding the permanent member states of the UNSC.

Naturally dissenting opinions do not have and can not have the same legal validity as ICJ's judgements and advisory opinions. Nevertheless, the mere textual approach while interpreting Article 6 of the Charter, which would lead to the impossibility of the expulsion from the UN a member which has persistently violated the Principles contained in the present Charter, for the reason of that State being a permanent member of the UNSC could definitely be considered as unreasonable as well as absurd. It would be legally and logically unimaginable for the state to continue to exercise the crucial functions of the UN and UNSC while at the same time constantly and continuously breaching its purposes and principles. Also, this conclusion would represent a violation of the principle of the sovereign equality of all UN members since it would lead to a situation where the violation of principles from the Charter would be allowed only for the UNSC's permanent members. So obviously, paraphrasing judge Alvrez's opinion, Article 6 has to 'be vivified so as to harmonize it with the new conditions of international life and the consequences of its application have to be taken into account.[17] The teleological approach of treaty interpretation must take a stage at this point. The reading of Article 6 of the Charter has to be exercised in the way that would not result in ' something unreasonable or absurd', having in mind the purposes, principles and preamble of the Charter, subsequent practice in the application of the Charter as

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[15] *Competence of the General Assembly for the Admission of a State to the United Nations* case, dissenting opinion of Judge Alvarez, 17. https://www.icj-cij.org/public/files/case-related/9/009-19500303-ADV-01-01-EN.pdf, accessed 3 November 2022.

[16] Ibid, *Competence of the General Assembly for the Admission of a State to the United Nations* case, 8, see also Mauer, D., *A U.N. Security Council Permanent Member's De Facto Immunity From Article 6 Expulsion: Russia's Fact or Fiction?*, Hard Nationak Security Choices, Lawfare, https://www.lawfareblog.com/un-security-council-permanent-members-de-facto-immunity-article-6-expulsion-russias-fact-or-fiction, accessed 3 November 2022.

[17] *Competence of the General Assembly for the Admission of a State to the United Nations* case, dissenting opinion of Judge Alvarez, 17, https://www.icj-cij.org/public/files/case-related/9/009-19500303-ADV-01-01-EN.pdf, accessed 3 November 2022

well as customary international law. The prohibition of the expulsion of the UNSC permanent member from the UN is not explicitly provided. It only stems from the power belonging to that member state to block the recommendation by using veto.

According to the given conclusions the only way to correctly interpret Article 6 of the Charter is to focus on the notion of the UNSC's recommendation while having in mind its nonmandatory character.

The nonmandatory character of UNSC's recommendation emerges from the basic definition of the word 'recommendation'. According to Merriam-Webster dictionary 'to recommend' means 'to suggest an act or course of action.'[18] Consequently, the UNSC's recommendation is not a *conditio sine qua non* for the General Assembly's decision. As Mauer correctly emphasises the Charter's drafters could have explicitly given the UNSC's decision concerning expulsion binding effect by using the words like 'with the consent of the UNSC' or the term 'decision' or 'binding opinion' instead of 'recommendation'.[19] This means that even if the positive recommendation about expulsion is not adopted by the UNSC, this fact should not prevent the General Assembly from adopting the decision conserning expulsion. As the ICJ has concluded: 'in connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the UNSC which has only the power to recommend and it is the General Assembly which decides and whose decision determines status; but there is a close collaboration between the two organs.'[20]

In 1950 the General Assembly decided that Trygve Lie, Secretary-General at the time, 'shall be continued in office for a period of three years.'[21] This deciosion was made despite the fact that the Secrurity Council was blocked[22] and the fact that, according to Article 97 of the Charter Secretary-General can be appointed by the General Assembly upon the recommendation of the UNSC.[23] So the words 'upon the recommendation of the UNSC' were simply ignored due to the lack of capability of the UNSC to exercise its right and obligation to give recommendation. If the adoption of recommendation would be practicly impossible due to the lack of good faith by one of the UNSC's permanent states than the interpretation which ignores the role of the UNSC would be even more justifyied.

Finally, as the ICJ has concluded, the primary responsibility for the maintenance of international peace and security which is conferred to the UNSC by Article 24(1)

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[18] Merriam-Webster, https://www.merriam-webster.com/dictionary/recommending, accessed 3 November 2022

[19] Mauer, *op. cit.*, note 18.

[20] *Certain expenses* case https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf, 16, accessed 3 November 2022.

[21] Continuation in office of the Secretary-General of the United Nations https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/SGE%20492.pdf, accessed 3 November 2022.

[22] Security Council Report, Special Research Report 3: Appointment of the UN Secretary-General, https://www.securitycouncilreport.org/research-reports/lookup-c-glkwlemtisg-b-7469165.php, accessed 3 November 2022.

[23] Mauer, *op. cit.*, note 18.

of the Charter should not be equalized with the exclusive responsibility.[24] The UfP is one more example of General Assembly's extension of powers due to the UNSC's inability to perform its duties.

Furthermore, this interpretation of Article 6 of the Charter should not be discouraged by the ICJ's conclusion from *Competence of the General Assembly for the Admission of a State to the United Nations* case where it has stated, considering Article 4 that provides acceptance in membership, that 'the text under consideration means that the General Assembly can only decide to admit upon the recommendation of the UNSC; … the recommendation of the UNSC is the condition precedent to the decision of the Assembly by which the admission is effected.'[25] Firstly, this case does not consider expulsion but only the state's admission to the UN. Secondly, it is after this statement that ICJ has emphasized that 'if…the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.'[26] Finally, this advisory opinion preceded the advisory opinion in *Certain Expenses* case in which the ICJ declared that the UNSC has only the power to recommend and it is the General Assembly which decides and whose decision determines status.[27]

Conclusively, Article 6 of the Charter could be interpreted as not prohibiting an expulsion of the permanent member of the UNSC from the UN in case of a persistent violation of principles contained in the Charter by that member. Of course, the General Assembly or the UNSC may request the International Court of Justice to give an advisory opinion on this legal question. The final answer on the possibility of this expulsion could be provided by the body most suitable for it - the ICJ.

4. VCLT'S TREATY TERMINATION RULES

Another avenue, although possible only in theory, should be mentioned: customary inernational law codified in the VCLT concerning termination of the treaties. In its Advisory Opinion *Reparations for Injuries* the ICJ has noticed that "is a subject of international law and capable of possessing international rights

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[24] *Certain expenses* case, https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf, 16., accessed 3 November 2022, see also Melling G, Dennett A., *The Security Council veto and Syria: responding to mass atrocities through the ''Uniting for Peace'' resolution*, Indian Journal of Inernatrional Law, 57, 2018, https://link.springer.com/content/pdf/10.1007/s40901-018-0084-9.pdf, accessed 3 November 2022, p. 299., Ramsden, M., *"Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the U.N. General Assembly*,Washington International Law Journal 25, 2, 2016, p. 284.

[25] *Competence of the General Assembly for the Admission of a State to the United Nations* case, Advisory Opinion, 8, https://www.icj-cij.org/public/files/case-related/9/009-19500303-ADV-01-01-EN.pdf, accessed 3 November 2022.

[26] *Ibid.*

[27] *Certain expenses* case, 16, https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf, accessed 3 November 2022.

and duties.“[28] This means, as Willis has stated, that although the Charter does not explicitly provide so, the UNSC is bound by customary international law[29] as well as are the UN member states. According to Article 38 of the Statute of the International Court of Justice, customary international law composed of objective and subjective elements[30] is one of the main sources of international law. The *inadimplenti non est adimplendum* principle is on of its glaring examples which also represents the general principles of law recognized by civilized nations as another source of international law.

This principle was considered as ‘so just, so equitable, so universally recognized, that it must be applied in international relations also.’[31] Incorporated in Article 60 of the VCLT that principle is a source of international rights and obligation for all subjects of international law.

As ICJ has stated, “the rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach … may in many respects be considered as a codification of existing customary law on the subject.”[32] In the *Gabčíkovo-Nagymaros Project* case the ICJ had stated that, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.[33]

Two issues should be mentioned here. Article 60 of the VCLT is permitted to take a stage since Charter is silent considering the expulsion of the permanent member of the UNSC from the UN. Secondly, Article 4 of the VCLT should also not to be regarded as an obstacle. Article 4 of the VCLT states: “Without prejudice to the application of any rules outlined in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention concerning such States.” This means that the VCLT does not apply to the UN Charter under the principle of non-retroactivity, which is envisaged in this article. However, this does not mean that Article 60 of the VCLT is not binding for UN member states when they apply the Charter. The *inadimplenti non est adimplendum* principle reflects customary international law which VCLT only codifies, and which has ‘unlimited temporal application’.[34]

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[28] *Reparations for Injuries* case, 179, 180, https://www.icj-cij.org/public/files/case-related/4/004-19490411-ADV-01-00-EN.pdf, accessed 3 November 2022.

[29] Willis, G., *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, Georgetown Journal of International Law, 42., 3/2011.

[30] Andrassy, J., Bakotić, B., Seršić M., Vukas, B., *Međunarodno pravo 1. dio*, Školska knjiga, Zagreb, 2010, p. 17.

[31] *Diversion of Water from Meuse (Neth. v. Belg.)* case, 211, http://www.worldcourts.com/pcij/eng/decisions/1937.06.28_meuse.htm, accessed 1 September 2022.

[32] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case 94, https://www.icj-cij.org/public/files/case-related/53/053-19710621-ADV-01-00-EN.pdf, accessed 1 September 2022, *Gabčikovo-Nagymaros Project* case 46, https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf, accessed 1 September.

[33] *Gabčíkovo-Nagymaros Project* case *op. cit.*, note 34,100.

[34] Rosenne, S., *The Temporal Application of the Vienna Convention on the Law of Treaties*, Cornell International Law Journal, 4, 1/1970, p. 1,3.

Consequently, Article 60 of the VCLT, as a reflection of customary international law,[35] is a relevant source of international law regarding possible expulsion of a permanent member of the UNSC from UN in a case of a material breach of the Charter by that State. By virtue of that Article, a material breach of a multilateral treaty by one of the parties entitles the other parties to terminate it by unanimous in the relations between themselves and the defaulting State.

A material breach can consist of a repudiation of the treaty or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Of course, in order to qualify as a material breach provided in Article 60 of the VCLT, this shouldn't be just a minor breach.[36] In the *Namibia* case, ICJ noticed that General Assembly resolution 2145 (XXI) determines that the administration of the Mandated Territory by South Africa has been conducted in a manner contrary to the Mandate, the UN Charter and the Universal Declaration of Human Rights as well as that South Africa had in fact disavowed the Mandate. It has continued that both, a repudiation, and violation of provision of the Mandate had occurred and that by disavowing the Mandate, South Africa had actually repudiated it. ICJ has concluded that the right to terminate a treaty exists in case of a deliberate and persistent violation of obligations that destroys the very object and purpose of that relationship.[37]

A very good example of an act that could be considered as a material breach in light of Article 60 is given by ICJ in the *Gabtikovo-Nagymaros* case. In 1977, Hungary and Czechoslovakia signed the Treaty on the Construction and Operation of the Gabtikovo-Nagymaros Barrage System. When Hungary suspended and abandoned the works, Czechoslovakia conducted a unilateral diversion of the Danube on its territory, which resulted in Hungary terminating the 1977 Treaty with effect from 25 May 1992. Hungary pointed out that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty. The material breaches were the alleged refusion of Czechoslovakia to enter negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment and putting into operation of Variant C. Regarding the first alleged breach the ICJ stated that it had not found sufficient evidence to this conclusion and regarding the second that it was premature. According to the ICJ 'Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.'[38] But this breach was not considered by the ICJ as a sufficient ground

[35] Giegerich, T., *Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach* in: Dörr, O. and Schmalenbach, K. (eds.), Vienna Convention on the Law of Treaties: A Commentary, Springer, Berlin, 2018, p. 1123.

[36] Kirgis Jr., F.L., *Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties*, Cornell International Law Journal, 22, 3/1989, p. 551, 555.

[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case, *op. cit.*, note 34, 92-95.

[38] *Gabčíkovo-Nagymaros Project* case, *op. cit.*, note 34 , 22, 23, 96, 100, 107, 108.

for termination of Treaty. Also, the ICJ had found that that the suspension and subsequent abandonment of the works on the project was also the breach of the same Treaty.[39]

The mere breach of a treaty does not by itself result in its termination. Still, it only gives the other parties the right to invoke the breach as grounds for termination.[40] Before Article 60 is activated, an adequate procedure for the determining a material breach must be conducted. Considering the seriousness of the consequences stemming from the application of Article 60 of the VCLT, the 'simple' resolution of a General Assembly, could hardly be sufficient. The best way to determine whether the material breach that allows termination of the Charter had occurred would be submitting the case to the ICJ. It is of no relevance if that determination is a part of the ICJ's judgement in a procedure initiated by one or more states against defaulting state or a part of an Advisory Opinion made by the ICJ on the request of the General Assembly or the UNSC.[41] After the material breach of the Charter has been determined, the other member states can initiate the procedure provided by Article 60 of the VCLT.

Articles 65 and 66 of the VCLT which proscribe the procedure that should be conducted when Article 60 of the VCLT is engaged could not be considered customary international law as ICJ itself has confirmed in the *Gabčíkovo-Nagymaros project* case and [42] *Armed activities on the territory of the Congo* case.[43] Nevertheless, this

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[39] Crawford, J., Olleson, S., *The Exception of Non-performance: Links Between the Law of Treaties and the Law of State Responsibility*, Australian Year Book of International Law, 27, 1, 2001, http://classic.austlii.edu.au/au/journals/AUYrBkIntLaw/2000/4.html#fn49, accessed 1 September 2022.

[40] *Appeal Relating to the Jurisdiction of the ICAO Council* case *(India v. Pakistan)*, Dissenting Opinion of Judge De Castro, 86, https://www.icj-cij.org/public/files/case-related/54/054-19720818-JUD-01-06-EN.pdf, accessed 1 September 2022. See also *Appeal Relating to the Jurisdiction of the ICAO Council*, 38, https://www.icj-cij.org/public/files/case-related/54/054-19720818-JUD-01-00-EN.pdf accessed 1 September 2022, Crawford, Olleson, *op. cit.,* note 41.

[41] It could be argued whether the submission of such a request is a procedural or a substantive matter. Naturally if this question would be considered as a substantive issue, the permanent member state of the Security Council in question could block this procedure. Nevertheless, this issue could hardly be seen as as a real problem since the General Assembly is much more active in that field than the Security Council which has requested Advisory Opinion only once. See International Court of Justice, Organs and agencies authorized to request advisory opinions. https://www.icj-cij.org/en/organs-agencies-authorized, accessed 3 November 2022

[42] *Gabčíkovo-Nagymaros Project* case op. cit., note 34, 109. The ICJ stated: 'Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.' Different in Chatinakrob T., *Material Breach and its Exception: An Analysis of a 'Humanitarian Character'*, Institute of Advanced Legal Studies (IALS) Student Law Review, 5 2, 2018, p. 48.

Armed Activities on the Territory of the Congo case , *op. cit.*, note 4, 125, Simma B., Tams, C.J., *Reacting against Treaty Breaches in: Duncan B. Hollis (eds.) The Oxford Guide to Treaties,* University Press, Oxford, 2020, p. 592.

[43] *Gabčíkovo-Nagymaros Project* case op. *cit.*, note 34, 109. The ICJ stated: „Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith." Different in Chatinakrob, *op. cit.,* note 44, p. 48., *Armed Activities on the Territory of the Congo* case, *op. cit.*, note 4, 125, see also Simma, Tams *op. cit.,* note 44, p. 592.

does not mean that the application of these VCLT rules should be seen as forbidden for other UN member states that are trying to expel a rogue one. In his opinion in the *Wightman* case before CJEU, Attorney General Campos Sánchez-Bordona concluded that there is no reason for even specific articles of the VCLT by which the EU is not bound may not be used to provide interpretative guidelines to assist in dispelling doubts about issues that are not expressly dealt with in TEU.[44] Of course this does not mean that those provisions would gain customary international law status. Following this logic, it can be assumed that although Articles mentioned above are not a real source of law for UN member states when they interpret the Charter, they could form guidelines for their actions in the given scenario. To cite the aforementioned ICJ's judgement in *Gabčíkovo-Nagymaros project* case, those Articles "if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith,"[45] and a progressive development of international law.[46] Additionally, there is no reason for all member states in question to agree about the application of these rules whose primary purpose is the protection of defaulting states' rights and *pacta sunt servanda* principle.[47]

In theory, another rule of customary international law incorporated in the VCLT could be invoked in this context. By virtue of *clausula rebus sic stantibus* incorporated in Article 62 of the VCLT, a fundamental change of circumstances which has occurred concerning those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may be invoked as grounds for terminating or withdrawing from the treaty inter alia if the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty.[48] As it emerges from the Charter's purpose and principles, expectation that all member states and especially permanent members of the UNSC will stay committed to maintaining the international peace and security and will refrain in their international relations from the use of threat or force against the territorial integrity or political independence of any state, can be considered as a circumstance which constitutes an essential basis of the consent of the parties to be bound by the Charter.

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[44] Case C-621/18 *Wightman* ECLI:EU:C: 2018:978 Opinion of Advocate General Campos Sánchez-Bordona, 82.

[45] *Gabčíkovo-Nagymaros Project* case, *op. cit.*, note 34, 109.

[46] Krieger, H., *Article 65 Procedure to be followed with respect to invalidity, termination, withdrawal. from or suspension of the operation of a treaty* in: Dörr, O. and Schmalenbach, K. (eds.), Vienna Convention on the Law of Treaties: A Commentary, Springer, Berlin, 2018, p. 1213.

[47] *Ibid.* 1213, 1233.

[48] *Fisheries Jurisdiction* case, 36, https://www.icj-cij.org/public/files/case-related/55/055-19730202-JUD-01-00-EN.pdf, accessed 3 November 2022.

The ICJ's practice considering this article in general is relatively poor.[49] In the *Fisheries Jurisdiction* case ICJ considered that the dangers for the vital interests of Iceland, resulting from changes in fishing techniques do not constitute fundamental change of circumstances.[50] In the *Gabčíkovo-Nagymaros Project* case the Hungary invoked to, among other, changes of a political nature as a fundamental change of circumstances. In the present case, the ICJ held that 'the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed.'[51] So the ICJ practice demonstrates a generally accepted extremely high threshold for *clausula rebus sic stantibus* application.

Regardless the ideal of ultimate protection of the stability of treaties expressed in *pacta sunt servanda* principle, Article 62 of the VCLT should not be reduced to a dead letter. In *Racke* case, CJEU held that the Council had not made a manifest error of assessment 'by holding that the pursuit of hostilities and their consequences on economic and trade relations, both between the Republics of Yugoslavia and with the Community, constitute a radical change in the conditions under which the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia and its Protocols ... were concluded and that they call into question the application of such Agreements and Protocols.'[52] This would be in accord with ICJ's request in *Gabčíkovo-Nagymaros Project* case that the plea of fundamental change of circumstances should be applied only in exceptional cases.[53]

Opposite of the situation in the *Gabčíkovo-Nagymaros Project* case, a change in the prevalent political conditions articulated in a threat or use of force against the territorial integrity or political independence of any state would, without any doubt, represent a fundamental change of circumstances in the light of a VCLT and ICJ practice as well. The CJEU's practice is a proof of that. Nevertheless, it is a fact that the possibilities of a successfull invocation to this principle as a way out from a treaty are rather small.[54]

In any case, I consider the solutions provided by VCLT's Articles 60 and 62 as highly inconceivable, favoring Article 31 of the VCLT as a much more appropriate legal solution. Practically, it would be imposible to reach a consensus between all

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[49] Giegerich, T., *Article 62. Fundamental change of circumstances* in: Dörr, O. and Schmalenbach, K. (eds.), Vienna Convention on the Law of Treaties: A Commentary, Springer, Berlin, 2018, p. 1146, Crnić-Grotić, *op.cit.* note 1, p. 277, Djeffal, C., *Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries*, The European Journal of International Law, 24, 4, 2013, 1230. Vidi i Draft Articles on the Law of Treaties with commentaries 1966, Reports of the Commission to the General Assembly, Yearbook of the International Law Commission, 1966, II, 257, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf, accessed 3 November 2022.

[50] *Fisheries Jurisdiction* case, *op. cit.*, note 50, 40.

[51] *Gabčíkovo-Nagymaros Project* case, *op. cit.*, note 34, 104.

[52] Case C-162/96. *Racke GmbH & Co. protiv Hauptzollamt Mainz*, ECLI:EU:C:1998:293, 56.

[53] *Gabčíkovo-Nagymaros Project* case, *op. cit.*, note 34, 104., Crnić-Grotić, *op.cit.* note 1, p. 280.

[54] Djeffal*, op. cit.*, note 51, p. 1230.

member states about the expulsion of one country, especially if it was one of the big five permanent members of the UNSC.

5. CONCLUSION

When the Charter was created it was hardly imaginable that the permanent member of the UNSC would abuse its righth to veto.[55] *A fortiori*, it was completely unthinkable that one of the five permanent members of the UNSC could ever act in a manner characterized as an agression against another independent country and a UN member. The fact that Charter does not provide for the expulsion of a permanent member of the UNSC from the UN but also does not directly prohibit it, has to be interpreted in a different way than in the time when the Charter was created. Consequently, Article 6 of the Charter has to be read as allowing the possibility of expulsion of such a member regardless of the fact that the member in the case is also a permanent member of the UNSC.

The possibilities offered by Articles 60 and 62 of the VCLT which exceed the Charter's text should not be overseen, although their practical feasibility is at the very least questionable.

On the contrary, customary international law regulating the interpretation of treaties, embodied in the VCLT, should take a stage here so that the lack of unanimity of the permanent members is not perceived as a *conditio sine qua* non for the expulsion of a permanent member of the UNSC from the UN.

The catch 22 stems from the words 'upon the recommendation of the UNSC' in the connection with procedural rules which allow permanent members to use veto blocking every UNSC's decision 'on all other matters' but the procedural. The problem should be solved as a 'gordian knot'- cutting it with a sword of customary international law regulating the treaty interpretation. This interpretation should focus on the nonmandatory character of the word 'recommendation', joint responsibility of the UNSC and General Assembly for the maintenance of international peace and security, and finally, the practice of the UN law itself which has, with the ICJ's approval, found a way to circumvent this kind of situations in the past. The key role here should be played the General Assembly. To quote Ramsden: 'as states and other actors coordinate their activities and strategize in forging creative solutions to overcome misuses of the UNSC veto, it is the General Assembly, now as in 1950, that can step into the breach'.[56]

[55] Carswell, *op. cit.*, note 8. p. 472, Scharf *op. cit.*, note 15, p. 5.

[56] Ramsden, M., *Uniting for Peace: The Emergency Special Session on Ukraine*, Harvard International Law Journal, https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/, accessed 3 November 2022.

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ISKLJUČENJE STALNE ČLANICE VIJEĆA SIGURNOSTI IZ UJEDINJENIH NARODA: KVAKA 22 ILI GORDIJSKI ČVOR

Ruska agresija na Ukrajinu otvorila je i kompleksno pitanje mogućeg isključenja stalne članice Vijeća sigurnosti iz Ujedinjenih naroda s obzirom na članak 6. Povelje UN-a, sukladno kojem Opća skupština može na preporuku Vijeća sigurnosti isključiti iz Ujedinjenih naroda člana koji uporno krši načela sadržana u Povelji. S obzirom na to da ovakvu preporuku Vijeće sigurnosti može donijeti samo konsenzusom svih stalnih članica, navedeno se isključenje čini nemogućim. Međutim, ta mogućnost proizlazi iz relevantnih pravila međunarodnog običajnog prava inkorporiranog u Bečkoj konvenciji o pravu međunarodnih ugovora. Ovakvi zahvati nisu nepoznati u praksi Međunarodnog suda ni u razvoju prava Ujedinjenih naroda.

Ključne riječi: *isključenje iz Ujedinjenih naroda, stalne članice Vijeća sigurnosti, međunarodno običajno pravo, Bečka konvencija o pravu međunarodnih ugovora*