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INVOCATION OF INTERNATIONAL (TREATY) LAW PRINCIPLES AGAINST AN AGGRESSOR STATE: SUSPENSION, RESTRICTION OF MEMBERSHIP RIGHTS, EXPULSION?

Abstract

The research aims at the invocation of the main principles of international law and treaty law, in particular, pacta sunt servanda, bona fide, jus cogens and the rule of law, in order to support the right to suspend, limit or restrict membership rights of Russia in treaties and international organizations in the context of aggression against Ukraine. The authors seek to demonstrate that the principles allow for certain measures to be taken against a State manifestly and flagrantly violating international law and to present this principle-based reasoning with a reference to the United Nations and the UN Charter. The contents of the listed principles are revealed demonstrating that they contain specific countermeasures regarding treaty participation and organization membership that may be invoked against the aggressor State. The authors emphasize that international law has always evolved around unprecedented events following universal legal values, and aggression against Ukraine obliges members of the international community to undertake responsibility and use international law solutions, including invocation of international (treaty) law principles in order the aggressor State does not benefit from grave breaches of international law and progressive development of international law is being ensured.

Key Words

Pacta Sunt Servanda, Bona Fide, Jus Cogens, Rule of Law, Russia's Isolation, Aggression against Ukraine, United Nations

Introduction

On the 24th of February 2022 fundamental catastrophe in the world based on the international rule of law happened: Russia started full scale aggression against peaceful and democratic state of Ukraine. On the 2nd of March 2022 General Assembly of the United Nations (further referred as the UN) according to the Uniting for Peace resolution¹ adopted a resolution “Aggression against Ukraine” deplored in the strongest terms the aggression by Russia against Ukraine in violation of Article 2(4) of the UN Charter, that is prohibition of the use of force with 141 votes in favour, 5 against and 35 abstentions.² Other international and regional organisations also adopted resolutions condemning Russia’s aggression against Ukraine and calling for comprehensive accountability system, including establishment of the tribunal for the crime of aggression against Ukraine that has been supported by the European Parliament, Parliamentary Assemblies of the Council of Europe, NATO and OSCE, national parliaments, as well as in the Reykjavik Declaration of the Summit of the Heads of State and Government of the Council of Europe.³

However, political resolutions alone do not ensure far-reaching political, financial and legal responsibility of the aggressor state Russia and do not make sure that credibility of international law is being restored and its effectiveness ensured. International law is characterised by and at the same time is criticized for specific means of its implementation usually lacking binding power and this lack of effectiveness is indicated among the main weaknesses of international legal order.

¹ On 25 February 2022, a draft UN Security Council resolution deploring the ‘Russian Federation’s aggression against Ukraine in violation of Article 2, paragraph 4 of the United Nations Charter’ obtained 11 votes in favour, 1 against and 3 abstentions (United Nations. “Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto”, UN Meetings Coverage and Press Releases of February 25, 2022, accessed June 28, 2024, <https://press.un.org/en/2022/sc14808.doc.htm>). Due to Russia’s veto and the UN Security Council’s inability to discharge its duties, the question was transferred to the UN General Assembly under provisions of the Uniting for Peace resolution, under which, if the Security Council, 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 with a view to making appropriate recommendations to 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 shall therefore meet in emergency special session within twenty-four hours of the request. Such emergency special session may be called if requested by the Security Council on the vote of any seven members (nine since 1965), or by a majority of the Members of the United Nations). See General Assembly Resolution 377 (V), Uniting for Peace (November 3, 1950).

² United Nations. “General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops”, UN Meetings Coverage and Press Releases of March 2, 2022, accessed June 28, 2024, <https://press.un.org/en/2022/ga12407.doc.htm>.

³ Council of Europe. Reykjavik Declaration. 4th Summit of Heads of State and Government of the Council of Europe, May 16-17, 2023, accessed 28 June 2024, <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html>, p. 5.

The role of the UN Security Council while fulfilling its primary responsibility to maintain international peace and security failed repeatedly until it has culminated in the collapse of the system of international peace and security in the eyes of Russia's open full-scale aggression against Ukraine in February 2022. Hardly ever before the world saw a more flagrant violation of the UN Charter⁴ by a permanent member of the UN Security Council, which has itself become and continues to be the major and direct threat to international peace and security it was trusted to safeguard as a permanent member of the UN Security Council.

Despite this blatant and manifest breach of the fundamental international law principle prohibiting use of force, Russia continues to sit in the managing bodies of international organisations; in the UN General Assembly it continues to vote, to exercise its veto in the UN Security Council and to continuously spread propaganda on the highest political level making international law a mockery.

From the first weeks of Russia's full-scale aggression against Ukraine, many political and legal voices called for Russia's isolation, suspension or termination of treaty participation or organisation membership.⁵ Disappointment and hopelessness has been felt during the years of the war in Ukraine repeatedly realising that measures which could be invoked effectively stopping the aggressor neither create an adequate automatic response on their own, nor go by default, thus desperately calling for the need of the UN reform stuck in hardly movable provisions of the UN Charter and the lack of political will. This context raises a fundamental question about the possibilities which international law and treaty law principles could offer to take against a state (e.g. suspension or limiting membership rights of the UN Member State, including expulsion) which violates fundamental principles of the international legal order, including *jus cogens*, together with foundational values of international law, the core of which is peace.

⁴ 1945, 1 UNTS XVI.

⁵ For example, Ukraine's President Volodymyr Zelensky urged to expel Russia from the UN Security Council so that it could not block decisions on its own war, having reminded the most terrible war crimes committed by Russian armed forces in Ukraine since the Second World War ("Zelensky tells UN that Russia must be expelled from Security Council," France24, modified April 5, 2022, accessed June 28, 2024, www.france24.com/en/europe/20220405-live-ukraine-s-zelensky-to-address-security-council-amid-outrage-over-bucha-killings). Similar calls were also upheld by academics, e.g. Iryna Zaverukha who believes that "there is nothing to stop the General Assembly from enacting reforms that would be needed to expel Russia from the Security Council" ("Op-Ed: The U.N. should kick Russia off the Security Council," Los Angeles Times, March 3, 2022, accessed 28 June 2024, www.latimes.com/opinion/story/2022-03-03/united-nations-should-remove-russia-from-the-security-council). Jack Detsch and Robbie Gramer Helsinki commented on the calls for the USA President Administration to take steps to remove Russia as a permanent member of the UN Security Council (Foreign Policy. "Helsinki Commission Recommends Kicking Russia Off U.N. Security Council. Not so fast, experts say," October 13, 2022, accessed June 28, 2024, <https://foreignpolicy.com/2022/10/13/helsinki-commission-recommends-kicking-russia-off-u-n-security-council/>). The ideas related with different restrictions of Russia's membership in the bodies of the UN (and other organisations) and treaty participation have been shared by other academics, diplomats and politicians since then.

This article aims at the invocation of key principles of international law and treaty law, in particular, *pacta sunt servanda*, *bona fide*, *jus cogens* and the rule of law, as supporting the legal possibility to limit Russia's participation in international organisations and treaties in general and focusing on the UN legal framework in particular. For this aim authors structure the analysis as follows. Firstly, the above listed principles are revealed from the doctrinal approach, including the case law of the International Court of Justice (ICJ) while proving the need for the progressive development of international law; secondly, Russia's violations of fundamental international law principles and consequences arising out of such conduct in terms of treaty participation and organisations' membership are being discussed; and finally, the application of the treaty law principles' approach to the UN (Charter) membership legal framework is being explained and legal possibility of expulsion from the UN discussed.

The novelty of this research is its focus on the general (doctrinal) approach concerning the right to limit, restrict or suspend membership rights of a State manifestly and flagrantly violating the principles of the treaty establishing a certain organisation. International law approach strengthened by systematic application of international law principles and principles of treaty interpretation, seeks to support and provide a broader legal framework for the proposals given by scholars or policy makers, ranging from contesting the seat of Russia among the five permanent members of the UN Security Council to the calls for expulsion.⁶

The research is based on the following main scientific research methods: comparative and systematic analysis as well as treaty interpretation among other. Systematic analysis is needed in order to ground the systematic logic of the international legal order, the inter-relation among the principles and their application; comparison is relevant in analysing the limitation and restriction of Russia's treaty participation and organisation membership; treaty interpretation methods are applied in order to establish the purpose and a true meaning of treaty provisions, in particular, the UN Charter.

⁶ For example, Thomas D. Grant argues that Ukraine is "the sole original member of the UN that has remained faithful to the organization's principles and was also a constituent of the USSR. It, therefore, has a credible claim to the USSR's seat" (The Centre for European Policy Analysis (CEPA), "Expelling Russia from the UN Security Council – a How-to Guide", September 26, 2022, accessed June 20, 2024, <https://cepa.org/article/expelling-russia-from-the-un-security-council-a-how-to-guide/>). Mykhailo Samus and Volodymyr Solovian see the possibilities for Russia's expulsion through the UN reform and, specifically, through targeted efforts to ensure the termination of Russia's participation in the UN Security Council (Analytical Portal New Geopolitics Research Network, "Development of a Possible Mechanism for Exclusion of Russia from the UN Security Council and IAEA", accessed June 20, 2024, <https://analytics.intsecurity.org/en/mechanism-exclusion-russia-un-security-council-iaea/>).

I. International (Treaty) Law Principles as the Core of and Guidelines for a Progressive Development of the International Legal Order

In order to retain its essence as universal legal system, its *corpus juris*, logic and vitality, international law has always developed responding to and reflecting new realities in international landscape, including the crises which were the basis of and the reason for major changes such as the emergence of new concepts and new doctrines of international law, new treaties or even new organisations.⁷ It is not merely a possibility, but a necessity for international law to constantly and adequately react to emerging challenges safeguarding the fundamental principles and values of the general and universal legal order, otherwise we may face nothing but the crisis of the international law as we got used to witness during the years of aggression against Ukraine.

That international law is capable to evolve and to do it in quite a short period of time was already proved by Justice Robert H. Jackson, leading Nuremberg trial on the side of United States, who in his opening statement to the International Military Tribunal stated that international law is more than a scholarly collection of abstract and immutable principles and unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law.⁸ Furthermore, as well noted by A. A. Cançado Trindade, “a violation of a norm or rule of International Law does not mean that such norm or rule ceased to exist; it means that International Law has been violated engaging the responsibility of the wrongdoer.”⁹

Russia’s aggression against a sovereign and independent state of Ukraine has broad and far-reaching consequences for many states and in different areas, starting from energy and food prices and finishing with greatly increased expenditures on military capabilities and destroyed credibility of fundamentals of international law. This entails necessity that responsi-

⁷ For example, the United Nations itself was created by States determined “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind” (Preamble of the UN Charter). The Responsibility to Protect emerged in response to the international community’s failure to prevent huge atrocities, mainly in the Balkans (the Srebrenica tragedy) and the Ruanda genocide and in essence was much guided by a principle of humanity and the interpretation of the concepts of State sovereignty and jurisdiction, as well as the interpretation of the aims of the UN (Charter) (for more about R2P see the United Nations, Office on Genocide Prevention and the Responsibility to Protect, accessed June 20, 2024, www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml).

⁸ Robert H. Jackson Center. Opening Statement before the International Military Tribunal. “Second Day, Wednesday, 11/21/1945, Part 04,” in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947, p. 98-102, accessed June 28, 2024, www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/.

⁹ Cançado Trindade, A. A (2006). *International Law for Humankind: Towards a New Ius Gentium*. Hague Academy of International Law, Leiden/Boston: Martinus Nijhoff Publishers, p. 110.

bility of the aggressor State also has broad legal, political and financial implications for its functioning, including possibilities to continue its aggression against Ukraine.

According to the general principles of State responsibility, any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,¹⁰ such as the principle on the non-use of force is. And the responsibility of the aggressor State does not end with the obligation to make reparations, because legal procedures ensuring reparations do take time and for pushing the aggressor State to the margins of international politics all international law solutions, entailing more political than purely legal consequences become of most importance. And for this end, suspension of Russia's participation in international treaties and restriction of its membership rights in different regional and international organisations contribute significantly to enforcement of legal together with political responsibility of Russia under international law.

Looking from a principle-based standpoint, everything what has been done so far seeking to use frozen Russia's assets for funding Ukraine's victory and reconstruction or looking for creative legal solutions for lifting personal immunities of Russia's political and military leadership while establishing Special Tribunal for the crime of aggression against Ukraine are illustrative examples of international community being willing to create new legal mechanisms by adapting international law so that it continues to safeguard one of its main principles – responsibility for breaches of international law. One should also not forget that the breach of *jus cogens* rules not only creates obligations *erga omnes*,¹¹ but also has certain implications on the consequences following such conduct (invalidates them under *ex injuria jus non oritur*).

Pacta sunt servanda is not only a conventional rule, but also a customary rule, the principle of an international law and a treaty law, at times considered also even as amounting to a general principle of law. The requirement to carry out international law obligations means that they shall always be implemented without attempts to disobey them due to a title of a treaty or with reference to domestic law, *etc.* Legal doctrine highlights the significance of the principle which, in the words of A. Aust is “elementary and universally agreed principle fundamental to all legal systems.”¹² ICJ in its case law emphasized the importance of the preservation of treaty obligations and “the integrity of the rule *pacta sunt servanda*”¹³ which

¹⁰ Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

¹¹ For Russia – to stop the aggression and assume its responsibility, for international community – to demand and seek the accountability of Russia and its individuals for atrocities in Ukraine, *etc.*

¹² Aust, A. (2013). *Modern Treaty Law and Practice* (Third Edition) Cambridge: Cambridge University Press, p. 160.

¹³ The ICJ explained that the performance of international obligations could not be set aside by reciprocal non-compliance, ICJ Judgment of 1997 in *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, I.C.J. Reports 1997, p. 7, para 114.

“is based on good faith.”¹⁴ It is important that obligations are “pursued in a joint and integrated way”¹⁵ and for this purpose States are invited to “find an agreed solution within the cooperative context of the treaty.”¹⁶

The duty of States to cooperate in upholding international law rules and principles is foundational principle of the international law¹⁷ on which the whole existence of international community is being grounded meaning that first of all, States must comply with their international law obligations and secondly, if they breach those obligations, other States using international law procedures and institutions established to safeguard those principles should enforce State responsibility for non-compliance. Compliance with international law obligations and on the other hand, enforcement of State responsibility for non-compliance are preconditions for effectiveness of international law. As H. Kelsen puts it, the collective character of the security established by a legal order manifests itself, firstly, in the fact that the use of force is forbidden by the legal order which is valid equally for all members of the community constituted by the order, and secondly, in the fact that the reaction against an illegal use of force is a collective action.¹⁸ According to the International Law Commission, States have even an obligation to cooperate to end serious breaches of peremptory norms of international law.¹⁹ And more importantly, in the face of serious breaches of peremptory norms of general international law (*jus cogens*), a duty of international organizations to exercise discretion in a manner that is intended to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*) is a necessary corollary of the obligation to cooperate.²⁰

Bona fide is both, an integral part of *pacta sunt servanda*, and may also be indicated as a separate principle, in the latter case elaborating on how the obligations shall be binding: precisely, aiming to preserve the object and purpose of a treaty, without any attempts to deviate from performance of obligations, without excuse for noncompliance due to domestic law, etc. In the words of the ICJ, “one of the basic principles governing the creation and perfor-

¹⁴ The ICJ ruled that even obligations undertaken by a unilateral declaration shall be respected, ICJ Judgment of 1974 in *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 253, para 46.

¹⁵ *Supra* note 13, para 140.

¹⁶ *Ibid*, para 142.

¹⁷ Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly resolution 26/25 (XXV) stipulates that states have duty to cooperate with one another and shall cooperate with other states in the maintenance of international peace and security.

¹⁸ H. Kelsen (1954). *Collective Security under International Law*. International Law Studies, Naval War College, p. 7.

¹⁹ International Law Commission. Chapter V: Peremptory norms of general international law (*jus cogens*). Report of the International Law Commission: Seventy-first session (29 April - 7 June and 8 July - 9 August 2019), conclusion 19.

²⁰ *Ibid*, para 5.

mance of obligations, without excuse for noncompliance due to domestic law, *etc.* In the words of the ICJ, “one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential.”²¹ However, the ICJ also reminds that the principle of good faith “is not in itself a source of obligation where none would otherwise exist.”²²

The rule of law, contrary to the principles above, is not listed as such among the principles of international law or treaty law, however, it has its firm place also in the international legal order. For example, the rule of law is one of the three pillars of the Council of Europe in addition to human rights and democracy.²³ In the UN framework the three pillars are as follows: rule of law and peace and security, rule of law and human rights, rule of law and development.²⁴ The rule of law is closely related to the above presented principles: for example, the UN Charter calls Member States to fulfil in good faith the obligations assumed by them in accordance with the UN Charter (Article 2(2)).

The new vision of the rule of law²⁵ calls even stronger to uphold this principle in the contemporary world faced with many challenges, including disregard for international law, political polarization, corruption, growing inequality and even political instrumentalization of core international law sources.²⁶ The rule of law is fundamental to international peace and security and political stability: in the framework of the UN system, it is a principle of governance under which all subjects (persons, institutions, entities and State itself) are accountable to law or laws which need to be equally enforced and which are consistent with international human rights norms.²⁷

²¹ *Supra* note 14, para 46.

²² ICJ Judgment of 2024 in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, accessed June 28, 2024, www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf, para 142.

²³ The Council of Europe at a Glance, accessed June 20, 2024, www.coe.int/en/web/portal/the-council-of-europe-at-a-glance.

²⁴ “United Nations and the Rule of Law.” The three pillars, accessed June 20, 2024, <https://www.un.org/ruleoflaw/the-three-pillars/>.

²⁵ “New vision of the Secretary-General for the Rule of Law,” accessed June 20, 2024, www.un.org/ruleoflaw/wp-content/uploads/2023/07/New-Vision-of-the-Secretary-General-for-the-Rule-of-Law.pdf.

²⁶ “Germany says will intervene at The Hague on Israel’s behalf, blasts genocide charge,” the Times of Israel, accessed June 28, 2024, <https://www.timesofisrael.com/germany-says-will-intervene-at-the-hague-on-israels-behalf-blasts-genocide-charge/>.

²⁷ “United Nations and the Rule of Law”. What is the Rule of Law, accessed June 20, 2024, www.un.org/ruleoflaw/what-is-the-rule-of-law/.

The application of the above presented principles of the rule of law, *pacta sunt servanda*, *bona fide* and *jus cogens* as allowing restrictions related to treaty participation and membership in organizations may even be strengthened by systematic application of all principles of international law, general principles of law and principles of treaty interpretation. The principles of the international law, including the sovereign equality of States, prohibition to use force and duty to respect territorial integrity and inviolability of State boundaries which shall be applied systematically support the need for action in order to restore the universal international legal order. The general principles of law, including justice (fairness) and humanity call for similar approach. "General principles of law help ensure the harmony of international law, adapt international law to new changes or needs, fulfil gaps and contribute to the development of new rules of law."²⁸ Moreover, the above approach is also upheld by the rules of treaty interpretation: "a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁹

II. Russia's Flagrant Violation of the Principles of International (Treaty) Law as a Catalyst for a Crucial Need of Change

Aggression and atrocities caused and continued by Russia in Ukraine and its conduct in rejecting and seeking to escape any accountability³⁰ is a clear example of Russia's acting against the rule of law, against the UN's commitment to the purposes and principles of the UN Charter and ruins the predictability and legitimacy of the international relations that the rule of law is aimed to safeguard at international level. Russia manifestly violates the UN Member State's duty to comply with the obligations under international law that are essential for the maintenance of international peace and security, human rights protection and international cooperation aimed at the achievement of other common aims of international community enshrined in the UN Charter.

Pacta sunt servanda is not only essential for the stability of treaty relations and effectiveness of international law, but crucial when we speak about the principles of the UN which are also the principles of the international law and "a Constitution of the international community." Russia has not only been demonstrating an open and flagrant breach of *pacta*

²⁸ Isokaitė-Valužė, I., Šinkūnas, H. (2023). Paminės teisės idėjos kaip bendrieji teisės principai ir konstituciniai principai [Fundamental Ideas of Law as General Principles of Law and Constitutional Principles]. In Konstitucinė justicija Lietuvoje: trys veiklos dešimtmečiai [Constitutional Justice in Lithuania: Three Decades of Activity]. Vilnius: Vilniaus universiteto leidykla, p. 451.

²⁹ Article 31(1) of the Vienna Convention on the Law of Treaties of 1969. United Nations Treaty Series, Vol. 1155, p. 331.

³⁰ For example, contesting the jurisdiction of the ICJ in cases instituted by Ukraine, not participating in proceedings, ignoring the arrest warrants issued by the International Criminal Court, vetoing decisions related with its interests at the UN Security Council, etc.

sunt servanda in recent years in particular,³¹ but usually tries to misuse, to misapply and intentionally misinterpret the international law adapting it to its own interests and making false statements even before the ICJ (as for example, “has turned Genocide Convention on its head,”³² etc.) and thus acting also contrary to *bona fide*. Distortion of treaty obligations, for example, when reasoning its “special military intervention” in order to demilitarise and denazify Ukraine or to act in a need of Russia’s defence against threats from the Western powers, supporting false referendums in occupied Ukrainian territories and granting recognition to such puppet entities and governments are just a few examples.³³

Russia’s full-scale invasion into Ukraine and open aggression comprising the violation of the prohibition to use force, its international crimes being committed (including torture) in Ukraine also amounts to a violation of *jus cogens* rules, calling international community not to recognise the consequences of such violations and seek for Russia’s accountability. For the latter purpose States should take all actions needed and in compliance with international law: “international law solutions exist and can be effective if States, politicians and decision-makers follow them. We cannot tire of questioning whether the concept of war crimes in the 21st century corresponds to the realities of the present time <...>.”³⁴ Among the attempts in this respect efforts aimed at limiting Russia’s participation in international frameworks or even its isolation has been heard since the beginning of aggression.

Already in Spring 2022 one of Ukraine’s websites³⁵ announced even 42 international forums where Russia’s membership was in certain form or to a certain extent suspended or

³¹ Principles and rules of international law and international humanitarian law, human rights law, international environmental law, international law of the sea and other areas of international law, elaborated in many international agreements and other sources the list of which this research due its limited scope does not aim to encompass.

³² Order of the ICJ of 16 March 2022 in the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, I.C.J. Reports 2022, p. 211, para 31.

³³ Many authors referred to Russia’s distorted interpretation of international law, e.g. Isokaitė-Valužė, I. Rusijos agresija prieš Ukrainą: laikas prikelti taptautinę teisę [Russia’s Aggression against Ukraine: a Time to Restore International Law]. *Teise.pro*, announced February 22, 2022, accessed June 20, 2024, <https://www.teise.pro/index.php/2022/02/28/i-isokaite-valuze-rusijos-agresija-prie-ukraina-laikas-prikelti-taptautine-teise/>.

³⁴ G. Grigaitė-Daugirdė addressed the need of exploring possibilities of using Russia’s confiscated assets for Ukraine’s reconstruction and the establishment of a special international tribunal for aggression. The Ministry of Justice of the Republic of Lithuania. “G. Grigaitė-Daugirdė: we must make the aggressor pays provision a reality”, announced July 25, 2022, accessed June 20, 2024, <https://tm.lrv.lt/en/news/g-grigaite-daugirde-we-must-make-the-aggressor-pays-provision-a-reality/>.

³⁵ “Isolation. Russia ousted from 42 international fora”, announced June 2, 2022, accessed June 20, 2024, <https://war.ukraine.ua/articles/isolation-russia-suspended-from-42-international-platforms/>. The list of international frameworks was presented in a broadest sense, encompassing also cases of suspension of certain rights and also encompassing such frameworks as sport federations, etc.

terminated, including the (bodies of) international organisations. Suspensions, restrictions and expulsions taken in respect to Russia at times partly competed and coincided with the initiative of Russia itself to withdraw or suspend participation in certain bodies, as for example, the Parliamentary Assembly of the Organisation for the Security and Cooperation in Europe (OSCE) which as Russia alleged “absolutely lacks independence, is politicized, and dances to the tune of Washington.”³⁶

Many States suspended or terminated certain treaties with Russia like Ukraine did³⁷ or have taken another restriction. For example, Lithuania has recently denounced bilateral treaty with Russia on cooperation in criminal matters³⁸ and refused OSCE observers, representatives from Russia and Belarus, to arrive to monitor presidential election.³⁹ Hardly the participation of the representatives of States aggressors establishing (or supporting the establishment of) fake republics in occupied territories of Ukraine and recognising fake regimes as well as violating other international law principles (including the prohibition of interference into domestic affairs of a State), the leaders of which themselves are elected in elections not meeting international election standards could be in compliance with OSCE aims, to the contrary, allowance of such participation would have been as “a mockery of democracy.”

These examples demonstrate that the logic of international (treaty) law is simple: a State party, intentionally, continuously and systematically acting against the principles and aims of a treaty or an organisation shall be subject to certain sanctions as countermeasures (suspension or limitation of membership rights, termination of a treaty), and the scope of such measures and subjects allowed to invoke them increase in cases of violation of *jus cogens* rules.

International organisations and States are also subject to the *rule of law*: no entity can be above the law or immune from responsibility for violations. Noncompliance with these guiding principles means nothing but a breach of the very logic and structure of the system of

³⁶ Reuters. “Russia’s parliament to vote on suspending Moscow’s participation in OSCE Parliamentary Assembly”, February 14, 2024, accessed 20 June 2024, www.reuters.com/world/europe/russias-parliament-vote-suspending-moscows-osce-participation-2024-02-13/.

³⁷ For example, the implications of the war in Ukraine on investment treaties have been analysed by Tamada, D. (2024). War in Ukraine and Implications for International Investment Law. *International Community Law Review*, 26(1-2), 187-207, <https://doi.org/10.1163/18719732-12341499>.

³⁸ There are proposals to terminate Lithuania’s agreements with the governments of Russia and Belarus on investment promotion and protection, as well as on trade and economic relations; in such case multilateral treaties could replace them at least for formal communication with these states. “Lithuania to terminate several agreements with Russia, Belarus,” BNS, Lrt.lt, announced May 22, 2024, accessed June 28, 2024, www.lrt.lt/en/news-in-english/19/2279450/lithuania-to-terminate-several-agreements-with-russia-belarus.

³⁹ National broadcaster of Lithuania. “OSCE not sending observers to Lithuania’s election due to Vilnius’ conditions,” Lrt.lt, announced May 8, 2024, accessed June 20, 2024, <https://www.lrt.lt/en/news-in-english/19/2267833/osce-not-sending-observers-to-lithuania-s-election-due-to-vilnius-conditions>.

international law. Instead of witnessing such failure and, in particular, in case of violation of *jus cogens* rules, international community shall act in order to stop such violation and to restore the compliance with international law, for this reason proposing new means and adapting existing instruments necessary to uphold the legal world order and retain its effectiveness.

The years of the war in Ukraine have demonstrated both, increasing awareness of the international community to act following the above presented approach, and supporting the ability and need of international law to change and develop. International community has taken joint action in taking or discussing novel measures in order to restore international legal order: establishing a special international tribunal for the crime of aggression,⁴⁰ using frozen assets of Russia for Ukraine's reconstruction (and payment for victims),⁴¹ recognition of Russia as terrorism-sponsoring State,⁴² economic and individual sanctions applied by the European Union have been unprecedented⁴³ as well as the increased workload of and proceedings before international courts, with dozens of States intervening as never before,⁴⁴ a great progress has been made and unique mechanisms created in the field of collection of evidence proving international crimes.⁴⁵

Despite the fact that international law is a field of law that has always been influenced greatly by international politics and development of international law by creative solutions do take courage, political will and time efforts of States, as R. Higgins rightly indicates, the political organs of the United Nations are also vitally concerned with the development of international law.⁴⁶ The number of occasions on which states see fit to act collectively has been greatly in-

⁴⁰ Among most recent papers see, for example, Butchard, P. Conflict in Ukraine: A Special Tribunal on the Crime of Aggression. House of Commons Library. February 22, 2024, accessed June 20, 2024, <https://researchbriefings.files.parliament.uk/documents/CBP-9968/CBP-9968.pdf>.

⁴¹ European Parliamentary Research Service. "Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine: a study". February 2024 accessed June 20, 2024, [www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU\(2024\)759602_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf).

⁴² European Parliament resolution of 23 November 2022 on recognizing the Russian Federation as a state sponsor of terrorism (2022/2896(RSP)), (2023/C 167/03).

⁴³ Council of the European Union. "EU Sanctions against Russia explained," accessed June 20, 2024, www.consilium.europa.eu/en/policies/sanctions-against-russia/sanctions-against-russia-explained/.

⁴⁴ For example, the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* with 32 States intervening, accessed June 20, 2024, www.icj-cij.org/case/182/intervention.

⁴⁵ Kliuchkovskiy, M., "How the Register of Damage Caused by Russia's Aggression will work," European Pravda, April 2, 2024, accessed June 20, 2024: <https://www.eurointegration.com.ua/eng/articles/2024/04/2/7182873/>.

⁴⁶ Higgins, R. (1963). *The Development of International Law Through Political Organs of the United Nations*. Oxford: Oxford University Press, p. 2.

created by the activities of international organizations and collective acts of States repeated by and acquiesced in by sufficient numbers with sufficient frequency eventually attain the status of law.⁴⁷

Taking into account the evolution of the UN General Assembly functions and powers within the institutional UN framework⁴⁸ allows to conclude that change of practice or procedures of the UN General Assembly supported by a solid majority of Member States does have importance in supporting certain understanding of provisions provided in the UN Charter concerning objectives of the UN and institutional division of powers while implementing those objectives.⁴⁹ Therefore, understanding that international law has been developed through the practice of the UN political organs towards maintaining possibility of this international organisation to fulfil its objectives, in the case of that blatant and manifest breach of the UN Charter by Russia that continues for more than two years and taking into account the role that UN has been established for, UN remains responsible and should stay determined to ensure that credibility of international law is being restored to the fullest, the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law are adhered to as guidelines towards seeking justice for Ukraine, safeguarding human rights and building peace and security for future generations.

Following the words of M. P. Scharf, in 2022, the United States “dusted off” the 1950 Uniting for Peace Resolution in order to obtain General Assembly condemnation of the Russian invasion of Ukraine and this use of the Uniting for Peace process represented a shift in power from the Security Council and to the General Assembly with potentially broad and long-term implications.⁵⁰ The UN General Assembly, acting under ‘Uniting for Peace,’ has so far adopted the following decisions in its resolutions: condemned Russia’s aggression and called for immediate withdrawal of Russia’s troops,⁵¹ addressed humanitarian consequences of Russia’s aggression in Ukraine,⁵² suspended the rights of membership of Russia in the UN Human Rights

⁴⁷ *Ibid.*

⁴⁸ In this respect ‘Uniting for Peace’ is perhaps the most illustrative example.

⁴⁹ Separate Opinion of Judge Sir Gerald Fitzmaurice, p. 201-202, the ICJ Advisory Opinion of July 20, 1962 on *Certain expenses of the United Nations*, I.C.J. Reports 1962, p. 151.

⁵⁰ Scharf, M. S. Power Shift: The Return of the Uniting for Peace Resolution, *Case Western Reserve Journal of International Law*, 2023, Vol. 55, Issue 1, p. 217.

⁵¹ UN General Assembly Resolution of March 2, 2022, A/RES/ES-11/1, accessed June 28, 2024, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es-11_1.pdf.

⁵² UN General Assembly Resolution of March 24, 2022, A/RES/ES-11/2, accessed June 28, 2024, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es-11_2.pdf.

Council,⁵³ called for territorial integrity of Ukraine and condemned the so called referendums in occupied territories of Ukraine, illegal annexation of territories,⁵⁴ addressed the need for the establishment of an international mechanism for reparation for damage, loss or injury, arising from the internationally wrongful acts of Russia in or against Ukraine and recommended the creation of an international register of damage,⁵⁵ reaffirmed the principles of the UN Charter underlying a comprehensive, just and lasting peace in Ukraine.⁵⁶

In addition to the given examples of novel developments, Russia's aggression reminded of a crystal-clear need of the UN reform. The UN General Assembly acting under the "Uniting for Peace machinery" in some sense tried to save the UN from collapsing. Ukraine's representatives not only once appealed to the conscience of States at the UN bodies wondering where the security to be guaranteed by the UN Security Council was and hoping there was no desire to have the UN Charter burnt.⁵⁷ But to keep the promises of peace and justice given after the Second World War alive, no doubt that more prominent role of UN General Assembly in upholding the mandate of the UN through the "door opener Uniting for Peace resolution"⁵⁸ enabling a variety of possible collective actions by the General Assembly must continue to be supported by the majority of UN Member States in the case of full-scale aggression by Russia against Ukraine.

III. Application of the Treaty Law Approach to the UN (Charter): Suspension of Membership Rights and Expulsion from the Organization

After the full-scale aggression against Ukraine, Russia was suspended from the Council

⁵³ UN General Assembly Resolution of April 7, 2022, A/RES/ES-11/3, accessed June 28, 2024, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es-11_3.pdf.

⁵⁴ UN General Assembly Resolution of October 12, 2022, A/RES/ES-11/4, accessed June 28, 2024, www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es_11_4.pdf.

⁵⁵ UN General Assembly Resolution of November 14, 2022, A/RES/ES-11/5, accessed June 28, 2024, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es_11_5.pdf.

⁵⁶ UN General Assembly Resolution of March 2, 2023, A/RES/ES-11/6, accessed June 28, 2024, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_es_11_6.pdf.

⁵⁷ "Ukraine President Zelensky addresses United Nations Security Council," April 5, 2022, video accessed June 20, 2024, www.youtube.com/watch?v=ytPWmYEIa78; and Official Website of the President of Ukraine. "We Do Not Want the UN Charter to Be Burnt Down Just Like These Books – Address by the President of Ukraine to the World Leaders on the Eve of the Peace Summit," May 26, 2024, accessed June 20, 2024, www.president.gov.ua/en/news/mi-ne-hochemo-shob-tak-samo-yak-ci-knizhki-zgoriv-statut-oon-91137.

⁵⁸ *Supra note* 50, p. 243.

of the Baltic Sea States,⁵⁹ Bank for international settlements,⁶⁰ International Council for the Exploration of the Sea,⁶¹ World Tourism Organization⁶² as well as its participation was suspended in bodies of Organization for Economic Co-operation and Development.⁶³ Following aggression against Ukraine, Russia was also excluded from the Council of Europe,⁶⁴ lost its seat in the Council of International Civil Aviation Organization⁶⁵ and was also suspended from the United Nations' leading human rights body – Human Rights Council.⁶⁶

International law scholars agree that sanctions of denying credentials, suspension of membership rights and expulsion that are being applied against certain States in cases of their brutal disregard for the statutory aims of the concrete organisation contribute to the effectiveness and reputation of that organisation.⁶⁷ Concerning effectiveness of multilateral organisations, in the case of aggression against Ukraine, by limiting membership rights of the aggressor state Russia or its expulsion, Member States also make sure that possibility to fulfil organisational functions is not hindered by procedural obstacles being consciously created by the aggressor State and preventing important decisions from being undertaken.

Due to gross and systematic violations of international law, including *jus cogens* rules, Russia has undermined its right to a full-fledged membership in majority of international or regional organizations and participation in treaties. This general approach (as presented in the preceding part of the research) implies possibilities of certain restrictions or limitations the

⁵⁹ "Russia suspended from Council of the Baltic Sea States," announced March 3, 2022, accessed June 28, 2024, www.regjeringen.no/en/aktuelt/russland-suspenderes-fra-ostersjoradet/id2903009/.

⁶⁰ Ostrof, C. "Russia Suspended From Bank for International Settlements." *The Wall Street Journal*, March 11, 2022, accessed June 28, 2024, www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-03-11/card/russia-suspended-from-bank-for-international-settlements-gEiXwjyillkp9JSTV7sU.

⁶¹ "Russia suspended from International Council for the Exploration of the Seas," updated March 30, 2022, accessed June 28, 2024, www.intrafish.com/fisheries/russia-suspended-from-international-council-for-the-exploration-of-the-seas/2-1-1193597?zephir_sso_ott=wJ6CZk.

⁶² "World Tourism Organization (UNWTO) Members Vote to Suspend Russia," announced April 27, 2022, accessed June 28, 2024, www.unwto.org/ar/node/12876.

⁶³ "Statement from OECD Secretary-General on further measures in response to Russia's large-scale aggression against Ukraine – OECD," accessed June 28, 2024, <https://search.oecd.org/countries/russia/statement-from-the-oecd-council-on-further-measures-in-response-to-russia-s-large-scale-aggression-against-ukraine.htm>.

⁶⁴ Consultative Council of European Prosecutors (CCPE). "Exclusion of the Russian Federation from the Council of Europe and suspension of all relations with Belarus," announced March 17, 2022, accessed June 28, 2024, www.coe.int/en/web/ccpe/-/the-russian-federation-is-excluded-from-the-council-of-europe.

⁶⁵ Lampert, A. "Russia loses U.N. aviation council seat in rebuke," Reuters, announced October 1, 2022, accessed June 28, 2024, www.reuters.com/world/europe/russia-not-re-elected-un-aviation-agencys-36-member-council-2022-10-01/.

⁶⁶ United Nations. "UN General Assembly votes to suspend Russia from the Human Rights Council," announced April 7, 2022, accessed June 28, 2024, <https://news.un.org/en/story/2022/04/1115782>.

⁶⁷ Halberstam, M. (1984). Excluding Israel from the General Assembly by a Rejection of its Credentials, *AJIL*, Vol. 78, p. 179.

particular ones of which are subject to types of treaties and organisations this research is not capable to encompass. For example, international humanitarian law treaties, treaties for the protection of human rights and the environment, multilateral law-making treaties are among these presumed not to be terminated by an international armed conflict,⁶⁸ and to the contrary, other types of treaties including bilateral and taking into account a purpose of a particular treaty may be suspended, terminated or the rules of treaty interpretation and application may require another most appropriate action (for example, limiting certain rights related to voting, access to information, nominating candidates, *etc.*).

But to expel or not to expel is an existential dilemma of international organizations.⁶⁹ As briefing of the European Parliament on suspension and expulsion of States from international organizations indicates, cases of expulsion from international organizations are extremely rare,⁷⁰ but expulsion may increase legitimacy of the international organization by showing that it takes compliance seriously⁷¹ especially in cases of an act of aggression by one State against another neighboring and peaceful member State. When Soviet Union invaded Finland in 1939, League of Nations expelled it from the organization.⁷² Yugoslavia was excluded from the Conference for Security and Cooperation in Europe because of its aggression against neighboring States in 1992.⁷³ Therefore, military aggression can clearly give rise to the issue of expulsion of an aggressive member State from multilateral organizations.

Even though legal provisions that empower an international organisation to suspend and expel its members leave broad areas for discretion and political decision-making,⁷⁴ the UN and the UN Charter are also not “immovable” in the eyes of continuing grave violations of international law and its underlying values, including peace, justice and humanity. The UN

⁶⁸ Indicative list of treaties presumed to continue in times of armed conflict is annexed to the Draft articles on the effects of armed conflicts on treaties, with commentaries. The International Law Commission, 2011. *Yearbook of the International Law Commission*, 2011, vol. 2, part II.

⁶⁹ Dzehtsiarou, K., Coffey, D. K. (2019). Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times, *International and Comparative Law Quarterly*, Vol. 68(2): 443-476. doi:10.1017/S0020589319000101, p. 446.

⁷⁰ Briefing of the European Parliament on suspension and expulsion of states from international organisations. Analysis of the Vienna Convention on the Law of Treaties and of the practice at the United Nations and the Council of Europe, July 2023, accessed June 28, 2024, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751410/EPRS_BRI\(2023\)751410_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/751410/EPRS_BRI(2023)751410_EN.pdf), p. 7.

⁷¹ *Supra note* 69, p. 447.

⁷² Gross, L. (1945) Was the Soviet Union Expelled from the League of Nations? *American Journal of International Law*, Vol. 39(1): 35-44, p. 42.

⁷³ *Supra note* 69, p. 450.

⁷⁴ *Ibid*, p. 451.

Charter refers to the principles analysed in this article, enshrines *jus cogens* rules, and calls for the observance of the principles and rules which means acting in compliance with the rule of law. Firstly, the UN Charter stipulates that the UN is an organisation only for peace-loving States capable to implement obligations (Article 4(1)). Secondly, all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter” (Article 2(2)). According to Article 5 of the UN Charter, a Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. And finally, a Member of the United Nations which has persistently violated the principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council (Article 6).

Understanding that the aggressor state Russia has permanent seat in the UN Security Council – institution having primary responsibility for international peace and security⁷⁵ – keeping in this UN institution the State that clearly and constantly fails to comply with the fundamental principle of the UN Charter and international peace, that is non-use of force in international relations, seriously undermines the importance, mandate and reputation of the UN in restoration of credibility of international law and its effectiveness in cases of acts of aggression, responsibility of which was also entrusted within the UN Security Council.⁷⁶

Even though no Member State has been expelled from the UN since its establishment in 1945,⁷⁷ taking into account that as it was previously mentioned an act of aggression can definitely raise the issue of suspension of membership rights and even lead to expulsion, the question remains if the UN Charter provisions and institutional practice on the suspension of membership rights or expulsion from the UN leave any room for manoeuvre in the case of an

⁷⁵ Article 24 (1) of the UN Charter.

⁷⁶ Article 39 of the UN Charter: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

⁷⁷ Sometimes case of Taiwan is considered as an expulsion from the UN case, but General Assembly in the resolution 2758 (1971) decided to restore all its rights to the People’s Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it. Moreover, records of General Assembly debates that led to the adoption of Resolution 2758 allow to conclude that 30 states specifically indicated that they saw the issue addressed by the resolution as merely a question of credentials, determining whether the representatives of the People’s Republic of China or of “Chiang Kai-shek” should occupy the Chinese seat at the UN. See more: DeLisle, J., Glaser, S. B. Why UN General Assembly Resolution 2758 Does Not Establish Beijing’s “One China” Principle: A Legal Perspective, April 2024, accessed June 28, 2024, https://www.gmfus.org/sites/default/files/2024-04/GMF_UNGA%20Res.%202758_April%202024%20Report.pdf.

act of aggression by the permanent member of the UN Security Council Russia against Ukraine and enable certain flexibility while dealing with bad faith exercise of veto by the aggressor being permanent member of the UN Security Council.

According to Articles 3-6 of the UN Charter that establish principles for membership, suspension of membership rights and expulsion of States, the power to initiate any of these procedures and enable General Assembly to suspend or expel a Member State under the Charter is exclusively reserved to the Security Council. But the Charter is silent on the issue of representation of a Member State and credentials, non-recognition of which *de facto* could mean inability of a Member State to exercise its rights in UN institutions.

Organizational guidance in relation to making decisions on the representation of a Member State in the UN were first adopted in the form of a GA resolution 396(V) (1950) on Recognition by the United Nations of the representation of a Member State,⁷⁸ which considering that it is in the interest of the proper functioning of the Organization that there should be uniformity in the procedure applicable whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, and that, in virtue of its composition, the General Assembly is the organ of the United Nations in which consideration can best be given to the views of all Member States in matters affecting the functioning of the Organization as a whole, first, recommended that, whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case; and secondly, recommended that, when any such question arises, it should be considered by the General Assembly, or by the Interim Committee if the General Assembly is not in session and the attitude adopted by the General Assembly or its Interim Committee concerning any such question should be taken into account in other organs of the United Nations and in the specialized agencies.

According to Article 21 of the Charter, General Assembly has its own rules of procedure, based on which this institution deals with issues of participation of States and its credentials. Credentials Committee examine the credentials of representatives and report without delay⁷⁹ and any member may object to any representative's admission as part of delegation.⁸⁰

Discussions on the credentials of Russia and its membership rights within the UN have been renewed after Ukrainian Permanent Representative to the UN Sergiy Kyslytsya speaking to the Security Council argued that Russia's "membership is not legitimate, as the General Ass-

⁷⁸ December 14, 1950, accessed June 28, 2024, www.refworld.org/legal/resolution/unga/1950/en/7705.

⁷⁹ Rules of Procedures of the General Assembly, A/520/Rev.20, Rule 28, accessed June 28, 2024, www.un.org/en/ga/about/ropga/pdf/A_520_Rev.20.pdf.

⁸⁰ *Ibid.*, Rule 29.

embly never voted on its admission to the Organization following the fall of the Soviet Union in December 1991.”⁸¹ In a letter dated 24 December 1991, Boris Yeltsin, the President of the Russian Federation, informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other UN organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.⁸² It is important to mention that following decision by the Council of Heads of State of the Commonwealth of Independent States Russia's continuance of the membership of the Union of Soviet Socialist Republics in the UN, including permanent membership of the Security Council, was supported by all these States.⁸³ For this reason, Grant argues that the Russian succession in the Security Council did not arise through an “automatic operation of law” but rather as the result of an explicitly political choice made during the dissolution of the Soviet Union.⁸⁴

And because of these developments, it is believed that changes in the UN Security Council had been based on the *bona fide* principle that this organisation followed. “A simple illustration of the application of the good faith principle was the approach of the members of the United Nations to the change of name of two permanent members of the Security Council, the Republic of China and the Union of Soviet Socialist Republics, whose original names are mentioned explicitly in the UN Charter, which was *not* changed.”⁸⁵ This example illustrates that international law does not prohibit to apply the principles presented above also to the UN Charter itself, even if its drafters have in certain sense placed the Charter above the law making any change of the composition of the UN Security Council and its powers impossible without being approved by themselves (Articles 23, 108) and giving the Charter provisions a higher standing in comparison to other treaty obligations (Article 103).⁸⁶

Furthermore, not only the change of representation in the UN Security Council in case of China (held by Taiwan until 1971), but also the membership of the South Africa the creden-

⁸¹ “Ukraine believes Russia’s UN, UNSC membership illegitimate,” announced February 25, 2022, accessed June 28, 2024, <https://euromaidanpress.com/2022/02/25/ukraine-questions-legality-of-russias-un-unscc-membership/>.

⁸² United Nations. “Russian Federation.” Member States, accessed June 28, 2024, www.un.org/en/about-us/member-states/russian-federation.

⁸³ Council of Europe. “Agreements establishing the Commonwealth of Independent States,” 1991, accessed June 28, 2024, [www.venice.coe.int/webforms/documents/?pdf=CDL\(1994\)054-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(1994)054-e).

⁸⁴ Grant, T. “No, Russia Can (Still) Not be Removed From the UN Security Council: A Response to Thomas Grant and Others: Part Two,” announced February 11, 2023, accessed June 28, 2024, <https://opiniojuris.org/2023/02/11/no-russia-can-still-not-be-removed-from-the-un-security-council-a-response-to-thomas-grant-and-others-part-two/>.

⁸⁵ *Supra* note 12.

⁸⁶ Some amendments have taken place: extension of the number of members of the UN Security Council from 11 to 15 (Article 23) and the affirmative votes demanded to take decisions from 7 to 9 (Article 27). United Nations. United Nations Charter (full text), accessed June 20, 2024, www.un.org/en/about-us/un-charter/full-text.

tials of which were not recognised by the General Assembly in 1974 propose that these developments took place without an explicitly established procedure, they were more based on a systematic interpretation and application of the international law and the UN Charter.⁸⁷ It is worth noting that when the General Assembly rejected credentials of the delegation set forth by the South Africa, many States considered the country's apartheid policy as their primary reason for following recommendation of the Credentials Committee.⁸⁸ The decision thus effectively barred South Africa from exercising its membership rights in circumstances where the Security Council and General Assembly had not taken steps formally to suspend it under Article 5 of the UN Charter.⁸⁹ Even UN legal counsel at that time opposed the choice stating that the General Assembly's actions "would have the effect of suspending a Member State from exercise of rights and privileges of membership in a manner not foreseen by the Charter."⁹⁰

Following the words of R. Higgins, UN General Assembly soon found it hard to maintain the distinction between disputes over credentials and those disputes which go farther⁹¹ and one can conclude that the Credentials Committee has emerged as a key player in critical questions of global governance.⁹² Therefore, following the wording of the UN Charter and considering UN institutional practice conclusion can be made that distinction between representation of a Member State and membership of a State provides opportunity to *de facto* limit possibility to exercise membership rights in the UN by challenging not only the legality and legitimacy of the ruling regime in a certain country, but also by referring to Member State's

⁸⁷ UN General Assembly in its Resolution of November 6, 1962 adopted in the 17th session (accessed June 20, 2024, www.worldlii.org/int/other/UNGA/1962/21.pdf) referred to the apartheid policy which is against the UN purposes and requested the UN Security Council to take appropriate action, including under Article 6 of the UN Charter, i.e. expulsion from the UN).

⁸⁸ Alden, R. "South Africa Is Rebuffed by U.N., but Not Expelled," *The New York Times*, announced October 6, 1973, accessed June 28, 2024, <https://www.nytimes.com/1973/10/06/archives/south-africa-is-rebuffed-by-un-but-not-expelled-south-africa.html>.

⁸⁹ Amirfar, C., Zamour, R., Pickard, D. (2022). Representation of Member States at the United Nations: Recent Challenges," *American Society of International Law, Asil Insights*, Vol. 26, Issue 6, www.asil.org/insights/volume/26/issue/6, p. 4.

⁹⁰ Jhabvala, F. (1977) The Credentials Approach to Representation Questions in the U.N. General Assembly. *California Western International Law Journal*, Vol. 7, No. 3, accessed June 28, 2024, <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1834&context=cwilj>, p. 633. See also Suttner, R. (1984) Has South Africa Been Illegally Excluded from the United Nations General Assembly? *African Journal of International and Comparative Law*, Vol. 17, p. 297, arguing that the credentials of the South African apartheid regime were thus rejected for many years by the General Assembly due to its "flagrant violation" of the UN Charter.

⁹¹ *Supra note 46*, p. 151-152.

⁹² *Supra note 89*, p. 7.

policy violating fundamental UN principles, including protection of human rights. In 2011, the Credentials Committee recommended UN seat to the National Transitional Council of Libya instead of to the Gaddafi regime⁹³ and the same committee again refused accreditation for Taliban regime of Afghanistan and Myanmar junta in 2022.⁹⁴

These examples of using technical credentials' procedures of the UN General Assembly for achieving political purposes that would be impossible to achieve because of clear UN Charter provisions reserving monopoly of the UN Security Council in dealing with suspension of membership rights and expulsion of a member allow to conclude that *de facto* Russia's membership rights could also be suspended by not recognizing its credentials. This suggestion is also supported by the fact that following full-scale aggression against Ukraine by Russia in its first resolution under the Uniting for Peace procedure UN General Assembly clearly recalled that the obligation under Article 2 (2) of the UN Charter, that all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter.⁹⁵ While the General Assembly cannot unilaterally suspend Russia from the UN through Article 5 of the UN Charter, it could potentially use that finding to reject Russia's credentials and block Russian diplomats from participating in UN bodies.⁹⁶

It is much more than enough evidence that Russia is not a peace-loving State, it manifestly violates principles of the UN Charter and aims of the UN, it abuses its seat in the UN Security Council and has undermined its membership at least in the UN Security Council. However, balancing on the edge of the Third World War reminds us that the Soviet aggression against Finland in 1939 ended not only in the expulsion of the Soviet Union but was followed also by the Second World War. Thus, despite the existing scope of being creative in construing and applying the UN Charter, there is also another, political and security, side of the matter, and both need to be balanced.

But as ICJ former president Winiarski stated in his dissenting opinion to the ICJ advisory opinion on Certain Expenses of the United Nations, the intention of those who drafted the Charter was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which are clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is

⁹³ United Nations. "After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session," General Assembly press release, September 16, 2011.

⁹⁴ Nichols, M. (2022) Afghan Taliban administration, Myanmar junta not allowed into United Nations for now, December 15, 2022, accessed June 29, 2024, www.reuters.com/world/afghan-taliban-administration-myanmar-junta-not-allowed-into-united-nations-now-2022-12-15/.

⁹⁵ Preamble of the UN General Assembly resolution A/RES/ES-11/1 Aggression against Ukraine.

⁹⁶ *Supra note* 50, p. 243-244.

sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being.⁹⁷

Considering these inborn features of UN legal framework and judging from practice of the UN while ensuring Russia's state responsibility for act of aggression against Ukraine and ensuring justice for Ukraine, conclusion can be made that permanent members of the UN Security Council are exempted from the enforcement capability of the UN. And for today, discussion on suspension of Russia's membership rights or its expulsion under the rules of the UN Charter remains theoretical and academic discussion. No doubt that permanent members of the Security Council would never recommend expulsion or suspension of membership rights of another permanent member understanding that such a precedent might one day turn against themselves. Moreover, since article 5 of the UN Charter regulates possibility of suspension of a member "against which preventive or enforcement action has been taken," it seems logical to conclude that persistent violation of the principles of the Charter mentioned in Article 6 also relates to preventive or enforcement actions that already have been taken against such Member State and such actions gave no feasible results. Moreover, enforcement actions remain exclusive domain of the UN Security Council⁹⁸ and Security Council recommendation on suspension or expulsion of a Member State is subjected to veto procedure as certainly being a substantive issue. For these reasons, there are opinions in the doctrine that from the Cold War until the present day, the fact that the UN system has failed to live up to the lofty expectations of its framers can be attributed in significant part to the threat and exercise of the veto by individual permanent five members of the Security Council.⁹⁹

Conclusions

The principles *pacta sunt servanda*, *bona fide*, *jus cogens* and the rule of law support a general approach allowing to take measures related with treaty participation and organisation membership against a State manifestly violating international law. *Pacta sunt servanda* calls for full compliance of obligations under international law and *bona fide* demands that they are implemented in good faith. *Jus cogens* is related with *erga omnes* obligations, including the responsibility of the wrongdoer for all international community and all States' duty to take measures in order to stop the violations and restore the compliance with international law. The rule of law is closely related to the above principles and requires that the international legal order is respected. As a principle of governance being fundamental to the international peace and stability it calls for the accountability of all subjects, upholding of which is of a crucial

⁹⁷ Dissenting opinion of President Winiarski to the ICJ Advisory Opinion, *supra note* 49, p. 230.

⁹⁸ ICJ Advisory Opinion of July 20, 1962 on *Certain expenses of the United Nations*, I.C.J. Reports 1962, p. 151, p. 163-164.

⁹⁹ Carswell, A. J. (2013). "Unblocking the UN Security Council: The Uniting for Peace Resolution," *Journal of Conflict and Security Law*, Volume 18, Issue 3, p. 453.

importance in the world faced with an urgent necessity to stop the aggression and respond to new threats to contemporary international law.

For this reason, international law needs to develop as it always did reacting to new realities and adjusting to the needs of international community, guided by fundamental principles and values of international legal order. The principles and rules established also during times of crises that we now follow emerged then as timely and brave ideas of the call for a progressive development of international law.

Broad areas of discretion and lack of courage and political will have been main reasons of criticism towards international and regional organisations in cases of not making unprecedented decisions towards legal and political responsibility of the aggressor state Russia for aggression against Ukraine. However, the scale of atrocities and damage caused by Russia in and to Ukraine are immense and have already united many states to take unprecedented measures needed to respond to grave violations of international law and to seek for the aggressor state's accountability, such as using frozen Russia's assets for funding Ukraine's victory and reconstruction or establishment of Special Tribunal for the crime of aggression against Ukraine.

The war in Ukraine is a historical moment for the need of a principal approach to stick to the fundamental principles of international law and of a courage and political will of international community to invoke the above presented principles against Russia. Russia clearly and continuously violates its obligations at a huge scale, including *jus cogens* rules, distorts and abuses international law and acts against the rule of law. The principles contain countermeasures that are allowed and need to be invoked against an aggressor State limiting, restricting or suspending its participation in treaties and international organisations to the extent reasonable and legitimate taking into account the aims and types of a particular treaty or organisation and other circumstances.

Appropriate application and interpretation of international law, including the international (treaty) law principles presented, strengthened by systematic application of all international law principles, general principles of law and principles for treaty interpretation, even more supports the view that there is no wall that would preclude international community from taking action against an aggressor needed to restore and safeguard the international legal world order. The UN and the UN Charter is also not "immune" from the above presented approach: the UN (Charter) is based on the same above presented principles and grave violation of them allows to take certain measures in order to stop the aggressor's abuse of its status in the UN Security Council thus destroying the very foundations of the international world order and questioning the role of the UN.

Suspending or limiting the rights of membership of Russia as an aggressor State or its expulsion from the UN is reserved domain of the UN Security Council as only recommendation

of this UN institution could enable UN General Assembly to act. But UN practice in relation to Uniting for Peace resolution and procedures of credentials prove that in critical situations when unprecedented political decisions are needed it becomes more an issue of unity of member states committed to fundamental UN values and protection of *jus cogens* rules, their political will and strategic approach in complex international landscape than the procedures or legal uncertainties contained in the text of the UN Charter. Systematic application of the principle-based approach and the interpretation of the UN Charter and international law has always provided political and legal space for creative and legitimate decisions towards fulfilment of UN objectives.

As R. H. Jackson indicated, international law is more than immutable principles¹⁰⁰ and one of the key features of international law is that it is being created and developed by states. The way states managed to come together for support and justice for Ukraine after the full scale aggression against Ukraine is unprecedented and continuing brutal aggression against Ukraine continues to test our solidarity and unity while ensuring protection for the victim state Ukraine and enforcing responsibility of the aggressor state Russia. UN General Assembly through its own accreditation procedures, adoption of the Uniting for Peace resolution and its application in practice, including recent resolutions concerning aggression against Ukraine, proved possibility of progressive development and change towards fulfilling UN mandate under the Charter. History will witness if member states of the UN in the case of that blatant act of aggression by a permanent member of UN Security Council Russia against sovereign and independent neighboring country of Ukraine will make unprecedented political decisions leading to progressive development of international law, including UN legal framework, so that provisions on suspension of membership rights or expulsion of a member state which commits act of aggression and persistently violates UN Charter fundamental principles is based not on promises by the UN Charter drafters and potential behind them, but this time on the strong precedent against the aggressor state.

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¹⁰⁰ *Supra* note 8.

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ЗАСТОСУВАННЯ ПРИНЦИПІВ МІЖНАРОДНОГО (ДОГОВІРНОГО) ПРАВА ПРОТИ ДЕРЖАВИ-АГРЕСОРА: ПРИЗУПИНЕННЯ, ОБМЕЖЕННЯ ПРАВ ЧЛЕНСТВА, ВИКЛЮЧЕННЯ?

Анотація

*Метою дослідження є звернення до основних принципів міжнародного права та права міжнародних договорів, зокрема, *pacta sunt servanda*, *bona fide*, *jus cogens* та верховенства права, для обґрунтування права на призупинення, обмеження або припинення прав членства Росії в міжнародних договорах та міжнародних організаціях в контексті агресії проти України. Автори прагнуть продемонструвати, що принципи дозволяють вживати певних заходів проти держави, яка явно і грубо порушує міжнародне право, і представити цю аргументацію на основі принципів з посиланням на Організацію Об'єднаних Націй та Статут ООН. Розкрито зміст перелічених принципів, який демонструє, що вони містять конкретні контрзаходи щодо участі в договорах та членства в організаціях, які можуть бути застосовані проти держави-агресора. Автори підкреслюють, що міжнародне право завжди розвивалося навколо безпрецедентних подій відповідно до універсальних правових цінностей, а агресія проти України зобов'язує членів міжнародного співтовариства брати на себе відповідальність і використовувати міжнародно-правові рішення, включаючи застосування принципів міжнародного (договірного) права для того, щоб держава-агресор не отримувала вигоди від серйозних порушень міжнародного права і забезпечувався прогресивний розвиток міжнародного права.*

Ключові слова

Pacta sunt servanda, bona fide, jus cogens, верховенство права, ізоляція Росії, агресія проти України, ООН