EXPULSION FROM THE EUROPEAN UNION FROM THE CUSTOMARY INTERNATIONAL LAW POINT OF VIEW

Stjepan NOVAK

PhD, Ministry of the Internal Affairs, Republic of Croatia
E-mail: stjepannovak@hotmail.com

Abstract

The expulsion of a member state from the European Union is not envisaged in the EU treaties. However, this paper considers this possibility based on customary international law, as codified in the Vienna Convention on the Law of Treaties. Specifically, it considers whether expelling a member state may take place based on a material breach of the EU Treaties as per Article 60 of the Vienna Convention. In doing so, the paper considers what procedural requirements may need to be followed to make a termination effective and the role of the Court of Justice of the EU (CJEU) in that process.

Keywords: *expulsion from the EU, customary international law, Treaty on European Union, Treaty on the Functioning of the European Union, Vienna Convention on the Law of Treaties, termination of a treaty, material breach, ICJ, CJEU.*

1. Introduction

While the UN Charter and the Statute of the Council of Europe both provide for the possibility of expelling a member state, the EU's constitutive treaties (Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU)) do not envisage expulsion of a member state from the European Union but expect only suspension of certain rights due to the Article 7 of the TEU. Some authors view expulsion as incompatible with the nature of the EU and the integration process. In contrast, others advocate for more robust mechanisms aimed at protecting the EU's fundamental values and ensuring their proper protection in the EU legal order (Bugarič, 2014; Kochenov, 2017; Cotter, 2022).

It is undoubtful that the expulsion of a state from the EU, although in extreme situations appropriate and legitimate (Theuns, 2022 p. 694), would be

nonpragmatic (Fekete, 2017, p. 9), politically inconceivable, and highly complicated from the legal point of view (Athanassiou, 2009, p. 33)

While some have expressed doubts regarding the practicality and usefulness of expelling a member state as a tool for upholding EU fundamental values, this paper is not concerned with these questions, but rather focuses on whether there may exist a legal basis under international law for expelling a member state (Theuns, 2022; Fekete, 2017, p. 9; Athanassiou, 2009, p. 33).

While there is no basis in the treaties for expelling a member state, it is conceivable that expulsion may take place on the basis of customary international law, as codified in the Vienna Convention on the Law of Treaties (VCLT). This article will consider whether expulsion could be achieved under art. 60 VCLT, which provides for the suspension or termination of a treaty as a consequence of its breach. Section II will examine the applicability of customary international law and the VCLT in the EU legal order. Section III focuses on substantive requirements that would need to be satisfied to carry out termination pursuant to Article 60, while Section IV deals with matters of procedure, specifically whether expulsion would need to take place in accordance with VCLT or TFEU procedural rules. Concluding remarks are given in the final section of the paper.

2. Customary international law and VCLT in EU legal order

It is a fact that the EU legal order is a new legal order of international law, for the benefit of which the states have limited their sovereign right. (CJEU, Case C-26/62 van Gend & Loos ECLI:EU:C:1963:1). EU is a legal sytem separated from international law (Mohay, 2017., p. 151), charachterized by both monistic and dualistic approach towards international law. It uses monistic approach in order to establish the autonomy of the EU legal order, unifying the legal order of its Member States with the legal system of the EU (Kirchmair, 2012, p. 685).

On the other hand, in its notorious Kadi judgement CJEU took an extremely dualist approach, 'emphasizing repeatedly and in various ways the separateness and autonomy of the EC from other legal systems and from the international legal order more generally, and the priority to be given to the EC's own fundamental rules.' (De Burca, 2010, 27). Following this judgement the CJEU started to abandon the 'international law friendly" approach of its earlier judgments (Higgins, 2003., 1; Kassoti, 2017, p. 341, CJEU Case T-512/12, Front Polisario v. Council, CJEU Case C-104/16, Council v. Front Polisario) and has subordinate international law to EU primary law (CJEU Case C-415/05 P Kadi ECLI:EU:C:2008:461) or to put it otherwise, it has limited the influence of international law to protect the intergrity of EU legal order (Odermatt, 2014, p. 697).

Neverheless, this can not justify the exclusion or separation of international law from this legal order, notwithstanding the primacy status of the EU legal order (CJEU Case C-6/64 Costa v E.N.E.L. ECLI:EU:C:1964:66). The CJEU has emphasized the EU's obligation to respect international law in exercising its power (CJEU Case C-286/09 *Poulsen and Diva* ECLI:EU:C:1992:453, para 9¸ CJEU Case C-162/96 *Racke* ECLI:EU:C:1998:293, para 45; CJEU Case C-415/05 P *Kadi* ECLI:EU:C:2008:461, para 291).

It also stated that customary international law is binding on the Union. (CJEU Case T-115/94 *Opel Austria* ECLI:EU:T:1997:3, para 90; CJEU Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, para 47).Furthermore, for example, in its *Hungyry v Slovakia* case the CJEU has invoked customary international law, although it did not explained its status in EU legal order and its relationship with EU law (CJEU Case C-364/10 *Hungary v Slovakia* ECLI:EU:C:2012:630, para 46).

This binding effect also applies to VCLT as the majority of its provisions, reflect the rules of customary international law. Also, it is crucial to note that Article 5 of the VCLT states that the Convention applies to any treaty that is an international organization's constituent instrument. This includes the EU Treaties.

In *Brita* case, the CJEU held that, even though the VCLT does not bind either the Union or all its Member States, a series of provisions in that Convention reflect the rules of customary international law, which, as such, are binding upon the Union institutions and form part of the EU legal order. (CJEU Case C-386/08 *Firma Brita* ECLI:EU:C:2010:91 para 42. Contrary in Case T-27/03 *SP SpA* ECLI:EU:T:2007:317 para 58).

While elaborating the direct effect of the provisions of the World Trade Organization (WTO) Agreement, Advocate General Saggio explicitly referred to *inadimplenti non est adimplendum* as it is laid down in Article 60 of the VCLT. He concluded that the breach of a provision of an agreement by a third country, if it is a material breach, may justify the agreement being suspended or even extinguished, either for all contracting States or only for the State in breach. Furthermore, he stated that a breach of this kind could therefore justify a suspension of the WTO Agreement (Case C-6/64 *Costa v E.N.E.L*. ECLI:EU:C:1964:66).

In any case, the rules of customary international law, whether they are part of VCLT or not, are binding for the EU (Dammann, 2016, p. 718).

Considering its objective and subjective components (Andrassy, Bakotić, Seršić, Vukas, 2010, p. 17), one of those principles is the *inadimplenti non est adimplendum* principle. According to this principle, a party or the parties to a treaty may unanimously terminate or suspend the Treaty if the other party or

parties have breached their treaty obligations in a material way (Runjić, 2019, p. 592).

As one of the *pacta sunt servanda* principle's implications, this legal idea was recognized and accepted in international law and ICJ's practice (Crnić-Grotić, 2002, p. 262; Chatinakrob, 2018, p. 44) and considered by Judge Anzilotti as the principle 'so just, so equitable, so universally recognized, that it must be applied in international relations also' (ICJ *Diversion of Water from Meuse (Neth. v. Belg.)* (Merits) [28 June 1937] para 211).

In the Namibia case, the ICJ stated that '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' (ICJ *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [21 June 1971] para 94). The Court reached the same conclusion in the Gabčíkovo-Nagymaros Project case, referring explicitly to 'the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62." Further, it should be mentioned that Article 5 of the VCLT provides that the VCLT applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization. This is in line with ICJ's conclusion in the Gabčíkovo-Nagymaros Project case, where this Court stated that the parties not having agreed otherwise, the treaty could be terminated only on the limited grounds enumerated in the Vienna Convention (ICJ *Gabčíkovo-Nagymaros Project* (Merits) [25 September 1997] para 100.).

From the above, the conclusion can be drawn that Article 60 of the VCLT, inasmuch as it reflects a principle of customary international law (Giegerich, 2018, p. 1123), is binding in the EU legal order. Since the TEU and the TFEU do not contain provisions contrary to Article 60 of the VCLT, nor do they consider their termination between member states in any way, there is no reason for Article 60 of the VCLT not to be applicable in case of a material breach of the TEU and the TFEU by a member state. This conclusion could be supported by the 2006 Report of the Study Group of the International Law Commission according to which the 'failure of a self-contained regime' results in the fall-back onto *lex generalis* (Koskenniemi, 2006).

This means that a material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to terminate it in the relations between themselves and the defaulting State. According to the Article 60 paragraph 3, a material breach of a treaty consists in a repudiation of the

Treaty or the violation of a provision essential to the accomplishment of the object or purpose of the Treaty.

Consequently, in the case of a material breach of the TEU or TFEU by a member state of the Union, according to Article 60 paragraph 2(a)(i) of the VCLT the other member states may in principle terminate those Treaties as between themselves and the defaulting State by unanimous agreement. The conditio sine qua non for this termination is a qualified material breach which represents a repudiation of TEU and TFEU or the violation of a provision essential for the purpose of those Treaties.

The following has thus far been established:

- the EU as well as its member states are bound by customary international law;
- this includes the *inadimplenti non est adimplendum* principle, as restated in Article 60 of the VCLT;
- consequently, member states may in principle suspend or terminate the EU treaties in relation to a defaulting member if that member can be shown to have committed a material breach of the treaties.

EU member states can apply Article 60 without infringing EU law. For this purpose, the relevant CJEU and ICJ decisions will be presented.

Having established the basic position under customary international law, the following sections consider the substantive and procedural requirements that would need to be satisfied for the procedure to be undertaken.

3. A material breach of the treaties

According to Article 60 of the VCLT, there are two types of material breach that can lead to a treaty termination: repudiation of the Treaty or the violation of a provision essential to the accomplishment of its object or purpose. The article does not provide definitions of these two categories. While the concept of repudiation, identified as a material rather than formal act covering, 'all the means available to a State attempting to free itself of obligations under a treaty' (*United Nations Conference on the Law of Treaties, Second session, 9 April – 22 May 1969, Twenty-first plenary meeting* https://legal.un.org/diplomaticconferences/1968_lot/docs/english/sess_2.pdf (6 April 2023) p. 115.) was broadly accepted, the concept of the violation of a provision essential to the accomplishment of the object or purpose of the treaty, is much more in dispute (Runjić, 2019, p. 597; Simma, Tams, 2020). The provision could be understood as allowing 'termination or suspension of a treaty already in the event of what amounts to no more than a minor or trivial violation of an essential provision." (Giegerich, 2018, p. 1106). Nevertheless,

predominant doctrinal opinion is that 'only cases in which the violation seriously jeopardizes the accomplishment of the treaty's object or purpose'(*United Nations Conference on the Law of Treaties, Second session, 9 April – 22 May 1969, Twenty-first plenary meeting* https://legal.un.org/diplomaticconferences/1968_lot/docs/english/sess_2.pdf (6 April 2023) p. 115.) would be sufficient to trigger expulsion from the treaty. Not only is this suggested by common sense but this was also the opinion of the International Law Commission. The Commission stipulated that it 'was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character' (*United Nation Yearbook of the International Law Commission, vol. II, 1966* https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (6 April 2023), p. 255). Also, it emphasized that it preferred the term 'material' to 'fundamental' since the word 'fundamental' might be understood 'as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty' (*United Nation Yearbook of the International Law Commission, vol. II, 1966* https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (6 April 2023), p. 255). On the contrary, there are other provisions, even of ancillary character, that are considered by a party to be essential to the effective execution of the treaty (*United Nation Yearbook of the International Law Commission, vol. II, 1966* https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (6 April 2023), p. 255).

In the Namibia case, the ICJ noted that General Assembly Resolution 2145 (XXI) determined that the administration of the Mandated Territory by South Africa had been conducted in a manner contrary to the Mandate, the UN Charter, and the Universal Declaration of Human Rights and that South Africa had in fact disavowed the Mandate. The Mandate was, in fact and in law, an international agreement with the character of a treaty or convention as per the ICJ's established practice. In accordance with Article 60 VCLT, the ICJ concluded that General Assembly resolution 2145 (XXI) determined that both forms of the material breach had occurred in this case and that by disavowing the Mandate, South Africa had actually repudiated it. As ICJ has emphasized, the right to terminate a treaty exists in case of a deliberate and persistent violation of obligations that destroys the treaty's very object and purpose (ICJ *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [21 June 1971] paras 92–95).

In the Gabčíkovo-Nagymaros Project case the ICJ emphasized that it is only a material breach of the treaty itself, by a state party to that treaty, which

entitles the other party to rely on it as grounds for terminating the treaty (Novak, 2023, 227; ICJ *Gabčíkovo-Nagymaros Project* (Merits) [25 September 1997] para 106).

The VCLT does not give precise instructions as to what kind of breach would qualify as serious enough to give rise to expulsion from the EU. Although strict interpretation of Article 60 of the VCLT would allow for every breach to induce termination of the Treaties, it is clear that the minor breach of a treaty would hardly suffice. After all this would be opposite to the *pacta sunt servnda* principle but also it is highly unlikely that the consensus between member states to trigger this procedure could be achieved in the case of a minor or even only relatively significant breach.

It is much more plausible that only the most severe or extreme breaches of the Treaties would lead to the most severe consequence provided by the law of treaties – its termination and expulsion from the EU by the offending State. According to this author's opinion, these should be member states' acts that would represent blatant breaches of the EU's fundamental values, Charter of Fundamental Rights of the European Union rules necessary for the functioning of the internal market or principle of sincere cooperation that would be so obvious, serious and/or persistent that would undoubtedly disqualify that state from EU membership. Examples might include armed attack against another member state, introducing a death penalty into the legal system or a group discrimination of the citizens of another member state.

The next step would be an agreement concluded by all EU member states except the defaulting one that, according to the mentioned European Council determination, the member state in question has made a material breach resulting in other member states exercising their right to terminate Treaties between themselves and the defaulting State.

4. Procedural questions

There are three types of procedural questions in this context: the question of procedure for determining a material breach, the question of the procedure for carrying out the termination and the procedure for challenging it.

4.1. Procedure for determining a material breach

As Judge de Castro asserted in a separate opinion in the *ICAO* case, the breach of a treaty does not by itself result in the termination of that treaty. It only gives the other parties the right to invoke the breach as grounds for termination (Crawford, Olleson, 2000; ICJ *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* (Merits) [18 August 1972], dissenting opinion of Judge De Castro para. 86; ICJ Appeal Relating to the Jurisdiction of

the ICAO Council (India v. Pakistan) (Merits,) [18 August 1972] para. 38). EU law does not provide for the option of expulsion at all and the VCLT does not require a special procedure for determining a material breach. Nevertheless, the adequate procedure for determining a material breach would be a relevant and useful part of the whole procedure.

There are two types of procedures like that in Treaties: special procedure provided in Article 7 of the TEU that is triggered in a case of a severe and persistent breach by a Member State of the EU's fundamental values and standard infringement procedures provided in Articles 258, 259 and 260 of the TFEU (Hillion, 2019, p. 4). Article 7 in its second paragraph, authorizes the European Council to, 'acting by unanimity on a proposal by one-third of the Member States or by the Commission and, after obtaining the consent of the European Parliament, determine the existence of a severe and persistent breach by a Member State of the Union's fundamental values, after inviting the Member State in question to submit its observations.' Consequences of such determination are provided in the following paragraph, which states that 'the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall consider the possible consequences of such a suspension on the rights and obligations of natural and legal persons.'

Infringement procedures are provided for 'more limited and circumstantial' (Hillion, 2019, p. 9) breaches, while Article 7 of the TEU deals with systematic and persistent breaches. This applies irrespective of the legal basis on which the proceeding is conducted, was it initiated by the Commission, by a member state, or by a CJEU itself. A decision by the CJEU is worthy of consideration in a proceeding activated under conditions from TFEU's Articles, a sufficient ground for determining that a concerned member state has made a material breach.

Article 60 of the VCLT does not insist the breach to be more serious to lead to termination rather than suspension of the treaty (Simma, Tams, 2020, p. 576, 586). Nevertheless, considering the seriousness of the goal to which Article 60 of the VCLT aims, the combination of both procedures would be the wise solution. The particular procedure from the TEU does not exclude standard infringement procedures provided by the TFEU (Kochenov, 2019, p. 178; eg CJEU Case C-619/18 *European Commission v Republic of Poland*, ECLI:EU:C:2019:325, opinion of AG Tanchev para. 51, Opinion of the Legal Service, http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/hr/pdf (6 April 2023). When acting under Article 7 of the TEU, member

states could use one or more CJEU decisions against defaulting states as proof of a severe and persistent breach of the Union's fundamental values.

4.2. Termination procedure

The grounds for terminating treaties listed in Part V of the VCLT do not operate automatically. They must be invoked in accordance with specific procedures (Giegerich, 2018). When a treaty is silent on the matter of its termination, as TEU and TFEU are, the default procedure is that which is stated in Article 65 of the VCLT even when EU law is in question. This conclusion is based on two premises.

First, as the ICJ itself has confirmed in the Gabčíkovo-Nagymaros project case, Article 65 of the VCLT, whilst not strictly speaking codifying customary international law, is broadly reflective of customary law and a direct implication of *pacta sunt servanta (*ICJ *Gabčíkovo-Nagymaros Project* (Merits) [25 September 1997] para. 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' ((ICJ *Gabčíkovo-Nagymaros Project* (Merits) [25 September 1997] para. 109).

Second, although the CJEU has noted that the specific procedural requirements laid down in Article 65. of the VCLT do not form part of customary international law (Case C-162/96 *Racke* ECLI:EU:C:1998:293 para. 59), there is no reason for 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, as Advocate general Campos Sánchez-Bordona has concluded (Case C-621/18 *Wightman* ECLI:EU:C:2018:978, opinion of Advocate General Campos Sánchez-Bordona, para. 82.).

According to the Article 65 of the VCLT, if all member states want to terminate the treaty between themselves and the defaulting State based on Article 60 of the VCLT, they must notify that state of their intention. If, after a period which, except in cases of particular urgency, shall not be less than three months after the receipt of the notification, the defaulting State does not raise any objection, the party making the notification may carry out in the manner provided in Article 67 of the VCLT, the measure which it has proposed. If the defaulting State objects to termination, a solution must be sought through the means indicated at Article 33 of the UN Charter. This means 'by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

Through the processs of implementing Article 344 of the TFEU, the 'key provision of the whole EU constitutional order" (Szpunar, 2017, p. 129), the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any settlement method other than those provided. In the Mox plant case, the CJEU has decided that 'by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the Mox plant located at Sellafield (United Kingdom), Ireland has failed to fulfil its obligations' (Case C-459/03 *Mox plant* ECLI:EU:C:2006:345.).under today's Article 344 of the TFEU. In its Opinion 1/91, CJEU emphasized that an international agreement 'provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that Court will be binding on the Community institutions, including the Court of Justice … is in principle compatible with Community law' (CJEU Opinion 1/91 ECLI:EU:C:1991:490). However, that agreement must not influence the fundamental provisions of the Community legal order (Szpunar, 2017, p. 131; Lock, 2011, p. 1029; CJEU Opinion 1/91 ECLI:EU:C:1991:490; cjeu Opinion 1/09 ECLI:EU:C:2011:123 para. 89). In its Opinion 2/13, CJEU has asserted that it has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. For that reason, it did not hold the accession of the EU agreement to the Convention for the Protection of Human Rights and Fundamental Freedoms in accordance with EU law (Opinion 2/13 ECLI:EU:C:2014:2454 paras 201–214). The CJEU's stance on the question is thus clear and solutions through the means indicated in Article 33 of the Charter must not exclude the CJEU's jurisdiction, under Article 344 of the TFEU. This means that member states are free to seek a solution through negotiations, inquiries, mediations, conciliations or even through the resorts to regional agencies or arrangements. On the other hand, judicial settlements or any kind of references to judicial bodies other than CJEU would represent a breach of the TFEU.

4.3. Procedure for challenging the termination agreement

According to Article 66 of the VCLT, if no solution has been reached within twelve months following the date on which the objection was raised, any parties can set in motion the procedure specified in the Annex to the VCLT concerning the application or the interpretation of relevant VCLT provisions regarding termination of treaties. The Annex envisages a constitution of a special conciliation commission and corresponding procedure before that

commission. This solution would not be possible in light of the EU law due to the Article 344. of the TFEU. Indeed, in its Armed activities on the territory of the Congo case, ICJ has held the rules contained in Article 66 of the VCLT do not represent customary international law (Simma, Tams, 2020, 592; ICJ *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Merits) [3 February 2006] para. 125). This means that the termination procedure would end in the phase regulated by the Article 65 of the VCLT, since no other judicial body except CJEU is allowed to conduct any procedure considering EU law.

As far as the procedure of challenging the termination is concerned, the defaulting state can, anytime during the termination procedure, seek protection of its rights before the CJEU as an EU state. For example, the question of the principle of sincere cooperation could be raised by defaulted state. The whole procedure conducted by member states could be considered opposite to the member states' obligation provided in Article 4 paragraph 3 of the TEU to 'refrain from any measure which could jeopardize the attainment of the Union's objectives'. CJEU has, in its early case law, explained that this principle 'lays down a general duty for the member states, the actual tenor of which depends in each individual case on the provisions of the Treaty, or the rules derived from its general scheme' (CJEU Case C-78/70 *Deutsche Grammophon* ECLI:EU:C:1971:59 para. 5). In any case, this question could be solved by CJEU. The principle was, after all, already dealt with by CJEU in its case law in various situations (Case C-355/04 P *Segi* ECLI:EU:C:2007:116 para. 52; Case C-105/13 *Pupino* ECLI:EU:C:2005:386 para. 42). In fact, if the defaulting member state feels that any of her rights were violated by other member states, including that the breach of the principle mentioned above has occurred, remedies from TFEU are at its disposal.

The CJEU's conclusion from the order in the *Bertelli Gálvez* case that the EU Treaty gives no jurisdiction to the Community judicature to adjudicate on the lawfulness of acts adopted based on Article 7 of the TEU cjeu (Case T-337/03 *Bertelli Gálvez* ECLI:EU:T:2004:106 para. 15) does not alter this conclusion. In this case, CJEU would not necessarily adjudicate on the lawfulness of acts adopted based on Article 7 of the TEU but on the application of the customary international law on behalf of the member states in the light of the principle of sincere cooperation.

Of course, this could only be possible before the agreement concluded by all EU member states takes effect. Naturally, after the state has been expelled, if the termination has been lawfully conducted, it would no longer be bound by the Treaties. So, the ICJ, in a procedure initiated by an expelled state against other member states, following the conditions laid down by the Statue of the ICJ, could answer the question of whether the expulsion of a state indeed represented a violation of its rights from the point of view of international law.

Unlike paragraph 2(a), paragraphs 2(b) and 2(c) of Article 60 of the VCLT provisions do not envisage termination of a treaty but only suspension of the Treaty with limited effect. Since cited provisions envisage only suspension and not the termination of treaties (Giegerich, 2018, p. 1115), they are not the focus of this research.

Finally, one more procedural solution should be pointed out. It is not impossible that after member states have reached an unanimous agreement to terminate the relations between themselves and the defaulting State and after eventual CJEU's decision that the defaulting State's rights have not been breached, the defaulting State decides to leave the Union by itself or at least engage in some kind of negotiations with member states which would be similar to the procedure provided by Article 50 of the TEU (Fekete, 2017, p. 14).

4.4. Practical examples

In the present politican environment of the EU, Poland and Hungary have been labelled as the most rogue EU member states and the most obvious violators of the EU law. The proof of this are various infringement procedures against both countries as well as the fact that Commission and Parliament have launched procedures provided in Article 7 of the TEU against Poland and Hungary respectively in December of 2017 and September of 2018 (Kochenov, Bard, 2019).

Regardless of the fact that these special procedures have not resulted in any concrete and final decision (Kochenov, Bard, 2019; Pech, Jaraczewski, 2023), the material conditions for activation of Article 60 of the VCLT have been met.

Nevertheless, as it has been emphasized earlier in this paper, the use of customary international law and expulsion of a member state would hardly be adequate in cases of minor or even only relatively significant breaches of EU law that could be determined in a 'plain' infringement procedure.

The material breaches that would lead to the described procedure should be much more extreme examples of violation of EU or even international law, like armed attack against another member state, introducing a death penalty into the legal system or a blatant group discrimination of the citizens of another member state.

Consequently, the expulsion of any of the two would still not be plausible not only from the political point of view which renders the unanimous agreement practically impossible, but also from a teleological point of view. The material breaches in question are still not as serious to result in expulsion from the EU.

5. Conclusion

The expulsion of a member state from the EU is not envisaged by Treaties. However, this paper considers the possibility of expelling a member state from the EU on the basis of customary international law codified in the VCLT, specifically its Article 60.

Of course it is hardly imaginable that the CJEU as well as Commission would accept such a strong influence of international law, even in a case of customary international law. The CJEU case law sought to eliminate such an influence of international law and any possibility that international law would impose on the Union what it did not considered its goal. Finally, the CJEU has retained the competence to decide about level of international law's influence in the EU legal order (Odermatt, 2014, p. 697.Kassoti, 2017, p. 340).

The CJEU's stance regarding international law aside, it is the true that relationships between international law, EU law and even national laws of members states can hardly be observed as hierarchical scale of completely separated entities. 'Just as a web, or net, is made up of numerous strands criss-crossing at various points while, at the same time, going in different directions.' (Betlehem, 1998, p. 195). CJEU could and probably would considered that the particular procedure provided in Article 7 of the TEU and standard infringement procedures provided in Articles 258, 259 and 260 of the TFEU eliminate the very need for expulsion and application of customary international law., as well as budgetary conditionality for breaches of the rule of law (Maurice, 2023; Goldner Lang, 2019, p.2).

But the purpose of this paper was not to explore the CJEU's case law regarding this specific issue nor the probability of its decision. This paper aimed at exploring at the legal possibilities available to member states in a case when they want to achieve a goal not provided in the Treaties. The influence of international law in EU law, especially of a customary international law, is impossible to exclude, and this paper tackled the possible use of customary international law for the purpose of expulsion of a member state from the EU as a common goal of other member states. As it has been explained in introductional part, this paper focuses on whether there may exist a legal basis under international law for expelling a member state. Precisely this endeavor of EU member states should be the crucial factor when deciding how much international law EU legal system could accept.

Consequently, according to the ICJ's well-established practice (ICJ *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [21 June 1971] paras. 94; ICJ *Gabčíkovo-Nagymaros Project* (Merits) [25 September 1997] para. 46; ICJ *Nuclear Tests (Australia v. France*)(Merits) [20 December 1974], dissenting opinion of Judge Barwick, 404), the VCLT and its Article 60 form customary international law. This was also reiterated by the CJEU (*Opel Austria* cit para. 90; *Western Sahara*

Campaign UK, para. 47). The CJEU has also stated in various decisions that the EU is bound by customary international law and the VCLT, to the extent that it encompasses customary international law (Case C-286/09 *Poulsen and Diva* ECLI:EU:C:1992:453, para. 9; Case C-162/96 *Racke* ECLI:EU:C:1998:293, para 45; Case C-415/05 P *Kadi* ECLI:EU:C:2008:461. para. 291; Case T-115/94 *Opel Austria* ECLI:EU:T:1997:3 para 90, Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, para 47; Case C-386/08 *Firma Brita* ECLI:EU:C:2010:91, para. 42).

According to Article 60 of the VCLT, a material breach of a multilateral treaty by one of the parties entitles the other parties to terminate that treaty by unanimous agreement. A material breach of a treaty, for the purposes of that Article, consists in the repudiation of the Treaty or in the violation of a provision essential to the accomplishment of the object or purpose of the Treaty. The breach of a treaty does not by itself result in termination of that treaty but only gives the other parties the right to invoke the breach as a ground for termination (Crawford, Olleson, 2000; ICJ *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* (Merits) [18 August 1972], dissenting opinion of Judge De Castro, para. 86. See also *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, para. 38).

This means an adequate procedure for determining material breach would be of great relevance, especially considering the seriousness of the situation and the consequences arising from the expulsion. According to the Treaties, there are two avenues for determining the material breach of Treaties: the particular procedure provided in Article 7 of the TEU and standard infringement procedures provided in Articles 258, 259 and 260 of the TFEU (Hillion, 2019, p. 4). In any case, a material breach in question could hardly be recognized as a repudiation of the Treaty but more likely as a violation of a provision essential to the accomplishment of the object or purpose of the Treaty (ICJ *Legal Consequences for States of the Contitiued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [21 June 1971], paras 92–95.).

While conducting the procedure under Article 60 of the VCLT, member states would be allowed to apply Article 65 as long as Article 344 of the TFEU is respected but would not be allowed to use Article 66 of the VCLT. While all considered states are still EU members, they must respect Article 344 of the TFEU, which imposes an obligation not to submit a dispute concerning the interpretation or application of the Treaties to any settlement method other than those provided for therein (Szpunar, 2017; Case C-459/03 *Mox plant* ECLI:EU:C:2006:345; Opinion 1/91 ECLI:EU:C:1991:490.; Opinion 1/09 ECLI:EU:C:2011:123 para. 89; Opinion 2/13 ECLI:EU:C:2014:2454, paras 201–214). This obligation must prevail not only on the basis of the *lex specialis derogate legi generali* principle, but also due to the fact that, as ICJ and CJEU

established through their practices, Article 65 is not, strictly speaking, codifying customary international law (ICJ *Gabčíkovo-Nagymaros Project* (Merits) [25 September 1997] para 109; Case C-162/96 *Racke* ECLI:EU:C:1998:293 para. 59) and rules contained in Article 66 of the VCLT do not represent customary international law (Simma, Tams, 2020, 592; ICJ *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Merits) [3 February 2006], para. 125).

Or to put it otherwise, it can be argued that in a relation between Article 60 of the VCLT and Article 344 of the TFEU the conflict does not exist because these two provisions regulate different subjects, former regulating the termination of treaties and latter exclusive CJEU's jurisdiction. On the other hand, when exploring Article 344 of TFEU and Articles 65 and 66 of the VCLT, the TFEU's Article prevails. These Articles do arrange the same matter and according to both customary international law and EU law, CJEU's jurisdiction cannot be disturbed.

As far as the remedies that defaulting state could use during the procedure conducted by member states, it should be noted that this state can submit its case to the CJEU at any time before its expulsion based on Article 259 of the TFEU. The violated right would most likely be the right to expect all member states to respect the principle of loyal cooperation. This is why it is of extreme important, although not obligatory, that adequate procedure for determining the existence of a material breach proscribed by the EU law is conducted. After the expulsion, the defaulting state can search the protection in ICJ jurisdiction.

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