1.02 Pregledni znanstveni članek

Neposredna uporaba splošno veljavnih načel mednarodnega prava v pravnem redu Republike Slovenije

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IZVLEČEK

Inkorporirana neposredno izvršljiva splošno veljavna načela mednarodnega prava se v pravnem redu Republike Slovenije uporabljajo neposredno. Obstaja problem odsotnosti sistemske ureditve evidence uveljavljenih tovrstnih pravnih norm in zato težavnost njihovega prepoznavanja. Zadrega je večja, ker tudi ni na voljo relevantne strokovno prevedene judikature mednarodenih tribunalov, z izjemo sodb Sodišča Evropske unije. Čeprav splošno veljavna načela mednarodnega prava veljajo v slovenskem pravnem redu *per se*, ni popolnoma jasno, kako naj se odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljenim običajnim mednarodnim pravom, vendar so nasprotujoče.

Ključne besede: splošno veljavna načela mednarodnega prava, običajna pravila občega mednarodnega prava, Ustava RS

JEL: K33

1 Uvod

Ustavna ureditev Republike Slovenije (v nadaljevanju RS) opredeljuje razmerje med mednarodnim pravom in notranjim pravom v 8. členu Ustave RS (v nadaljevanju Ustave), ki določa: »Zakoni in drugi predpisi morajo biti v skladu s splošno veljavnimi načeli mednarodnega prava in z mednarodnimi pogodbami, ki obvezujejo Slovenijo. Ratificirane in objavljene mednarodne pogodbe se uporabljajo neposredno.« Mednarodno pravo torej vstopa v slovenski pravni red v obliki mednarodnih pogodb ter v obliki splošno veljavnih načel mednarodnega prava. Omeniti velja, da v notranji pravni red Slovenije vstopa kot tuje pravo sui generis tudi evropsko pravo, vendar ne v okviru 8. člena Ustave, ampak po določbi tretjega odstavka 3/a. člena Ustave, česar pa v pričujočem prispevku ne bomo raziskovali.

Obstajajo različna mnenja pravnih strokovnjakov, kaj bi morali razumeti pod besedno zvezo »splošna veljavna načela mednarodnega prava«, katero

v strokovni literaturi zasledimo tudi kot izraz »običajna pravila občega mednarodnega prava« (angl. *customary rules of general international law*).[1] Ker ni cilj pričujočega prispevka poglobljena obravnava tega vprašanja, služi kot pravni okvir vsebinskega razumevanja tega termina odločba Ustavnega sodišča (v nadaljevanju US) RS, ki se je opredelilo do tega vprašanja in zapisalo, da ta pojem zajema predvsem mednarodne običaje kot dokaz obče prakse, sprejete kot pravo in splošna pravna načela, ki jih priznavajo civilizirani narodi in sta kot vira mednarodnega prava našteta v Statutu Meddržavnega sodišča v točkah b) in c) prvega odstavka 38. člena (US, U-I-266/04-105). Običajno pravo tvori pomemben del mednarodnega prava, vendar zaradi svoje nezapisane oblike zahteva dokazovanje narave in motivov dejanja (Zemanek & Hartley, 1998, str. 149). Fitzmaurice navaja, da lahko sicer pride tudi do njihove kodifikacije v mednarodnih pogodbah oz. zapisov v različnih mednarodnopravnih dokumentih (Sancin, 2009, str. 51). Sestoji se iz objektivnega in subjektivnega elementa. Dokaz obče prakse je objektivni element, subjektivni pa *opinio juris sive necessitati*, tj. pravna zavest, ki pomeni, da države ravnajo na določeni način zato, ker se zavedajo, da je tako ravnanje za njih obvezno po pravilih mednarodnega prava. Oba pogoja morata biti izpolnjena kumulativno, navaja Schwarzenberger (Thirlway, 1972, str. 46). Splošna pravna načela, ki jih priznavajo civilizirani narodi, pa se lahko razumejo kot največji skupni imenovalec temeljnih načel, zgodovinsko izoblikovanih v okviru notranjih pravnih ureditev (Pogačnik, 1999b, str. 470), npr. načelo zakonitosti, načelo prepovedi retroaktivnosti, načelo *res iudicata*, litispendenca, načelo nedopustnosti neupravičene obogatitve, načelo *lex specialis derogat legi generalis* (Škrk, 2007, str. 282-283), načelo *actor sequitur forum rei* (US U-I-245/00). Türk temu dodaja še načeli, da nihče ne more prenesti na drugega več pravic, kot jih ima sam, in načelo *bona fides* (2007, str. 59). V delih teoretikov Bartoša, Guggenheima, Andrassya, Shawa in Pelleta pa se najdejo še naslednja: načelo prepovedi zlorabe prava; načelo prepovedi neupravičenega obogatenja; načelo prepovedi okoriščenja iz lastne napake; načelo zastaranja; načelo obveznosti povrnitve škode, tako neposredne kot tudi posredne; načelo *nemo plus iuris ad alium transfere potest quam ipse habet*; načelo *estoppel*; načelo pravice do izločitve sodnika, načelo enakosti strank, pravila o dokazih, načelo *audiatur et altera pars*, načelo *res iudicata*, načelo *nemo iudex in sua causa* (Vukas, 1992, str. 259).

V besedilu članka se večkrat navajata izraza »mednarodno običajno pravo« ali »običajna pravila občega mednarodnega prava«. V bistvu gre le za skrajšani zapis besedne zveze »mednarodni običaji kot dokaz obče prakse sprejete kot pravo« iz 38. člena Statuta Meddržavnega sodišča. Pri tem je v tem članku to besedno zvezo razumeti v kontekstu izraza »splošno veljavna načela mednarodnega prava« iz 8. člena Ustave, katere sestavni del je tudi običajno mednarodno pravo . In obratno. Ko se v članku navaja izraz splošna veljavna načela mednarodnega prava iz 8. člena Ustave, se s tem misli tako na mednarodno običajno pravo, kakor tudi na splošna pravna načela, ki jih

1 Več o tem Škrk, 2012, str. 1104–1106.

priznavajo civilizirani narodi, določeni v alineji b) in c) prvega odstavka 38. člena Statuta Meddržavnega sodišča.

Inkorporirano mednarodno pravo se uporablja v slovenskem notranjem pravu neposredno ali pa posredno s predhodno transformacijo ali inkorporacijo v nacionalno zakonodajo. Neposredna uporabnost (angl. *direct applicabillity*) splošno veljavnih načel mednarodnega prava bo v nadaljevanju članka predmet proučevanja, zato se do posredne uporabe mednarodnih norm ne bomo podrobneje opredeljevali.

Bralca naj ne zavede, da v prispevku večkrat predstavljamo konkretne navedbe, ki zadevajo mednarodne pogodbe (angl. *treaty*) in bi zato mogoče naslov tega članka ali posameznih poglavij bil neustrezen. Razlog temu je, da je doktrina bogatejša pri proučevanju problematike neposredne uporabnosti in neposredne izvršljivosti (angl. *self-executing*) norm mednarodnega prava na področju mednarodnih pogodb. Ker v mednarodnem pravu ni hierarhije mednarodnih pravnih virov[2] in imajo mednarodne pogodbe kot vir mednarodnega prava teoretično enako pomembnost kot običajna pravila občega mednarodnega prava in obča pravna načela, bi lahko sklepali, da določene ugotovitve na področju mednarodnih pogodb *mutatis mutandis* lahko veljajo *idem quod* tudi za splošno veljavna načela mednarodnega prava.

2 Opredelitev problema

Norme mednarodnega prava učinkujejo v notranjem pravu samo, kadar je država to določila (Türk, 2007, str. 71). Obstajajo sicer izjeme, imenovane *ius cogens*. Pri tovrstnih imperativnih mednarodnih pravilih ni treba, da bi država sploh sodelovala pri njihovem nastajanju, ampak postane zavezan subjekt tem normam mednarodniega prava v trenutku, ko postane mednarodnopravni subjekt (Platiše, 2005, str. 185). Države se sicer precej razlikujejo glede na postopke, po katerih na svojem ozemlju dajejo veljavo mednarodnem pravu. Večina med njimi sprejema doktrino, da je mednarodno pravo del notranjega pravnega reda. Kljub različnim postopkom v notranjih pravnih redih držav, mednarodno pravo s svojimi zahtevami vendarle učinkuje na njihovem območju (Jennings & Watts, 1997, str. 53).

Glede učinkovanja mednarodnega prava v pravnem redu RS v segmentu splošno veljavnih načel mednarodnega prava, jim slovenska Ustava ne določa izrecno neposredne uporabnosti, medtem ko to naredi v primeru ratificiranih in objavljenih mednarodnih pogodb (Pogačnik, 1999b, str. 472). Ob gramatikalnem razumevanju 8. člena Ustave se zato neukemu bralcu nakazuje dvom, ali se splošno veljavna načela mednarodnega prava sploh smejo uporabljati neposredno v pravnem redu RS. Glede tega vprašanja že obstaja judikatura, ki utemeljuje njihovo neposredno uporabnost. Obstajajo pa še odprta vprašanja predvsem glede prepoznave oz. ugotovitve obstoja tovrstnih norm in njih neposredne uporabe v odločbah upravnih organov.

2 Več o tem Škrk, 1985, str. 149–150, in Villinger, 1997, str. 58.

3 Pravna akulturacija mednarodnega prava v pravnem redu Republike Slovenije

Prevzemanje mednarodnega prava v slovenski pravni red poteka na tri načine. Prvi način je zakonska *ad hoc* inkorporacija (angl. *statutory ad hoc incorporation*). Gre v bistvu za transformacijo mednarodnega prava z aktom zakonodajalca in s tem za posredno uporabo mednarodnega prava, pri tem pa norma mednarodnega prava tudi izgubi naravo mednarodne norme in postane notranjepravna norma. Transformacija mednarodnopravnih norm je npr. značilna za pravna pravila iz področja kazenskega prava zaradi kazenskopravnega načela *nullum crimen nulla poena sine lege praevia*.

Drugi način prevzemanja mednarodnega prava je avtomatična *ad hoc* inkorporacija (angl. *automatic ad hoc incorporation*). Po tem pristopu se mednarodna pravila začnejo uporabljati v notranjem pravnem sistemu samo, če zakonodajni organ sprejme poseben izvedbeni zakon, in sicer brez reformulacije teh pravil (Hofmann, 2008, str. 93). V slovenski pravni ureditvi to konkretno pomeni prevzem mednarodnih pogodb z zakonom o ratifikaciji ali uredbo vlade o ratifikaciji mednarodne pogodbe. S tem aktom mednarodna norma ne izgubi svoje pravne narave in ostane norma mednarodnega prava, saj se ne posega v njeno vsebino.

Tretji način pravne akulturacije mednarodnega prava, ki je relevanten za potrebe pričujočega prispevka, je avtomatska adopcija (angl. *automatic standing incorporation*), kar velja za vstop splošno veljavnih načel mednarodnega prava v pravni red RS, ki so kot takšna sama po sebi, *per se*, vir notranjega prava. Ustava v 8. členu določa, da morajo biti zakoni in drugi predpisi v slovenskem pravnem redu v skladu splošno veljavnimi načeli mednarodnega prava. S tem se deklarira presumpcija njihove inkorporiranosti v slovenski pravni red brez notranje pravnega ratifikacijskega akta, kot to velja za mednarodne pogodbe (Weingerl, 2002, str. 355). To pomeni, da morajo državni organi in posamezniki *ipso facto* in brez kakršnega koli ravnanja spoštovati v mednarodni skupnosti uveljavljena pravila mednarodnega običajnega prava, navaja Cassese (Škrk, 2007, str. 279). Tovrstna mednarodna norma ne izgubi svoje pravne narave in ostane norma mednarodnega prava, saj se ne posega v njeno vsebino.

4 Prepoznavanje vsebine splošno veljavnih načel mednarodnega prava

Pred uporabo uveljavljenih pravil mednarodnega običajnega prava jih je treba prej prepoznati. Edini preverljivi način meritorno ugotovljenega obstoja in vsebine običajnopravnega pravila pred uporabo, navaja Kreća, je primerna razsodba mednarodnega sodišča. Teoretično v takem primeru ne bi šlo za transformacijo običajnopravnega pravila, ampak le za ugotovitev sodišča o obstoju običajnega pravila (Kreća, 2006, str. 23). Graselli navaja, da poleg sodišč tudi upravni organi v Sloveniji sami ugotavljajo vsebino mednarodnega

prava, ki ga neposredno uporabljajo. Pri tem konkretno za sodišča navaja, da upoštevajo vire iz 38. člena [3] Statuta Meddržavnega sodišča vključno s sodnimi odločbami in stališči priznanih mednarodnopravnih strokovnjakov (Šturm, 2002, str. 143).

Poudariti velja, da sodišča in pravni strokovnjaki ne ustvarjajo mednarodnih norm, ampak le ugotavljajo njihov obstoj in jih tolmačijo. Judikatura in doktrina sta torej le pomožna pravna vira, ki pomagata izkristalizirati smisel in pomen treh glavnih formalnih pravnih virov, tj. mednarodnih pogodb, mednarodnih običajev in občih pravnih načel.

Ob pregledu slovenskih spletnih strani ponudnikov elektronskih pravnih vsebin Pravno informacijski sistem RS, Register predpisov Slovenije, TAX-FIN-LEX in IUS INFO lahko opazimo, da na njih ni sistematično zbranih vsebin vseh veljavnih norm s področja mednarodnega prava, ampak so le tiste, ki so bile z aktom ratifikacije objavljane v uradnem listu. Zadovoljivo sistematično je urejeno področje mednarodnih pogodb, ne pa področje splošno veljavnih načel mednarodnega prava, pa čeprav izjemoma obstajajo tudi v zapisani obliki. Z uveljavljenimi normami občega mednarodnega prava se je mogoče seznaniti le toliko, kolikor se te vsebine najdejo v odločitvah US, ki so objavljene v uradnem listu. Vendar v uradnem listu na primer ni mogoče najti Dunajske konvencije o pogodbenem pravu med državami in mednarodnimi organizacijami in mednarodnimi organizacijami med seboj iz leta 1986, čeprav je znano, da se v njej nahajajo kodificirane norme običajnega občega mednarodnega prava, ki veljajo v pravnem redu RS *per se*. Enako velja za Splošno deklaracijo človekovih pravic iz leta 1948.

Ker gre pri splošno veljavnih načelih mednarodnega prava predvsem za nepisane pravne vire, jih bo uporabnik prava našel zapisane in tolmačene v primernih sodbah mednarodnih tribunalov. [4] Pomaga si lahko tudi z judikaturo US, v katerih je dotedaj US že zavrnilo ali prepoznalo nepisane norme mednarodnega običajnega prava in jih komentiralo. [5] V pomoč je lahko tudi strokovna literatura s področja običajnega mednarodnega prava, v kateri priznani mednarodnopravni strokovnjaki obravnavajo konkretne tovrstne zadeve. V angleškem jeziku so na določenih spletnih straneh javno dostopne tudi nekatere pravne vsebine, ki so lahko v pomoč pri prepoznavanju občega običajnega mednarodnega prava. Npr.: Juridical Yearbook na spletni strani http://www.un.org/law/UNJuridicalYearbook/index.htm; League of Nations

3 Statut Meddržavnega sodišča, 38. člen: Sodišče, katerega naloga je odločati v skladu z mednarodnim pravom v sporih, ki se mu predložijo, naj uporablja: a) meddržavne dogovore, bodisi splošne bodisi posebne, s katerimi so postavljena pravila, ki jih države v sporu izrečno pripoznavajo; b) mednarodni običaj kot dokaz obče prakse, ki je sprejeta kot pravo; c) obča pravna načela, ki jih pripoznavajo civilizirani narodi; d) sodne odločbe, s pridržkom določbe 59. člena, in nauk najbolj kvalificiranih pravnih strokovnjakov različnih narodov, kot pomožno sredstvo za ugotavljanje pravnih pravil. Ta določba ne omejuje pravice sodišča, da odloča o zadevi ex aequo et bono, če se pravdne stranke o tem sporazumejo.

4 Npr. judikati Permanent Court of International Justice, International Court of Justice, International Criminal Court, Permanent Court of Arbitration, Dispute Settlement Body, International Tribunal for the Law of the Sea.

5 Npr. v judikatih US U-I-90/91, US Up-97/02, US Up-114/05.

Treaty Series na spletni stravi http://www.worldlii.org/int/other/LNTSer/; United Nations Treaty Series na spletni strani http://treaties.un.org/; Repertoire of the practice of the United Nations with regard to questions of international law na spletni strani http://www.un.org/en/sc/repertoire/; Reports of International Arbitral Awards na spletni strani http://untreaty.un.org/cod/riaa/index.html.

Obstaja pa dodatna ovira. V Sloveniji ni poskrbljeno za natančne pravne prevode relevantnih odločitev mednarodnih sodnih in arbitražnih tribunalov, z izjemo sodb Sodišča Evropske unije[6], niti ni poskrbljeno, da bi bile tovrstne odločitve zbrane na enem mestu. V Združenih državah Amerike je *American Law Institute* izdal zbirko evidentiranih načel z imenom *The Restatement of the Law*, s pomočjo katere se uporabniki prava lahko seznanijo z uveljavljenimi običajnimi pravili občega mednarodnega prava. Takšna zbirka, posebno še če bi bila natančno prevedena, bi lahko bila primeren pripomoček sodnikom in pravnikom v Sloveniji.

Poudariti je, da je prepoznana vsebina običajne norme mednarodnega prava le prvi korak k njeni uporabi. Da bi lahko učinkovala med pravnimi subjekti, mora biti tudi ne le neposredno uporabna (angl. *direct applicability*), ampak tudi neposredno izvršljiva (angl. *self-executing*).

5 Razumevanje besedne zveze »neposredna uporaba norm mednarodnega prava«

Obstaja različno razumevanje pojmov, ki so povezani s predmetom raziskovanja. V tuji literaturi je zaslediti, da se besedna zveza notranjepravna uporabnost (angl. *domestic applicability*) enači z zvezo »notranjepravna neposredna uporabnost« (angl. *domestic direct applicability*), uporablja pa se tudi za označevanja neposredno izvršljivih (angl. *self-executing*) norm (Iwasawa, 1998, str. 46; Conforti & Francioni, 1997, str. 237). Podobno razlikovanja navaja Schermers, kjer se izraz neposredno uporabne norme (angl. *directly applicable*) uporablja kot sinonim za neposredno učinkovite norme (angl. *directly effective*) in za neposredno izvršljive norme (angl. *self-excuting*) (Müllerson, 2000, str. 195).

Kako torej naj razumemo slovensko ustavno določbo v 8. členu, da je mednarodna norma neposredno uporabna (angl. *direct applicability*), glede na raznolikost uporabljanja te besedne zveze v doktrini?

US RS je v judikatu iz leta 1997 zapisalo, da so neposredno uporabne pravne norme tiste, ki urejajo pravice in obveznosti subjektov notranjega prava in jih lahko npr. sodišče neposredno uporabi (US Rm-1/97). Temu je sledilo tudi VS RS, ki je v judikatu iz leta 1998 zapisalo, da neposredna uporaba mednarodnih pogodb pomeni, »da se lahko sodišča ob uporabi njihovih določb neposredno

6 Vlade RS je 22. marca 2007 sprejela sklep št. 02500-1/2007/9 o vzpostavitvi projekta »Prevajanje in redakcija sodb Sodišča Evropskih skupnosti in Sodišča prve stopnje«. Vlada je za njegovo izvedbo zadolžila Službo Vlade Republike Slovenije za zakonodajo.

sklicujejo nanje kot na določila domačih zakonov in, kar je še pomembnejše, uporabijo jih, ne da bi bile pretočene v domačo zakonodajo. To pomeni, da so del notranjega prava, pri čemer imajo celo prednost pred zakoni« (VS II Ips 55/98).

Izraz neposredna uporabnost norm je v slovenskih judikatih torej razumljen kot oznaka za pravila, ki so zaradi svoje natančnosti opredeljevanja pravic in obveznosti subjektov neposredno izvršljiva (angl. *self-executing*). Pri tem se seveda takoj postavlja vprašanje, ali tista splošno veljavna načela mednarodnega prava, ki niso formulirana dovolj natančno, torej niso neposredno uporabna?

Pogačnik pojasnjuje, da je besedno zvezo iz 8. člena Ustave »uporabljajo neposredno« razumeti predvsem kot adopcijo mednarodne pogodbe v pravni red RS v smislu vzpostavitve njihove notranjepravne veljavnosti, ne pa avtomatično tudi v pomenu njihove neposredne izvršljivosti (1999b, str. 481). Torej, pomensko natančneje definira pomen izraza neposredna uporabnost in neposredna izvršljivost. Pogačnik še misli, da glede na samo naravo običajnih norm občega mednarodnega prava ob obstoju modela ustavne adopcije njegove vsebine načelno ni ovir za neposredno izvršljivost, če je le zadevna norma vsebinsko dovolj specificirana (Grad et al., 2002, str. 322). Temu se pridružuje tudi Ilešič, ki pravi, da vsaka neposredno uporabna določba nima tudi neposrednega učinka in nadaljuje, da ima nasprotno lahko neposredni učinek samo določba, ki je neposredno uporabna (1997, str. 1326). Tudi sicer, obstaja spoznanje, da so nekatere norme običajnega mednarodnega prava neposredno uporabne in nekatere ne, ter da so nekatere neposredno uporabne norme hkrati tudi neposredno izvršljive in nekatere ne (Sik et al., 1994, str. 159).

Izhajajoč iz judikatov in pojasnil doktrine je lahko zaključiti, da je besedno zvezo »neposredna uporabnost« razumeti širše, kot nadpomenko (*hipernim*), ki zajema tako neposredno izvršljive mednarodne norme, kot tudi tiste, ki niso dovolj natančne, da bi lahko bile neposredno izvršljive in služijo kot pravni vir oblastem pri oblikovanju pravnih aktov.

6 Razumevanje izraza »neposredna izvršljivost norm mednarodnega prava«

Izraz »neposredna izvršljivost« (angl. *self-executing*) izvira iz ameriškega prava, uporablja pa se za opis pogodbenih določb, ki se neposredno uporabljajo pred sodiščem. Neposredna izvršljivost se v enakem pomenu razume tudi v drugih pravnih sistemih, navaja Leary-eva in nadaljuje, da je kljub temu v različnih pravnih sistemih dejanski pomen neposredno izvršljivih norm zelo različen (1982, str. 70).

V literaturi je zaslediti, da se izraz »neposredna uporabnost« (angl. *direct applicability*) predstavlja v angleškem jeziku tudi kot »neposredna izvršljivost«

(angl. *self executing*), v nemškem jeziku v »unmittelbare Anwendbarkeit«, v francoskem jeziku pa » direct effect« ali tudi »applicabilité directe« (Verhellen, 1996, str. 168). Alen in Pas menita, da ni splošno sprejete opredelitve v pravu ali sodni praksi glede besedne zveze »neposredna izvršljivost«. Poleg tega je njen pomen odvisen od ustavnega prava vsakega pravnega sistema (Ibidem, str. 165). Tudi Rudolf misli, da ne obstaja uveljavljena pravna definicija »neposredno izvršljive« norme, ker je ta izraz iznajdba pravnikov, profesorjev. Gre za materijo notranjega prava posamezne države, katere norme so neposredno izvršljive (Tunkin & Rüdiger, 1988, str. 47–48), zato se dogaja, da je posamezno pravilo, ki temelji na mednarodni pogodbi ali izvira iz mednarodnega običaja, »neposredno izvršljivo« v notranjem pravu neke države, v drugi državi pa nima tega svojstva. Kot primer navaja Rudolf 6. člen Evropske konvencije o človekovih pravicah, ki je v Nemčiji »neposredno izvršljiva« norma, v Avstriji ne in je potrebna normodajna intervencija države, da se to normo lahko uporabi (Ibidem, str. 42). Sodišča različnih držav uporabljajo različne kriterije (ali enake kriterije na različen način) pri ugotavljanju, katero določilo norme je »neposredno izvršljivo«, razmišlja Learyeva podobno in nadaljuje, da je rezultat tega, da se nekatere določila norme uporabljajo neposredno pred sodišči neke države, pred sodišči druge države pa se ne (1982, str. 71). Torej, gre za odvisnost od pravnega sistema posamične države, kako vidi posamezno normo, pravi Tunkin (Tunkin & Rüdiger, 1988, str. 46–47). Mazzeschi pa ima pomisleke, da je problem »neposredne izvršljivosti« le materija notranjega prava, ampak pravi, da gre za mešano problematiko, ki zadeva mednarodno pravo in ustavno pravo. Mednarodno pravo vsebuje nekaj splošnih spoznanj o obstoju »neposredno izvršljivih« pravil. Po drugi strani pa, ker to vprašanje zadeva tudi pristojne organe države oz. proceduro uvajanja teh mednarodnih norm, pa je to tudi materija ustavnega prava države (Randelzhofer & Tomuschat, 1999, str. 207).

Kakšne lastnosti torej mora imeti mednarodna norma, da je lahko neposredno izvršljiva?

Müllerson navaja, da so neposredno izvršljive norme mednarodnega prava tista pravna pravila, ki imajo značilnost, da jih načeloma subjekti posamezne države lahko uporabljajo pred domačimi sodišči v državah, kjer je mednarodno pravo (bodisi iz mednarodnih pogodb, bodisi iz običajnih mednarodnih pravil ali oboje) neposredno uporabno (2000, str. 194–195). Norme, ki so preveč ohlapne in neprecizne, seveda ne morejo biti neposredno izvršljive (Sik et al., 1994, str. 159). Med te pa ne sodijo le tiste, ki urejajo pravice posameznikov, meni Ergec, ampak tudi tiste, za katere sodišče oceni, da imajo legalno moč upravnega akta (Verhellen, 1996, str. 172). Primer tega so take npr. določbe mednarodne pogodbe, ki urejajo ekstradicijo, navajata Jacobs in Roberts (Ibidem).

V doktrini je zaslediti mnenje, da naj bi pri ugotavljanju obstoja neposredno izvršljive norme v mednarodni pogodbi razčistili dve vprašanji. Mogoče je razlikovati dva kriterija, pravita Andre in Wouter, in sicer objektivni in subjektivni

kriterij. Oba morata biti podana skupaj, torej kumulativno. Subjektivni kriterij je treba iskati v namenu in zasledovanih ciljih skleniteljev mednarodne pogodbe. Če pogodbene stranke izrazita strinjanje in deklarirata, da so pogodbeno zapisane obligacije neposredno izvršljive, potem je te norme v izhodišču šteti kot možno takšne. Vendar pa večinoma pogodbene stranke ne izrazita tovrstne volje tako jasno, posebno še, če gre za multilateralne mednarodne pogodbe. Drugi, objektivni kriterij pa pomeni, da mora biti besedilo določil mednarodne pogodbe dovolj jasno in natančno, tako da je lahko neposredno uporaben na sodišču (Alan & Pas, 1996, str. 170–171). Conforti objektivnemu testu dodaja kriterij, da v tekstu pogodbe ni zaslediti predhodne zahteve, da se norma zakonsko konkretizira (Conforti & Francioni, 1997, str. 85). Alan in Pas menita, da je objektivni kriterij odločilen (1996, str. 172).

Podobno glede neposredne izvršljivosti navaja tudi Iwasawa. Meni, da je potrebno predhodno ugotoviti: prvič, ali sta/so pogodbene stranke mednarodne pogodbe same izključile neposredno uporabnost določb pogodbe v celoti. Če je v pogodbi najti takšno določilo, je neposredno uporabnost norm treba zavrniti. Torej, neposredna uporabnost se povezuje s pogodbeno voljo strank. Drugič, če neposredna uporabnost pogodbe ni izključena, se šele pristopi k ugotavljanju posameznih norm, ali so le-te dovolj precizne. Pri običajnem mednarodnem pravu pride torej v poštev pri ugotavljanju neposredne izvršljivosti le-ta, drugi korak (1998, str. 153–154). Podobno razmišlja Perenič, ki pravi, da še preden pride do uporabe mednarodnega prava v notranjem pravu RS, mora pristojni organ razjasniti, ali mora v konkretnem razmerju določen mednarodni akt sploh uporabiti. Za odgovor na to vprašanje mora najprej ugotoviti, ali sploh gre za pravno zavezujoč akt. Ko to ni več sporno, se mora ugotoviti, koga zavezuje. Marsikateri mednarodni pravni akti urejajo samo razmerja med državami pogodbenicami, vse več pa je takih, ki veljajo tudi za posameznike, kot je na primer Evropska konvencija o človekovih pravicah. Pri tem je pomembna tudi ugotovitev, ali je mednarodni pravni akt povsem splošen ali pa je dovolj konkreten, da ga je mogoče uporabiti neposredno, brez dodatnih predpisov v notranjem pravu. Kot tretje vprašanje, ki si ga morajo pristojni organi razčistiti pri uporabi mednarodnega akta v notranjem pravu pa je, ali je ta pravilno umeščen (inkorporiran) v notranji pravni sistem (1996, str. 9).

Navedeni pogoji doktrine v mednarodnem pravu, ki zadevajo »neposredno izvršljivost norm« (angl. *self executing*) mednarodnega prava, so podobni in primerljivi z obstoječo judikaturo Evropske unije, ki sicer direktno ne zadevajo mednarodnega prava, ampak področje evropskega prava, kot prava *sui generis*. Gre za vprašanja neposrednega učinkovanja (angl. *direct effect*) evropskega prava. Evropska unija uveljavlja nov pravni red mednarodnega prava, v dobrobit katerega so države članice prenesle del svojih suverenih pravic, in ta pravni red ne potrebuje nobene zakonodajne intervencije (Škrk, 2005, str. 7), je leta 1963 razsodilo Sodišče Evropske unije v primeru »*Van Gend & Loos*« (SEU Case 26/62), in s tem utemeljilo doktrino neposrednega učinka. To pa

pomeni, če neka pravna odredba neposredno učinkuje, imajo posamezniki pravico, ki jo morajo nacionalna sodišča ščititi (Hartley, 1998, str. 177). Winter navaja, da se s pojmom »neposredni učinek« norme označuje možnost, da se posameznik neposredno sklicujejo na takšno normo v postopkih, ki tečejo znotraj njihovega pravnega reda (Ilešič, 1997, str. 1325). Sodišče je oblikovalo štiri pogoje, da se po določbi prava Evropske unije lahko prizna neposredni učinek, navaja Hartley. Določba norme mora biti: 1) jasna, 2) nepogojna, 3) v obliki prepovedi in 4) ne sme obstajati rezervacija, ki bi uporabo določbe v pravnem redu države članice pogojevala s pozitivno zakonodajo države članice (Sancin, 2009, str. 87).

Proprius signum norm mednarodnega prava, ki jih lahko označimo kot neposredno izvršljive (angl. *self-executing*), so ob lastnem razumevanju uporabnika prava le-teh, njihova: jasnost, brezpogojnost, natančnost, decidiranost, popolnost, in z njimi se urejajo pravice in obveznosti fizičnih in pravnih oseb.

7 Neposredna uporaba splošno veljavnih načel mednarodnega prava

VS RS se je leta 1998 soočilo z revizijsko trditvijo, da Ustava ne dovoljuje neposredne uporabe mednarodnega običajnega prava, vendar je razsodilo, da temu stališču ni mogoče slediti. Res je zapisano v drugem stavku 8. člena Ustave, da se ratificirane in objavljene mednarodne pogodbe uporabljajo neposredno, kar pomeni, da se lahko sodišča ob uporabi njihovih določb neposredno sklicujejo nanje kot na določila domačih zakonov, ne da bi bile prevzete v domačo zakonodajo. Ne pomeni pa tega, da sodnik ne sme uporabiti načel mednarodnega prava. Ko Ustava terja skladnost zakonov s splošno veljavnimi načeli mednarodnega prava (drugi odstavek 153. člena Ustave) in daje s tem tudi prednost načelom pred zakoni, je očitno, da se ob sojenju uporabljajo ta načela (VS, II Ips 55/98). Dodatno je to razvidno iz prvega odstavka 3. člena Zakona o sodiščih[7], ki določa, da je sodnik pri opravljanju sodniške funkcije vezan tudi na splošna načela mednarodnega prava in na ratificirane in objavljene mednarodne pogodbe.

Čeprav splošno veljavna načela mednarodnega prava veljajo v slovenskem pravnem redu per se, ni popolnoma jasno, kako naj se odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljenim mednarodnim pravom, vendar so nasprotujoče.[8]

7 Zakon o sodiščih (Ur. list RS, št. 19/94 in nasl.), 3. člen: »Sodnik je pri opravljanju sodniške funkcije vezan na ustavo in zakon. V skladu z ustavo je vezan tudi na splošna načela mednarodnega prava in na ratificirane in objavljene mednarodne pogodbe.«

8 Npr. Zakon o uravnoteženju javnih financ (Ur. list št. 40/2012) v 188. in 246. členu zapoveduje obvezno prenehanje veljavnosti pogodb o zaposlitvi javnim uslužbencem, kar pomembno odstopa od določb zavezujoče konvencije Mednarodne organizacije dela, št. 158, ki jo je ratificirala Jugoslavija (Ur.l. SFRJ - MP, št. 4/84, 18.5.1984) in na podlagi pravne kontinuitete zavezuje tudi Slovenijo (Akt o notifikaciji, Ur.l. RS - MP, št. 15/92, 13.11.1992). Navedeni določbi ZUJF-a tudi pomembn0 odstopata od zapovedane ureditve z Direktivo 2006/54 ES in z Direktivo Sveta 2000/78/ES, ki zavezujeta Slovenijo na podlagi 288. člena Lizbonske pogodbe,

Več o tem je že znanega, ampak se nanaša na sodnike sodišč in ne na upravne organe, pa vendarje materija lahko relevantna tudi pri iskanju odgovorov, ki se nanašajo na odločanje upravnih organov.

Če sodnik meni, da je zakon, ki bi ga moral uporabiti, neskladen s hierarhično nadrejenimi odločbami mednarodnih pogodb, mora postopek prekiniti in začeti postopek pred US, meni Testen (2003, str. 1488). Novak pa misli, da mora sodnik rednega sodišča ali kateri koli drug državni organ, vključno z upravnimi organi, ki pri reševanju neke zadeve naleti na nasprotujoči si določili mednarodne pogodbe in zakona, zadevo rešiti na podlagi pravil iz mednarodne pogodbe, pri tem pa ne odloči o (ne)veljavnosti določbe domačega zakona, temveč le o njeni (ne)uporabnosti v konkretni zadevi, v kateri je prevladala neposredna uporabna mednarodna norma (1997, str. 30). Podobno meni Zupančič, ki misli, da se 125. člen[9] in 160. člen[10] Ustave ne izključujeta, ker US o neskladju zakona s splošno veljavnimi načeli mednarodnega prava odloča abstraktno, medtem ko redna sodišča odločajo samo za konkretne primere (Zupančič, 2010, str. 8). Testen misli drugače, in sicer, da se določilo 8. člena Ustave ne more uporabljati kot argument, da je Ustava v razmerju do mednarodnih pogodb odstopila od sistema koncentrirane ustavnosodne kontrole ustavnosti zakonov (2003, str. 1488). To utemeljuje z razlagami odločb US št. U-I-154/93, U-I-77/93 in U-I-103/95. Testen še meni, da bi lahko na prvi pogled izhajalo, da je US nakazalo možnost, da zaradi načela neposredne uporabnosti mednarodna pogodba lahko spreminja posamezne zakonske določbe tako, da jih derogira, natančnejše branje pa po njegovi oceni lahko privede le do sklepa, da mednarodna pogodba s posameznimi svojimi neposredno izvršljivimi določbami lahko zakon dopolnjuje (Ibidem, str. 1492). Iz navedenih odločitev I-154/93, U-I-77/93 in U-I-103/95US je v grobem razbrati naslednje:

- sodnik ne odloči po neusklajenem zakonu, ampak po neposredno uporabni normi mednarodnega prava, ki je hkrati tudi neposredno izvršljiva (U-I-154/93);[11]
- sodnik ne odloči po neusklajenem zakonu, kakor tudi ne odloči po sicer neposredno uporabnem pravilu mednarodnem pravu, ker ta mednarodna norma ni neposredno izvršljiva (U-I-77/93);[12]

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ki spreminja Pogodbo o Evropski uniji in Pogodbo o ustanovitvi Evropske skupnosti (UL C 306/01).

9 125. člen URS: »Sodniki so pri opravljanju sodniške funkcije neodvisni. Vezani so na ustavo in zakon.«

10 Prvi odstavek druge alineje 160. člena URS: »Ustavno sodišče odloča o skladnosti zakonov in drugih predpisov z ratificiranimi mednarodnimi pogodbami in s splošnimi načeli mednarodnega prava;«.

11 Odločitev US U-I-154/93 z dne 2/6-1994: »Na podlagi določbe 8. člena Ustave se v času neusklajenosti izpodbijanega Zakona s Protokolom določbe Protokola sicer uporabljajo neposredno, vendar razlogi pravne varnosti narekujejo, da Državni zbor ugotovljeno neskladnost odpravi ob prvi spremembi Zakona.«

12 Odločitev US, U-I-77/93 z dne 6.7.1995: »Take mednarodne pogodbe se na podlagi 8. člena Ustave uporabljajo neposredno, vendar razlogi pravne varnosti narekujejo, da se v zakonodaji operacionalizirajo obveznosti, ki jih je država s temi pogodbami prevzela.«

- sodnik uporabi obe normi, ki se dopolnjujeta, tako zakon kot normo mednarodnega prava (U-I-103/95).[13]

Iz predstavljenega v prejšnjem odstavku so razvidna mnenja, ki se nanašajo na ravnanja sodnikov sodišč, ne nanašajo pa se na ravnanja upravnih organov, razen mnenja Novaka, ki misli, da morajo upravni organi, ki pri reševanju neke zadeve naletijo na nasprotujoči si določili mednarodne pogodbe in zakona, zadevo rešiti na podlagi pravil iz mednarodne pogodbe (1997, str. 30).

Kako naj se torej odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljenim mednarodnim pravom, vendar so nasprotujoče. V bistvu gre za vprašanje skladnosti določenega zakonske norme z določeno normo mednarodnega prava[14] in vprašanje neposredne uporabe norm mednarodnega prava.

Pri odločanju v konkretnih primerih pa je v »določenih« primerih[15] treba neposredno uporabljati Ustavo, in sice ne samo njeno besedilo, ampak tudi razlago Ustave, kakor jo je v svojih dokončnih odločbah (ki so po tretjem odstavku 1. člena Zakona o Ustavnem sodišču obvezne) razvilo US (Stupica, 2013, str. 27). Obrazložitve odločitev US so zato za razumevnaje prava zelo pomembne in zavezujoče.

US je leta 2010 v svoji odločitvi zapisalo: »Upravni organi so /…/ v svojih postopkih dolžni varovati ustavni red ter človekove pravice in temeljne svoboščine, saj ta obveznost ni in ne more biti pridržana le sodiščem. Res je sicer, da so upravni organi skladno z načelom zakonitosti vezani na zakon in ne morejo odkloniti njegove uporabe v primeru dvoma v njegovo skladnost z Ustavo, prav tako pa tudi niso med postopkom upravičeni postaviti zahteve za presojo skladnosti zakona z Ustavo na Ustavno sodišče, saj je ta možnost dana le sodiščem (156. člen Ustave). Vendar pa iz vezanosti upravnih organov na Ustavo in na dolžnost spoštovanja ustavnih pravic posameznikov in pravnih oseb izhaja, da morajo upravni organi v primeru, če bi pri odločanju o pravicah, obveznostih ali pravnih koristih strank morali uporabiti zakon, ki je po njihovem mnenju protiustaven, na to opozoriti nadrejeni organ, ta pa bi moral tako stališče preučiti in v primeru dvoma v ustavnost zakona predlagati ustrezno ukrepanje najvišjim organom izvršilne veje oblasti, ki so skladno z Ustavo in zakonom pristojni in odgovorni za to, da predlagajo spremembo

13 Odločitev US, U-I-103/95 z dne 24.10.1996: »Na podlagi 8. člena Ustave se ratificirane in objavljene mednarodne pogodbe uporabljajo neposredno, kar pomeni, da je sodnik za mladoletnike dolžan upoštevati določbo točke c) 37. člena Konvencije neposredno, tudi če njene določbe niso prevzete v notranje pravo, to je v ZKP. Sodnik za mladoletnike lahko na podlagi izpodbijanih določb ZKP in citirane določbe Konvencije odredi, da se mladoletnik pripre skupaj s polnoletnim le izjemoma, in le pod pogojem, da je skupno prestajanje pripora izključno v mladoletnikovem interesu in v njegovo korist.«

14 URS v drugem odstavku 153. člena določa: »Zakoni morajo biti v skladu s splošno veljavnimi načeli mednarodnega prava in z veljavnimi mednarodnimi pogodbami, ki jih je ratificiral državni zbor, podzakonski predpisi in drugi splošni akti pa tudi z drugimi ratificiranimi mednarodnimi pogodbami.«

15 URS v 15. členu določa, da se človekove pravice in temeljne svoboščine uresničujejo neposredno na podlagi ustave.

protiustavnega predpisa ali pa da vložijo zahtevo za presojo zakona na Ustavno sodišče« (US U-I-39/10-6).

Iz navedene odločitve je mogoče z logičnim sklepanjem razumeti, da:

- so tudi upravni organi, poleg sodišč, dolžni varovati ustavni red ter človekove pravice in temeljne svoboščine;
- upravni organi ne morejo odkloniti uporabe zakona;
- upravni organi morajo zaradi vezanosti na Ustavo in na dolžnost spoštovanja ustavnih pravic posameznikov in pravnih oseb, le opozoriti nadrejene, na verjetno protiustavnost zakona;
- če nadrejeni upravni organ po proučitvi stališča podrejenega upravnega organa oceni, da je stališče glede protiustavnosti zakona utemeljeno, izdela predlog ustreznega ukrepanja najvišjim organom izvršilne veje oblasti.

Videti je, da je takšno razumevanje judikata preozko, saj ne zagotavlja učinkovitega varstva človekovih pravic in temeljnih svoboščin.

Vendar z natančnim branjem obravnavanega judikata lahko vsebino razumemo tudi tako, da se ta nanaša le na primere, ki konkretno ne zadevajo človekovih pravic in temeljnih svoboščin iz II. poglavja Ustave, ampak le na druge primere, ki sicer zadevajo ustavne pravice posameznikov in pravnih oseb.[16] Tej tezi v prid je dejstvo, da je US v istem judikatu glede varovanja ustavnih pravic namreč zapisalo dve formulaciji. Prva se glasi:

- »dolžnost spoštovanja ustavnih pravic posameznikov in pravnih oseb«,

druga formulacija pa se glasi:

- »dolžni varovati ustavni red ter človekove pravice in temeljne svoboščine«.

Pri tem se seveda logično postavi vprašanje, ali je napotilo[17] upravnim organom v judikatu US glede dolžnosti spoštovanja ustavnih pravic posameznikov in pravnih oseb razumeti enako tudi v primerih, ko morajo upravni organi odločati v zadevah, ki zadevajo tudi človekove pravice in temeljne svoboščine iz II. poglavja Ustave? Ali vezanost upravnih organov na načelo zakonitosti res pomeni to, da ob obstoju zakona in norme mednarodnega prava, ki urejata določeno vprašanje pravic in obveznosti posameznika nasprotujoče, vseeno uporabi zakon in prezre veljavno neposredno uporabno in neposredno izvršljivo normo mednarodnega prava, ki je istočasno v hierarhiji pravnih aktov nad zakoni? Ali 15. člen Ustave zaradi načela zakonitosti ne zavezuje

16 Iz judikata US U-I-39/10-6 je razbrati, da pobudnik za začetek postopka ocene ustavnosti ne zatrjuje neskladnost izpodbijanega akta z določbami ustave med 14. in 65. členom, ki opredeljujejo človekove pravice in temeljne svoboščine.

17 Upravni organi so skladno z načelom zakonitosti vezani na zakon in ne morejo odkloniti njegove uporabe v primeru dvoma v njegovo skladnost z Ustavo. Upravni organi morajo opozoriti nadrejeni organ, ta pa bi moral tako stališče preučiti in v primeru dvoma v ustavnost zakona predlagati ustrezno ukrepanje najvišjim organom izvršilne veje oblasti, ki so skladno z ustavo in zakonom pristojni in odgovorni za to, da predlagajo spremembo protiustavnega predpisa ali pa da vložijo zahtevo za presojo zakona na Ustavno sodišče.

tudi upravnih organov k neposrednemu uresničevanju človekovih pravic in temeljnih svoboščin?

Izražena poenostavljena vprašanja nakazujejo na njihovo zanikanje. Katere argumente pa se lahko navede v prid zanikanju postavljenih vprašanj?

Ne gre prezreti, da se je US v obravnavanem judikatu nedvomno izreklo, da so upravni organi človekove pravice in temeljne svoboščine dolžni varovati. Logično je, da to lahko storijo le tako, da jih sami ne kršijo. Ta teza se lahko podkrepi z odločitvijo US iz leta 1996, ko je sicer za sodnike zapisalo, da so le ti dolžni upoštevati človekove pravice in temeljne svoboščine neposredno na podlagi 15. člena Ustave (US Up-155/95). Ker varovanje človekovih pravic in temeljnih svoboščin po odločitvi US U-I-39/10-6 ni pridržana le sodiščem, ampak tudi upravnim organom, je s sklepanjem z argumentacijo *ad simili ad simile* logično, da potem odločitev US Up-155/95, ki govori o neposredni uporabi Ustave po 15. členu, zavezuje tudi upravne organe, kljub načelu zakonitosti.

Temu jih nenazadnje napotuje določba 120. člena ustave, ki določa, da upravni organi opravljajo svoje delo v okviru in podlagi Ustave in zakonov. Torej tudi na podlagi 15. člena Ustave! Tudi ni v nerešljivem nasprotju z določilom 153. člena Ustave, ki določa, da morajo izdani posamični akti upravnih organov temeljiti na zakonu ali zakonitem predpisu. Med zakonite predpise je namreč lahko šteti tudi mednarodne pogodbe (Šturm, 2002, str. 1009). Ker pa med viri mednarodnega prava ni hierahije, se lahko logično v širšem smislu med zakonite predpise uvrsti tudi določene neposredno izvršljive norme običajnega mednarodnega prava, ki imajo v materialnem pomenu potrebne značilnosti predpisa. Za primer vzemimo deklaracijo človekovih pravic, ki v Sloveniji ne velja kot mednarodna pogodba, ampak veljajo v njej določene norme, kot del običajnega mednarodnega prava, ki so po 8. členu Ustave del pravnega reda *per se*.

Navedeni argumenti dajejo podlago za utemeljeno zagovarjanje stališča, da morajo upravni organi v primeru, ko so pravice in obveznosti pravnih subjektov, katere se uvrščajo v II. poglavje Ustave, hkrati nasprotujoče urejene z zakonom in uveljavljeno normo običajnega mednarodnega prava, pri odločanju uporabiti slednjo, in sicer neposredno na podlagi 15. člena Ustave.

8 Sklepne ugotovitve

Pri opredelitvi problema obravnavane tematike je bilo v začetnem delu članka zastavljeno raziskovalno vprašanje, ki zadeva zmožnost prepoznave oz. ugotovitve obstoja splošno veljavnih načel mednarodneg prava in njihovo neposredno uporabo v odločbah upravnih organov.

Splošna veljavna načela mednarodnega prava se v pravnem redu RS po ustaljeni judikaturi US RS uporabljajo neposredno, čeprav to ni izrecno zapisano v Ustavi. Ker gre praviloma za nezapisano materijo veljavnega

mednarodnega prava, obstaja problem prepoznave teh norm, ki veljajo v pravnem redu RS *per se*. Uporabnik prava jih mora prej poiskati v primernih sodbah mednarodnih tribunalov. Pri tem obstaja dodatna ovira. V Sloveniji ni poskrbljeno za prevode v slovenski jezik relevantnih odločitev mednarodnih sodnih in arbitražnih tribunalov, z izjemo sodb Sodišča Evropske unije, niti ni poskrbljeno, da bi bile tovrstne odločitve zbrane na enem mestu. V pomoč je lahko judikatura US, v katerih je do tedaj US že zavrnilo ali prepoznalo nepisane norme mednarodnega običajnega prava in jih komentiralo. Vendar tovrstnih odločitev ni veliko. Pomagamo si lahko tudi s strokovno literatura iz področja običajnega mednarodnega prava, v kateri priznani mednarodnopravni strokovnjaki obravnavajo konkretne tovrstne zadeve in se pri tem sklicujejo na konkretne judikate mednarodnih tribunalov. Očitno je, da problem prepoznavanja splošno veljavnih načel mednarodnega prava obstaja in ni zadovoljivo sistemsko rešen, ampak je to prepuščeno znanju in iznajdljivosti posameznih uporabnikov prava.

Čeprav splošno veljavna načela mednarodnega prava veljajo v slovenskem pravnem redu per se, ni popolnoma jasno, kako naj se odzovejo upravni organi v situacijah, ko so pravice in obveznosti pravnih subjektov hkrati urejene z zakonom in uveljavljeno normo običajnega mednarodnega prava, vendar so nasprotujoče. Z natančnim branjem vsebine judikata US U-I-39/10-6 lahko razumemo dve situaciji. Prva je, da morajo upravni organi, ko sporni zakon ureja ustavne pravice posameznikov ali pravnih oseb, na spornost predpisa opozoriti nadrejeni organ, ta pa mora v primeru potrjenega dvoma predlagati ustrezno ukrepanje najvišjim organom izvršilne veje oblasti, ki so skladno z Ustavo in zakonom pristojni in odgovorni za to, da predlagajo spremembo protiustavnega predpisa ali pa da vložijo zahtevo za presojo zakona na ustavno sodišče. Druga situacija pa je, ko sporni zakon ureja človekove pravice in temeljne svoboščine iz II. poglavja Ustave. V takih primerih obstajajo argumenti, da upravni organ kljub načelu zakonitosti, uporabi na podlagi 15. člena Ustave neposredno izvršljivo normo običajnega mednarodnega prava.

Dr. Anton Olaj je doktor znanosti na področju prava. V svojih raziskavah se predvsem ukvarja s proučevanjem splošno veljavnih načel mednarodnega prava in njihove uporabe v notranjem pravu.

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1.02 Review article

Direct Applicability of Generally Accepted Principles of International Law in Legal Order of the Republic of Slovenia

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ABSTRACT

Self-executing, incorporated and generally accepted principles of international law have been used directly in legal order of the Republic of Slovenia. Systematic records of these identified and enforced norms do not exist. It is difficult for lawyers and judges to get acquainted with them. The predicament is even greater because, with the exception of the Court of Justice of the European Union, a translation of the relevant case law of international tribunals is not available. Generally accepted principles of international law are applicable in Slovenian legal order *per se*. Despite that, it is not entirely clear how administrative bodies should react in situations where the rights and obligations of legal entities are on the one hand regulated by law and customary international law but on the other hand are contradictory.

Key words: *generally accepted principles of international law, customary rules of general international law, the 8th Article of the Constitution of the Republic of Slovenia, the 15th Article of the Constitution of the Republic of Slovenia*

JEL: K33

1 Introduction

The Constitution of the Republic of Slovenia defines relations between international law and domestic law in the 8th Article of the Constitution, which determines: "Laws and regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly." We can see that international law enters into Slovenian legislation in the form of treaties and in the form of generally accepted principles of international law. It should be noted that European law as foreign law *sui generis* also enters into domestic legal order, not in context of the 8th Article of the Constitution, but

according to the provisions of the third paragraph of the 3rd/a Article of the Constitution, which will not be discussed in this paper.

Legal experts have diverging opinions of what is to be understood by the phrase 'generally accepted principles of international law'. In the literature, it can also be traced under the phrase 'customary rules of general international law'.[1] For the purposes of this article, we will use the decision of the Constitutional Court, which will serve as a legal framework for understanding this syntagm. The Constitutional Court states that the term 'generally accepted principles of international law' covers a primarily "international custom, as evidence of a general practice accepted as law" and "general principles of law recognized by civilized nations". They are enumerated as the source of international law in the Statute of the International Court of Justice in bullets b) and c) of the first paragraph of the 38th Article (US, U-I-266/04-105). Customary law constitutes an important part of international law, but due to its unwritten form, it requires a proof of the action's nature and motives. (Zemanek & Hartley, 1998, p. 149). Fitzmaurice states that their codification can also occur in treaties or records in various international documents (Sancin, 2009, p. 51). It consists of an objective and a subjective element. A proof of general practice is an objective element. A subjective element is *opinio juris sive necessitati*. This means that countries act in a certain way because they are aware that such an action is obligatory for them by the rules of international law. Schwarzenberger indicates that both conditions must be fulfilled cumulatively (Thirlway, 1972, p. 46). The general principles of law recognized by civilized nations can be understood as the greatest common denominator of fundamental principles historically formed within a domestic legal system (Pogačnik, 1999b, p. 470), for example the principle of legality, the principle of non-retroactivity, the principle of *res judicata*, the litispidenca, the principle of unjustified enrichment, the principle of *lex specialis derogat legi generalis* (Škrk, 2007, p. 282–283) and the principle *actor sequitur forum rei* (US U-I-245/00). Additionally, Türk appoints two more principles: the first one stating that no one can transfer to another person more rights than they themself have; and the second is the principle of *bona fides* (2007, p. 59). In the works of scholars Bartos, Guggenheim, Andrassy, Shaw and Pell, the following can also be found: the principle of prohibition of abuse of law, the principle of the prohibition of unjustified enrichment, the principle of non-favorable treatment from own mistakes, the principle of limitation, the principle of obligations to compensate for damage, the principle *nemo plus iuris ad alium transfers potest quam ipse habet*, the principle of *estoppel*, the principle of the right to exclusion of a judge, the principle of equality of the parties, the principle of *audiatur et altera pars*, the principle of *res judicata* and the principle of *nemo iudex in sua causa* (Vukas, 1992, p. 259).

The syntagms 'customary international law' and 'customary rules of general international law' are repeatedly stated in this article. It should be mentioned

1 More about this Škrk, 2012, p. 1104–1106.

that this is just short for "international custom, as evidence of a general practice accepted as law", which is written in the 38th Article of the Statute of International Court of Justice. In this article, this phrase is understood in the context of the syntagm "generally accepted principles of international law", specified in the 8th Article of the Constitution and which customary international law is an integral part of. And *vice versa*, when the article states the syntagm 'generally accepted principles of international law', specified in the 8th Article of the Constitution, both "customary international law" as well as "general principles of law recognized by civilized nations" are meant in this case and are specified in bullets b) and c) of the first paragraph of the Statute of the International Court of Justice's 38th Article.

International law is applicable in Slovenian internal law, either directly or indirectly, by previous transformation or adoption into domestic law. The subject of this article's study will be the direct applicability of generally accepted principles of international law, therefore an indirect applicability of international norms will not be defined in more detail.

Readers should not be confused by the article's various references to treaties, while the title of this article does not mention treaties and they are not a theme of this research. The reason is that a doctrine is richer in examining an issue of direct applicability and self-executing norms of international law framed by a treaty. In international law, there is no hierarchy of international legal sources.[2] As a source of international law, treaties theoretically have the same importance as customary rules of general international law and general principles of law. It is logical that certain findings in the field of treaties shall apply *mutatis mutandis idem quod* to generally accepted principles of international law.

2 Definition of the Problem

The norms of international law take effect in domestic law only if the state has determined it (Türk, 2007, p. 71). However, there are exceptions, also known as *ius cogens*. In these types of international imperative rules, it is not required that the state in any way takes part in their formation. These norms become binding on a State at the moment when it becomes an international legal subject (Platiše, 2005, p. 185). Countries vary depending on the procedures by which they give effect to international law on their territory. Most of them accept the doctrine that international law is a part of domestic legal order. In spite of different procedures in domestic legal systems of countries, international law with its demands nevertheless takes effect on their area (Jennings & Watts, 1997, p. 53).

As to the effect of international law in the legal order of the Republic of Slovenia in the segment of generally accepted principles of international law, the Slovenian Constitution does not provide for explicit direct applicability,

2 More about this Škrk, 1985, p. 149–150, and Villinger, 1997, p. 58.

while it does in the case of ratified and published treaties (Pogačnik, 1999b, p. 472). A purely linguistic understanding of the 8th Article of the Constitution indicates doubt whether it is permissible to use generally accepted principles of international law directly. We already know the answer to this question, because there already exists case law that justifies their direct applicability. However, there are still open questions, particularly regarding the recognition of the existence of such norms and their direct application by administrative bodies.

3 Legal Acculturation of International Law in the Legal Order of the Republic of Slovenia

There are three methods of reception of international law in Slovenian legal order. The first is Statutory ad hoc incorporation. It is actually a transformation of international law by an act of legislature and thereby for indirect applicability of international law. In doing so, a norm of international law loses the nature of an international norm and becomes a domestic legal norm. A typical example of transformation of international norms are norms in the field of criminal law because of law principles *nullum crimen nulla poena sine lege praevia*.

The second method to take on international law is automatic ad hoc incorporation. Under this approach, the international rules apply in the domestic legal system only if the legislative authority adopts a specific implementing law without reformulating these rules (Hofmann, 2008, p. 93). In the Slovenian legal framework, this means the adoption of treaties with a law on ratification or with a government decree on ratification. By this act, an international norm does not lose its legal nature, therefore it remains a norm of international law, because it does not interfere with its content.

The third method of the legal acculturation of international law, which is relevant for the purposes of this article, is an automatic standing incorporation. It is valid for the entry of generally accepted principles of international law into domestic legislation, which are as such, *per se*, a source of domestic law. The Constitution, in the 8th Article, specifies that laws and regulations must comply with generally accepted principles of international law. This presumption declares their incorporation into Slovenian legislation without domestic legal instrument of ratification, which also applies to treaties (Weingerl, 2002, p. 355). This means that the public authorities and individuals must *ipso facto* and without any conduct respect in the international community established rules of customary international law, states Cassese (Škrk, 2007, p. 279). By this act, an international norm does not lose its legal nature and remains a norm of international law, because it does not interfere with its content.

4 Identifying the Contents of Generally Accepted Principles of International Law

Before using the established rules of customary international law, they must be previously identified. The only verifiable manner of establishing the existence and contents of a customary rule prior to use, citing Kreča, is suitable judgment of the International Court of Justice. Theoretically, in this case, there is no transformation of a customary rule but only the court's finding of existence of a customary rule (Kreća, 2006, p. 23). Grasselli argues that in addition to the courts, Slovenian administrative bodies themselves also identify content of international law before using it. With courts specifically, he mentions that they take into account the resources of the 38th Article[3] of the Statute of International Court of Justice, including judicial decisions and the views of highly qualified international legal experts (Šturm, 2002, p. 143).

It should be emphasized that the courts and legal experts do not create international norms, they only note their existence and interpret them. Case law and doctrine are only ancillary legal sources that help crystallize the meaning and importance of the three main formal legal sources, i.e. treaties, customary international law and general principles of law.

When reviewing Slovenian websites of providers of electronic legal information Legal Information System of the Republic of Slovenia, Register of Regulations of the Republic of Slovenia, TAX-FIN-LEX and IUS INFO, it can be noticed that there are no systematically collected contents of all applicable norms in the field of international law but only those that have been an act of ratification published in the official gazette. The area of treaties is regulated in a systematic way, but quite the opposite goes for generally accepted principles of international law, even if in exceptional cases they do exist in written form. One can be informed about the established norms of customary international law only as far as the content can be found in the decisions of the Constitutional Court, which is published in official gazette. However, in the official gazette for example, the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations of 1986 cannot be found, although it is known that there are codified norms of customary international law applicable in the legal order of the Republic Slovenia per se. The same goes for the 1948 Universal Declaration of Human Rights.

3 Statute of the International Court of Justice, 38th Article: "1. The Court, whose function is to decide in accordance with international law in such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules explicitly recognized by the states in conflict; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified international publicists, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree on it."

Generally accepted principles of international law are primarily unwritten sources of law. Therefore, they can be found in some of the judgments of international tribunals.[4] Lawyers can also help themselves with the case law of the Constitutional Court, which have been rejected or identified as unwritten norms of customary international law.[5] Specialized literature in the field of customary international law, where recognized international legal experts deal with concrete matters of this kind, may also be of assistance. Some legal contents that may be helpful in recognizing general customary international law are also publicly available on specific websites. For example: Juridical Yearbook at http://www.un.org/law/UNJuridicalYearbook/index.htm; League of Nations Treaty Series at http://www.worldlii.org/int/other/LNTSer/; United Nations Treaty Series at http://treaties.un.org/; Repertoire of the practice of the United Nations with regard to questions of international law at http://www.un.org/en/sc/repertoire/; Reports of International Arbitral Awards at http://untreaty.un.org/cod/riaa/index.html.

But there is an additional difficulty. In Slovenia, there is no legal provision for precise translation of the relevant decisions of international judicial and arbitral tribunals, with the exception of judgments of the European Court of Justice.[6] These types of decisions are also not collected in one place. In the United States of America, the *American Law Institute* has released a collection with the name 'The principles of the Restatement of the Law'. With it, users can familiarize themselves with the established customary rules of general international law. Such a collection, especially if it was accurately translated, would be an appropriate tool for judges and lawyers in Slovenia.

However, the identified content of customary norms of international law is only the first step towards its implementation. In order to take effect between legal entities, it must not only be directly applicable but also self-executing.

5 Understanding the Syntagm 'Direct Applicability' of International Law Norms

The concepts that are connected with the subject of this research can be understood differently. In foreign literature, the syntagm 'domestic applicability' is at times equated with the syntagm 'domestic direct applicability'. It is also used for marking of 'self-executing' norms (Iwasawa, 1998, p. 46; Conforti & Francioni, 1997, p. 237). Schermers puts forward a similar distinction. He argues that the syntagm 'directly applicable' is used as a synonym for 'directly effective' and 'self-executing' (Müllerson, 2000, p. 195).

4 For example: Permanent Court of International Justice, International Court of Justice, International Criminal Court, Permanent Court of Arbitration, Dispute Settlement Body, International Tribunal for the Law of the Sea.

5 For example: US U-I-90/91, US Up-97/02, US Up-114/05.

6 The Government of the Republic of Slovenia in 2007 adopted decision No. 02500-1/9/2007 on the establishment of the project "Translation and Redaction of Judgments of the European Court of Justice and the Court of First Instance" For its implementation, the government entrusted the Job to the Office of Legislation.

Regarding the diversity of application of the sytagm in doctrine, what should therefore be understood by the Slovenian constitutional provision in the 8th Article, which states that the international norm is directly applicable?

In its decision from 1997, the Constitutional Court stated that the directly applicable legal norms are those that govern the rights and obligations of entities of domestic law and may, for example, be applied directly by the court (US Rm-1/97). This was followed by the 1998 decision of the Supreme Court of the Republic of Slovenia, which stated that the direct applicability of treaties means that "the courts in the application of their provisions can directly refer to it as the provisions of domestic law and, more importantly, courts can use them without being streamed into domestic legislation. This means that they are part of domestic law, giving an advantage before the law" (VS II Ips 55/98).

The syntagm 'direct applicability' of norms is thus in the Slovenian judicial decisions understood as a label for rules that are, due to their precision in creating rights and obligations of entities, self-executing. A question arises regarding whether the generally accepted principles of international law that are not formulated in a sufficiently precise manner may not be directly applicable?

Pogačnik explains that the syntagm 'directly applicable' from the 8th Article of the Constitution should be understood primarily as an adoption of treaties into legal order of the Republic of Slovenia in the context of establishment of their domestic validity, but not automatically in the sense of their self-execution (1999b, p. 481). Furthermore, Pogačnik thinks that considering the nature of the customary rules of general international law, in the case of the existence of a model of constitutional adoption of their contents, in principle there is no obstacle for the self-executing, whenever the norm is sufficiently specified (Grad et al., 2002, p. 322). Ilešič joins him, saying that each directly applicable provision is not self-executing and continues by saying that on the contrary only a provision that is directly applicable can have a self-executing effect (1997, p. 1326). Also, otherwise there exists a recognition that some norms of customary international law are directly applicable and some are not, some directly applicable norms are also self-executing and some are not (Sik et al., 1994, p. 159).

Considering the judicial decisions and clarifications of the doctrine, it can be concluded that the syntagm 'direct applicability' must be understood more broadly. It must be understood as a hypernym that includes both self-executing international norms as well as those that are not sufficiently precise to be self-executing and only serve as a source for legal authorities when creating new legal acts.

6 Understanding the syntagm 'self-executing' norms of international law

The syntagm 'self-executing' was derived from U.S. law and is used to describe the contractual provisions that are directly applicable in the courts. The syntagm 'self-executing' is in other legal systems understood in the same sense, indicates Leary, but goes on to say that the real meaning of self-executing rules is very different in different legal systems (1982, p. 70).

It can be observed in the literature that the term 'direct applicability' is in English presented also as 'self-executing', in German 'unmittelbare Anwendbarkeit' and in French 'direct effect' or the 'applicabilité directe' (Verhelle, 1996 , p. 168). Alen and Pas consider that there is no commonly agreed definition in the law or jurisprudence about the syntagm 'self-executing'. In addition, its meaning depends on the constitutional law of each legal system (ibid, p. 165). Rudolf also thinks that there is no established legal definition of a 'self-executing' norm, because this phrase is an invention of lawyers and professors. It is a matter of domestic law of each country which norms are self-executing (Tunkin & Rüdiger, 1988, pp. 47–48), so it happens that a specific rule, which is based upon a treaty or derived from international custom, is self-executing in the domestic law of a certain country, but in another country it does not have these features. Rudolf states the example of the 6th Article of the Convention for Protection of Human Rights and Fundamental Freedoms, which in Germany is a self-executing norm but not in Austria, where a rule-making intervention by the State is necessary in order for this norm to be used (Ibid, p. 42). Leary says that the courts of different countries use different criteria (or the same criteria in different ways) in establishing which norm provision is self-executing. The result is that some norm provisions are used directly in the courts of a certain state but not in the courts of some other state (1982, p. 71). So, the treatment of an individual norm depends on the legal system of each state, says Tunkin (Tunkin & Rüdiger, 1988, pp. 46–47). On the other hand, Mazzeschi thinks that the problem of self-executing norms is not just a matter of domestic law but a mixed issue that concerns both international and constitutional law. International law contains some general knowledge about the existence of self-executing rules. But since this issue also affects the competent authorities of the state and the procedure of implementation of these international norms, it is also a matter of constitutional law (Randelzhofer & Tomuschat, 1999, p. 207).

What qualities must an international norm therefore have in order to be self-executing?

Müllerson states that self-executing norms of international law are those legal rules whose characteristics can be used by entities of individual countries in domestic courts where international law (whether derived from treaties or from customary international law or both) is directly applicable (2000 p. 194–195). Norms that are too imprecise, of course, cannot be self-executing

(Sik et al., 1994, p. 159). Self-executing norms include not only those that govern the rights of individuals but also those that the court evaluates to have the legal power of an administrative act, states Ergec (Verhelle, 1996, p. 172). Such are provisions of a treaty that govern extradition, state Jacobs and Roberts (ibid).

The doctrine recognizes that when establishing the existence of a self-executing norm in a treaty, two issues have to be clarified. Andre and Wouter distinguish two criteria, that is the objective and the subjective criterion. Both must be given together, that is cumulatively. The subjective criterion is to be found in the purpose and aims of the parties of treaty. If the contracting parties express consent and declare that the contractual obligation is recorded as self-executing, then these norms in the baseline can be regarded as such. However, most of the parties do not express such intention so clearly, especially in the case of multilateral treaties. The second, an objective criterion, means that the text of a treaty provision must be sufficiently clear and exact to be self-executing in court (Alan & Belt, 1996, pp. 170–171). Conforti adds a criterion that in the treaty there should not exist a prior request for such norm to be legislatively concretized (Conforti & Francioni, 1997, p. 85). Alan and Pas consider that an objective criterion is crucial (1996, p. 172).

Iwasana has a similar opinion about self-execution. He believes that what needs to be established first is whether the parties of the treaty completely excluded the direct applicability of the treaty provisions themselves. If the treaty contains such a provision, the direct applicability of norms is rejected. In this case, the direct use of norm is associated with the contractual intent of the parties. Secondly, if the direct applicability of a treaty is not excluded, only then the examination of individual rules should take place to find out whether they are sufficiently precise. In customary international law, only the second possibility of determining self-executing is applicable (1998, pp. 153–154). Perenič has a similar opinion and states that even before the international law is used in the domestic law of the Republic of Slovenia, the competent authority must clarify whether a specific international act should even be applied in a certain relation. To get the answer to this question, they must first ascertain whether it is a legally binding act. When there is no longer any dispute, they must determine who is committed to this act. Many international legal acts regulate only relations between the Contracting States, but there is also an increasing number of those that apply to individuals, such as the Convention for Protection of Human Rights and Fundamental Freedoms. It is also important to determine whether the international act is completely general or if it is specific enough to be used directly without additional regulations in domestic law. The third issue that the competent authorities should clarify regarding the use of international acts in domestic law is whether it is properly incorporated in the domestic legal system (1996, p. 9).

These conditions of the doctrine in international law that relate to self-executing norms are similar and comparable to those used in the case law

of the Court of Justice of the European Union and refer to European law. It is a question of direct effect in European law. The European Union represents a new legal order of international law for the benefit of which the states have limited their sovereign rights. This law does not require any legislative intervention (Škrk, 2005, p. 7), which the European Court of Justice ruled in 1963 in the case of 'Van Gend & Loos' (ECJ Case 26/62), thus justifying the doctrine of direct effect. This means that if some legal injunction has a direct effect, the individuals have a right that the national courts must protect (Hartley, 1998, p. 177). Winter argues that the concept of a 'direct effect' of a norm indicates a possibility for an individual to directly refer to such norm in proceedings that run within their legal order (Ilešič, 1997, p. 1325). Citing Hayley, the Court has established four conditions for, according to the provisions of European Union law, the direct effect to be recognized. The provision of the law must be: 1) clear, 2) unconditional, 3) in the form of prohibitions and 4) without reservation that would condition the use of the European legal norm in legal order of Member States on a positive legislation of a Member State (Sancin, 2009, p. 87).

Proprius signum norms of international law, which can be characterized as self-executing at the user's own understanding are: clarity, unconditionality, precision, completeness, editing rights and obligations of natural and legal persons.

7 Direct Applicability of Generally Accepted Principles of International Law

In 1998, the Supreme Court of the Republic of Slovenia faced the audit claim that the Constitution of the Republic of Slovenia does not allow for direct applicability of customary international law but held that this view cannot be accepted. It is true that the second sentence of the 8th Article of the Constitution states that ratified and published treaties are directly applicable, which means that the courts, in the application of their provisions, directly refer to it as the provisions of domestic law, without being streamed into domestic legislation. However, this does not mean that the judge cannot apply the principles of international law. When the Constitution requires the compliance of laws with generally accepted principles of international law (the 153rd Article of the Constitution) and thus gives the advantage of principles before the laws, it is clear that at a trial these principles are used (VS II Ips 55/98). In addition, this is also clear in the 3rd article of the Court Act,[7] which determines that in the course of the judicial function, the judge is bound to the general principles of international law as well as to the ratified and published treaties.

7 Courts Act (Official Gazette of RS, no. 19/94 et seq.) 3rd Article: "In the performance of the judicial function, the judge is bound to the Constitution and the law. In accordance with the Constitution, they are also bound to the general principles of international law as well as ratified and published treaties."

Although the generally accepted principles of international law are used in the Slovenian legal order *per se*, it is not fully clear how the administrative bodies should respond in situations where the rights and obligations of legal entities are at the same time protected by law and well-established international law but are contradictory.[8] More information concerning this issue is already known, but it refers to judges of the courts and not to the administrative bodies. However, the matter may be relevant in finding answers relating to the decisions made by administrative bodies.

Testen thinks that if the judge believes that the law that should be applied is inconsistent with the hierarchical superior provisions of treaties, he must stop the proceedings and initiate proceedings at the Constitutional Court (2003, p. 1,488). However, Novak states that if the judge of a court or any other governmental authority, including administrative bodies, when solving some issues, finds conflicting provisions of treaty and law, they should resolve the matter on the basis of a treaty. In doing so, they do not decide on the (in) validity of a provision of domestic law but only on its (non)applicability in the current case, in which the directly applicable international norm prevailed (1997, p. 30). Zupancic has a similar opinion. He thinks that the 125th and the 160th Articles of the Constitution do not exclude each other, saying that the Constitutional Court decides about conflict between a law and generally accepted principles of international law in an abstract manner, while the ordinary courts decide only for actual cases (Zupancic, 2010, p. 8). Testen argues that the provision of the 8th Article of the Constitution cannot serve as an argument that the Constitution in relation to treaties should withdraw from the system of concentrated constitutional review of constitutionality of laws (2003, p. 1,488). He justifies this with interpretations of Constitutional Court decisions no. U-I-154/93, U-I-77/93 and U-I-103/95. Furthermore, Testen believes that at first glance it could result that the Constitutional Court indicated a possibility for the treaty to change the statutory provisions in a manner that they derogate, due to the principle of direct applicability. But in his opinion, a more precise reading of the decision of the Constitutional Court can only lead to the conclusion that a treaty with individual self-executing provisions can only complement the law (Ibid, p. 1,492). From decisions I-154/93, UI-77/93 and UI-103/95, we can roughly deduce the following:

- A judge does not decide according to the uncoordinated law but according to the directly applicable norm of international law, which is also a self-executing one (UI-154/93).
- A judge does not decide according to the uncoordinated law and he does not decide according to the otherwise directly applicable rule of international law, because this international norm is not self-executing (UI-77/93).

8 For example, Fiscal Balance Act in its 188th and 246th Article deviate significantly from the binding provisions of the ILO Convention no. 158. These provisions also deviate significantly from the provisions of Directive 2006/54 EC and Council Directive 2000/78/EC, which binds on Slovenia on the basis of the 288th article of the Lisbon Treaty (OJ C 306/01).

- A judge uses both legal norms (domestic law and international law), which are complementary (UI-103/95).

The above paragraph presents opinions that relate to practices of judges of courts but do not relate to practices of the administrative bodies, with the exception of Novak who thinks that the administrative bodies who, while resolving some issues, encounter conflicts between provisions of treaties and laws, need to resolve the matter on the basis of the rules of treaties (1997, p. 30).

How should the administrative bodies therefore respond in situations where the rights and obligations of legal entities are at the same time protected by law and established international law but are contradictory? This is in fact a question of compliance of a certain statutory norm with a certain norm of international law[9] and the question of direct applicability of the norms of international law.

When deciding, it is necessary in some cases[10] to directly use the Constitution and not only its wording but also the interpretation of the Constitution, as the Constitution Court developed in its final decisions (which are compulsory according to the 3rd paragraph of the 1st Article of the Constitutional Court Act) (Stupica, 2013, p. 27). The explanations of decisions of Constitutional Court are therefore very important and binding for the understanding of the law.

The Constitutional Court stated in its 2010 decision: "Administrative bodies are / ... / in their procedures obliged to protect the constitutional order and human rights and fundamental freedoms, because this obligation is not and cannot be detained only by courts".

It is true though that the administrative bodies are in accordance with the principle of legality bound to law and cannot refuse its application in case of doubt regarding its compliance with the Constitution. Furthermore, during the process they are not entitled to set requirements for the assessment of compliance of the law with the Constitution on the Constitutional Court, because this option is given only to the court (the 156th Article of the Constitution). However, taking into account the binding of administrative bodies on the Constitution and the obligation to respect the constitutional rights of individuals and legal entities, administrative bodies should in case of deciding about rights, obligations or legal interests of the parties with potentially unconstitutional law, warn a higher authority. The higher authority should examine this and in case of doubt regarding the constitutionality of the law suggest appropriate action of the highest authority of the executive

9 The Constitution, in the second paragraph of the 153rd Article, states: "Laws must be in compliance with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties".

10 The Constitution, in the 15th Article, states: "Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution".

branch of government, who is in accordance with the Constitution and the law competent and responsible for suggesting change of the unconstitutional provision or requesting a review of the law at the Constitutional Court (U.S. UI-39/10-6).

From this decision, it can be with logical reasoning understood that:

- The administrative authorities, in addition to the courts, are also obliged to protect constitutional order as well as human rights and fundamental freedoms.
- The administrative bodies cannot refuse application of law.
- The administrative bodies are bound by the Constitution and an obligation to respect the constitutional rights of individuals and legal entities, therefore they must 'only' inform superiors about the likelihood of unconstitutional law.
- If higher administrative bodies, after examining the views of a subordinate administrative bodies, consider that the views about unconstitutionality of law are justified, they make a proposal of an appropriate action to the highest authority of the executive branch of government.

It seems that such an understanding of judicata is too restrictive, because it does not provide an effective protection of human rights and fundamental freedoms.

However, by carefully reading the relevant judicial decision, the content might be understood in a manner that it applies only to cases not specifically referring to human rights and fundamental freedoms of the II. Chapter of the Constitution but only to 'other cases' that otherwise affect the constitutional rights of individuals and legal entities.[11] In favor of this proposition is the fact that the Constitutional Court wrote two formulations in the same judicial decision regarding the protection of constitutional rights. The first is as follows:

- "duty to respect the constitutional rights of individuals and legal entities".

The second formulation is as follows:

- "bound to protect constitutional order and human rights and fundamental freedoms".

11 The decision of the Constitutional Court UI-39/10-6 shows that the initiator of proceedings before the Constitutional Court does not claim a lack of compliance with the provisions of the impugned Act Constitution between the 14th and the 65th Article that define human rights and fundamental freedoms.

In doing so, of course, the logical question is whether the 'guidance'[12] to administrative bodies in the judicial decision of the Constitutional Court regarding the obligation to respect the constitutional rights of individuals and legal entities is to be understood the same also in cases where the administrative bodies have to decide on matters that concern the human rights and fundamental freedoms of the II. Chapter of the Constitution. Does the linkage of administrative bodies to the principle of legality really mean that at the existence of the law and the norm of international law, which govern the specific question of the rights and obligations of the individual each in a different, conflicting way, administrative bodies should nevertheless use the law and ignore a directly applicable self-executing norm of international law that is at the same time, in the hierarchy of legal acts in the Slovenian legal order, above the law? Does the 15th Article of the Constitution due to the principle of legality not bind the administrative bodies to direct realization of human rights and fundamental freedoms?

Expressed simplistic questions indicate their own denial. What arguments can be given in favor of the denial of the questions?

Do not forget that the Constitutional Court decision in the actual case undoubtedly stated that the administrative bodies are obliged to protect human rights and fundamental freedoms. Logically, this can only be done when they themselves do not violate them. This hypothesis can additionally be argued with the decision of the Constitutional Court in 1996, when it stated that judges are obliged to respect human rights and fundamental freedoms 'directly' on the basis of the 15th Article of the Constitution (U.S. Up-155/95). The decision of the Constitutional Court U-I-39/10-6 does not reserve the protection of human rights and fundamental freedoms only for the courts but also for administrative bodies, therefore it is by concluding with argument *ad simili ad simile* logical that the decision of the Constitutional Court Up-155/95, which talks about the direct application of the Constitution under the provisions of the 15th Article, is also binding on administrative bodies, despite the principle of legality.

This largely refers to the provision of the 120th Article of the Constitution, which states that administrative bodies perform their work within the framework and on the basis of the Constitution and laws. So also on the basis of the 15th Article of the Constitution! This also is not in an irresolvable conflict with the provisions of the 153rd Article of the Constitution, which states that individual acts and actions of state authorities must be based on a law or a regulation adopted pursuant to law. Treaties can also be considered

12 Administrative authorities are in accordance with the principle of legality bound to the law and cannot refuse to use it in case of doubt in its compliance with the Constitution. Administrative authorities must alert a higher body, which should examine the issue and in case of doubt about the constitutionality of the Act propose appropriate action to the highest authority of the executive branch of government, which according to the Constitution and the law is competent and responsible for proposing a modification of the unconstitutional regulation or filing a request for assessment of law to the Constitutional Court.

as regulations adopted pursuant to law (Sturm, 2002, p. 1009). Since there is no hierarchy among the sources of international law, certain self-executing norms of customary international law, which have in 'material sense' the necessary characteristics of regulation, may logically in a broader sense fall under regulations adopted pursuant to law. Take, for example, The Universal Declaration of Human Rights, which in Slovenia does not apply as a treaty, but there are specified norms as part of customary international law that are, according to the 8th Article of the Constitution, a part of the domestic legal order *per se*.

These arguments provide the basis for informed advocacy positions, stating that administrative bodies must in the case when deciding about the rights and obligations of legal entities that are classified in II. Chapter of the Constitution and are at the same time contradictorily regulated by law and the established norm of customary international law, use the latter that is directly based on the 15th Article of the Constitution.

8 Conclusion

In defining the problem of the topic covered, during the initial part of the paper a research question was posed. It concerns the ability to prove the existence of generally accepted principles of international law and their direct applicability by administrative bodies.

Generally accepted principles of international law are directly applicable in the legal order of the Republic of Slovenia according to settled case law of the Constitutional Court, although this is not explicitly stated in the Constitution. As this is usually the unwritten matter of a valid international law, there is the problem of recognition of these norms that apply in the legal order of the Republic of Slovenia *per se*. The user must locate them first in the relevant judgments of international tribunals. There is an additional obstacle. With the exception of the judgments of the European Union Court of Justice, Slovenia did not take care of appropriate Slovenian translations of relevant decisions of international judicial and arbitral tribunals. Furthermore, such decisions are also not collected in one place. What can be of assistance is the case law of the Constitutional Court, in which the Court already rejected or recognized unwritten norms of customary international law. But there are not a lot of these types of decisions. One can also help oneself with the specialized literature in the field of customary international law in which recognized international legal experts deal with concrete matters of this kind. Obviously, the problem of identifying the generally accepted principles of international law exists and is not systemically solved. It is left to the skills and resourcefulness of the individual users of the law.

Although the generally accepted principles of international law are used in the Slovenian legal order *per se*, it is not fully clear how the administrative bodies should respond in situations where the rights and obligations of legal entities

are at the same time protected by law and well established international law but are contradictory. By carefully reading the contents of the judgment of the Constitutional Court UI-39/10-6, two situations can be understood. The first situation is that the administrative bodies must, in case of a controversial law governing the 'constitutional rights of individuals or legal entities', inform the higher body, which must in the case of a confirmed doubt propose an appropriate action to the highest authority of the executive branch of government. The latter is, in accordance with the Constitution and the law, competent and responsible to propose a change of the unconstitutional regulation or to request a review of the law at the Constitutional Court. The second situation is when the controversial law governs the 'human rights and fundamental freedoms' from the II. Chapter of the Constitution. In such cases, there are arguments that the administrative body, in spite of the principle of legality, should, on the basis of the 15th Article of the Constitution, use the self-executing norm of customary international law.

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