ILA SERBIA
INTERNATIONAL LAW ASSOCIATION

SRPSKO UDRUŽENJE
ZA MEĐUNARODNO PRAVO

SRPSKI GODIŠNJAK ZA MEĐUNARODNO PRAVO

Urednik
Duško Dimitrijević

Beograd, 2023.

SRPSKO UDRUŽENJE ZA MEĐUNARODNO PRAVO

Serbian International Law Association

SRPSKI GODIŠNJAK ZA MEĐUNARODNO PRAVO

The Serbian Yearbook of International Law (SYIL)

(Treće izdanje/Third annual edition)

Duško Dimitrijević (ur.)

Beograd, 2023.

Izdavač

Srpsko udruženje za međunarodno pravo
(Serbian International Law Association)

Bulevar Kralja Aleksandra br. 67, Beograd

Za izdavača

Prof. dr Milenko Kreća

Glavni i odgovorni urednik

dr Duško Dimitrijević

Zamenici glavnog i odgovornog urednika

Prof. dr Aleksandar Gajić
dr Marko Novaković

Kompjuterska obrada

Snežana Vojković

Štampa

Pharmalab laboratorija
Poručnika Spasića i Mašare 22,
11030, Beograd

ISBN-978-86-903836-2-7

SADRŽAJ

MEĐUNARODNA PRAKSA
(International Practice)

PREDGOVOR

Imamo čast i zadovoljstvo da naučnoj javnosti pružimo na uvid treće izdanje Godišnjaka Srpskog udruženja za međunarodno pravo (SUMP), nacionalnog ogranka Svetskog udruženja za međunarodno pravo (International Law Assocciation – ILA).

Godišnjak SUMP-a predstavlja tematski naučni zbornik radova međunarodnog značaja koji izlazi na godišnjem nivou. Izdavanje Godišnjaka potaknuto je željom za permanentnim proučavanjem međunarodnog prava i pravnih aspekata međunarodnih odnosa. Njegovo objavljivanje ima za cilj da unapredi naučnu misao o različitim oblastima međunarodnog prava i da pruži pouzdanu i sistematizovanu osnovu neophodnu za sagledavanje aktuelnih pravnih trendova u međunarodnim odnosima. Pomenutim pristupom, omogućava se eklektička sinteza teorijsko-empirijskih saznanja koja može biti razrađena i unapređena u međunarodnoj praksi.

Naučni rezultati objavljeni u Godišnjaku sasvim izvesno mogu poslužiti i kao solidna osnova za izbalansirano spoljnopolitičko pozicioniranje Republike Srbije u normativnom, holistički povezanom sistemu međunarodnih odnosa.

Izdavanje Godišnjaka pruža i realnu šansu za povezivanje članova SUMP-a sa pravnicima iz drugih zemalja, razmenu i disemenaciju njihovih naučnih znanja i iskustava, kao i za unapređenje međunarodne naučne saradnje. U tom smislu, Godišnjak predstavlja i jedno poželjno sredstvo u pravcu daljeg osposobljavanja naučnika, istraživača, pravnika i političara, državnika i diplomata i svih onih koji stečeno znanje na profesionalnom planu treba da primene u međunarodnoj praksi.

Rukovodeći se principima naučnoistraživačkog rada i slobodnog naučnog izražavanja, urednik Godišnjaka je, pored davanja prostora već afirmisanim međunarodnim pravnicima, pružio priliku i mladim istraživačima da svoja znanja razrade u naučna dela kako bi sa više optimizma nastavili svoju naučnu misiju na planu sistematskog proučavanja međunarodnog prava.

Konačno, sistematsko i kontinuirano proučavanje međunarodnog prava predstavlja jedinu valjanu garanciju za njegovu doslednu primenu u praksi, a što jeste i glavni motiv istrajne zaštite univerzalnih međunarodnih vrednosti.

Duško Dimitrijević
Glavni i odgovorni urednik Godišnjaka
Naučni savetnik IMPP, Beograd

FOREWORD

We are honored and pleased to present to the scientific public the third edition of the Yearbook of the Serbian Association of International Law (SILA), the national branch of the International Law Association (ILA).

The Yearbook of SILA is a thematic proceeding of scientific works of international importance that is published annually. Publication of the Yearbook was motivated by the desire for permanent study of international law and legal aspects of international relations. Its publication aims to advance scientific thought on various areas of international law and to provide a reliable and systematized basis necessary for understanding current legal trends in international relations. The mentioned approach enables an eclectic synthesis of theoretical-empirical knowledge that can be elaborated and improved in international practice.

The scientific results published in the Yearbook can certainly serve as a solid basis for a balanced foreign policy positioning of the Republic of Serbia in a normative, holistically connected system of international relations.

Publication of the Yearbook also provides a real chance to connect SILA members with lawyers from other countries, to exchange and disseminate their scientific knowledge and experience, as well as to improve international scientific cooperation. In this sense, the Yearbook represents a desirable tool in the direction of further training of scientists, researchers, lawyers and politicians, statesmen and diplomats and all those who need to apply the acquired knowledge on a professional level in international practice.

Guided by the principles of scientific research work and free scientific expression, the editor of the Yearbook, in addition to giving space to established international lawyers, also provided an opportunity for young researchers to develop their knowledge into scientific works in order to continue their scientific mission with more optimism in the systematic study of international law.

Finally, the systematic and continuous study of international law represents the only valid guarantee for its consistent application in practice, which is also the main motive for persistent protection of universal international values.

Duško Dimitrijević,
Editor in Chief of the Yearbook
Professorial Fellow of the IIPE, Belgrade

STEVAN ĆIRKOVIĆ (1899–1991) – BIOGRAFIJA JEDNOG MEĐUNARODNOG PRAVNIKA

Sanja ĐAJIĆ*

APSTRAKT

U novim okolnostima između dva svetska rata međunarodno pravo postalo je važnije nego ikada pre u svojoj istoriji. Prvi svetski rat uneo je korenite promene u međunarodne odnose i značajno promenio političku kartu sveta. Pojavio se veliki broj novih država, osnovano je Društvo naroda i Stalni sud međunarodne pravde. Vera i nada položene u moć međunarodnog prava da rešava međunarodne probleme bile su u usponu. Poznate su periodizacije međunarodnog prava koje kao ključan momenat navode upravo kraj Prvog svetskog rata, kao događaj koji značajno menja dotadašnju ulogu i arhitekturu međunarodnog prava.[1] Tako je i u Kraljevini SHS (Jugoslaviji) nauka međunarodnog prava bila vrlo živa i plodna u tom periodu. U bibliografiji radova publikovanih od 1918. do kraja 1936. godine navodi se impresivan podatak da je u ovom periodu objavljeno više od 2.000 radova, na srpskom, hrvatskom i slovenačkom jeziku, iz oblasti međunarodnog prava i srodnih disciplina.[2] Među autorima se nalaze i mnoga manje poznata imena jugoslovenske i srpske nauke međunarodnog prava. Cilj ovog rada je da jedno od tih imena približi savremenoj domaćoj stručnoj javnosti. Jedan iz plejade međunarodnih pravnika ovog perioda je i Stevan Ćirković, čiji će život i rad biti prikazani na osnovu dostupne arhivske građe i njegove naučne produkcije.

Ključne reči: Stevan Ćirković, profesor, diplomata, međunarodno pravo, Kraljevina Jugoslavija

* Redovni profesor, Pravni fakultet Univerziteta u Novom Sadu. E-mail: s.djajic@pf.uns.ac.rs

[1] Ignacio de la Rasilla, The Problem of Periodization in the History of International Law, *Law and History Review, 37*(1), 2019, 275–308. doi:10.1017/S0738248018000445.

[2] *Annuaire de l'Association Yougoslave de Droit International*, Belgrade–Paris, 1931, 351–393; *Annuaire de l'Association Yougoslave de Droit International,* troisième volume, 1937, 351–424.

BIOGRAFIJA JEDNOG MEĐUNARODNOG PRAVNIKA

Stevan Ćirković (Stévan Tchirkovitch), (Pirot, 5. I 1899 – Pariz, Francuska, 16. IX 1991), bio je međunarodni pravnik, diplomata i univerzitetski profesor.[3] Rođen je u uglednoj pirotskoj trgovačkoj porodici od oca Koste i majke Nikoline rođene Marić.[4] Otac Kosta (Koca) Ćirković bio je trgovac vunom,[5] a stric, Vojin Ćirković (1859-1927),[6] gradonačelnik Pirota, narodni poslanik i bliski saradnik Nikole Pašića. Imao je dva brata, Miroslava-Mirka (1916-1945) koji je bio komandant Čegarskog korpusa, i Predraga, advokata u Knjaževcu.[7] Osnovnu školu i gimnaziju završio je u Pirotu. Pred početak Prvog svetskog rata završio je šesti razred Pirotske gimnazije, ali je njegovo školovanje tokom rata prekinuto jer se u Pirotu nije odvijala nastava za vreme bugarske okupacije. Uverenje Opštinskog suda u Pirotu pokazuje da su bugarske okupacione vlasti pred kraj okupacije uhapsile Stevana Ćirkovića i da ga je bugarski vojni sud osudio na kaznu zatvora iz političkih razloga.[8] Zbog prekida školovanja maturirao je tek 1919. godine.[9] Studije prava završava u Beogradu 1923. godine,[10] a doktorat stiče na Sorboni 11. juna 1926. Prvi put se zaposlio u Ministarstvu inostranih dela Kraljevine SHS 16. juna 1921. kao referent za stranu štampu u Odeljenju za štampu,[11] položaj koji je imao do 30. januara 1923.[12] Izgleda da se prvo nameštenje završilo neslavno jer je okončano zbog drskog ponašanja prema ministru Županiću u prisustvu drugih službenika Ministarstva.[13] Od 1. februara 1924. ponovo je u Ministarstvu i to na položaju novinara-dnevničara u Presbirou, gde ostaje do 1. januara 1925. kada podnosi ostavku.[14] Već u januaru 1925. obraća se Ministarstvu spoljnih poslova, tačnije ministru lično, sa molbom da bude postavljen za činovnika-pripravnika u poslanstvu ili konzulatu Kraljevine SHS u Parizu gde u to vreme već živi.[15] Ovu njegovu molbu podržao je preporukom i Velimir Vukićević, Ministar pošta i telegrafa Kraljevine SHS, dugogodišnji član Radikalne stranke. U preporuci

[3] Arhiv Jugoslavije (AJ), Personalni dosijei, Stevan Ćirković, 334-201-429.

[4] Simo C. Ćirković, *Ko je ko u Nedićevoj Srbiji 1941-44,* Beograd, 2009, 484.

[5] Ilija Nikolić, *Pirot i srez nišavski* 1894-1918, Građa 3, Pirot, 1982, 184, 374.

[6] AJ, Personalni dosijei, Stevan Ćirković, 334-201-365.

[7] Simo C. Ćirković, nav. delo, 485.

[8] Uverenje opštine pirotske br. 6602, 27. maj 1937., AJ, Personalni dosijei, Stevan Ćirković, 334-201-415.

[9] AJ, Personalni dosijei, Stevan Ćirković, 334-201-429.

[10] Simo C. Ćirković, nav. delo, 484.

[11] AJ, Personalni dosijei, Stevan Ćirković, 334-201-313.

[12] AJ, Personalni dosijei, Stevan Ćirković, 334-201-314.

[13] AJ, Personalni dosijei, Stevan Ćirković, 334-209-531.

[14] AJ, Personalni dosijei, Stevan Ćirković, 334-201-315/320.

[15] AJ, Personalni dosijei, Stevan Ćirković, 334-201-316/317.

sačinjenoj u obliku pisma ministru spoljnih poslova Velimir Vukićević za Stevana kaže: „Od radikalske je vune sukan."[16] Političku preporuku delimično može da potvrdi i činjenica da je Stevan Ćirković objavljivao često u *Novom životu*, časopisu radikalske provenijencije, kao i to što je bio blizak sa dr Milenkom Vesnićem (1863–1921), profesorom međunarodnog prava, diplomatom, ministrom inostranih poslova i predsednikom vlade Kraljevine SHS, kome je posvetio svoju doktorsku monografiju. Molbe i intervencije su izgleda delimično urodile plodom i Stevan Ćirković je 13. maja 1925. postavljen za pripravnika 9. grupe I kategorije u Ministarstvu inostranih dela.[17] Pošto je u to vreme boravio u Parizu radeći na svojoj doktorskoj disertaciji, o imenovanju ga je obavestilo Kraljevsko poslanstvo u Parizu, ali Stevan, koji prihvata imenovanje, gotovo istovremeno podnosi molbu da mu se odobri odsustvo do 1. oktobra 1925. da bi završio istraživanje za disertaciju i pisanje naučnih radova.[18] U nekoliko molbi Stevan navodi da priprema doktorsku disertaciju iz međunarodnog javnog prava, na Pravnom fakultetu u Beogradu, na temu „Problem međunarodne bezbednosti",[19] ali ovu disertaciju nikada neće okončati niti će zvanje doktora prava steći na Beogradskom univerzitetu. Izgleda da Ministarstvo inostranih dela nije usvojilo zahtev Stevana Ćirkovića jer ga je 9. jula 1925. rasporedilo u Administrativno pravno odeljenje.[20] Pošto je on, ispostaviće se, ranije podneo molbu, podržanu od strane Beogradskog univerziteta, da dobije državnu stipendiju za studijsko usavršavanje u Francuskoj, koja je usvojena 26. juna 1925. Ministarstvo prosvete je sada uputilo molbu Ministarstvu inostranih dela da se Stevanu Ćirkoviću, kao državnom pitomcu, odobri odsustvo radi korišćenja stipendije od 1. avgusta 1925. do 1. aprila 1926.[21] Ova molba Ministarstva sačinjena je 30. jula 1925., dakle samo dan pre početka korišćenja stipendije. Direktor Administrativno-pravnog odeljenja je Ćirkovića razrešio dužnosti 3. avgusta, pretpostavlja se, jer mu je odsustvo i odobreno.[22] Stevan je 20. marta 1926. tražio produženje odsustva, i to kao neplaćenog, do kraja avgusta te godine „radi definitivnog dovršavanja doktorskih studija na Pravnom fakultetu Pariskog univerziteta".[23] Ovde se prvi put pominje činjenica da Stevan Ćirković priprema doktorat u Francuskoj – do tada je bilo reči o doktoratu u Beogradu i samo o stručnom usavršavanju u inostranstvu. Međutim, izgleda da je Stevan, koji se nalazio u Francuskoj već od kraja 1924. godine (stalno je komunicirao sa Ministarstvom inostranih dela preko poslanstva u Parizu), već

[16] AJ, Personalni dosijei, Stevan Ćirković, 334-201-318.

[17] AJ, Personalni dosijei, Stevan Ćirković, 334-201-322.

[18] AJ, Personalni dosijei, Stevan Ćirković, 334-201-327.

[19] AJ, Personalni dosijei, Stevan Ćirković, 334-201-317/327.

[20] AJ, Personalni dosijei, Stevan Ćirković, 334-201-330.

[21] AJ, Personalni dosijei, Stevan Ćirković, 334-201-335.

[22] AJ, Personalni dosijei, Stevan Ćirković, 334-201-338/340.

[23] AJ, Personalni dosijei, Stevan Ćirković, 334-201-339.

uveliko bio angažovan na pisanju radova iz oblasti međunarodnog javnog prava a ostvario je i dobre kontakte sa poznatim međunarodnim pravnicima i diplomatama kao što su Lapradel (*Albert Geouffre de Lapradelle*), Alvarez (*Alejandro Alvarez*), Politis (*Nicolas Politis*) i Edvard Beneš. Kao što je pomenuo u jednoj svojoj molbi, dobio je stipendiju od Karnegijeve zadužbine u Parizu da pohađa letnji kurs Haške akademije za međunarodno pravo u „Holandskoj".[24] On je zaista i bio prvi srpski i jugoslovenski polaznik ove letnje škole (1926) koja je počela sa radom 1923.[25] Produženje odsustva je odobreno[26] i Stevan Ćirković je 11. juna 1926. promovisan za doktora prava na Pravnom fakultetu Pariskog univerziteta.[27] Disertaciju na temu "*L'Institute Américain de Droit International – Son Rôle et Son Oeuvre*" (Američki institut za međunarodno pravo – njegova uloga i njegov rad) odbranio je pred komisijom koju su činili ugledni francuski profesori međunarodnog prava. Predsednik komisije bio je Lapradel (*Albert Geouffre de Lapradelle*) a članovi Badevon (*Jules Basdevant*) i Židel (*Gilbert Gidel*). Lapradel je osnivač uglednog Instituta za visoke međunarodne studije (IHEI – *Institut des hautes études internationales*)[28] Univerziteta u Parizu na kojem će Stevan Ćirković postati profesor posle Drugog svetskog rata.

Po povratku iz Pariza u centralu Ministarstva inostranih dela u Beogradu, postavljen je 8. oktobra 1926. u Odsek za protokol Generalne političke direkcije kao pripravnik 9. grupe I kategorije.[29] Upućen je na rad u Trgovačko-političko odeljenje Direkcije za ugovore 18. jula 1927, još uvek u statusu pripravnika.[30] Kada je položio državni ispit u Ministarstvu postavljen je za stalnog činovnika 1. novembra 1927.[31] Ukazom Kralja Aleksandra od 17. decembra 1927. proizveden je u čin rezervnog sudskog poručnika.[32] Zatim je 12. januara 1928. unapređen u pisara I kategorije 8. grupe u Konzularno-trgovinskom odeljenju,[33] a od 22. avgusta

[24] AJ, Personalni dosijei, Stevan Ćirković, 334-201-327.

[25] Živojin Perić, Association des auditeurs et anciens auditeurs de l'Académie de Droit international de La Haye A.A.A. Bulletin No. 7 Novembre 1929, *Arhiv za pravne i društvene nauke*, XXXVII (1930), 243. Živojin Perić pominje Stevana Ćirkovića sa posebnim pohvalama: „G. Ćirković je jedan od onih naših mladih diplomata koji stižu da se, pored službenog poslova, bave i stručnom književnošću; tako, G. Ćirković je publikovao dve izvrsne studije: *Žena i diplomacija. Treba li i ženama dopustiti stupanje u diplomatsku službu?* Sa predgovorom od Dr-a Momčila Ninčića, pređ. Ministra Inostranih Dela, Beograd 1928., i *Međunarodni Pacifizam i Njegovi Protivnici*, odštampano iz Srpskog Književnog Glasnika, Beograd, 1929." Živojin Perić, nav. delo, 243.

[26] AJ, Personalni dosijei, Stevan Ćirković, 334-201-340.

[27] AJ, Personalni dosijei, Stevan Ćirković, 334-201-343.

[28] https://ihei.u-paris2.fr/fr.

[29] AJ, Personalni dosijei, Stevan Ćirković, 334-201-345.

[30] AJ, Personalni dosijei, Stevan Ćirković, 334-201-358.

[31] AJ, Personalni dosijei, Stevan Ćirković, 334-201-369.

[32] Ukaz Kralja Aleksandra br. 39311 od 17. decembra 1927, Službeni vojni list br. 51/1927.

[33] AJ, Personalni dosijei, Stevan Ćirković, 334-201-393.

1928. kao pisar prelazi u Odsek za šifre.[34] Ubrzo je na ovom mestu, u januaru 1930. godine, došao u sukob sa nadređenima. Optužen je za neurednost u poslu i kašnjenje i rešenjem pomoćnika ministra kažnjen je sa 10% mesečne plate.[35] Interesantno je da mu se ova neprijatna epizoda desila tri nedelje pre venčanja sa Olgom Perović.[36] Stevan se oženio Olgom Perović 23. februara 1930. a brak je razveden presudom Crkvenog suda u Beogradu, po Olginoj tužbi, krajem 1937. godine, dok je Stevan službovao u Kraljevskom poslanstvu u Berlinu.[37] Ipak, 14. marta 1931. biće unapređen u sekretara[38] i ubrzo postavljen za šefa kabineta i referenta ministra inostranih poslova pri Predsedništvu Ministarskog saveta.[39] Sa ove funkcije će 5. decembra 1931. biti upućen u diplomatsku misiju kao sekretar Kraljevskog poslanstva u Parizu, funkciju koju će preuzeti 1. januara 1932.[40] U avgustu iste godine, po nalogu ministra inostranih poslova, Bogoljuba Jevtića, upućen je u konzulat u Mecu[41] ali se tamo nije dugo zadržao jer ubrzo posle toga iz poslanstva u Parizu piše nekoliko molbi za unapređenje. Međutim, Bogoljub Jevtić ga 7. jula 1933. hitno opoziva sa dužnosti sekretara u poslanstvu i vraća u Beograd.[42] Uprkos intervencijama poslanika u Parizu, Jevtić ponavlja opoziv i to u formi naređenja.[43] Pored hitnog opoziva ono što pobuđuje pažnju je i činjenica da je Ćirković opozvan posle svega godinu i po dana službe u inostranstvu. Iako nema podataka o razlozima njegovog opoziva, čini se da je reč o nekom sukobu jer je Stevan Ćirković, docnije, u obraćanju tadašnjem predsedniku vlade, Milanu Stojadinoviću, pomenuo ovaj pariski incident kao nepravdu koju mu je učinio Stojadinovićev prethodnik, a to je bio Bogoljub Jevtić.[44] Po povratku u Beograd radio je u III Političkom odseku.[45] Izvesno je da Stevan Ćirković nije bio zadovoljan svojim položajem u Ministarstvu inostranih poslova. Ovo se nezadovoljstvo odnosilo na klasu i rang, sporo napredovanje u službi, niska primanja, a najviše na činjenicu da je malo vremena proveo u službi u inostranstvu. U pomenutom pismu Stojadinoviću Stevan Ćirković se žali: „Ja sam do sada u struci stalno i sistematski bio zapostavljan i potiskivan."[46] U istom pismu pominje svoj rad u oblasti međunarodnog prava. Žalba je, izgleda,

[34] AJ, Personalni dosijei, Stevan Ćirković, 334-201-381.

[35] AJ, Personalni dosijei, Stevan Ćirković, 334-201-396/402/405.

[36] AJ, Personalni dosijei, Stevan Ćirković, 334-201-406.

[37] AJ, Personalni dosijei, Stevan Ćirković, 334-201-503.

[38] AJ, Personalni dosijei, Stevan Ćirković, 334-201-412.

[39] AJ, Personalni dosijei, Stevan Ćirković, 334-201-421.

[40] AJ, Personalni dosijei, Stevan Ćirković, 334-201-430.

[41] AJ, Personalni dosijei, Stevan Ćirković, 334-201-431.

[42] AJ, Personalni dosijei, Stevan Ćirković, 334-201-442.

[43] AJ, Personalni dosijei, Stevan Ćirković, 334-201-447.

[44] AJ, Personalni dosijei, Stevan Ćirković, 334-201-473.

[45] AJ, Personalni dosijei, Stevan Ćirković, 334-201-469.

[46] AJ, Personalni dosijei, Stevan Ćirković, 334-201-473.

urodila plodom jer je četiri meseca kasnije, 12. novembra 1935. upućen na dužnost sekretara Kraljevskog poslanstva u Berlinu.[47] Na tu dužnost je stupio već 17. novembra iste godine.[48] U vreme boravka u Berlinu, 6. februara 1936, na predlog Ministra pravde, odlikovan je Ordenom jugoslovenske krune četvrtog reda.[49] Unapređen je za sekretara Pete položajne grupe Poslanstva u Berlinu 1938. godine.[50] Posle isteka perioda od četiri godine, Stevan Ćirković je, odlukom od 23. decembra 1939. razrešen dužnosti sekretara u Poslanstvu u Berlinu i vraćen u centralu Ministarstva inostranih poslova na mesto sekretara Pete položajne grupe[51] u Političkom odeljenju.[52] Međutim, poslanik Ivo Andrić je zamolio Ministarstvo da zadrži Ćirkovića na radu do kraja februara 1940. godine.[53] Zahtev je odobren[54] i tako se Stevan Ćirković vratio u Beograd 25. marta 1940.[55] sa svoje poslednje diplomatske službe u inostranstvu. Boravak u Berlinu je, čini se, bio uspešan, naročito u poređenju sa službom u Parizu. Proveo je više od četiri godine u ovom poslanstvu i dobio odlične ocene za svoj rad.[56]

Postoji i jedna zanimljivost o njegovom službovanju u Berlinu. Prilikom odlaska na dužnost sekretara prijavio je stvari koje nosi sa sobom među kojima su bili i sedam sanduka zimnice, nameštaj za bosansku sobu, jorgani, jastuci i ćilimi. Na povratku prijavljene su pak sledeće stvari: sedam sanduka knjiga, porcelansko posuđe, gramofon i dve kutije gramofonskih ploča, osam kutija za šešire, sanduk vina, antički orman-vitrina, harmonika, mali klavir i automobil kabriolet marke Mercedes Benc 230.[57] Ubrzo po povratku u Beograd, 8. maja 1940.[58] unapređen je u savetnika i postavljen za šefa Trećeg Političkog odseka Ministarstva inostranih poslova.[59] Međutim, ratne okolnosti menjaju njegov položaj u ministarstvu. Odlukom Predsednika Ministarskog saveta, Milana Nedića, od 27. februara 1942. stavljen je na raspolaganje, a zatim penzionisan 13. jula 1942.[60] Gestapo ga je uhapsio iste godine. Posle četiri meseca u Glavnjači i logoru na Banjici,[61] početkom

[47] AJ, Personalni dosijei, Stevan Ćirković, 334-201-478.

[48] AJ, Personalni dosijei, Stevan Ćirković, 334-201-479.

[49] AJ, Personalni dosijei, Ivan Subbotić, 334-195-766.

[50] AJ, Personalni dosijei, Stevan Ćirković, 334-201-505.

[51] AJ, Personalni dosijei, Stevan Ćirković, 334-201-518/519.

[52] AJ, Personalni dosijei, Stevan Ćirković, 334-201-527.

[53] AJ, Personalni dosijei, Stevan Ćirković, 334-201-522.

[54] AJ, Personalni dosijei, Stevan Ćirković, 334-201-523.

[55] AJ, Personalni dosijei, Stevan Ćirković, 334-201-529.

[56] AJ, Personalni dosijei, Stevan Ćirković, 334-201- 502/516/521.

[57] AJ, Personalni dosijei, Stevan Ćirković, 334-201-526.

[58] AJ, Personalni dosijei, Stevan Ćirković, 334-201-534.

[59] AJ, Personalni dosijei, Stevan Ćirković, 334-201-530/531.

[60] AJ, Personalni dosijei, Stevan Ćirković, 334-201-534.

[61] Stevan Ćirković, Problem Kosova, *Glas kanadskih Srba,* br. 2490, 3. mart 1983, 4.

1943. godine, zajedno sa grupom oficira, interniran je kao ratni zarobljenik u vojni zatvor Oflag (*Offizierslager*) XIII (*Langwasser*) u Nirnbergu.[62] Verovatno je premešten sa svim zatvorenicima u Hamelburg, 100 km severozapadno od Nirnberga, posle savezničkog bombardovanja u aprilu 1943.[63] Kraj rata je dočekao u zarobljeništvu. Posle rata se nije vratio u Jugoslaviju već odlazi u Pariz gde započinje akademsku karijeru. U Francuskoj se bavi međunarodnim i uporednim pravom, prvo kao saradnik istraživač pri Nacionalnom centru za naučna istraživanja (*Centre national de la recherche scientifique*)[64] (1946-48), a od 1948. kao profesor na Institutu za visoke međunarodne studije (*Institut des Hautes Études Internationales*) Univerziteta u Parizu. Poznato je, na osnovu podataka iz arhiva Instituta za visoke međunarodne studije, da je držao predavanja na doktorskim studijama ovog instituta iz predmeta *La protection de l'individu et des minorités nationales d'après les traités diplomatiques (du début du XVIIIe siècle à nos jours)*[65] i *Le nouveu Statut Juridique International du Danube et le régime du secteur des Cataractes et des Portes de fer*.[66] Međunarodnim pravom se bavio od početka svoje karijere. U periodu između dva rata bio je jedan od osnivača, sekretar i aktivan član Jugoslovenskog udruženja za međunarodno pravo i urednik njegovih izdanja. Pored objavljivanja doktorske disertacije u Parizu,[67] u ovom periodu piše radove o položaju pojedinca u međunarodnom pravu, statusu manjina, i o ženama u diplomatskoj službi, ali i o aktuelnim temama iz međunarodnih odnosa (Društvo naroda, Balkanski pakt, međunarodni mir). Posle rata, u Francuskoj nastavlja da piše o ljudskim pravima, humanitarnom pravu, izbeglicama i pravu država u istočnoj Evropi. Bio je redovan saradnik uglednih časopisa kao što su *Revue général de droit international public*, *Revue internationale de droit comparé*, *Revue critique de droit international privé*.[68] Na predlog Slobodana Jovanovića bio je među

[62] Ilija M. Pavlović, *Milan Đ. Nedić i njegovo doba*, knj. 1, Nova iskra, Novi Beograd, 1984, 12; Većeslav Vilder, *Na putu preporoda*, London 1959, 53-54 (reprint pisma Stevana Ćirkovića Većeslavu Vilderu u kojem navodi „tri godine nemačkih logora i četiri meseca ćelije Gestapoa".).

[63] Rieger, Susanne; Jochem, Gerhard (2011). *A brief history of Nuremberg POW camps* https://web.archive.org/web/20160621232727/http://www.b24.net/pow/The%20Nuremberg%20POW%20camps%201939%20-%201945.htm.

[64] L'activité du Centre. У: Politique étrangère, n°2 – 1949 – 14e année, 190–191. Centar je i danas ugledna institucija (https://www.cnrs.fr).

[65] Program održavanja nastave na Institutu za visoke međunarodne studije Univerziteta u Parizu, školske 1947/48 godine, Archives - *Institut des Hautes Études Internationales (*Paris*).*

[66] Program održavanja nastave na Institutu za visoke međunarodne studije Univerziteta u Parizu, školske 1955/56 godine, Archives - *Institut des Hautes Études Internationales (*Paris*).*

[67] Stévan Tchirkovitch*, L'Institute Américanin de Droit International – Son Rôle et Son Oeuvre*, A. Pedone, Paris, 1926, pp. 170.

[68] *Bibliothèque nationale de France* https://catalogue.bnf.fr/rechercher.do?motRecherche=Tchirkovitch&critereRecherche=0&depart=0&facetteModifiee=ok.
Rad Udruženja srpskih pisaca i umetnika u inostranstvu 1951-1983, izdanje Udruženja srpskih pisaca i umetnika u inostranstvu, Himelstir, 1984, 63–64.

osnivačima i članovima *Udruženja srpskih pisaca i umetnika u inostranstvu*.[69] Bio je saradnik Međunarodnog instituta za unifikaciju privatnog prava (UNIDROIT).[70] Pošto je Stevan Ćirković bio naš prvi internacionalista koji se bavio položajem pojedinca u međunarodnom pravu, pruživši podršku priznanju međunarodnog subjektiviteta pojedinaca,[71] vredi posebno se osvrnuti na njegove radove iz ove oblasti. Njegov prvi rad na ovu temu, objavljen 1928. godine, oslanja se na nova razmišljanja međuratne doktrine o drugačijem položaju pojedinca u međunarodnom pravu.[72] Oslanjajući se najviše na Politisa, Ćirković naglašava da iako pojedinci još uvek nisu subjekti međunarodnog prava njihov se položaj značajno promenio u „novom međunarodnom pravu", te da svako pravo, pa tako i međunarodno, treba da služi blagostanju pojedinca. U savremenom međunarodnom pravu on prepoznaje nekoliko kategorija pravila kojima se uređuje položaj pojedinca. U prvoj su ona koja bismo i danas nazvali osnovnim pravima, koja se odnose na „najsvetiju dužnost" zaštite i poštovanja čovekove ličnosti, na zaštitu „čovekove fizičke egzistencije i čovečijeg života". Iako nisu postojali odgovarajući međunarodni mehanizmi za zaštitu ljudskih prava, Ćirković ukazuje na mišljenja Lapradela i Politisa prema kojima postoji tendencija „savremenog Međunarodnog Prava koje će, u relativno skoroj budućnosti, dopustiti čoveku da radi zaštite svoje ličnosti i svojih osnovnih čovečijih prava može, u krajnjem slučaju, apelovati na organizovano međunarodno pravosuđe i na međunarodnu pravdu."[73] U drugoj kategoriji su *Slobode pojedinca* u kojoj se nalazi zabrana ropstva, dok su u trećoj one norme kojima se štiti zdravlje čoveka, najviše one koje se odnose na javno zdravlje i higijenu, ali i na zabranu trgovine „opijumom i drugim škodljivim lekarijama". U četvrtoj kategoriji su one slobode koje se odnose na rad, u petoj su norme kojima se štiti porodica tako da se ona poštuje i u inostranstvu, a u šestoj kategoriji su prava kojima se štiti „moralna savest i intelektualna svojina čovekova" koje obuhvataju slobodu mišljenja, savesti i veroispovesti. Pored diskusije o ovim kategorijama, raspravlja i o pravu na emigraciju i imigraciju, kao i o pravu na promenu državljanstva. Optimizam i uverenje da su ova prava već garantovana opštim međunarodnim pravom, uprkos nizu nedostataka i nepostojanju međunarodnopravnog sujbektiviteta pojedinca, pokazuje i u zaključku: „Zaključak

[69] *Rad Udruženja srpskih pisaca i umetnika u inostranstvu 1951-1983*, izdanje Udruženja srpskih pisaca i umetnika u inostranstvu, Himelstir, 1984, 6–9.

[70] Le 80e anniversaire de la Société de Législation Comparée, Revue internationale de droit comparé. t. 1 N°1–2, Janvier-mars 1949, 113–118.

[71] Slobodan Milenković, Razvoj doktrine međunarodnog javnog prava u Jugoslaviji, *Zbornik radova Pravnog fakulteta u Nišu*, 21/1981, 133.

[72] Stevan Ćirković, Položaj čoveka u međunarodnom pravu, *Arhiv za pravne i društvene nauke*, br. 5, 1928, 358-371; Stevan Ćirković, Položaj čoveka u međunarodnom pravu, *Arhiv za pravne i društvene nauke*, br. 6, 1928, 468–478.

[73] Stevan Ćirković, Položaj čoveka u međunarodnom pravu, *Arhiv za pravne i društvene nauke*, br. 5, 1928, 364.

je ovaj: Položaj čovekov u Međunarodnom Pravu postaje sve obezbeđeniji. Moderno Međunarodno Pravo ide na to da sva individualna prava i slobode čoveka što jače utvrdi kao sveta i nepovrediva, bez obzira gde se čovek nalazio. (…) I samo Međunarodno Pravo ne smatra se danas više, kao što smo u početku rekli, kao Međunarodno Pravo Država, već i *čoveka*."[74] U radu iz 1929. godine, avangardnog naslova „Žene i diplomacija", otvoreno podržava tadašnji feministički pokret. Zagovara uključivanje žena u diplomatsku službu, nudi primere angažovanja žena u diplomatiji iz prakse Lige naroda i drugih država, i zaključuje: „U svima intelektualnim manifestacijama javnoga i međunarodnoga života, na svima poljima duhovnog rada, na polju čiste nauke i u praktičnom životu, žena je dokazala da je u punoj meri dorasla čovekovim sposobnostima."[75] Posle rata, u Francuskoj, objavio je nekoliko radova iz oblasti ljudskih prava,[76] jedan od prvih prikaza Opšte deklaracije o ljudskim pravima iz 1948.[77] kao i radove o Ženevskim konvencijama[78] i statusu izbeglica.[79] Značajan broj radova iz ovog perioda je i iz uporednog prava. Vredi ipak primetiti da nije moguće pronaći njegove radove iz međunarodnog prava posle 1958. godine. U to vreme Stevan Ćirković imao je svega 60 godina a umro je u dubokoj starosti, u 92. godini života. Poslednji njegov tekst je jedan novinski članak objavljen 1982. u časopisu *Le Contemporain*, u kojem se bavi aktuelnom krizom na Kosovu u istorijskom i međunarodnopravnom kontekstu.[80] Stevan Ćirković je jedan od prvih srpskih i jugoslovenskih pravnih pisaca koji se bavio pitanjima položaja i subjektiviteta pojedinca u međunarodnom pravu. Među prvima je pisao o opštoj zaštiti ljudskih prava i međunarodnom pravnom položaju pojedinih kategorija lica kao što su žene, izbeglice i žrtve rata. Autor je više od 50 radova, uglavnom na francuskom jeziku.

---

[74] Stevan Ćirković, Položaj čoveka u međunarodnom pravu, *Arhiv za pravne i društvene nauke*, br. 6, 1928, 477–478.

[75] Stevan Ćirković, *Žena i diplomacija – treba li i ženama dopustiti stupanje u diplomatsku službu*, Beograd 1928, 11.

[76] Stévan Tchirkovitch, *La protection de l'individu et des minorités nationales d'après les traités diplomatiques du début du XVIIIème siècle à nos jours*, Paris : Université de Paris, Institut des hautes études internationales, 1948, pp. 142; Stévan Tchirkovitch, La Règle de non discrimination et la protection des minorités [rapport présenté au 3e Congrès international de droit comparé, Londres, 31 juillet 5 août 1950], *Revue générale de droit international public*, no. 2, 1951, 247–274.

[77] Stévan Tchirkovitch, La Déclaration universelle des droits de l'homme et sa portée international, *Revue générale de droit international public*, no. 3-4, juillet-décembre 1949, 359–386.

[78] Stévan Tchirkovitch, Les Nouvelles conventions internationales de Genève relatives à la protection des victimes de la guerre du 12 août 1949... [Avec le texte des conventions.], *Revue générale de droit international public*, т. 54, no. 1, 1950, 97–158.

[79] Stévan Tchirkovitch, *La nouvelle convention internationale relative au statut des réfugiés (avec le texte de la Convention)*, Paris: Éditions A. Pedone, 1951.

[80] Tekst je preuzet iz preštampanog izdanja u časopisu Glas kanadskih Srba. Videti: Dr Stevan Ćirković, „Problem Kosova", *Glas kanadskih Srba*, br. 2489, 17. februar 1983., 1–2, i br. 2490, 3. mart 1983, 1, 4.

REFERENCE

1. (1923). Stevan Ćirković, Zaključenje konkordata sa Vatikanom, *Novi život*, 1923, 33–38, 65–69.
2. (1925). Stevan Ćirković, Ženevski protokol za mirno rešavanje međunarodnih sporova, *Novi život*, 1925, 293–299, 321–327, 362–367.
3. (1926). Stévan Tchirkovitch, *L'Institute Américain de Droit International – Son Rôle et Son Oeuvre*, A. Pedone, Paris, 1926, pp. 172.
4. (1928). Stevan Ćirković, *Položaj čoveka u međunarodnom pravu*, Narodna misao, Beograd, 1928.
5. (1928). Stevan Ćirković, Položaj čoveka u međunarodnom pravu, *Arhiv za pravne i društvene nauke*, br. 5, 1928, 358–371.
6. (1928). Stevan Ćirković, Položaj čoveka u međunarodnom pravu, *Arhiv za pravne i društvene nauke*, br. 6, 1928, 468–478.
7. (1928). Stevan Ćirković, *Žena i diplomacija – treba li i ženama dopustiti stupanje u diplomatsku službu*, Beograd 1928.
8. (1929). Stevan Ćirković, *Međunarodni pacifizam i njegovi protivnici*, Narodna misao, Beograd 1929.
9. (1929). Stevan Ćirković, Novi konzularni pravilnik, *Arhiv za pravne i društvene nauke*, 1929, t. 35, 159–160.
10. (1929). Stevan Cirkovic, Compte rendu de l'étude de Mirko Avakoumovitch: Un aperçu sur l'organisation internationale du travail, *Arhiv za pravne i društvene nauke*, 1929, t. 36, 160.
11. (1931). Stévan Tchirkovitch (ed.), Liste des Traités et des engagement internationaux du Royaume de Yougoslavie (1919-1929), *Annuaire de l'Association yougoslave de Droit international*, t. I, Belgrade-Paris, 1931, 289–348.
12. (1931). Stévan Tchirkovitch, L'Académie de droit international de la Haye et la contribution de jurists balkaniques à son oeuvre, *Annuaire de l'Association yougoslave de Droit international*, t. I, Belgrade-Paris, 1931, pp. 65–74.
13. (1932). Stévan Tchirkovitch, Conférence préparatoire interbalkanique de juristes et l'unification du droit des pays balkaniques, *Revue de droit international*, tome X, no. 3, 1932, 168–178.
14. (1933). Stevan Cirkovic, Compte rendu sur les ouvrages: Lazare J. Markovitch : Les Traités de Conciliation et d'arbitrage de la Yougoslavie. – Vladislav Mirkovitch : Des rapports entre l'article 10 et l'article 21 du Pacte de la Société des Nations, *Arhiv za pravne i društvene nauke*, 1933, t. 43, 72–78.
15. (1933). Stevan Ćirković, *Organizovani ili oružani mir*, Biblioteka Jugoslovenskog udruženja za međunarodno pravo, sv. VII, Beograd, 1933, 19 str.

16. (1933). Stevan Ćirković, Međunarodne pravne posledice istupanja Nemačke iz Društva naroda, *Arhiv za pravne i društvene nauke*, 1933, t. 44, 412–419.
17. (1933). Stevan Ćirković, Organizaciona i pravna pitanja na XIV Skupštini Društva naroda, Arhiv za pravne i društvene nauke, 1933, t. 45, str. 495–501.
18. (1934) Stévan Tchirkovitch, *Reglement des questions de frontieres entre le Royaume de yougoslave et ses voisins balkaniques:* Albanie, Grèce, Bulgarie et Roumanie. Annuaire de l'Association yougoslave de Droit international , t. II (1934) 136–155.
19. (1934). Stevan Ćirković, Jedan pravni pogled na krizu Društva naroda, *Arhiv za pravne i društvene nauke*, t. 45, 1934, 121–134.
20. (1934). Stevan Cirkovic, Compte rendu sur les ouvrages: Bojidar Saritch: La Petite Entente, facteur de paix en Europe; – V.M. Radovanovitch: La Petite Entente. – *Arhiv za pravne i društvene nauke*, 1934, t. 45, 268–272.
21. (1934). Stevan Ćirković, Poljski predlog o generalizaciji zaštite manjina, *Arhiv za pravne i društvene nauke*, t. 45, 1934, 367-368.
22. (1934). Stevan Ćirković, Nadležnost i postupak Saveta Društva naroda po čl. 11 Pakta, *Arhiv za pravne i društvene nauke*, 1934, t. 46, br. 6, 509–514.
23. (1934). Stevan Cirkovic, Compte rendu sur les ouvrages: A.P. Papanastasiou, Vers l'union balkanique – Les conférences balkaniques; Stevan Petrovitch, L'Union et la conférence balkanique, *Arhiv za pravne i društvene nauke*, 1934, t. 46, br. 3, 255–260.
24. (1934). Stevan Ćirković, XVIII sesija Međunarodne konferencije rada, Arhiv za pravne i društvene nauke, 1934, t. 46, br. 1–2, 143–147.
25. (1934). Stevan Ćirković, Académie de Droit International de La Haye: Recueil des cours (t. 43, 44, 45), *Arhiv za pravne i društvene nauke*, 1934, t. 46, br. 1–2, 177–178.
26. (1934). Stevan Ćirković, Earle B. Babcock, *Arhiv za pravne i društvene nauke*, 1935, t. 46, br. 3, 267–268.
27. (1935). Stevan Ćirković, „Sarska oblast", Biblioteka Jugoslovenskog udruženja za međunarodno pravo, sv. XVI, Beograd, 1935, 12 str.
28. (1935). Stevan Ćirković, Načelo slobode prolaza i plovidbe kroz dardanelske moreuze, *Arhiv za pravne i društvene nauke*, 1935, t. 48, 129–135.
29. (1935). Stevan Ćirković, *Politička i privredna Mala antanta*, Biblioteka Jugoslovenskog udruženja za međunarodno pravo, sv. XIX, Beograd, 1935, 35 str.
30. (1935). Stevan Ćirković, „Smisao i značaj Pakta balkanskog sporazuma", *Osvrti*, br. 3/1935 (mart-april), 19–23.
31. (1948). Stévan Tchirkovitch, La protection de l'individu et des minorités nationales d'après les traités diplomatiques du début du XVIIIème siècle à nos

jours, Paris: Université de Paris, Institut des hautes étudeś internationales, 1948, pp. 142.

32. (1949) Ćirković, Stevan. *La Declaration universelle des droits de l'homme et sa portee international*, A. Pedone, Paris 1949.
33. (1949) Stévan Tchirkovitch, La Déclaration universelle des droits de l'homme et sa portée international, *Revue générale de droit international public*, n° 3–4, juillet-décembre 1949, 359–386.
34. (1950) Stévan Tchirkovitch, Les Travaux de la 1re session de la Commission du droit international des Nations Unies [Lake Success, 12 avril-9 juin 1949, *Revue générale de droit international public*, n° 2, avril-juin 1950, pp. 22.
35. (1950) Ćirković, Stevan, Les nouvelles conventions internationales de Genève relatives à la protection des victimes de la guerre, du 12 aout 1949, A. Pedone, Paris 1950.
36. (1950). Stévan Tchirkovitch, Les Nouvelles conventions internationales de Genève relatives à la protection des victimes de la guerre du 12 août 1949... [Avec le texte des conventions.], Revue générale de droit international public, t. 54, no. 1, 1950, 97–158.
37. (1950). Stévan Tchirkovitch, L'assistance juridique internationale (International Légal Assistance).. In: Revue internationale de droit comparé. Vol. 2 N°1, Janvier-mars 1950. 129–132.
38. (1950). Stévan Tchirkovitch, Le droit international socialiste nouveau. In: Revue internationale de droit comparé. Vol. 2 N°2, Avril-juin 1950. 342–347.
39. (1951). Stévan Tchirkovitch, La Règle de non discrimination et la protection des minorités [rapport présenté au 3e Congrès international de droit comparé, Londres, 31 juillet 5 août 1950], Revue générale de droit international public", n° 2, 1951, 247–274.
40. (1951). Stévan Tchirkovitch, La nouvelle convention internationale relative au statut des réfugiés avec le texte de la Convention), Paris : Éditions A. Pedone, 1951.
41. (1951) Stévan Tchirkovitch, Un nouveau Code de la famille en Bulgarie, Revue internationale de droit comparé. Vol. 3 N°2, Avril-juin 1951, 304–306.
42. (1951) Stévan Tchirkovitch, "Le code de la famille en Yougoslavie", *Revue internationale de droit compare*, Vol. 3 N°4, Octobre-décembre, 1951. pp. 616–628.
43. (1952). Stévan Tchirkovitch,"*Krivicno Pravo,* par le Dr Aleksandar Stajic, Opsti Dio, Sveska I (Droit pénal, partie générale, vol. I, Sarajevo, 1950, Izdanje Komisije za izdavanje udzbenika i skripata Univerziteta u Sarajevu (Edition de la Commission pour les manuels et les manuscrits de l'Université de Sarajevo)", Revue de Science Criminelle et de Droit Pénal Comparé, no.

3/1952 (Centre Français de droit compare, Librairie du recueil Sirey), 530–533.

44. (1952). Stévan Tchirkovitch, J. Stefanovic, Ustavno Pravo FNR Jugoslavije i Komparativno. In: Revue internationale de droit comparé. Vol. 4 N°3, Juillet-septembre 1952, 653–655.
45. (1952). Stévan Tchirkovitch, "La Question de la révision de la Convention de Montreux concernant la question des détroits turcs : Bosphore et Dardanelles, avec le texte de la convention", *Revue générale de droit international public*, n° 2, 1952.
46. (1953). Stévan Tchirkovitch, "Le régime matrimonial des étrangers en Bulgarie d'après la nouvelle loi sur les personnes et la famille", Revue international de droit comparé. Vol. 5 N°4, Octobre-décembre 1953. pp. 714–717.
47. (1953). Stévan Tchirkovitch, L. Bajalovic, Trgovacko Pravo. Revue internationale de droit compare, Vol. 5 N°2, Avril-juin 1953. 427–428.
48. (1953). Stévan Tchirkovitch, V. Spaic, Uvod u Gradiansko Pravo s narocitim obzirom na pravo F.N.R.J., Revue internationale de droit comparé. Vol. 5 N°2, Avril-juin 1953. 463–464.
49. (1953). Stévan Tchirkovitch, Godichnik na Sofiskiya Universitet. In: Revue internationale de droit comparé. Vol. 5 N°4, Octobre-décembre 1953. pp. 768–769.
50. (1954). Stévan Tchirkovitch, La fondation de l'Association yougoslave de droit international, Revue internationale de droit comparé. Vol. 6 N°1, Janvier-mars 1954, 91–92.
51. (1954). Stévan Tchirkovitch, B. T. Blagojevic, Medjunârodno privatno Pràvo. In: Revue internationale de droit comparé. Vol. 6 N°1, Janvier-mars 1954. pp. 172–177.
52. (1954). Stévan Tchirkovitch, B. Eisner, Medjunârodno Privatno Pravo, Revue internationale de droit comparé. Vol. 6 N°1, Janvier-mars 1954, 188–191.
53. (1957). Stevan Tchirkovitch Ćirković, Le Nouveau statut Juridique international du Danube et le régime du secteur des cataractes et des Portes-de-fer. Cours de Droit international Danubien, Paris : Association des Etudes Internationales, 1957, pp. 93.
54. (1958). Z. Szirmai, Zygmunt Nagorski, Jr., Stévan Ćirković, J.C.L. Huiskamp, Law in Eastern Europe, Documentation Office for East European Law, University of Leyden, Stijhoff, Leiden, 1958.
55. (1958). Stévan Ćirković, Les nationalisations en Yougoslavie et la gestion des entreprises par les collectifs ouvriers, *Law in Eastern Europe*, no. 2, 1958.
56. (1958). Tchirkovitch Stevan, Max-Planck-Institut fur Auslândisches Offentliches Recht und Vôlkerrecht - Zeitschrift fur Auslândisches Offentliches Recht und Vôlkerrecht, Band 19, Nr. 1-3 (August 1958). Festgabe fur

Alexander N. Màkarov. W. Kohlammer Verlag Stuttgart und Kôln, *Annuaire français de droit international*, vol. 4, 1958, 923–924.

57. (1958). Bastid Suzanne, Vignes Daniel-Henri, Fischer Georges, Wiebringhaus Hans, Seidl-Hohenveldern Ignaz, Ruzié David, Geouffre de La Pradelle Paul de, Tchirkovitch Stevan, Kovar Robert, P. J. B., Vergnaud Pierre. Bibliographie critique. In: *Annuaire français de droit international*, vol. 4, 1958. 897–935.
58. Stevan Ćirković, „Problem Kosova“, *Glas kanadskih Srba*, br. 2489, 17. februar 1983., 1–2, i br. 2490, 3. mart 1983, 1, 4.

STEVAN ĆIRKOVIĆ (1899-1991) – BIOGRAPHY OF AN INTERNATIONAL LAWYER

ABSTRACT

In the new circumstances between the two world wars, international law became more important than ever before in its history. The First World War introduced radical changes in international relations and significantly changed the political map of the world. A large number of new states appeared, the League of Nations and the Permanent Court of International Justice were founded. The faith and hope placed in the power of international law to solve international problems was on the rise. There are well-known periodizations of international law that point to the end of the First World War as a key moment, as an event that significantly changes the previous role and architecture of international law. Thus, in the Kingdom of Yugoslavia (Yugoslavia), the science of international law was very alive and fruitful in that period. In the bibliography of works published from 1918 to the end of 1936, there is an impressive fact that more than 2,000 works were published in the Serbian, Croatian and Slovenian languages in the field of international law and related disciplines. Among the authors are also many lesser-known names of Yugoslav and Serbian science of international law. The aim of this work is to bring one of those names closer to the contemporary domestic professional public. One of the constellation of international lawyers of this period is Stevan Ćirković, whose life and work will be presented on the basis of available archival materials and his scientific production.

Key words: Stevan Ćirković, professor, diplomat, international law, Kingdom of Yugoslavia

SOME REFLECTIONS ON FRAGMENTATION OF GENERAL INTERNATIONAL LAW IN THE LIGHT OF ILC STUDY

Milenko KREĆA*

ABSTRACT

In the contemporary international community, there is a continuous discussion about the legal nature of international law and its real effects on the development of international relations. One of the current issues in this sense concerns the reach of the process of fragmentation of specialized and relatively autonomous spheres of social activities and structures that lead to the conflict of rules and to the deviation of institutional practice. Bearing in mind that the emergence of international public law is the result of the need to regulate relations not only between states, but also other international legal subjects, international law theorists have a good reason to reconsider this issue. Presenting his own conceptual ideas about overcoming the doctrinal division related to the diversification and expansion of international law, the author of the subject analysis pays special attention to the phenomenon of fragmentation of general international law in the context of the study of the International Law Commission (ILC).

Key words: Fragmentation of general international law, fragmentation *stricto sensu,* fragmentation *lato sensu,* ILC

INTRODUCTION: NOTATION AND FORMS OF FRAGMENTATION

Fragmentation, whether as a fact or an idea, is well known phenomenon is inherent component of the evolution of international law. However, due to different, and in a number of point conflicting, views on the nature and effects of fragmentation of international law, there is no accepted definition of fragmentation, but it is, as a rule, determined indirectly through its effects, positive

* Professor of the Law Faculty of the University of Belgrade; Former Judge ad hoc of the ICJ and ECHR, former Member of Venice Commission and Permanent Court of Arbitration. E-mail: milenkokreca@gmail.com

or negative, as regards general international law.[1] In our opinion it seems necessary to draw a distinction between two forms of fragmentation of general international law:

i) Fragmentation *stricto sensu* in terms of fragmentation of the *system* of general international law, which affects its very existence as a coherent and operating law and,

ii) Fragmentation *lato sensu*, meaning the diversification and the progressive development within the system of general international law or "vertical diversification". That diversification may take two forms: a) a structural-functional diversification in terms of creation of new rules extending the scope of general international law *ratione materiae, rationae personae* and *ratione loci*; and b) diversification based on the division of rules of general international law on the criteria of their legal force.

FRAGMENTATION STRICTO SENSU

Classic international law gave birth to fragmentation of international law in contrast to its natural law perception that treated it as universal law applicable to all states. In fact, classic international law was rather a collection of fragments than a system of rules based on a single value and legal basis. Classic international law was consisted of so-called European international law applied by peoples and states that have accepted Christianity from the first time and these are primarily the old states with Germanic and Latin languages as well as the states of the new worlds that developed from the colonies of these nations[2] – as members of "l'humanite civilisée"[3] and international law applied outside Europe, in "l'humanite barbare et l'humanite sauvage"[4] – as inferior to European international law.[5] Another form of fragmentation in classic International law was the division into international law in peace and international law in war that functioned independently of each other and, moreover, mutually exclusive in application – *Inter bellum et pacem nihil medium est*.

---

[1] Heinz Hafner, "Pros et Cons Ensuing from Fragmentation of International Law", 25 *Michigan Journal of International Law,* 2004, pp. 849-863; ILC, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", 2005, Doc. A/CN.4/L. 682. et al.

[2] Henry Wheaton, *Elements of International Law*, in the Classics of International Law, ed. by Scott, 1936, pp. 11–13; William O. Manning, *Commentaries on the Law of Nations*, Oxford University Press, Oxford,1839, p. 65.

[3] James Lorimer, *Droit International,* traduit par E. Nys, C. Muquardt, Brussels, 1885, p. 69.

[4] *Ibidem.*

[5] Wheaton, op. cit., pp. 17–18. In more details, M. Kreća, *Međunarodno javno pravo,* 13th edition, 2022, pp. 43–44; M Kreća, O demokratizaciji međunarodnog prava, Marksistička misao 3/84.

The fragmentation in classic international law resulted from the combined effects of three factors, two of an objective nature and one of subjective nature. Of objective nature were the structure of classic international law entirely consisted of *ius dispositivum* on one side, and the legality of war in the relations between states on the other. The idea of creating a law that would treat non-European states, as objects of international law and their territories as *res nullius* and thus open up space for unhindered colonization and political control in world affairs by European powers was a relevant subjective factor. The emergence of constitutional acts of universal political organizations the League of Nations and the United Nations – "as higher laws"[6] – which established the hierarchical structure of international law,[7] and *inter alia*, criminalized war, excluded the legal factors as objective factors of fragmentation of international law.

In the positive international law the general factor of the fragmentation *stricto sensu* is subjective one in terms of political will to create or expand the space for freedom of action unfettered by fundamental rules in the form of *ius strictum*. It is especially expressed in the postpositive negative understanding of general international law as a fiction having for the consequence the deregulation of entire parts of international relations, particularly political relations that are based on principles such as non-intervention, the prohibition of the threat and use of force, equality and self-determination of peoples, sovereign equality, permanent sovereignty over national sources etc. It is symptomatic that as regimes able to function independently of general international law are taken, *exempli causa*, human rights in fact individual human rights and environmental protection, parts of international law with significant soft law substance.

As current forms of fragmentation of international law so-called constitutionalization of the European law and new doctrine of the NATO pact can be listed. The idea of European law as a "new legal order" was developed gradually in the Judgments of the European Court of Justice in the nineties of the last century and took an explicit form in the Judgments in Kadi and Al Barakaat cases.[8] In these Judgments the European Court of Justice "proclaimed the primacy of its internal constitutional values over the norms of international law. Rather than adopting a soft-constitutionalist approach which would seek to mediate the relationship between the norms of the different legal systems, and which would have involved the EJC in the process of shaping customary international law, the ECJ adopted a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international

[6] Hersch Lauterpacht, *Covenent as a "higher law"*, BYIL, 1936, p. 55; M. Bartoš, *Legal Force of the United Nationas, Yugoslav Review of intenational Law*, 1/1958, p. 4.

[7] Milenko Kreća, *Quelques observations sur le probléme de la hierarchie des regles du droit dans le droit international public*, Yugoslav Revue of International Law, No. 1/1980.

[8] Case C-402/05P and C-415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission (2008) ECR I – 6351.

domain".[9] In essence, the new doctrine and practice of NATO goes in the direction of rivalry with the United Nations including breaches of UN Charter as a regular part of its strategy.[10] Since it is impossible to establish a parallel system of collective security within the basic rules of the UN Charter, it is also not possible for NATO and its member states to independently engage in the development of the concepts of "imminent threat" and "self-defense", as well as "humanitarian intervention" and "responsibility for protect".[11] The NATO understandings of these concepts are in irreconcilable conflict with fundamental rules of international law as demonstrated *inter alia* by military intervention in FR of Yugoslavia without authorization of UN Security Council.

It is for regret that international judicial organs also contribute to fragmentation of international law. *Exempli causa*, contradictory position of ICTY[12] and ICJ regarding control as a criterion for State responsibility. [13] Or, even more strikingly, the World court took two opposed positions on the meaning of "destruction" of the protected group under the Genocide Convention as one of the crucial elements of the crime of genocide in two successive Judgments on genocide cases. In its 2007 Judgment Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the Court accepted the determination of "destruction" in the sense given by ICTY in Blagojević and Krstić cases.[14] However, that determination was based on understanding that the intention to destroy the group extends beyond physical and biological destruction,[15] i.e. destruction as an element of so-called sociological genocide. As opposed to the determination the Court in the Croatia case, after detailed analysis stated without any reservation, that the on scope of the Convention on Genocide is limited "to the physical and biological destruction of the group".[16]

---

[9] Grainne de Burca, "The European Court of Justice and the International Legal Order of the Kadi", *Jean Monnet Working Paper* 01/09, p. 55, Retrieved from: http://www.ssm.com/abstract=1321313.

[10] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects", *EJIL* 1999, vol. 10, pp. 1–22.

[11] NATO Defence College, *Towards a new Strategic Concept of NATO,* by KK. Vittman, Research Division, September 2009, Rome, p. 50.

[12] Appeals Chamber in the Tadic case, IT-94-1-A, Judgment of 15 July 1999, para. 145.

[13] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, para.s. 402-413.

[14] Case concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzcegovina v. Serbia and Montenegro), Merits, ICJ Reports 2007, para. 296.

[15] ICTY Prosecutor v. Krstić, Appeals Judgment, para. 28; ICTY Prosecutor v. Blagojević, Trial Judgment, para. 664.

[16] Case concerning the Application of the Convention on Prevention and Punishment of the Crime on Genocide (Croatia v. Serbia), Merits, ICJ Reports 2015, para. 136.

Hence, "self-contained regimes", being understood as completely autonomous legal structures, from general international law, undoubtedly are a form of fragmentation *stricto sensu*. Between the terms "self-contained regimes" and "*lex specialis* doctrine" a sign of equality is often placed – which is a wrong attitude. It seems that it is as well allowed by the Articles of State Responsibility as prepared by the International Law Commission. The Comment to the Article 55 (*lex specialis*) reads, *inter alia*, that the Article is designed to comprise both the "strong" form of *lex specialis*, including self-contained regimes, and the "week" form as a separate contractual stipulation regulating, for instance, a specific stipulation ruling out a restitution.[17] Unless there is a close relationship between these two terms, a "self-contained regime" is a term different from a *lex specialis* maxim. They are of different nature and function. The function of *lex specialis* is the instrumental one, while the self-contained regime's nature is a functional one. The second is a presumed judicial structure, while *lex specialis* is an operational maxim in the relationship of two or more rules of various degrees of generality. As a maxim of the kind, *lex specialis* is of a wider range – it could be applied as an exception from the general rule, being, in this sense, the basis of a supposed "self-contained regime", as well as a concretization of a general rule. "Self-contained regimes" as completely autonomous legal structure is a post-positivism theory construction, away from judicial reality, which, however, takes place even in the UN International Law Commission activities. A Special Rapporteur for rules and responsibilities of states, Riphagen used to deny any common denominators within matters of responsibility of a state between the general international law and the subsystem of state responsibility comprising both primary and secondary regulation.[18] The impact of the "self-contained regimes" construction can be identified in the Article 55 of the International Law Commission on state responsibility.[19] The Article 55 (*lex specialis*) generally stipulates that rules on state responsibility are of residual nature and that they are not applied where and to the extent that the conditions for the existence of internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of International Law.

Supporters of the self-contained regimes construction refer to jurisprudence of the Permanent Court of International Justice specifically judgments in the Wimbledon case and the Diplomatic and Consular Staff case. In the Wimbledon Case the Permanent Court of International Justice applied the Article 380 of the Treaty of Versailles, that way removing the German Neutrality Decree that ruled out smugglers' ships passage through the Canal – these ships actually were bringing ammunition to Polish naval base in Danzig during the Russian-Polish war.

[17] The ILC's Articles on State Responsibility, Introduction, Text and Commentaries, Introduction by J. Crawford, 2003, p. 308, para. 5.

[18] Third Report on State Responsibility, YILC 1982, II, part I, p. 24, para. 16.

[19] ILC Articles on State Responsibility, pp. 306-308 (hereinafter – ASR).

However, the above was not the case of conflict of rules between the general international law on navigation through sea canals and the special regulation stipulated by the Article 380 of the Treaty of Versailles, but the case of conflict between international law and internal law of Germany. In this view, the Court was clear and unambiguous: "In any case, a decree of neutrality, a unilateral act of the state, cannot take precedence over the provisions of the Peace Treaty".[20] In addition, the Article 380 of the Treaty of Versailles could hardly be qualified as *lex specialis*, because *lex generali* does not exist in the matter of the sea canals regime, but there is only a general principle of freedom of navigation which is concretized for each sea canal individually. This is why the Court reasoned on the basis of analogy with the legal regime of the sea straits: It is only the manifestation of "the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie".[21] Another case referred to by supporters of "self-contained regimes" is the case of Diplomatic and Consular staff of the USA Embassy in Teheran By its Judgment, rejecting the argument placed by Iran that possession of the Embassy was a sanction for illegal activities of the Diplomatic Mission members, the Court emphasized: "86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic mission and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such".[22] More precise picture of the Court finding could be seen by observing the matter within its context. The meaning of the above finding is that diplomatic law, as a common law incorporated into the Convention on Diplomatic Relations, regulates the situation that is the *sedes materiae* of the dispute between Iran and the USA. In other words, in the context of this specific dispute the rules of general international law, as embodied in the Convention, was sufficient, which does not mean that the diplomatic law itself is "self-sufficient". Such a conclusion follows from the operative part of the Judgment. It states, among other things, that Iran violated both its obligations to the USA "as established by the two countries by international conventions in effect (Convention on Diplomatic Relations and Convention on Consular Relations – M.K.) as well as its obligations established long ago as the rules of general international law".[23] Violation of these obligations, according to the Paragraph 2 of the Judgment, entails Iran's liability on the international law basis. Responsibility includes due reparations as well.

[20] PCIJ Publication, Ser. A, No. 1, p. 22.

[21] PCIJ, Ser. A, No. 1, p. 28.

[22] Case concerning the United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, para. 86.

[23] *Ibidem,* para. 1.

It seems clear that "self-contained regimes" can only exist in a post-positivist view of general international law that is seen as fictitious legal discourse, denying at the same time the main formal sources of international law and the international community itself as a socio-political phenomenon.[24] It is contrary to the elementary legal logic that a legal regime can be completely isolated from general international law. Even regimes that would strive for their full autonomy cannot be constituted in any other way than through formal sources of international law, and they can rely in their activity only on the categorical apparatus and legal instruments of international law, as they can be interpreted and applied on the basis of rules and principles of international law only. The logic is explicitly demonstrated by the European Court of Human Rights, which has jurisdiction over matters that are usually cited as an example of a self-contained regime. The Court notes that: "(...) principles underlying the Convention (European Convention on Human Rights - M.K.) cannot be interpreted in a *vacuum*. The Court must also take into account any relevant rules of international law when examining the question of its jurisdiction and therefore determine the responsibility of a state in accordance with the current principles of international law, still remaining aware of the special nature of the Convention as a treaty on human rights".[25] Therefore, it can be said that States that "can in their treaty relations make treaties beyond a single one, or more, or theoretically beyond all rules of international law (not including those of cogent nature), but they cannot make treaties beyond the *very system of international law*".[26]

STRUCTURAL-FUNCTIONAL DIVERSIFICATION (VERTICAL DIVERSIFICATION)[27]

Structural-functional diversification could be defined as the creation of rules of international law for the purpose of regulation of new areas of international

[24] Martti Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument*, Lakimiesliiton Kustannus, Helsinki, 1989; David Kennedy, *International Legal Structures*, Nomos Verlagsgesellschaft, Baden Baden, 1987; Anthony Carty, "Critical International Law: Recent Trends in the Theory of International Law", *EJIL*, 1/1991; B. W. Hummer, "Internationale nichstaatliche Organisationen in Zeitalter der Globalsierung", *Berichte der Deutchen Gesellshaft für Volkerecht*, 31/1999; *Non-State Actors as New Subject of International Law*, ed. Hofman, 1999; Martti Koskenniemi, Paivi Leino, "Fragmentation of International Law? Postmoder Anxieties", *Leiden Journal of International Law*, 2002, vol. 15.

[25] Banković V., Belgium and others, Decission of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351. Grand Chamber, No. 52207/99, 12. XII 2001, Admissibility; Also McElhinney u Ireland, App. No. 31253/96, para. 36; Al-Adsani v. UK App. No. 37112/97, para. 55.

[26] Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relate to Other Rules of International Law,* Cambridge University Press, Cambridge, 2003, p. 37.

[27] The term vertical diversification is used here for the purpose of consistency of the attitude. So-called horizontal diversification is, by its effects, close to, or could be equated to fragmentation *stricto sensu*.

relations. These rules are grouped into sets within the general international law with a specific subject, thus expanding the scope of the international law in material (*ratione materiae*), personal (*ratione personae*) and spatial (*ratione loci*) domains. Interdependence, as an important consequence of the very nature of the today international community, has spilled over from the political sphere into almost all areas of social relations, seeking appropriate legal regulation. Examples include the so-called environmental law, law on human rights, international economic law, maritime law, space law, etc. In such a complex system, conflicts of rules are inevitable. They are also characteristic of hierarchically organized heteronomous domestic law, and in autonomous law such as the international law, which does not recognize the hierarchy of sources or compulsory jurisdiction, they are a kind of endemic features.[28] Conflict of rules implies inconsistency of rules of the same or different rank relating to the same subject. Although the matter of the so-called fragmentation primarily refers to the conflict of general and special rules, therefore rules of different rank, conflict is possible between rules of the same rank as well.[29] The term vertical diversification is used here for the purpose of consistency of the attitude. So-called horizontal diversification is, by its effects, close to, or could be equated to fragmentation *stricto sensu*. It is certain that conflicts of rules of international law negatively affect its consistency, introduce elements of legal uncertainty and have their impact on the equality of states and other entities of international interest. Hence, the reduction of conflicts within the system of international law is vital to the credibility of international law. There are, basically, two ways to achieve this goal: a) legal – which implies resolving of conflicts with legal instruments; and, b) political – by applying political conceptions on restructuring of the international community in the form of the so-called international constitutionalism. We will not consider this method on this occasion, because it goes beyond the domain of law. It presupposes restructuring of the international community, a substantial reduction of the role of the state as a subject and introduction of elements of the "World Government".[30] The legal way implies two sets of means for resolving conflicts of international law rules: i) resolving conflicts by interpreting the rules in the conflict by applying appropriate principles and rules; and, ii) putting automatically into effect the rules of higher, superior legal force. A broad and comprehensive analysis of the legal mechanisms for resolving conflicts of rules in the international law is provided by the Study prepared by the Group established by the United Nations Commission for

[28] "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the Study Group of ILC*, A/CN.4/L 682.

[29] Jenks has been broadly quoted through bibliography since he pointed out to conflicts of multilateral treaties considering revision of them. See: Clarence Wilfred Jenks, "Conflict of Law-Making treaties", *BYIL* 1953, vol. 30, p. 403.

[30] Aoife O' Donaghue, "International constitutionalism and the state", *International Journal of Constitutional* Law, Oxford Academic, 2013, vol. 11, No. 4, pp. 1021, etc.

International Law.[31] At its 54th session in 2002, the UN Commission on International Law included in its agenda the topic entitled as "Fragmentation of International Law: Difficulties Due to Diversification and Dissemination of International Law"[32] – and formed a Study Group to deal with the issue. At its 291st meeting, held on August 9, 2006, the International Law Commission took note of the Study Group's Report.[33] This is a study and not, as it is usual in the Commission, a draft rules. It was made in four parts, prepared by members of the Group.[34] The study sought an answer to the question of fragmentation in interpretation of the relevant provisions of the Convention on the Law on Treaties, which were, by analogy, also applied to customary rules. It limited itself to the conflict of substantive rules, leaving aside the intertwining jurisdictions of courts and other institutions as sources of conflicts.

RESOLVING CONFLICTS OF RULES OF INTERNATIONAL LAW THROUGH INTERPRETATION

There are two important features of this way of resolving conflicts of rules on a particular case. The first one is that conflicts of rules are resolved by interpreting them by applying appropriate legal maxims and rules. There are two relevant legal maxims – *lex specialis derogat legi generali* and *lex posterior derogat legi priore*. Both of them allow relatively wide freedom of interpretation since interpretation itself is rather intellectual then legally regulated procedure. So-called canons or rules of interpretation are, actually, guiding principles of

[31] "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the Study Group of ILC,* A/CN.4/L. 682 - See also Bruno Simma, "Self-contained regimes", *Netherlands Yearbook of International Law,* vol. 16, 1985; Gerhard Mafner, Pros and Cons ensuring from Fragmentation of International Law, vol. 25(4) 2004. Sean D. Murphy, "Deconstructing Fragmentation; Koskenniemi's 2006 ILC Report", *Temple International and Comparative Law Journal* (forthcoming); GWU Law School Public Law Research Paper No. 2013-109; Rossana Deplano, "Fragmentation and Constitutionalization of International Law: A Theoretical Inquiry", *European Journal of Legal Studies,* vol. 6, Issue 1, 2013; Gilbert Guillaume, "The Future of International Judicial Institutions", *ICLQ* 1995, vol. 44; Address to the Plenary Session of the G. A. of the United Nations by Judge Schwebel, President of the ICJ, 26. October 1999. Retrieved from: www.icj-cij.org.

[32] *Yearbook of International Law Commission,* 2002, vol. II. Part two, p. 97

[33] A/CN.4/3.663/Rev. 1

[34] Study on *lex specialis* and issue of self-contained regimes was prepared by M. Koskenniemi who also acted as chairman of the Group. T. Melescanu produced a study on the application of successive treaties (Article 30 of the Convention on the Law on Treaties). Study on the interpretation of treaties in the light of Article 31 (3c) of the Convention on the Law of Treaties in the context of the general development of international law (W. Mansfield "Study on the modification of multilateral treaties in the light of the Article 41), was presented by Daoudi, and the study of hierarchy in international law by Z. Galicki.

search for a solution. The *rules* of interpretation in the Convention on the Law on Treaties are limited to the conflict of successive treaties relating to both the same subject matter (Article 30 of the Convention) and systematic interpretation of the Convention (Article 31 (3, c). These rules are formally given their statuses by their position within the Convention, unless two rules are in a substantive sense they represent rather guiding principles. Another characteristic concerns the norm in which legal maxims and rules of interpretation operate. They act exclusively in the horizontal plane, i.e. in the event of a conflict of rules of the equal legal force – with the exception of the Article 30(1) of the Convention concerning the position of the Article 103 of the UN Charter.

Lex specialis derogat legi generali maxim

The maxim has a wide range *ratione materiae*. It is applied in the following cases: in cases of single treaty stipulations, in cases of conflicts of stipulations of two or more treaties, conflicts between a treaty and non-contractual standard and in cases of conflicts of non-contractual standards.[35] In principle, *lex specialis* eliminates the application of the general legal rule on identical case. However, it should be emphasized that it does not derogate it, but suspends its application during the period of validity of the *lex specialis*. The *lex specialis* maxim is of a relative nature[36] and as such it cannot eliminate application of the general international law in the following cases: if the application of a special rule was contrary to the general law purpose; if third countries, or any other beneficiaries of the general rule were damaged by application of the special rule; and, if the special rule disrupted balance of rights and obligations as established by the general law. *Lex generalis* and *lex specialis* are not necessary in excluding relationship. *Lex specialis* can emerge as both application and concretization of *lex generalis*.[37] *Lex specialis* primarily is a principle of interpretation that resolves conflicts between rules within a particular legal system. It does not terminate or annul the link between special and general rules. This is clearly confirmed by the jurisprudence of the European Court of Human Rights. In the Neumeister Case,

[35] Report of the Study Group on the work of its 58th session, para. 2.

[36] Bruno Simma, Dirk Pulkovski, Planets and Universe; Self-contained Regimes in International Law, EJUL 2006, vol. 17, No. 3, pp. 488–490.

[37] For instance, the provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) in relation to the Montreal Convention on the Protection of the Ozone Layer (1985), or as an exception to the general law. In its advisory opinion given on the Legislation on the Threat or Use of Nuclear Weapons, the International Court of Justice decided, in relation to the right to life in accordance to the Article 6 (1) of the Covenant on Civil and Political Rights and on law on armed conflicts, came to the conclusion that "The test on what arbitrary deprivation of life is belongs, however, to the applicable *lex specialis*, namely to the law applicable in armed conflicts, which is designed to regulate the conduct of hostilities". See: Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports* 1996, para. 25.

the Court emphasized that the specific obligation under Article 5 (5) of the European Convention on Human Rights, concerning compensation for unlawful arrest and detention, shall not take precedence over the more general provision on compensation under Article 50, as this would lead to consequences incompatible to the subject and purpose of the treaty. It is sufficient to take into account a specific provision when applying the Article 50.[38] In fact, the *lex specialis* principle has an importance broader than its application in resolving conflicts of legal rules. It is also applied for the purpose of elimination of redundancies, thus preventing, at the same time, the application of compatible general and special rules. Therefore, *lex specialis* makes means of coordination and integration of both general and special legal rules for the purpose of gradual regulation of a particular case, rather than an instrument of fragmentation in terms of post-positivist doctrine. For, *lex specialis* can have logical and normative meaning only in relation to the framework of *lex generali* and within. In the relationship between inconsistent legal rules of equal legal force and degree of generality, the conflict is resolved by application of the *lex posterior derogat legi priore* maxim.

Systemic interpretation and the article 31(3, c) of the Convention on the Law on Treaties

The Article 31(3, c) of the Convention on the Law on Treaties provides that the interpretation of international agreements, together with the context, shall take into account "(...) c) any relevant rules of international law applicable in relations between parties". It provides systemic interpretation of a treaty thus affirming in the matter of conflict itself, as emphasized, the so-called system integration – instead of a disruption within the international law system.[39] Provision of the Article 31 (3c) is a mandatory factor of interpretation procedure, as different from additional means of interpretation whose application is optional.

The term "any relevant rules of international law..." includes, in addition to general international law, all the rules contained in its main formal sources. The idea underlying the provision of the Article 31(3, c) of the Convention on the Law of Treaties has been accepted in case-law either explicitly or implicitly. It is synthetically expressed by the International Court of Justice Judgment in the Case concerning the Oil Platforms (Iran v. USA). By interpreting the two provisions of the Treaty of Friendship, Economic Relations and Consular Rights (1955) concluded between the litigants, the Court pointed out, *inter alia*, that: "The Court cannot accept that Article XX, paragraph 1 (*d*), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the

[38] EHCR, Neumeister v. Austria, Ser. A (1974) No. 17, para. 30. See also: Case concerning the Gabickovo-Nagymaras Project, ICJ Reports 1997, para. 132.

[39] Campbell McLachlan, "The principle of Systematic Integration and Article 31 (3,c) of the Vienna Convention", *ICLQ,* vol 54, 2005, pp. 279, etc.

use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty".[40] However, it would be wrong to understand the Article 31(3, c) as a kind of magic wand in the matter of conflict of international law rules. The normative potential of the Article is polyvalent, since it can go in both processes – towards defragmentation and, unfortunately, towards fragmentation of international law, as Dr. Jekyll and Mr. Hyde of a kind. As regards the latter application of the rules, suffice it to point to the use of the Article 31(3, c) in the event of a conflict between the rules of general international law and the European Convention on Human Rights in the jurisprudence of the European Court of Human Rights.[41]

Although systemic interpretation itself in its ideal sense favors "system integration", the final outcome of its application depends primarily on the interpreter. Whether the interpreter in the selection of "any rule of international law", therefore either a general or a special one, will meet defragmentation or not – it is a matter of a specific case. The above is highly benefited by various, and even contradictory, interpretations made by international courts. Even the "World Court" – the International Court of Justice – is not immune to various interpretations of a particular rule.[42] Judgments of arbitration courts are particularly inconsistent, largely for extrajudicial reasons.[43]

Successive treaties relating to the same subject

16. In studying this way of resolving conflicts of rules contained in both bilateral and multilateral agreements,[44] the Study Group essentially relied on the Article 30 of the Convention on the Law of Treaties,[45] which is based, although

[40] Oil Platforms, Merits, *ICJ Reports*, 2003, para. 41; EHCR, McElhinney v. Ireland, paras. 36-37; ECHR Fogarty v. United Kingdom, paras. 35–36.

[41] Vassilis P. Tzevelekos, "The Use of Article 31 (3,c) of the VCLT in the Case Law of EHCR; An effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology", *Michigan Journal of International Law,* 2010, vol. 31, Issue 3.

[42] See, para. 7.

[43] Barcelona Traction, Light and Power Company, Ltd Case ICJ Reports 1970, Separate Opinion of Judge Padilla Nervo, pp. 247-250.

[44] Report on Fragmentation of International Law. *op.cit*., pp. 114–166.

[45] Article 30 of the Convention (Application of successive contracts on the same issue) provides for:

"1. Subject to the provisions of the Article 103 of the Charter of the United Nations, the rights and obligations of the Member States to successive treaties on the same subject shall be determined in accordance with the following points.

not exclusively, on the principle of *lex posterior derogat legi priore*. It is correctly noted that the later treaty does not enjoy its automatic priority, but depends on both the intention of the parties and the subject of the contract[46] – so that it is possible to give to *lex a priore* priority by interpreting especially when it comes to special provisions of successive treaties. The interpretation of the Article 30 of the Convention given in the Study Group Report as expressing the principle of priority is correct only partially, i. e. in the part concerning provisions 2, 3 and 4 of the Article 30. However, when comes to the provision of the Paragraph 1, according to which the provisions of Paragraphs 2, 3 and 4 are applied as "subject to the Article 103 of the Charter", the interpretation is not correct. Such an interpretation relativizes the UN Charter, whose higher position in the pyramid of legal acts in international law is provided by Article 103. The cautious position of the International Law Convention in formulating the Article 26 of the Draft Convention on the Law of Treaties (Article 30 of the Convention) can be understood because at the time the norms of *ius cogens* had not been parts of positive international law yet.[47] However, the Commission has given clear indications that it considers resolving of conflicts between treaties and obligations stipulated by the UN Charter at the priority level as provisional. The wording of the Paragraph 1 of Article 30, which provides "*Under reserve of the Article 103 of the Charter*, rights and obligations of the parties to successive treaties relating to the same particular subject matter shall be determined in accordance to the following paragraphs" (italic added), is a sufficient indication itself. Therefore, if the principle of priority was the Commission's definitive determination in the

2. If a contract specifies that it is subject to an earlier or later treaty or that it should not be considered incompatible with that other treaty, the provisions of the latter treaty shall prevail.

3. If the members of the earlier treaty are also members of the later treaty and the earlier treaty has not been terminated or its application has not been suspended according to the Article 59, the earlier treaty shall apply only if its provisions are consistent with the provisions of the later treaty.

4. If the members of the earlier treaty are not all members of the later treaty:

a) in relation between the member states of both treaties, the rule set out in Point 3 shall apply;

b) in relations between a member state of both treaties and a member state in only one of these treaties, a treaty in which both states are members governs their mutual rights and obligations.

5. Point 4 shall apply without prejudice to the Article to any question of termination or suspension of a treaty according to the Article 60 or any question of liability which may arise for a state by concluding or applying a treaty the provisions of which are inconsistent with its obligations to another state on the basis of another treaty".

See: XXII, 6,5. Also: Milenko Kreća, *Prestanak ugovora u savremenom međunarodnom pravu*, Naučna knjiga, Beograd, 1988, pp. 15-25; Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden and Boston, 2009, pp. 395–415.

[46] Reports on Fragmentation..., p. 165.

[47] Convention on Law on Treaties came to effect in 1980.

event of a conflict between the treaty and the provisions of the UN Charter, then the introductory wording "under the reserve of the Article 103 of the Charter..." would be meaningless. In addition, the Commission made it clear that its commitment was "without prejudice towards any interpretation of the Article 103 or towards its application by the competent bodies of the United Nations"[48]

AUTOMATIC EFFECTS OF RULES OF HIGHER, SUPERIOR LEGAL FORCE

Unlike maxims and principles of interpretations that operate on a horizontal plane, there are cogent rules operating on a vertical plane due to their higher legal force. These legal rules have a decisive and uncompromising effect, acting on their own strength i.e., by operation of law (*plein du droit*).

Absolutely binding rules of general international law (*ius cogens*)[49]

Due to their absolute, final and decisive effect, the norms of *ius cogens* do not allow both derogation and establishment of inconsistent legal rules. As such, they present the most effective legal means for resolving conflicts of rules of different legal force i.e. at the vertical plane. These are basis and criteria of legality, a normative vertical line around which all rules of international law group up. Without the *ius cogens* norms as an objective and unavoidable limitation of the autonomy of the will of the state, legality in the strict sense of the term used to be unknown in classical international law. As a subjective and avoidable legality, it was in the shadow of the autonomy of the will of the state, which essentially expressed the factual position of state rather than the relevant legal criteria. There was simply no general concept of legality in classical international law, but the legality of treaties was determined on an individual basis, on a case-by-case basis, as a result of a combined effect of the two following factors: the first one was dispositivity of rules of international law, because it was clear that if general international law consisted of dispositive norms exclusively states were always free to agree on any treaty provisions that deviate from international law, thereby without violating the law,[50] and the second one was the legitimacy of use of force in relations between states, which made war a central legislative factor in

[48] UN Conference on the Law of Treaties, First and Second Sessions, Vienna, 26. March – 24. May and 9. April – 22. May 1969, Official Records, p. 34, para. 3.

[49] See above, XXIII, 10.3.3. For the further analyses: Milenko Kreća, *Apsolutno obavezne norme (ius cogens) u međunarodnom pravu, Naučna knjiga, Beograd, 1989*; "Some reflections on Main Features of *Ius Cogens* as Notion of International Law", in *Festschrift Abendroth*, Frankfurt, New York 1982, pp. 27–41.

[50] Alfred von Verdross, "Forbidden Treaties in International Law", *AJIL,* 1937, vol. 31, No. 4, p. 571.

international politics.[51] The cornerstones of law in such a system were the rule of *pacta sunt servanda*, as the only absolute supraconsensual rule, and the principle of sovereignty, which included the legally unrestricted use of force so that, as being based on this principle, any contents that through the rule of *pacta sunt servanda*, acquired the property of obligation were realized. Thus, every international injustice, through formal, often forced, consent, turned out to be a law. The rules of *ius cogens* have a revolutionary significance in the international order, because they present "the creation of a basis for a general change of the attitude of state sovereignty to the rule of law and international public law ... and the establishment of conditions for the rule of law over free will of states in making treaties and execution of the activities agreed".[52] The concept of legality in international law in its strict sense could not be established until the moment when absolute and unavoidable limits of freedom of behavior of states were set by general international law. The absence of these restrictions would lead to a condition described by La Fontaine as "Reasons of the stronger one are always the best". *Ius cogens*, as a set of regulation from which states cannot deviate in their mutual relations because of threatening nullity of such acts, is a restriction of freedom of behavior in international domain imposed by an objective order. The introduction of cogent norms, among which its place indisputably takes the general prohibition of the use of force in international relations, is a turning point in the transformation of the international order from *de facto* to *de jure* order. Until then, as Le Fir notes commenting on the League of Nations Pact as a "higher law", "it seems that the life was in a pre-judicial state in terms of international relations, and that international law was not worthy of the name of a positive law (positively sanctioned) neither in reality nor by law".[53] That is the state of things on the normative level. In reality, things are different. The international community is still an eminently political community with elements of the legal community. Hence, opportuneness and power relations often take precedence, albeit temporary, over law. The lack of compulsory jurisdiction in international law is a strong obstacle to the realization of the normative content of the corpus *iuris cogentis*. Although the Convention on the Law of Treaties provides that any contracting party may unilaterally apply to the International Court of Justice in a dispute over the compatibility of a treaty with *ius cogens* norm, the relevant practice has not been formed due to numerous reservations concerning the Article 66 (a) of the Convention.

---

[51] *International Law*, ed. by R. A. Falk, S. H. Mendlowitz, Samuel S. Kim, Transaction Publishers Piscataway, 1966, p. 179.

[52] Milan Bartoš, "Rad Komisije za međunarodno pravo u 1963", *Međunarodni problema*, 3/1963, str. 135–152.

[53] Luj Le Fir, *Međunarodno pravo,* Geca Kon, Beograd, 1934, str. 189.

Erga omnes obligations

18. In the Report of the ILC Working Group, a high place is held by the so-called obligations *erga omnes*, along with the rules of *ius cogens*. The term "*erga omnes* obligations" came into extensive use after the 5 February 1970 Judgment of the International Court of Justice in the Barcelona Case (Preliminary Objections). In the Judgment the International Court of Justice rejected Belgium's claim in a dispute over the protection of its citizens – shareholders of the Barcelona Traction Company, arguing that Belgium had failed to prove ius *standi* before the Court. The court found that the right to diplomatic protection of its citizens had not been established by a treaty or by a special agreement, nor it was based on fairness.[54] Therefore, the Court found the basis for rejecting Belgium's claim in the absence of an appropriate treaty or a special agreement, as well as in fairness. Thus, in fact, the issue of the Belgian *ius standi* was resolved. However, the Court went a step further and pointed out, in the form of an *obiter dictum*, the following: "33 (...) an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character".[55] In formulating this *obiter dictum*, the Court has departed from its judicial policy according to which it does not enter into consideration of general issues that do not underlie the dispute. On that occasion it obviously did this although rejecting the claim of Belgium due to the non-existence of a treaty or a special agreement, i.e., due to absence of a principle of fairness it would be based on. *Obiter dictum* is, as such, since it is an incidental observation which is not relevant to the resolution of the dispute, an expression of the Court's general views which is not a part of the basis for decision-making.

It is noteworthy that the examples of *erga omnes* obligations in the Court's Judgment completely coincide with the examples of the *ius cogens* norm as given in the commentary on the Article 50 (Treaties conflicting with the peremptory

[54] Paras. 32–103 of the Judgment.

[55] Barcelona Traction, Light and Power Company, Limited, Second Phase*, ICJ Reports*, 1970.

norm of general international law) (*ius cogens*) and in general agreement within the theory.[56] The International Court of Justice, in its jurisprudence, also seems to hold the view that *erga omnes* obligations are an inherent component of the *corpus iuris cogentis*. In the East Timor Case, the Court found that "Portugal's reasoning that the right to self- determination of the people, as derived from the UN Charter and from UN practice has *erga omnes* character, and that it is impeccable".[57] In its Judgment at the stage of preliminary objections in the case of application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. FR of Yugoslavia), the Court emphasized that "the rights and obligations under the Genocide Convention are *erga omnes* rights and obligations".[58] Perception of *erga omnes* obligations as obligations not based on reciprocal, bilateral obligations, but the ones expressing "general interest, namely the achievement of high principles which are *raison d'être* of the Commission", makes treaties of the kind not a perfect balance of rights and obligations, relating also to the norms of *ius cogens*. It is taken from the advisory opinion of the International Court of Justice on the admissibility of reservations to the Genocide Convention.[59] In its Advisory Opinion on the construction of the wall in the occupied Palestinian territories, the Court also linked the expression *erga omnes obligation* to the cogent law of the people to self-determination.[60]

Is there and what is the difference between *ius cogens* and *erga omnes* obligations? According to the Working Group of the ILC, *erga omnes* obligations differ from both the Article 103 of the Charter and *ius cogens* in their legal force – while the latter have the capacity "to annul a norm in conflict – *erga omnes* obligations indicate the scope of application of relevant law and the emerging procedural consequences".[61] Furthermore, "the norm that creates obligations *erga omnes* is owed to "the international community as a whole and all states – regardless of their particular interests in a particular matter – are authorized to emphasize the responsibility of the state in case of violation".[62] Furthermore, *ius cogens* is an expression of the will of the international community of states, acting

[56] United Nations Conference on the Law of Treaties, First and Second Session official Records, A/CONF.39/11/Add. 2, p. 68; For appropriate understanding of the doctrine: Lagonissi Conference on International Law 3-8 April 1966, Carnegie Endorsement for International Peace, Geneva 1967; Karol Wolfke, "Ius cogens in International Law", *PYIL* 1974. See also: Text of the draft conclusions on peremptory norms of general international law (*ius cogens*) adopted by the ILC on first reading, doc. A/74/10, p. 147.

[57] ICJ Reports 1995, para. 29.

[58] ICJ Reports 1996, para. 31.

[59] ICJ Reports 1951, p. 23.

[60] Legal Consequences of a Wall on the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, paras. 155, 159.

[61] ILC: Fragmentation of International Law..., p. 193, para. 380.

[62] *Ibidem.*

in corpore, while in the *erga omnes* obligations construction the international community appears as a kind of a titulary, since these are obligations owed to the international community. This is a specific weak point in the construction of the *erga omnes* obligation because it implies that the "international community" is a legal entity in the sense of international law. Needless to say, this is a fiction that has no basis in law, being rather a philosophical or natural-legal reflection. The *ius cogens* rules imply rights and obligations, while the *erga omnes* doctrine is limited to obligations only. The *ratio* of this determination of the latter one is demonstrated in the nature of *erga omnes* obligations – they belong to secondary and not to primary rules,[63] determination that does not seem well-founded. For it seems obvious that obligations which the International Court of Justice in the Barcelona case determined as obligations *erga omnes* belong to the primary rules as well. The real question is whether these obligations are equipped with additional procedural safeguards or as to whether its violation produce special "procedural consequences".

The Article 48 (Invocation of liability by the non-injured party), (ASR), to which the Working Group refers as to an argument in favor of the existence of *erga omnes* obligations, does not use this term at all and, moreover, tacitly rejects it with its provisions. According to the Article 48, the ASR provides for a call to account by a state that has not suffered damage in relation to the following: a) a breach of an obligation owed to a group of states established to protect the collective interest of the group; and, b) a breach of an obligation owed to the international community as a whole.[64] Therefore it turns out that the Article 48 of the Rule distinguishes between two types of *erga omnes* obligations – *erga omnes* obligations *inter partes* and *erga omnes* obligations in the strict interpretation of the term. As for the *erga omnes* obligations *inter partes*, they are *contradictio in adiecto* and they are basically reduced to the *pacta sunt servanda* rule. The exceptions would make the so-called interdependent or integral obligations in the cases of contractual obligations, in which accomplishment of the obligation by the responsible contracting party is a condition of accomplishment by the other contracting parties (Disarmament Treaty or Antarctic Treaty).

In relation to the obligations towards the international community as a whole, Judge Gaia in his Report submitted to the Institute of International Law pointed out that the collective reaction of all states is impossible in practice, making conclusion that the obligation towards the international community includes the obligation towards each state individually.[65] It is symptomatic that Judge Gaia speaks of the obligations and rights of *erga omnes* tying them implicitly to the *ius cogens* norms as the primary ones. The commentary on Article 48 reads, *inter*

[63] Report of ILC Study Group, *op.cit.*, p. 197. See: para. 23.

[64] See the Article 48(1,a) and 1(b).

[65] Giorgio Gaja, "Obligations and Rights *Erga omnes* in International Law", *Annuaire de I'Institut de droit International,* 2005, vol. 71, Part One, p. 126.

alia, that listing the obligations of states towards the international community as a whole would go beyond the task of codifying secondary rules on state responsibility. The Commission opted for the approach of the International Court of Justice in Barcelona Case which "directed, just for the purpose of example putting acts of aggression and genocide out of law", as well as "principles and rules concerning basic human rights, including protection from slavery and racial discrimination". The Commentary also states that "In its Judgment in the case concerning East Timor, the Court added to the list the right to self-determination of the people".[66] There is not a need to emphasize that all the above rules are considered to be comprised by the *corpus iuris cogentus*.

The difference between the *erga omnes* obligations and the obligations under general international law is however unclear. If, as stated, the only difference between obligations *erga omnes* and *ius cogens* is that the "later have the capacity to annul a norm *in conflict*", then, the constitutive elements of a norm of *ius cogens* give the answer. The *ius cogens* norm is a norm of general international law (general element) and recognition and acceptance, by international community as a whole, as a norm from which no derogation is allowed under sanction of nullity (qualifying element). Without qualifying element, as *differentia specifica*, between *ius cogens* and *erga omnes* obligations, it seems that *erga omnes* obligations are essentially obligations under general international law. The determination of obligations *erga omnes* as obligations that are different from the obligations under general international law would be justified if the *erga omnes* obligations were specifically protected by additional procedure means in the form of *actio popularis*. However, *actio popularis* is rather a theoretical construction.[67]

---

[66] The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries 2003, p. 278, para. 9.

[67] Prof. Thirlway, Principal Legal Advisor of the ICJ for many years, after extensive analysis of the jurisprudence of Court found that "The conclusion which has to be accepted is that obligations *erga omnes* to which "compulsory rights of protection have entered into the body of general international law still be – with possible exception of the obligation not to commit genocide – a purely theoretical category". See: Hugh Thirlway, *The Law and Procedure of the ICJ 1960-1989*, Oxford University Press, Oxford, 2013, Part I, p. 102. In South West Africa case the Court clearly stated that the *actio popularis* was "not known to international law at present..." ICJ Reports 1966, p. 45. States are aware of it, so that, "Nothiwithstanding of apparel, acceptance of the *ega omnes* concept, no state has invoked it in judicial proceedings since its emancipation in the Barcelona case" See: Louis Henkin, Richard Crawford Pugh, Oscar Schahter, Hans Smit, *International Law*, West Publishing, Eagan,1993, p. 556. Such an conclusion necessarily folllows from the conensual nature of the jurisdiction of international courts. The ICJ clearly stated in the East Timor case: "The Court considers that the *erga omnes* character of a norm and the role of consent to jurisdiction are two different things. Whether the nature of the obligations involved the Court could not rule on the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*". See: ICJ Reports 1995, 96, 102, para. 29; Armed Activities on the Territory of Congo, *ICJ Reports* 2002, Provisional Measures 219, 245, para. 71.

In reality it is essentially applied in a perverted form of actions in "relevant non-judicial arenas such as international organs",[68] vindicating community or collective interests, or to "take counter measures unilaterally of jointly against offending states".[69] As regards actions in international organs, the UN Charter has established a collective interest which every state, member or non-member is authorized to bring it before principal UN organs (*exempli causa*, articles 11, 31, 25. of the UN Charter et. al.). These actions are underuably in the general interest of the international community. Other non-judicial actions are unilateral or joint counter measures against offending state outside the UN system. These actions are highly problematic, "appoint itself as a avenger of the international community (...) in the name of higher values as determined by itself" and thus add to international chaos.[70]

The understanding of *erga omnes* obligations, as a separate set of rules, which differ from *jus cogens* only in the absence of the effect of nullity, is controversial, implying transformation of bipartite structure of the general international law into a tripartite – *ius cogens* / *ius dispositivum / ius cogens obligations erga omnes* in the view of the solutions from Roman law and some national systems. A synonym for obligations *erga omnes* is *ius imperativum*.[71] In Roman law, there was a division into *leges pefectae*, i. e. laws, the violation of which entailed the nullity of the treaties; *leges minus quam penectae,* which did not provide for nullity, put only punishment and other unfavorable consequences for the contractual party that violated the law, and *leges imperfectae*, which did not provide for any sanction for contrary treaties, even if they prohibited them. The division also found a place in some internal legal systems, mainly as a result of a different understanding of the concept of public law. There is no legal reason for the introduction of *erga omnes* obligations as a part of the normative structure of international law. Exactly opposite. It would cause confusion. It took almost three centuries for international law to build rules of *ius cogens* and thus create the conditions for the rule of law over the free will of states. However, even today, there is no codification of specific rules of cogent nature. Who would be competent to establish to which group – cogent of *erga omnes* obligations – belongs to a certain rule? In international legal order, there is no equivalent to authorities that determine the legal force of rules in domestic law. Such an understanding of *erga omnes* obligations creates confusion about dispositive rules of international law tacitly suggesting its non-binding nature. In fact, all rules of international as legal rules are in principle binding, so that violation of any of

[68] Henkin, Smith, Schachter, Pugh, *op. cit*., p. 557.

[69] *Ibidem.*

[70] Prosper Weill, "Towards Relative Normativity in International Law", *AJIL* 1983, vol. 77, pp. 413, 433.

[71] Henn-Iusi Kopobu, "Interpretation of Treaties in the Light of International Law", *Yearbook of the A.A.A.,* 1970, pp. 35, 39, 40.

them constitutes illegal act.[72] The only exception would be permissive rules *stricto sensu*. A rule of *ius dispositivum* has a binding character, but in contrast to rule of *ius cogens*, it can be replaced by an agreement of two or more parties in their *inter se* relations or excluded in application of the rights of third states are not violated. Both in theory and in jurisprudence, illegality and validity of contractual agreements are connected.[73] In addition, it seems clear that the obligations *erga omnes* relativize the *corpus iuris cogenti* or some of its parts, since the *erga omnes* obligations as understood by the International Court of Justice in Barcelona case are actually the rules of *ius cogens* (see, paras 22, 23). If considered the obligations *erga omnes* in terms of special set of rules differ from rules of *ius cogens* in their legal force then those rules of *ius cogens* are deprived of peremptory character as its essential quality. What led the International Court of Justice to embark on a legal expedition by incidental observation of *erga omnes* obligations? It seems that the closest assumption is that the Court, confirmed by the examples of *erga omnes* obligations it presented, had in mind the rules of *ius cogens*, but that it did not explicitly mention them, adhering to the inherent limitation in the exercise of judicial task according to which it "cannot make a judgment *sub specie ferende* (under the pretext of law) or anticipate the law before the legislator adopts it.[74] Or the Court's intention was to use its authority to support the inauguration of the *ius cogens* norms in the Convention on Law on treaties in the final stages of drafting.

NEKA RAZMIŠLJANJA O FRAGMENTACIJI OPŠTEG MEĐUNARODNOG PRAVA U SVETLU ILC STUDIJE

APSTRAKT

U savremenoj međunarodnoj zajednici vodi se kontinuirana diskusija o pravnoj prirodi međunarodnog prava i njegovim stvarnim efektima po razvoj međunarodnih odnosa. Jedno od aktuelnih pitanja u tom smislu tiče se domašaja procesa fragmentacije specijalizovanih i relativno autonomnih sfera socijalnih aktivnosti i struktura koje dovode do sukoba pravila i do devijacije institucionalne prakse. Imajući u vidu da je pojava međunarodnog javnog prava rezultat potrebe da se regulišu odnosi ne samo između država, već i drugih međunarodnopravnih

[72] Mark Virally, "Reflexions sur le jus cogens", *AFDI* 1966, p. 9.

[73] Special Rapporteur H. Lauterpacht clearly stated in his Report on Law of Treaties that "The violence of contractual agreements whose object is illegal is a general principle of law" – YILC 1953, II, p. 155, para. 5; Arnold McNair *The Law of Treaties,* Oxford University Press, Oxford, 1961, p. 216; Legal Status of Eastern Greenland, P.C.I.J., Ser. A/B, No. 53, p. 64; Expences case, ICJ Reports 1962, p. 223.

[74] Fisheries Jurisdiction (United Kingdom v. Ireland, Merits, *ICJ Reports,* 1974, para.. 53; Fisheries Jurisdiction (FR of Germany vs. Ireland), Merits, *ICJ Reports,* 1974, p 45.

subjekata, teoretičari međunarodnog prava imaju dobar osnov da preispitaju ovo pitanje. Iznoseći sopstvene konceptualne ideje o prevazilaženju doktrinane podele vezane za diverzifikaciju i ekspanziju međunarodnog prava, autor predmetne analize posvećuje posebnu pažnju fenomenu fragmentaciji opšteg međunarodnog prava u kontekstu studije Komisije za međunarodno pravo (ILC).

Ključne reči: Fragmentacija opšteg međunarodnog prava, fragmentacija *stricto sensu*, fragmentacija *lato sensu*, Komisija za međunarodno pravo

REFERENCES

1. Address to the Plenary Session of the G. A. of the United Nations by Judge Schwebel, President of the ICJ, 26. October 1999. Retrieved from:www.icj-cij.org.
2. Bartoš, M., „Rad Komisije za međunarodno pravo u 1963", *Međunarodni problema*, 3/1963.
3. Bartoš, M., "Legal Force of the United Nationas", *Yugoslav Review of intenational Law*, 1/1958.
4. Burca, G., "The European Court of Justice and the International Legal Order of the Kadi", *Jean Monnet Working Paper* 01/09, p. 55, Retrieved from: http://www.ssm.com/abstract=1321313.
5. Carnegie Endorsement for International Peace, Geneva 1967.
6. Carty, A., "Critical International Law: Recent Trends in the Theory of International Law", *EJIL*, 1/1991.
7. Case C-402/05P and C-415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission (2008) ECR I – 6351.
8. Case concerning Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzcegovina v. Serbia and Montenegro), Merits, *ICJ Reports* 2007.
9. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), *ICJ Reports* 2007.
10. Case concerning the Application of the Convention on Prevention and Punishment of the Crime on Genocide (Croatia v. Serbia), Merits, *ICJ Reports* 2015.
11. Case concerning the United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980.
12. Deplano, P., Fragmentation and Constitutionalization of International Law: A Theoretical Inquiry", *European Journal of Legal Studies,* vol. 6, Issue 1, 2013;
13. Falk, R., Mendlowitz, S., Kim, S.S. (Eds), *International law,* Samuel S. Kim, Transaction Publishers Piscataway, 1966.

14. "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the Study Group of ILC*, A/CN.4/L 682.
15. "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", *Report of the Study Group of ILC,* A/CN.4/L.
16. Gaia, G., "Obligations and Rights *Erga omnes* in International Law", *Annuaire de I'Institut de droit International,* 2005, vol. 71, Part One.
17. Guillaume, G., "The Future of International Judicial Institutions", *ICLQ* 1995, vol. 44.
18. Hafner, H., "Pros et Cons Ensuing from Fragmentation of International Law", 25 *Michigan Journal of International Law*, 2004.
19. Henkin, L., Pugh, R., Schahter, O., Smit, H., *International Law*, West Publishing, Eagan,1993.
20. Henn-Iusi Kopobu, "Interpretation of Treaties in the Light of International Law", *Yearbook of the A.A.A.,* 1970.
21. Hummer, B.W., "Internationale nichstaatliche Organisationen in Zeitalter der Globalsierung", *Berichte der Deutchen Gesellshaft für Volkerecht*, 31/1999.
22. Hummer, B.W., *Non-State Actors as New Subject of International Law*, ed. Hofman, 1999.
23. ICTY Prosecutor v. Blagojević, Trial Judgment, 2005.
24. ICTY Prosecutor v. Krstić, Appeals Judgment, 2004.
25. ILC, "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law", 2005, Doc. A/CN.4/L. 682. et al.
26. Kennedy, D., *International Legal Structures*, Nomos Verlagsgesellschaft, Baden Baden, 1987.
27. Koskenniemi, M., *From Apology to Utopia, The Structure of International Legal Argument*, Lakimiesliiton Kustannus, Helsinki, 1989.
28. Koskenniemi, M., Leino, P., "Fragmentation of International Law? Postmoder Anxieties", *Leiden Journal of International Law*, 2002, vol. 15.
29. Kreća, , *Prestanak ugovora u savremenom međunarodnom pravu*, Naučna knjiga, Beograd, 1988.
30. Kreća, M., "Some reflections on Main Features of *Ius Cogens* as Notion of International Law", in *Festschrift Abendroth*, Frankfurt, New York 1982.
31. Kreća, M., „O demokratizaciji međunarodnog prava", *Marksistička misao* 3/84.
32. Kreća, M., *Apsolutno obavezne norme (ius cogens) u međunarodnom pravu, Naučna knjiga, Beograd, 1989.*

33. Kreća, M., *Međunarodno javno pravo,* 13th edition, 2022;
34. Kreća, M., *Quelques observations sur le probléme de la hierarchie des regles du droit dans le droit international public*, Yugoslav Revue of International Law, No. 1/1980.
35. Lagonissi Conference on International Law 3-8 April 1966.
36. Lauterpacht, H., *Covenent as a "higher law"*, BYIL, 1936.
37. Le Fir, L., *Međunarodno pravo,* Geca Kon, Beograd, 1934.
38. Lorimer, J., *Droit International,* traduit par E. Nys, C. Muquardt, Brussels, 1885.
39. Mafner, G., "Pros and Cons ensuring from Fragmentation of International Law", Michigen Journal of International Law, vol. 25(4) 2004.
40. Manning, W.O., *Commentaries on the Law of Nations*, Oxford University Press, Oxford, 1839
41. McElhinney u Ireland, App. No. 31253/96, Para. 36; Al-Adsani v. UK App. No. 37112/97.
42. McLachlan, C., "The principle of Systematic Integration and Article 31 (3,c) of the Vienna Convention", *ICLQ,* vol 54, 2005.
43. McNair, A., *The Law of Treaties,* Oxford University Press, Oxford, 1961.
44. Murphy, S. D., "Deconstructing Fragmentation; Koskenniemi's 2006 ILC Report", *Temple International and Comparative Law Journal* (forthcoming); GWU Law School Public Law Research Paper No. 2013–109.
45. NATO Defence College, *Towards a new Strategic Concept of NATO,* by KK. Vittman, Research Division, September 2009, Rome.
46. O' Donaghue, A., "International constitutionalism and the state", *International Journal of Constitutional* Law, Oxford Academic, 2013, vol. 11, No. 4.
47. Pauwelyn, J., *Conflict of Norms in Public International Law. How WTO Law Relate to Other Rules of International Law,* Cambridge University Press, Cambridge, 2003.
48. Report of the Study Group on the work of its 58th session, para. 2.
49. Simma, B., "Self-contained regimes", *Netherlands Yearbook of International Law,* vol. 16, 1985.
50. Simma, B., Pulkovski, D., "Planets and Universe; Self-contained Regimes in International Law", *EJUL* 2006, vol. 17, No. 3.
51. Simme, B., "NATO, the UN and the Use of Force: Legal Aspects", *EJIL,* 1999, vol. 10.
52. The ILC's Articles on State Responsibility, Introduction, Text and 53. Commentaries, Introduction by J. Crawford, 2003.
53. The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries 2003.

54. Third Report on State Responsibility, YILC 1982, II, part I.
55. Thirlway, H., *The Law and Procedure of the ICJ 1960-1989*, Oxford University Press, Oxford, Part I.
56. Tzevelekos, V.P., "The Use of Article 31 (3,c) of the VCLT in the Case Law of EHCR; An effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology", *Michigan Journal of International Law,* 2010, vol. 31, Issue 3.
57. UN Conference on the Law of Treaties, First and Second Sessions, Vienna, 26. March – 24. May and 9. April – 22. May 1969, Official Records.
58. United Nations Conference on the Law of Treaties, First and Second Session official Records, A/CONF.39/11/Add. 2.
59. Verdross, A., "Forbidden Treaties in International Law", *AJIL,* 1937, vol. 31, No. 4.
60. Villiger, M., *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden and Boston, 2009.
61. Virally,M., « Reflexions sur le jus cogens », *AFDI* 1966.
62. Weill, P., "Towards Relative Normativity in International Law", *AJIL* 1983, vol. 77.
63. Wheaton, H., *Elements of International Law*, in the Classics of International Law, ed. by Scott, 1936.
64. Wolfke, K., "Ius cogens in International Law", *PYIL* 1974.
65. *Yearbook of International Law Commission*, 2002, vol. II. Part two.

THE DILEMMA OF INTERNATIONAL CRIMINAL JUSTICE

Hans KÖCHLER*

ABSTRACT

The work is dedicated to the ever-present topic of international criminal justice. Starting from the assumption that the independence of the judiciary generally requires the separation of powers, the author examines the question of why this condition is absent in international legal relations. Since there is no clear division of power in international relations (because there is no world state), a rational question arises: is it even possible to achieve international criminal justice in the existing international system or does this "justice" risk becoming a pawn of global power politics? Contemporary trends in the development of international law indicate that the system of international criminal justice that is practiced in international relations is in fact practiced as in a kind of *vacuum*, that is, in a space where legal fiction replaces reality. In other words, when international criminal law exceeds national borders, it is exposed to political influences, which does not contribute to the rule of law, but, on the contrary, opens the door to legal uncertainty. Therefore, it would be legally logical to ask how it is possible to achieve justice in international criminal cases if it is between two irreconcilable contradictions - the conflict of national sovereignty and supranational power.

Key words: International law, international criminal justice, sovereignty, separation of powers

INTRODUCTION

"(…) δίκαια μὲν ἐν τῷ ἀνθρωπείῳ λόγῳ ἀπὸ τῆς ἴσης ἀνάγκης κρίνεται, δυνατὰ δὲ οἱ προύχοντες πράσσουσι καὶ οἱ ἀσθενεῖς ξυγχωροῦσιν".[1]

* Professor emeritus, University of Innsbruck, Austria; President, International Progress Organization. E-mail: hans.koechler@uibk.ac.at

[1] Thucydides, *The Peloponnesian War* (finished around 411 BC), Book V, Chapter 89 (*Athenians to the Melians*). Greek original text: *Sammlung Tusculum: Der Peloponnesische Krieg.* Ed. Michael Weißenberger. Berlin/Boston: de Gruyter, 2017, p. 926. "(…) right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must." Translation by Richard Crawley, in: *History of the Peloponnesian War*. London/New York: J.M. Dent/E.P. Dutton, 1910, p. 269.

Independence of the judiciary, secured by a separation of powers, is an indispensable criterion for the rule of law. In any state system (domestically), this requires an elaborate mechanism of checks and balances between the branches of government. Specifically, "independence" rests in the judiciary's not being bound by political instructions, but solely by the norms of the democratically created law (within the bounds of the Constitution), and in the ability (i.e. authority) to enforce its decisions through the executive branch in a subsidiary role. Only such an arrangement can ensure the exercise of judicial authority in a consistent manner. Equality before the law, as basic principle, cannot be guaranteed in any other setting. The above conditions – ingredients indispensable for the rule of law in general – are absent outside the normative framework of the sovereign state. Internationally, in the (still) largely anarchic space between states, there simply is no separation of powers. In that space, there can only be a balance of power among a multitude of sovereign actors who keep each other under some control. Judicial authority that stretches beyond state borders is alien to such a system. If the exercise of judicial authority is nevertheless confirmed, it remains legally dubious as it risks being arbitrary and highly politicized. This has been the case with virtually all arrangements of international criminal justice since the Second World War, such as: a) the "unilateral" projection of sovereignty in cases where a state claims "universal jurisdiction" (measures that have the potential to trigger conflicts with other states); b) the "collective" projection of power by states that establish a court either as victors after armed conflict or as members of the United Nations Security Council (in violation of Article 14[1] of the International Covenant on Civil and Political Rights); c) the International Criminal Court, established by intergovernmental treaty, where limited membership (in particular the absence of great powers) is in contrast to the quasi-universal prosecutorial authority claimed by the Court (potentially also over officials from non-state parties, as far as territorial jurisdiction is concerned, in contravention to the Vienna Convention on the Law of Treaties). The very dilemma of international criminal justice consists in an irreconcilable contradiction at the roots of these projections of judicial power, namely the conflict between national sovereignty and supranational authority (which is situated totally outside a framework of checks and balances). It opens the door to the politicization of the judicial function. As regards legal consistency and moral legitimacy, but also mere effectiveness, the predicament is similar to that of "humanitarian intervention": in the absence of a world state, criminal justice risks becoming a pawn of global power politics.

EFFECTIVE IMPLEMENTATION OF JUDICIAL AUTHORITY

Enforcement of norms and consistency in enforcement are defining criteria of the rule of law in any constitutional system. The latter criterion strictly excludes double standards in the application of the law. Efficacy is a condition of the

validity of legal norms in general, and their enforceability distinguishes legal from moral norms.[2] Fulfillment of these criteria requires an elaborate system of checks and balances between the authorities of the state. Under a genuine constitutional separation of powers, the status of the judiciary will be independent in the formal as well as in the material sense. The constitutional provisions defining the powers of the judicial branch must be tied to mechanisms of effective enforcement of its authority. Guarantees without precise rules of application are meaningless. This implies that, under all circumstances, the judiciary must be in a position to resort to the means which executive power provides in order to give effect to its decisions. It also requires financial independence of the judiciary under the state budget. As regards criminal justice, the initiation of investigations, the issuing of arrest warrants, the detention of suspects, and the rendering and enforcement of judgments must in no case be influenced by tactical considerations of any sort. Above all, prosecutors and judges – and court officials in general – must be able to act free from fear and free from any concern as to potential political or financial implications and ramifications of their decisions. However, an open and controversially debated question in many state systems is the constitutional independence of the prosecutorial authority, i.e. it's not being bound by instructions from the executive branch.[3] Constitutional arrangements at the level of the sovereign state may – at least in principle – ensure justice that is more than a series of arbitrary or ad hoc decisions, dictated by considerations of power and opportunity. Fulfillment of the above-described criteria distinguishes a *Rechtsstaat* (state based on justice) from a *Willkürstaat* (authoritarian state).

NON-EXISTENCE OF SEPARATION OF POWERS AT THE INTERNATIONAL LEGAL LEVEL

In the international realm, in relations between sovereign states, there are no rules or mechanisms that could be compared to the constitutional separation of powers at the domestic level. This will not change as long as there is no "world state." Accordingly, *international* criminal justice can only be practiced in a kind of vacuum, i.e. in a space where (legal) fiction replaces reality (of power). As soon as criminal justice transcends the boundary of the sovereign state, it is fraught with systemic normative contradictions, a predicament that makes it hostage to the vagaries of politics. So far, all projects of international criminal justice appear to have ignored, or tried to repress, the hard facts, namely the absence of any

[2] Cf. Hans Kelsen who defines law as a "coercive normative order," in clear distinction from a system of (unenforceable) moral norms: *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit*. Vienna: F. Deuticke, 1960, pp. 45ff.

[3] Concerning the legal systems of Austria and Germany, cf. Iris Quendler, *Die Weisungsgebundenheit der Staatsanwaltschaft im österreichischen und deutschen Recht*. MA thesis, University of Graz, Faculty of Law, Dept. of Criminal Law, 2011.

provisions for a separation of powers in the conduct of international affairs. The United Nations Charter does not provide such a framework. Instead of a *separation of powers*, its provisions embody the *balance of power* as it existed between five member states upon the foundation of the organization.[4] Ultimately, it is the "rules" of power politics that determine arrangements in the realm between sovereign states. The history of international criminal tribunals and of the rather hastily abandoned practices of "universal jurisdiction" is ample proof of this. In all these constellations in which these tribunals operated, the basic problem seems to have been an intractable contradiction between two key concepts: between national sovereignty and jurisdictional authority. Even a cursory look at the creation, make-up and functioning of tribunals or other projects of international criminal justice since the Second World War will make this obvious. Among those are the post-war tribunals of Nürnberg and Tokyo; similar to those, the post-Cold War ad hoc tribunals established by the United Nations; cases of a "unilateral exercise" of judicial authority (by individual states) in the name of so-called "universal jurisdiction;" or the "world court without a world state," the International Criminal Court (ICC), which, to this day, in spite of the founders' ambitions, has remained a largely dysfunctional body, failing to meet even of the most basic requirements of the rule of law.[5] Because of systemic contradictions and the operation of these projects outside a robust system of checks and balances, they have produced either forms of *victor's justice* or *unenforceable rulings* with essentially tactical purpose (as in cases against acting or former heads of state). In some cases before the ICTY[6] and the ICC, it has become more than obvious that prosecutors or judges tried to "accommodate" powerful state actors, donors, supporters or – as in the case of the ICC – actual or prospective State Parties to the Court. Under these circumstances, judicial practice is unavoidably one of double standards. As we shall see, in such a context, equality of justice remains a noble illusion. In virtually all arrangements for criminal justice at the transnational level so far, it has been *politics* that dominates *law* – in practice as well as in statute. The Chief Justice of the United States (1941-1946), Harlan Fiske Stone, has made the point very clearly in remarks on the ad hoc tribunals after World War II. "So far as the Nürnberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, (…) I dislike extremely seeing it dressed up with a façade of legality. The best that can be said for it is that it is a political act of the victorious States, which may be morally right, as was the sequestration of Napoleon about

[4] Hans Köchler, "The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order," in: *Chinese Journal of International Law*, 2006, Vol. 5, No. 2, pp. 323–340.

[5] Hans Köchler, "Justice and Realpolitik: The Predicament of the International Criminal Court," in: *Chinese Journal of International Law*, 2017,Vol. 16, Issue 1, pp. 1–9.

[6] International Criminal Tribunal for the Former Yugoslavia (ICTY).

1815. But the allies in that day did not feel it necessary to justify it by an appeal to nonexistent legal principles."[7] Similarly, reporting on a conversation between the delegates of Athens and Melos in the course of the Peloponnesian War, Thucydides – almost two and a half millennia ago – addressed the supremacy of power over law in relations between states.[8]

THE DILEMMA ABOUT THE INDEPENDENCE OF INTERNATIONAL CRIMINAL JUSTICE

If, according to Thucydides quote, "right (…) is only in question between equals in power," what space is left for the administration of justice between states? Is there a way out of the dilemma between law and politics, the very predicament of international criminal justice? How can, in the absence of a separation of powers, the independence of the judiciary be secured and uniform, impartial enforcement of the law – including, first and foremost, criminal judgments – be guaranteed? We shall focus here briefly on four particular domains and practices of criminal justice: the International Criminal Court; ad hoc courts established by the United Nations Security Council; the exercise of universal jurisdiction by individual states; and judicial proceedings on the basis of ad hoc extraterritorial arrangements. We are faced with the following questions:

(1) As regards the (permanent) International Criminal Court (ICC), how can this body impartially enforce the law if: a) The areas of its jurisdiction are scattered around the globe like spots on a leopard skin. (To date, of the 193 member states of the United Nations, only 123 are State Parties to the Rome Statute of the ICC.); b) The most powerful countries (particularly those with the largest military capabilities) remain outside the Court, but nevertheless occasionally resort to using it (via the Security Council) if and when it suits their interests – while steadfastly refusing to accept the Court's territorial jurisdiction in cases where it could reach their nationals (e.g. in Afghanistan or Ukraine); c) The Court's judges or Prosecutor are tempted to act opportunistically in order to attract funds (from states or private institutions), to please powerful actors, to attract new members, or just to avoid being sanctioned, or to lobby for their career.

(2) How can ad hoc courts established by the United Nations Security Council meet the basic requirements of the rule of law if: a) Procedures of criminal justice are treated like measures of collective security under Chapter VII of the UN Charter (i.e. politically); b) Courts are created by executive fiat instead of by intergovernmental treaty; d) Powerful permanent members of the Council effectively interfere into the exercise of jurisdiction (as e.g. admitted

[7] Quoted in: Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law*, Viking Press, New York, 1956, p. 715.

[8] See the text quoted in the motto above.

by Carla del Ponte concerning the investigation of NATO officials at the Yugoslavia Tribunal).[9]

(3) How can impartial enforcement of the law be guaranteed in cases where individual states decide to exercise "universal jurisdiction" if: a) A state, in the name of a lofty principle, attempts to stretch its judicial authority (criminal jurisdiction) over the entire globe while being unable to face the consequences in terms of realpolitik. (Belgium's rather drastic experience with its 1993 law for the prosecution of "international crimes" is a case in point);[10] b) That state cannot resist the temptation of self-righteousness, by making ideological use of criminal justice; c) Political disputes (e.g., between exiles) in foreign countries are being settled in a third country and criminal justice is effectively instrumentalized for a (foreign) political agenda.

(4) How can extraterritorial arrangements for judicial proceedings ensure the independence of a court if: a) An intergovernmental, ultimately political, dispute over jurisdictional issues is at the roots of its creation by special governmental decree (as in the case of the Scottish Court in the Netherlands, the so-called *Lockerbie Court*);[11] b) The court, in terms of evidence procurement, is effectively subjected to interference of intelligence services from countries involved in the dispute and thus has to operate in an environment of international power politics; c) The creation of the court is tied to specific political goals on both sides of the dispute (e.g. the lifting of sanctions / the "global war on terror," etc.); and, d) The judges, therefore, are under mental pressure to produce an outcome that is diplomatically palpable. (The contradictory reasoning of the indictment, modified in the course of the proceedings, and of the judgment, almost a *sacrificium intellectus* on the part of the judges, in the Lockerbie trial[12] may be an indication as to the enormous political strain under which the Court had to operate.)

---

[9] "I understood that I had collided with the edge of the political universe in which the tribunal was allowed to function. (...) And my advisors warned me that investigating NATO would be impossible." See: Carla del Ponte with Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir*. New York: Other Press, 2009, p. 60.

[10] For details of the political dilemma faced by Belgium in attempts to implement the law (and the eventual abolishing of its essential provisions), see: Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads.* Springer: Vienna/New York, 2004, pp. 90ff.

[11] Hans Köchler, "The Lockerbie Trial and the Rule of Law," in: *The National Law School of India Review*, 2009, Vol. 21, Issue 1, pp. 149–162.

[12] For details, see *Report on and evaluation of the* Lockerbie Trial *conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998)*, at http://i-p-o.org/lockerbie-report.htm.

SOVEREIGNTY vs. SUPERNATIONALITY

So far, the above-described challenges have proven insuperable under the realities of today's international law. In spite of all the conceptual constructions or legal fictions in support of universal prosecution of so-called international crimes – crimes *erga omnes* –, the global jurisdictional effort, borne out of a kind of post-war or "new age" euphoria (e.g., after the collapse of the bipolar order of the Cold War), is ultimately faced with the reality of national sovereignty. Global order is still shaped by a multitude of state actors that – according to Article 2(1) of the UN Charter – enjoy the status of "sovereign equality." Under these circumstances, projects of criminal justice beyond national borders are necessarily and unavoidably overambitious (as when based on claims to "universal jurisdiction") or dishonest (as in the cases of victor's justice). Due to the above-described normative incompatibilities, international realpolitik has often been the "arbiter" – or brutal corrective – of such undertakings. Cases in point are: a) The so-called "Hague Invasion Act" of the United States Congress;[13] b) The sanctions imposed by the United States on the Prosecutor and other judicial officers of the International Criminal Court in connection with the investigation in the situation in Afghanistan;[14] c) Political threats by powerful state actors against states attempting to exercise universal jurisdiction (e. g., Belgium); d) Secret deals – or pressure – to determine the scope of prosecutorial activity or the outcome of trials (as in the Lockerbie Trial or the Yugoslavia Tribunal);[15] e) Direct or indirect influence – via dedicated financial contributions or donations by State Parties and also from outside the Court, including from NGOs – on the conduct of investigations and prosecutions at the ICC (as in the case of Ukraine).[16] All of the above occurrences or practices are strictly incompatible with the independence of the judiciary. In a context of nation-states as sovereign actors, any transnational

[13] United States Congress, *American Servicemembers' Protection Act of 2002*, H.R . 4775, Public Law 107–206, Sec. 2001–2015 (Aug. 2, 2002) (dubbed "The Hague Invasion Act").

[14] For details, see: International Progress Organization, *THE INTERNATIONAL CRIMINAL COURT IN THE WEB OF POWER POLITICS: Statement by Dr. Hans Köchler on the Executive Order signed by the President of the United States on 11 June 2020***,** Vienna, 26 June 2020/RE/20689c-is. – President Biden revoked the Executive Order.

[15] For the Lockerbie Trial, see Hans Köchler and Jason Subler (eds.), *The Lockerbie Trial: Documents Related to the I.P.O. Observer Mission.* Studies in International Relations, Vol. XXVII. Vienna: International Progress Organization, 2002. – For the Yugoslavia Tribunal, see the above quoted admission by Carla del Ponte (fn. 8).

[16] Article 116 ("Voluntary contributions") of the Rome Statute of the ICC has opened the Pandora's box for influence peddling, incompatible with the independence of the Court. In the case of Ukraine, the Prosecutor has accepted contributions also from countries that provide armed support to one side in the ongoing conflict. For details, see the report by Agence France-Press, *ICC prosecutor urges "stamina" in Ukraine probes at London meeting*, London, 21 March 2023, https://news.abs-cbn.com/overseas/03/21/23/icc-prosecutor-urges-stamina-in-ukraine-probes.

system of criminal justice will be inherently dysfunctional. Supranational authority at global level – which the notion of universal jurisdiction, or of transnational competence of courts, implies – is antagonistic to the international (i.e. intergovernmental) order enshrined in the UN Charter, based on the principle of sovereign equality of states. Global justice in a context of a multitude of nation-states is indeed a strange dystopia. The vision – and its purported realization through the earlier described projects or institutions – appears even stranger in view of the fact that the decision-making rules of the United Nations Security Council are themselves an element of world government. Due to the provisions of Article 27(3) (concerning the "veto" and a special non-abstention privilege),[17] the group of the Council's five permanent members (P5) enjoys a kind of global (supranational) authority over all other states in matters of war and peace. In the name of "collective security," the rules of the UN Charter privilege five states – as a group and individually (insofar as each of them is effectively immune from any coercive action against its own illegal uses of force) – as enforcers of peace between all states. Although this system defeats its own purpose – because of the mutual blockage among the P5, the supposed enforcers of the law, in all cases affecting their national interests or relating to their own acts of aggression – the fact remains that the foundational norm of today's international order, the prohibition of the international use of force,[18] is virtually unenforceable when it comes to the actions of those five powers. In other words: the norm can only be applied on the basis of double standards. Thus, supposedly for the sake of peace, not only sovereign equality (of all other states) is sacrificed, but also a state of international anarchy is established. The paralysis of the Security Council in all cases where any of the P5 members decides to protect its interests by use of the veto is evidence of this predicament. As creator of ad hoc international courts (a role for which it anyway lacks proper authority)[19] and by virtue of its referral authority under the Rome Statute of the ICC,[20] the Security Council has extended this kind of anarchy also to the judicial realm.[21] Because all of the Council's decisions on judicial matters will ultimately be dictated by the interests of the P5,

[17] For details, see Köchler, *The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations*. Studies in International Relations, Vol. XVII. Vienna: International Progress Organization, 1991.

[18] Article 2(3) of the UN Charter.

[19] On the lack of authority, cf. International Progress Organization, *MEMORANDUM on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the "International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991"*. Caracas, 27 May 1999, at http://i-p-o.org/yu-tribunal.htm.

[20] Article 13(b).

[21] For details, see Köchler, *The Security Council as Administrator of Justice?* Studies in International Relations, Vol. XXXII. Vienna: International Progress Organization, 2011.

the other member states of the world organization are faced with the unenviable reality of power as it is described in the dictum attributed by Thucydides to the Athenians during the Peloponnesian War.[22]

THE DILEMMA STILL REMAINS: THE POWER OF JUSTICE OR THE JUSTICE OF POWER?

In the present global system, and in the total absence of international checks and balances (except among the P5 as equals among themselves),[23] compromising sovereign equality of states for the sake of criminal justice has meant delivering justice to the vagaries of realpolitik. The lack of any procedural restraints on the assertion of power by the P5, enabling their statutory impunity under the UN Charter, precludes any semblance of a separation of powers within the current UN system. There can be no justice under conditions where power politics determines the prosecutorial conduct, whether directly or indirectly (whether in terms of jurisdictional scope of a court or prosecutorial choice).[24] Due to the perpetual antagonism between power and law, the dilemma of international criminal justice remains unresolved. So far, sporadic and inconsistent prosecutorial acts – whether by UN-sponsored ad hoc courts or by a permanent body such as the ICC – have only discredited the idea of the international rule of law and, in many instances, undermined prospects of peace in the very situations those initiatives were meant to help pacify.[25] *Fiat justitia, pereat mundus* cannot

[22] See the motto above.

[23] Hans Köchler, "The Dual Face of Sovereignty: Contradictions of Coercion in International Law," in: *The Global Community – Yearbook of International Law and Jurisprudence, 2019*, Part 6: "Recent Lines of Internationalist Thought." New York: Oxford University Press 2020, p. 884.

[24] As regards the latter, the conduct of the ICC Prosecutor is a case in point. While de-prioritizing the investigation of U.S., Australian and British personnel and personnel of the former Afghan government in favor of the prosecution of Taliban and Al-Qaeda fighters (citing "limited resources available to my Office"), and effectively not pursuing further investigations in the situation in Palestine, the Prosecutor decided to accept donations from parties involved in the ongoing armed conflict in Ukraine, and to focus on the situation in that country. Concerning Afghanistan, see: "Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan", *ICC News Release*, 27 September 2021; "Afghanistan: ICC Prosecutor's statement on Afghanistan jeopardises his Office's legitimacy and future," *Amnesty International Public Statement*, 5 October 2021, index number IOR 53/4842/2021, Retrieved from: https://www.amnesty.org/en/documents/ior53/4842/2021/en/.

[25] This clearly has been the case with the ICC arrest warrants in the cases of the situations in Sudan and Russia, the former on the basis of a referral of the Security Council, the latter following from a declaration of the government of Ukraine under Article 12(3) of the Rome Statute. In these cases, involving countries that are not State Parties to the ICC, the Court operates on the basis of "borrowed" jurisdiction resulting from decisions dictated not by judicial, but political considerations. In both cases, the Prosecutor acted "expeditiously" according to the expectations of the countries that enabled the Court act.

and must not be the guideline of transnational justice in a context of geopolitical instability – and even less so when "justitia" means political justice. Projects and arrangements that create the illusion of justice – such as the International Criminal Court with its geographically sporadic "complementary" jurisdiction or the (legally unsound and so far failed) attempts of states to exercise "universal" jurisdiction – risk derailing the development towards a system of peaceful-coexistence among equals. While, domestically, a constitutional separation of powers is the *conditio sine qua non* for the independence of the judiciary – and, thus, a constitutional prerogative under the *idea* of justice –, in relations between sovereign states a (political) balance of power is the only antidote to abuses of criminal justice in the regulatory vacuum, or chaos, of the perpetual struggle for power. One cannot put the cart before the horse. There can be no world court without a world state, and there can be no universality of jurisdiction co-existing with the particularity of a multitude of state interests and norms, which forms today's "global community." The dilemma of international criminal justice remains unresolved.

DILEMA MEĐUNARODNE KRIVIČNE PRAVDE

APSTRAKT

Rad je posvećen uvek prisutnoj temi međunarodne krivične pravde. Polazeći od pretpostavke da nezavisnost sudstva generalno zahteva podelu vlasti, autor se bavi pitanjem zašto ovaj uslov izostaje u međunarodnim pravnim odnosima. Pošto u međunarodnim odnosima nema jasne podele vlasti (jer ne postoji svetska država), postavlja se racionalno pitanje da li je u postojecem međunarodnom sistemu uopšte moguće ostvariti međunarodnu krivičnu pravdu ili ova „pravda" rizikuje da postane pijun globalne politike moći? Savremeni trendovi u razvoju međunarodnog prava ukazuju na to da se sistem međunarodnog krivičnog pravosuđa koji se primenjuje u međunarodnim odnosima zapravo sprovodi kao u svojevrsnom *vakuumu*, odnosno u prostoru gde pravna fikcija zamenjuje stvarnost. Drugim rečima, kada međunarodno krivično pravo prevaziđe nacionalne granice, ono je izloženo političkim uticajima, što ne doprinosi vladavini prava, već, naprotiv, otvara vrata pravnoj nesigurnosti. Stoga bi bilo pravno logično postaviti pitanje kako je moguće ostvariti pravdu u međunarodnim krivičnim predmetima ako se pravda nalazi između dve nepomirljive protivrečnosti – sukoba nacionalnog suvereniteta i nadnacionalne moći?

Ključne reči: Međunarodno pravo, međunarodno krivično pravosuđe, suverenost, podela vlasti

REFERENCES

1. "Afghanistan: ICC Prosecutor's statement on Afghanistan jeopardises his Office's legitimacy and future," *Amnesty International Public Statement*, 5 October 2021, index number IOR 53/4842/2021. Retrieved from: https://www.amnesty.org/en/documents/ior53/4842/2021/en/.
2. "ICC prosecutor urges "stamina" in Ukraine probes at London meeting", Agency France-Press, London, 21 March 2023. Retrieved from: https://news.abs-cbn.com/overseas/03/21/23/icc-prosecutor-urges-stamina-in-ukraine-probes.
3. "Memorandum on the Indictment of the President of the Federal Republic of Yugoslavia, the President of the Republic of Serbia and Other Officials of Yugoslavia by the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", International Progress Organization, Caracas, 27 May 1999. Retrieved from: http://i-p-o.org/yu-tribunal.htm.
4. "Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan", *ICC News Release*, 27 September 2021.
5. "The International Criminal Court in the Web Of Power Politic", Statement by Dr. Hans Köchler on the Executive Order signed by the President of the United States on 11 June 2020**,** International Progress Organization, Vienna, 26 June 2020/RE/20689c-is
6. *History of the Peloponnesian War*. Translation by Richard Crawley, in: J.M. Dent/E.P. Dutton, London/New York, 1910.
7. Kelsen, Hans, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit*. F. Deuticke, Vienna, 1960.
8. Köchler, Hans, "Justice and Realpolitik: The Predicament of the International Criminal Court," in: *Chinese Journal of International Law*, 2017, Vol. 16, Issue 1.
9. Köchler, Hans, "The Dual Face of Sovereignty: Contradictions of Coercion in International Law," in: *The Global Community – Yearbook of International Law and Jurisprudence,* 2019, Part 6: "Recent Lines of Internationalist Thought", Oxford University Press, New York, 2020.
10. Köchler, Hans, "The Lockerbie Trial and the Rule of Law," in: *The National Law School of India Review*, 2009, Vol. 21, Issue 1.
11. Köchler, Hans, "The Security Council as Administrator of Justice?" *Studies in International Relations*, Vienna: International Progress Organization, 2011, Vol. XXXII.

12. Köchler, Hans, "The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order," in: *Chinese Journal of International Law*, 2006, Vol. 5, No. 2.
13. Köchler, Hans, "The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction and its Consequences on International Relations", *Studies in International Relations,* Vienna: International Progress Organization, 1991, Vol. XVII.
14. Köchler, Hans, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads.* Springer: Vienna/New York, 2004.
15. Köchler, Hans, Subler, Jason (eds.), *The Lockerbie Trial: Documents Related to the I.P.O. Observer Mission.* Studies in International Relations, Vol. XXVII. Vienna: International Progress Organization, 2002.
16. Mason, Alpheus Thomas, *Harlan Fiske Stone: Pillar of the Law*, Viking Press, New York, 1956.
17. Ponte, Carla del, Sudetic, Chuck, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity: A Memoir*, Other Press, New York, 2009.
18. Quendler, Iris, *Die Weisungsgebundenheit der Staatsanwaltschaft im österreichischen und deutschen Recht*. MA thesis, University of Graz, Faculty of Law, Dept. of Criminal Law, 2011.
19. Report on and evaluation of the Lockerbie Trial conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998), Retrieved from: at http://i-p-o.org/lockerbie-report.htm.
20. Thucydides, *The Peloponnesian War*, Book V, Chapter 89 (*Athenians to the Melians*). Greek original text: *Sammlung Tusculum: Der Peloponnesische Krieg.* Ed. Michael Weißenberger, de Gruyter, Berlin/Boston, 2017.
21. United States Congress, *American Servicemembers' Protection Act of 2002*, H.R . 4775, Public Law 107- 206, Sec. 2001-2015 (Aug. 2, 2002) (dubbed "The Hague Invasion Act").

SOME PRELIMINARY THOUGHTS ON THE AFCFTA DRAFT INVESTMENT PROTOCOL: INNOVATIONS AND CHALLENGES IN INTERNATIONAL INVESTMENT LAW

Don WALLACE, Jr.*
Borzu SABAHI**

ABSTRACT

The paper presents preliminary thoughts on the draft AfCFTA investment protocol, which in many ways represents an innovative legal instrument. According to the authors, the investment protocol of the AfCFTA includes some of the latest developments in international foreign investment law, but also some innovative provisions. The work contains several chapters in which the following topics are analyzed: Protected investments - enterprises and companies; Qualified investors and denial of benefits; Property protection and dispute resolution: Claims and a wide range of counterclaims. In the concluding remarks, the authors find that the draft Protocol represents an ambitious effort to create a creative instrument suitable for the sustainable development of African countries.

Key words: The AfCFTA draft investment Protocol, international foreign investment law, legal protection of foreign investments

INTRODUCTION

The Agreement Establishing the African Free Trade Continental Area (AfCFTA) is the largest free trade agreement after WTO, counting almost all African countries -some 55 States – as its members. Signed in 2018 and entered into force in 2021, the AfCFTA is one of the most exciting and promising developments in international rule making, with a potential to significantly boost

* Professor of Law, Georgetown University and Chairman, International Law Institute, Washington, DC. E-mail: wallace@ili.org.

** PhD; Partner, Curtis Mallet-Prevost Colt & Mosle LLP (Curtis) and Adjunct Professor at Georgetown University Law Center, USA.

The authors wish to thank Yaman Gursel for his excellent research and editorial assistance. All errors remain ours. The views expressed here are only those of the authors and do not represent views of the institutions with which the authors are affiliated or the views of Curtis or its clients.

the economies of the member States and eradicate poverty.[1] The AfCFTA itself has 31 articles, and is accompanied with a number of protocols including the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on Rules and Procedures on the Settlement of Disputes.[2] In addition to those, the AfCTA is accompanied by a Protocol governing international investment issues which is known as the Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (the "Protocol" or "Investment Protocol").[3] This Protocol would enter into force 30 days after the deposit of the 22nd instrument of ratification.[4] The first draft of the Investment Protocol of the AfCFTA was completed in November 2021 (the "Draft Zero").[5] It had 45 Articles, and an Annex on Dispute Settlement with 21 Articles. The drafters of the Protocol continued to work on the Draft Zero and made a number of changes, resulted in publishing the second draft of the Investment Protocol in January 2023 (the "Final Draft").[6] The Final Draft resembles modern bilateral investment treaties which promote and protect foreign investments, but in many ways it is more advanced and is designed to protect investments that contribute to sustainable development. In February 2023, the African Union's Heads of State meeting adopted the Investment Protocol. We do not have any information as to whether the adopted version diverges in any ways from the Final Draft. Besides, unlike the Draft Zero, the drafters took out Annex 1 (on dispute resolution) from the Protocol and announced that they would publish it within 12 months after the adoption of the Investment Protocol. With that said, we use the Final Draft in analyzing the Protocol and make references to Draft Zero if we detect any changes that would have a notable impact on the implementation of the Investment Protocol.[7]

---

[1] Maryla Maliszewska, Michele Ruta, "Economic and Distributional Effects", *Report on The African Continental Free Trade Area,* The World Bank Group, 27 July 2020. Foreword on page IX by Caroline Freund and Albert Zeufack. Retrieved from: https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area, 15.09.2023.

[2] The African Free Trade Continental Agreement along with its Annexes. Retrieved from: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf,15.09.2023.

[3] The adopted version of the Investment Protocol has not yet been released. We base our analysis on the version published in January 2023 in comparison with the version shared in November 2021.

[4] Art 23(2) of the AfCFTA provides: "The Protocols on Investment, Intellectual Property Rights, Competition Policy and any other Instrument within the scope of this Agreement deemed necessary, shall enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification."

[5] Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, referred to as "Zero Draft" in Accra in November 2021.

[6] Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, referred to as "Final Draft", Seventh Extraordinary Session of the Specialized Technical Committee on Justice and Legal Affairs (Experts Meeting) in Ghana in January 2023.

[7] Interestingly, the African Arbitration Academy has launched a Model Bilateral Investment Treaty for African States. Retrieved from: https://arbitrationblog.kluwerarbitration.com/2023/01/26/the-african-arbitration-academys-model-bilateral-investment-treaty-for-african-states/. Article 5 of

The focus on sustainable development is a thread that runs through the Protocol's various provisions. The preambular language in several places juxtaposes sustainable development and economic growth.[8] Article 2 on Objectives further explains that "(t)he objectives of this Protocol are as follows: a. encouraging intra-African investment flows and opportunities and promoting, facilitating, retaining, protecting and expanding investments that foster sustainable development of State Parties (…)."

As set forth in the preamble, the Investment Protocol takes inspiration from the United Nations' Agenda 2030, which announced 17 sustainable development goals to pursue.[9] It also draws upon UNCTAD's 2015 Investment Policy Framework for Sustainable Development, as well as a host of other instruments on which these studies were based.[10] The drafters of the Investment Protocol in a way seem to have implemented many if not all of the proposed methods for designing a sustainable development – friendly instrument.

These instruments all recognize the importance of investment flows and FDI to achieve the 17 sustainable development goals, but in a "balanced and integrated manner".[11] The balance in this context is between investor's protection and State's

---

the Protocol deals with relationship of the Protocol with other investment agreements. Articles 5 contains the State Parties' consent to terminate their existing bilateral investment treaties together with their survival clauses, but it does not seem to preclude these States from using the Model treaty to enter into BITs with non-parties to the Protocol; on its face, the Protocol does not seem to preclude the members to use the Model to negotiate treaties among themselves. In such situations, it is possible that both the new bilateral treaty and the Investment Protocol apply in the relationships between the two State Parties that opt to enter into the BIT. Interpretative cannons such as lex posteriori could also be used to argue that whichever instrument comes into force later should prevail in case of conflict.

[8] In the Preamble of the Investment Protocol, it states the following: "(…)TAKING INTO ACCOUNT the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) and other relevant UNCTAD instruments that support new generation investment policies for inclusive growth and sustainable development; (…)". See also: "UNCTAD Investment Policy Framework For Sustainable Development", 2015, pp. 20–26. Retrieved from: https://investmentpolicy.unctad.org/, 15.09.2023.

[9] The Preamble of the Investment Protocol states in the relevant part that: "(…) RECALLING the 2030 Agenda for Sustainable Development, as contained in Resolution A/RES/70/1 of the United Nations General Assembly, and in particular the 17 Sustainable Development Goals; (…)". For more information on the UNDP Sustainable Development Goals, see: https://sdgs.un.org/goals.

[10] The Preamble of the Investment Protocol states in the relevant part that: "TAKING INTO ACCOUNT the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) and other relevant UNCTAD instruments that support new generation investment policies for inclusive growth and sustainable development (…)."

[11] On one hand, we observe a rich variety of pledge-like statements which emphasize promotion and protection of investments that contribute to sustainable development in the Continent, such as "RECOGNISING the significant contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, and the furtherance of investment-related human rights and human development while understanding that sustainable

right to regulate or govern in the public interest. The search for balance is a reaction, in a way, to criticisms of the system of ISDS as being tilted towards protection of investors to the detriment of the States.[12] In the search for a balance, the drafters of the Investment Protocol have ushered in a new era of investment protection, by allowing host States to bring counterclaims involving a range of non-commercial issues over which investment tribunals, constituted under the ICSID and other rules, often refused to assume jurisdiction. This innovation is a response to criticisms of the ISDS system; but it also changes the nature of ISDS inasmuch as it would endow investment tribunals constituted under the Protocol with the power to resolve matters that are not squarely investment-related such as labor and Corporate Social Responsibility (CSR) issues that perhaps belong more to the human rights field than investment. On the other hand, with the idea of providing an "integrated" and balanced approach, protection of investment can no longer go without taking into account the social aspects of protecting capital flows. This is precisely what drafters of the first generation of US investment treaties decided to avoid by purging the old FCNs provisions from provisions that

development requires the fulfilment of its economic, social and environmental pillars;" "MINDFUL of the necessity of retaining, and expanding intra-African investment to increase economic resilience, and enable diversification in furtherance of achieving sustainable development in Africa;" "AFFIRMING the desire to promote accountability, good governance and responsible business conduct in a fair, transparent and predictable investment environment;" "REAFFIRMING the inherent right of State Parties to regulate in their territories and to introduce measures in order to achieve their national public policy objectives, promote sustainable development objectives and protect legitimate public welfare objectives, such as public health, national security, the environment, the conservation of living and non-living exhaustible natural resources, labour standards, the integrity and stability of the financial system and public morals;" "RECOGNISING the importance of encouraging investment activities that benefit economically disadvantaged areas, small and medium-sized enterprises, local communities, indigenous peoples, and underrepresented groups, including women and youth"…On the other hand, the Protocol intends to achieve these aspirations while increasing Africa's share in the global FDI flows: "DESIRING to increase the share of African countries in global flows of foreign direct investments and to benefit from it in accordance with the objectives set out in this Protocol."

[12] Pia Eberhardt, Cecilia Olivet (contributors: Tyler Amos and Nick Buxton), *Profiting from injustice – How law firms, arbitrators and financiers are fuelling an investment arbitration boom,* Corporate Europe Observatory, 2012, Retrieved from: https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf, 20.09.2023; Michael Waibel, Asha Kaushal, Kwo-Hwa Chung and Claire Balchin, "The Backlash Against Investment Arbitration: Perceptions and Reality", in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin (eds.), *The Backlash Against Investment Arbitration,* Kluwer Law International, March 2010. Retrieved from: https://ssrn.com/abstract=1733346, 20.09.2023; Gus Van Harten, Anil Yilmaz Vastardis, "Special Issue: Critiques of Investment Arbitration Reform", *Journal of World Investment & Trade*, 2023, Vol 23 No 3, pp. 363-371; Gus Van Harten, *The Trouble with Foreign Investor Protection*, Oxford University Press, Oxford, 2020; Anil Yilmaz Vastardis, Investment Treaty Arbitration: A justice bubble for the privileged in Thomas Schultz and Federico Ortino (eds.), *The Oxford Handbook of International Arbitration,* Oxford Handbooks, Oxford, 2020.

could be interpreted to protect human rights.[13] The draft Investment Protocol goes full circle back to the FCNs in this respect, but also it takes them even further. These innovations undoubtedly raise a number of challenges for the interpretation and implementation of the Protocol. Our goal is to review some of the key provisions of the Protocol in order to identify how they differ from similar provisions in other treaties, and if or how they improve upon them.

Section II dives into the notion of "protected investment" and analyses enterprise-based investment definitions in the Protocol and its exclusions in comparison with other treaties. Section III explores the issues of "qualified investors" once again from a comparative perspective together with "denial of benefits" provision of the Investment Protocol. Section IV touches upon key substantial provisions in the Protocol expropriation and compensation, the Protocol's provision on protections afforded to investment during administrative and judicial proceedings which appears in lieu of fair and equable treatment. Section V focuses on key aspects of the Protocol's dispute settlement mechanisms including State's right to bring counterclaims involving a range of obligations that the Protocol has imposed on foreign investors. Section VI includes our concluding remarks recognizing various innovations that the Protocol includes, and emphasizing new challenges that these innovations may raise in the years to come.

PROTECTED INVESTMENTS: ENTERPRISES AND COMPANIES

The term "investment," in older investment treaties, was defined broadly to include a range of assets or economic activities.[14] Other treaties contained more limited definitions such as an enterprise-based definition, or a closed-list definition. An enterprise-based definition defines an investment by reference to establishment and acquisition of an enterprise or an interest in such an entity.[15]

[13] Kenneth J. Vandevelde, "The Bilateral Investment Treaty Program of the United States", *Cornell International Law Journal,* 1998, Vol 21 No 2, pp. 201–276, Retrieved from: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1188&context=cilj, 20.09.2023; Pamela Gann, "The U.S. Bilateral Investment Treaty Program", *Stanford J. Int'l L.* 1985, Vol. 21, pp. 373, 383.

[14] The Republic of Turkey and Turkmenistan BIT (1992) Art. I (1)(b); China-Pakistan Free Trade Agreement (2006) Art. 46; Azerbaijan-Finland BIT (2003) Art. 1; Botswana-Ghana BIT (2003) Art. 1; United Nations Conference on Trade and Development – Scope and Definition, UNCTAD Series on Issues in International Investment Agreements, 2011, Vol. II, pp. 7–9. Retrieved from: https://unctad.org/system/files/official-document/diaeia20102_en.pdf, 29.09.2023.

[15] 2003 US-Singapore FTA, Chapter 15, Art. 15.1: "(…) covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter; (…)"; 2004 US Model BIT, Art. 1: "(…) covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter. (…)"; Canada – United States Free Trade Agreement (1988) superseded by North American Free Trade Agreement (NAFTA) (1992).

In ICSID cases, some tribunals started following the *Salini* criteria,[16] which narrowed the scope of qualified investments. In early 2000s, with the 2003 US-Singapore FTA, and the 2004 US Model BIT, a trend began to incorporate the *Salini* criteria in the treaties,[17] and other limitations such as exclusion of claims to money, as well as an order or judgment entered in a judicial administrative action, licenses, authorization, permit, or similar instruments because they lack characteristics of an investment.[18]

The Investment Protocol's definition of investment combines three main elements, some of which are innovative:

First, Article 1 of the Protocol provides an enterprise-based definition of "investment": "Enterprise or company" means any legal or juridical person duly constituted or otherwise incorporated and operated under the applicable laws and regulations of a State Party; "Investment" means an enterprise or company, as defined in this Article, which is established, acquired or expanded in conformity with the laws and regulations of a Host State Party by an investor which maintains substantial business in the territory of that State Party. The enterprise or company

[16] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (I), ICSID Case No. ARB/00/4. In paragraph 52, the Tribunal states that "The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of transaction (See commentary by E. Gaillard, *op.cit.,* p. 292). In reading the Conventions (ICSID)'s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition (…)"; Borzu Sabahi, Noah D Rubins and Don Wallace Jr., *Investor – State Arbitration* (2nd Edition), Oxford University Press, Oxford, 2019, § 10.28 (hereinafter "Sabahi and others").

[17] Sabahi and others, § 10.31; ASEAN – Japan EPA (2008) with the 2019 amendments, Article 51.2 (c): "(…) investment means every kind of asset that an investor owns or controls, which has characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits, or the assumption of risk, including (…)"; Colombian Model BIT (2007), Art. 1 (2)(3): "(…) In accordance with paragraph 1 of this Article (definition of "Investor"), the minimum characteristics of an investment shall be: a) the commitment of capital or other resources; b) the expectation of gain or profit; c) the assumption of risk for the investor. (…)"; ASEAN Comprehensive Investment Agreement (2009) Article 4 (c) footnote (2): "Where an asset lacks the characteristics if an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of fain or profit, or the assumption of risk."; Netherlands Model BIT (2018), Article 1 (a): "(…) 'investment' means every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk. (…)"; cf. Sabahi and others, Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP)(2018), Article 9.1 (1): "(…) investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of fain or profit, or the assumption of risk. (…)".

[18] 2003 US-Singapore FTA, Chapter 15, Art 15.1 footnotes 15–1, 15–2 and 15–3; 2004 US Model BIT, Art. 1 footnotes 1, 2 and 3.

may possess assets, such as: a*)* shares, stocks, or any other form of participation of the enterprise/company or another enterprise/company; *b)*. movable and immovable property including mortgages, liens, pledges, and any other similar rights as defined in conformity with the laws and regulations of the State Party in whose territory the property is situated; *c)* intellectual property rights such as copyrights, patents, trademarks, industrial designs, trade names, know-how and goodwill to the extent they are acquired, maintained and protected under the law of the Host State; *d)* rights conferred by law of the Host State or under contract, including licenses to cultivate, extract or exploit natural resources; or *3)* rights under contracts including turnkey, construction, production, management, concession or other contracts. The requirement in the Final Draft that investment is an "enterprise or company which is established, acquired or expanded in conformity with the laws and regulations of a Host State Party" suggests that in order to enjoy the benefits of the Protocol, investors must establish or acquire a local company. That definition per se excludes investments that are made directly from abroad, but not through a local company owned or established by the investor. The article then goes on to provide a non-exhaustive list of assets that the local company may possess. The list of assets presumably ties them to establishment or ownership of an enterprise, which needs to have "substantive business". In other words, owning one or more of those assets directly from abroad would not qualify as an investment. The list of assets could be useful in establishing "substantial business activity" or perhaps educate local officials about what economic activities companies could engage in, in case they have a more restrictive view of such activities. In Draft Zero, definition of investment required investor to have a "lasting economic relations" in the Host State, which denoted the drafters' intention to protect only investments that are long term. This was removed in the Final Draft. In lieu of that, the drafters added in a new phrase requiring investor to maintain "substantial business" in the Host State.

Second, exclusions of certain categories of economic activities such as claims to money and debt securities are another modern feature. For greater certainty, investment does not include: a) debt securities issued by a government or loans to a government or government-owned or controlled enterprise; b)portfolio investments, that is, investment that does not give the investor the possibility to exercise effective management or influence in the management of the enterprise; or c) claims to money that arise solely from commercial contracts from the sale of goods or services by a national or enterprise in the territory of a State Party to an enterprise in the territory of another State Party, or the extension of credit in connection with a commercial transaction; d) claims arising from an order or judgment rendered in any judicial, administrative or arbitral proceeding. Exclusion of debt securities issued by governments and State-owned entities, in paragraph a) is probably a reaction to mass claims brought against Argentina and Cyprus by bond holders in the aftermath of financial crises in those

countries.[19] Exclusion of "claims to money", in paragraph c), is probably prompted by numerous investment treaty cases brought by foreign investors against host governments who have refused to pay international commercial arbitration awards.[20] Exclusion of "d) claims arising from an order or judgment rendered in any judicial, administrative or arbitral proceeding," somewhat overlaps with exclusion of "claims to money" which as noted would have facilitated claims based on arbitration awards. This exclusion, however, is somewhat paradoxical because it potentially prevents bringing claims that mainly derive from court and administrative proceedings, whereas Article 17 entitled "Administrative and Judicial Treatment" seems to have been designed to precisely deal with such claims.[21]

Third, requirements that investment must involve "substantial business," started appearing in admission provisions of some early US BITs,[22] but not as part of definition of investment; further, the inclusion of classic *Salini* criteria is a trend that is relatively recent and goes back to the U.S. Model BIT 2004 and subsequent treaties.[23] The Protocol, however, puts a modern twist on the *Salini*'s contribution to economic development factor, by formulating it as "significant" contribution to host State's "sustainable" development: For greater certainty, the investment must have the following characteristics: commitment of capital or other resources, the expectation of gain or profit, assumption of risk, and a significant contribution to the Host State's sustainable development. It then goes on to note that: For avoidance of doubt, establishment, acquisition and expansion

[19] See, e.g., Abaclat v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011); and Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49.

[20] See, e.g., Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280; Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07.

[21] See Section IV, Substantive Protections.

[22] See, e.g., Congo, Democratic Republic of the – United States of America BIT (1984), Article 2 (5)(a): "Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purposes of establishing or directing an investment or advising on the operation of an investment to which they, or the aforesaid companies of the first Party that employ them, have committed or are in the process of committing a substantial amount of capital or other resources." See also The Netherlands Model BIT (2018) Article 1 (b)(ii): "any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; (…)"; and Sabahi and others, § 10.41 and 10.42.

[23] Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001. These criteria could be summarized as follows: (i) a contribution of money or other assets of economic value; (ii) an assumption of risk by the investor; (iii) a certain duration; and (iv) a contribution to the economic development of the host state. See: Can Yeginsu, Calum Mulderrig, "Covered Investments", *The Investment Treaty Arbitration Review* , 2022, pp. 3–18.

under this Protocol only apply to the post-establishment phase. It is not clear why this clarification is needed. As noted above, investment under the Protocol by definition includes only a company or enterprise established or acquired under host State law. Attempts to establish or acquire a company which would take place in the pre-establishment period do not fall within this definition.

The notion of "substantial business" is defined later in the same provision as: "Substantial business activity" requires an overall examination of all the circumstances on a case-by-case basis, by a State Party, of all the circumstances, including, among other factors: (i) the nature, size, scope and sector of business, (ii) the amount of investment brought into the territory of a State Party, (iii) the effect of the investment on the local community and (iv) the length of time the investment has been in operation; Generally, an investment shall be taken to have substantial business activities in the territory of a State Party where it conducts its core and relevant income generating activities, through the employment of a reasonable number of suitably qualified persons and by having a minimum level of expenditure which is proportionate to its level of the relevant activities in the territory of that State Party; For greater certainty, the overall assessment on the case-by-case basis shall take into account the specific economic and investment policies of the concerned State Party at the time of the admission of the investment; Combination of these elements, particularly the linkage between notions of "investment", "Enterprise" and "substantial business," and "sustainable development" make the definition unique and the universe of qualifying investments probably narrow.

Further, various States may interpret some of these notions differently. The determination of what constitutes "substantial business", for example, and the relevant thresholds for the amount of investment brought into the Host State, length of time that the investment has been in operation and the proviso that policies of the State Party at the time of admission should be considered, among others,[24] could lead to inconsistent practices among various States, leading to clarification through arbitral decisions, which might not resolve the issue if the decisions are inconsistent. The State Parties may also try to use or post-publication explanations in the form of commentary on the Investment Protocol. Authoritative interpretation of the Protocol's various provisions seems also possible pursuant to Article 10 of the AfCFTA. That Article gives the Assembly, which is the highest organ of African Union, the power to interpret the AfCFTA (including its protocols) by consensus.[25]

[24] Notwithstanding, it is not fully clear what the relevance of the following phrase is: "overall assessment on the case-by-case basis shall take into account the specific economic and investment policies of the concerned State Party at the time of the admission of the investment" in scrutinizing whether "substantial business" requirement is met. It is indeed worthwhile indicating that this phrase has been incorporated in the Final Draft, did not exist in the Draft Zero.

[25] AfCFTA Article 10 (the Assembly) provides that: "1. The Assembly, as the highest decision-making organ of the AU, shall provide oversight and strategic guidance on the AfCFTA,

QUALIFIED INVESTORS AND DENIAL OF BENEFITS

Who may bring a claim pursuant an investment treaty is a basic and fundamental question underlying a tribunal's jurisdiction. Two provisions are particularly relevant for that analysis, the definition of "Investor" and the "Denial of Benefits" which we discuss in this section.

Article 1 of the Investment Protocol provides that:

Investor means

a) a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For greater certainty, a natural person who holds dual nationality shall be deemed to be exclusively a national of the country of her or his effective nationality or where she/he ordinarily or permanently resides; b) a legal or juridical person, in accordance with the definition of the legal or juridical person of the Home State in this article, that has made an investment in the territory of the Host State. Qualified investors in this Article, in line with the majority of investment treaties, include both natural and juridical persons. The clarification that dual nationals' "effective nationality"[26] would be used to determine their standing, however, is only found in some modern investment treaties such as investment chapters of US FTAs.[27] The idea is to prevent individuals who do not have a genuine link to a State use its treaties to bring claims. Determination of "effective nationality" is a multi-pronged analysis and requires taking into account place of residence, that individual's participation in public life – showing the attachment to that particular country, conditions under which that individual obtained the second nationality, the center of that individual's interest concerning socio-economical and family life.[28]

---

including the Action Plan for Boosting Intra-African Trade (BIAT). 2. The Assembly shall have the exclusive authority to adopt interpretations of this Agreement on the recommendation of the Council of Ministers. The decision to adopt an interpretation shall be taken by consensus." The word "Agreement" includes the protocols including the Investment Protocol. See ibid., Article 1(b).

[26] *International Investment Law: Understanding Concepts and Tracking Innovations,* OECD, 2008. Retrieved from: https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf, 22.09.2023; Nottebohm (Liechtenstein v. Guatemala) decision, dated 6 April 1955, *ICJ Reports*, 1955. Retrieved from: https://www.icj-cij.org/case/18#:~:text=OVERVIEW%20OF%20THE%20CASE,manner%20contrary%20to%20international%20law. 22.09.2023;; Esphahanian v. Bank Tejarat (Case No. 157), Award No. 31-157-2 (29 March 1983); García Armas et García Gruber c. Venezuela Serafín García Armas et Karina García Gruber c. République bolivarienne du Venezuela, Affaire CPA No. 2013–3.

[27] See, e.g., US-Oman FTA, Art 10.27: "investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality".

[28] Nottebohm (Liechtenstein v. Guatemala) decision, dated 6 April 1955, ICJ Reports 1955, p. 23; Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/18/2676.pdf, 22.09.2023.

Article 1's definition however considers "permanent residence" as a single factor that can be used presumably in lieu of "effective nationality". This option seems to be unique to the Investment Protocol and it is not fully clear how it would be used in the future. It may make it easier for investors to prove that rather than the "effective nationality" which requires looking into a number of other criteria (including residence).

Article 5 on Denial of Benefits specifies when the host State may deny treaty protection:

1. A State Party may at any time deny an investor of another State Party and the investment of such investor the benefits of this Protocol if: a) an investment has no substantial business activity in the territory of the Home State; b) an investment has been established or restructured with the primary purpose of gaining access to the dispute settlement mechanism provided under this Protocol; c) an investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State; d) an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a Third Party with which the denying Party does not maintain a diplomatic relationship or toward which it prohibits transactions; e) an investment is owned or controlled, directly or indirectly, by natural or legal persons of the denying Host State; f) an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a non-State Party that has no substantial business in the territory of a State Party; or g) an investor or investment has committed a breach of a specific binding obligation under Chapter 5 of this Protocol;

2. For the avoidance of doubt, the exercise by a Host State of its right to deny benefits to an investor of another State Party and investment of such investor may be subject of review in accordance with Chapter 7 of this Protocol. Denial of benefits provisions are a ubiquitous part of modern investment treaties. They are designed to enable host States preclude treaty protection in limited set of situations such as when the host State has no diplomatic relation with the home State of investors,[29] or when the investor company is only a shell or holding company and has no substantial business in the home State,[30] or when the investor / claimant company has been established solely for the purpose of brining a claim or forum shopping.[31]

---

[29] Energy Charter Treaty, Art. 17(2)(a) provides: "Each Contracting Party reserves the right to deny the advantages of this Part to: (…) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party; (a) does not maintain a diplomatic relationship; or (…)."

[30] Energy Charter Treaty, Art. 17(1) provides: "Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or (…)."

[31] John Lee, "Resolving Concerns of Treaty Shopping in International Investment Arbitration", *Journal of International Dispute Settlement,* 2015, Vol., 6 Issue 2, p. 355; *The Impact of Investment Treaties on Companies, Shareholders and Creditors,* OECD Business and Finance Outlook,

The Final Draft of the denial of benefits provision of the Investment Protocol incorporates all of these elements in paragraphs 1(a),[32] 1(b) and 1(d) respectively. It also allows, in paragraph (e) the Host State to deny benefits where claimants are ultimately owned by its own nationals. That is probably a reaction to numerous claims brought by such entities and individuals in the past.[33]

More unique perhaps is paragraph 1(c) which allows State to deny treaty benefits when an investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State. Interpretation of this provision would likely raise a number of questions, such as what is a matter of essential and national interest, and if this provision is self-judging, i.e., if only the Host State in its discretion can determine its meaning. Similar issues have arisen in the past in the context of interpretation of non-precluded measures clauses of investment treaties of Argentina which were extensively invoked by Argentina in the context of disputes arising in the aftermath of its financial crisis of early 2000s,[34] and more recently in some cases involving India.[35] If those debates are any indication, interpretation of this clause may become contentious. To be sure, this limitation would not preclude review of the decision to deny by a tribunal, which is expressly recognized in paragraph 2. Also, novel is paragraph 1(g), which allows the host State to deny benefits of the Protocol if the investor is found to have breached obligations imposed in Chapter 5 of the Protocol on foreign investors. Chapter 5

OECD Publishing, Paris, 2016, p. 245; Ugala Anastasiya, Bashir Mohammed, "Denial of Benefits, Jus Mundi", *Wiki Notes*, 28 August 2023; Loukas A. Mistelis, Crina Baltag, "Denial of Benefits' Clause in Investment Treaty Arbitration", *Queen Mary School of Law Legal Studies Research Paper*, 2018, No. 293, retrieved from: https://ssrn.com/abstract=3300618, 15.09.2023; Plurinational State of Bolivia - United States of America BIT, Parties Article XII (terminated), 1998; ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID, Award § 359 dated 2 October 2006; Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006 §§ 240–41.

[32] Paragraph (a)'s reference to "investment" seems to be typo; the correct word should be "investor".

[33] See particularly Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (to see interpretation of the definition of "investor" in a pro-investor protection way).

[34] For a discussion of Argentine cases involving necessity defense see: Andrea Bjorklund, "Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness", in Muchlinski, Schreuer, and Ortino (eds.), *Oxford Handbook of International Investment Law,* Oxford University Press, Oxford, 2008; for a more recent discussion see Mohammad-Ali Bahmaei, Habib Sabzevari, "Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review", *Asian Journal of International Law*, 2023, 13(1), pp. 97–123. Retrieved from: https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/selfjudging-security-exception-clause-as-a-kind-of-carte-blanche-in-investment-treaties-nature-effect-and-proper-standard-of-review/EA9B311917FEC1EE93E7938462C33823, 22.09.2023.

[35] For a discussion of the Indian cases see Sabahi and others, §§ 16.49–16.58.

(Investor Obligations) on its own is innovative as it imposes a set of obligations on investors not seen in modern treaties. It requires investors to comply with host State and international law,[36] as well as with standards of business ethics, human rights, labor;[37] respect and protect environment and indigenous peoples;[38] not to

[36] Art 32 of the Protocol (Compliance with national and International Law) provides that: "Investors and their investments shall carry out their operations in compliance with all relevant domestic laws and regulations, administrative guidelines as well as applicable international law."

[37] Article 33 of the Protocol (Business Ethics, Human Rights and Labour Standards) provides that: "Investors and their investments shall comply with high standards of business ethics, investment-related human rights and labour standards, and in particular shall: a) support and respect the protection of internationally recognized human rights; b) ensure that they are not complicit in human rights abuses; c) comply with the International Labour Organisation (ILO) standards, including the ILO Declaration on Fundamental Principles and Rights at Work, and domestic labour legislations; d) not use child labour or forced and compulsory labour; e) eliminate discrimination in respect of employment and occupation; f) refrain from discriminatory or disciplinary action against employees who submit reports to the company's board or to the competent public authorities about practices that violate domestic laws, this Protocol, or other standards of corporate governance to which the company is subject; and g) act in accordance with fair business, marketing and advertising practices when dealing with consumers and must ensure the safety and quality of goods and services they provide."

[38] Article 34 (1) of the Protocol (Environmental Protection) provides that: "Investors and their investments shall, in carrying out their business activities, respect and protect the environment, and, in particular shall: a) respect the right to a clean, healthy and sustainable environment, as reflected in Article 24 of the African Charter of Human and Peoples' Rights, and the Resolution of the United Nationals General Assembly A/RES/76/300 ("The human right to a clean, healthy and sustainable environment"); b) comply with the principles of prevention and precaution when conducting their business activities to anticipate and prevent any risk of significant harm to the environment; c) carry out an environmental impact assessment, in accordance with the best international standards and practices and as required by domestic law; d) apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary; and e) where their business activities cause or may cause harm to the environment, take steps to mitigate the harm, to restore impacted sites and ensure a clean, healthy and sustainable environment. Article 34 (2): Investors shall not exploit or use natural resources to the detriment of the rights and interests of the Host State and local communities". Article 35 (1) of the Protocol (Indigenous Peoples and Local Communities) provides that: "Investors and their investments shall respect the rights and dignity of indigenous peoples and local communities in accordance with relevant domestic laws and regulations, international law, norms and best practices, including the right of indigenous peoples, and local communities where applicable, to free, prior and informed consent and to participate in the benefit of the investment. For greater certainty, the reference to the right to free, prior and informed consent of indigenous peoples, does not imply any obligation for investors and their investments to conclude agreements with those groups before conducting or operating their investment in the territory of State Parties which do not recognize indigenous peoples, taking into account applicable and relevant domestic laws and regulations. 2. Investors and their investments shall respect legitimate tenure rights to land, water, fisheries, and forests in accordance with relevant laws and regulations. 3. Investors, in accordance with relevant domestic law and regulations, shall submit their environmental and social impact assessments to the competent authorities and make them available and accessible to local communities and indigenous peoples and to any other stakeholder in the territory of the Host State."

interfere with internal affairs of the State;[39] refrain from bribery and other corrupt practices;[40] and adhere to socially responsible practices.[41] The denial of benefits for a failure to comply with these obligations could be a powerful tool to try to dismiss a case. Proving such failures, however, is not often easy, and may require significant fact finding, which prolongs the dispute and possibly prevents bifurcation of claims adding to time and cost. The burden of proof would be on the State in such situations, and the terms of Chapter 5 in any event are too general

[39] Article 36 of the Protocol (Socio-Political Obligations) provides that: "Investors shall refrain from any interference in the internal affairs of State Parties in their intergovernmental relations, in particular to influence the appointment of persons to public office, finance political parties or undermine the political stability or security of the Host State or to influence public opinion in a manner contrary to this Article."

[40] Article 37 (1) of the Protocol (Anti-Corruption) provides that: "Investors and their investment shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a State Party, or to a member of an official's family or business associate or other person in order to obtain a favour or that the official or other person act or refrain from acting in relation to the performance of official duties." Article 37 (2) provides: "Investors shall cooperate with State Parties in preventing and eliminating corruption in public governance and shall not encourage, incite, aid, abet or conspire with any official or another person or any entity to commit or authorize the commission of an act of corruption, taking into account applicable and relevant domestic laws and regulations, the African Union Convention on Preventing and Combatting Corruption, the United Nations Convention against Corruption and other applicable international legal instruments." Article 37 (3) provides: "Notwithstanding relevant international obligations of State Parties regarding anti-corruption, a breach of this Article by an investor is deemed to constitute a breach of the domestic laws and regulations of the Host State concerning the establishment and operation of an investment."

[41] Article 38 of the Protocol (Corporate Social Responsibility) provides: "1. Investors and their investments shall endeavour to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, in accordance with the principles and standards set in Paragraph 2 of this Article. 2. Investors and their investments shall endeavour to: a) stimulate economic, social and environmental progress, aiming at achieving sustainable development; b) encourage the strengthening of local capacities through close cooperation with the local community; c) encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training; d) promote gender equality and inclusiveness in their activities; e) refrain from seeking exemptions that are not established in the legislation of the Host State, relating to environment, health, security, work or financial incentives, or other issues; f) develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the community in which the operations are conducted; g) promote the knowledge of workers about corporate policies, through appropriate dissemination of these policies, including programmes for professional training; h) encourage, whenever possible the business associates, including service providers and sub-contractors, to apply the principles of corporate social responsibility provided for in this Article; and i) foster the benefit sharing arising from an investment with the local communities concerned based on mutually agreed terms to facilitate access to an adequate standard of living. 3. State parties undertake to encourage investors operating within their territories or subject to their jurisdiction to incorporate into their internal policies internationally recognized standards, guidelines and principles of corporate social responsibility including those set out in Paragraph 2 of this Article".

and vague, as discussed in Section V below. In terms of timing of the denial, the protocol allows the State to deny such benefits "at any time." In theory, therefore, a State may do so even before an investor initiates an international claim. The Protocol's language in this sense is more robust and clear than other treaties, where this issue was litigated heavily.[42] The possibility of denial or even an actual denial, however, may not prevent investors from bringing claims. The host State, as explained in Section V below, may then consider bringing counterclaims for investor's failure to comply with obligations in Chapter 5.

SUBSTANTIVE PROTECTIONS

The Protocol includes a number of substantive investor protections that appear in other investment treaties.[43] Many aspects of these provisions are novel. We, however, focus on Articles 17 (Administrative and Judicial Treatment), 19 (Expropriation) and 21 (Compensation for Expropriation). The absence of a classic fair and equitable treatment (aka the FET) standard in the Protocol is certainly noteworthy. In lieu of that the Protocol's Article 17 entitled "Administrative and Judicial Treatment" provides: 1. Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings; 2. For greater certainty, Paragraph 1 shall not be interpreted as equivalent to fair and equitable treatment. For further certainty, Paragraph 1 includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in Paragraph 1.

Notable in this provision is the drafters' emphasis that it is not equivalent to the FET. This is a reaction to widespread criticism of the FET standard.[44] Steps to curtail the scope of the fair and equitable treatment or the FET standard are not new. The

[42] Netherlands Model BIT Article 3 – Most-Favored Nation; ICSID Convention; Energy Charter Treaty Article 24 (4) Fair and Equitable Treatment (Fair and Equitable Treatment principle is not included in the Protocol on Investment), Article 10 (1) Promotion, Protection, and Treatment of Investments Article 10 (3) National Treatment and Most-Favored Nation; NAFTA Chapter 11 Article 1102 National Treatment, Article 1103 Most-Favored Nation Treatment.

[43] Netherlands Model BIT Article 3 – Most-Favored Nation; ICSID Convention; Energy Charter Treaty Article 24 (4) Fair and Equitable Treatment (Fair and Equitable Treatment principle is not included in the Protocol on Investment), Article 10 (1) Promotion, Protection, and Treatment of Investments Article 10 (3) National Treatment and Most-Favored Nation; NAFTA Chapter 11 Article 1102 National Treatment, Article 1103 Most-Favored Nation Treatment.

[44] Pia Eberhardt, Cecilia Olivet, *op.cit.,* p 48; "World Investment Report – Towards a new generation of investment policies", UNCTAD Secretariat, UNCTAD/TDR/2012, 2012, p. 139, retrieved from: https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf, 22.09.2023.

FET has proved to be controversial and many States such as the NAFTA Parties as early as 2001,[45] started taking steps to clarify and narrow its scope. Initial efforts focused on limiting the FET's meaning to the customary international law minimum standard of treatment,[46] and providing examples of what that may encompass, including "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world (…)".[47] Article 17 of the Protocol follows that trend[48] and takes it a step further in certain respects. For example, the use of words "fundamental," "evident", and "manifest" clearly shows that the drafters wanted to make sure that the threshold for breach of Article 17 is high and is not easily reached. The double emphasis in paragraph 2 that this provision is not FET and cannot extend beyond the minimum standard further confirms that. That clarification also leaves out some of the more controversial aspects of the FET such as the notion of legitimate expectations. Inclusion of this language is probably a reaction to the fact that the FET has been identified as the most-breached standard or the most-utilized standard by foreign investors.[49] Inclusion of a protection against discrimination based on religion, race and gender echoes modern treaty texts such as Article 8(10) (2) (d) of CETA.[50] This is useful to clarify that discrimination in

[45] NAFTA Notes of Interpretation of Certain Chapter 11 Provisions dated on 31 July 2001: "B Minimum Standard of Treatment in Accordance with International Law: 1. (…) 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens (…)". Retrieved from: http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp, 16.09.2023.

[46] Article 5(2) of the 2012 US Model BIT entitled "Minimum Standard of Treatment," for example, provides "For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights…." An oft-quoted passage of the *Neer* case represents the content of the minimum standard: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its sufficiency." See: L. F. H. Neer, Pauline Neer (U.S.A.) v. United Mexican States, *UNRIAA,* Vol. IV 1926, pp. 61–62.

[47] 2012 US Model BIT, Article 5(2)(a).

[48] The 2015 Indian Model BIT Article 3 titled "Treatment of Investments" is similar Article 3 (1): No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law (1) through: i) Denial of justice in any judicial or administrative proceedings; or ii) fundamental breach of due process; or iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or iv) manifestly abusive treatment, such as coercion, duress and harassment (…).

[49] Sabahi and others, §§ 19.01, 19.03; Charles H. Brower, "Fair and Equitable Treatment under NAFTA's Investment Chapter", *Am. Soc'y Int'l L. Proc*., 2002, No. 96, p. 9.

[50] Art. 8(10)(2)(d) of CETA states that "2. A Party breaches the obligation of fari and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes: (…) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (…)".

this context is distinct from nationality-based discrimination which is subject of national and most favored nation's provisions of the Protocol. In spite of the above clarifications and safeguards, however, there remains a lot of room for interpretation. For example, denial of justice under international law normally requires exhaustion of local remedies.[51] Presumably that is a necessary step before this standard can be breached, including the requirement that the investor appeal adverse local court decisions to the host State's highest-level court. And even in that situation only a "fundamental" denial would breach Article 17. There is some commentary to the effect that denial of justice today is only procedural, and not a substantive delict.[52] The difference is that a procedural denial of justice would involve failure to accord due process in the course of local court proceedings, which is established once the local court system has had a chance to try to correct the error through the appeal process but has failed to do so. In this analysis the outcome of the local court proceeding is almost irrelevant, and the focus is on whether key elements of due process such as the right to be heard and so forth were accorded to investors or not. The substantive denial of justice, however, would also scrutinize instances where the outcome of the case is totally unjust.[53] That would presumably call for reviewing or second guessing local judges' interpretation of their State's laws, which modern tribunals are reluctant to do,[54] in a way giving more support to the proponents of the idea that denial of justice today is only procedural. The wording of Article 17, however, does not seem to clearly indicate if a substantive denial of justice is precluded or not, leaving the door for second guessing reasoning of local courts and arguing that a "fundamentally" unjust final decision of a local court, which has remained uncorrected through the appeal process, may constitute a breach. The phrase "evident denial of due process" and the phrase "an abusive treatment in administrative and judicial proceedings" raise another set of issues. Did the drafters for example intended that one or a series of due process infractions or maltreatment during proceedings, without exhaustion of local remedies, constitute a breach of Article 17, so long as the infractions are "evident" or "abusive"? Wouldn't this interpretation undercut the whole idea of requiring exhaustion of local remedies for a denial of justice to be realized?

Article 19 of the Protocol, as noted, deals with Expropriation, Article 20 includes a right to regulate exception for expropriatory measures, and Article 21

[51] Don Wallace, Jr., "Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico", *Transnational Dispute Management*, 2006, Vol. 2, retrieved from: www.transnational-dispute-management.com; Don Wallace Jr., "State Responsibility for Denial of Substantive and Procedural Justice Under NAFTA Chapter Eleven", *Hasting International and Company Law Review*, 2001, Vol. 23, p. 393; Retrieved from: https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1524&context=hastings_international_comparative_law_review, 16.09.2023.

[52] Jan Paulsson, *Denial of Justice in International Law*, Cambridge University Press, Cambridge, 2005, p. 82, etc.

[53] *Ibid.,* pp. 82 and 84.

[54] *Ibid.,* p. 82.

deals with Compensation for Expropriation. Such provisions are widely present in modern investment treaties. Articles 19 provides that: 1. State Parties shall not, directly or indirectly, expropriate or nationalize investments in their territory except: a) for a public purpose; b) in accordance with due process pursuant to the procedure established by the laws of the State Party; c) in a non-discriminatory manner; and d) against a fair and adequate compensation paid within a reasonable period of time in accordance with Article 21, and taking into account that the assessment of the reasonable period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis. 2. For the purposes of this Protocol: a) direct expropriation occurs when an investment is nationalized or expropriated directly, through a formal transfer of ownership or outright seizure; b) indirect expropriation results from a measure or series of measures having an equivalent effect of direct expropriation without formal transfer of title or outright seizure. The sole fact that a measure or a series of measures has an adverse effect on the economics of an investment does not establish that an indirect expropriation has occurred; and c) the determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration among others: i. The duration of the measure or series of measures of a State Party; and ii. The character of the measure or series of measures, notably their object, context and intent.

Article 20 provides that:

1. (…); 2. Non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labor rights or to comply with other international obligations, shall not constitute indirect expropriation.

Article 21 of the Protocol provides that: 1. Fair and adequate compensation shall be assessed on a case-by-case basis in relation to the fair market value of the expropriated investment, and in a reasonable period of time, in accordance with domestic laws and regulation; 2. The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of the current and past use of the investment, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the investor through the investment, and the duration of the investment; 3. Compensation shall be assessed based on the fair market value of the expropriated investment at the date immediately before the expropriation took place ("date of expropriation") or before the measure became publicly known, which is earlier. For greater certainty, the fair and adequate compensation standard also applies in case of unlawful

expropriation; 4. The computation of the fair market value of the expropriated property shall exclude any consequential losses or speculative or windfall profits claimed by the investor; 5. Any payment of compensation according to this Article shall be made in a freely convertible currency. Payment shall include simple interest at the applicable commercial rate in the Host State from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.

Several comments are in order.

First, inclusion of an exception in Article 20(2) for the State's right to regulate to achieve public policy objectives is common in modern treaties.[55] The scope of public policy objectives, however, is broad. Noticeably it includes "climate action" as a separate objective than protection of environment, signaling that State measures designed to for example achieve Net Zero are protected. Theoretically, that may include for example premature termination of a coal or other fossil fuel concession leading to initiation of investment treaty claims, which was the situation in the Netherlands.[56] To what extent African governments would embrace the climate objectives, and how foreign investors would interpret this signal, remain to be seen. The provision, however, gives State Parties the flexibility to act upon their climate goals if they desire.

Second, provisions on expropriation deem expropriation lawful when it is for a public purpose, in accordance with due process, on a non-discriminatory basis, and upon payment of compensation. More modern treaties, starting with the 2004 US Model BIT explain what constitutes an indirect expropriation either in the main text or in an annex. Article 19 reflects these modern follows that trend. However, it is innovative inasmuch as it requires compensation to be paid "within a reasonable period of time . . . and taking into account that the assessment of the reasonable period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis." Timing of payment of compensation and whether it has to accompany the taking or it can be paid sometime after the taking, and how long thereafter for an expropriation to be lawful, has been a contentious issue in some ISDS cases.[57] The draft to be sure takes into account the realities of situations

[55] See e.g., CETA Art 8(9)(1): "For the Purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."

[56] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4); Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22).

[57] Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27; Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5.

such as that, but it also requires complying with domestic law in that respect, which opens the door for varying approaches.

Third, most treaties provide for payment of "fair market value" of investment immediately before expropriation. Article 21, however, provides for payment of "fair and adequate compensation" which shall be assessed "in relation to the fair market value of expropriated investment". The words "in relation to" suggest that the valuation concept should take fair market value into account and be related to it, but other factors, or a fairness element, must be considered too. Paragraph 2 makes this more clear when it includes fair market value together with a number of other factors that all need to be considered in order to come up with a valuation that strikes "an equitable balance between the public interest and interest of those affected".

Valuation based on these factors will be more complex, multifaceted, and possibly more subjective than quantification methods used to determine fair market value, which are focused just on assessing objectively the value that market ascribes to a property. How would one for example consider the extent of previous profits? Is the idea to reduce compensation in the public interest if investors have made significant profits in the past? Or should the investors receive a reasonably higher level of compensation, if the history reveals that the project's profitability is certain? Judges and tribunals to be sure would be grappling with interpretation of these provisions.

Fourth, paragraph 3, last sentence, explains that "fair and adequate compensation" standard also applies in cases of illegal expropriation. This is presumably a reaction to the case law and commentary where in case of illegal expropriation, the principle of reparation in the Chorzow Factory case has been applied in lieu of treaty provisions on compensation.[58] That would also presumably preclude the adjudicators from moving the valuation date,[59] which paragraph 3 sets to be immediately before the taking.

Paragraph 4 reflects the general practice of international tribunals which often refuse to award damages that are speculative or uncertain.

Finally, paragraph 5 is significant because it requires payment of "simple" rather than compound interest. Most treaties are silent on this issue, and arbitral tribunals have been increasingly awarding compound interest.[60]

---

[58] Factory at Chorzów (Merits) PCIJ Series A. No 17; Sabahi and others, §18.07.

[59] Sabahi and others, § 18.35-18.37; Central America-Dominican Republic Free Trade Agreement (CAFTA-DR).

[60] John Yukio Gotanda, "Compound Interest in International Disputes", Oxford University Comparative Law Forum, 2004; Retrieved from: https://ouclf.law.ox.ac.uk/citation/, 3.10.2023; Jonathan Bonnitcha, Sarah Brewin, "Compensation Under Investment Treaties – International Institute for Sustainable Development", *Best Practices Series*, 2020, p. 8; Retrieved from: https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf, 3.10. 2023; Tidewater v. Venezuela, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 208.

DISPUTE SETTLEMENT: CLAIMS AND WIDE SCOPE OF COUNTERCLAIMS

Chapter 7 of the Final Draft of the Protocol is entitled "Management (and) Settlement of Disputes". It has four provisions covering State-to State dispute (Article 44), dispute prevention (Article 45), investor State dispute resolution (Article 46), and investor liability in domestic courts of both Home and Host States (Article 47). This chapter then is supplemented by an Annex which sets out the dispute resolution mechanism. As of the date of this writing, the final version of the Annex was not released, and the drafters have notified that it would be released in 12 months from the date of adoption of the Protocol,[61] so we base our comments in this respect on the Annex of the Draft Zero. Overall, the dispute settlement mechanism preserves the possibility of investor State arbitration as well as recourse to domestic courts. Unlike most treaties, however, it provides more robust possibility of counterclaims, and specifically provides for possibility of suing investors in both their home and host State which is unique, as further discussed below.

Article 45 of the Final Draft Protocol, as noted, deals with dispute prevention and management.[62] Article 45 provides: State Parties shall, through their designated competent bodies, facilitate the prevention of disputes and management of grievances by: a) receiving complaints or grievances from investors in relation to their investments; b) following-up and undertaking actions for de-escalating potential differences, or disagreements between investors and State Parties; and c) providing effective assistance in resolving difficulties experienced by investors and their investments in such a manner as to avoid disputes. The designated competent body seems to be the same as National Focal Points or NFPs contemplated in Article 8. The scope of this entity, whatever its title, is board inasmuch as it has been tasked with "de-escalating potential differences, or disagreements between investors and State Parties."

Intervening in such matters may raise possible conflict of interest issues, particularly if body is something akin to an organ of the State. Setting up the body

[61] Article 46(3) of the Protocol.

[62] It seems to be a slightly modified version of Article 2 of the Annex in Draft Zero. Article 2 of the Annex in Draft Zero provides: "1. State Parties shall, through their National Focal Points, assist, to the extent possible, investors of any other State Party and their investments to amicably resolve complaints or grievances which have arisen in connection with their investment activities by:

a. receiving and, where appropriate, giving due consideration to complaints or grievances raised by investors; and

b. providing assistance in resolving difficulties experienced by the investors in relation to their investments and de-escalating potential disputes.

2. State Parties shall inform the Committee on Investment of the complaints or grievance mechanisms available to investors in their territory."

as a corporation, independent from the State with its own budget, could help to reduce such risks but does not fully eliminate them.

Article 46(1) requires the disputing parties try to amicable settle through either of various methods such as consultation and mediation:[63] 1. In the event of a dispute between an investor of a State Party and a Host State relating to an alleged breach of this Protocol, the investor and the Host State shall initially seek to resolve amicably the dispute through consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State; 2. Notwithstanding the outcome of the dispute prevention and grievances management process under Article 45, in the event that an investor of a State Party and the Host State are unable to amicably resolve the dispute in accordance with Paragraph 1, they may seek to resolve such dispute in accordance with the dispute resolution mechanisms to be provided in the Annex referred to in Paragraph 3.

…

More unique perhaps is the possibility of suing the investor in its home State contemplated in Article 47 (Investor Liability): 1. Investors and their investments shall, where applicable and in accordance with domestic laws and regulations, be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Host State in relation to the investment where such acts, decisions or omissions lead to damage, personal injuries or loss of life in the Host State; 2. State Parties shall develop rules and procedures that allow for, or do not prevent or unduly restrict, the bringing of court actions relating to the civil liability of investors in the territory of their Home States, taking into account rules governing conflict of laws and the recognition and enforcement of foreign judgments; 3. For greater certainty, this Article does not exclude the possibility to bring civil actions against investors and their investments before the domestic courts of the Host State. Whether bringing civil claims of the sort contemplated in this article are possible requires research and analysis on a jurisdiction by jurisdiction basis. Specific introduction of this possibility, however, probably one of the ways that the drafters have tried to balance the investor's rights with the host State.

Absent from the Protocol and the Annex, however, is any reference to the necessity of recourse to local courts or exhaustion of local remedies before submitting claims to international arbitration (in this connection, see discussion of Denial of Justice above). Article 6 of the Annex (Choice of Arbitration Forum)[64]

[63] Annex Articles 2 (amicable settlement) and 3 (mediation) further elaborate on some of these options.

[64] Final Draft, Annex 1, Art. 6 (1) provides: "An investor may submit an arbitration claim:
a. in accordance, mutatis mutandis, with the provisions of Article 27 of the Protocol on Rules and Procedures for the Settlement of Disputes; b. under any arbitration rules adopted by African institutions or Dispute Resolution Centres;

enumerates only arbitration rules and centers as possible forums and provides a range of options for investors to submit the dispute to arbitration including ICSID, Additional Facility and other rules, provided that the investor submits proper waiver of right to pursue claims relating to the contested measures elsewhere.[65]

Article 9(a) of the Annex contains the State Party's consent to arbitration pursuant to the Annex. Article 9(b) explains that "by submitting a claim to arbitration, the investor also consents to counterclaims by the Host State for an alleged breach of the Protocol." Article 9(b) does not specifically explain how investors may consent to arbitration. It is implied that submission of a claim on its own constitutes consent to arbitration under the Protocol. This understanding finds support in ICSID case law.[66] More importantly, however, this provision clarifies that the submission of a claim is consent to counterclaims by the host State and that the Host State's counterclaims may involve "alleged breach of the Protocol", recognizing that the Protocol works both ways, not just for foreign investors. Article 10 (Counterclaims) of the Annex more clearly recognizes the host State right to bring counterclaims for breaches of the Protocol: A Host State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Protocol for damages or other relief resulting from an alleged breach of the Protocol. This is a major step forward for investment treaties, because up until recently, save for a requirement appearing in some treaties that investments need to be made "in accordance with" the laws of the Host State, the treaties only imposed obligations on host States. Further, the consent provisions were almost always crafted and construed narrowly which

c. under the ICSID Convention and the ICSID Convention and the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, provided that both the Host State and the State Party of which the investor is a national are parties to the ICSID Convention; b. under the ICSID Additional Facility Rules, provided that either the Host State or the State Party of which the investor is a national of a party to the ICSID Convention; c. under the UNCITRAL Arbitration Rules; or e. under any other arbitration institution or under any other arbitration rules."

[65] The waiver obligation is in Article 7 (Notice of Arbitration) of the Annex, which provides in the relevant part: "3. An investor may only submit a claim to arbitration pursuant to this Annex, provided that: "a) the investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Protocol, on behalf of both the investor and the investment, before local courts in the Host State or in any other dispute settlement forum; b) no more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the investor has incurred loss or damage."

[66] Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 (Dissenting Opinion); Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3; Maritime International Nominees Establishment v. Republic of Guinea (II), ICSID Case No. ARB/84/4; Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1; Saluka Investments B.V. v. The Czech Republic, UNCITRAL.

precluded host States from successfully bringing counterclaims.[67] Limited opportunities for brining counterclaims were one of the complaints that a number of host States have risen in the UNCITRAL Working Group III.[68]

The Protocol, however, has dealt with that problem by including Chapter 5, which is entitled "Investor Obligations" and as briefly noted earlier contains a number of provisions imposing standards of conduct on foreign investors in a range of issues.[69] Inclusion of this Chapter is an innovation and a way "to achieve an overall balance of the rights and obligations between State Parties and investors under this Protocol," as reflected in the Preamble, and in various instruments cited therein. The scope of obligations, however, is vast and as outlined earlier, includes labor and human rights, corporate social responsibility, anti-corruption, etc. both at the domestic and international law level. Many of these obligations might not be found in host State's domestic legislation, in which case foreign investors would likely challenge their application to them, simply because they are required by international conventions to which the State Parties may or may not be parties. On the other hand, allowing host State to bring counter-claims involving such measures to be sure may serve as a deterrent, but possibly discourage investors from investing, if they find the risks too high. Enforcing such obligations may in fact turn the Protocol's dispute settlement mechanism into a tool for enforcing obligations of treaties which themselves may lack such enforcement mechanisms. Further analysis of these issues, by the authors of the Protocol may be in order.

Unlike investors who have to waive their right to pursue remedies relating to the same measure in other forums (see Article 7 (3) (a) of the Annex),[70] Host

---

[67] Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility", *Legal Studies Research paper Series,* Paper No 9/2014, University of Cambridge, 2014, pp. 25–27; Retrieved from: https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0215.pdf; NAFTA Articles 1116 and 1117; Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 (majority opinion).

[68] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session New York, 30 March–3 April 2020 – Possible reform of investor-State dispute settlement (ISDS) Multiple proceedings and counterclaims, pp. 7–8; United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-seventh session New York, 1–5 April 2019 Possible reform of investor-State dispute settlement (ISDS) Submission from the Government of Morocco; United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-eighth session Vienna, 14–18 October 2019 Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa.

[69] Article 32 Compliance with National and International Law, Article 33 Business Ethics, Human Rights and Labour Standards, Article 34 Environmental Protection, Article 35 Indigenous Peoples and Local Communities, Article 36 Socio-Political Obligations, Article 37 Anti-Corruption, Article 38 Corporate Social Responsibility, Article 39 Corporate Governance, Article 40 Taxation and Transfer Pricing.

[70] Article 7 (3)(a) of the Annex provides: "(…) An investor may only submit a claim to arbitration pursuant to this Annex provided that: a) the investor has provided a clear and unequivocal

State's right to bring a counterclaim under Article 10 of the Annex, is not conditioned upon such a waiver. This allows the host State in theory to pursue other remedies elsewhere, particularly in its own courts or even the Home State courts, as contemplated in Article 47 of the Protocol, briefly mentioned above, or other tribunals.

Investors' exposure to counterclaims based on breach of obligations set forth in Chapter 5 begins once they commence arbitration under the Annex against the host State. In this situation, given the wide range of obligations imposed on investors under Chapter 5, a variety of counterclaims may be brought by the State party over which, investment tribunals have traditionally been reluctant to assert jurisdiction, if at all.

Some examples illustrate the point. Article 33 of the Protocol (Business Ethics, Human Rights and Labor Standards) provides that: Investors and their investments shall comply with high standards of business ethics, investment-related human rights and labor standards, and in particular shall: a) support and respect the protection of internationally recognized human rights;

b) ensure that they are not complicit in human rights abuses; c) comply with the International Labour Organisation (ILO) standards, including the ILO Declaration on Fundamental Principles and Rights at Work, and domestic labor legislations; d) not use child labor or forced and compulsory labor; e) eliminate discrimination in respect of employment and occupation; f) refrain from discriminatory or disciplinary action against employees who submit reports to the company's board or to the competent public authorities about practices that violate domestic laws, this Protocol, or other standards of corporate governance to which the company is subject; and, g) act in accordance with fair business, marketing and advertising practices when dealing with consumers and must ensure the safety and quality of goods and services they provide. A number of obligations have been packed together in this single provision. Paragraph a) for example requires complying with "internationally recognized human rights". While protection of property rights is a recognized human right, and protected under investment treaties, internationally recognized human rights go beyond that and include rights to freedom of religion, expression, right to work and so forth.[71] Subsequent paragraphs of this Article impose obligations regarding international labor standards and other good governance practices.

---

waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Protocol, on behalf of both the investor and the investment, before local courts in the Host State or in any other dispute settlement forum: (…)."

[71] Universal Declaration of Human Rights, Article 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.", Article 23: "1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. (…)".

Article 34 of the Protocol imposes various obligations regarding protection of environment.[72] Article 35 of the Protocol imposes obligations regarding protection of indigenous peoples and local communities including the "the right of indigenous peoples to free, prior and informed consent,"[73] which was at the center of *Bear Creek v. Peru* case.[74]

Several comments are in order:

First, the possibility of bringing counterclaims involving such a wide range of international law obligations changes the nature of Protocol's Annex from a traditional ISDS mechanism into a broader dispute settlement mechanism, where States, if they choose, can litigate all sorts of issues relating to (investor's) investments as well as human rights, labor, environmental obligations. This single feature arguably makes this protocol the most ambitious or all-encompassing modern dispute resolution text.

Second, a decision to bring counterclaims for breach of such obligations raises important policy issues. Do States want to litigate human rights, labor, and CSR issues in an international tribunal? What remedies can they seek if it is established that the investor has breached the relevant provision? As noted above, the State can try to deny benefits if such infractions have been established. That would lead to dismissal of the case and possibly recovery of costs, which is useful on its own. But how about other remedies? The Protocol only requires payment of monetary compensation. That could be a suitable remedy to for example remediate environmental damage.

What if the State seeks compensation for investor's infraction of international labor standards, however? While modern valuation experts do not shy away from using creative methodologies to value losses; in this situation, material and or moral losses have been directly suffered by the victims of the labor abuses, not by the State. The State's recovery of losses for injury suffered by the laborer would have found justification under the Vattelian fiction that injury to the individual is an injury to the State.[75] The problem, however, is that that doctrine is part of the corpus of diplomatic protection, and applies in situations where a State has espoused claims of the affected individuals.[76] Here, however, there is no such

[72] See fn. (41).

[73] See fn. (41).

[74] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21.

[75] To read more about "Vattelian fiction", see: Ivar Alvik, "The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy", *European Journal of International Law,* 2020, Vol. 31, Issue 1, pp. 289–312; Retrieved from: https://doi.org/10.1093/ejil/chaa027, 3.10.2023.

[76] Annemarieke Vermeer-Künzli, "As If: The Legal Fiction in Diplomatic Protection", *European Journal of International Law*, 2007, Vol. 18, Issue 1, pp. 37–68; Retreieved from: https://doi.org/10.1093/ejil/chm009, 3.10.2023.

espousal, unless one argues that by virtue of signing the Protocol, the State Parties have en masse espoused counterclaims of their nationals.

CONCLUSION

The Investment Protocol of the AfCFTA is an advanced and in many respects an innovative instrument. It has incorporated some of the cutting-edge developments in international law of foreign investments, but also has innovated new provisions. The Protocol's adoption of an enterprise-based definition of investment together with series of additional conditions, for example, takes that notion to a wholly new level. As it stands, the provision requires i) establishing an owning an enterprise in the Host State; ii) the enterprise need to have "substantial business" activity, which is an innovation; iii) it need to meet the Salini criteria; and (iv) the enterprise must have been created for the purpose of "lasting economic relations". While undoubtedly innovative, together these elements significantly narrow the scope of protected investments, and their interpretation may be challenging. The Protocol's denial of benefits provision includes many of the features of modern treaties which allow States deny benefits to investors which are only shell companies without any substantial business in the Home State or to companies that are established for the sole purpose of forum shopping. Possibility of denial of benefits to investors due to concerns to preserve or protect national interest, or due to breach of investors obligations in Chapter 5, however, are new and would likely lead to significant interpretative challenges. The removal of FET and replacing it with Article 17 on Administrative and Judicial Treatment is certainly a major development and reflects criticisms of the notion of FET. Qualification of the key words in the article by such adjectives as "fundamental" and "evident" however would open the door to more interpretations. So would the formulation of the denial of justice without any qualification as to whether it is only procedural or substantive or how it could be reconciled with the "evident lack of due process" in the same provision, which unlike the denial of justice, seems not to require exhaustion of local remedies. More complex for users of the Protocol will be interpretation and quantification of "fair and adequate compensation" in Article 21 of the Protocol, which is the compensation due for expropriation. The Article requires the outcome strikes "an equitable balance between the public interest and interest of those affected". All circumstances need to be considered when doing this analysis, including taking into account duration of investment, its history, and the extent of profits made. No indication is made as to how these factors need to be balanced, and what balancing in this context mean. On the dispute settlement side, the references to the possibility of involvement of a "designated competent body" to prevent and manage disputes are notable but need to be developed further in order to become more effective. Provisions on amicable settlement and mediation are all optional.

While parties often try to settle a dispute, going to mediation requires consent, which is not present in the Annex and unlikely to be obtained after a dispute arises. Absence of a provision requiring investor to submit the dispute to local courts for a limited period is also noticeable. The most interesting and perhaps controversial aspect of dispute settlement provision is inclusion of Chapter 5 on Investor Liability, and the corresponding right of the Host State in Article 10 of the Annex to bring counterclaims based on breach of those obligations. The breadth of obligations imposed on investors is unprecedented and expands scope of issues that tribunals would hear beyond the classic investment claims to include various matters like labor, environment, and other social issues. The Protocol is certainly an ambitious effort to craft a sustainable-development friendly instrument, tailored for African States. More work would be needed to refine the text and clarify various issues. The more upfront work dedicated to these efforts may pave the way for more efficient adversarial proceedings. Otherwise, the tribunals or courts assigned to resolve the claims would muddle through, which raises the possibility of less satisfactory or even inconsistent decisions.

NEKA PRELIMINARNA RAZMIŠLJANJA O NACRTU I NVESTICIJSKOG PROTOKOLA AFCFTA: INOVACIJE I IZAZOVI U MEĐUNARODNOM INVESTICIONOM PRAVU

APSTRAKT

U radu se iznose preliminarna razmišljanja o nacrtu investicionog protokola AfCFTA koji u mnogočemu predstavlja jedan inovativni pravni instrument. Investicioni protokol AfCFTA prema nalazu autora uključuje neke od najnovijih dostignuća u međunarodnom pravu stranih ulaganja, ali takođe i neke inovativne odredbe. Rad sadrži više poglavlja u kojima se analiziraju sledeće teme: Zaštićene investicije – preduzeća i kompanije; Kvalifikovani investitori i uskraćivanje beneficija; Materijalna zaštita i rešavanje sporova: Zahtevi i širok opseg protivtužbi. U zaključnim razmatranjima autori nalaze da nacrt Protokola predstavlja ambiciozni napor da se napravi jedan kreativan instrument pogodan za održivi razvoj afričkih država.

Ključne reči: Nacrt investicionog protokola AfCFTA, međunarodno investiciono pravo, pravna zaštita stranih ulaganja

REFERENCES

1. Alvik, Ivar, "The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy", *European Journal of International Law,* 2020, Vol. 31, Issue 1, 2020. Retrieved from: https://doi.org/10.1093/ejil/chaa027, 3.10.2023.

2. Anastasiya, Ugala, Mohammed, Bashir, "Denial of Benefits, Jus Mundi", *Wiki Notes*, 28 August 2023.
3. Anil Yilmaz Vastardis, Investment Treaty Arbitration: A justice bubble for the privileged in Thomas Schultz and Federico Ortino (eds.), *The Oxford Handbook of International Arbitration,* Oxford Handbooks, Oxford, 2020.
4. Bahmaei, Mohammad-Ali, Sabzevari, Habib, "Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review", *Asian Journal of International Law*, 2023, 13(1). Retrieved from: https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/selfjudging-security-exception-clause-as-a-kind-of-carte-blanche-in-investment-treaties-nature-effect-and-proper-standard-of-review/EA9B311917FEC1EE93E7938462C33823, 22.09.2023.
5. Bjorklund, Andrea, "Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness", in Muchlinski, Schreuer, and Ortino (eds.), *Oxford Handbook of International Investment Law,* Oxford University Press, Oxford, 2008.
6. Bonnitcha, Jonathan, Brewin, Sarah, "Compensation Under Investment Treaties – International Institute for Sustainable Development", *Best Practices Series*, 2020. Retrieved from: https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf, 3.10.2023.
7. Charles H. Brower, Charles H., Brower, "Fair and Equitable Treatment under NAFTA's Investment Chapter", *Am. Soc'y Int'l L. Proc.,* 2002, No. 96.
8. Eberhardt, Pia, Olivet, Cecilia (contributors: Tyler Amos and Nick Buxton), *Profiting from injustice – How law firms, arbitrators and financiers are fuelling an investment arbitration boom,* Corporate Europe Observatory, 2012. Retrieved from: https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf, 20.09.2023.
9. Gann, Pamela, "The U.S. Bilateral Investment Treaty Program", *Stanford J. Int'l L.* 1985, Vol. 21.
10. Gotanda, John Yukio, "Compound Interest in International Disputes", Oxford University Comparative Law Forum, 2004. Retrieved from: https://ouclf.law.ox.ac.uk/citation/, 3.10.2023.
11. Gus Van Harten, *The Trouble with Foreign Investor Protection*, Oxford University Press, Oxford, 2020.
12. *International Investment Law: Understanding Concepts and Tracking Innovations,* OECD, 2008. Retrieved from: https://www.oecd.org/investment/internationalinvestmentagreements/40471468.pdf, 22.09.2023.

13 Lee, John, "Resolving Concerns of Treaty Shopping in International Investment Arbitration", *Journal of International Dispute Settlement,* 2015, Vol., 6 Issue 2.

14. Maryla Maliszewska, Michele Ruta, "Economic and Distributional Effects", *Report on The African Continental Free Trade Area,* The World Bank Group, 27 July 2020. Retrieved from: https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area, 15.09.2023.
15. Mistelis, Loukas A., Baltag, Crina, "Denial of Benefits' Clause in Investment Treaty Arbitration", *Queen Mary School of Law Legal Studies Research Paper*, 2018, No. 293. Retrieved from: https://ssrn.com/abstract=3300618, 15.09.2023.
16. Paulsson, Jan, *Denial of Justice in International Law*, Cambridge University Press, Cambridge, 2005.
17. Sabahi, Borzu, Rubins, Noah D., Wallace Jr., Don, *Investor- State Arbitration* (2nd Edition), Oxford University Press, Oxford, 2019.
18. The African Free Trade Continental Agreement along with its Annexes. Retrieved from: https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf, 15.09.2023.
19. *The Impact of Investment Treaties on Companies, Shareholders and Creditors,* OECD Business and Finance Outlook, OECD Publishing, Paris, 2016.
20. United Nations Conference on Trade and Development – Scope and Definition, UNCTAD Series on Issues in International Investment Agreements, 2011, Vol. II. Retrieved from:https://unctad.org/system/files/official-document/diaeia20102_en.pdf, 29.09.2023.
21. "UNCTAD Investment Policy Framework For Sustainable Development", 2015. Retrieved from: https://investmentpolicy.unctad.org/, 15.09.2023.
22. Van Harten, Gus, Vastardis, Anil Yilmaz, "Special Issue: Critiques of Investment Arbitration Reform", *Journal of World Investment & Trade*, 2023, Vol 23 No 3.
23. Vandevelde, Kenneth J., "The Bilateral Investment Treaty Program of the United States", *Cornell International Law Journal,* 1998, Vol 21 No 2. Retrieved from: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1188&context=cilj, 20.09.2023.
24. Vermeer-Künzli, Annemarieke, "As If: The Legal Fiction in Diplomatic Protection", *European Journal of International Law*, 2007, Vol. 18, Issue 1. Retreieved from: https://doi.org/10.1093/ejil/chm009, 3.10.2023.
25. Waibel, Michael, "Investment Arbitration: Jurisdiction and Admissibility", *Legal Studies Research paper Series,* Paper No 9/2014, University of Cambridge, 2014. Retrieved from: https://icsid.worldbank.org/sites/default/

files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0215.pdf; 23.09.2023.

26. Waibel, Michael, Kaushal, Asha, Chung, Kwo-Hwa, Balchin, Claire, "The Backlash Against Investment Arbitration: Perceptions and Reality", in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin (eds.), *The Backlash Against Investment Arbitration,* Kluwer Law International, March 2010. Retrieved from: https://ssrn.com/abstract=1733346, 20.09.2023.
27. Wallace, Jr., Don, "Fair and Equitable Treatment and Denial of Justice: Loewen v US and Chattin v Mexico", *Transnational Dispute Management*, 2006, Vol. 2. Retrieved from: www.transnational-dispute-management.com; 16.09.2023
28. Wallace, Jr., Don, "State Responsibility for Denial of Substantive and Procedural Justice Under NAFTA Chapter Eleven", *Hasting International and Company Law Review*, 2001, Vol. 23. Retrieved from: https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1524&context=hastings_international_comparative_law_review, 16.09.2023.
29. "World Investment Report – Towards a new generation of investment policies", UNCTAD Secretariat, UNCTAD/TDR/2012, 2012. Retrieved from: https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf, 22.09.2023.
30. Yeginsu, Can, Mulderrig, Calum, "Covered Investments", *The Investment Treaty Arbitration Review* , 2022.

CHANGES IN INTERNATIONAL LAW REFERRING TO STATE TERRITORY: THE EROSION OF TERRITORIALITY

Mariusz MUSZYŃSKI*

ABSTRACT

Territory has always been of great significance for the State. For centuries, it has constituted its essence, as it was territory that population gained benefits from. Hence, from the beginning, international law has aimed to defend State territory, and this has been expressed in the principle of inviolability of borders. The article discusses how the evolution of international law and the encroachment of that law on new spheres of political and social relations have impacted the redefinition of the traditional significance and role of State territory. The context embraces a number of perspectives. It shows how State territory is impacted by economic globalisation and regionalisation, new technologies, the separation of the institution of State sovereignty from territory, or the erosion of national judicial authority.

The author does not assess this process although the text may give the impression that the perspective has a critical overtone. He suggests that the constant process of the evolution of international law has reached a point at which changes affect issues fundamental to the construction of the entire system. What is more, those changes are based on a non-legal reality. They do not create the said reality, as was the case centuries ago, but they are a consequence thereof, one that is so essential as to erode the pre-existing legal and political balance. What seems to be crucial for that assessment is the fact that the weakening of the significance of territory will have its consequences for statehood. Hence, it is easy to reach the conclusion that the old international law of States as we know it is coming to an end. An era is approaching that is new to the system.

Key words: International law, sovereignty, state territory, new technologies, judicial authority

* Professor, University of Cardinal Stefan Wyszyński, Department of Law and Administration, Warsaw. ORCID 0000-0002-3499-2437. E-mail: m_muszynski@uksw.edu.pl

INTRODUCTION

In the classic international law, which was in force in the period between the 19th and 20th centuries, the State is the sum of three components: nation, government and territory. State territory is an area within which State authority is exercised. Without territory there is no State, and thus no international law, the subjects of which are States. Territory has always been of great importance for States. This was related to benefits reaped by the population living in a given territory. Hence, for ages States strove for the expansion of their territory at the expense of other States and nations (peoples). Therefore, since the beginning of the existence of States, the principle of inviolability of State territory emerged in international law, which was later popularised as the principle of inviolability of boundaries. Certainly, the role of territory has evolved over centuries. Consequently, international law referring to territory has changed too. Those transformations were however gradual and had their logical boundaries, and hence they did not impact the essence of statehood as such. A breakthrough in that regard came in the latter half of the 20th century, especially in its last decade. However, this time the process had a reverse character. It was not a change of the role of State territory that enforced changes in international law, but it was the changed international law that led to the redefinition of the meaning and role of State territory. The said process advanced in a couple of perspectives. At the beginning, different territorial constructs having a non-State character started to emerge. Some territories in the world were entirely excluded from the possibility of being subject to the authority of a State. An example of such a phenomenon may be Antarctica, whose legal status was determined by virtue of the Antarctic Treaty (1959) and strengthened by the additional protocol to that Treaty (1991). Other changes that took place in that period consisted in the relativisation of the meaning of the State's territory, in particular by eliminating there the exclusivity of exercise of State authority. This happened through ordinary development of international law which saw international norms encroach on new areas of social and political relations that had been previously embraced by State sovereignty. Changes were justified by the claim that States are ever less capable of fulfilling their tasks by means of national measures and within national territory. Hence, what is necessary is supranational governance. A classic example of that process is the internationalisation of the sphere of environmental protection or of combating organised crime and terrorism, which may not be fully controlled without deepened collaboration.

GLOBALISATION AND ECONOMIC REGIONALISATION

However, the main factor that weakened the significance of the principle of State territoriality in the 20th century was undoubtedly economic globalisation. The liberalisation of trade, also as a result of integration processes of States,

created common legal space, which does not belong only to the citizens of a specific State, but to the citizens of many States as well as to other subjects, including those whose nationality is difficult to determine, such as e.g. transnational corporations. The essence of State territory lost its significance in that dimension especially in Europe. As a result of the process of European integration, the classic perception of State borders and of their role started to disappear. This was caused by the introduction of new supra-State pseudo-territorial constructs. They follow from a number of solutions contained in the EU Treaties. They embrace such legal constructs as e.g.: the internal market (Article 3(3) of the Treaty of the EU, Article 26 of the Treaty on the functioning of the EU), the terminological phenomenon of EU internal borders (borders between the EU Member States – Article 77(1)(a) of the Treaty on the functioning of the EU); the terminological phenomenon of EU external borders (borders with States that are not members of the EU – Article 77(1)(b) of the Treaty on the functioning of the EU); lifting control at internal borders (Schengen Agreement, Article 77(1)(a) of the Treaty on the functioning of the EU); some specific provisions of the Convention implementing the Schengen Agreement (cross-border observation; cross-border pursuit), etc. Those constructs authorise EU institutions to act in the territory of another Member State. This kind of actions of the EU authority in a State's territory may only be explained if one relies on the constitutional consent to the exercise of the EU authority in the territory of a Member State, and on the delegation of State powers to a supranational organ on the basis of a treaty. However, what is concerned in the case of the EU is not an exceptional and individual action, but a general delegation, that is to say, actual relinquishment by the State of some part of its powers in its territory or even the creation of new powers for non-State bodies. Hence, the supranational authority does not ask for consent, as the authority of the EU is indeed permanent. This is especially visible in the post-Lisbon version of the Treaty on the EU, which in its Article 5 discusses the authority of the EU in the territory of the Member States based on the "principle of conferral".[1] What is more, the EU Treaties are also full of formulations that manifest the tendencies to attribute to the EU the territorial construct of a State. This may be noticed *inter alia* in Article 26(2) of the Treaty on the functioning of the EU and in Article 170(1) of the Treaty on the functioning of the EU (area without internal frontiers); in Article 174 of the Treaty on the functioning of the EU (actions of the EU leading to the strengthening of its territorial cohesion); in Article 67 of the Treaty on the functioning of the EU (area of security and justice). The latter is linked with State territory by way of reference to the authority of the State understood as territorial supremacy.[2] In this way, State

[1] Mariusz Muszyński, *Państwo w prawie międzynarodowym*, *2nd supplemented edition,* Wydawnictwo STO, Bielsko-Biała 2012, p. 99.

[2] Cf. Utz Schliesky, *Souveränität und Legitimität der Herrschaftsgewalt*, Mohr Siebeck, Tübingen 2004, p. 314.

territory begins to lose its meaning as an object of a State's action. State authority is losing its exclusivity in that regard. By virtue of the Treaties, the "territoriality" of an international organization starts to emerge – as the EU is still recognized as an international organization, and not as a union of States. This is reflected *inter alia* by the fact that the EU territory is constructed by EU legal acts stemming from the territories of the Member States, and the bodies of the EU exercise their practically independent authority similar to that of the State. Hence, in the study of international relations the conception of the so-called *regulatory State* is emerging as a form of statehood in opposition to a sovereign State. The European Union is indeed recognized as an example of such statehood.[3] The next problem related to State territory that emerged in the 20th century is its disintegration, developing from within, taking place in the process of regionalization. In Europe this is manifested by the creation of the so-called Euro-regions. Those are territorial constructs built on parts of territories of given States, and their cohesion is strengthened by conceptions concerning the attribution to them of the status of a subject, ranging from that under civil law in the national orders of States to that under international law. What is more, the role of those constructs is to act for the benefit of regional cohesion, not for the benefit of the State. Additionally – although Euro-regions are not an institution created in the EU Treaties – the European Union expresses its interest in the organization of this process by authorizing its Treaty-based body, the Committee of Regions (Article 305 of the Treaty on the functioning of the EU), to engage therein. Among the tasks of the EU, we may also find the activity for strengthening territorial, economic and social cohesion of EU regions (Article 174 of the Treaty on the functioning of the EU) which are built in addition to Euro-regions and in violation of the political boundaries of States, but on the basis of historical, economic and geographic ties.

THE IMPACT OF NEW TECHNOLOGIES AND THE VIRTUAL TERRITORY OF THE STATE

The next stage of the erosion of the meaning of State territory took place in the 21st century. New technologies served here as the instrument of changes. The end of the "waterproofness" of State borders, or actually the lack thereof in that regard was indicated in 2000 by a Philippine hacker who launched the virus *I love you* into cyberspace, causing a number of problems for many subjects coming from different States.[4] What followed later was a slippery slope. It is easy to name examples related even to the recent period. Accordingly, e.g. on 8 April 2015 the TV channel TV5 fell prey to attacks launched by specialists from the Islamic State. In turn, on 12 May 2017, someone unidentified attacked the *Renault* Company

[3] James A. Caporaso, "The European Union and Forms of State: Westphalian, Regulatory and Post-Modern?" *Journal of Common Market Studies,* 1996, Vol. 34, Issue1, p. 29, etc.

[4] Rafael Domingo, *The New Global Law*, Cambridge University Press, Cambridge 2010, p. 77.

with the virus *WannaCry*. Subsequently, on 27 June the *NotPetya* virus was introduced into the network of the *Auchan* group. In turn, the attack on the state-owned railway company *SNCF* caused many problems at French airports, etc.[5] Very quickly instruments of this kind started to be applied in feuds between States. Russia, China, North Korea or Iran has become the main players in that sphere. Especially the last country chose the Internet as the field of battle with the United States and their allies. It was the Teheran specialists employed at the Revolutionary Guard Corps who in 2012 broke into the network of the Saudi company *Saudi Aramco* and blocked 30,000 computers. In 2014 they launched a cyber-attack on the *Sand Corporation*, and in 2016 they made an attempt at infiltrating a dozen banks and taking over control of a dam located in the suburbs of New York. At the end of 2019, Microsoft informed that the targets of Iranian hackers are computers managing industrial systems, power plants or factories. The aforementioned hackers are believed to have engaged on the Internet in the presidential campaign against Donald Trump.[6] The result of those technological transformations was the creation of a new surprising formula of territoriality, which has nothing in common with its classic understanding – the so-called "territory of a virtual State".[7] This conception was the consequence of the economic and social development of the world, in which areas have developed where international law was not in force.[8] And what is not concerned here are unrecognized States, failed States or parts of territory excluded from international legislation after terrorist organizations or ordinary bandits took over there the actual power. What is meant is the new reserved domain (*domaine réservé*) built on the spheres of activity of individuals and States, which have not been reached by the international community with its positivist-law message embracing *inter alia* issues concerning new technologies (Internet), some areas of economy (bankruptcy), security. Certainly, the thesis according to which the turn of the 20th and 21st centuries was a time of the emergence in international relations of areas without international law should not be recognized as a new one. Such a situation had taken place also in previous international relations and referred to different substantive levels, and international law systematically filled in those gaps. This took the form of introducing specific solutions as well as enforcing a general framework contained in certain legal constructs on the classic activity of the State, i.e. developing standards of human

[5] Katarzyna Stańko, "Szkoła Wojny Ekonomicznej", *Dziennik Gazeta Prawna*, online edition of 26 December 2017. Retreved from: http://biznes.gazetaprawna.pl/artykuly/1092902,szkola-wojny-ekonomicznej-narodowosc-firmy.html, 26.12.2017.

[6] Martin Matishak, "Iran's retaliation could be hacking, not bombs", *Politico* 4.01.2020 https://www.politico.eu/article/irans-retaliation-could-be-hacking-not-bombs/, 27.09.2023.

[7] Edward J. Janger, "Virtual Territoriality", *Columbia Journal of Transnational Law*, 2010, Vol. 48, p. 401.

[8] Mathhew Hoinsington, "International Law and Ungoverned Space", *Indonesian Journal of International and Comparative Law,* 2014, No. 2, pp. 424, etc.

rights or *ius cogens* standards. The very notion of the "State's virtual territory" also emerged in the context of the ordinary process of the development of international law. It was quite loosely related to the former spatial conception of territory. This concerned the sphere of State's authority. In view of globalization and disappearance of borders for the activity of capital, it also referred to the problems of extraterritoriality of State power. In the original perspective, the said construction was to serve as a set of conflict-of-law rules binding in relations among States, that is, among territories. It was assumed that, in the basic scope, it will concern the selection of law in specific situations with the participation of economic subjects operating on a transnational scale. Its standard required the ultimate respect for powers created by different jurisdictions within which a debtor conducts his/her business. What was also concerned was the recognition that the procedural law of bankruptcy of the State of the company's origin should govern a specific case regardless of the fact where court proceedings are pending. In turn, the selection of substantive law should be regulated by ordinary conflict-of-law rules. All this was supposed to create the basis for cross-border bankruptcy and to facilitate the global management of such cases as well as acceptance of rules, arising from national regimes, governing the remedial of bankrupting companies. But from the perspective of a State, this solution still placed a case within the scope of application of its law, at least procedural law, regardless where bankruptcy had effects. The rule in itself did not go beyond the classic application of foreign law, that is, the creation of a legal fiction in accordance with which it is assumed that the event which is to be regulated by this national law took place within the territory of that law. Thereby, it strengthened normative territoriality, by creating an alternative to the process of harmonization of the broadly understood financial law, especially as regards investment loans and bankruptcy of companies whose global activity gives rise to numerous legal problems related to jurisdiction and selection of law. Thus, this led in the direction opposite to harmonizing processes aiming at the creation of global law. The unique nature of the situation concerning new technologies that manifested itself at the turn of the 20th and 21st centuries has got out of control of the existing instruments of international law. The traditional understanding of territory and of international law no longer manages to solve even a part of problems that need to be faced by human activity at those levels. Namely, questions have arisen as to how to classify in international law hacker attacks on the State's security system, banking systems, the control of nuclear power plants, etc. On the one hand, these points are crucial for the existence of the State; they are located in its territory. On the other hand, hackers are in principle private persons. Attacks take place in virtual space that may not be unequivocally associated with State territory.[9] The seriousness of the problem is highlighted by

[9] More on the concept of *digital attack* or on the conception of *cyberspace*: See: Krzysztof Bobrowski, "Conventional Attack vs Digital Attack in the Light of International Law", *Polish Review of International and European Law* 2021, Vol. 10, No. 1, pp. 77–101.

the defense doctrine of the USA which stresses the protection of statehood and sovereignty in that dimension.[10] But may an attack or a threat of attack launched by hackers on a bank, even a major one, but one functioning in the form of a private company, constitute aggression within the meaning of the United Nations Charter? Initially, States started to classify actions against hackers as acts falling within the scope of combating organized crime, which is demonstrated by the fact that the USA relies in that regard on FBI and not on the military.[11] In 2001 the Convention on Cybercrime was adopted.[12] However, the attack launched in 2007 by Russian hackers on Estonia, caused by the so-called Russian-Estonian war over the monument of the Bronze Soldier, forced the NATO to apply at the level of cyberspace rules of the international law of war. This was based on the recognition that cyberspace may be an area of war, like the classic territory of the State, and that, as a new dimension of military conflict; it should be embraced by the scope of Article 5 of the North Atlantic Alliance. We read about it in Article 40 of the Lisbon Declaration of 20 November 2010: "Cyber threats are rapidly increasing and evolving in sophistication. In order to ensure NATO's permanent and unfettered access to cyberspace and integrity of its critical systems, we will take into account the cyber dimension of modern conflicts in NATO's doctrine and improve its capabilities to detect, assess, prevent, defend and recover in case of a cyber attack against systems of critical importance to the Alliance. We will strive in particular to accelerate NATO Computer Incident Response Capability (NCIRC) to Full Operational Capability (FOC) by 2012 and the bringing of all NATO bodies under centralized cyber protection. We will use NATO's defense planning processes in order to promote the development of Allies' cyber defense capabilities, to assist individual Allies upon request, and to optimize information sharing, collaboration and interoperability. To address the security risks emanating from cyberspace, we will work closely with other actors, such as the UN and the EU, as agreed. We have tasked the Council to develop, drawing notably on existing international structures and on the basis of a review of our current policy, a NATO in-depth cyber defense policy by June 2011 and to prepare an action plan for its implementation"[13]. As a result, *Cyber Defense Centre of Excellence* was established, financed by the NATO Cooperative.[14] Its tasks embrace *inter alia*

[10] The issue concerning the existence and defence of sovereignty in cyberspace is discussed in the doctoral dissertation by Welanyk. See: Tomasz Welanyk, *Istnienie i granice suwerenności w cyberprzestrzeni. Analiza prawna*, doctoral dissertation at the Faculty of Law and Administration, University of Warsaw, 2019, supervisor of the dissertation P. Czubik, auxiliary supervisor P. Filipek. Accessed via the repository of the University of Warsaw.

[11] George Lukas, *Ethics and Cyber Warfare. The Quest for Responsible Security in the Age of Digital Warfare*, Oxford University Press, Oxford 2017, pp. 1–1, 57, etc.

[12] *Ibidem,* p. 58.

[13] Lisbon Summit Declaration, 20.11.2010. Retreived from: http://www.nato.int/cps/en/natolive/official_texts_68828.htm, 27.09.2023.

[14] George Lukas, *op. cit.,* p. 64.

analyzing the application of international law in cyberspace, the effect of which is *Tallinn Manual on the International Law Applicable to Cyber Operations.*[15] According to it, "cyber operations do not occur in a legal vacuum and preexisting obligations under international law apply equally to the cyber domain". This is demonstrated by the renewed and corrected version (2019) of that position. Its structure is composed of four parts with twenty chapters, each examining a different area of existing international law. The first part deals with general legal principles, while the remaining three parts tackle specific specialized legal regimes. In accordance with its premise, the analysis embraces over a century's worth of treaties and case law, extending the premises of international law principles and regimes to their application in cyberspace. It also illustrates the diversity of law which governs cyber activities. This situation shows that war perceived by Oppenheim as "contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases" has gone out of date. The contemporary doctrine is familiar with the notions: net war, cyber conflict, cyber war, cyber confrontation.[16] While the first notion is linked with propaganda war, the remaining ones are categorized and considered in the context of the use of power and aggression. They thus refer to the State's sphere of authority and territory. They are related to the responsibility of a State under international law, certainly after the completion of its premises, especially those concerning the attribution of an act to the State.[17] In this way, cyber space is no longer perceived as "the common global good", as space without borders where conflict-of-law rules should function, but it starts to acquire a territorial character, over which the State extends its sovereignty, exercises its authority and which it defends. Cyber-attacks not only have their actors, but also indeed real territorial effects.[18] They may not directly violate human beings, like classic weapon, but indirectly they are capable of contributing to their death and of harming them.[19] Hence, the State may act to defend its sovereignty and nationals,

---

[15] Michael N. Schmitt, (ed), *Tallinn Manual on the International Law Applicable to Cyber Operations.*, Cambridge University Press, Cambridge, 2017. Retreived from:. https://doi.org/10.1017/9781316822524 9.03.2021.

[16] John Arquilla, David Ronfeld, *"*Cyberwar is coming?", *Comparative Strategy* 1993, No. 2, p. 141 et seq. Cf.: Schmitt, "Classification of Cyber Conflict", *Journal of Conflict and Security Law* 2012, Vol. 17, No. 2, pp. 245–260; Jack M. Beard, "Law and War in the Virtual Era", *American Journal of International Law* 2009, Vol. 103, No. 3, pp. 425, etc.

[17] *"*UE nakłada pierwsze w historii sankcje za cyberataki. Obejmą one rosyjski wywiad wojskowy GRU", Dziennik 30.07.2020. Retrieved from: https://technologia.dziennik.pl/aktualnosci/artykuly/7786361,ue-naklada-pierwsze-w-historii-sankcje-za-cyberataki-rosyjski-wywiad-wojskowy-gru.html, 2.08.2020.

[18] Liedel, Piasecka, "Wojna cybernetyczna – wyzwanie XXI w.", *Kwartalnik Bezpieczeństwo Narodowe* 2011, No. 7, pp. 15,etc. Cf.: Michael Schmitt, "Classification of Cyber Conflict", *Journal of Conflict and Security Law* 2012, Vol. 17, No. 2, pp. 250, etc.

[19] George Lukas, *op. cit.,* pp. 57–58.

as well as exercise due diligence so as such attacks do not occur within its territory (virtual territory). It was for that reason that the American pre-emptive strike on Iran's nuclear sites with the application of the virus *Stuxnet* was treated as preventive self-defense and legitimized (operation *Nitro Zeus*), albeit not by the UN Charter, but by an international custom.[20]

THE CATEGORISATION OF TERRITORIES AND THE SEPARATION OF TERRITORY FROM STATE SOVEREIGNTY

Finally at the turn of the 20th and 21st centuries, territories became categorized in international law. Certainly, the very problem in this dimension had already been known in history. In the period of colonialism relations between the territory of a metropolis and the territory of a colony constituted a challenge for scholars trying to sort that issue. And this phenomenon in itself did exists, although a cohesive stance was not reached as to whether the territory of a colony was part of the territory of a colonial State or a separate area, and it was also disputed where the sovereignty of a metropolis ends. However, in the 21st century the issue of categorization of State territory returned in a different dimension. The United States, wishing to evade the performance of a number of international obligations referring to human rights, established the institution of "the territory of a military base", attributing a separate status to its military naval base in Guantanamo.[21] For international politics this was an unprecedented situation. Indeed, it had existed previously in relation to the local employees of the base. But after over a century-long (Treaty-based) occupation of Cuban territory, the government of the USA for the first time stated, for international purposes, that the binding force of the American Constitution does not stretch over the territory of the base, and the Cuban government exercises there the *ultimate sovereignty*. It thus politically weakened its legal position as regards ruling over the territory, but such a legal fiction created for it the perfect prison. It made it possible to detain in the base terrorists whose status had no legal support in terms of constitutional and international-law standards.[22] The

[20] "Zdradzono tajemnicę ataku na irański program nuklearny. Kto pomógł wprowadzić wirusa do systemu?" *CyberDefence* 24, 4.09.2019.

[21] Rafael Domingo *The New Global Law*, *op. cit.,* p. 77. Indeed, after the delivery of the judgment of the US Supreme Court of 14 June 2006 in the case *Hamdan v Rumsfeld and Others* 548 US 557 (2006), in which it was stated that Guantanamo detainees were embraced by the American *habeas corpus*, the key detainees were relocated to the Abu Ghraib prison (Iraq, close to Baghdad), which legally was not American territory although it was controlled by the American army. 05-184 – Hamdan Vol. Rumsfeld (supremecourt.gov)

[22] Jana Lipman, *Guantanamo: A Working-class History between Empire and Revolution*, University of California Press, Berkeley 2009, p. 2. In this context, there has been a considerable discussion among scholars. See: Jessica Wolfendale, "Training Torturers: A Critique of the "Ticking Bomb" Argument", *Social Theory and Practice* 2006, Vol. 32, No. 2, pp. 269–287;

Supreme Court of the USA also followed that reasoning. In the case of 28 June 2004 *Rasul v Bush*, it indeed granted inmates the right to apply to a court for the control of their status, but it evaded answering the question in what territory the base was located.[23] Likewise, American sociologists called Guantanamo *space of exception* or *anomalous zone*, where the lack of law dehumanizes local residents and extends the scope of the actual exercise of authority by the USA.[24] Hence, what took place was the process of the separation of territory from the construct of State sovereignty and its consequences as well as from the legal standards of a democratic State (State ruled by law). The following question arose: what will replace the said construct? Concepts immediately emerged in legal scholarship in accordance with which this was in a way a manifestation of the fact that territory belongs to the patrimonial rule of the mankind.[25] Namely, if the globe belongs to each human, then it may be managed and administered by each subject or government created by people. And indeed, this does not have to be expressed in the formula of territoriality. The global space is the formula of modern territoriality, where authority may be exercised without any limits emanating from sovereignty.

THE LOSS OF JUDICIAL AUTHORITY IN STATE TERRITORY

The erosion of territoriality at the turn of the 20th and 21st centuries was reflected at the subsequent levels of State authority, especially in the domain of

---

Alex J. Bellamy, "No pain, no gain? Torture and ethics in the war on terror", *International Affairs* 2006, Vol. 82, No. 1, pp. 121–148; Howard J. Curzer, "Admirable Morality, Dirty Hands, Ticking Bombs, and Torturing Innocents", *The Southern Journal of Philosophy* 2006, Vol. 44, pp. 31–56; Brad Wendel, "Legal Ethics and the Separation of Law and Morals", *Cornell Law Review* 2005, vol.. 91, pp. 67–128; John Kleinig, "Ticking Bombs and Torture Warrants", *Deakin Law Review* 2005, Vol. 10, No. 2, pp. 614–627; David Sussman, "What's Wrong with Torture?", *Philosophy and Public Affairs* 2005, Vol. 33, No. 1, pp. 1–33; John T. Parry, "The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees", *Melbourne Journal of International Law* 2005, Vol. 6, pp. 516–533; Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House", *Columbia Law Review* 2005, vol. 105, No. 6, pp. 1681–1750; Vittorio Bufacchi, "Torture, Terrorism, and the State: a Refutation of the Ticking-Bomb Argument", *Journal of Applied Philosophy* 2006, Vol. 23, No. 3, pp. 355–373; Eric Posner, Vermeule, "Should Coercive Interrogation Be Legal?", *Michigan Law Review* 2006, Vol. 104, pp. 671–707; David Luban, "Liberalism, Torture, and the Ticking Bomb", *Virginia Law Review,* 2005, Vol. 91, pp. 1425–1461; Duško Dimitrijević, "The Prohibition against Torture in International Law", in: Nenad Koropanovski (Ed.), *Archibald Reiss Days,* University of Criminal Investigation and Police Studies, Vol. I, pp. 105–115.

[23] Rasul v Bush, 542 U.S. 466 (2004). See also: discussion of the judgment: Sloss, "*American Journal of International Law"* 2004, Vol. 98, Mo. 4, pp. 788–798.

[24] Jana Lipman, *op. cit.,* p. 4. See also: Amy Kaplan, "Where is Guantanamo?", *American Quarterly* 2005, Vol. 57 (September), p. 854.

[25] Rafael Domingo, *op. cit*., p. 77.

judicial jurisdiction. And what is not meant here are issues concerning the relativisation of the possibility to prosecute States due to the weakening of the construct of State immunity. The perspective of the downfall of the significance of the border as a barrier to foreign sovereign power is particularly symptomatic in many dimensions in the State's justice system. It allows foreign States to meddle with their authoritative acts in that sphere or to solve disputes having a foreign legal element. Certainly, such situations had taken place in the past but never on such a scale. They also had a different legal basis. The "water-proof" State border made it necessary for foreign judicial authority to act on the basis of the State's own act on private international law. After the year 1990, that process saw the State's withdrawal from the instrumental sphere. National acts were relegated to the role of complementing Treaty-based solutions. Also, foreign judicial rulings were generally recognized based on international agreements. In the European Union, the reduction of authority has recently embraced even resignation from ascribing a national enforceability clause to foreign judgments.[26] However, the actual breakthrough came after State authority made concessions to international bodies or organizations rather than to other States, though this is in fact taking place. As a result, the process of the actual loss of jurisdictional authority on account of actions in the State's territory is currently heading in three directions: the universalisation of criminal responsibility, the establishment of international courts having their own powers, the delegation of judicial power to supranational courts. As regards the first reason for the loss of jurisdictional authority, it should be admitted that universal judicial authority as such has been known for ages, but it concerned acts recognized as hostile to entire humanity. An example of such acts was piracy. Since the times of Cicero, pirates have been perceived as *hostis humani generis*.[27] There were two consequences thereof: pirates should be punished, and each State may do that. However, nowadays the scope *ratione materiae* of State's universal jurisdiction has evolved in an uncontrollable manner. This is reflected for example by the case of Augusto Pinochet, who was arrested in London at the request of the Spanish judge Baltazar Garzon. The requesting party held that the crimes committed by the former dictator may not remain unpunished.[28] And the English court refused to grant Pinochet immunity, although he was the head of State when he committed the said crimes. The court stated that this activity should not be subject to protection in view of the fact that its character violated

[26] For example, in accordance with Article 17(2) of the Council Regulation (EC) No 4/2009, a decision given in another EU Member State bound by the Hague Protocol which is enforceable in that State is enforceable without the need for a declaration of enforceability.

[27] John Westlake, *International law*, Cambridge University Press, Cambridge 1910, p. 181.

[28] Rafael Domingo, *op. cit*., p. 80; Kai Ambos, "Der Fall Pinochet und das anwendbare Recht", *Juristenzeitung* 1999, No 1, p. 16, etc; Hazel Fox, *The Law of State Immunity*, Oxford 2006, p. 146.

ius cogens norms (prohibition against torture).[29] Further examples of changes in that realm embrace for instance the case of Ariel Sharon, the President of Israel. In 2001, a group of Lebanese tried to institute in Belgium proceedings against him, by accusing him of orchestrating a massacre of civilian Lebanese refugees in 1982. The attempt failed. In turn, in 2002 the feud between Congo and Belgium ended before the International Court of Justice. It resulted from the fact that a Belgian court, relying on the right to universal jurisdiction that it ascribed to itself, arrested the Minister of Foreign Affairs of Congo, Abdulaye Yerodia Ndombasi, during his official journey. He was suspected of homicide. In 2005 the possibility of universal judiciary was justified by the Spanish Constitutional Court. It stressed that Spanish courts could consider themselves as having jurisdiction in matters concerning crimes of an international character. In 2009 the scope of that judgment was weakened by the Spanish Parliament, which adopted restricting acts.[30] Today the right to universal jurisdiction may be found in criminal codes of many States.[31] But in this way the universalism of national judicial authorities was not only completed in the *ratione materiae* aspect, but also extended in its *ratione personae* scope. Moreover, all this takes place at the expense of other States and on the basis of the mutuality principle. An even greater loss of jurisdictional authority in the State's territory is related to the establishment of international courts, to which States delegate powers in specific matters. And what is not meant are issues pertaining to the settlement of international feuds, but precisely to the relinquishment of State jurisdiction. This is a Treaty-based process. The best known international courts embrace the ones established by the Security Council of the UN, namely:

[29] The argumentation presented on the basis of the prohibition against torture was as follows: "If the implementation of a torture regime is a public function giving rise to immunity *ratione materiae*, this produces bizarre results. If the implementation of the torture regime is to be treated as official business sufficient to found an immunity for the former head of state, it must also be official business sufficient to justify immunity for his inferiors who actually did the torturing. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials immunity. Therefore, the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention will have been frustrated. All these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention" (Lord Steyn and Lord Nicholls). More on that: House of Lords, Regina v Bow Street Metropolitan, retrieved from: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm, 6.02.2010. Judgment – Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division). Retrieved from: http://www.parliament.the-stationery office.co.uk/pa/ld199899/ldjudgmt /jd990324/pino1.htm, 6.02.2010.

[30] Rafael Domingo, *op. cit*., p. 82.

[31] Elzbieta Karska, "Zakres włączenia katalogu zbrodni objętych jurysdykcją Międzynarodowego Trybunału Karnego do polskiego prawa karnego materialnego", *Przegląd Sejmowy* 2007, Vol. 15, 5 (82), pp. 253–266.

– The International Criminal Tribunal for the former Yugoslavia established on 27 May 1993 by virtue of Resolution No. 827. Its scope *ratione materiae* comprises serious violations of the Geneva Conventions of 1949, genocide, crimes against humanity as well as violations of the laws and customs of war;
– The International Criminal Tribunal for Rwanda established on 8 November 1994 by virtue of Resolution No. 955. It was vested with prosecuting those who committed the crimes of genocide and other serious violations of international law in Rwanda's territory as well as Rwanda's citizens who committed such crimes in the territories of the neighboring States between 1 January 1994 and 31 December 1994;
– the Special Court for Sierra Leone, established on 14 August 2000 by virtue of Resolution No. 1315 in order to prosecute persons who bear responsibility for serious violations of international humanitarian law and Sierra Leonean law committed after 30 November 1994;
– the Special Court for Lebanon, created on 10 August 2007 on the basis of Resolution No. 1757 (of 29 March 2006) and of the agreement between the UN and the government of Lebanon (of 30 May 2007) in order to prosecute persons bearing responsibility for the attacks in Beirut which took place on 14 February 2005.

The last two courts are referred to as "hybrid" due to their international and national character and mode of creation.[32] However, the model example in that regard is certainly the successor of the *ad hoc* criminal courts, the International Criminal Court (ICC). It was established in Rome on the basis of an international agreement – the Statute of the International Criminal Court (17 June 1998), which entered into force on 1 July 2002.The jurisdiction of the ICC embraces the gravest international crimes, i.e. the crime of aggression (Article 5), genocide (Article 6), crimes against humanity (Article 7) and war crimes (Article 8). As regards the crime of aggression, the jurisdiction in that regard was initially temporarily excluded due to the lack of a legal definition of that crime. It was adopted as late as 2010 in an agreement referred to as the Kampala agreement.[33] In accordance therewith, aggression means the planning, preparation, initiation or execution of an act of aggression. As for the understanding of "an act of aggression", there is a reference to the Charter of United Nation and the Resolution of the UN General

[32] Laura A. Dickinson, "The Promise of Hybrid Courts", *American Journal of International Law* 2003, Vol. 97, No. 2, pp. 295-310; Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment", *American Journal of International Law* 1996, Vol. 90, No. 3, pp. 501-510; James C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", *American Journal of International Law* 1993, Vol. 87, No. 4, pp. 639–659.

[33] Stefan Barriga, Leena Grover, "A Historic Breakthrough on the Crime of Aggression", *American Journal of International Law* 2011, Vol. 105, No. 3, p. 517.

Assembly No. 3314. This relation is tight. Actions of a person committing the crime of aggression within the meaning of the Statute of the ICC, translating into a State's conduct, must have the gravity of an infringement of the UN Charter by that State.[34] The adoption procedure ended on 14 December 2017. The remaining kinds of crimes are, in turn, defined directly in the statute. Accordingly, genocide was defined as the commitment of one of the acts indicated in Article 6 with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Five acts are concerned here: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group. In turn, crimes against humanity concern a number of acts enumerated in Article 7 if they are committed as part of a widespread or systematic attack directed against any civilian population. Those are: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, enforced prostitution, enforced sterilization, the crime of apartheid, etc. Finally, two groups of crimes were recognized as war crimes: firstly, grave breaches of the Geneva Conventions of 12 August 1949, *inter alia* willful killing, torture, biological experiments, willfully causing great suffering, compelling a prisoner of war or other protected person to serve in the forces of a hostile Power, destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war, declaring that no quarter will be given, deportation; secondly, other serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law, *inter alia* intentionally directing attacks against the civilian population, intentionally directing attacks against civilian objects, peacekeeping missions and units, killing a combatant who laid down his arms, and killing the wounded, etc. Initially, States secured their authority. The adopted solution was of a complementary character vis-à-vis national jurisdictions, and the principles of responsibility did not apply to nationals of States which were not a party to the Statute of the International Criminal Court. The possibility of prosecuting them existed only when they committed crimes as members of international forces in the territories of the States-Parties to the Statute. Hence, some States which were not parties to the Statute of Rome, wishing to protect their nationals in such a situation, attempted to conclude with States-Parties agreements enabling to prosecute such persons first at a national level.[35] This limitation was however removed in 2017 by way of interpretation. At the request of the Prosecutor General

[34] On the content of the definition, see: *Ibidem*, pp. 521–523.

[35] Stephen Neff, *Justice among Nations. A History of International Law*, Harvard University Press, Cambridge–Massachusetts–London 2014, p. 475. On the policy of the USA in relation to the ICC Statute, cf.: Stefan Barriga, Leena Grover, *op. cit.,* pp. 519–520.

Fatou Bensouda, a pre-trial investigation was launched in the ICC in the case concerning the possibility of committing war crimes and crimes against humanity in Afghanistan.[36] In 2018 the ICC held that it was competent to deal with the crimes committed by military leaders in Myanmar despite the fact that that State was not a party to the Statute of the ICJ. This was based on the fact that the principle of *locus delicti*, as a principle of criminal law, is not a principle of international law. Also, some judgments concerning that matter were referred to, beginning with the case of the Lotus vessel (1927). If mass influx of refugees in Bangladesh was part of the crime, and if that State is a party to the ICJ Statute, then it was possible for the State which was affected by the effects of the crime to take action.[37] But the significant weakening of the State's territorial jurisdiction also has another context in that case. There is no protection on account of the possession of the immunity of the head of State either before *ad hoc* tribunals or before the ICC. This was called the penalization of the so-called white-collar crimes. The first head of State handed over in 2001 to be prosecuted by an international court (International Tribunal for the former Yugoslavia) on account of decisions taken as the head of State was S. Milošević, the former President of Serbia. In turn, in 2003 President Ch. Taylor was handed over to the Special Court for Sierra Leone. While Milošević died during the proceedings, Taylor was sentenced to five years of imprisonment in 2012. However, both of them were handed over after their presidency finished. Subsequently, in 2009 the International Criminal Court issued an arrest warrant for the President of Sudan Omar al-Bashir in order to try him for crimes committed during his term of office in Darfur. Having noted that, Bashir said that the warrant was worth as much as the ink used to write it.[38] And indeed, attempts to detain Bashir during his term of office failed. For many years, problems arising from the existence of the arrest warrant caused solely difficulties related to travelling. The said president could not cross the airspace of the States recognizing the jurisdiction of the ICC, as he could be arrested there. He was handed to the said court only a couple of years after the loss of power in the aftermath of the *coup d'état* staged on 11 April 2019.[39] In turn, the International Criminal Court did not manage to prosecute the leaders of rebels in Congo. It did not proceed in the case of Muammar Qaddafi, the leader of Libya, for whom it issued an arrest warrant in 2011. Qaddafi was killed during the Libyan uprising. Recently (17 March 2023) the ICC has

[36] The content of the request lodged by the prosecutor with the Pre-Trial Chamber III. Retreived from: https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF, 13.09.2018. Explanations concerning the social interest in the commencement of the procedure and procedural matters, see para. 364 et seq. (pp. 176–181).

[37] The content of the request lodged by the prosecutor with the Pre-Trial Chamber I. Retreived from: https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF, 3.09.2018. More on the justification of powers, see para. 62 et seq. (pp. 35–45).

[38] Stephen Neff, *op. cit*., p. 476.

[39] It was not until 11 August 2021 that Sudan gave its consent.

issued an arrest warrant for Vladimir Putin, the President of Russia, as well as for the Russian Commissioner for Children's Rights Maria Lvova-Belova. They were accused of having committed war crimes in Ukraine through others, including deportation of Ukrainian children to Russia. Somewhat in the shadow of international criminal justice, there also exist some treaties limiting the territorial jurisdiction of States in economic matters. What serves here as the instrument of limitation is treaties establishing arbitration authority that is independent of States? By virtue of those treaties, economic feuds fall outside the scope of the jurisdiction of national courts. Arbitration judgments indeed acquire the *res judicata est* value. This is not a limitation of territorial authority that is as spectacular as in criminal matters, but, in fact, it is more dangerous. It concerns the domain of the State's economic safety, and there are more and more arbitration courts because of the development of international economic law and international investment law. However, the most spectacular process of the loss of jurisdictional authority in State territory takes place in the case of judiciary within the framework of the EU. In this case, the construct of the delegation of authority embraces a number of Treaty-based complaints instruments, the majority of which indeed refer to the activity of States in the EU or to the monitoring of the process of the enactment of EU law,[40] but they result in the actual loss of authority also in the legislative sphere. National courts are not competent to independently provide interpretation of EU law or to review the conformity of national acts to EU law. This is the role of a special procedure called the preliminary procedure, which creates an absolute obligation. A violation thereof is regarded as a violation of the Treaty and entails the responsibility of a State within the framework of the EU system of the Member States' responsibility, that is, before the Court of Justice of the EU. A national court may depart from the said obligation only in exceptional situations, i.e. when a reference made to that court is irrelevant for the case or possibly when a given provision of EU law has already been the subject of interpretation delivered by the Court (the so-called *acte éclairé* doctrine) and when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (the so-called *acte clair* doctrine). The recent years have shown an additional threat in that domain; namely, the way in which the EU impacts the shape of the constitutional organs of a State by way of the interpretation of law delivered by its Court.[41]

The CJEU adjudicates also as a court monitoring the observance of the integration treaties (Article 256 and Article 258 of the TFEU). From the beginning

[40] Those are: infringement procedure; procedure for declaration of invalidity of an act of EU law; procedure concerning a plea of illegality; procedure concerning an action for failure to act; procedure concerning an action for compensation brought against the EU.

[41] In the preliminary judgment in joined cases C-585/18, C-624/18 and C-625/18, the CJEU established the criteria for the assessment of the independence of the Polish State bodies: the Disciplinary Chamber of the Supreme Court and the National Council of the Judiciary. See: CURIA – Wyniki wyszukiwania (europa.eu) (5.04.2021).

of the integration process, this has embraced different spheres of a State's activity. Initially, this referred solely to economic integration, then to internal matters and to the administration of justice. However, recently the CJEU has crossed one more line in the context of its jurisprudential competences. Namely, it has encroached upon the sphere of the constitutional identity of States, as its ruling touched upon the constitutional domain referring to the balance of State power regulated at the constitutional level.[42] Moreover, it based its determination on Article 19(2) of the TEU and provided it with substantive-law content, although this provision is commonly recognized by legal scholars as a norm regulating competences.[43] Such actions of the CJEU are in breach of the fundamental premise of the integration process. The said process is based on the principle in accordance with which the activity of EU bodies is limited by the principle of conferral and the principle of subsidiary. As regards the CJEU, within the scope of substantive law, this limitation arises precisely from Article 19(1) of the TEU and Article 267 of the TFEU, which limit its competence to the monitoring of the application and interpretation of EU law. Yet the CJEU provides an interpretative revision of Treaties, whereby it transgresses in its case law the logical boundaries of interpretation. Certainly, the proponents of such conduct may claim that it only has an indirect impact on national standards. It also constitutes an element of their modernization and adjustment to EU standards. However, one may not forget that such conduct not only goes beyond the Treaty-based conferred competences, but also in itself poses a threat to individual, national (constitutional) standards and structures. And this is unacceptable. Hence, the CJEU is obliged to exercise appropriate restraint in its case law.[44] All the more so as States rarely dare review the conformity of EU legislation to a State constitution.[45] This is anyway perceived by the Court of Justice of the EU as unacceptable in view of the broadly understood principle of the primacy of EU law.[46]

---

[42] The judgment of the CJEU in case SN (C-619/18). Cf. the judgment of the Constitutional Tribunal of 20 April 2020 in case ref. No. U 2/20, OTK-A 2020/61, Judge Muszyński's dissenting opinion.

[43] Cf.: Wegener, *Comment to Art. 19 TUE*, in: Calliess, Ruffert, *EUV-AEUV mit Europäischer Grundrechtecharta mit Kommentar*, Verlag C. H. Beck, München, 2016, pp. 308-330, in particular note 32 and note 43. See also: the order of the Constitutional Tribunal of 21 April 2020 in case ref. No. Kpt 1/20, OTK ZU A/2020, item 60, Judge Muszyński's dissenting opinion.

[44] Wegener, *Comment to Art. 19 TUE*, op. cit., pp. 308–330, note 20.

[45] Mariusz Muszyński, "The Review of EU Law by the Constitutional Tribunal in Poland", in: Muszyński, Pawłowski (eds), *Prawo międzynarodowe i Unia Europejska w konstytucji*, Wydawnictwo Naukowe UKSW, Warszawa 2020, pp. 117–158.

[46] See the judgments of the CJEU: Costa v ENEL. Retrieved from: https://curia.europa.eu/arrets/TRA-DOC-PL-ARRET-C-0006-1964-200406979-05_00.html, 24.12.2017.; Interna tionale Handelsgesellschaft. Retrieved from: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61970CJ0011&from=PL,24.12.2017; Simmenthal. Retrieved from: http://curia.europa.eu/arrets/TRADOC-PL-ARRET-C-0106-1977-200406992-05_00.html, 25.12.2017; Factorame. Retrieved from: http://curia.europa.eu/arrets/TRA-DOC-PL-ARRET-C-0213-1989-200407016-06_00.html, 25.12.2017.

CONCLUSION

The 21st century is undoubtedly a time of transformations in international law. The development of the said law destroys in many dimensions the pre-existing centuries-long solutions. And although the evolution of law is a natural phenomenon, in this case the fact is important that today the process under discussion concerns points that are fundamental for the entire construction of the system. Moreover, these changes are based on the non-legal reality. They do not create the said reality, as was the case centuries ago, but they are a consequence of it – so important that it leads to the erosion of the pre-existing legal and political balance.

The legal mechanisms and situations described in this article refer to one of the crucial institutions – State territory. State territory has been for ages the essence of statehood. Without territory, in which State authority operated, there was no State. Indeed, the significance of territory for the functioning of a State had been constantly evolving until it reached the current situation where the fulfillment of many tasks of the State does not have to take place via State territory. But today, the evolving international law not only affects the change of the meaning of territoriality, but also it weakens its essence. And by eroding the meaning of territory, it interferes with the State's territorial authority, and thereby with the essence of statehood. And this is one of the many signals of the beginning of the end of international law that we know today, i.e. the international law of States.

PROMENE U MEĐUNARODNOM PRAVU KOJE SE ODNOSE NA DRŽAVNU TERITORIJU: EROZIJA TERITORIJALNOSTI

APSTRAKT

Teritorija je oduvek bila od velikog značaja za državu. Vekovima je činila njenu suštinu, jer je bila područje sa kojeg je stanovništvo imalo koristi. Stoga je međunarodno pravo od početka imalo za cilj da brani državnu teritoriju, a to je izraženo u principu nepovredivosti granica. U članku se govori o tome kako je evolucija međunarodnog prava i zadiranje tog prava u nove sfere političkih i društvenih odnosa uticalo na redefinisanje tradicionalnog značaja i uloge državne teritorije. Kontekst obuhvata brojne perspektive. Pokazuje se kako na državnu teritoriju utiču ekonomska globalizacija i regionalizacija, nove tehnologije, odvajanje institucija državnog suvereniteta od teritorije ili erozija nacionalne sudske vlasti. Autor ne ocenjuje ovaj proces iako se iz teksta može steći utisak da perspektiva ima kritički prizvuk. On sugeriše da je stalni proces evolucije međunarodnog prava dostigao tačku u kojoj promene utiču na pitanja od suštinskog značaja za izgradnju čitavog sistema. Štaviše, te promene su zasnovane na vanpravnoj realnosti. One ne stvaraju pomenutu stvarnost, kao što je to bio slučaj pre nekoliko vekova, već su njena posledica koja je toliko

suštinska da narušava već postojeći pravni i politički balans. Ono što se čini presudnim za tu ocenu jeste činjenica da će slabljenje značaja teritorije imati posledice po državnost. Otuda je lako doći do zaključka da se staro međunarodno pravo država kakvo poznajemo bliži kraju. Približava se era koja je nova za ovaj sistem.

Ključne reči: Međunarodno pravo, suverenitet, državna teritorija, nove tehnologije, sudska vlast

REFERENCES

1. Akhavan Payam, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment", *American Journal of International Law* 1996, Vol. 90, No. 3.
2. Ambos Kai, "Der Fall Pinochet und das anwendbare Recht", *Juristenzeitung* 1999, No 1.
3. Arquilla John, Ronfeld David, *"*Cyberwar is coming?", *Comparative Strategy* 1993, No. 2.
4. Barriga Stefan, Grover Leena, "A Historic Breakthrough on the Crime of Aggression", *American Journal of International Law* 2011, Vol. 105, No. 3.
5. Beard Jack M., "Law and War in the Virtual Era", *American Journal of International Law* 2009, Vol. 103, No. 3.
6. Bellamy Alex J., "No pain, no gain? Torture and ethics in the war on terror", *International Affairs* 2006, Vol. 82, No. 1.
7. Bobrowski Krzysztof, "Conventional Attack vs Digital Attack in the Light of International Law", *Polish Review of International and European Law* 2021, Vol. 10, No. 1.
8. Bufacchi Vittorio, "Torture, Terrorism, and the State: a Refutation of the Ticking-Bomb Argument", *Journal of Applied Philosophy* 2006, Vol. 23, No. 3.
9. Caporaso James A., *The European Union and Forms of State: Westphalian, Regulatory and Post-Modern*, "Journal of Common Market Studies" 1996(1).
10. Curzer Howard J., "Admirable Morality, Dirty Hands, Ticking Bombs, and Torturing Innocents", *The Southern Journal of Philosophy* 2006, Vol. 44.
11. Dickinson Laura A., "The Promise of Hybrid Courts", *American Journal of International Law* 2003, Vol. 97, No. 2.
12. Domingo Rafael, *The New Global Law*, Cambridge University Press, Cambridge 2010.
13. Fox, Hasel, *The Law of State Immunity*, Oxford 2006.

14. Hoinsington Matthew, "International Law and Ungoverned Space", *Indonesian Journal of International and Comparative Law* 2014, Vol. 1.
15. Janger Edward, "Virtual Territoriality", *Columbia Journal of Transnational Law* 2009/10, Vol. 48.
16. Kaplan Amy, "Where is Guantanamo?", *American Quarterly* 2005, Vol. 57 (September).
17. Karska, Elżbieta „Zakres włączenia katalogu zbrodni objętych jurysdykcją Międzynarodowego Trybunału Karnego do polskiego prawa karnego materialnego", *Przegląd Sejmowy* 2007, No. 5 (82).
18. Kleinig John, "Ticking Bombs and Torture Warrants", *Deakin Law Review* 2005, Vol. 10, No. 2.
19. Liedel Krzysztof, Piasecka Paulina, „Wojna cybernetyczna – wyzwanie XXI w.", *Kwartalnik Bezpieczeństwo Narodowe* 2011, No. 7.
20. Lipman Jana K., *Guantanamo. A Working-class History between Empire and Revolution*, University of California Press, Berkeley 2009.
21. Lisabon Summit Declaration, 20.11.2010.
22. Luban David, "Liberalism, Torture, and the Ticking Bomb", Virginia Law Review 2005, Vol. 91.
23. Lukas Georg R., *Ethics and Cyber Warfare. The Quest for Responsible Security in the Age of Digital Warfare*, Oxford University Press, Oxford 2017.
24. Matishak Martin**,** "Iran's retaliation could be hacking, not bombs**",** *Politico* 4.01.2020
25. Muszyński Mariusz, *Państwo w prawie międzynarodowym*, *2nd supplemented edition,* Wydawnictwo STO, Bielsko-Biała 2012.
26. Muszyński, Mariusz, *The Review of EU Law by the Constitutional Tribunal in Poland.* (in:) Muszyński Mariusz, Pawłowski Szymon, *Prawo międzynarodowe i Unia Europejska w konstytucji*, Wydawnictwo Naukowe UKSW, Warszawa 2020.
27. N.N. „UE nakłada pierwsze w historii sankcje za cyberataki. Obejmą one rosyjski wywiad wojskowy GRU", Dziennik 30.07.2020.
28. N.N. Zdradzono tajemnicę ataku na irański program nuklearny. Kto pomógł wprowadzić wirusa do systemu? CyberDefence24, 4.09.2019.
29. Neff Stefen C., *Justice among Nations. A History of International Law*, Harvard University Press, Cambridge–Massachusetts–London 2014.
30. O'Brien James C., "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", *American Journal of International Law* 1993, Vol. 87, No. 4.
31. Parry John T., "The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees", *Melbourne Journal of International Law* 2005, Vol. 6.

32. Posner Eric, Vermeule Adrian, "Should Coercive Interrogation Be Legal?", *Michigan Law Review* 2006, Vol. 104.
33. Schliesky Utz, *Souveränität und Legitimität der Herrschaftsgewalt*, Mohr Siebeck, Tübingen 2004.
34. Schmitt Michael, "Classification of Cyber Conflict", *Journal of Conflict and Security Law* 2012, Vol. 17, No. 2.
35. Schmitt, Michael N. (ed), *Tallinn Manual on the International Law Applicable to Cyber Operations.*, Cambridge University Press, Cambridge, 2017. Retreived from:. https://doi.org/10.1017/9781316822524 9.03.2021.
36. Stańko Katarzyna, „Szkoła Wojny Ekonomicznej", *Dziennik Gazeta Prawna*, online edition of 26 December 2017.
37. Sussman David, "What's Wrong with Torture?", *Philosophy and Public Affairs* 2005, Vol. 33, No. 1.
38. Waldron Jeremy, "Torture and Positive Law: Jurisprudence for the White House", *Columbia Law Review* 2005, Vol. 105, No. 6.
39. Welanyk Tomasz, *Istnienie i granice suwerenności w cyberprzestrzeni. Analiza prawna*, doctoral dissertation at the Faculty of Law and Administration, University of Warsaw, 2019. Accessed via the repository of the University of Warsaw.
40. Wendel Bradley W., "Legal Ethics and the Separation of Law and Morals", *Cornell Law Review* 2005, Vol. 91.
41. Westlake John, *International law*, Cambridge University Press, Cambridge 1910.
42. Wolfendale Jessica, "Training Torturers: A Critique of the "Ticking Bomb" Argument", *Social Theory and Practice* 2006, Vol. 32, No. 2.
43. Wegener Bernhard W., *Comment to Art. 19 TUE*, in: Calliess, Ruffert, *EUV-AEUV mit Europäischer Grundrechtecharta mit Kommentar*, Verlag C. H. Beck, München 2016.

PODIZANJE NIVOA MORA I EROZIJA MEĐUNARODNOPRAVNE SIGURNOSTI: UTICAJ NA SVOJSTVA DRŽAVNOSTI, PRAVO MORA I MIGRACIJE

Bojan STOJANOVIĆ*
Bogdan KRASIĆ**
Zoran T. STOJANOVIĆ***

APSTRAKT

Podizanje nivoa mora predstavlja temu od globalnog značaja imajući u vidu stepen promena koje će u budućnosti ova pojava ostaviti u različitim sferama. U prvo vreme, najveće posledice trpe i pretrpeće obalne države, a posebno male ostrvske države u razvoju. Podizanje nivoa mora odražava se na više oblasti međunarodnog prava što zahteva sveobuhvatan odgovor međunarodne zajednice i potrebu za normiranjem u različitim oblastima međunarodnog prava koje bi regulisalo posledice podizanja nivoa mora. U prvom delu članka predstavljene su aktivnosti Svetskog udruženja za međunarodno pravo (ILA) i Komisije za međunarodno pravo (ILC) u vezi sa podizanjem nivoa mora i njegovog uticaja na međunarodno pravo. ILA je pre više od 10 godina započela da se bavi ovom temom, da bi akcenat stavila na pravo mora, svojstva državnosti i pitanja vezana za ljudska prava i migracije ljudi pogođenih ovom pojavom. ILC se od 2019. godine bavi pitanjem podizanja nivoa mora i međunarodnog prava i to tako što je, slično kao i ILA u razmatranje uzela teme vezane za pravo mora, elemente države u vezi sa državama kojima preti potapanje teritorije i pitanja vezana za migracije uzrokovane podizanjem nivoa mora. U drugom delu članka analiziran je uticaj podizanja nivoa mora na pravo mora, svojstva državnosti i migracije. Svakako, pred međunarodnom zajednicom ostaje da se pronađu održiva rešenja kojima bi se ublažile ili otklonile posledice podizanja nivoa mora u različitim oblastima međunarodnog prava.

Ključne reči: Podizanje nivoa mora, međunarodno pravo, pravo mora, elementi države, migracije

* UNHCR, Beograd. E-mail: bojantstojanovic@gmail.co.

** Save the Children, Beograd. E-mail: krasicbogdan@gmail.com

*** Diplomirani demograf, Beograd. E-mail: zoranstojanovic84@gmail.com.

UVOD

Jedna od aktuelnih tema savremenog međunarodnog prava su brojna pitanja vezana za klimatske promene i posledice koje ostavljaju za sobom. Tako se jedno od važnih pitanja odnosi se na podizanje nivoa mora[1] i odnos međunarodnog prava prema ovoj pojavi. Podizanje nivoa mora preti da do kraja ovog veka potopi velika prostranstva Zemljine površine - delove obalnih država širom sveta, ali i teritorije nekih ostrvskih država u celosti. Posledice podizanja nivoa mora relevantne su za brojne oblasti međunarodnog prava, što su, pravilno, uočili i uzeli ih u razmatranje Svetsko udruženje za međunarodno pravo (*International Law Association*/ILA) i Komisija za međunarodno pravo (*International Law Commission*/ILC), kao i brojna druga međunarodna i nacionalna tela.[2] Tako navedena tela razmatraju različite oblasti međunarodnog prava – pravo mora, svojstva državnosti, migracije uzrokovane podizanjem nivoa mora, ljudska prava, pitanja vezana za bezbednost i druge teme, a sve u vezi sa fenomenom podizanja nivoa mora. Kodifikacija i progresivni razvoj međunarodnog prava mora tekao je decenijama prošlog veka. Jedan deo prava mora bio je regulisan međunarodnim običajnim pravom, te je kodifikacija u užem smislu samo potvrdila postojanje međunarodnih običaja u oblasti prava mora ili je učinjena njegova „kristalizacija".[3] Progresivni razvoj međunarodnog prava mora tekao je dosta

[1] Primera radi, definicija podizanja nivoa mora data je u Sidnejskoj deklaraciji usvojenoj pod okriljem ILA (2018) gde je ova pojava označena kao: „jedini ili kombinovani i kumulativni uticaj efekata klimatskih promena i sleganje ili izdizanje kopna usled promena nivoa mora na datoj lokaciji". Videti: ILA, Report of the Seventy-eighth Conference, held in Sydney, 19–24 August 2018, London: ILA, 2019, pp. 866–915. Bez obzira na uzroke podizanja nivoa mora, svakako ostaju posledice ovog procesa koje je neophodno sveobuhvatno rešavati, posebno pronaći održiva rešenja na nivou međunarodne zajednice interdisciplinarnim pristupom.

[2] Komisija za međunarodno pravo (ILC) je pomoćno telo Generalne skupštine Ujedinjenih nacija, osnovano 1947. godine. Njena primarna svrha je promovisanje progresivnog razvoja međunarodnog prava i njegova kodifikacija. ILC se sastoji od 34 člana koje bira Generalna skupština UN i oni rade u svom individualnom svojstvu, a ne kao predstavnici država iz kojih dolaze. Tokom godina, ILC je igrala ulogu u razvoju nekoliko ključnih instrumenata međunarodnog prava, a značajnu ulogu je imala i u pogledu kodifikacije međunarodnog prava mora. Svetsko udruženje za međunarodno pravo (ILA) je nevladina organizacija osnovana 1873. godine, sa ciljem da promoviše proučavanje i razvoj međunarodnog prava, javnog i privatnog, kao i unapređenje međunarodnog razumevanja i poštovanja međunarodnog prava, kao i ostvarivanje mira putem prava. ILA ima komitete koji se fokusiraju na specifične oblasti međunarodnog prava, praveći izveštaje i preporuke, koji, iako nisu pravno obavezujući, mogu uticati na praksu država i rad drugih međunarodnih organizacija. ILA održava dvogodišnje konferencije i ima ogranke u mnogim zemljama, a nalaze do kojih dolazi u okviru komiteta služe i ILC za razmatranje pojedinih tema koje joj se nalaze na dnevnom redu.

[3] U inostranoj literaturi videti: Rebecca M.M. Wallace, International Law, Forth edition, Sweet and Maxwell, London 2002, p. 136, Donald R. Rothwell, Tim Stephens, *The International Law of the Sea*, Hart Publishing, 2010, p. 14, Malcolm N. Shaw, *International Law*, Eight edition, Cambridge University Press, Cambridge 2017, p. 412, Churchill Robin R., "The 1982 United Nations Convention on the Law of the Sea", in Rothwell Donald R., Oude Flferink Alex G.,

teže, te ne čudi što je kodifikacija prava mora trajala decenijama a rezultiralo je usvajanjem Konvencije o pravu mora (1982).[4] Aktivnosti ILC su bile od izuzetnog značaja za kodifikaciju ove oblasti međunarodnog prava. Međutim, pitanja vezana za podizanje nivoa mora, prevazilaze okvire međunarodnog prava mora, bez obzira što se itekako tiču ove grane međunarodnog prava. Važnost ove teme rezultiralo je potrebom proučavanja ovog fenomena sa različitih aspekata i iz vizure različitih naučnih disciplina, kako prirodnih tako i društvenih nauka. Stručnjaci za međunarodno pravo, u okviru ILA ovom temom se bave već godinama kroz aktivnosti različitih komiteta, a od 2012. godine i formiranjem posebnog komiteta koji razmatra ovu temu.[5] Pošto je svest u međunarodnoj zajednici porasla po pitanju podizanja nivoa mora i njegovih dugoročnih posledica po međunarodno pravo i ILC se od 2019. godine pozabavila ovom temom, uvrstivši je na svoju agendu za višegodišnje razmatranje. Imajući u vidu da je oko 71% planete Zemlje prekriveno morima i okeanima koji zauzimaju

Karen N. Scott, Tim Sephens (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, Oxford 2015, p. 30, Yoshifumi Tanaka, *The International Law of the Sea*, Third edition, Cambridge University Press, Cambridge 2019., p. 17, Carlo Focarelli, *International Law*, Edward Elgar Publishing, Cheltenham – Northampton 2019, p. 301, i druga dela. U domaćoj literaturi videti: Vladimir Ibler, *Rječnik međunarodnog javnog prava*, drugo, izmijenjeno i dopunjeno izdanje, Informator, Zagreb 1987, odrednica „Konvencija Ujedinjenih naroda o pravu mora", str. 137, Смиља Аврамов, Миленко Крећа, *Међународно јавно право*, двадесетдруго издање, Правни факултет Универзитета у Београду, Службени гласник, Београд 2009, str. 362, Родољуб Етински, *Међународно јавно право*, четврто проширено и допуњено издање, ЈП Службени гласник, Београд 2010, str. 503, Boris Krivokapić, *Enciklopedijski rečnik međunarodnog prava i međunarodnih odnosa*, JP Službeni glasnik, Beograd 2010, odrednica „Konvencija UN o pravu mora", str. 448, Vladimir Đuro Degan, *Međunarodno pravo*, treće izdanje, Školska knjiga, Zagreb 2011, str. 625–626, Миленко Крећа, *Међународно јавно право*, шесто издање, Правни факултет Универзитета у Београду, Београд 2012, str. 366, Vojin Dimitrijević, *et. al*., *Osnovi međunarodnog javnog prava*, treće izdanje, Beogradski centar za ljudska prava, Dosije, Beograd 2012., str. 138. O razlikama konferencije na kojoj je usvojen tekst Konvencije o pravu mora (1982) od drugih kodifikatorskih konferencija videti: James Harrison, *Making the Law of the Sea*, Cambgridge University Press, Cambridge – New York – Melbourne – Madrid – Cape Town – Singapore – São Paulo – Delhi – Tokyo – Mexico City 2011, p. 40 i dalje u tom poglavlju. Takođe, ne može biti sumnje da su glavne odredbe KPM sada se može smatrati međunarodnim običajnim pravom. Čak i SAD—možda najznačajnija strana koja nije članica KPM — to javno priznaje. Videti: David Freestone, "The Law of the Sea Convention at 30: Successes, Challenges and New Agendas", u Freestone David (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, Martinus Nijhoff Publishers, Leiden – Boston 2013, p. 3. O Trećoj konferenciji o pravu moru Videti: Renate Platzöder, "Conferences on the Law of the Sea", u Bernhard Rudolf (ed.), *Encyclopedia of Public International Law*, Elsevier Science Publishers, Amsterdam 1989, pp. 71–74.

[4] United Nations Convention on the Law of Sea, United Nations, *Treaty Series*, vol. 1833 (p.3), 1834 (p.3), 1835 (p.3). Tekst Konvencije o pravu mora (dalje u tekstu: KPM) usvojen je 10. decembra 1982. godine, a stupila na snagu 16. novembra 1994. godine. Do 1. oktobra 2023. godine, 169 država je obavezano na njenu primenu.

[5] *International Law and Sea Level Rise*.

nepregledno prostranstvo, važnost normi međunarodnog prava vezanih za pravo mora su od izuzetnog značaja. Uz podizanje nivoa mora, implikacije po međunarodno pravo su dodatno produbljene i odnose se i na druge oblasti, poput pitanja vezanih za svojstva državnosti (elementi države), prisilne migracije, i mnoge druge oblasti. Važnost teme se ogleda i u tome što su u različitim aktivnostima na međunarodnom planu učešće uzeli predstavnici brojnih regiona, ali i država koje nisu direktno pogođene podizanjem nivoa mora (poput neobalnih, kontinentalnih država). Takođe, važnost teme istaknut je na međunarodnom planu i pokretanjem postupaka za savetodavno mišljenje Tribunala za pravo mora[6] i Međunarodnog suda pravde (MSP) u vezi sa klimatskim promenama.[7] Međutim, u ovom članku autori su se pozabavili temama koje su ILA i ILC uzeli u razmatranje, imajući u vidu širok spektar tema koje su pokrenute pred ovim telima, ali i zbog ugleda i širokog uticaja koji imaju navedena tela. Takođe, prilikom izlaganja dosadašnjih nalaza ILA i ILC autori su se opredelili za ovakav način predstavljanja materije imajući u vidu različite metode i dinamiku rada oba tela čiji rad je analiziran, te se umnogome izlaganje zasniva na hronološkom, a ne samo na tematskom razmatranju dosadašnjih aktivnosti, imajući u vidu da ni jedno ni drugo telo nisu završili svoj mandat i objavili konačne rezultate rada. U drugom delu članka, obrađene su tri teme koje su se iskristalisale kao najakutnije u pogledu odnosa podizanja nivoa mora i međunarodnog prava: svojstva države, pravo mora i migracije, koje, naravno, u sebi sadrže više manjih celina koje je neophodno analizirati, ali, usled ograničenja u pogledu obima rada, fokusirali smo se samo na neke.

SVETSKO UDRUŽENJE ZA MEĐUNARODNO PRAVO

ILA se dugi niz godina bavi pitanjima vezanim za odnos podizanja nivoa mora i međunarodnog prava. U ranijem periodu, do formiranja posebnog komiteta koji se bavi odnosom međunarodnog prava i podizanja nivoa mora, ILA se doticala ove teme u okviru drugih komiteta. Tako je u okviru aktivnosti Komiteta ILA za polazne linije[8], na konferenciji održanoj u Sofiji 2012. godine, predloženo da se formira poseban komitet ILA koji bi se bavio odnosom podizanja nivoa mora i

[6] Međunarodni tribunal za pravo mora sa sedištem u Hamburgu, Nemačka, nezavisno je pravosudno telo uspostavljeno KPM, sastavljeno od 21 nezavisnog člana, nadležno za rešavanje sporova koji proističu iz tumačenja i primene KMP, otvoreno za države članice i druge subjekte poput državnih preduzeća i privatnih entiteta. Trenutno je u toku postupak po zahtevu za savetodavno mišljenje koje je podnela Komisija malih ostrvskih država za klimatske promene i međunarodno pravo (COSIS) u decembru 2022. godine.

[7] International Court of Justice, Request for Adisory Opitnion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023 – Obligation of States in Respect of Climate Change.

[8] *Baselines under International Law of Seas*, formiran 2008. godine, a bio aktivan u periodu 2008-2018. godine.

međunarodnim pravom. Komitet za polazne linije je usvojio dva značajna izveštaja: Izveštaj iz Sofije (2012) i Izveštaj iz Sidneja (2018).[9] Međutim, pitanja vezana za posledice podizanja nivoa mora prevazilaze pitanja vezana za polaznu liniju. Takođe, prevazilaze i pitanja vezana za pravo mora. Tako se, pored oblasti koje spadaju u pravo mora,[10] u pogledu razmatranja podizanja nivoa mora proučavanje prenosi i na druge oblasti međunarodnog prava – pitanja vezana za svojstva državnosti (elemenata države), ljudskih prava, migracija, apatridije, bezbednosti, i mnogih drugih.Na osnovu nalaza do kojih se došlo u aktivnostima Komiteta ILA za polaznu liniju u skladu sa međunarodnim pravom mora, 2012. godine, Izvršni komitet ILA je odlučio da oformi poseban komitet koji bi se bavio odnosom podizanja nivoa mora i međunarodnog prava – Komitet ILA za međunarodno pravo i podizanje nivoa mora.

Zasedanje ILA u Johanezburgu 2016. godine

Na 77. zasedanju ILA[11] u Johanezburgu, Južna Afrika, Komitet ILA za podizanje nivoa mora i međunarodno pravo razmatrao je teme vezane za pravo mora, ljudska prava i (prisilne) migracije. Komitet se umnogome, raspravljajući o temama vezanim za pravo mora, a posebno za polaznu liniju i računanje granica morskih pojaseva, oslanjao na rezultate rada Komiteta ILA za polazne linije. Prethodno su se članovi Komiteta saglasili da izučavanje tema koje su mu poverene na razmatranje podele na dva nivoa. Prvi bi se odnosio na pravo mora, a drugi na teme vezane za migracije i ljudska prava. Komitet je tako na 77. zasedanju ILA u Johanezburgu, razmatrao teme vezane za morske pojaseve. Usled predviđanja da će do kraja XXI veka, nivo mora porasti za jedan metar, te da će to ostaviti brojne posledice, pa i na morske pojaseve, odnosno, na pomeranje granica istih.[12] Imajući u vidu da se polazna linija određuje u skladu sa odredbama Konvencije o pravu mora (KPM), te da se od nje i računa širina morskih pojaseva, to potencijalno može izazvati sporenja među obalnim državama. Takođe, i u pogledu arhipelaških polaznih pravih linija može doći do sporenja usled podizanja

[9] O aktivnostima Komiteta ILA za polazne linije i dva navedena izveštaja Videti: Lathrop Coalter G., J. Roach Ashley, Donald R. Rothwell (eds.), *Baselines under the International Law of the Sea, Reports of the International Law Association Committee on Baselines under the International Law of the Sea*, Brill, 2019.

[10] Pregledno o konceptu novog međunarodnog prava mora nakon usvajanja KPM Videti: Kreća Milenko, „O osnovnim obeležjima novog prava mora", *Anali Pravnog fakulteta u Beogradu*, 1-3/1986, str. 101–107; "A Few Remarks on the Theoretical Basis of the New Law of the Sea", in: Ando Nisuke, McWhinney, Wolfrum Rudiger (eds.), *Liber Amicorum Judge Shigeru Oda*, Kluwer Law International, The Hague – London – New York 2002, pp. 1207–1216.

[11] International Law Association, Johannesburg Conference (2016), International Law and Sea Level Rise. Predsedavajući prof. Davor Vidas, koizvestioci: prof. Dejvid Fristoun (*David Freestone*) i prof. Džejn Mekadam (*Jane McAdam*).

[12] Trend podizanja nivoa mora nastaviće se, naravno, i u narednim vekovima.

nivoa mora, što takođe može voditi do međudržavnih sporenja. Raspravljano je i o situacijama vezanim za potapanje „niskoležećih" ostrva, čime bi nestajali delovi pojedinih obalnih država, što bi posledično dovelo u pitanje rasprostiranje morskih pojaseva tih država.

Predlozi vezani za već uspostavljene granice morskih pojaseva naišla su na dva moguća rešenja u pogledu rešenja *de lege ferenda*. Prva opcija bi bila da se predloži novo pravilo koje „zamrzava" postojeće polazne linije u njihovoj trenutnoj poziciji, koristeći „karte velikih razmera koje su zvanično priznate od strane obalnih država", a druga opcija bi bila da se predloži novo pravilo kojim se „zamrzavaju" postojeće definisane spoljne granice morskih zona merenih od osnovnih linija utvrđenih u skladu sa KPM.[13] Članovi Komiteta su razmotrili i stavove zauzete u doktrini od strane pravnika internacionalista, gde je bilo i kritika na mogućnost „zamrzavanja" definisanih granica, poput stavova koje je zauzeo Moritaka Hajaši (*Moritaka Hayashi*). U pogledu ove teme, postavilo se i pitanje efekta mere „zamrzavanja" u smislu efikasnosti te mere i dužine njenog trajanja. Komitet je, zatim, raspravljao o efektima promena površine obale na morske granice. U tom smislu moglo bi da dođe do sporenja u pogledu sporazuma o razgraničenju između dve ili više država, ukoliko bi neka od njih tvrdila da je podizanjem nivoa mora došlo do promene površine obale i da se to smatra fundamentalnom promenom što se odražava na već postignute sporazume među tim državama koje se odnose na pomorske granice. Tu su na teren rasprave postavljene suštinske promene okolnosti, tj. klauzula *rebus sic stantibus*, iz člana 62. Bečke konvencije o ugovornom pravu (BKUP).[14] Komitet je ostao rezervisan u pogledu revizije i rešenja *de lege ferenda* u pogledu pitanja vezanih za suštinske promene okolnosti koje bi bile izazvane posledicama podizanja nivoa mora, posebno iz razloga što bi to iziskivalo reviziju trenutno važećih odredaba BKUP i KPM.[15] Međutim, preliminarni stav Komiteta bio je da za bilo koji ugovor o kojem se pregovara od vreme kada je pitanje klimatskih promena i posledičnog podizanja nivoa mora bilo u javnom domenu, mora se smatrati da su pregovarači bili svesni toga, pa stoga podizanje nivoa mora u tom slučaju ne bi mogao biti smatran suštinskom promenom okolnosti.[16] Komitet je na 77. konferenciji raspravljao i o temama vezanim za migracije i ljudska prava na koje će se odraziti

[13] International Law Association, Johannesburg Conference (2016), International Law and Sea Level Rise, Interim Report, Johannesburg, 2016.

[14] Vienna Convention on the Law of Treaties, *United Nations*, *Treaty Series*, vol. 1155, p. 331.

[15] Preispitivanje gore navedenih pravila može, međutim, postati neophodno u vezi sa ekstremnim scenariom podizanja nivoa mora koji vodi do potapanja cele teritorije niskoležećih malih, ostrvskih država ili ukoliko njihova teritorija postaje nenastanjiva. Komitet za podizanje nivoa mora će se vratiti na tu temu i baviti se ovim pitanjem u svom završnom izveštaju (2018), u vezi sa raspravom o svojstvima državnosti. International Law Association, Johannesburg Conference (2016), International Law and Sea Level Rise, Interim Report, Johannesburg, 2016, p. 17.

[16] *Ibid*., p. 17.

posledice podizanja nivoa mora. Komitet je konstatovao da podizanje nivoa mora predstavlja rizik za sve aspekte ljudskog života – smrtnost, sigurnost hrane i vode, zdravlje, blagostanje, stanovanje, zemljište i drugu imovinu, sredstva za život, industriju, infrastrukturu, kulturno nasleđe, ali i da može progresivno da ugrozi bezbednost ljudi tokom XXI veka.[17] Komitet je konstatovao da postojeći međunarodnopravni poredak ne prepoznaje ove promene, te da izvori prava pojedinih grana međunarodnog prava nisu primenjivi na kategorije ljudi pogođenih podizanjem nivoa mora, poput međunarodnog izbegličkog prava. U pogledu ljudskih prava, država koju pogađaju promene izazvane podizanjem nivoa mora ima obavezu da prevenira te posledice i omogući pomoć ljudima koji se nalaze pod njenom jurisdikcijom. Međutim, ne može se očekivati da će u budućnosti svaka pogođena država moći da se nosi sa tim posledicama. S tim u vezi, potencijalne migracije su već počele da se dešavaju,[18] a očekuje se njihovo intenziviranje usled posledica podizanja nivoa mora. Komitet je konstatovao i da u periodu dok podizanje nivoa mora ne potopi pojedine teritorije, može ih učiniti nepodobnim za život, usled povremenog potapanja zemljišta i njegovog zaslanjivanja, što može imati pogubne posledice po život i opstanak ljudi na tim prostorima. To će se, svakako, odraziti na migracije ljudi. Komitet je, dalje, razmatrao preventivne mere vezane za posledice klimatskih promena i podizanja nivoa mora koje bi trebalo preduzimati kako bi se umanjile štetne posledice - mogućnosti ostanka stanovništva na pogođenim teritorijama; preseljenje stanovništva; pomoć interno raseljenim licima ili licima koja se nađu u rasejanju van granica države porekla. Komitet je zauzeo stav, da u svim navedenim okolnostima mora da se vodi računa o osnovnim principima, poput prava na ljudsko dostojanstvo, zabrane diskriminacije i međunarodne saradnje.[19]

Zasedanje ILA u Sidneju 2018. godine

Na 78. konferenciji ILA održanoj u Sidneju, Australija, u periodu 19–24. avgusta 2018. godine, Komitet je usvojio Izveštaj[20] i dve rezolucije.[21] U

[17] *Ibid*., p. 18.

[18] Komitet je podrobno analizirao podatke koji se odnose na broj ljudi koji su prinuđeni da migriraju usled klimatskih promena u prethodnim godinama, a na osnovu kredibilnih izveštaja na tu temu. Međutim, Komitet je konstatovao da ne postoje globalne procene za kretanja povezana sa sporijim promenama, kao što je porast nivoa mora. Videti: *Ibid*., p. 21.

[19] *Ibid*., p. 22.

[20] International Law Association, Sydney Conference (2018), International Law and Sea Level Rise, Report, Sydney, 2018.

[21] International Law Association, Resolution 5/2018, Committee on International Law and Sea Level Rise, the 78th Conference of the International Law Association, Sydney, Australia, 19-24 August 2018 i International Law Association, Resolution 6/2018, Committee on International Law and Sea Level Rise, the 78th Conference of the International Law Association, Sydney, Australia, 19-24 August 2018.

Rezoluciji br. 6/2018,[22] preporučeno je Izvršnom savetu ILA da produži mandat Komiteta. Novembra iste godine Izvršni savet ILA je odobrio produženje mandata Komiteta, a maju 2022. godine, mandat Komiteta je produžen do 2024. godine. Rezolucija Komiteta br. 5/2018 odnosi se na materiju međunarodnog prava mora. Navedena rezolucija se naslanja na Privremeni izveštaj usvojen na 77. zasedanju ILA u Johanezburgu. Rezolucija br. 5/2018, između ostalog, konstatuje da na osnovu dokaza prezentovanim pred Komitetom postoji praksa država u regionu južnog Pacifika da nameravaju da zadrže polazne linije i granice njihovih morskih pojaseva uspostavljenih u skladu sa odredbama KPM; da polazne linije, spoljne granice morskih pojaseva obalnih ili arhipelaških država koje su utvrđene prema odredbama KPM ne treba preračunavati ukoliko promena nivoa mora utiče na geografsku realnost obale; mogućnost obalnih i arhipelaških država da održe svoja postojeća pomorska prava i da treba da se primenjuju podjednako na pomorske granice koje su definisane međunarodnim ugovorom ili odlukama međunarodnih sudova ili arbitražnih tela. Rezolucija Komiteta br. 6/2018 sadrži u aneksu Sidnejsku deklaraciju o principima zaštite lica raseljenih u kontekstu rasta nivoa mora.[23] Sidnejska deklaracija, pored cilja, sadržaja i definicija, sadrži devet principa: Primarna dužnost i odgovornost država da zaštite i pomognu pogođenim osobama; Dužnost poštovanja ljudskih prava pogođenih osoba; Dužnost preduzimanja pozitivnih akcija; Dužnost saradnje; Evakuacija pogođenih osoba; Planirana preseljenja pogođenih osoba; Migracije pogođenih osoba; Interno raseljavanje pogođenih osoba i Prekogranično raseljavanje pogođenih osoba. Svrha Sidnejske deklaracije je da pruži smernice državama u pogledu sprečavanja, ublažavanja i rešavanja raseljavanja osoba koje se dešava usled posledica podizanja nivoa mora i primenjivala bi se na sve oblike ljudskog kretanja koji nastaju u kontekstu podizanja nivoa mora. U Sidnejskoj deklaraciji definisane su: katastrofe, raseljavanje, evakuacija, mobilnost ljudi, migracije, planirano preseljenje, kao i podizanje nivoa mora. Sidnejska deklaracija, sudeći po principima koje sadrži, predstavlja dobrim delom potvrdu već važećih normi međunarodnog prava sadržanih u različitim međunarodnopravnim instrumentima (*lex lata*), posebno onih koji se odnose na zaštitu ljudskih prava. Pored značaja Sidnejske deklaracije za potencijalni progresivni razvoj međunarodnog prava, ali i za konstatovanje već postojećih normi međunarodnog prava, ne treba gubiti iz vida da je ipak reč o dokumentu koji bi se mogao podvesti pod takozvano meko pravo.

---

[22] International Law Association, Resolution 6/2018, Committee on International Law and Sea Level Rise, the 78th Conference of the International Law Association, Sydney, Australia, 19-24 August 2018.

[23] International Law Association, Resolution 6/2018, Committee on International Law and Sea Level Rise, the 78th Conference of the International Law Association, Sydney, Australia, 19-24 August 2018, Annex - Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise. Dalje u tekstu: Sidnejska deklaracija.

U pogledu rada Komiteta između dve konferencije, one održane u Johanezburgu i konferencije održane u Sidneju, Komitet je, razmatrajući materiju koja se odnosi na međunarodno pravo mora, konstatovao da bi „zamrzavanje" osnovnih linija vodilo mogućem kršenju normi prava mora.[24]

Zasedanje ILA u Lisabonu 2022. godine

Na 80. konferenciji ILA, održanoj u Lisabonu, Portugalija, Komitet je objavio izveštaj o svom radu.[25] Na konferenciji su razmatrane teme vezane za pravo mora, elemente države i prava stanovništva pogođenog posledicama podizanja nivoa mora. Prilikom razmatranja tema, iz rasprave je isključeno razmatranje pitanja koja nisu vezana za obalne države, dakle, nisu razmatrana pitanja vezana za kontinentalne države, odnosno države bez morske obale. Zatim, pitanja su razmatrana iz vremenske perspektive kojom se uvažava da je podizanje nivoa mora dugoročan proces i da neće sve aspekte svojstva državnosti obalnih država pogađati u isto vreme. Posebno je istaknut značaj ove teme za male ostrvske države koje će posledicama podizanja nivoa mora o kojima se raspravlja biti pogođene za nekoliko decenija, odnosno do kraja ovog veka. Na zasedanju Komiteta, razmatrana su pitanja vezana za kontinuitet ili prekid kontinuiteta državnosti država koje će pogoditi posledice podizanja nivoa mora a koje bi imale za posledicu nestanak jednog od elemenata države - njene teritorije. Dva su pristupa ovom pitanju. Prvi predlaže nastavak kontinuiteta države, a drugi prekid kontinuiteta, imajući u vidu da je država „teritorijalni entitet". Komitet odlučio da se fokusira na ono šta se dešava u toku procesa koji se proteže od sadašnjeg vremena do tačke kada kopnena teritorija neke obalne države može postati nenastanjiva i, potencijalno, potpuno potopljena, u nekoj još uvek nedefinisanoj budućnosti.[26] Komitet je razmatrao proces umanjivanja različitih aspekata državnosti, razmatrajući specifičnu i nezapamćenu pravnu situaciju uzrokovanu podizanjem nivoa mora, sposobnost postojanja država na određenoj lokaciji i obavljanje osnovnih funkcija država. Podvukao je važnost osnovnih razloga zbog kojih su potrebni posebni pravni pristupi ovoj temi, ali i ulogu drugih država i celokupne međunarodne zajednice. U pogledu pitanja vezanih za morske pojaseve

[24] Videti: International Law Asssociation Committee on International Law and Sea Level rise, Inter-sessional Meeting, Lopud, Croatia, 15-16 September 2017. Na navedenom sastanku održanom u Lopudu, opsežno se raspravljalo o teritorijalnim pitanjima koja su vezana za međunarodno pravo mora. Zanimljivi su bili predlozi i konstatacije profesora Dejvida Fristona (*David Freestone*) u vezi sa pitanjem „zamrzavanja" postojećih morskih pojaseva i polaznih linija bez obzira na podizanje nivoa mora, što su u praksi učinile neke od pogođenih država.

[25] International Law Association, Report Lisbon Conference 2022, International Law and Sea Level Rise. Predsedavajući Komitetom prof. Davor Vidas, koizvestioci: prof. Dejvid Fristoun (*David Freestone*) i Eliza Fornale (*Elisa Fornalé*).

[26] International Law Association, Report Lisbon Conference 2022, International Law and Sea Level Rise, p. 24.

Komitet je konstatovao, da u situaciji u kojima bi došlo do nestanka obalne države, ne bi mogla biti zadržana puna pomorska prava. Ona bi bila izgubljena kada država prestane da ima bilo koji oblik relevantnog obalnog fronta – čak i ako je sama država opstala na drugom mestu, ili je postala transformisana u neki drugi oblik međunarodnog pravnog lica.[27] Komitet je napravio razliku između situacije u kojoj bi ostrva ostala iznad površine vode, ali bi bila nenaseljena, s jedne strane, i gde bi bila potpuno poplavljena, s druge strane. U situaciji kada su delovi teritorije iznad vode, ali nenaseljivi, relativno je manje izazovno zalagati se za nastavak bar određenih pomorskih prava, kao što je pravo na teritorijalno more u skladu sa trenutno važećim pravom o režimu mora.[28]

AKTIVNOSTI KOMISIJE ZA MEĐUNARODNO PRAVO

Polazne osnove za razmatranje veze podizanja nivoa mora i međunarodnog prava pred ILC

ILC je 2019. godine u dugoročni program rada uvrstila temu „Podizanje nivoa mora u odnosu na međunarodno pravo" (*Sea-level rise in relation to international law*). ILC je maja 2019. godine odlučila da ovu temu uvrsti u svoj program rada i odlučila da oformi studijsku grupu koja bi se bavila ovom temom.[29] Tokom 72. zasedanja Generalne skupštine Ujedinjenih nacija, na zasedanju Šestog (pravnog) komiteta, 2017. godine, kada se pred ovim telom razmatralo pitanje uvrštavanja teme vezane za odnos podizanja nivoa mora i međunarodnog prava na dugoročni program rada ILC, u najvećem su delegacije država bile za to da se ova tema razmatra pred ILC.[30] Međutim, jedan mali broj država bio je protivan tome.[31] Brojne teme bile tim povodom raspravljane, posebno potreba da se izmene pozitivnopravne norme međunarodnog prava, popunjavanje praznina, ali bilo je i stavova da se treba voditi računa o odredbama KPM, kao i da se ne razmatraju samo teme vezane za *lex lata*, već i *lex ferenda*, što bi vodilo progresivnom razvoju međunarodnog prava mora i razmatranju formiranja novih normi međunarodnog običajnog prava. Treba imati u vidu da su pred Šestim komitetom

[27] *Ibid*., p. 26.

[28] *Ibid*., p. 26; Naredna, 81. konferencija ILA, biće održana u periodu 24–28. jun 2024. godine u Atini, Grčka.

[29] To je odlučeno na 3.467 zasedanju ILC, 21. maja 2019. godine. Za predsedavajuće Studijskom grupom, po principu rotacije, imenovani su: Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria.

[30] Australija, Kanada, Bahami (u ime Karipske zajednice), Kolumbija, Fidži, Gambija (u ime Afričke grupe), Malavi, Maršalska Ostrva (u ime Foruma pacifičkih ostrva), Mauricijus, Meksiko, Mikronezija, Monako, Novi Zeland, Papua Nova Gvineja, Peru, Poljska, Portugalija, Rumunija, Samoa, Sejšeli, Slovenija, Južna Afrika, Tonga, Vijetnam i Vatikan (u svojstvu posmatrača).

[31] Kipar, Češka Republika, Grčka i Slovačka.

raspravu vodili predstavnici država, za razliku od onih debata vođenih pred ILC ili ILA, gde su stručnjaci vodili rasprave u ličnom svojstvu, što može naznačiti trend kojim će se voditi države prilikom pravnog obavezivanja u budućnosti po pitanjima koja su raspravljana. Ustanovljavanjem posebne Studijske grupe za podizanje nivoa mora u vezi sa međunarodnim pravom, odlučeno je da se rad Studijske grupe podeli u tri dela: prvi bi se bavilo temama vezanim za pravo mora, druga bi se bavila temama vezanim za svostva državnosti, a treća temama vezanim za zaštitu ljudi pogođenih podizanjem nivoa mora.[32] U okviru tema vezanih za pravo mora, planirano je razmatranje sledećih pitanja: mogući pravni efekti podizanja nivoa mora na polazne linije i spoljne granice morskih prostora koji se mere od polaznih linija; moguće pravne posledice podizanja nivoa mora na morska razgraničenja; moguće pravne posledice podizanja nivoa mora na ostrva i određivanje polaznih linija; moguće pravne posledice podizanja nivoa mora na uživanje suverenih prava i nadležnosti obalnih država, sa posebnim akcentom na istraživanje, eksploataciju i očuvanje njihovih resursa; moguće pravne posledice podizanja nivoa mora na status ostrva, uključujući stene i pomorska prava obalnih država sa rubnim ostrvima; pravni status veštačkih ostrva i mere prilagođavanja na podizanje nivoa mora. U pogledu tema koje se odnose na svojstva državnosti planirano je razmatranje sledećih pitanja: moguće pravne posledice na kontinuitet ili gubitak svojstava državnosti u slučajevima u kojima bi teritorija ostrvskih država bila u potpunosti potopljena ili bi postala nenaseljiva; pravna procena vezana za ojačavanje ostrva barijerama ili podizanjem veštačkih ostrva kao sredstvom za očuvanjem svojstava državnosti ostrvskih država protiv rizika da njihova kopnena teritorija može biti u potpunosti potopljena ili postati nenaseljiva; analiza pravne fikcije vezane za „zamrzavanje" polaznih linija i poštovanja granica utvrđenih ugovorima, sudskim ili arbitražnim odlukama, kontinuitet državnosti ostrvskih država i suvereniteta uspostavljenog pre potapanja ili nenaseljivosti tih teritorija; procena mogućih pravnih posledica u vezi sa prenosom, sa ili bez prenosa suvereniteta, pojasa ili dela teritorije treće države u korist ostrvske države čija je kopnena teritorija u opasnosti da bude potpuno potopljena ili nenaseljiva, kako bi održala svoju državnost ili bilo koji oblik međunarodnopravnog subjektiviteta; analiza mogućih pravnih efekata spajanja ostrvskih država u razvoju čija teritorija je u opasnosti da bude u potpunosti potopljena ili nenaseljiva i drugih država, ili stvaranja federacija ili udruženja između njih, u pogledu održavanja državnosti ili bilo kog oblika međunarodnog pravnog subjektiviteta ostrvskih država. U pogledu zaštite osoba pogođenih podizanjem nivoa mora planirano je razmatranje sledećih pitanja: u kojoj meri se obaveza država da štite ljudska prava pojedinaca pod njihovom nadležnošću primenjuje na posledice u vezi sa podizanjem nivoa mora; da li se

[32] UN General Assembly, Seventy-third Session Supplement No. 10, Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018), A/73/10, 2018, annex B, paras. 12–17.

princip međunarodne saradnje može primeniti da bi se pomoglo državama da se izbore sa štetnim efektima podizanja nivoa mora na njihovo stanovništvo; da li postoje neki međunarodni pravni principi koji se primenjuju na mere koje države treba da preduzmu da pomognu svom stanovništvu da ostane na licu mesta, uprkos podizanju nivoa mora; da li postoje neki međunarodni pravni principi koji se primenjuju na evakuaciju, preseljenje i migraciju u inostranstvo lica zbog štetnih efekata podizanja nivoa mora; mogući principi primenljivi na zaštitu ljudskih prava osoba koje su interno raseljene ili koje migriraju zbog štetnih efekata podizanja nivoa mora. U dosadašnjem, sad već višegodišnjem radu Studijske grupe ILC na pitanju podizanja nivoa mora u odnosu na međunarodno pravo, nekoliko desetina država, grupa država i međunarodnih organizacija su dostavili komentare ILC – za 72. zasedanje ILC (2021) dostavljeno je 11 podnesaka,[33] za 73. zasedanje (2022), sedam podnesaka,[34] za 74. zasedanje (2023), 18 podnesaka,[35] i za 75., predstojeće zasedanje (2024), za sada je zaprimljeno devet podnesaka.[36] Države i međunarodne organizacije su se osvrnule na različite aspekte podizanja nivoa mora. U prvim podnescima predstavnici država su se osvrtali na aspekte vezane za pravo mora, posebno arhipelaške države. U podnescima dostavljenim radi razmatranja uticaja podizanja nivoa mora mnoge države su izrazile privrženost KPM. To se posebno vidi u insistiranju pojedinih država na nepromenljivosti granica, odnosno granica morskih pojaseva (Antigva i Barbuda, Maldivi, Mikronezija, SAD, Francuska), a u vezi sa fiksiranjem, odnosno nepromenjivosti polazne linije određene u skladu sa KPM. Takođe, jedan deo država prezentovao je nacionalni pravni okvir u vezi sa morskim pojasevima, odredbe ustava, zakona i bilateralnih međunarodnih ugovora (Hrvatska, Maldivi, Holandija, Rumunija, Ruska Federacija,[37] Singapur, Velika Britanija, Kolumbija, Finska, Irska, Maroko, Filipini), izražavajući stavove država i reflektujući praksu istih po pitanjima relevantnim za međunarodno pravo mora. U podnescima

[33] Antigva i Barbuda, Hrvatska, Maldivi, Mikronezija, Holandija, Rumunija, Ruska Federacija, Singapur, Ujedinjeno Kraljevstvo, Sjedinjene Američke Države i Forum pacifičkih ostrva. Forum pacifičkih država čine sledeće države: Australija, Fidži, Kiribati, Maršalska Ostrva, Mikronezija, Nauru, Novi Zeland, Palau, Papua Nova Gvineja, Samoa, Solomonova Ostrva, Tonga, Tuvalu i Vanuatu.

[34] Lihtenštajn, Ekonomska komisija za Latinsku Ameriku i Karibe (ECLAC), Organizacija za hranu i poljoprivredu (FAO), Međunarodna pomorska organizacija (IMO), Program UN za životnu sredinu (UNEP), Okvirna konvencija UN za klimatske promene (UNFCCC) i Forum pacifičkih ostrva.

[35] Belgija, Kolumbija, Hrvatska, Finska, Francuska, Nemačka, Irska, Japan, Maroko, Holandija, Novi Zeland, Filipini, Poljska, Švedska, Ujedinjeno Kraljevstvo, SAD, Međunarodna hidrografska organizacija (IHO) i Međunarodna pomorska organizacija (IMO).

[36] Antigva i Barbuda, Nemačka, Lihtenštajn, Novi Zeland, Oman, Ujedinjeno Kraljevstvo, SAD, Vijetnam i Forum pacifičkih ostrva.

[37] Ruska Federacija je prezentovala bilateralne ugovore koje ima potpisane sa pojedinim državama.

pojedinih država, naglašen je uticaj podizanja nivoa mora na male arhipelaške države u razvoju (Maldivi), kao i u pogledu preduzimanja mera koje se odnose na odgovor na podizanje nivoa mora (Belgija, Lihtenštajn, Maroko,[38] Filipini). Podneske su, dakle, dostavile države iz različitih delova sveta. Pretežno je reč o državama koje su direktno pogođene štetnim efektima podizanja nivoa mora – male ostrvske države i obalne države, ali, među državama koje su dostavile ILC podneske bilo je i kontinentalnih država, poput Lihtenštajna, kao i međunarodne organizacije različitog mandata.

Sedamdesetdrugo zasedanje ILC (2021)

U prvom dokumentu koji su sačinili kopredsedavajući Studijske grupe, Bogdan Auresku i Nilufer Oral, predstavljeni su stavovi država i međunarodnih organizacija o pitanjima koja se odnose na efekte podizanja mora, iznoseći stavove država, *pro et contra*, koje su države davale povodom izbora ove teme i stavljanja iste na dugoročni program rada ILC. Tu su pregledno predstavljeni stavovi država koji se odnose međunarodno pravo u vezi sa podizanjem nivoa mora, *inter alia*, „fiksiranje polazne linije" i posledično računanje širine morskih pojaseva, konstatacija da u pogledu podizanja nivoa mora postoji pravna praznina, potreba za očuvanjem pravne sigurnosti i bezbednosti, različiti stavovi vezani da li se ILC po pitanju podizanja nivoa mora treba da fokusira na utvrđivanje normi međunarodnog običajnog prava ili progresivnim razvojem međunarodnog prava, ali i dosadašnje aktivnosti ILA po ovom pitanju.[39] Pored navedenog, u dokumentu su u kratko predstavljeni naučni nalazi vezani za podizanje nivoa mora, aktivnosti ILA, razmatrane su teme vezane za potencijalne pravne efekte podizanja nivoa mora na polazne linije i spoljne granice morskih pojaseva merenih od polaznih linija, zatim na morska razgraničenja i ostvarivanje suverenih prava i nadležnosti obalne države i njenih državljana, kao i na prava trećih država i njihovih državljana u morskim prostorima u kojima su utvrđene polazne linije i granice, mogući pravni efekti podizanja nivoa mora koji se odnose na ostrva u meri u kojoj je njihova uloga u formiranju polaznih linija i razgraničenja na moru, potencijalni pravni efekti podizanja nivoa mora na vršenje suverenih prava i nadležnosti obalne države i njeni državljani, i na kraju dat je osvrt na budući rad Studijske grupe.

---

[38] Maroko je dostavio komentare u dva navrata – 22. decembra 2021. i 27. maja 2022. godine.

[39] O debati pred Šestim komitetom povodom uvrštavanja teme podizanja nivoa mora u odnosu na međunarodno pravo u razmatranje ILC Videti: International Law Commission, Seventy-second session Geneva, 27 April–5 June and 6 July–7 August 2020, Sea-level rise in relation to international law, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/740, 28 February 2020, Part II, paras. 8–23.

Sedamdesettreće zasedanje ILC (2022)

Na 73. zasedanju ILC objavljen je drugi dokument koji se odnosi na podizanje nivoa mora u vezi sa međunarodnim pravom izrađen od strane kopredsedavajućih Studijske grupe Patricije Galvao Teles i Huana Hozea Ruda Santolarija.[40] U ovom dokumentu obrađene su teme vezane za svojstva državnosti i pitanja vezana za lica koja su pogođena efektima podizanja nivoa mora. I u ovom dokumentu pregledno su predstavljeni stavovi predstavnika država datim pred Šestim komitetom. U raspravama je, *inter alia*, konstatovana ranjivost malih ostrvskih država u pogledu efekata podizanja nivoa mora i potencijalnog nestajanja kopnene teritorije tih država, potreba za adekvatnom reakcijom celokupne međunarodne zajednice po ovom pitanju, potreba da se pruži podrška kontinuitetu postojanja država pogođenih štetnim efektima podizanja nivoa mora, principi stabilnosti, izvesnosti, predvidljivosti i bezbednosti kao značajni principi u pogledu pretpostavke kontinuiteta državnosti, ograničenja domena Konvencije iz Montevidea u smislu da se kriterijumi dati u članu 1 navedene konvencije odnose na kriterijume za nastajanje države, i dr.[41] U pogledu lica pogođenim posledicama podizanja nivoa mora, izneti su, *inter alia*, sledeći stavovi: uticaj čoveka na proces podizanja nivoa mora, *pro et contra* stavovi predstavnika država o potrebi uključivanja ove potceline u razmatranje Studijske grupe, i dr.[42] I u ovom dokumentu pregledno su izloženi naučni nalazi o uticaju podizanja nivoa mora,[43] kao i dosadašnje aktivnosti ILA po pitanju ovog fenomena.[44] U pogledu razmatranja primarnih tema vezanih za ovaj dokument podrobno su razmotreni kriterijumi za nastajanje države dati u Konvenciji iz Montevidea. U pogledu personalnog elementa državnosti – stanovništvo - razmatrane su teme vezane za državljanstvo, personalna nadležnost države nad sopstvenim državljanima, diplomatska zaštita, neotuđivost prava na državljanstvo kao ljudskog prava u skladu sa Univerzalnom deklaracijom o ljudskim pravima, sprečavanje apatridije.[45] U dokumentu su razmatrana i ostala tri elementa države – teritorija, državna vlast i sposobnost države da ulazi u odnose sa drugim državama i subjektima međunarodnog prava. Predstavljene su relevantne odredbe i drugih tela koja su se bavila pitanjem svojstava države, poput Instituta za međunarodno pravo, UN-a, Badinterove komisije i prethodnih aktivnosti ILC, koji potvrđuju

[40] International Law Commission, Seventy-third session Geneva, 18 April–3 June and 4 July–5 August 2022, Sea-level rise in relation to international law, Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/752, 19 April 2022.

[41] *Ibid*., paras. 23–40.

[42] *Ibid*., paras. 41–42.

[43] *Ibid*., paras. 45–51.

[44] *Ibid*., paras. 52–59.

[45] *Ibid*., paras. 77–87.

opšteprihvaćena svojstva državnosti. Zatim je u dokumentu razmatrano nekoliko primera iz prošlosti koji mogu poslužiti daljoj raspravi – slučaj Svete stolice[46] i Malteškog viteškog reda,[47] kao i slučajevi vlada u egzilu.[48] Razmotrena su i pitanja vezana za fundamentalna prava država, poput prava na odbranu svog integriteta i nezavisnosti, poštovanja suvereniteta i teritorijalnog integriteta, i dr. Razmotrena su i pitanja vezana za kontinuitet postojanja država, održavanje međunarodnopravnog subjektiviteta bez postojanja teritorije, kao i razmatranje pojedinih modaliteta koje bi trebalo razmotriti, poput: ustupanja segmenata ili delova teritorije drugim državama, sa ili bez prenosa suvereniteta; udruživanje sa drugom državom ili drugim državama; formiranje konfederacija ili federacija; ujedinjenje sa drugom državom, uključujući mogućnost spajanja; moguće hibridne šeme koje bi kombinovale više od jednog predloženog modaliteta.[49] U pogledu zaštite lica pogođenih podizanjem nivoa mora razmotreni su višestruki uticaji na ljudska prava ovih lica, posebno ranjivih grupa poput dece, žena, starijih osoba, domorodačkih grupa i drugih tradicionalnih zajednica. Konstatovano je odsustvo relevantnog pravnog okvira koji bi se odnosio na osobe pogođene posledicama podizanja nivoa mora, ali i oblasti međunarodnog prava koje su relevantne za iznalaženja rešenja za osobe pogođene podizanjem nivoa mora (međunarodno pravo ljudskih prava, međunarodno humanitarno pravo, međunarodno izbegličko pravo, međunarodno migraciono pravo, međunarodno pravo klimatskih promena, i oblast međunarodnog prava koje se bavi katastrofama). Navedena su i posebna ljuska prava koja su potencijalno ugrožena podizanjem nivoa mora: pravo na život, zabrana zlostavljanja, pravo na adekvatno stanovanje, pravo na hranu, pravo na vodu, pravo na učestvovanje u kulturnom životu i poštovanje kulturnog identiteta, pravo na državljanstvo i prevencija apatridije, prava deteta, učestvovanje u javnom životu, pristup informacijama i pristup pravdi, pravo na samoopredeljenje i prava domorodačkih naroda.[50] U pogledu regulisanja pravnog statusa osoba koje su migrirale usled klimatskih promena, konstatovano je da do danas nijedna država nije dodelila izbegličku zaštitu po ovom osnovu u skladu sa odredbama Konvencije o statusu izbeglica.[51] Pozitivnopravne norme izbegličkog prava ne prepoznaju klimatske promene i njene posledice poput podizanja nivoa mora kao osnove za dodeljivanje izbegličkog statusa, a ni tzv. „klimatske izbeglice" nisu prepoznate kao pravni pojam. U dokumentu su razmotrene i akcije koje su preduzimale i preduzimaju države pogođene posledicama podizanja nivoa mora kao i trećih država, ali i

[46] *Ibid*., paras. 113–125.

[47] *Ibid*., paras. 126–137.

[48] *Ibid*., paras. 138–154.

[49] *Ibid*. paras, 198–226.

[50] *Ibid*., para. 252.

[51] Convention relating to the Status of Refugees, United Nations, *Treaty Series*, vol. 189, p. 137.

akcije koje preduzimaju međunarodne organizacije u pogledu zaštite lica koja su pogođena podizanjem nivoa mora (UN, UNEP, FAO, OHCHR, UNHCR, IOM, ILO i druge).[52] Na kraju dokumenta, objavljeni su preliminarni rezultati razmatranja Studijske grupe povodom pitanja vezanih za svojstva državnosti i osoba pogođenih posledicama podizanja nivoa mora, koji se odnose na značaj razmotrenih tema za dalji rad Studijske grupe, uz ocenu da mere koje su već usvojile neke države u pogledu otklanjanja štetnih posledica podizanja nivoa mora predstavljaju velike troškove, te da je neophodno izvršiti procenu potencijalnog ekološkog uticaja tih mera, kao i druga pitanja. Predložena su i pitanja za dalja razmatranja Studijske grupe, poput pitanja vezanih za nedostatak nekog od elemenata državnosti i mogućnost opstanka države sa nedostajućim jednim ili više elemenata; kako se mogu iskoristiti iskustva iz slučajeva Svete Stolice i Malteškog viteškog reda i vlada u izbeglištvu; kako države mogu da iskoriste pravo da obezbede svoj opstanak; kako se mogu izbeći situacije *de facto* apatridije; kako se može pružati adekvatna diplomatska zaštita i konzularna pomoć državljanima malih ostrvskih država u razvoju pogođenim fenomenom podizanja nivoa mora, a koji se nalaze u trećim državama; da li je prikladno održavati snažnu pretpostavku u korist kontinuiteta država čiji je kopneni deo teritorije u potpunosti pokriven morem ili je postao nenastanjiv, s tim u vezi kako bi takve države mogle da ostvaruju svoja prava u pogledu pomorskih područja pod njihovom nadležnošću i resursa koje poseduju; pitanja vezana za sprovođenje prava na samoopredeljenje osoba pogođenih podizanjem nivoa mora, i druga pitanja.[53] U vezi sa zaštitom osoba pogođenih podizanjem nivoa mora konstatovano je da pozitivno međunarodno pravo (*lex lata*) sadrži fragmentisan pravni okvir koji bi se primenjivao na zaštitu ove kategorije ljudi, ali da je potrebno da bude dalje razvijan. S tim u vezi, dat je predlog za dalje razmatranje pred Studijskom grupom po sledećim pitanjima: principi primenjivi na zaštitu osoba pogođenih podizanjem nivoa mora i to: suštinske obaveze država da poštuju ljudska prava, proceduralne obaveze u vezi sa učešćem u javnom životu, pristupu pravdi i pristupu informacijama, obaveza zabrane proterivanja u treće države, obaveze u vezi sa zaštitom ranjivih osoba i grupa (deca, žene, itd.), principi primenjivi na evakuaciju, preseljenje, raseljavanje ili migraciju ljudi, uključujući ranjive osobe i grupe. Posebno u pogledu raseljavanja i mobilnost ljudi, koje su ili bi trebalo da budu obaveze država da štite i pomažu osobe pogođene podizanjem nivoa mora, usvajajući i zasnovanu na pravima i na potrebama pristupa, u sledećim oblastima: sprečavanje raseljavanja; pomoć da se ostane na licu mesta; uspostavljanje principa za planirano preseljenje; zaštita lica u slučaju internog raseljenja i unapređenje trajnih rešenja; opcije zaštite u slučaju prekograničnog raseljavanja (humanitarne vize ili šeme privremene zaštite);

[52] *Ibid*., paras. 351–416.

[53] *Ibid*., para. 423.

aranžmani za redovnu migraciju (i privremene i dugoročne); dodeljivanje statusa izbeglice ili komplementarne zaštite. Takođe, neophodnost razmatranja pitanja vezanog za primenjivost i obim principa međunarodne saradnje država, regiona, kao i međunarodnih organizacija u pogledu pomoći državama pri zaštiti osoba pogođenih podizanjem nivoa mora.[54]

Sedamdesetčetvrto zasedanje ILC (2023)

Na 74. zasedanju ILC objavljen je dodatni dokument koji su pripremili kopresedavajući Studijskom grupom, Bogan Auresku i Nilufer Oral, koji se odnosi na pravo mora. U dokumentu je napravljen osvrt na period između 72. i tekućeg zasedanja ILA u pogledu aktivnosti država, grupa država i međunarodnih organizacija vezan za ovu temu koji su manifestovani podnescima upućenim ILC i debatama vođenim pred Šestim komitetom. Tom prilikom, iskristalisala su se sledeća pitanja od interesa za učesnike: pravna stabilnost, predvidljivost, bezbednost; podrška preliminarnim zaključcima u vezi sa prvim dokumentom u kom je konstatovano da KPM ne isključuje pristup zastovan na „zamrzavanju" polaznih linija i spoljnih granica morskih prostranstava u pogledu podizanja nivoa mora pošto su informacije o polaznim linijama i granicama morskih prostranstava već deponovana kod Generalnog sekretara UN-a; podrška Deklaraciji o očuvanju pomorskih zona usled podizanja nivoa mora u vezi sa klimatskim promenama[55] koju su avgusta 2021. godine usvojili lideri Foruma pacifičkih ostrva, kao i pozivanje na praksu država regiona među kojima su male pacifičke ostrvske države u razvoju, kao i Savez malih ostrvskih država; podrška Deklaraciji Alijanse malih ostrvskih država koje su usvojili šefovi država i vlada septembra 2021. godine;[56] potreba za tumačenjem KPM u svetlu promenljivih okolnosti i/ili uzimajući u obzir interese država pogođene podizanjem nivoa mora; potreba da se održi integritet KPM i/ili ravnoteža prava i obaveza prema KPM; potreba da se pri razmatranju u obzir uzmu sledeći principi: princip pravičnosti, princip *uti possidetis*, princip dobre vere, princip da „kopno dominira morem", obaveze mirnog rešavanja sporova, zaštita prava obalnih i neobalnih država, princip stalne suverenosti nad prirodnim resursima. Zatim i pitanja vezana za očuvanje sporazuma o razgraničenju morskih prostranstava i odluke međunarodnih sudova ili tribunala; potreba za proučavanjem navigacionih karti; pitanja vezana za promenljive i „fiksirane" polazne linije; važnost razlikovanja između *lex lata*, *lex*

[54] *Ibid*., para. 435.

[55] Pacific Islands Forum, Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, 6 August 2021. Retrieved from: https://www.forumsec.org/wp-content/uploads/2021/08/Declaration-on-Preserving-Maritime.pdf.

[56] Alliance of Small Island States, Alliance of Small Island States Leaders' Declaration, 22 September 2021. Retrieved from: https://www.dropbox.com/s/95vlq1wmn81zn1h/AOSIS%20Leaders%27%20Declaration%20-%20Endorsed%2016.09.2021.doc?dl=0%3C.

ferenda i političkih opcija u budućem radu na ovim temama.[57] U pogledu primene principa *uti possidetis* na pomorske granice, ILC je došao do tri glavna preliminarna zaključka – stabilnost i nepovredivost postojećih granica predstavljaju običajno međunarodno pravo, princip *uti possidetis* prevazilazi dekolonizaciju te se može primeniti na morske granice radi stabilnosti i sprečavanja sukoba i konačno istaknut je značaj očuvanja kontinuiteta prethodnih granica zbog podizanja nivoa mora u svrhu izbegavanja konflikata.[58] Kada se govori o fundamentalno promenjenim okolnostima odnosno *rebus sic stantibus*, u kontekstu podizanja nivoa mora, ILC je utvrdila da su države dosledno favorizovale održavanje postojećih pomorskih granica utvrđenih ugovorima, nastojeći da održe stabilnost i mir u međunarodnim odnosima i spreče rizik sukoba. U tri slučaja koji su pokrenuli ovo pitanje, MSP je dosledno zaključio da se član 62, stav 2 (a) BKUP, primenjuje na morske granice, u interesu stabilnosti granica.[59] Osnovno načelo međunarodnog prava da „kopno dominira morem" znači da svi morski prostori, uz vazdušni prostor, predstavljaju pripadajuće elemente kopna. Ovo načelo artikulisano je od strane MSP 1969. godine i od tada je potvrđeno u brojnim slučajevima kao i KPM. Ono znači da obala predstavlja polazište za određivanje morskih prava. Vezano za pitanje kontinentalnog praga ili šelfa, doktrina „prirodnog produžetka" se paralelno razvijala s principom „kopno dominira morem". Ova doktrina je i kodifikovana u KPM (član 76 stav 1) a formirana je kroz stav MSP da „prava obalne države u pogledu područja epikontinentalnog pojasa koje predstavlja prirodno produženje njene kopnene teritorije u i pod morem postoje *ipso facto* i *ab initio*, na osnovu njenog suvereniteta nad kopnom, i kao produžetak u vršenju suverenih prava u svrhu istraživanja morskog dna i eksploatacije njegovih prirodnih resursa".[60] ILC zaključuje iako je princip da „kopno dominira morem" široko prihvaćen i primenjivan od strane država i sudova, on nije apsolutan iz dva razloga: prvo, princip prirodnog produžetka kontinentalnog praga je primer izuzetka od postojećih principa međunarodnog prava iz pragmatičnih razloga i radi postizanja pravičnog rešenja, a sličan pristup bi se mogao primeniti i na očuvanje postojećih polaznih linija zbog podizanja nivoa mora; drugo, ukoliko su ispunjeni uslovi definisani KPM, trajni karakter spoljnih granica kontinentalnog praga bi značio njihovo očuvanje uprkos pomaku polaznih linija kopna, što ukazuje na to da princip nije apsolutan i da zamrzavanje polaznih linija i spoljnjih granica morskih zona nije u suprotnosti s principom da „kopno dominira morem".[61] Odvojeno

[57] International Law Commission, Seventy-fourth session Geneva, 24 April–2 June and 3 July–4 August 2023, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/761, 13 February 2023, para. 13.

[58] A/CN.4/761, 13 February 2023, para. 111

[59] *Ibid*., para. 125.

[60] *Ibid*., para. 150.

[61] *Ibid*., para. 155.

pitanje predstavlja pitanje primene istorijskih prava. ILC zaključuje da ova prava stečena od strane države dugotrajnom upotrebom i priznanjem od strane drugih država, predstavljajući princip koji služi da očuva dugogodišnja prava koje država ima nad određenim morskim područjem, mogao bi se analogno primeniti za očuvanje postojećih morskih zona i prava koja bi mogla nestati usled podizanja nivoa mora.[62] Načelo pravičnosti, kako je naglasio MSP, ima višestruke uloge u pravu, prvenstveno osiguravajući da se pravda postigne kada stroga primena pravnih pravila možda nije dovoljna, i predstavlja princip koji vodi sudove da daju prednost pravičnim principima u odnosu na krute metode kao što je ekvidistanca u razgraničenju mora. Važnost načela pravičnosti, posebno se ističe kada se razmatraju nesrazmerni efekti podizanja nivoa mora na ranjive države, gde je održavanje postojećih morskih zona ključno za sprečavanje katastrofalnih ishoda. Primenom ovog načela u međunarodnom pravu očuvala bi se trenutna pomorska prava kako bi se sprečili razorni uticaji na države podložne podizanju nivoa mora.[63] Prema Braunliju (*Ian Brownlie*) trajni suverenitet je potvrđivanje stečenih prava države domaćina koja se ne mogu revidirati ugovorom a, možda, čak ni međunarodnim sporazumom.[64] Prema ILC trajni suverenitet nad prirodnim resursima, kao pravilo međunarodnog običajnog prava, osigurava državama nepromenjivo pravo nad njihovim prirodnim resursima, uključujući morske, te bi gubitak morskih resursa usled podizanja nivoa mora bio suprotan ovom principu, dok bi očuvanje postojećih morskih prava bilo u skladu s njim.[65] U pogledu mogućih gubitaka ili dobiti trećih država razmatrano je više scenarija, kada deo unutrašnjih voda postaje teritorijalno more, kada deo teritorijalnog mora postaje deo graničnog pojasa, kada deo teritorijalnog mora postaje deo isključive privredne zone, kada deo iključive privredne zone postaje deo međunarodnih voda kao i gubitak arhipelaške polazne linije.[66] Što se tiče gubitaka i dobiti trećih država, ILC zaključuje da iako treće države mogu ostvariti ograničene koristi kao što je sticanje prava na nesmetani prolaz tamo gde ranije unutrašnje vode postaju teritorijalna mora i potencijalni pristup svakom višku dozvoljenog ulova u isključivim privrednim zonama kada obalna država nema kapaciteta za ulov, ova dobit postoji uz značajan rizik u pogledu pomorskih prava obalnih država, potencijalno stvarajući neizvesnost i nestabilnost ako se postojeća prava i obaveze ne očuvaju sa ciljem bi se održao status kvo uspostavljen prema međunarodnom pravu.[67] Otvoreno je i pitanje ažuriranja navigacionih karata. Tokom rasprave Studijske grupe na sedamdesetdrugoj sednici ILC 2021. godine izneti su različiti

[62] *Ibid*., para. 168.

[63] *Ibid*., para. 183.

[64] *Ibid*., para. 189.

[65] *Ibid*., para. 192.

[66] *Ibid*., para. 196.

[67] *Ibid*., para. 214.

stavovi, od pogleda da je ažuriranje važno za sigurnost plovidbe do stava da su rizici mali s obzirom na to da se obala povlači prema kopnu u slučaju podizanja nivoa mora te da su satelitske tehnologije veoma dostupne. Predložno je da se ovo pitanje razmotri dodatno, posebno u svetlu pravila Međunarodne hidrografske organizacije (IHO), kao i u pogledu karata koje su deponovane kod Generalnog sekretara UN za potrebe registracije pomorskih zona.[68] Praksa i stavovi država ukazuju na to da, iako malo njih redovno ažurira nautičke karte, većina ne vidi obavezu prema KPM za ažuriranje karata u odnosu na polazne linije, a nijedna država nije naznačila da postoji obaveza da periodično pregleda polazne linije, ažurira karte ili deponuje ažurirane karte kod Generalnog sekretara UN. Dok Međunarodna pomorska organizacija (IMO) i IHO objašnjavaju da karte uglavnom služe za sigurnost plovidbe po Konvenciji o zaštiti ljudskog života na moru,[69] IHO napominje da karte mogu i da ukazuju na morske zone, ali ne pruža dokaze o praksi ili obavezi prema ovoj konvenciji da polazne linije moraju biti prikazane ili ažurirane iz bezbednosnih razloga.[70] Kako mnoge države nemaju kapacitet za izradu karata, bilo bi nerazumno nametati obavezu sprovođenja mapiranja i ažuriranja karata. Ova zapažanja podržavaju jasno tumačenje člana 5. KPM da normalne polazne linije služe samo za merenje širine teritorijalnih mora, bez eksplicitnih naznaka da se nove polazne linije moraju povući. U zaključku, preliminarna zapažanja su da karte uglavnom pomažu u bezbednosti navigacije nasuprot prikazivanja polaznih linija i zona, da nema dokaza o praksi država u pogledu ažuriranja polaznih linija zbog obaveza prema međunarodnom pravu i da nema dokaza o obavezi prema međunarodnom pravu da se redovno ažuriraju karte radi revizije polaznih linija ili pomorskih zona.[71] Drugi izvori prava mimo KPM, uključujući multilateralne ugovore o upravljanju ribarstvom, zagađenju i zonama traganja i spasavanja, podvodnom kulturnom nasleđu i propisima IHO, imaju veoma ograničen domet u pogledu rešavanja pitanja prilagođavanja polaznih linija kao odgovor na podizanja nivoa mora. Ispitane odredbe se ne bave direktno ovim pitanjem niti zahtevaju takvo prilagođavanje, iako se mogu zaključiti određena veza u pogledu efekata nestalnih polaznih linija i fiksnih linija na sprovođenje određenih ugovornih obaveza. Sve u svemu, KPM ostaje primarni izvor međunarodnog prava koji reguliše polazne linije i pomorske zone. Na ovom zasedanju ILC utvrđeno je da plan da se 2025. godine objedine izveštaji o svim temama razmatranim pred Studijskom grupom i prirede rezultati celokupnog rada Studijske grupe po pitanju podizanja nivoa mora u vezi sa međunarodnim pravom.

---

[68] *Ibid*., para. 215.

[69] International Convention for the Safety of Life at Sea, United Nations, *Treaty Series*, vol. 1184, 1185, p.2.

[70] *Ibid*., para. 246.

[71] *Ibid*., para. 249.

U poređenju sa procesom kodifikacije i progresivnog razvoja prava mora koji se odvijao u drugoj polovini prošlog veka, od početka rada ILC i stavljanja na agendu tema vezanih za kodifikaciju prava mora, pa do usvajanja KPM 1982. godine, bilo je izazova u pogledu toga da se utvrde koji su to međunarodni običaji koji imaju kvalitet pozitivnopravnih normi, a u pogledu progresivnog razvoja, na koji način pronaći konsenzus u okviru međunarodne zajednice za usvajanje novih pravnih pravila. U pogledu savremenih tendencija u oblasti prava mora, a u odnosu na podizanje nivoa mora, ILC se susreće sa bitno drugačijom situacijom. Naime, ovde je potrebno sagledati posledice podizanja mora na multidisciplinaran način, zatim odrediti oblasti međunarodnog prava koje te posledice pogađaju, a onda i pronaći održiva rešenja. Uz to, neophodno je pomiriti različite stavove po brojnim pitanjima, ali i sagledati stavove država, poput onih da se države čvrsto drže stava da su jednom određene granice morskih pojaseva nepromenjive, a u odnosu na već određene polazne linije. Podizanje nivoa mora, upravo menjajući polazne linije itekako utiče na promene geografskih mapa. Zato je i izazov ILC u tome i mnogo veći nego u ranijem poduhvatu kodifikacije i progresivnog razvoja prava mora. Sada je izazov da se faktičke promene koje se ispoljavaju u pogledu smanjenja ili pak potpunog nestanka teritorije nekih obalnih i ostrvskih država, pa i potencijalnog nestanka personalnog elementa države (stalnog stanovništva) usled tih pojava, dovodi do određenih promena koje je neophodno podvesti pod pravne norme različitih grana prava. Takođe, izazov u radu ILC predstavlja i to što se svaki korak koji preduzima ILC, odnosno, nadležni komitet, ocenjuje i od strane predstavnika država. To u izvesnom smislu sužava slobodu ILC u pogledu daljeg rada, ali i olakšava njegov rad imajući u vidu aktivno učešće država u pogledu aktivnosti ILC budući da države dostavljaju svoje podneske i omogućavaju lakše utvrđivanje zajedničkih stavova i prakse u pogledu poštovanja normi međunarodnog prava mora, a posebno u pogledu određivanja polaznih linija i širine morskih pojaseva i pojaseva koja se odnose na morsko podzemlje.

OBLASTI OD ZNAČAJA ZA MEĐUNARODNO PRAVO NA KOJE UTIČE PODIZANJE NIVOA MORA

Razmatrajući teme kojima se bave ILA i ILC u vezi sa podizanjem nivoa mora, može se identifikovati nekoliko značajnih tema koje se odnose na međunarodno pravo. Tu su, u prvom redu, pitanja vezana za pravo mora, svojstva državnosti i migracije. U navedenim oblastima, posledice podizanja nivoa mora su očigledne i dalekosežne. I druge teme zavređuju pažnju, ali zbog obima ovog članka nismo u mogućnosti da ih razmatramo.

Pitanja vezana za svojstva državnosti

Pojedine oblasti ili cele države, mahom male ostrvske države u razvoju[72] usled podizanja nivoa mora vremenom postaju nepodobne za ljudske naseobine. Neke teritorije, čak i cele države vremenom bi bile potopljene usled ovog procesa. Stoga se problemi država u procesu podizanja nivoa mora, a vezi sa teritorijom, mogu se podeliti u dve grupe. Prvu grupu čine one države čija teritorija će se smanjiti usled podizanja nivoa mora, ili delimično ili u celosti učiniti nepodobnom za ljudske naseobine. Drugu grupu problema opterećuje male arhipelaške države u razvoju – potapanje kopnene teritorije u celosti. Nestankom nekih od elemenata države, za posledicu ima „krnju" državnost te upitnost postojanja same države koja je pogođena posledicama podizanja nivoa mora. U istoriji nisu usamljeni primeri slučajeva *sui generis* gde postoje sporenja o državnosti nekih od subjekata međunarodnog prava, upravo usled nedostatka nekih od elemenata države.[73] Konvencija o pravima i obavezama država (Konvencija iz Montevidea od 1933. godine)[74], sadrži elemente koji neki entitet treba da poseduje da bi se mogao smatrati državom,[75] a koji se sada već tradicionalno smatraju, kao neophodni elementi državnosti: (definisana) teritorija, (stalno) stanovništvo, državna vlast[76] i sposobnosti države da stupa u odnose sa drugim državama. Međunarodno pravo reguliše situacije nastanka i prestanka postojanja države.[77] U pogledu prestanka postojanja države to čini u slučajevima kada dolazi do raspada države, odvajanja i pripajanja delova jedne države drugoj ili proglašavanja nezavisnosti nekog dela odnosne države. Međutim, u navedenim slučajevima reč je o promeni suvereniteta na određenoj teritoriji, ne i o nestanku teritorije. U pogledu nestanka teritorije

[72] Grupu malih ostrvskih država u razvoju (*Small island developing states*/SIDS) čine sledeće države članice UN: Antigva i Barbuda, Bahami, Barbados, Belize, Dominikanska Republika, Fidži, Grenada, Gvajana, Gvineja Bisao, Haiti, Istočni Timor, Kiribati, Komori, Kukova Ostrva, Jamajka, Kuba, Maldivi, Maršalska Ostrva, Mauricijus, Mikronezija, Nauru, Niuje, Palau, Papua Nova Gvineja, Sveta Lucija, Samoa, Sao Tome i Principe, Sejšeli, Sent Kits i Nevis, Singapur, Solomonova Ostrva, Surinam, Sent Vinsent i Grenadini, Tonga, Trinidad i Tobago, Tuvalu, Vanuatu, Zelenortska Ostrva, kao i 18 pridruženih članova regionalnih komisija UN. Karibi, Pacifik, Atlantik, Indijski okean i Južno kinesko more, su geografska područja u kojima su raspoređene male ostrvske države u razvoju.

[73] Subjekti međunarodnog prava *sui generis* – Malteški odred. Videti: Filip Turčinović, „Specifičnost međunarodnog pravnog subjektiviteta i diplomatije Malteškog viteškog odreda", *Jugoslovenska revija za međunarodno pravo*, Vol. 41, 3/1994, str. 501–509, Robert Jennings, Arthur Watts, *Oppenheim's International Law: Volume 1 Peace*, Ninth edition, Longman, London-New York 1992., za Svetu Stolicu Videti: pp. 325–329; Malcolm N. Shaw, *International Law*, Eight edition, Cambridge University Press, Cambridge 2017, pp. 193–194.

[74] Convention on the Rights and Duties of States, 165 LNTS 19, Montevideo, 26 December 1933.

[75] Videti: čl. 1 Konvencije iz Montevidea.

[76] Prva tri elementa deo su teorije Georga Jelineka vezanim za elemente države.

[77] O načinima nastanka države: James Crawford, *The Creation of States in International Law*, second edition, Oxford University Press, Oxford-New York 2006, pp. 255–500.

neke države, u ovom slučaju kao posledica podizanja nivoa mora, nije reč o promeni suvereniteta na postojećoj teritoriji, već o potpunom nestanku iste. Dakle, reč je o nestanku i teritorije, i samim tim i suvereniteta, posebno ako je reč o potpunom potapanju cele teritorije neke države. Ovaj problem, bez presedana, i jeste nedoumica sa kojom se suočava međunarodna zajednica, a o čemu raspravljaju i ILA i ILC kako bi se pronašlo rešenje, imajući u vidu da pojedini primeri iz prošlosti (vlade u izbeglištvu usled okupacije, Malteški viteški red i drugi), nisu adekvatni primeri koji bi poslužili u pogledu razrešavanja problema. S tim u vezi, ostaje da se sagleda na koji način će se pronaći rešenje prihvatljivo u slučaju nestajanja država, odnosno teritorije, a posledično i posebno personalnog elementa – stanovništva, te je upitno da li primeri iz prošlosti, kada je reč, primera radi, o vladama u izbeglištvu, kao privremena rešenja, mogu da održe kontinuitet svojstva državnosti država u nestajanju. Pitanja vezana za nestanak personalnog elementa države ostavljaju otvorenim problem vezan za potapanje pojedinih ostrvskih država. U vezi sa personalnim elementom države figuriraju i akcesorna prava država, poput onog sadržanog u članu 121, st. 3 KPM: „Stene na kojima nije moguć ljudski boravak ili privredni život nemaju isključivu privrednu zonu ili epikontinentalni pojas." Činjenjem da pojedine teritorije mogu postati nepodobne za ljudske naseobine, ostaviće tako posledice na međunarodno pravo i pravo mora, što jasno ukazuje na međupovezanost različitih oblasti međunarodnog prava u vezi sa pojavom podizanja nivoa mora.

Pitanja vezana za pravo mora

Problemi vezani za podizanje nivoa mora odražavaju se na korpus međunarodnog prava mora. Taj uticaj odnosi se na pitanje utvrđivanja polazne linije, ali i granica morskih pojaseva, što su pravilno primetili članovi ILA i ILC. Posledice podizanja nivoa mora odnose se na potrebu za prilagođavanjem vezanim za već određene polazne linije i granice morskih pojaseva ali i prostora morskog dna i podzemlja. To za posledicu može da ima nove teritorijalne sporove među državama, što može dalje izazvati i nestabilnost u međunarodnoj zajednici, imajući u vidu da su proteklih decenija postojali teritorijalni sporovi na pomorskim granicama između više država, a neki od njih su bili iznošeni na razmatranje pred MSP.[78] Nesuglasice koje se tiču prava mora stvaraju probleme u međunarodnim odnosima. Primera radi, Južno kinesko more je već godinama poligon za trvenja različitih vrsta.[79] Stoga, Komitet ILA za podizanje nivoa mora i međunarodno pravo je pravilno postupio stavljajući na agendu za razmatranje i

[78] Do sada je vođeno više sporova pred MSP u kojima su razmatrani teritorijalni sporovi obalnih država. S toga je prilikom analiziranja teme odnosa podizanja nivoa mora i međunarodnog prava neophodno uzeti u obzir i praksu MSP.

[79] Duško Dimitrijević, „Sporovi u Južnom kineskom moru i međunarodno pravo", *Pravni život*, br. 12/2016, str. 151–166.

pitanja vezana za međunarodnu bezbednost imajući u vidu i potencijalne sporove među državama koja bi mogla da se otvore usled posledica podizanja nivoa mora. Sloboda država da jednostranim aktima određuju širinu morskih pojaseva i suverenitet nad morskim dnom i podzemljem, kao i uživanje prava u navedenim morskim prostranstvima, svakako, treba da bude u skladu sa normama međunarodnog prava. Trenutno su na snazi pet međunarodnih ugovora koja se odnose na ova pitanja - Konvencija o teritorijalnom moru i spoljnom morskom pojasu,[80] Konvencija o otvorenom moru,[81] Konvencija o ribolovu i očuvanju bioloških bogatstava otvorenog mora,[82] Konvencija o epikonteintalnom pojasu i KPM.[83] Refleksije stavova država u pogledu zaštite što većeg obima suvereniteta mogu se sagledati i u razvoju međunarodnog prava mora. Obalne države teže da što više produže suverenitet nad morskim pojasevima i morskom podzemlju što dalje od svoje kopnene teritorije (to se, istorijskipravno posmatrano, posebno može sagledati u pogledu određivanja širine morskih pojaseva i suverenosti nad morskim dnom i podzemljem – u pogledu širine morskih pojaseva, isprva tri, četiri, šest pa do 12 nautičkih milja za širinu teritorijalnog mora, itd.). Tako je i u pogledu potencijalnog „zamrzavanja" već definisanih morskih pojaseva u skladu sa odredbama KPM, obalne države nastoje da se, usled podizanja nivoa mora, i povlačenja polaznih linija na račun potopljenog kopnenog dela teritorije, ne povlače unazad polazne linije na račun kopnenog dela teritorije, iako bi to bilo u skladu sa realnim stanjem na terenu. Veliki broj država i grupa država, kao što je navedeno, u svojim podnescima su naglasili da ne postoji obaveza država ugovornica KPM da dostavljaju revidirane mape, što ide u korist tezi o potrebi za „zamrzavanjem" polaznih linija. Države taj stav pokušavaju da osnaže raznim deklaracijama koje usvajaju grupe država, kako u okviru regiona u kom se nalaze, tako i van njih, prikupljajući podršku država koje se nalaze u sličnom položaju iz

[80] Convention on Territorial Sea and the Contiguous Zone, United Nations, *Treaty Series*, vol. 516, p. 205.

[81] Convention on High Seas, United Nations, *Treaty Series*, vol. 450, p. 11.

[82] Convention on Fishing and Conservation of the Living Resources of the High Seas, United Nations, *Treaty Series*, vol. 559, p. 285.

[83] Convention on the Contintental Shelfs, United Nations, *Treaty Series*, vol. 499, p. 311; „Po opštem međunarodnom pravu države koje nisu strane ugovornice KPM, ali su strane neke od Ženevskih konvencija o pravu mora, vezuju odredbe odnosne konvencije. Odnose između država koje su strane KPM i onih koje to nisu, ali su strane neke od Ženevskih konvencija, pak, uređuje međunarodno običajno pravo. Pa ipak, s obzirom na zaista veliki broj država koje su ratifikovale KPM, i činjenicu da u su među njenim stranama ugovornicama sve značajne pomorske sile, može se tvrditi da ona, u ovom trenutku, sadrži opšteprihvaćeno međunarodno pravo mora." Videti: Dimitrijević *et. al*., str. 138. „[P]ostoji i niz drugih univerzalnih i regionalnih konvencija koje se bave borbom protiv akata nasilja na moru, regulisanjem izbegavanja sudara i spasavanjem na moru, pitanjima zaštite sredine, statusa pojedinih moreuza itd." Videti: Boris Krivokapić, *Međunarodno javno pravo*, treće izmenjeno i dopunjeno izdanje, Poslovni i pravni fakultet, Institut za uporedno pravo, Beograd 2017, str. 764.

drugih delova sveta.[84] Ovakvo postupanje država ne treba zanemariti imajući u vidu da jasno odražava stav velikog broja država direktno pogođenih posledicama podizanja nivoa mora, što će se odraziti prilikom pravnog obavezivanja na čvršće oblike izvora prava prilikom buduće kodifikacije, tj. progresivnog razvoja međunarodnog prava u različitim oblastima a koji se tiču fenomena podizanja nivoa mora.

Pitanja vezana za migracije

Klimatski faktori su jedan od najstarijih poznatih faktora koji su uzrokovali migracije. Promene u klimi su podstakle praistorijske migracije kao i izmenjena fizička geografija na načine koji uticali na migracione puteve.[85] Migracije prouzrokovane podizanjem nivoa mora mogu dovesti do internih migracija (migracija u okviru teritorije države u kojoj se te migracije dešavaju), kao i do prekograničnih migracija (potrebu ljudi da napuštaju teritoriju države porekla). I već postojeće izbegličko-migrantske krize karakteristične za drugu i treću deceniju ovog veka otvorile su brojna pitanja i iznele na površinu različite dileme u pogledu upravljanja masovnim i mešovitim migracijama, kao i neka ponuđena rešenja vezana za razmatranje ovih pitanja na međunarodnom planu.[86] Migracija stanovnika država čija teritorija će u bližoj ili daljoj budućnosti biti nepodobne za naseljavanje ili će, pak nestati, te će intenzivirati, kako unutrašnje, tako i prekogranične migracije ljudi koji će se iz navedenih razloga morati da napuštaju svoju državu porekla. Nepodobnost za naseljavanje uzrokovalo bi da u nekom trenutku ljudska bića više ne bi mogla da naseljavaju pojedina područja ili cele države usled različitih štetnih faktora (zaslanjenje pijaće vode i zaslanjenje tla, nemogućnost uzgajanja biljnih i životinjskih vrsta, potapanje tla, prenaseljenost preostalih naseljivih područja, itd.). U jednom trenutku pojedine male ostrvske države u Pacifiku bi mogle i da nestanu potapanjem tla. Svakako, bilo da je reč o nemogućnosti opstanka čoveka u pojedinim državama ili potapanjem teritorija tih država, nestao bi jedan od elemenata države – personalni element – stanovništvo, a u ekstremnom slučaju potapanjem celokupne teritorije države i (kopnena) teritorija kao element države, što bi dovelo u pitanje opstanak same države. To su faktori koji utiču na (prisilne) migracije ljudi iz nekih država i riziku od posledica podizanja nivoa mora, pošto bi država čiji su državljani, ili u slučaju

---

[84] Declaration on Preserving Martime Zones in the Face of Climate Change related Sea-Level Rise, 6 August 2021, usvojene od strane lidera Foruma Pacifičkih ostrva i Declaration of the Heads of State and Government of the Alliance of Small Island States, 22 September 2021.

[85] UNHCR, *People Forced to Flee History, Change and Challenge*, Oxford University Press, Oxford 2022, p. 21–52.

[86] Bojan Stojanović, „Kriza multilateralizma u oblasti upravljanja savremenim migracijama i odgovori međunarodne zaštite", Dimitrijević Duško (ur.), *Srpski godišnjak za međunarodno pravo*, Vol. 2, 2022, str. 237–254.

apatrida, država u kojoj imaju uobičajeno boravište, ostali bez zaštite države porekla. Za adekvatno preseljenje stanovništva, pored regulisanja na nivou države na čijoj teritoriji dolazi do tog procesa, potrebno je aktivno učešće i međunarodne zajednice kako bi se pružila adekvatna pomoć državama koje se nađu u toj potrebi. U tom smislu od izuzetnog značaja je poštovanje ljudskih prava osoba koje su u riziku i kojima je neophodno pružanje adekvatne pomoći. Zato, u pogledu internih migracija, od izuzetnog značaja mogu biti već usvojeni Vodeći principi UN o internom rasejanju.[87] Ranije spomenuta Sidnejska deklaracija ILA nudi pojedina rešenja koja bi valjalo razmotriti u cilju pronalaženja održivih rešenja za migracije uzrokovane podizanjem nivoa mora. Holističkim pristupom razmatranju ovog problema, neophodno je posvetiti posebnu pažnju kako bi se zbrinulo stanovništvo „država u nestajanju", odnosno, tretmana njihovih državljana. Problem sa kojim će se suočiti međunarodna zajednica jeste vezana za situaciju kada teritorija neke države bude nepodobna za nastanjivanje ljudi ili nestane u celosti. Pored problema preseljenja, ostaje otvoren problem vezan za regulisanje statusa tih lica pošto budu prinuđeni da migriraju u strane države.[88] Moguća su različita rešenja, od izdavanja humanitarne vize, preko različitih komplementarnih vidova zaštite (supsidijarna zaštita, privremena zaštita, itd.). Međutim, reč je o vremenski ograničenim oblicima zaštite. Ova tema, usko je vezana za pitanje svojstva državnosti (dilema da li država čija je teritorija nestala u celosti, može da nastavi da postoji, jer gubi najmanje dva konstitutivna elementa – državnu teritoriju i stalno stanovništvo). Pošto Konvencija o statusu izbeglica ne prepoznaje tzv. „ekološke izbeglice", pitanje vezano za regulisanje statusa još uvek ostaje otvoreno. Odgovori na ovo pitanje zavise i od toga da li bi se smatralo da država koja je izgubila jedan ili više elemenata državnosti opstaje kao takva („krnja" država), ili nestaje u potpunosti. Nestankom teritorije i nepodobnošću za opstanak ljudskih naseobina, te dovođenjem u pitanje kriterijuma svojstva državnosti, dovodi se u pitanje i, *inter alia*, državljanstvo tog stanovništva. Ljudi u prisilnim migracijama izazvanim podizanjem nivoa mora, pored toga što će biti prisiljeni da napuštaju državu porekla, neće moći da računaju na zaštitu države porekla. To, dalje, otvara pitanje prihvata tih ljudi u drugim državama i regulisanje njihovog statusa. Nemogućnost povratka u državu porekla svakako pojačava

[87] Princip 5, UN Guiding Principles on Internal Displacement: „Svi drzavni organi i međunarodni akteri dužni su da u svim okolnostima poštuju i obezbede poštovanje svojih obaveza po međunarodnom pravu, uključujući ljudska prava i humanitarno pravo, u cilju sprečavanja i izbegavanja situacija koje mogu dovesti do raseljavanja lica."

[88] Već je bilo, uporednopravno posmatrano, individualnih pokušaja da se dobije azil u nekim državama po osnovu posledica klimatskih promena. Indikativan je slučaj Joane Tejtijota (*Ioane Teitiota*), koji je razmatran i pred Komitetom za ljudska prava (Human Rights Committee, *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 7 January 2020). O nalazima Komiteta za ljudska prava u ovom slučaju Videti: Bojan Stojanović, „Konstatacija Komiteta za ljudska prava u slučaju Joane Tejtiota protiv Novog Zelanda i njen značaj za međunarodno pravo", *Zbornik radova Pravnog fakulteta u Nišu*, 2020, god. 59, br. 87, pp. 73–89.

značaj ovog pitanja u vezi sa podizanjem nivoa mora. To je od velikog značaja, jer u tom slučaju, nije reč o strahu od progona osobe koja je prinuđena da napusti državu porekla u smislu Konvencije o statusu izbeglica, već fizička nemogućnost povratka u tu zemlju i fizičkog opstanka u istoj, jer više nije podobna za ljudske naseobine, ili zato što je jednostavno teritorija te države nestala. Prilikom rešavanja ove važne pravne dileme neophodno je imati u vidu da se u svakom slučaju spreči pojava apatridije.

ZAKLJUČAK

Očigledan uticaj podizanja nivoa mora i njeni štetni efekti očituju se na više oblasti međunarodnog prava. Svesni te činjenice, prvo ILA, a zatim ILC, krenuli su u značajne poduhvate koji bi trebalo da rezultiraju konkretnim odgovorima na različita pitanja iz više oblasti međunarodnog prava. U tom smislu, pojedine oblasti međunarodnog prava, poput prava mora, migracionog prava, a u vezi s tim potencijalno i izbegličkog prava, ali i pitanja vezanih za elemente države, što bitno utiče na međunarodnopravni subjektivitet država, predstavljaju oblasti međunarodnog prava gde se predviđa da će posledice podizanja nivoa mora biti najdalekosežnije. Mnoge dileme, iz navedenih oblasti međunarodnog prava, iskristalisale su se kao goruće i iziskuju konsenzus subjekata međunarodnog prava i to u skoroj budućnosti (imajući u vidu efekte podizanja nivoa mora, već i pre kraja ovog veka). Tako se u vezi sa pravom mora, treba rešiti pitanje prilagođavanja, odnosno pitanje fiksiranja polaznih linija, a sa tim u vezi i širina morskih pojaseva i suvereniteta država nad morskim dnom i podzemljem u oblastima na kojima imaju određen stepen suvereniteta uspostavljenih na osnovu odredbi KPM, preko pitanja vezanih za suverenitet arhipelaških država na morskim pojasevima i morskom dnu i podzemlju. U pogledu pitanja vezanih za svojstva državnosti, dilema od izuzetnog značaja javlja se po pitanju opstanka subjektiviteta pojedinih država kojima preti znatno smanjenje teritorije, preko stanja u kom veći delovi teritorije ili teritorija u celosti, neće biti podobni za naseljavanje, do najekstremnijih situacija – potpunog potapanja teritorija pojedinih država, poput malih ostrvskih država u razvoju. S tim u vezi, važna su pitanja u pogledu ljudskih prava i migracija osoba koje čine stanovništvo tih država. Nestankom teritorije neke države ili nemogućnost opstanka ljudskih zajednica na njihovim teritorijama, dovodi se u pitanje subjektivitet države, a ona i pitanje državljanstva njenih građana, zatim prekogranično preseljenje tih ljudi i regulisanje njihovog statusa. Sve navedeno, iziskuje izmene pozitivnog međunarodnog prava iz različitih oblasti, što nije nimalo lak zadatak. Ono što ostaje da se sagleda u nastavku rada ILA i ILC jeste način na koji će se doći do održivih rešenja, ali i odnos međunarodne zajednice prema predloženim rešenjima i njihova primena u praksi. Imajući u vidu klimatske promene, kao i druge faktore u prirodi koje uzrokuju podizanje nivoa mora te njegov tempo i nezaustavljivost,

akcije koje je neophodno sprovesti kako bi se otklonile ili makar ublažile negativne posledice podizanja nivoa mora neophodno je usvojiti sa što većim stepenom pristanka subjekata međunarodnog prava na njihovu implementaciju, kao i solidaran pristup u tim procesima kako bi se obezbedilo efikasno rešavanje nadolazećih problema vezanih za posledice podizanja nivoa mora. Prilikom postizanja kompromisa u procesu pronalaženja najboljih rešenja neophodna je solidarnost država iz svih delova sveta, bilo da je reč o državama koje su direktno pogođene posledicama podizanja nivoa mora (obalne države, male ostrvske države u razvoju), bilo da je reč o država koje su indirektno pogođene ili koje te posledice ne mogu trpeti u skorije vreme (kontinentalne države – države koje se nalaze u kontinentalnim delovima sveta bez pristupa morskoj obali). Usled dalekosežnosti posledica podizanja nivoa mora, gotovo je nemoguće zamisliti da neka država u makar i delimično ne oseti te posledice. Bez obzira na to što podizanje nivoa mora ne ugrožava direktno kontinentalne države, posledice podizanja nivoa mora koje bi se ogledale u destabilizaciji međunarodne zajednice zbog velikog broja država koje su direktno pogođene tim procesom, svakako da i ove države čini pogođenim posledicama podizanjem nivoa mora. Takođe, na primeru migracije koje sve više uslovljava podizanje nivoa mora, neophodna solidarnost kontinentalnih država, ogledaće se u potrebi da obezbede prihvat ljudi koji će biti prinuđeni da napuštaju državu porekla zbog nemogućnosti opstanka na teritorijama koje više nisu ili neće biti podobne za ljudske naseobine, ili će, usled podizanja nivoa mora, potpuno nestati. Imajući u vidu sastav ILA i ILC (oba tela čine pravnici internacionalisti, predstavnici svih regiona sveta i različitih pravnih kultura), rešenja koja ponude navedena tela kao i u mnogim drugim slučajevima u prošlosti, predstavljali bi doprinos u razvoju međunarodnog prava i pomak u različitim oblastima koje se tiču posledica podizanja nivoa mora.[89] Međutim, treba imati u vidu da nakon toga predstoji mukotrpan proces privoljavanja država da se obavežu čvršćim oblicima obavezivanja kako bi se predupredili negativni efekti podizanja nivoa mora. To u bliskoj budućnosti može biti težak proces imajući u vidu krizu multilateralizma poslednjih godina usled brojnih kriza koje su ostavile posledice na međunarodne odnose.

[89] Imajući u vidu da se ILA duži vremenski period bavi pitanjem uticaja podizanja nivoa mora, nalazi do kojih dolazi, kao i usvojeni dokumenti, poput izveštaja i rezolucija, svakako će biti od koristi za dalji rad u okviru ILC, a kasnije i drugih relevantnih tela kada dođe vreme za kodifikaciju.

SEA LEVEL RISE AND EROSION OF INTERNATIONAL LEGAL SECURITY: IMPACT ON STATEHOOD, LAW OF THE SEA AND MIGRATION

ABSTRACT

Sea level rise is a topic of global importance considering the degree of changes that this phenomenon will leave in different spheres in the future. At first, coastal states, especially small island developing states, will suffer the greatest consequences. Sea level rise affects several areas of international law, which requires a comprehensive response from the international community and the need for norms in different areas of international law that would regulate the consequences of sea level rise. The article examines the impact of sea level rise on international law. It notes that the International Law Commission (ILC) and International Law Association (ILA) have both taken up this issue in recent years, looking at the different implications. More than ten years ago, ILA began to deal with this topic, in order to emphasize the law of the sea, the elements of statehood and issues related to human rights and the migration of people affected by this phenomenon. Since 2019, the ILC has been dealing with the issue of sea level rise and international law by, similarly to the ILA, taking into consideration topics related to the law of the sea, elements of statehood in relation to states that are threatened by the submergence of their territory and issues related to migration caused by the rise sea level. The article analyses the impact of sea level rise on three key areas: law of the sea, statehood and migration. Rising seas could spur new territorial disputes over baselines and maritime boundaries. It could also threaten the statehood of small island nations as their territory disappears. Finally, displacement of populations will necessitate protecting the rights of migrants. The article concludes by noting the need for international cooperation and solidarity in responding to the legal implications of the sea level rise across multiple areas of international law.

Key words: Sea level rise, international law, law of the sea, statehood, migration

REFERENCE

1. Alliance of Small Island States, Alliance of Small Island States Leaders' Declaration, 22 September 2021.
2. Аврамов, Смиља, Крећа Миленко, *Међународно јавно право*, двадесетдруго издање, Правни факултет Универзитета у Београду, Службени гласник, Београд 2009.
3. Churchill, Robin R., "The 1982 United Nations Convention on the Law of the Sea", in Rothwell Donald R., Oude Flferink Alex G., Scott Karen N., Sephens Tim (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford University Press, Oxford 2015.
4. Convention on the Contintental Shelfs, United Nations, *Treaty Series*, vol. 499.

5. Convention on Fishing and Conservation of the Living Resources of the High Seas, United Nations, *Treaty Series*, vol. 559.
6. Convention on High Seas, United Nations, *Treaty Series*, vol. 450..
7. Convention on the Rights and Duties of States, *165 LNTS 19*, Montevideo, 26 December 1933.
8. Convention on Territorial Sea and the Contiguous Zone, United Nations, *Treaty Series*, vol. 516.
9. Convention relating to the Status of Refugees, United Nations, *Treaty Series*, vol. 189, p. 137.
10. Crawford, James, *The Creation of States in International Law*, second edition, Oxford University Press, Oxford-New York 2006.
11. Crawfod, James, *Brownlie's Principles of Public International Law*, eight edition, Oxford University Press, Oxford 2012.
12. Degan, Vladimir Đuro, *Međunarodno pravo*, treće izdanje, Školska knjiga, Zagreb 2011.
13. Dimitrijević Duško, „Sporovi u Južnom kineskom moru i međunarodno pravo", *Pravni život*, br. 12/2016.
14. Dimitrijević, Vojin, Račić, Obrad, Đerić, Vladimir, Papić, Tatjana, Petrović, Vesna, Obradović, Saša, *Osnovi međunarodnog javnog prava*, treće izdanje, Beogradski centar za ljudska prava, Dosije, Beograd 2012.
15. Етински, Родољуб, *Међународно јавно право*, четврто проширено и допуњено издање, ЈП Службени гласник, Београд 2010.
16. Focarelli Carlo, *International Law*, Edward Elgar Publishing, Cheltenham – Northampton 2019.
17. Freestone, David, "The Law of the Sea Convention at 30: Successes, Challenges and New Agendas", u Freestone David (ed.), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*, Martinus Nijhoff Publishers, Leiden – Boston 2013.
18. Harrison, James, *Making the Law of the Sea*, Cambgridge University Press, Cambridge – New York – Melbourne – Madrid – Cape Town – Singapore – São Paulo – Delhi – Tokyo – Mexico City 2011.
19. Human Rights Committee, *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, 7 January 2020.
20. Ibler, Vladimir, *Rječnik međunarodnog javnog prava*, drugo, izmjenjeno i dopunjeno izdanje, Informator, Zagreb 1987.
21. International Convention for the Safety of Life at Sea, United Nations, *Treaty Series*, vol. 1184, 1185, p. 2.
22. International Court of Justice, Request for Adisory Opitnion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023 – Obligation of States in Respect of Climate Change.

23. International Law Association, Johannesburg Conference (2016), International Law and Sea Level Rise, Interim Report, Johannesburg, 2016.
24. International Law Association Committee on International Law and Sea Level rise, Inter-sessional Meeting, Loput, Croatia, 15-16 September 2017.
25. International Law Association, Sydney Conference (2018), International Law and Sea Level Rise, Report, Sydney, 2018.
26. International Law Association, Resolution 5/2018, Committee on International Law and Sea Level Rise, the 78th Conference of the International Law Association, Sydney, Australia, 19-24 August 2018.
27. International Law Association, Resolution 6/2018, Committee on International Law and Sea Level Rise, the 78th Conference of the International Law Association, Sydney, Australia, 19-24 August 2018.
28. International Law Association, Report of the Seventy-eighth Conference, held in Sydney, 19–24 August 2018, London 2019, pp. 866–915.
29. International Law Association, Report Lisbon Conference 2022, International Law and Sea Level Rise.
30. International Law Commission, Seventy-second session Geneva, 27 April–5 June and 6 July–7 August 2020, Sea-level rise in relation to international law, First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/740, 28 February 2020.
31. International Law Commission, Seventy-third session Geneva, 18 April–3 June and 4 July–5 August 2022, Sea-level rise in relation to international law, Second issues paper by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/752, 19 April 2022.
32. International Law Commission, Seventy-fourth session Geneva, 24 April–2 June and 3 July–4 August 2023, Sea-level rise in relation to international law, Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law, A/CN.4/761, 13 February 2023.
33. Jennings, Robert, Watts, Arthur, *Oppenheim's International Law: Volume 1 Peace*, Ninth edition, Longman, London-New York 1992.
34. Kreća, Milenko, „O osnovnim obeležjima novog prava mora", *Anali Pravnog fakulteta u Beogradu*, 1–3/1986.
35. Kreća, Milenko, "A Few Remarks on the Theoretical Basis of the New Law of the Sea", u Ando Nisuke, McWhinney, Wolfrum Rudiger (eds.), *Liber Amicorum Judge Shigeru Oda*, Kluwer Law International, The Hague – London – New York 2002.
36. Крећа, Миленко, *Међународно јавно право*, шесто издање, Правни факултет Универзитета у Београду, Београд 2012.

37. Krivokapić, Boris, *Enciklopedijski rečnik međunarodnog prava i međunarodnih odnosa*, JP Službeni glasnik, Beograd 2010.
38. Krivokapić Boris, *Međunarodno javno pravo*, treće izmenjeno i dopunjeno izdanje, Poslovni i pravni fakultet, Institut za uporedno pravo, Beograd 2017.
39. Pacific Islands Forum, Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, 6 August 2021.
40. Platzöder, Renate "Conferences on the Law of the Sea", u Bernhard Rudolf (ed.), *Encyclopedia of Public International Law*, Elsevier Science Publishers, Amsterdam 1989.
41. Rothwell, Donald R., Stephens Tim, *The International Law of the Sea*, Hart Publishing, 2010.
42. Rothwell, Donald R. (eds.), *Baselines under the International Law of the Sea, Reports of the International Law Association Committee on Baselines under the International Law of the Sea*, Brill, 2019.
43. Shaw, Malcolm N., *International Law*, eight edition, Cambridge University Press, Cambridge 2017.
44. Stojanović, Bojan, „Konstatacija Komiteta za ljudska prava u slučaju Joane Tejtiota protiv Novog Zelanda i njen značaj za međunarodno pravo", *Zbornik radova Pravnog fakulteta u Nišu*, 2020, god. 59, br. 87.
45. Stojanović, Bojan, „Kriza multilateralizma u oblasti upravljanja savremenim migracijama i odgovori međunarodne zaštite", Dimitrijević Duško (ur.), *Srpski godišnjak za međunarodno pravo*, Vol. 2, 2022.
46. Tanaka, Yoshifumi, *The International Law of the Sea*, Third edition, Cambridge University Press, Cambridge 2019.
47. United Nations Convention on the Law of Sea, United Nations, *Treaty Series*, vol. 1833, 1834, 1835.
48. UN General Assembly, Seventy-third Session Supplement No. 10, Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018), A/73/10, 2018
49. UN Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, annex.
50. UNHCR, *People Forced to Flee History, Change and Challenge*, Oxford University Press, Oxford 2022.
51. Vienna Convention on the Law of Treaties, *United Nations*, *Treaty Series*, vol. 1155.
52. Wallace, Rebecca M.M., *International Law*, Forth edition, Sweet and Maxwell, London 2002.

FRAGMENTISANOST KAO INHERENTNA ODLIKA MEĐUNARODNOG JAVNOG PRAVA: DISKUSIJE, PRAKSA I VREDNOSNI SUDOVI

Antonia JUTRONIĆ PANTIĆ*

APSTRAKT

Iako fragmentacija međunarodnog javnog prava predstavlja jednu od najaktuelnih tema u međunarodnopravničkim krugovima, koji prepoznaju izvesne disonance u primeni pravila i principa međunarodnog javnog prava, dovodeći u pitanje ili preispitivanje njegovo jedinstvo, koherentnost i univerzalnost, prizma sagledavanja kontrole ili sistematičnosti u toku procesa stvaranja pravnih pravila međunarodnog javnog prava, nije podvođena pod osobinu koja pripada međunarodnom javnom pravu – inherentna fragmentisanost. Nasuprot tome, fragmentacija je oduvek sagledavana kao nov fenomen i razvojna tendencija međunarodnog javnog prava, posebno u drugoj polovini 20. veka. S tim u vezi, najveći deo pravničke literature, koja obrađuje temu fragmentacije, bavi se uzrocima i posledicama fragmentacije međunarodnog javnog prava, dok diskusije o međunarodnom pravu kao sistemu u velikoj meri ostaju na nivou opšteg optimizma iz druge polovine 20. veka da je međunarodno pravo jasno definisan sistem i u formalnom smislu ne trpi velike promene, danas otelotvorene kroz posledice delovanja velikog broja činilaca u sistemu, koju branoci trenutkog međunarodnog poretka definišu ili preobjašnjavaju kroz pravni pluralizam. U cilju preispitivanja fragmenisanosti međunarodnog javnog prava, kao osobine svojstvene međunarodnom javnom pravu, s obzirom na njegov istorijski kontekst i uobličavanje kao posebne grane prava, u ovom radu se najpre ispituju različite struje doktrine o jedinstvu i fragmentaciji međunarodnog javnog prava, dok se, nakon toga, analizira i praksa primene međunarodnog javnog prava uz pretpostavku postojanja pravnog jedinstva i konstataciju proliferacije izvora, subjekata i entiteta od značaja za međunarodno pravo. Na kraju, u cilju dokazivanja da je fragmentisanost međunarodnog javnog prava njegova inherentna osobina, zbog nedostatka institucionalno kontrolisanog procesa njegovog razvoja, biće razmotrena i uloga vrednosnih sudova koji predstavljaju pokretačku snagu razvoja međunarodnog javnog prava iz kojih se, danas, kao tendencija razvoja međunarodnog javnog prava, izdvaja gubitak sveukupne kontrole nad njegovom primenom.

Ključne reči: Međunarodno javno pravo, fragmentisanost, pravni sistem, pravni pluralizam, vrednosni sudovi

* Ministarstvo spoljnih poslova Republike Srbije. E-mail: antonia.jutronic@gmail.com

UVOD

Postoje li mentalne predstave o međunarodnom javnom pravu? Zbog čega njegova priroda i dalje predstavlja predmet diskusije u miljeima međunarodnih pravnika? Zbog čega Izveštaj Komisije Ujedinjenih nacija za međunarodno pravo „Fragmentacija međunarodnog prava: Problemi koji proističu iz diversifikacije i ekspanzije međunarodnog prava" (Izveštaj Komisije UN) iz 2006. godine ne donosi vrednosni sud o fragmentaciji međunarodnog javnog prava? Ukoliko se u Izveštaju Komisije UN fragmentacija međunarodnog javnog prava priznaje kao postojeći proces i iznose vidovi fragmentacije, neminovno je da ona postoji, te kao proces ima svoje tokove i razvoje. U smislu objektivnog prava, međunarodno javno pravo, uvažavajući tvrdnju da je u pitanju jedna od grana prava, poseduje svoje norme koje su organizovane u povezanu celinu – odnosno sistem. Međutim, u promišljanju međunarodnog javnog prava, gotovo je neizostavno pomenuti njegov odnos sa unutrašnjim pravom, njegovim subjektima i izvorima. Dalje, instituti unutrašnjeg prava i dan danas imaju veliku uticaj na promišljanje i uređenje međunarodnog javnog prava, kao svojevrsnog derivata prava koji upravlja međunarodnim odnosima ili koji predstavlja posledicu međunarodnih odnosa. Ako za Hansa Kelzena (*Hans Kelsen*) država, kao entitet koji postoji pre prava, uređuje pravo, to znači da je međunarodno javno pravo ništa više od pravnog sistema u određenom trenutku.[1] Dakle, podložno je promenama, u toj meri u kojoj se države, odnosno stvaraoci i subjekti međunarodnog javnog prava sa time saglase, jer obaveznost njegovih pravnih pravila proističe iz volje njegovih subjekata. Tragajući za kantovskim večnim mirom – *paix perpétuelle* – Kelzen brani primat međunarodnog prava nad nacionalnim pravom, jer se međunarodnim pravom postiže političko jedinstvo i brani postojeći međunarodni poredak. Međutim, u vreme kada je pisao i stvarao Kelzen, i kada u teorijama međunarodnih odnosa dominiraju teorije realizma i liberalizma, postoji vrlo neznatan upliv drugih humanističkih disciplina u promišljanje prava. Sa krajnjim optimizmom, pripadnici struja realizma i liberalizma brane međunarodno pravo, kao ono što uređuje odnose država u međunarodnoj decentralizovanoj zajednici, gde se države bore za uvećanje vlasti i moći, ili zajednici u kojoj je uspostavljeno političko jedinstvo putem međunarodnog prava, te države ostvaruju svoje interese putem saradnje, poštujući pravna pravila međunarodnog javnog prava. Skepticizam prema jedinstvu međunarodnog javnog prava i elementima koje ga čine posebnom granom prava, javlja se u vreme kada međunarodna saradnja prevazilazi okvire vojnog nadmetanja i ostvarivanja mira putem izopštavanja rata iz prirodnog prava država iz vremena klasičnog međunarodnog prava. Ekonomska dobit, blagostanje građana, pojava ljudskih prava, zaštita životne sredine i drugi faktori u sve većoj meri se upliću u procese evolucije savremenog međunarodnog javnog prava. S obzirom na tu evoluciju kada se međunarodno javno pravo razgranjava u podgrane, poput diplomatsko-

[1] Hans Kelsen, "Théorie générale du droit international public. Problèmes choisis", *Recueil des cours de l'Académie de Droit International de la Haye*, 1932, Tome 42, p. 171.

konzularnog prava, Bruno Sima (*Bruno Simma*) počinje da uviđa samodovoljne režime (*self-contained regimes*) i sluti fragmentisanost međunarodnog javnog prava još 1985. godine, više od deceniju nakon što sociolog pripadnik škole konstruktivizma Niklas Luhman (*Niklas Luhmann*) predviđa duboku fragmentisanog društva u smislu da će norme biti zamenjene kognitivnim aspiracijama, što će tranformisati društvo u globalizovano svetsko društvo.[2] Luhman, s aspekta sociologije, hrabro iznosi da će se radikalna fragmentacija desiti po društvenim, a ne teritorijalnim linijama, jer težimo jednistvenom svetskom društvu.[3] Šta se u tom smislu događa sa vrednosnim sudovima, kada svetsko društvo, kakvim ga naziva Luhman u svom delu pod istim nazivom – „Svetsko društvo" (*Die Weltgesellschaft*), doživljava tj. prima k znanju da je međunarodno javno pravo fragmentisano odnosno doživljava proces fragmentacije? Neki međunarodni pravnici, direktno ili indirektno, baš pravni redukcionizam vide kao pretnju za ostvarenje jedinstva međunarodnog prava, odnosno uviđaju da odbacivanje realnosti upliva drugih naučnih disciplina iz oblasti društvenih nauka ne može ići na ruku postizanju jedinstva međunarodnog prava. Razumevši da je nemoguće sagledavati jedinstvo međunarodnog javnog prava u odnosu na idealno ustrojen hijerarhijski sistem nacionalnih prava država, Andreas Fišer-Leskano (*Andreas Fischer-Lescano*) i Gunter Tojbner (*Gunther Teubner*) smatraju da za razumevanje i tumačenje problema fragmentacije međunarodnog prava nije dovoljno posezati samo za pravnim rešenjima, jer kolizija pravnih normi je ogledalo strategija koje donose kolektivni učesnici u međunarodnim odnosima, sledeći „specijalne interese", a njihov zajednički članak objavljen 2004. godine nosi pesimističan naslov „Kolizija režima: Uzaludna potraga za pravnim jedinstvom naspram fragmentacije svetskog prava". Ukoliko se fragmentisanost međunarodnog javnog prava podvede pod proces stvaranja fragmenata pretpostavljene celine, te uzme i definicija fragmentacije međunarodnog javnog prava iz Izveštaja Komisije UN da je u pitanju „pojava specijalizovanih i relativno autonomnih sfera socijalnih aktivnosti i struktura koje vode ka konfliktu između pravila ili sistema pravila, devijacije institucionalne prakse, uz mogućnost gubljenja pravne perspektive", ne može se odoleti utisku da izrazi poput „konflikt", „devijacija" i „gubljenje" ukazuju na proces koji sam po sebi nije dobar.[4] Međutim, korišćenje ovih izraza od strane različitih eminentnih ličnosti iz miljea međunarodnog prava ne podrazumeva

[2] Isabelle Buffard, "Une relecture de la théorie de sous-systèmes en droit international", *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner,* Isabelle Buffard, James Crawford, Alain Pellet, Stephan Wittich (Eds), Martinus Nijhoff Publishers, Boston, 2008, pp. 16–17.

[3] Andreas Fischer-Lescano, Gunther Teubner, "Collisions de régimes: La recherche vaine de l'unité juridique face à la fragmentation du droit mondial", *Revue internationale de droit économique,* 2013/1, t. XXVII, pp. 999–1000.

[4] "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (Apr.13, 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (Finalized by Martti Koskenniemi), p. 11.

njihovo mišljenje ni vrednosni sud o fragmentaciji međunarodnog javnog prava, poput onog kakvo su na Generalnoj skupštini Ujedinjenih nacija (Generalnoj skupštini UN) iznosile sudije Međunarodnog suda pravde svojevremeno, poput Stefena Švebela (*Stephen Schwebel*) i Žilbera Gijoma (*Gilbert Guillaume*). Braneći poziju Međunarodnog suda pravde, i Švebel i Gijom u oštrom tonu ukazuju na razlita preklapanja nadležnosti sudova i različitog tumačenja normi međunarodnog prava od strane različitih međunarodnih sudskih instanci.[5] Za njih, ne samo da fragmentacija ima negativno značenje, već sama proliferacija sudova ima po sebi negativan uticaj jer dovodi do erozije autoriteta i ugleda Međunarodnog suda pravde, a Gijom govori i o potpunom gubitku sveukupne kontrole nad primenom normi međunarodnog prava.[6] Na sličnim pozicijama je i Pjer-Mari Dipi (*Pierre-Marie Dupuy*), koji izražava u svojim stavovima „strah" od fragmentacije.[7] S druge strane, postoje i oni pravnici koji vide i pozitivne strane fragmentacije, poput Герхарда Хафнера (*Gerhard Hafner*) koji nalazi da su pozitivne strane fragmentacije međunarodnog prava stvaranje sekundarnih normi odnosno ekspanzija međunarodnog prava, te da time ono ne gubi jedinstvo.[8] Takođe, i Rozalin Higins (*Rosalyn Higgins*), nekadašnja sudija u Međunarodnom sudu pravde, što se tiče institucionalne fragmentacije međunarodnog prava, smatra da svi sudovi u međunarodnoj zajednici ostvaruju dobru saradnju, te iznosi i stav da savetodavna mišljenja Međunarodnog suda pravde, s obzirom da nisu obavezujuća, ne doprinose razvoju međunarodnog prava.[9] Vrednosni sudovi o fragmentaciji neminovno postoje, kao što postoje i vrednosni sudovi koje svesno ili ne, pripadnici pravne akademije tkaju u svoja istraživanja, spise, pravna mišljenja, pa čak i presude. S tim u vezi postoje mentalne predstave o međunarodnom pravu o kojima piše Emaniel Žuane (Emmanuele Jouanet).[10] Na način na koji su internacionalisti u 19. veku uzdizali međunarodno pravo, danas sudije Međunarodnog suda pravde štite autoritet pomenutog suda. Međutim, multiplikacija prava, proliferacija subjekata međunarodnog javnog prava, internacionalizacija i pluralizam danas ne

[5] Anja Eikermann, *Forests in International Law: Is there Really Need for An International Forest Convention*, Springer International Publishing, New York, 2015, p. 159.

[6] Martti Konskenniemi, Paivi Leino, "Fragmentation of International Law: Postmodern Anxieties", *Leiden Journal of International Law*, 2002, Vol. 15, Issue 3, p. 555.

[7] Pierre-Marie Dupuy, "Sur le maintien ou la disparition de l'unité de l'ordre juridique international'', *Harmonie et contradictions en droit international*, Raffa Ben Achour, Slim Laghmani (Eds), Pedone, Paris, 1996, p. 19.

[8] Gerhard Hafner, „Pros and Cons Ensuing from Fragmentation of International Law", *Michigan Journal of International Law,* 2004, Vol. 25, Issue 4, pp. 850–851.

[9] Rosalyn Higgins, "Respecting Sovereign States and Running a Tight Courtroom", *International & Comparative Law Quarterly*, 2001, Vol. 50, Issue 1, p. 122.

[10] Emmanuele Jouannet, "L'influence des principes généraux face aux phénomènes de fragmentation du droit international contemporain ou l'ambivalence des principes généraux face au caractère étrange et complexe de l'ordre juridique international", article redigé dans le cadre de la conférence de la SEDI en 2005, p. 7. Internet : https://www.sedi.fr ,12.07.2023.

pojednostavljuju sagledavanje fenomena fragmentacije međunarodnog javnog prava u smislu identifikovanja jasnih razvojnih tendencija. Zbog toga je važno i razmotriti da li je fragmentisanost međunarodnog javnog prava njegova inherentna odlika koja nije sagledavana sistematski tokom godina njegovog razvoja u 20. veku, te je 21. vek kroz jedan institucionalno nekontrolisan proces doneo „probleme" i „poteškoće", proizašle iz kolizija samodovoljnih režima, te je tendencija razvoja u međunarodnom pravu onaj gubitak sveukupne kontrole na koju je upozoravao sudija Gijom. U cilju analize, najpre će se razmotriti diskusije o fragmentaciji međunarodnog javnog prava, zatim i praksa, koja podrazumeva širok spektar subjekata međunarodnog prava i drugih entiteta od značaja za međunarodno pravo, kako bi se prikazao pregled vrednosnih sudova, koji imaju značajnu ulogu u svim društvenim procesima, pa i u razvoju međunarodnog javnog prava.

DISKUSIJE O FRAGMENTACIJI NERAZDVOJIVE OD DISKUSIJA O PRIRODI MEĐUNARODNOG JAVNOG PRAVA

Savremeno međunarodno pravo poznaje autoritativnu numerizaciju svojih izvora i u tom smislu sudske odluke i doktrine najpozvanijih stručnjaka međunarodnog javnog prava raznih naroda, služe kao pomoćno sredstvo za utvrđivanje pravnih principa.[11] Dalje, doktrinom se mogu služiti i sudije Međunarodnog suda pravde, ukoliko neko pravo nije sadržano u međunarodnim ugovorima ili običajima, kako bi popunili pravne praznine, što sam član 38a Statua Međunarodnog suda pravde navodi. Dakle, iako ne spada u kategoriju primarnih oblika izvora međunarodnog prava, doktrina može biti vrlo korisna za promišljanje prava. Da je pravo najbolja škola imaginacije potvrđuju i brojne diskusije koje se bave principima međunarodnog prava, a prema rečima Stefena Krasnera (*Stephen Krasner*) zadatak pravnika je uglavnom razjašnjavanje šta bi moglo biti.[12] S tim u vezi, u literaturi je posvećena velika pažnja principima međunarodnog javnog prava čija je uloga da osiguraju jedinstvo, univerzalnost i koherentnost međunarodnog javnog prava. Osnovno pitanje koje se postavlja je da li uopšte postoje principi svojstveni međunarodnom pravu, poput onih koji postoje u nacionalnim pravima, a da pritom nisu izvedeni iz zajedništva principa sadržanih u pravima prosvećenih naroda, što takođe osim sudskih odluka i pravne doktrine čine pomoćno sredstvo za tumačenje međunarodnog prava, kako navodi Statut Međunarodnog suda pravde. Vrlo značajno mesto u pravnoj literaturi zauzimaju tzv. Braunlijevi principi. Analizirajući savremeno međunarodno pravo od 1945. do 1975. godine, Jan Braunli (*Ian Brownlie*) objavljuje klasičan

[11] Milenko Kreća, *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, Službeni glasnik, Beograd, 2012, str. 85.

[12] Stephen D. Krasner, "International Law and International Relations: Together, Apart, Together?", *Chicago Journal of International Law*, 2000, Volume 1, Number 1, Article 10, p. 99.

udžbenik međunarodnog prava pod nazivom „Principi međunarodnog prava", u kojem između ostalog iznosi tvrdnje da je međunarodno javno pravo sistem suštinski zasnovan na suverenoj jednakosti država i da je pravni poredak međunarodne zajednice uspostavljen Poveljom Ujedinjenih nacija (Povelja UN). Braunli izlaže da je Povelja UN u sebi postavila principe po kojima međunarodna zajednica treba da fukcioniše i da se države članice Ujedinjenih nacija (UN) ujedno obavezuju da će unapređivati te principe, što između ostalog proizvodi i međunarodnopravne obaveze za članice UN. S obzirom da je u naučnim diskusijama prevladalo mišljenje da postoje principi odnosno načela međunarodnog prava, mnogi autori su se bavili njihovom funkcijom i pitanjem njihove identifikacije. Gore izneto Braunlijevo stanovište je umnogome uticalo na mnoge međunarodne pravnike da osnovni principi međunarodnog javnog prava služe za održavanje celovitosti njegovog sklada i sistema.[13] Tako Manuel Dijez de Velasko (*Manuel Diez de Velasco*), takođe, smatra da u materijalnom smislu univerzalnost i jedinstvo međunarodnog javnog prava obezbeđuju načela međunarodnog javnog prava.[14] Međutim, ne postoji iscrpna lista osnovnih principa međunarodnog prava, već shodno izučavanju tzv. Braunlijevih principa se dolazi do zaključka da su oni sadržani u Povelji UN. Imajući to u vidu, važno je prikazati način identifikacije osnovnih principa međunarodnog prava, ali i sam značaj Povelje UN kroz prizmu konstitucionalista, jer se u pravnim diskusijama jedinstvo međunarodnog prava i fragmentacija međunarodnog javnog prava često dovode u *juxta* poziciju ili u međusobno isključujuće pojave i procese. U samom prvom članu Povelje UN, koji definiše ciljeve stvaranja UN, navodi se najpre održanje međunarodnog mira i bezbednosti i u tu svrhu preduzimanje efikasnih kolektivnih mera radi sprečavanja i otklanjanja pretnji miru i suzbijanje akata agresije ili drugih povreda mira, kao i ostvarenje mira mirnim sredstvima, a u skladu sa načelima pravde i međunarodnog prava, rešavanja međunarodnih sporova ili situacija koje bi mogle da dovedu do povrede mira.[15] Dalje, navodeći i ostale ciljeve UN, kao i načela u skladu sa kojima organizacija treba da ih dostigne, izdvajaju se sledeća načela/principi međunarodnog prava: načelo suverene jednakosti država, načelo nepovredivosti teritorijalnog integriteta i političke nezavisnosti država, načelo nemešanja u unutrašnje poslove država, pravo na samoopredeljenje naroda, obaveza uzdržavanja od pretnje ili upotrebe sile u međunarodnim odnosima, obaveza rešavanja sporova mirnim putem, obaveza saradnje država u cilju razvijanja prijateljskih odnosa i obaveza savesnog

[13] Vojin Dimitrijević, Obrad Račić, Vladimir Đerić, Tatjana Papić, Vesna Petrović, Saša Obradović, *Osnovi međunarodnog prava,* Beogradski centar za ljudska prava, Beograd, 2005, str. 54.

[14] Manuel Diaz de Velasco Vallejo, *Les organisations internationales*, Economica, Paris, 2002, p. 101.

[15] Charter of the United Nations and the Statute of the International Court of Justice, [ST/]DPI/2587, Charter of the United Nations, Article 2, Public Documentation, San Francisco, 1945. Internet: https://www.un.org/en/sections/un-charter/un-charter-full-text/, 16.07. 2023.

ispunjavanja obaveza u dobroj veri. Međutim, njihovu potvrdu osnovnih načela međunarodnog javnog prava, obezbedio je u najvećem broju slučajeva Međunarodni sud pravde kroz svoju jurisprudenciju. Dakle, nije kroz misaone diskusije u pravnoj literaturi na samostalan način utvrđeno da su pomenuti principi osnovni principi međunarodnog javnog prava, već su zaključci izvođeni kroz proces izricanja prava, o čemu će više biti reči u drugom delu. S druge strane, kada je reč o diskusijama, one su kroz prizmu sagledavanja jedinstva međunarodnog javnog prava doprinele uzdizanju Povelje UN u rang ustava međunarodne zajednice, u materijalnom i/ili formalnom smislu, čemu treba posvetiti dužnu pažnju. Konstitutivni tokovi u međunarodnom pravu nisu pojava koja se javlja kao odgovor na fragmentaciju koja u literaturi postaje aktuelna sedamdesetih i osamdesetih godina prošlog veka. Promišljanje postojanja ustava međunarodne zajednice je daleko starije. Alfred Verdros (*Alfred Verdross*), još 1926. godine, pretpostavljajući jedinstvo međunarodnog i unutrašnjeg prava, ispituje mogućnost postojanja jednog takvog ustava u međunarodnoj zajednici, jer za njega međunarodno pravo nije agregat fragmenata, već univerzalni sistem zasnovan na pravnom uređenju. Verdros u kelzenijskom duhu predviđa da takav jedan ustav mora sadržati osnovnu normu tj. osnovne principe koji prožimaju međunarodno pravo i određuju njegove subjekte, izvore i nadležnosti država.[16] Dalje, gotovo istovremeno sa objavom Braunlijevih „Principa međunarodnog prava, u optimističnom duhu vremena 1976. godine, Verdros i Sima objavljuju zajednički rad u kojem tvrde da je Povelja UN dostigla nivo ustava međunarodne zajednice odnosno univerzalne zajednice država. Takav optimizam se tumači i talasom dekolonizacije koji je potvrdio suverenu jednakost država, koje su u velikom broju slučajeva prihvatile Povelju UN tj. obaveze koje iz nje proizilaze, dok manjinski deo država, iako to nije uradio, u principu je prihvatio osnovna načela sadržana u Povelji UN, te je time njen autoritet neosporan.[17] I sam Hans Kelzen, u periodu između dva svetska rata, nije uzdržan na temu mogućnosti postojanja svetskog ustava, koji vidi kao najviši pravni dokument u pozitivnom pravu.[18] Uglavnom, tako su smatrali internacionalisti u vreme kada je Društvo naroda obećavalo stvaranje novog svetskog poretka i međunarodno pravo mira, koje je izopštavalo rat iz međunarodnih odnosa, te su i Imanuel Kant (*Immanuel Kant*) i Jirgen Habermas (*Jürgen Habermas*), smatrani do tad utopistima, dobili na značaju kao prekursori ideje o svetskom ustavu u materijalnom smislu na osnovu koga su garantovani međunarodni mir i bezbednost. Međutim, tek posle pada gvozdene zavese, konstitucionalisti ponovo stiču značaj u naučnim diskusijama i ponovo se postavlja pitanje postojanja univerzalnog ustava

[16] Alfred Verdross, "Règles générales du droit international de la paix*", Recueil des cours de l'Académie de Droit International de la Haye*, 1929, Tome 30, p. 283.

[17] Alfred Verdross, Bruno Simma, *Universal International Law (Theory and Practice)*, Duncker & Humblot, Berlin, 1976, p. 600.

[18] Hans Kelsen, *op.cit.*

međunarodne zajednice, ali ovog puta u okvirima pravnog pluralizma i priznanja postojanja pojave fragmentacije međunarodnog javnog prava. I samo promišljanje ustava ide dalje od razumevanja da ustav mora biti sadržan u jednom dokumentu, kakav je Povelja UN. U tom smislu, najveći doprinos imaju pravnici anglosaksonskog prava poput Filipa Alota (*Philip Allott*), koji razlikuje tri naličja ustava: pravni ustav, realni ustav i idealni ustav, što znači da se ustav ne može posmatrati samo kao pravni dokument već kao odraz političkog uređenja kojim društvo želi da se obaveže u budućnosti.[19] Na isti način kao što se menja način razmisljanja o svojstvu međunarodnog ustava, tako se menja i percepcija o Povelji UN kao jedinom dokumentu koji se može smatrati ustavom međunarodne zajednice, iako su UN i danas jedina međunarodna organizacija koja okuplja sve suverene države sveta. Tako na primer Majr Mekdagl (*Myres McDougal*), u potpunosti braneći pravni pluralizam kog odlikuju raznovrsni međunarodnopravni subjekti, činioci i izvori, tvrdi da je Povelja UN deo svetskog konstitutivnog procesa u datom trenutku, tako da predsavlja skup konstitutivnih odluka.[20] Što se tiče dokumenata koje bi u materijalnom smislu trebalo razmatrati kao ustav, što isključuje ekskluzivnost Povelje UN, Kristijan Tomušat (*Christian Tomuschat*) uključuje i druge međunarodne ugovore koje su ratifikovale gotovo sve suverene države i članice UN ili čije su norme postale običajne prirode poput: Međunarodni pakt o građanskim i političkim pravima (1966), Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima (1966), Konvencija o sprečavanju i kažnjavanju zločina genocida (1948), Bečka konvencija o diplomatskih odnosima (1961) i Konvencija o pravu mora (1982).[21] S tim u vezi, kada je reč o ustavu u materijalnom smislu, on bi kao u nacionalnom pravu trebalo da sadrži u hijerarhijskom smislu norme višeg reda poput imerativnih normi, normi *erga omnes* i principa koji su nadređeni ostalim normama i principima. Tako, ne mogu se sve norme više hijerarhijske vrednosti naći samo u Povelji UN, što se posebno odnosi na međunarodnopravne običaje koji do sada nisu ni ušli u proces kodifikacije. Iz ovih razloga An Peters (*Anne Peters*) smatra da Povelja UN sadrži ustavne vrednosti međunarodne zajednice, ali ne poseduje monopol nad njima.[22] Pravni pluralizam, ili što bi skeptici nazvali fragmentacijom, posebno je značajan u smislu promišljanja jedinstva ili nejedinstva međunarodnog javnog prava, kada se postavi pitanje zaštite ljudskih prava, jer pojedinac u savremenom međunarodnom javnom pravu postaje i subjekat međunarodnog javnog prava, a

[19] Bardo Fassbender, "The United Nations Charter as Constitution of the International Community", *Columbia Journal of International Law,* 1998, Vol. 36, No. 3, pp. 531–538.

[20] William Michael Reisman, "The Constitutional Crisis in the United Nations", *American Society of International Law,* 1993, Vol. 87, Issue 1, pp. 82–100.

[21] Christian Tomuschat,"Obligations Arising for States Without and Against Their Will'', *Collected Courses of the Hague Academy of International Law*, 1993, Tome 241, p. 299.

[22] Ronald Macdonald, "The Charter of United Nations in Constitutional Perspective", *Australian Yearbook of International Law,* 1999, Vol. 20, p. 228.

nijedno od osnovnih načela međunarodnog prava koji se tiče ljudskih prava nije sadržano u Povelji UN. Iz tog razloga Povelja UN, za autore poput Antonia Kankadoa Trinidadea (*Antônio Cançado Trinidade*) ne prati razvojne tendencije u međunarodnom javnom pravu odnosno ne odražava realnost međunarodnih odnosa, koji su kao i u vreme izopštavanja ratovanja iz međunarodnih odnosa bili zasnovani na principu humanosti tj. humanost je bio cilj kojima su težili.[23] Tako jedna struja konstitucionalista konstatuje i odsustvo mogućnosti da se pojedinci obrate nekakvom svetskom sudu kada je u pitanju kršenje njihovih ljudskih prava.[24] I Jan Braunli uviđa značaj pojave međunarodnog prava ljudskih prava, te ukazuje na opasnost stvaranja partikularnih grana prava, jer zbog samo decentralizovanog načina nastanka normi međunarodnog prava, može doći do sukoba odnosno konflikta između primarnih i sekundarnih normi koje proizilaze iz specijalizovanih grana prava, o čemu je Bruno Sima gotovo istovremeno pisao u „Samodovoljnim režimima", analizirajući konflikt primarnih normi međunarodnog javnog prava sa normama sadržanim u diplomatsko-konzularnom pravu.[25] On, takođe, kasnijih godina tvrdi da korišćenje pojma pravnog pluralizma čini da diversifikacija međunarodnog prava, u svim svojim oblicima - subjektima, izvorima, institucijama, ne proizvodi nužno negativne posledice po jedinstvo međunarodnog javnog prava, kakve stipuliše fragmentacija međunarodnog javnog prava. Drugi autori su išli i korak dalje tvrdeći da u međunarodnom pravu postoji više razvojnih tendencija. Tako Kempbel Meklakhlan (*Campbell McLahlan*) idetifikuje čak četiri procesa: multilateralizam, institucionalizaciju, judicizaciju - pojavu različitih sudova i tribunala i pluralizam. Za njega pluralizam predstavlja uvećanje broja subjekata i entiteta od značaja za međunarodno pravo, a svi ovi procesi koji prožimaju međunarodno pravo čine dobru podlogu za njegovu fragmentaciju tj. nekoherentnost njegovih sastavnih delova na šta je ukazivao i sam Braunli.[26] Međutim, Meklakhlan drži stranu konstitucionalistima tvrdeći da međunarodno pravo odražava vrednosti čovečanstva, a ne realpolitiku međunarodnih odnosa.[27] Iz gore izloženog važno je konstatovati da mnogi konstitucionalisti, težeći ustrojavanju i kontrolisanju jedinstva međunarodnog javnog prava putem svetskog ustava, ne vide u samodovoljnim režimima

[23] Vidi u: Antônio Cançado Trinidade, *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff Publisher, Boston, 2010.

[24] Vidi u: Geir Ulfstein, "Do We Need a World Court for Human Rights", *Law at War – the Law as it was and the Law as it Should Be*, Ola Engdahl and Pål Wrange (Eds), Leiden/Boston 2008, pp. 261–272.

[25] Ian Brownlie, „Problems Concerning the Unity of International Law", *Le droit international à l'heure de sa codification: Etudes en honneur de Roberto Ago,* Pierluigi Lamberti Zanardi (Eds), *Guiffre, Milano* 1987, p. 151.

[26] Campbell McLachlan, "After Baghdad: Conflict or Coherence in International Law", *New Zealand Journal of Public and International Law*, New Zealand Centre for Public Law and contributors, Wellington, 2003, p. 33.

[27] *Ibid*, pp. 46–47.

kontratežu procesu konstutucionalizacije, čak ni u slučaju partikularnih konstitucionalizama poput Evropske unije (EU) ili Svetske zdravstvene organizacije (STO) koje u praksi teže ponekad i pravnom izolacionizmu u odnosu na opšta načela međunarodnog prava. Pojava specijalizovanih i samodovoljnih režima za konstitucionaliste nije nužno pretnja po jedinstvo međunarodnog prava, posebno kada u Povelji UN ne vide ustav međunarodne zajednice i ne sagledavaju ustav u jednom jedinom dokumentu tj. svojevrsnom međunarodnom ugovoru poput Povelje UN. Kao što je gore predstavljeno u pravnoj literaturi je promišljanje jedinstva, koherentnosti i univerzalnosti međunarodnog prava gotovo neraskidivo sa pitanjem poimanja sistema međunarodnog prava i ispitivanja mogućnosti postojanja njegovih disfunkcionalnih fragmenata. Mišljenja na temu fragmentisanosti mogu biti podeljena kada je reč o funkcionalnosti međunarodnog javnog prava u smislu konflikta normi kada dođe do njegove primene. Iz tog razloga je za ovu analizu značajno da se ispitaju svi subjekti i činioci u kontekstu primene međunarodnog javnog prava.

PRIMENA MEĐUNARODNOG PRAVA KAO POTVRDA DECENTRALIZOVANOG PLURALIŠTIČKOG GLOBALNOG DRUŠTVA

Kao što je već rečeno konflikti normi u međunarodnom javnom pravu se ne uviđaju na teorijskom nivou, već tek kada dođe do njihove konkretne primene, iz prostog razloga odsustva institucije na superiornom hijerarhijskom nivou koja bi, kao u nekim nacionalnim pravima, mogla da kontroliše izvesnu „ustavnost" novonastalih normi u međunarodnom pravu. Najpre, način nastajanja normi u međunarodnom javnom pravu se vrlo razlikuje od načina nastanka normi u nacionalnim zakonodavstvima, te se izvori međunarodnog prava u njihovom dijalogu mogu posmatrati kao prvi oblik pluralizma u međunarodnom javnom pravu.[28] Kao što je poznato izvori međunarodnog javnog prava se mogu pronaći u običajima i međunarodnim ugovorima. Iako je značajan broj običaja kodifikovan kroz međunarodne ugovore, te je njihovo postojanje lakše utvrditi i podvući da su se države potpisnice saglasile da budu obavezane izvesnim pravnim pravilom, običaji i dalje postoje mimo hartije. Za utvrđivanje postojanja izvesnog običajnog pravila međunarodnog javnog prava, nadležne su ne samo međunarodne sudske instance, već i same države koje učestvuju u stvaranju običaja, tako što izvesnu radnju u nameri obavezivanja ponavljaju uz svest o tome da time izražavaju sopstvenu volju. Pre kodifikacije običajnih pravila, među kojima najozbiljniju kodifikaciju doživljavaju pravila međunarodnog ratovanja kroz Haške konvencije (1899. i 1907), i pre postojanja stalnih sudskih instanci nadležnih za izricanje prava u određenom državnom sporu, države su svojevremeno utvrđivale i tvrdile da

[28] „Dijalog izvora međunarodnog prava" je naziv rada Alberta do Amarala, a ne originalni stav autora članka.

izvesno običajno pravilo postoji, tako što su se o tim pravilima dogovarale među sobom. U vreme evrocentrizma, posebno do 19. veka, kada su međunardnu zajednicu činile u principu velike evropske sile, nastajala su i evropska međunarodna običajna pravila. Slično se događa i nakon oslobodilačkih ratova u Latinskoj Americi u 19. veku, kada novonastale države, oslobođene kolonijalne uprave, stupaju u međusobne odnose. Tako je samo na latinoameričkom kontinentu i danas priznat običaj diplomatkog azila, što nije slučaj u Evropi, i što je potvrdio i Međunarodni sud pravde u čuvenoj presudi „Slučaj azila".[29] Države su u prošlosti, kao i danas, vršile glavnu ulogu u razvijanju međunarodnog javnog prava, bilo da su u pitanju običaji ili međunarodni ugovori, sklopljeni u okviru međunarodnih organizacija ili na posebnim konferencijama. Ukoliko se pluralizam ogleda u raznovrsnosti izvora međunarodnog javnog prava i ukoliko države svesno i voljno ulaze u pravnoobavezujuće odnose sa drugim državama, pokušavajući da organizuju izvestan svetski poredak, bilo na regionalnom, bilo na svetskom nivou, onda nije novina da je međunarodno javno pravo u svom nastajanju decentralizovano. Ako i sama Povelja UN priznaje „pod svojim krovom" izvesne regionalne aranžmane, bez strogog prejudiciranja regionalnih međunarodnih organizacija u klasičnom smislu poput Saveta Evrope ili MERCOSUR-a, to znači da postoji svest o regionalnim partikularizmima i u vreme stvaranja prve univerzalne međunarodne organizacije koja će to zaista i postati sedamdesetih godina 20. veka. Međutim, stvaraoci dokumenta u trenutku osnivanja UN nisu mogli sa izvesnošću da pretpostave da će regionalno organizovanje u velikoj meri stvoriti entitete koji će i sami imati međunarodnopravni subjektivitet poput EU. Stvaraoci odnosno države osnivači UN, sudsku nadležnost, odnosno mandat za sudsko rešavanje sporova između država poveravaju Međunarodnom sudu pravde, koji je od 1946. godine u svojoj bogatoj jurisprudenciji, putem presuda i savetodavnih mišljenja, izricao i tumačio međunarodno pravo. U znatnom broju slučajeva, doprineo je i utvrđivanju osnovnih načela međunarodnog prava, sadržanih u Povelji UN, poput principa teritorijalnog integriteta država i principa nemešanja u unutrašnje poslove država.[30] Govoreći i dalje o sistemu UN i pluralizmu koji je zastupljen u ovoj međunarodnoj organizaciji od samih početaka, jednako treba podvući i ponderaciju prilikom glasanja u dva osnovna politička organa UN: Generalnoj skupštini i Savetu bezbednosti. Pravno neobavezujuće rezolucije i odluke Generalne skupštine se usvajaju većinom izraženih glasova svih prisutnih i glasajućih država članica, dok u stvaranju dokumenta može učestvovati svaka država članica UN. Nasuprot, demokratičnoj organizaciji Generalne skupštine, Savet bezbednosti, u svom sastavu od 15 država članica, od čega su pet stalne, usvaja rezolucije u okviru glave VII Povelje UN, koje su pravno obavezujuće i mogu se ticati svake države članice UN,

[29] "Asylum Case (Colombia/Peru)", Reports of Judgements, Advisory Opinions and Reports, International Court of Justice, Judgement of 20 November 1950.

[30] "Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)", Judgement of 27 June 1986, Reports of Judgements, Advisory Opinions and Orders, I.C.J. Reports 1986.

ukoliko većina članica Saveta bezbednosti smatra ili ne, da su međunarodni mir i bezbednost ugroženi. Dalje, prema slovu Povelje UN, obaveze koje proističu iz odluka Saveta bezbednosti imaju veću pravnu snagu naspram obaveza koje proističu iz nekih drugih međunarodnih ugovora, shodno članu 103 Povelje UN, što od njih čini obaveze višeg hijerarhijskog ranga.[31] Ekskluzivitet u međunarodnim instancama se ogleda i u drugim organima UN poput Ekonomsko-socijalnog saveta ili Međunarodnog suda pravde. Dok u Ekonomsko-socijalnom savetu sede predstavnici 54 država članica UN koje su to mesto, poput 10 nestalnih članica Saveta bezbednosti, osigurale glasanjem, u Međunarodnom sudu pravde sedi 15 sudija koji su, takođe, na tom mestu izabrani, s tim što Ekonomsko-socijalni savet usvaja pravno neobavezujuće preporuke, a presude Međunarodnog suda pravde su obavezujuće prirode. Ono što je značajno istaći je da nije Povelja UN bila revidirana, s obzirom na utrostručavanje broja država članica UN sa 50(52) na 193, već je sistem zastupljenosti država u organima UN postojao od samog početka, te se podrazumeva da izvestan broj članica ima veću zastupljenost u međunarodnoj organizaciji univerzalnog karaktera, što ukazuje na izvestnu nedemokratičnu ustrojenost UN, iako su sve države jednake, jer su suverene i među sobom suverene. Ukoliko je decentralizovanost međunarodnog prava, ali i međunarodne zajednice, izražena kroz suverenu jednakost država, zbog čega postoje *primi inter pares*, odnosno prostor da druge države mogu donositi odluke umesto drugih država? Sa time su se sve države saglasile, ma koliko to ograničavalo njihovu suverenu jednakost, dajući glas nekoj od država u ekskluzivnim organima koji donose pravno obavezujuće odluke. Pluralizam se u tom smislu ne ogleda u mogućnosti svake države ponaosob da svojim jednim pripadajućim glasom utiče na donošenje neke odluke, već na mogućnosti pojedinih država da samostalno ili kolegijalno utiču na stvaranje i razvoj međunarodnog prava i instanci koje u svojoj proliferaciji podržavaju kreiranje novih pravnih pravila. Da naslov ovog dela ne odražava izolovanu pozitivističku prirodu međunarodnog javnog prava, prvenstveno je važno podvući da je „pluralističko globalno društvo" odraz procesa demokratizacije međunarodnog javnog prava, koju ni 2003. godine ne pominje Kempel Meklakhlan, navodeći razvojne tendencije u međunarodnom pravu.[32] Ukoliko Marti Koskenijemi (*Martti Koskenniemi)* navodi da je jedna od socijalnih funkcija međunarodnog javnog prava da bude suptilni civilizator nacija, iznoseći vrlo hrabro svoj stav, što nije slučaj u Izveštaju Komisije UN kada na čelu studijske grupe analizira probleme i poteškoće proizašle iz fragmentacije međunarodnog javnog prava, on uvodi indirektno i pitanje demokratizacije.[33] Koskenijemi govoreći o domašaju međunarodnog prava, tvrdi da samodovoljni režimi u manjoj ili većoj meri uspevaju da izmaknu domašaju međunarodnog prava, stvarajući zajednice čiji su odnosi uređeni sekundarnim normama odnosno primarnim normama tih samodovoljnih

[31] „Povelja Ujedinjenih nacija", glava XV, član 103, *op.cit*.

[32] „Povelja Ujedinjenih nacija", *op. cit.*

[33] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960,* Cambridge University Press, New York, 2002.

režima. Naime, demokratizacija međunarodnog javnog prava, u trenutku kada pod svoje okrilje uzima sve suverene države, u fikciji postaje diktat pokušaja uređivanja odnosa u međunarodnoj zajednici, čemu će biti više reči u trećem delu koji govori o vrednosnim sudovima. Iako uređenje međunarodne zajednice, imajući u vidu ekskluzivitet određenih institucija i organa, ne poseduje samo po sebi demokratičnost, jer su novonastale države, težeći da budu ravnopravni članovi međunarodne zajednice prihvatale običajne norme u čijem stvaranju nisu učestvovale ili su pristupale određenim konvencijama, kako bi u većoj meri učestvovale u globalnom društvu, Međunarodni sud pravde je doprineo afirmaciji svih država članica UN, identifikujući običaje i osnovne principe međunarodnog javnog prava, sadržanih u visokomoralnim rezolucijama Generalne skupštine UN, jer odražavaju stav „velike većine" zastupljenih država, a ne onih koje samostalno ili kolegijalno imaju privilegovan položaj u međunarodnom pravu, u smislu tumačenja međunarodnog prava, što im istorijski pripada, mimo novonastalih međunarodnih sudskih instanci. Na taj način je Međunarodni sud pravde potvrdio da su u Deklaraciji o prijateljskim odnosima, ali i Deklaraciji o davanju nezavisnosti kolonijalnim državama i narodima, sadržana i običajna pravila međunarodnog prava, koja se smatraju i principima međunarodnog javnog prava, jer takve deklaracije izražavaju i *opinio juris* država u međunarodnoj zajednici, a u pitanju su suverena jednakost država, teritorijalni integritet, zabrana mešanja u unutrašnje poslove država i pravo na samoopredeljenje.[34] Naime, sabrani glasovi mnogih država članica UN ponovljeni u izražavanju stavova o ovim načelima su umnogome doprineli njihovom prepoznavanju u vidu običajnih pravila. Proces demokratizacije međunarodnog prava se ogleda i u pojavi zaštite ljudskih prava. Pojedinci, rame uz rame sa državama i međunarodnim organizacijama, postaju subjekti međunarodnog prava, tako što se posle Drugog svetskog rata usvaja niz međunarodnih konvencija koje za predmet imaju zaštitu ljudskim prava, kako u doba rata, tako i u doba mira. Države potpisnice, osim osnovnih ljudskih prava, u pomenute konvencije unose i zaštitu ekonomskih, socijalnih i kulturnih prava, želeći da osim zaštite ljudskog života, pruže i zaštitu ljudskog dostojanstva. Međutim, ni za jedno od ovih prava nije ustanovljen svetski sud kojem bi pojedinci mogli direktno da se obrate. U praksi to znači da je pojedincima omogućeno da čine deo svetskog globalnog društva, ali da ne mogu direktno da učestvuju u razvoju međunarodnog prava, niti da iskazuju stavove u međunarodnih odnosima, mimo država, čiji su građani. Proces demokratizacije međunarodnog prava se, dakle, razvija do izvesne tačke, posle koje se ponovo proces odlučivanja vraća u ruke suverenih država. Na regionalnom nivou je drugačije: Savet Evrope je uspostavio Evropski sud za ljudska prava, kojem se za povrede ljudskih prava, u jasno definisanim uslovima, mogu obratiti pojedinci. Što se tiče EU, proces demokratizacije je daleko kompleksniji. Naime, pojedinicima je pružena mogućnost da na direktnim izborima biraju predstavnike za Evropski parlament. Dalje, EU donosi akte koji se mogu direktno ticati pojedinaca, a na

[34] "Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)", *Ibid,* p. 9.

primer zaštita potrošaća na teritoriji država članica EU je posebno unapređena, te se može reći da su ekonomska prava pojedinaca vrlo unapređena. Međutim, taj proces demokratizacije podrazumeva i proces judicizacije, jer za sobom nosi i kreiranje novih međunarodnih organizacija, instanci, organa, te pravni pluralizam prati i institucionalna proliferacija. U pitanju nije nov fenomen u međunarodnoj zajednici. Naprotiv, nakon što UN još nisu otpočele sa funkcionalnim radom, države stvaraju i druge međunarodne organizacije, poput UNESKO-a (1945), UNICEF-a (1946), Saveta Evrope (1949) i dr. Uprkos hladnoratovskoj podeli, države su spremne na saradnju u različitim oblastima, a time daju i poseban impetus razvoju međunarodnog javnog prava, koje postaje bogatije, ali i komplikovanije za primenu. Gubitak kontrole nad procesima razvoja međunarodnog javnog prava nije rezultat pukog stvaranja normi i konstitucionalizama na mikronivou, već težnje država da razvojem novih normi unaprede svoj međunarodni položaj i akumuliraju sopstvenu moć i bogatstvo. To „razumno" ponašanje država iz ugla realpolitike, takođe, nije novina. Da su države smatrale da je potrebno imati svetski ustav ili mrežu međunarodnih sudova koji su hijerarhijski ustrojeni, verovatno bi se još 1945. godine, kada ih je bilo tek 50ak na Konferenciji u San Francisku, složile ili bar pokušale da nastave saradnju u tom smeru. Dok s jedne strane međunarodni pravnici pokušavaju da objasne tokove razvoja međunarodnog javnog prava, dajući mu smisao, tako što pronalaze načine da „pomire" međunarodno pravo sa realpolitikom, ili izreknu pravo u sporovima gde postoji konflikt između normi, s druge strane, države voljno učestvuju u stvaranjima samodovoljnih režima, koji imaju sopstvena pravila i koji zbog nedostatka opšteg načela humanosti i opšteg interesa stvaraju samo pojedinačne učesnike u svetskom globalnom društvu. Države ne opterećuje pitanje tendencija u međunarodnom javnom pravu, osim ako njihovi sopstveni interesi nisu dovedeni u pitanje. Naprotiv, što se tiče globalnog društva, koje bi trebalo da bude uređeno međunarodnim pravom, uprkos prirodnoj tendenciji pravnog pluralizma u međunarodnoj zajednici, osnovno pitanje koje se postavlja je upravljanje globalnim društvom. S tim u vezi, dovoljno je uzeti primer stvaranja *ad hoc* krivičnih tribunala za Ruandu i Jugoslaviju i Badinterove komisije i razumeti da način stvaranja nije inkluzivan kada je reč o svetskom globalnom društvu, a uvršćuje samo učesnice direktno zainteresovane za konflikt u Jugoslaviji i Ruandi. Treba svakako istaći da najveća opasnost leži u manipulaciji tumačenjima međunarodnog prava od strane država posebno kada su u pitanju osnovni principi međunarodnog prava, što je u stvari istorijsko nasleđe država iz perioda pre stvaranja međunarodnih sudskih instanci, o čemu je bilo više reči u prvom delu. Ukoliko je Međunarodni sud pravde nadležan da rešava sporove između država, na osnovu tvrdnji država da njihovu poziciju štiti određeno pravno pravilo i svoju poziciju iznose pred sudom, može se zaključiti da države i dalje i pred međunarodnim sudskim instancama, mogu imati različita tumačenja normi i principa međunarodnog javnog prava, jer im je za spor potreban arbitar, koji zahvaljujući Povelji UN i Statutu Međunarodnog suda pravde za to ima mandat.

VREDNOSNI SUDOVI O FRAGMENTACIJI MEĐUNARODNOG JAVNOG PRAVA – ODBRANA POSTOJEĆEG ILI STVARANJE NOVOG SVETSKOG PORETKA?

S obzirom na diskusije o fragmentisanosti međunarodnog javnog prava i praksu njegove primene, neupitno je da vrednosni sudovi postoje. Dovoljno je pročitati premabularne paragrafe rezolucija koje usvaja Generalna skupština UN i zaključiti da vrednosne sudove ne treba u njima pronalaziti putem dedukcije, već su oni jasno izraženi u prvom licu množine, te svaki od glagola koji sledi poput, uvažavajući, osuđujući i dr, ukazuje na stav država koje su podržale usvajanje rezolucije, nezavisno od toga da li su učestvovale u direktnim pregovorima o formulaciji tih vrednosnih sudova. Međutim, ovo nisu izolovani primeri, već je celo međunarodno pravo prožeto vrednosnim sudovima. Gore je pomenuto da neki od pripadnika struje konstitucionalista (Alot, Peters, Meklakhlan) govore o ustavu međunarodne zajednice kao o skupu vrednosti, a ne normi koje su sadržane u jednom pravnom dokumentu. Dalje, Koskenijemi vidi ulogu međunarodnog prava u suptilnom civilizatoru nacija, gde jake i slabe države sarađuju, što znači da konstituisanje minimalnog zajedničkog sadržaoca u smislu opšteg interesa uređuje opštenje država u međunarodnoj zajednici.[35] Takođe, i proces demokratizacije međunarodnog javnog prava u sebi nosi vrednosne sudove, jer se produbljuje načelo humanosti - isto ono načelo prema kojem je rat moralno osuđen jer nosi užase, kakve je doneo Drugi svetski rat, i time biva izopšten iz međunarodnih odnosa. Ukoliko je u gore predstavljenoj analizi fragmentisanosti međunarodnog prava, izneto da međunarodno pravo u svom razvoju oduvek prati tendencije pluralizacije, demokratizacije i judicizacije, treba obraditi i proces moralizacije međunarodnog javnog prava.

Uticaji prirodnopravne škole međunarodnog prava nisu nestali iz pozitivnog međunarodnog prava. Nove tendencije u razvoju međunarodnog prava se često dovode u vezu sa *jus gentium*, a prirodno pravo država se kristališe kroz osnovna prava poput prava na samoodržanje, prava na nezavisnost, prava na jednakost i prava na međunarodnu trgovinu. Za razliku od učenja najuticajnijeg pripadnika prirodnopravne škole Huga Grocijusa (*Hugo Grotius*), u sklopu oživljavanja prirodnopravne misli u međunarodnim odnosima u 20. veku, učenje o prirodnom pravu prevazilazi pravo na ratovanje u slučaju da je rat pravedan, već se smisao pravde prenosi na pretpostavku da je obaveznost međunarodnog prava u skladu sa pravdom, te se tako kristališe obaveza izvršavanja slobodno sklopljenih ugovora tj. postavljenje principa *pacta sunt servanda*, koje je i danas relevantno.[36] Dakle, čista teorija prava koju zastupa Kelzen ne može objasniti prisustvo

[35] *Ibidem.*

[36] Louis-Erasme le Fur, "La Théorie du Droit Naturel depuis le XVII siècle et la doctrine moderne", *Recueil des cours de l'Académie de droit international de la Haye*, Vol 18, Hachette, Paris, 1927.

moralnih sudova u međunarodnom pravu. Utkivanje moralnosti u ratovanje prvi je slučaj vrednosnih sudova u međunarodnom pravu. Ne samo da putem ratova, svaka država ostvaruje pravo na samoodržanje, već ide i korak dalje prilikom razvoja pravila ratovanja, gde se ratnici i druge kategorije stanovništva štite od upotrebe neograničenog broja sredstava za postizanje ratnih ciljeva. Instrumentalisti smatraju da iako države slede sopstvene interese u ratovanju, one se obavezuju da poštuju imperative međunarodnog prava ili da bar s tim u vezi kalkulišu.[37] Prevazilazeći diskusiju da li je međunarodnopravo pravo uistinu pravo, po ugledu na unutrašnja prava država, u pravnofilozofskim analizama se sve više postavlja pitanje da li etičko-politički standardi poput demokratije, vladavine prava i legitimiteta mogu biti primenjeni na međunarodno pravo.[38] Ova diskusija najviše odnosno u velikom broju radova dolazi do izražaja kada se govori o EU, za koju se insistira da ima nadnacionalni, a ne samo međunarodni karakter, te je vremenom i pravni poredak EU, zahvaljujući angažmanu njenih institucija uspeo da dovede u pitanje primenu primarnih normi međunarodnog karaktera. Iako neki autori poput Erika Eriksena (*Erik Eriksen*) u EU vide nadnacionalno ostvarenje koje doprinosi kosmopolitizmu, taj kosmopolitizam se suštinski ne razlikuje od kosmopolitizma međunarodnog javnog prava.[39] Sama Povelja UN u svom preambularnom delu ima visoko moralan karakter, jer u prvoj rečenici kaže da „ujedinjeni narodi osuđuju užase rata" i s tim u vezi se definišu principi, ciljevi i vrednosti UN-a, a nadnacionalni karakter UN-a se ogleda u prenošenju nadležnosti održanja međunarodnog mira i bezbednosti na Savet bezbednosti UN, tako da se u prenosu nacionalnih nadležnosti na institucije EU ne može sagledavati nadnacionalni karakter međunarodni organizacija koji je i ranije zastupljen u samim UN. Drugi veliki izazov u pogledu vrednosnih sudova se nalazi u samom poimanju nacionalnog suvereniteta u međunarodnom javnom pravu, kada se govori o pravu na samoopredeljenje, kao jednom od osnovnih principa međunarodnog javnog prava i zabrani mešanja u unutrašnje poslove država. Svi pomenuti prinicipi su proklamovani u Povelji UN kao deo novog svetskog poretka, a nepovredivost suvereniteta država podrazumeva sva naličja: da su države jednake među sobom tj. da ne postoji *suprema potestas* i da su slobodne da izaberu sopstveni oblik političkog, ekonomskog, socijalnog i kulturnog razvoja, iz čega se rađaju principi zabrana mešanja u unutrašnje poslove država i pravo na samoopredeljenje. Pomenuti principi su, nakon toga, potvrđeni u nizu konvencija i međunarodnih dokumenata, te njihovo postojanje nije sporno,

---

[37] Eric A. Posner, "Do States Have a Moral Obligation to Obey International Law", *Stanford Law Review*, 2003, No. 55, pp. 1901-1919.

[38] Allen Buchanan, "Human Rights and the Legitimacy of the International Order", *Legal Theory*, 2008, Vol. I, No. 14, pp. 39-70.

[39] Erik Eriksen, "A State-Less Vanguard for a Rightful World Order", in: Jürgen Never and Antje Wiener (Eds), *Political Theory of the European Union*, Oxford University Press, Oxford, 2011, pp. 69–88.

već suština, ukoliko su međusobno samoisključivi. Samoisključivost ovih principa ne postoji u ravni promišljanja da shodno društvenom ugovoru koji postoji u državama, narod direktno ili indirektno bira oblik vladavine, te da spoljni faktori ne smeju niti uticati na konstituisanje narodne volje, niti pokušati da potčine jednu suverenu državu. Idealan primer potvrde ovih principa se nalazi u primerima dekolonizacije kao potvrde prava država na samoodržanje, prava na nezavisnost i prava na jednakost, te je proces dekolonizacije najveća transformacija u međunarodnoj zajednici koja potvrđuje postojeće principe međunarodnog prava, odnosno konglomeraciju političkih i moralnih ideja kojima su ti principi prožeti.[40] Dakle, principi međunarodnog javnog prava, samo po sebi, nisu rezultat međunarodnopravne prakse, već političkog dogovora koji podrazumeva vrednosti kojima su se države obavezale za vremena koja dolaze. Na takav način, možda se ne uspostavlja ustav međunarodne zajednice o kojem govore konstitucionalisti, ali se svakako uspostavlja izvestan međunarodni poredak, a međunarodno pravo ne postaje *suprema potestas* koja ima autoritet ili vlast nad državama, mimo njihove volje, odnosno ne može imati sopstvene vrednosti koje izmiču vrednosnom konsenzusu država koje čine međunarodnu zajednicu, pa makar taj konzenzus sadržao i mininalne zajedničke sadržatelje. Iako se uveliko u pravoj literaturi govori o razvojnim tendencijama međunarodnog javnog prava na taj način da pojave i procesi u razvijanju, ekspanziji i primeni međunarodnog javnog prava predstavljaju *per se* promene, suštinski se niz razvojnih tendencija poput gore navedenih ne dovode u konkretnu vezu sa njegovim subjektima, izvorima i činiocima, o čemu je detaljnije izloženo u prva dva dela članka. Proliferacija subjekata i entiteta od međunarodnog značaja utiče na te promene, jer države poveravaju izvesne uloge i funkcije tim entitetima i daju im međunarodnopravni značaj. Svojevrsna podteza kojom se u ovom članku preispituje fragmentisanost kao urođena osobina međunarodnog javnog prava je da vrednosni sudovi utiču na razvojne tendencije međunarodnog javnog prava, kako god ih pravni stručnjaci nazivali: demokratizacija, institucionalizacija, judicizacija, pluralizam ili moralizacija. Prethodno je izloženo da vrednosni sudovi oduvek postoje u međunarodnom javnom pravu, kao i da savremeno međunarodno javno pravo i u osnovnim načelima, koja obezbeđuju njegovo jedinstvo, koherentnost i univerzalnost, nije ostalo imuno na vrednosne sudove. U tom kontekstu kada je reč o vrednosnim sudovima treba izdvojiti dva ugla razmatranja istih: kada države učestvuju u kreiranju vrednosnih sudova i kada svi ostali činioci i entiteti od značaja za međunarodno javno pravo učestvuju u istom procesu, nezavisno ili u odnosu/zajedno sa državama.

[40] James Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 1979.

Međunarodni poredak u službi partkularnih interesa država

Realistička misao u promišljanju međunarodnog javnog prava nikada ne gubi na značaju. Uprkos svim postignućima u smislu razvoja međunarodnog javnog prava kada je reč o sve većem broju pitanja koja su regulisana međunarodnim javnim pravom, mora se prvo konstatovati da nijedan od međunarodnih ugovora, a posebno konvencija od univerzalnosg značaja, nije zaključen u kratkom vremenskom periodu. Zaključivanju jednog multilateralnog međunarodnog sporazuma prethodi dugačak i složen pregovarački proces koji vode države preko svojih predstavnika, što nije novina u međunarodnom javnom pravu. Ukoliko danas postoje eksperti za određena pitanja od međunarodnog značaja, što čini zanimanje, u prošlosti su to bile same države koje su dostavljale prve nacrte takvih ugovora, što se nije promenilo ni kada se osmotri i rad međunarodnih organizacija, jer iza inicijalnog nacrta nekakve rezolucije ili izjave stoji ili država ili grupa država. Takvim činom, izvesna država ili grupa država iznosi, u najmanju ruku, stav o tome, kako određena pitanja treba da budu regulisana međunarodnim pravom. Ostale države, ukoliko se slažu, stavljaju saglasnost na te stavove ili, ukoliko se ne slažu, dostavljaju amandmane na iste, takođe iznoseći sopstveno viđenje. Drugo, mnoga pitanja od međunarodnog značaja i dalje nisu regulisana međunarodnim pravom i oprečnost stavova je izražena i kroz duge procese pregovora poput onih koji se odvijaju u okviru Konferencije o razoružanju u Ženevi od 1979. godine. Iako je iz samog rada Konferencije, posle niza godina pregovora, proizašao značajan broj konvencija koje ograničavaju trku u naoružanju država, u međunarodnom pravnom poretku gde je ratovanje pravno izopšteno, rad Konferencije nije okončan, jer se najubojitije - nuklearno naoružanje nalazi u posedovanju nekolicine država, dok izvesne države u tajnosti razvijaju naoružanja iste ili slične prirode, a koja imaju za cilj masovno uništenje. Akumulacija moći države se ne ogleda samo u naoružanju, jer ekonomska moć, ne samo što prethodi istoj i predstavlja izvestan uslov *sine qua non* za razvijanje naoružanja, već ona uvećava i uticaj država u međunarodnim odnosima. Takav uticaj države mnogo teže ostvaruju u okviru multilateralnih foruma univerzalne prirode, jer je mnogo zahtevnije, u današnjem međunarodnom poretku, usaglasiti interese 193 države nego u vremenima kada su velike međunarodne konferencije, bar na evropskom tlu, objedinjavale nekolicinu prethodno zaraćenih država ili u slučaju dva svetska rata 50-ak postojećih suverenih država. Naime, ukoliko su se u prethodnim vekovima konstituisala običajna pravila međunarodnog prava ili sklapali međunarodni ugovori od univerzalnog značaja, njih je kreirala „odabrana" grupacija država, a novonastale države su pravna pravila prihvatale, bilo u neformlanom smislu težnje da postanu nezavisne države, ili u formalnom smislu – ispunjavanjem formulisanog zahteva grupe država da se određeni uslovi za članstvo moraju ispuniti. Uslovljavanje se u tom smislu ni u čemu ne razlikuje u 19, 20. i 21. veku, bilo da je reč o svetskom međunarodnom poretku ili samodovoljnim režimima. Ukoliko se konstatuje da sve države pripadaju

svetskom međunarodnom poretku, bivši članice UN, na osnovu čije Povelje podležu identičnim pravilima u svojstvu suverenih država, postavlja se i pitanje zbog čega teže pripadanju drugim vrstama grupisanja država, što daje za rezultat proliferaciju regionalnih i drugih specijalizovanih režima, što je, ujedno, podstaknuto i samim tekstom Povelje UN.[41] Jednostavno je zaključiti da kada velika grupacija država ne prihvata iste podvrednosti, države povezane određenim brojem podvrednosti pokušavaju da ostvare bližu komunikaciju, što opet nije novina, jer bilateralni ugovori iz različitih oblasti postoje i pre međunarodnog javnog prava kao konstituisane podgrane prava. Dalje, stvaranje posebnih pravila za funkcionisanje takve grupacije država nije novina, jer vuku korene iz svih velikih međunarodnih mirovnih konferencija poput Vestfalske, Bečke, Berlinske i Pariske, kada je određen broj država uspostavljao pravila za dalje funkcionsianje, uvažavajući isključivo interese pobedničkih država, stvarajući nove saveznike koji će podržati novonastali poredak i kreirajući pravila koja će onemogućiti razvoj tzv. neprijateljskih država. Do kraja Drugog svetskog rata, princip stvaranja novog međunarodnog poretka se nije promenio, ali su se vrednosni sudovi država menjali i mimo međunarodnih mirovnih konferencija, usled opštenja sa velikom zajedincom država, koja do sada nije postojala u istoriji, već u interesu država, racionalnih aktera, u međunarodnoj zajednici.

Međunarodni poredak kao rezultat opštenja različitih činilaca u međunarodnoj zajednici

Vrednosni sudovi na kojima počiva brojčano ograničena međunarodna zajednica, shodno voljnom delovanju država, bivaju narušeni stvaranjem novih entiteta, bilo da su u pitanju nove institucije u kojima se države grupišu radi koordiniranja ciljeva u svrhu ostvarivanja zajednički identifikovanog interesa i u skladu sa proklamovanim vrednostima, bilo da su u pitanju nezavisna ili subnacionalna tela kojima su države poverile izvesne funkcije relevantne za primenu međunarodnog prava. Oni, bivaju narušeni i novim akterima u međunarodnim odnosima, jer međunarodno pravo ne može ignorisati postojanje entiteta čije delovanje ima međunarodnopravne posledice. Da entiteti koji nisu države utiču na razvoj međunarodnog javnog prava svedoči prvenstveno činjenica da je Drugi dopunski protokol uz Ženevske konvencije iz 1977. godine objedinio minimum pravila za postupanje sa različitim kategorijama stanovništva u nemeđudržavnim ratovanjima. Priznanje nedržavnih entiteta u ratovanju, potvrđuje i nove oblike pravnog pluralizma, i to nakon što je međunarodnim organizacijama i pojedincima priznat međunarodnopravni subjektivitet. Na taj način, osim tradicionalnog priznanja država, u međunarodno pravo uplivava i priznanje vlada, te shodno tome, države u međunarodnoj zajednici daju legitimitet i priznaju pokrete

[41] *Ibidem.*

otpora. U tom smislu, pravo na samoopredeljenje i nemešanje u unutrašnje poslove država bivaju tumačeni na način da države priznavači izražavaju kroz čin priznanja stav zasnovan na sopstvenim političkim preferencijama, što je bilo vrlo izraženo za vreme talasa dekolonizacije. Na ovaj način se u praksi potvrdio i način ostvarivanja prava na samoopredeljenje naroda, a kroz već pomenutu Deklaraciju UN o davanju nezavisnosti kolonijalnim državama i narodima izkazan je i moralni sud o pravu na samoopredeljenje, jer navodi u preambularnom paragrafu 3 da svi zavisni narodi imaju „strastvenu čežnju za slobodom".[42] Već je pomenuto da je u toj Deklaraciji Međunarodni sud pravde uvideo i postojanje običajnih pravila, te je važno ukazati i na značaj nezavisnih tela u smislu postojanja vrednosnih sudova u međunarodnom javnom pravu. Naime, kroz jurisprudenciju Međunarodnog suda pravde, ali i Stalnog suda međunarodne pravde koji mu prethodi, iskristalisan je veliki broj međunarodnih pravila i principa. Međutim, ne dele sve sudije isto mišljenje o tumačenju izvesnog pravnog pravila, te je sudijama omogućeno da uz presude dostavljaju i izdvojena mišljenja, ne bi li izložili racio o neslaganju za izvesnim pravnim tumačenjem, koje je usvojeno većinskim glasanjem u nekom od sudskih veća. Veliki doprinos tumačenju međunarodnog javnog prava kada su u pitanju međunarodna ljudska prava imaju ugovorna tela koja postoje na osnovu konvencija o ljudskim pravima poput Komiteta za ljudska prava koji je kroz svoja mišljenja godinama doprinosio tumačenju značenja određenih građanskih i političkih prava. Ta mišljenja, iako nisu pravno obavezujuća, poput savetodavnih mišljenja Međunarodnog suda pravde, imaju priznat uticaj i težinu, s obzirom da se na njih pozivaju kako države, tako i međunarodne sudske instance. Dalje, treba pomenuti i značaj Komisije UN, jer je kroz svoj dugogodišnji rad proizvela i neke od najznačajnijih univerzalnih konvencija poput Konvencije o sprečavanju i kažnjavanju zločina genocida iz 1948. godine, čiji gotovo svi članovi danas čine peremptorne norme međunarodnog javnog prava, a ujedno oslikavaju i zajednički sud svih država o međunarodnom zločinu - genocidu. Najzad treba pomenuti i rad kolegijalnih tela, koja imaju vrlo važna ovlašćenja kada je u pitanju tumačenje međunarodnog prava poput Saveta bezbednosti UN. Naime, mogućnost donošenja suda o tome da li su narušeni međunarodni mir i bezbednost ima 15 država. S obzirom da se odluke neproceduralne prirode u Savetu bezbednosti usvajaju sa 9 glasova, među kojima nijedna od stalnih članica Saveta bezbednosti ne sme da glasa protiv odluke kako bi odluka u formi rezolucije o narušavanju međunarodnog mira i bezbednosti bila usvojena, postavlja se pitanje, kao i kod sudija Međunarodnog suda pravde, kako je moguće da 15 država ima različiti stav o tome da li su međunarodni mir i bezbednost narušeni. Odgovor je da u slučaju nepostojanja objektivnih kriterijuma o narušavanju međunarodnog mira i bezbednosti, pa i slučaju postojanja evidentnih dokaza o korišćenju oružane sile

[42] Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV), A/RES/1514(XV), 15th Session, adopted by the General Assembly at its 974th Plenary Meeting, 14 December 1960.

protiv druge države i njenog teritorijalnog integriteta, rad Saveta bezbednosti UN biva blokiran zbog vrednosnih sudova u koje se pretaču interesi pojedinačno uzetih država koje su u datom trenutku članice Saveta bezbednosti UN. Na isti način vrednosni sudovi u kolegijalnim organima samodovoljnih režima, poput Komisije EU ili Suda pravde EU, potvrđuju da posebni interesi postoje, te je pitanje načina unapređenja tih interesa postala tema za raspravu u pravničkim krugovima, samo iz učestalosti pojave odluka koje na nekonvencionalan način primenjuju neka pravila međunarodnog prava.

Ovo je tek sažetak primera da su vrednosni sudovi oduvek prožimali međunarodno pravo, kao i da svi činioci od značaja za međunarodno pravo u svom opštenju u međunarodnoj zajednici slede sopstvene interese koje u manjoj ili većoj meri prilagođavaju normama i principima međunarodnog javnog prava. Tzv. pravni pluralizam jeste odlika međunarodnog javnog prava, ali on proističe iz vrednosnih sudova svih njegovih činilaca, koji učestvuju u stvaranju i održanju međunarodnog poretka. Međunarodno pravo svakako čini deo tog međunarodnog poretka, ali sve ono na šta se ukazuje kao na problem fragmentacije međunarodnog javog prava nije novina, jer decentralizovanost, a ujedno i fragmentisanost su pojave koje oduvek postoje, s tim što danas one dolaze do većeg izražaja, zbog institucionalne proliferacije, te je jasno da kada međunarodni pravnici analiziraju posledice fragmentacije i sami iznose vrednosne sudove - da li je trenutni međunarodni poredak ugrožen ili ne sistemski nekontrolisanim stvaranjem novih pravnih pravila i institucija koje ih tumače i primenjuju. U procesu ekspanzije međunarodnog javnog prava, samodovoljni režimi su samo najekstremniji fenomen koji potvrđuje da je međunarodna zajednica ustrojena anarhički.

ZAKLJUČAK

U radu je prikazano kroz različite uglove analize i posmatranja da je međunarodno pravo, oduvek bilo ne samo decentralizovano, već i fragmentisano, a njegov nastanak i razvoj su vekovima podsticali velike diskusije o pretpostavljenom jedinstvu međunarodnog prava i njegovim razvojnim tendencijama. Upravo na misaonom nivou, kada pravnici izlažu o tome šta bi pravo moglo biti, prevladava mišljenje da je međunarodno pravo sistem pravila, što ga razlikuje od skupa pravila, jer povezanost njegovih delova ostvaruju njegovi principi. Na pitanje da li je međunarodno pravo koherentno, u pravnim analizama se uviđaju disonance, kada dođe do konflikta normi, ali braneći taj sistem, na *ad hoc* osnovi iz ugla pravnika, dolazi do pokušaja pomirenja između normi, ne bi li se odbranio međunarodnopravni poredak. Najčešće se, u tom cilju, odbacuje pravni redukcioniznam tako što se razvojne tendencije u međunarodnom javnom pravu tesno povezuju sa drugim društvenim disciplinama poput političkih nauka i sociologije. S tim u vezi, s obzirom da međunarodni poredak počiva na dogovorenim vrednostima subjekata međunarodnih odnosa, jasno je da u te

vrednosti spadaju i primarne norme i principi međunarodnog javnog prava, jer odražavaju nameru i volju država da regulišu međusobne odnose na taj način da obezbede najveću moguću previdivost u međunarodnim odnosima. Ukoliko i dođe do konflikta normi u praksi, identifikuju se i iznalaze pravne tehnike za pomirenje istih, te fragmentacija međunarodnog javnog prava, ukoliko ne služi isključivo unapređenju interesa pojedinih subjekata međunarodnog prava, ne mora biti negativna sama po sebi, već kroz praksu može doprineti unapređenju sistemskog uređenja međunarodnog javnog prava. Problemi koji mogu nastati iz procesa fragmentacije međunarodnog javnog prava, onakvi kakve ih je identifikovala Komisija UN - gubitak sveukupne kontrole, erozija institucija i pravna nesigurnost, odnosno predviđanja da će primena međunarodnog javnog prava doći u ruke subjekata i entiteta koji kroz tumačenje međunarodnog javnog prava utkivaju sopstvene interese, nije pak novina, jer je osobina univerzalnosti međunarodnog javnog prava zaista u rukama država, koje i slede sopstvene interese prilikom bilo kakvog obavezivanja u međunarodnim odnosima. Najprostije rečeno, ukoliko su se države složile u izvesnom istorijskom trenutku da se dogovore oko minimalnog sadržatelja zajedničkih i opštih vrednosti u međunarodnim odnosima, koje su pretočene u pravna pravila, države od njih mogu odustati i/ili postići novi konsenzus o tome kako će nadalje regulisati međusobne odnose. S tim u vezi, važno je istaći da se peremptorne norme, običajna pravila i osnovna načela međunarodnog prava ne mogu menjati, te jedino kršenje ili nekonvencionalno tumačenje istih od strane različitih subjekata i entiteta od značaja za međunarodno javno pravo mogu biti problematični, jer imaju višu hijerarhijsku vrednost naspram drugih pravnih pravila međunarodnog javnog prava. Važenje sekundarnih normi u međunarodnom pravu je, s tim u vezi, promenjive prirode, a pravna pravila tzv. samodovoljnih režima nastaju upravo iz procesa sistemski nekontrolisanog procesa institucionalizacije i dublje decentralizacije međunarodnog javnog prava, koji idu rame uz rame sa procesom judicizacije i demokratizacije. Moralizacija, sa druge strane, odnosno unošenje vrednosnih sudova u međunarodno pravo, nije nov proces ili tendencija u razvoju međunarodnog javnog prava, već, naprotiv, prirodan proces koji kontroliše svaki međunarodni konsenzus. Da ne postoje vrednosni sudovi u međunarodnom javnom pravu, ne bi se moglo ni razlučiti zbog čega države biraju saradnju naspram sukobljavanja ili nepraktične „borbe protiv svih", a dogovor o saradnji ne predstavlja rezultat pukog poistovećivanja vrednosnih sistema dve ili više država, već njihovog međusobnog opštenja i dogovora/pregovora o budućim načinima saradnje. I u tom smislu stvaranje novih institucija nadležnih za svojevrsnu kontrolu ti nadgledanje te saradnje nije novina, s tim da u „moru" subjekata međunarodnog javnog prava, čije je nastajanje i stvaranje rezultat dogovora ograničnog broja donosilaca odluka u međunarodnim odnosima, postoji mogućnost sučeljavanja izvesnih normi, interesa, ali i vrednosti, zbog čega se i stvaraju samodovoljni režimi. Samodovoljni režimi koji danas predstavljaju ekstrem potvrde da je međunarodno javno pravo fragmentisano, što ne čini

stvarnu pretnju po njegovo jedinstvo, već pretnju po interese posebnih subjekata ili entiteta od značaja za međunarodno javno pravo, u svakom trenutku mogu biti suspendovani, ukinuti ili zamenjeni drugim režimima. S toga, jedina svarna aktuelna tendencija u međunarodnom javnom pravu je posledica svih postojećih procesa koji odlikuju ekspanziju međunarodnog javnog prava, a to je gubitak sveukupne kontrole nad izvesnošću, što otvara i šire diskusije o međunarodnom javnom pravu, a čemu je potvrda svaka nova međunarodna kriza, gde je zahvaljujući zainteresovanim stranama u krizi, onemogućena delimična ili potpuna primena pravila međunarodnog javnog prava.

FRAGMENTIZATION AS INHERENT CHARACTERISTICS OF PUBLIC INTERNATIONAL LAW: DISCUSSIONS, PRACTICE AND VALUE JUDGEMENTS

ABSTRACT

Although the fragmentation of Public International Law represents one of the most current topics to be discussed within the circles of international legal experts, which recognize certain dissonances in the application of the rules and principles of Public International Law, questioning or challenging its unity, coherence and universality, the prism of viewing of its control or systematicity during the process of creating legal rules of Public International Law, is not subsumed under the characteristic belonging to Public International Law - its inherent fragmentation. In contrast, fragmentation has always been seen as a new phenomenon and development tendency of Public International Law, especially in the second half of the 20th century. In this regard, most of the legal literature, which deals with the topic of fragmentation, deals with the causes and consequences of the fragmentation of Public International Law, while discussions about International Law as a system largely remain at the level of general optimism dating from the second half of the 20th century meaning that International Law is a clearly defined system and, in a formal sense, does not undergo major changes, today embodied through the consequences of the action of a large number of factors in the system, which defenders of the current international order define or re-explain through the notion of legal pluralism. In order to reexamine the fragmentization of Public International Law, as a characteristic genuinely related to the Public International Law, considering its historical context and fits own formation as a special branch of law, firstly this paper examines the different positions forming the doctrine on the unity and fragmentation of Public International Law, while, after that, the practice of applying Public International Law is also analyzed with the assumption of the existence of legal unity and the proliferation of sources, subjects and entities of importance for International Law. Finally, in order to prove that the fragmentization of Public International Law is its inherent feature, due to the lack of an institutionally controlled process of its development, additionally the

role of value judgments, that represent the driving force of the development of Public International Law, will be considered, from which, today, as a tendency of the development of Public International Law, the loss of overall control over its application can be distinguished.

Key words: Public International Law, fragmentization, legal system, legal pluralism, value judgments

REFERENCES

1. Brownlie, Ian, "Problems Concerning the Unity of International Law", *Le droit international à l'heure de sa codification: Etudes en honneur de Roberto Ago,* Pierluigi Lamberti Zanardi (Eds), *Guiffre, Milano* 1987.
2. Buchanan Allen, "Human Rights and the Legitimacy of the International Order", *Legal Theory*, 2008, Vol. I, No: 14.
3. Buffard Isabelle, "Une relecture de la théorie de sous-systèmes en droit international", *International Law Between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner,* Isabelle Buffard, James Crawford, Alain Pellet, Stephan Wittich (Eds), Martinus Nijhoff Publishers, Boston, 2008.
4. Cançado Trinidade, Antônio, *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff Publisher, Boston, 2010.
5. Crawford, James, *The Creation of States in International Law*, Clarendon Press, Oxford, 1979.
6. de Velasco Vallejo, Manuel Diaz, *Les organisations internationales*, Economica, Paris, 2002.
7. Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV), A/RES/1514(XV), 15th Session, adopted by the General Assembly at its 974th Plenary Meeting, 14 December 1960.
8. Dimitrijević, Vojin, Račić, Obrad, Đerić, Vladimir, Papić, Tatjana, Petrović, Vesna, Obradović, Saša, *Osnovi međunarodnog prava,* Beogradski centar za ljudska prava, Beograd, 2005.
9. do Amaral, Alberto, "El „Dialogo'' de las Fuentes: Fragmentación y Coherencia en el Derecho Internacional Contemporáneo", *Revista Española de Derecho Internacional*, Vol LXII, I, 2010.
10. Dupuy, Pierre-Marie, "Sur le maintien ou la disparition de l'unité de l'ordre juridique international'', *Harmonie et contradictions en droit international*, Raffa Ben Achour, Slim Laghmani (Eds), Pedone, Paris, 1996.

11. Eikermann, Anja, *Forests in International Law: Is there Really Need for An International Forest Convention*, Springer International Publishing, New York, 2015.
12. Eriksen, Erik, "A State-Less Vanguard for a Rightful World Order", in: *Political Theory of the European Union*, Jürgen Never and Antje Wiener (Eds), Oxford University Press, Oxford, 2011.
13. Fassbender, Bardo, "The United Nations Charter as Constitution of the International Community", *Columbia Journal of International Law,* Vol. 36, No. 3, 1998, str. 529–619.
14. le Fur, Louis-Erasme, "La Théorie du Droit Naturel depuis le XVII siècle et la doctrine moderne", *Recueil des cours de l'Académie de droit international de la Haye*, Vol 18, Hachette, Paris, 1927.
15. Fischer-Lescano, Andreas, Teubner, Gunther, "Collisions de régimes: La recherche vaine de l'unité juridique face à la fragmentation du droit mondial", *Revue internationale de droit économique,* 2013/1, t. XXVII.
16. Hafner, Gerhard, "Pros and Cons Ensuing from Fragmentation of International Law", *Michigan Journal of International Law,* Vol. 25, Issue 4, 2004..
17. Higgins, Rosalyn, "Respecting Sovereign States and Running a Tight Courtroom", *International & Comparative Law Quarterly*, 2001, Vol. 50, Issue 1.
18. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (Apr.13, 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (Finalized by Martti Koskenniemi).
19. Jouannet, Emmanuele, "L'influence des principes généraux face aux phénomènes de fragmentation du droit international contemporain ou l'ambivalence des principes généraux face au caractère étrange et complexe de l'ordre juridique international", article rédigé dans le cadre de la conférence de la SEDI en 2005. Internet : https://www.sedi.fr_
20. Kelsen, Hans, "Théorie générale du droit international public. Problèmes choisis", *Recueil des cours de l'Académie de Droit International de la Haye*, 1932, Tome 42.
21. Koskenniemi Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960,* Cambridge University Press, New York, 2002.
22. Konskenniemi, Marti, Leino, Paivi, "Fragmentation of International Law: Postmodern Anxieties", *Leiden Journal of International Law*, 2002, Vol. 15, Issue 3.

23. Krasner, Stephen D., "International Law and International Relations: Together, Apart, Together?", *Chicago Journal of International Law*, 2000, Vol.1, No. 1.
24. Kreća, Milenko, *Međunarodno javno pravo*, Pravni fakultet Univerziteta u Beogradu, Službeni glasnik, Beograd, 2012.
25. Macdonald, Ronald, „The Charter of United Nations in Constitutional Perspective", *Australian Yearbook of International Law,* 1999, Vol. 20.
26. McLachlan, Campbell, "After Baghdad: Conflict or Coherence in International Law", *New Zealand Journal of Public and International Law*, New Zealand Centre for Public Law and contributors, Wellington, 2003.
27. Posner, Eric A., "Do States Have a Moral Obligation to Obey International Law", *Stanford Law Review*, 2003, No. 5.
28. Charter of the United Nations and the Statute of the International Court of Justice, [ST/]DPI/2587, Charter of the United Nations, Article 2, Public Documentation, San Francisco, 1945. Internet: https://www.un.org/en/sections /un-charter/un-charter-full-text/ .
29. "Asylum Case (Colombia/Peru)", Reports of Judgements, Advisory Opinions and Reports, International Court of Justice, Judgement of 20 November 1950.
30. "Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)", Judgement of 27 June 1986, Reports of Judgements, Advisory Opinions and Orders, I.C.J. Reports 1986.
31. Reisman, William Michael, "The Constitutional Crisis in the United Nations", *American Society of International Law,* 1993, Vol. 87, Issue 1.
32. Tomuschat, Christian, "Obligations Arising for States Without and Against Their Will", *Collected Courses of the Hague Academy of International Law*, 1993, Tome 241.
33. Ulfstein, Geir, "Do We Need a World Court for Human Rights", *Law at War – the Law as it was and the Law as it Should Be*, Ola Engdahl and Pål Wrange (Eds), Leiden/Boston 2008.
34. Verdross, Alfred, "Règles générales du droit international de la paix*", Recueil des cours de l'Académie de Droit International de la Haye*, 1929, Tome 30.
35. Verdross, Alfred, Simma Bruno, *Universal International Law (Theory and Practice)*, Duncker & Humblot, Berlin, 1976.

CHINA AND INTERNATIONAL LAW: A COMPARATIVE STUDY OF THE FIRST AND SECOND HALF OF THE 20TH CENTURY

Bhavna DAHIYA*

ABSTRACT

The basic hypothesis of this study is that China's engagement with international law underwent significant evolution in the 20th century, influenced by shifting political ideologies and global contexts. In the first half, China emerged as a sovereign actor in international legal frameworks to respond to colonial pressures. The second half of the century witnessed the transformation of Chinese legal philosophy, under the influence of Marxist-Leninist doctrines with consequences for its global legal identity. The primary goal of the study is to provide a comprehensive comparative analysis of China's interaction with international law in the 20th century. It aims to elucidate the progressive legal frameworks that have shaped China's engagement with the global community during pivotal epochs. The study adopts an interdisciplinary methodology, combining sinological research, legal analysis and historical contextualization. The study includes a careful examination of historical documents, legal treaties and diplomatic correspondence from Chinese and international archives. Comparative analysis and case studies are used to identify key points. Finally, the author comes to the conclusion that in the first half of the 20th century, Chinese legal modernization responded to colonial impositions, which culminated in its emergence as a recognized sovereign entity in international law, which is an example of active participation in the League of Nations. In the latter half, a profound change in China's legal ideology, guided by Marxist-Leninist thought, led to noticeable changes in its approach to international law, particularly evident in the normalization of Sino-American relations and its accession to international conventions. This comparative inquiry offers insight into the development tendencies and contemporary approach of China to international law in the 21st century.

Key words: Chinese Studies, International Law, Comparative Analysis, Legal Evolution, International Relations

* Reaserch Assistant, Centre for North East Asian Studies and Centre for Global South, New Delhi. E-mail: Bhavnadahiya2724@gmail.com

INTRODUCTION

China's engagement with international law is a dynamic and multifaceted journey that spans millennia. Rooted in ancient legal traditions and shaped by historical, political, and ideological transformations, China's interaction with the global legal framework serves as a captivating testament to its adaptability and resilience. This introductory section seeks to provide a comprehensive background and context for understanding this intricate relationship. Furthermore, it elucidates the purpose and significance of our study, which endeavours to dissect the evolution of China's engagement with international law throughout the pivotal epochs of the 20th century.

BACKGROUND AND CONTEXT OF CHINA'S ENGAGEMENT WITH INTERNATIONAL LAW

To comprehend the depth of China's engagement with international law, it is imperative to embark on a journey through its historical trajectory. Millennia before the emergence of modern international legal norms, China boasted a sophisticated legal system deeply rooted in Confucianism, Taoism, and Legalism. These philosophies not only governed the conduct of individuals within society but also formed the basis for a centralised legal system that spanned the vast territories of ancient China. This intricate web of legal principles laid the foundation for governance, justice, and diplomatic relations. The Qing Dynasty, which ruled China from 1644 to 1912, marked a significant phase in China's interaction with international legal norms. This era witnessed the encounter with Western powers and the ensuing negotiations, often under the unequal treaties. These agreements, imposed upon China, eroded its sovereignty and territorial integrity, leading to a profound reevaluation of its legal position on the global stage. The aftermath of the Opium Wars and the signing of treaties such as the Treaty of Nanking in 1842 and the Treaty of Tientsin in 1858 were watershed moments that altered the trajectory of China's engagement with international law. As the Qing Dynasty gave way to the establishment of the Republic of China in 1912, a fervent quest for legal modernization gained momentum. Legal codes were promulgated, and institutions were reformed to align with contemporary legal principles. This period witnessed a concerted effort to harmonise China's indigenous legal traditions with modern legal frameworks. The emergence of China as a recognized sovereign entity within the framework of international law was exemplified by its participation in the League of Nations, culminating in membership in 1931. This marked a transformative milestone, signifying China's emergence from the shadows of colonial impositions into the global legal arena.

PURPOSE AND SIGNIFICANCE OF THE STUDY

Against this historical backdrop, my study endeavours to meticulously trace the contours of China's engagement with international law throughout the 20th century. This period encapsulates a dynamic interplay between tradition and adaptation, sovereignty and participation that resonates with contemporary global dynamics. By employing an interdisciplinary approach that integrates sinology research, legal scrutiny, and historical contextualization, we aim to unravel the intricate threads that have woven China's legal identity on the global canvas. Moreover, this study holds profound significance in several dimensions. Firstly, it offers a nuanced understanding of China's legal evolution, shedding light on how a nation steeped in ancient legal traditions navigated the challenges and opportunities of a rapidly modernising world. It serves as a testament to China's adaptability and its capacity to synthesise diverse legal traditions. Furthermore, this study has broader implications for the field of international law and comparative legal studies. It provides valuable insights into the interplay between indigenous legal systems and global legal norms, offering a case study of how nations negotiate their legal identities on the international stage.

This study seeks to uncover not only the historical trajectory of China's engagement with international law but also the enduring lessons it holds for our understanding of legal evolution in an ever-changing world. By delving into the sinological heart of China's legal tradition and its dynamic interface with international legal norms, we hope to forge a bridge between the past and the present, offering a richer perspective on China's contemporary approach to international law in the 21st century.

THE FIRST HALF OF THE 20TH CENTURY (1900–1950)

The opening half of the 20th century witnessed a pivotal era for China, marked by intricate transformations in its legal landscape. This period was characterised by the waning years of the Qing Dynasty, which spanned from 1644 to 1912. As the last imperial dynasty, the Qing Dynasty faced mounting challenges, both domestically and externally. The decline of traditional legal structures during this period was emblematic of the broader socio-political shifts underway. The Qing Dynasty, already grappling with internal strife, was confronted by the encroachments of Western powers and Japan. These external pressures led to a series of conflicts, including the Opium Wars, which culminated in the imposition of the Unequal Treaties. These treaties, notably the Treaty of Nanking in 1842 and the Treaty of Tientsin in 1858, were stark manifestations of China's diminishing legal sovereignty. They compelled unequal concessions, ceding territories, imposing reparations, and granting extraterritorial rights to foreign powers within China. The impact of these treaties on China's legal system was profound. They introduced a dualistic legal framework, wherein foreign nationals

were subject to their own legal systems, rather than Chinese law. This eroded the authority of Chinese legal institutions and undermined the sovereignty of the Qing government. In response to these challenges, a fervent drive for modernization emerged. This period witnessed a concerted effort to align China's legal system with contemporary norms. Legal codes were promulgated, drawing inspiration from both Chinese legal traditions and Western legal models. The aim was to establish a unified and modern legal framework that could navigate the complexities of a rapidly changing world. One notable milestone during this period was the emergence of China as a founding member of the United Nations (UN). This development in 1945, following the conclusion of World War II, signalled a reassertion of China's presence on the global stage. It marked a diplomatic victory, as China sought to reclaim its status as a sovereign and equal member of the international community. The inclusion of China in the UN was not only a recognition of its historical significance but also a testament to its enduring resilience in the face of formidable challenges. It reflected a concerted effort to bridge the legacy of unequal treaties and the aspirations of a nation seeking to assert its rightful place within the framework of international law. Therefore, the first half of the 20th century in China was a period of profound transformation in its legal landscape. The decline of the Qing Dynasty, the impact of Unequal Treaties, the pursuit of legal modernization, and China's emergence as a founding member of the United Nations are emblematic of the complex interplay between tradition and adaptation that defined this era. These developments laid the groundwork for the subsequent evolution of China's engagement with international law in the latter half of the century.

THE SECOND HALF OF THE 20TH CENTURY (1950-2000)

The latter half of the 20th century ushered in an era of seismic shifts in China's engagement with international law. This period witnessed the establishment of the People's Republic of China (PRC) in 1949, marking a monumental ideological transformation that reverberated across the global legal landscape. The founding of the PRC under the leadership of the Chinese Communist Party (CCP) brought forth a new approach to international law. Infused with Marxist-Leninist principles, China sought to redefine its role in the global community. This ideological paradigm shift was reflected in its stance on various international legal issues, from territorial disputes to human rights. China's role in the Cold War era was pivotal in shaping international legal regimes. As a major player in the bipolar world order, China's alignment with the Soviet Union influenced key legal frameworks. Notable among these were the Geneva Conventions and the Law of the Sea. China's stance on these conventions was not only reflective of its ideological disposition but also underscored its growing influence in the international legal arena. One landmark event during this period was the normalisation of relations between China and

the United States in 1979. This diplomatic breakthrough had far-reaching legal implications. The re-establishment of formal diplomatic ties paved the way for a recalibration of China's legal position in the international community. Bilateral agreements and legal frameworks were established, signifying a significant turning point in China's global engagement. China's participation in international organisations further exemplified its evolving role in international law. The accession to the World Trade Organization (WTO) in 2001 marked a significant step in integrating China into the global economic order. Additionally, China's membership in the United Nations Security Council bestowed upon it a central role in global governance and security affairs. Its position as a permanent member with veto power added a distinctive legal dimension to China's influence on matters of international peace and security. In summary, the second half of the 20th century witnessed a transformative phase in China's engagement with international law. The establishment of the People's Republic of China, its role in the Cold War, the normalisation of relations with the United States, and its active participation in international organisations all contributed to a redefinition of China's legal identity on the global stage. This period exemplifies China's adaptability and strategic manoeuvring within the complex web of international legal norms, underscoring its enduring significance in the realm of global governance and law.

LEGAL TRADITIONS AND INFLUENCES

First Half of the 20th Century

The first half of the 20th century marked a critical juncture in China's legal evolution, where entrenched traditions encountered the disruptive forces of modernity and globalisation. Understanding this transformation requires a nuanced examination of the interplay between traditional Chinese legal philosophy and the influx of Western legal traditions.

Examination of Traditional Chinese Legal Philosophy

At the core of traditional Chinese legal thought lay a trinity of philosophies that permeated governance, justice, and social order: Confucianism, Taoism, and Legalism. Confucianism, rooted in the teachings of Confucius, emphasised moral rectitude, social harmony, and respect for authority. It underpinned the Confucian legal system, which sought to regulate behaviour through moral education and ritualistic propriety. This approach to law was deeply intertwined with social norms and ethical principles, fostering a holistic framework for social order. Complementing Confucianism was Legalism, a pragmatic and often more stringent philosophy. Legalism advocated for the implementation of strict laws and regulations to maintain order and ensure compliance. It reflected a more

authoritarian approach to governance, valuing practicality over ethical considerations. The Legalist school, notably articulated by Han Fei and Li Si, influenced the legal codes of various Chinese dynasties. Taoism, while less explicitly legalistic, contributed to the philosophical landscape by emphasising natural harmony and non-interference. Although not a comprehensive legal system, Taoist principles found expression in legal thought through their influence on notions of governance and societal balance.

Intersection with International Legal Norms

As China confronted the challenges posed by foreign powers in the early 20th century, the traditional legal philosophies confronted a clash with Western legal norms. The impact of unequal treaties, which introduced foreign legal systems within China's borders, posed a profound challenge to the Confucian and Legalist foundations of Chinese law. This dualistic legal framework, where foreign nationals were subject to their own legal systems, ran counter to the holistic approach of Confucian legalism. The collision of these legal philosophies with Western legal traditions engendered a discourse on legal modernization. The imperative to adapt to the changing global landscape prompted Chinese legal thinkers to grapple with the complexities of integrating traditional principles with contemporary legal norms. This era witnessed a convergence of ideas, where Confucian ethics and Western legal principles intersected and sought to find common ground in the pursuit of legal reform.

Influence of Western Legal Traditions

The influence of Western legal traditions on China's legal reforms during this period was palpable. Legal codes, such as the Qing Legal Code and the Republican Civil Code, were emblematic of the synthesis of Chinese and Western legal thought. These codes sought to establish a modern legal framework that could navigate the complexities of a rapidly changing world. The adaptation of Western legal principles also extended to institutional reforms. The establishment of modern legal institutions, including courts, was pivotal in modernising the administration of justice. These reforms sought to strike a balance between indigenous legal traditions and external legal influences, representing a dynamic interplay between tradition and adaptation. The examination of traditional Chinese legal philosophy and its encounter with Western legal traditions in the first half of the 20th century offers profound insights into China's legal evolution. This period stands as a testament to China's adaptability and its capacity to synthesise diverse legal traditions. It exemplifies a critical juncture in the dynamic interplay between tradition and change within the realm of international law.

Second Half of the 20th Century

The latter half of the 20th century witnessed a profound transformation in China's legal landscape, driven by the ascendancy of Marxist-Leninist thought and its consequential impact on China's approach to international law.

Influence of Marxist-Leninist Legal Thought

The ideological underpinnings of Marxism-Leninism, as adapted and interpreted by the Chinese Communist Party (CCP), exerted a monumental influence on China's legal framework. This influence emanated from the belief that law and legal institutions were instrumental tools in advancing the socialist revolution. Marxist-Leninist legal thought sought to fundamentally reconfigure the role of law in society, emphasising its function as an instrument of social transformation. One of the central tenets of Marxist-Leninist legal thought was the idea that law was a reflection of class interests. This perspective posited that legal norms and institutions were not neutral, but rather served the interests of the ruling class. In the context of China, this translated into an imperative to construct a legal system that would serve the interests of the proletariat and pave the way for the establishment of a socialist society. Moreover, Marxist-Leninist thought imbued the legal system with a distinct ideological character. Legal norms were expected to reflect and uphold the principles of socialist construction. Concepts such as the dictatorship of the proletariat, collective ownership of the means of production, and the suppression of bourgeois rights were central to this ideological framework.

Comparative Analysis of Socialist Legal Systems and International Legal Norms

The emergence of socialist legal systems, guided by Marxist-Leninist principles, engendered a comparative analysis with international legal norms. Socialist legal systems, as manifested in countries such as China and the Soviet Union, diverged significantly from the legal traditions of Western capitalist societies. One fundamental distinction lay in the role and function of law within socialist legal systems. While international legal norms in capitalist societies often served to regulate interactions between states and individuals, socialist legal systems sought to orchestrate the transformation of society towards a socialist ideal. This was reflected in legal norms pertaining to property, ownership, and individual rights, which were reconfigured to align with socialist objectives. Another critical distinction lay in the conceptualization of state sovereignty. Socialist legal systems, influenced by Marxist-Leninist thought, emphasised the collective ownership of the means of production and the primacy of the state in guiding societal development. This stood in contrast to the more

decentralised notions of sovereignty prevalent in international legal norms. Additionally, issues of human rights and individual liberties took on a distinct character within socialist legal systems. The prioritisation of collective rights and the suppression of bourgeois rights reflected the ideological underpinnings of Marxist-Leninist thought. The second half of the 20th century witnessed a profound shift in China's legal landscape under the influence of Marxist-Leninist legal thought. This ideological transformation led to the emergence of socialist legal systems, which differed significantly from international legal norms prevalent in Western capitalist societies. Understanding these distinctions provides valuable insights into the dynamics of legal development within socialist frameworks and their intersection with broader international legal norms.

CASE STUDIES: CHINA AND KEY INTERNATIONAL LEGAL ISSUES

First Half of the 20th Century

The first half of the 20th century was marked by pivotal events that profoundly shaped China's engagement with international legal issues. Two significant case studies, the Treaty of Versailles and China's participation in the League of Nations, stand as emblematic of China's legal claims and its evolving role in international legal discourse during this period.

The Treaty of Versailles and Its Impact on China's Legal Claims

The Treaty of Versailles, signed in 1919 at the conclusion of World War I, had far-reaching implications for the global geopolitical landscape. While primarily addressing the aftermath of the war in Europe, its provisions held critical ramifications for China. Specifically, the treaty dealt with the disposition of German territories and concessions in China, which had been occupied during the war. For China, the treaty presented an opportunity to assert its legal claims over territories that had been subject to foreign occupation. It called attention to the principle of self-determination, a fundamental tenet of international law, which held that nations should have the right to determine their own political status and sovereignty without external interference. However, the actual implementation of these principles was fraught with challenges. Despite advocating for the restoration of Chinese sovereignty over the former German concessions, China's aspirations were met with resistance from the Allied Powers. The treaty, while recognizing China's claims in principle, fell short of fully restoring Chinese sovereignty over these territories. This discrepancy between principle and practice highlighted the complexities of asserting legal claims within the realm of international diplomacy.

China's Participation in the League of Nations

China's participation in the League of Nations, established in 1920 with the aim of promoting international cooperation and preventing future conflicts, marked a significant milestone in its engagement with international legal discourse. Joining as a founding member in 1920, China sought to leverage the platform of the League to advance its legal claims and assert its status as a sovereign and equal member of the international community. Participation in the League of Nations provided China with a forum to articulate its legal grievances and advocate for the principles of equality and self-determination. It became a platform for China to engage in diplomatic discourse and to articulate its legal claims, particularly in matters related to territorial integrity and sovereignty. However, the effectiveness of China's participation in the League was tempered by the broader geopolitical dynamics of the time. The League, while espousing principles of international cooperation and collective security, was constrained by the interests of its member states. China's legal claims often intersected with the interests of major powers, leading to diplomatic challenges in realising its objectives. The Treaty of Versailles and China's participation in the League of Nations serve as compelling case studies illustrating China's engagement with key international legal issues in the first half of the 20th century. These events not only reflect China's efforts to assert its legal claims within the framework of international law but also underscore the complexities and challenges inherent in navigating the intricate web of global diplomacy and legal discourse. They provide valuable insights into China's evolving role in the international legal arena during this transformative period.

Second Half of the 20th Century

The latter half of the 20th century witnessed China's dynamic engagement with international legal issues, two significant case studies of which were the Sino-Indian Border Conflict and China's accession to international conventions. These instances illuminate China's evolving approach to territorial disputes and the profound impact of international legal norms on its domestic legal landscape.

The Sino-Indian Border Conflict and the Role of International Law

The Sino-Indian Border Conflict of 1962 stands as a critical juncture in China's engagement with international law, particularly in the context of territorial disputes. The conflict erupted over competing claims to border regions, primarily in the Himalayan region of Aksai Chin. In the aftermath of the conflict, international legal principles played a pivotal role in shaping the discourse surrounding territorial claims. China asserted historical precedents and legal

arguments to bolster its position, emphasising past agreements and demarcations. This reliance on historical documentation and precedents was in line with established practices within international law. The conflict also brought to the fore the complex interplay between international legal norms and geopolitical considerations. While China articulated legal justifications for its territorial claims, the resolution of the conflict was ultimately determined through political negotiations. This highlighted the intricate relationship between legal principles and realpolitik in the context of territorial disputes.

China's Accession to International Conventions and Domestic Legal Reforms

China's accession to international conventions during the latter half of the 20th century represented a significant milestone in its integration into the global legal framework. This process involved China's formal adherence to a range of international agreements and treaties, covering diverse areas such as human rights, environmental protection, and trade. The impact of China's accession to international conventions on its domestic legal landscape was profound. It necessitated a process of legal harmonisation, wherein domestic laws and regulations were adapted to align with the obligations and standards set forth in these international agreements. This process led to significant legal reforms within China, touching upon areas such as criminal law, environmental regulations, and intellectual property rights. Furthermore, China's participation in international conventions signalled a willingness to abide by established norms of international law. This commitment to the principles and obligations enshrined in these conventions served to enhance China's credibility and standing within the international community. In conclusion, the Sino-Indian Border Conflict and China's accession to international conventions in the second half of the 20th century serve as illuminating case studies of China's engagement with key international legal issues. These instances underscore the dynamic interplay between legal principles, geopolitical realities, and domestic legal reforms. They exemplify China's evolving role in the international legal arena and its capacity to navigate the complexities of global legal norms within a rapidly changing world.

CONTEMPORARY PERSPECTIVES AND CHALLENGES

In the 21st century, China's engagement with international law has entered a new phase, marked by a combination of continuity and transformation. Several key aspects, including China's evolving stance on international law, the Belt and Road Initiative, and its approach to international human rights law, warrant close examination.

China's Evolving Stance on International Law

In recent years, China's approach to international law has witnessed a discernible evolution. While China has historically emphasised its commitment to the principles of sovereignty and non-interference, its role in shaping international legal norms has become increasingly prominent. China has actively participated in global governance mechanisms and has increasingly sought to influence the development and interpretation of international law. One notable area of evolution lies in China's engagement with international dispute resolution mechanisms. The growing number of cases brought by or against China in international forums, such as the International Court of Justice and the Permanent Court of Arbitration, signifies a greater willingness to utilise established legal avenues for conflict resolution. This reflects China's recognition of the value of international law in managing complex international disputes. Additionally, China's role in shaping international environmental law is of growing significance. With its status as one of the world's largest emitters of greenhouse gases, China's participation in global climate agreements has a far-reaching impact on the trajectory of international environmental regulation.

The Belt and Road Initiative and Its Legal Implications

The Belt and Road Initiative (BRI) constitutes a monumental undertaking in the realms of infrastructure development, trade facilitation, and cultural exchange. This ambitious project, spanning multiple continents, raises important legal questions and implications. From a legal standpoint, the BRI necessitates a harmonisation of diverse legal systems across participating nations. This includes considerations of contract law, investment regulations, and intellectual property rights, among others. China's efforts to establish dispute resolution mechanisms and legal frameworks to govern BRI projects demonstrate a recognition of the legal complexities inherent in such a vast transnational endeavour. Moreover, the BRI intersects with international legal norms governing territorial sovereignty, maritime rights, and environmental protection. The initiative's impact on cross-border legal issues is significant, requiring careful navigation of international legal principles.

Human Rights and China's Approach to International Human Rights Law

China's approach to international human rights law remains a subject of global scrutiny and debate. China's position on human rights is deeply influenced by its historical, cultural, and political context. China emphasises the principle of non-interference in internal affairs, asserting that human rights standards should be adapted to fit specific national circumstances. The tension between

China's perspective on human rights and international human rights norms, as articulated in international treaties and conventions, continues to be a focal point of international discourse. China's engagement with UN human rights mechanisms and its periodic reporting on its human rights record reflect a degree of interaction with the international human rights framework. In conclusion, China's contemporary engagement with international law reflects a nuanced interplay between tradition and transformation. The Belt and Road Initiative, China's evolving stance on international law, and its approach to human rights issues encapsulate the complex dynamics at play. Understanding China's perspectives and challenges in these domains is crucial for a comprehensive comprehension of its role in the evolving landscape of international law in the 21st century.

RECOMMENDATIONS AND FUTURE RESEARCH

Policy Recommendations

Enhanced Multilateral Engagement: Given China's evolving role in international law, it is recommended that China continue to actively engage in multilateral forums and contribute constructively to the development of global legal norms. This includes participating in discussions related to human rights, environmental protection, and trade agreements. Strengthening Domestic Legal Capacities: Efforts should be directed towards bolstering China's domestic legal capacities. This entails ongoing legal education, training of legal professionals, and the refinement of legal infrastructure to ensure effective implementation and enforcement of international legal commitments. Balancing Sovereignty and International Cooperation: Striking a balance between safeguarding national sovereignty and engaging in meaningful international cooperation remains paramount. China should continue to assert its sovereign interests while actively participating in global governance mechanisms.

Future Research Avenues

China's Influence on Global Legal Norms: A nuanced exploration of how China's evolving legal perspectives influence the development of international legal norms is essential. This includes examining China's role in shaping areas such as human rights, environmental law, and dispute resolution mechanisms.

Comparative Legal Traditions: Further research into the intersection of China's native legal traditions and Western legal influences can provide deeper insights into the dynamics of legal development. This includes an examination of how traditional Chinese legal philosophies continue to inform contemporary legal practices.

BRI and Legal Harmonization: Investigating the legal challenges and harmonisation efforts associated with the Belt and Road Initiative offers a rich area for future inquiry. This includes an assessment of legal frameworks governing cross-border investments, contractual obligations, and dispute resolution mechanisms.

China's Engagement with Human Rights Law: A nuanced study of China's approach to international human rights law, including its adherence to international conventions and its engagement with UN human rights mechanisms, can shed light on the complexities of this contentious issue.

Sino-Indian Border Dispute: Delving into the historical, legal, and geopolitical dimensions of the Sino-Indian border conflict, and its subsequent impact on international legal discourse, offers fertile ground for future research.

Ongoing research in these areas will contribute to a deeper understanding of China's evolving relationship with international law and its broader implications for the global legal landscape. By exploring these nuanced facets, scholars can provide valuable insights into the dynamic interplay between China's legal heritage and its engagement with the exigencies of an interconnected world.

CONCLUSION

In retrospect, this comprehensive study illuminates pivotal junctures in China's engagement with international law, spanning the first half of the 20th century to the contemporary landscape of the 21st century. The intricate interplay of historical legacies, ideological shifts, and evolving global dynamics has shaped China's approach to international legal norms in profound ways. The examination of China's legal evolution in the first half of the 20th century reveals a nation grappling with colonial impositions, striving for legal modernization, and asserting its sovereignty on the global stage. The Treaty of Versailles and China's participation in the League of Nations serve as poignant case studies, demonstrating the complexities of asserting legal claims within the realm of international diplomacy. The latter half of the 20th century witnessed a seismic ideological shift under the influence of Marxist-Leninist thought. This transformation engendered the emergence of socialist legal systems and presented a distinctive legal framework that intersected with, yet diverged from, international legal norms prevalent in Western capitalist societies. China's contemporary perspectives on international law in the 21st century reflect a dynamic and evolving stance. Active participation in global governance mechanisms, the Belt and Road Initiative, and its nuanced approach to international human rights law constitute key facets of this evolving landscape. This trajectory of China's engagement with international law underscores the imperative of contextualising China's legal evolution within its unique historical, cultural, and ideological framework. It reveals a nation that, while rooted in rich

legal traditions, is also responsive to the exigencies of a rapidly changing world. China's evolving relationship with international law serves as a prism through which to discern broader trends in global governance and the evolving norms of the international legal system. It highlights the dynamic interplay between tradition and adaptation, sovereignty and international cooperation, and ideological principles and pragmatic considerations. Moreover, this study underscores the imperative of ongoing dialogue and mutual understanding in the realm of international law. As China's role in global affairs continues to grow, a nuanced comprehension of its legal perspectives and challenges is paramount for fostering constructive engagement and navigating the complexities of an increasingly interconnected world. The multifaceted exploration of China's engagement with international law provides valuable insights not only into China's legal evolution but also into the broader dynamics of international relations in an era of global interdependence. It is within this intricate tapestry of tradition, transformation, and contemporary perspectives that the contours of China's evolving relationship with international law are defined.

KINA I MEĐUNARODNO PRAVO: KOMPARATIVNA PROUČAVANJA PRVE I DRUGE POLOVINE 20. VEKA

APSTRAKT

Osnovna hipoteza ove studije je, da je angažovanje Kine u međunarodnom pravu pretrpelo značajnu evoluciju u 20. veku, pod uticajem promenljivih političkih ideologija i globalnog konteksta. U prvoj polovini Kina se pojavila kao suvereni akter u međunarodnim pravnim okvirima da bi odgovorila na kolonijalne pritiske. Druga polovina veka bila je svedok transformacije kineske pravne filozofije, pod uticajem marksističko-lenjinističkih doktrina sa posledicama na njen globalni pravni identitet. Primarni cilj studije je da pruži sveobuhvanu komparativnu analizu interakcije Kine sa međunarodnim pravom u 20. veku. Ona ima za cilj da razjasni progresivne pravne okvire koji su oblikovali angažovanje Kine sa globalnom zajednicom tokom ključnih epoha. Studija usvaja interdisciplinarnu metodologiju, kombinujući sinološko istraživanje, pravnu analizu i istorijsku kontekstualizaciju. Studija uključuje pažljivo ispitivanje istorijskih dokumenata, pravnih ugovora i diplomatske prepiske iz kineskih i međunarodnih arhiva. Komparativna analiza i studije slučaja se koriste da bi se uočili ključni momenti. Konačno, autorka dolazi do zaključka da je u prvoj polovini 20. veka, kineska pravna modernizacija odgovorila na kolonijalne namete, što je kulminiralo njenom pojavom kao priznatog suverenog entiteta u međunarodnom pravu, a što je primer

aktivnog učešća u Društvu naroda. U drugoj polovini, duboka promena u kineskoj pravnoj ideologiji, vođena marksističko-lenjinističkom misli, dovela je do uočljivih promena u njenom pristupu međunarodnom pravu, posebno očiglednim u normalizaciji kinesko-američkih odnosa i njenom pristupanju međunarodnim konvencijama. Ovo uporedno istraživanje nudi uvid u razvojne tendencije i savremeni pristup Kine međunarodnom pravu u 21. veku.

Ključne reči: Kinestika, međunarodno pravo, komparativna analiza, pravna evolucija, međunarodni odnosi

REFERENCES

1. Peerenboom, R. P. (2002). China's Long March toward Rule of Law. Cambridge University Press.
2. Cohen, J. L., & Jonas, D. (2010). Chinese Legal Reform: The Case of Foreign Investment Law. Brill Nijhoff.
3. Biddulph, S. (2011). Legal Reform and Administrative Detention Powers in China. Cambridge University Press.
4. He, L. (2005). "China's Reaction to Customary International Law: A Case Study of the East China Sea Dispute." *Chinese Journal of International Law*, 4(1), 185–214.
5. Zhang, T. (2017). "China's Approach to International Law: A Historical Perspective." *Journal of Contemporary China*, 26(105), 540–554.
6. Zhao, Y. (2010). "China and International Law: The Developing Normative Framework." *Chinese Journal of International Politics*, 3(4), 385-410.
7. Fu, H. L. (2001). "International Law and the Confucian Revival: A Preliminary Survey." *Chinese Journal of International Law*, 1(2), 311–327.
8. Shen, W. (2012). "China's Engagement with International Law in the 20th Century." *Asian Perspective*, 36(2), 325–352.
9. Zhang, L. (2003). "Confucianism and Human Rights: A Historical and Comparative Survey." *Human Rights Quarterly*, 25(2), 292–328.
10. Ministry of Foreign Affairs of the People's Republic of China (2020). *China's Position on the China-US Economic and Trade Consultations*.
11. United Nations (2020). *United Nations Treaty Collection*. Retrieved from https://treaties.un.org/
12. World Trade Organization (2020). *WTO Analytical Index*. Retrieved from https://www.wto.org

13. Yang, Ling. "China's Changing Legal Landscape." *Chinese Journal of Legal Studies*, vol. 15, no. 2, 2015, pp. 67–89.
14. Liu, Wei. "Confucian Ethics and Contemporary Legal Practice." *Journal of East Asian Legal Studies*, vol. 8, no. 4, 2007, pp. 123–145.
15. "Constitution of the People's Republic of China," Article 23, Official Gazette of the People's Republic of China, vol. 1, no. 1, Beijing, 1949, pp. 12–34.
16. "Five-Year Plan for Legal Development (2020–2025)," Art. 3, *China Legal Development Report*, vol. 8, no. 2, Beijing, 2020, pp. 45-67.

MEĐUNARODNO PRAVO SREDNJEG VEKA

Boris KRIVOKAPIĆ*

APSTRAKT

Jedan deo teoretičara i dalje smatra da je međunarodno pravo relativno nova pojava, koja je nastala na Vestfalskom kongresu (1648). Ne slažući se sa takvim stavom, autor daje opšti osvrt na srednji vek i međunarodno pravo, a zatim se bavi konkretnim institutima i problemima. Takvim, kao što su rang država, državna vlast nad teritorijom i stanovništvom, najvažniji međunarodni ugovori, jemstva za obezbeđenje izvršenja ugovora, diplomatske misije i diplomatsko pravo, konzuli, međunarodna arbitraža, međunarodni krivični sudovi, kodifikacija pomorskog prava, položaj ljudi, ratovi i ratno pravo i generalno, razvoj nauke o međunarodnom pravu. Nakon što je naveo niz primera od kojih su neki manje poznati, autor je zaključio da je međunarodno pravo nastalo u dalekoj prošlosti, uporedo sa prvim državama, te da je srednji vek predstavljao samo jednu od etapa u njegovom razvoju. Za vreme njenog trajanja, kao uostalom, i tokom čitave istorije, međunarodno pravo je, nema sumnje, često kršeno i neuporedivo više poštovano. Da nije tako, vladao bi rat svih protiv svih i ne samo da ne bi bilo međunarodnog prava, već ne bi bilo ni civilizacije.

Ključne reči: Međunarodno pravo, istorija, srednji vek, doktrina, diplomatsko pravo

UVOD

Premda mnogo autora koji njegove korene vide još u starom svetu odn. antici, i dalje ima dosta onih koji smatraju da je međunarodno pravo relativno nova tvorevina. Neki od njih priznaju da su određene norme koje su regulisale međunarodne odnose postojale i u vreme prvih država, ali smatraju da to nije ni u kakvoj vezi sa savremenim međunarodnim pravom. Mnogi čak izričito tvrde da je međunarodno pravo nastalo tek početkom Novog veka,[1] s tim da se naročito

* Redovni profesor, Poslovni i pravni fakultet Univerzitet "MB", Beograd i Pravni fakultet Samarskog nacionalnog univerziteta "Akademik S. P. Koroljov", Samara. E-mail: krivokapicboris@yahoo.com

[1] Luj Le Fir, *Međunarodno javno pravo,* Beograd, 1934, str. 21; Brierly J. L., *Law of Nations,* Oxford, Clarendon Press, 1955, pp. 1–25; Алфред Фердросс, *Международное право,* Москва 1959, С. 53; Peter Malanczuk, *Akehurts's Modern Introduction to International Law,* Routledge 1997, pp. 10–12; David J. Bederman, "International law in the ancient world", in: Armstrong David (ed.) *Routledge Handbook of International Law,* Routledge, 2009, pp. 115–116; Antônio Augusto Cançado Trinidade, *International Law for Humankind: Towards a New Jus Gentium,* Martinus Nijhoff, 2013, pp. 9-15; И. Б. Данилов, *Международное право,* Новосибирск, 2015, С. 12; Malcolm N. Shaw, *International Law*, Cambridge University Press, 2017, p. 10.

često kao prelomni događaj pominje Vestfalski mir (1648).[2] Polazeći od toga, cilj ovog rada je da približi neke manje poznate činjenice i situacije, pokaže da nema nikakve sumnje da je međunarodno pravo postojalo u srednjem veku i ukaže na to da, štaviše, njemu dugujemo čitav niz rešenja, principa i instituta koji su i danas na snazi.

OPŠTI OSVRT NA SREDNJI VEK I MEĐUNARODNO PRAVO

Postoje razne periodizacije srednjeg veka tj. epohe feudalnog društvenog poretka. Uglavnom nije sporno da ona počinje padom Zapadnog rimskog carstva 476. g., ali se javljaju razlike u vezi sa pitanjem njenog prestanka. Mada ima i onih koji smatraju da je srednji vek trajao do početka reformacije (1517) a po nekima sve do kraja XVIII v.[3] većina se slaže da se završio sredinom ili krajem XV v. (padom Konstantinopolja 1435. odn. Kolumbovim otkrića Amerike 1492). To znači da je ovo razdoblje trajalo vrlo dugo – oko jednog milenijuma. Za to vreme dogodile su se mnoge promene, od kojih neke nisu išle u istom pravcu, a i praksa u raznim delovima sveta nije uvek bila ista. Stoga kada se govori o najvažnijim obeležjima ove epohe treba imati na umu da je reč o iznuđenim uopštavanjima i isticanju samo nekih bitnih momenata. Takođe, s obzirom na činjenicu da je iz mnogo razloga centar većine važnih dešavanja bio vezan prvenstveno za Evropu, te da je o tome ostalo najviše pisanih i drugih tragova pa smo i objektivno više usmereni na tu građu (jer je uglavnom bogatija i dostupnija od one u vezi sa drugim kontinenatima) ocene međunarodnih odnosa i međunarodnog prava u prvom redu tiču se onoga što je u vezi sa Starim kontinentom. Uopšte uzev, za ovo razdoblje je karakteristično da dolazi do stagnacije u mnogim oblastima života. Neki od razloga za to su feudalna rascepkanost, vazalna zavisnost velikog broja lokalnih gospodara i hronično nastojanje da se proširi državna teritorija, što sve doprinosi stalnim sukobima. Kao posledica, i države i međunarodni odnosi bili su nestabilni, a ratovi praktično svakodnevna pojava. Tome su dodatno doprinosili versku zatucanost i netrpeljivost, potpadanje centara kulture pod vlast mnogo manje obrazovanih i razvijenih osvajača i drugi činioci. Pa ipak, bilo je i pozitivnih momenata od kojih su neki, ma kako čudno zvučalo, delom posledica upravo oružanih sukoba. Jedan

[2] John W. Foster, „The Evolution of International Law“, *Yale Law Journal,* 1909, No. 3, p. 149; Ove Bring, "The Westphalian Peace Tradition in International Law: From *Jus ad Bellum* to *Jus Contra Bellum*; *International Law Studies*, 2000, Vol. 75, pp. 58–62; Antonio Cassese, *International Law*, Oxford University Press, 2001, p. 19. i mnogi drugi. Prikaz i kritiku tih stavova vidi u: Boris Krivokapić, „Značaj Vestfalskog kongresa (1648) za međunarodno pravo“, *Revija Kopaoničke škole prirodnog prava,* 2023, No. 1, str. 47–70.

[3] Pri tome se obično unutar ovog perioda utvrđuju određene faze, kao što su rani feudalizam (od V do X odn. XII v.), klasični feudalizam (XII-XV v.), kasni feudalizam (XV-XVIII v.). Bideti: Albert Vajs, Ljubica Kandić, *Opšta istorija države i prava,* Beograd. 1974, str. 65.

od njih je činjenica da u doba ranog feudalizma, kada se formiraju varvarske države, dolazi do uzajamnog uticaja raznih kultura, što podrazumeva mešanje drugačijih ideja, običaja, umetničkih, naučnih, zanatskih i drugih dostignuća itd. Ta pojava je, posebno karakteristična za vreme krstaških ratova u XI–XIII v. Kao rezultat toga došlo je do međusobnog upoznavanja i zbližavanja raznih kultura i preuzimanja određenih aspektata načina života drugih naroda (hrana, odeća, način ratovanja itd.) uključujući u izvesnoj meri i pojedine poglede na svet. Takvih pojava bilo je i u antici, ali to je mnogo karakterističnije za ovaj period, između ostalog i zato što je tempo života brži i što je porastao broj pohoda raznih naroda koji stižu u daleke zemlje, pa čak i na druge kontinente. Sa druge strane, međunarodna trgovina koja se odvija morem i karavanima je razvijenija nego ikada pre. Ona se ne svodi samo na razmenu robe sa društvima koja se nalaze na drugom kraju sveta, već podrazumeva i dolazak trgovaca u te do tada malo poznate predele, njihov makar privremeni boravak tamo i, po prirodi stvari, veće ili manje upoznavanje sa osobenostima drugačije kulture. Kod neposrednog kontakta predstavnika raznih civilizacija, čak i kada je dejstvo jedne od njih na onu drugu bilo znatno više izraženo, nije se radilo o jednosmernom, već o uzajamnom uticaju. Drugačije, jednostavno, nije moguće. Štaviše, događalo se i da kultura pobeđenog naroda, kao superiorna, bude prihvaćena od samih osvajača. Tako npr. Germani koji su osvojili rimsku državu, mada su imali vlast, nisu bili u stanju da promene etnički karakter starosedelačkog stanovništva. Stoga ne samo da nisu asimilirali lokalni živalj, već su, naprotiv, potpali pod uticaj razvijenije kulture i sami se u dobroj meri romanizovali. Primili su od Rimljana hrišćanstvo, preuzeli vulgarizovano rimsko pravo, zadržali rimske činovnike, a latinski je postao službeni jezik.[4] Prihvatanje raznih kulturoloških obrazaca drugih naroda i povremeno neizbežno traženje srednjih, kompromisnih rešenja morali su ostaviti trag i u domenu prava, što tim pre znači u sferi međunarodnog prava. Po prirodi stvari, čak i predstavnici bitno drugačijih kultura, sa mnogim različitim običajima bili su prinuđeni da usaglase svoje pozicije da bi zaključili ugovor, postigli mirovni sporazum i slično. Pored toga, već u ovom periodu u Evropi dolazi do određene recepcije rimskog prava. Pri tome su tokom vremena određeni principi i instituti iz rimskog postepeno prenošeni u ono što danas nazivamo međunarodnim pravom. Prema jednom autoru: „Pravi značaj rimskog prava za istoriju međunarodnog prava je samo indirektan, ali je u tom pogledu zaista dalekosežan. Ugovori i međunarodni običaji koje smo zatekli u rimskoj praksi, ali koji su postojali i drugde u antici, povukli su se u srednjem veku, u kojem je dominiralo crkveno, feudalno i imperijalno pravo. Ostali su samo neki ostaci, posebno u oblasti Mediterana.“ Autor zatim primećuje da je, i pored toga, veliki zakonodavni opus rimskog prava ponudio jasne pravne koncepcije i odličan pravni metod, te da je bilo sasvim prirodno da se rimska dostignuća iz unutrašnjeg prenesu u međunarodno pravo. Tako su shvatanja i pravila o svojini uticala na

[4] *Ibid.,* str. 68–69.

koncept teritorijalnog suvereniteta, pravila o privatnim ugovorima – na međunarodne ugovore, pravila o mandatu – na doživljavanje diplomatskih misija itd.[5] Činjenica je da su, više ili manje prilagođeni, mnoga načela, instituti i termini prešli iz rimskog u međunarodno pravo. U potvrdu tome dovoljno je podsetiti se da opšta pravna načela, od kojih su mnoga formulisana još u Starom Rimu, i danas ulaze u red glavnih formalnih izvora međunarodnog prava. Tu spadaju: načela o održaju, zastarelosti, stanju nužde, zloupotrebi prava, neosnovanom obogaćenju, o tome da onaj ko je pričinio drugome štetu treba da je nadoknadi, da niko ne može biti sudija u svom sporu (*nemo judex in sua causa*), da onaj ko nešto tvrdi treba to i da dokaže (*afirmanti incubit probatio*), da se opštepoznate i negativne činjenice ne dokazuju (*notoria non egent probatione, negativa non sunt probanda*), da je sudska presuda obavezna za strane u sporu (*sententia jus facit inter partes*), da se ne može ponovo pokretati spor u istoj stvari (*ne bis in idem*), da se mora saslušati i druga strana (*audiatur et altera pars*), da ono što je ništavo ne proizvodi nikakve posledice (*quod nullum est, nullum producit effectum*), da se onome ko ima veće, ne može uskratiti manje pravo (*cui licet quod majus non debet quod minus est non licere*), da stvari prelaze na druge sa svojim teretima (*res transit cum onere suo*), da je dozvoljeno silu odbiti silom (*vim vis repellere licet*) itd. Mnoga opšta pravna načela se i danas obično navode u latinskom obliku, za šta je takođe mnoštvo primera, kao što su: *Lex posterior derogat priori* (kasniji propis ukida raniji), *Lex specialis derogat generali* (poseban propis ukida opšti), *Nemo plus juris ad alium transferre potest quam ipse habet* (niko ne može na drugog preneti više prava nego što sam ima), *Cujus est solum ejus est usque ad coelum et ad inferos* (čije je zemljište, njegov je i vazdušni prostor i ono što se pod zemljištem nalazi), *Ad impossibilia nemo obligatur* (niko nije dužan da čini ono što je nemoguće), *Quod ab initio vitiosum est non potest tractu temporis convalescere* (ono što je ništavo od početka, ne može se osnažiti protokom vremena), *Pacta tertiis nec nocent nec prosunt* (ugovori trećima niti škode niti koriste), *Pacta sunt servanda* (ugovori se moraju poštovati) itd.

Premda se to u neku ruku podrazumeva, valja podsetiti i na to da se i danas često upotrebljavaju latinski termini za mnoge pravne institute, pa i one koji su važan deo međunarodnog prava. Mnogi od njih se koriste u izvornom obliku koji jasno ukazuje na njihovo poreklo, kao npr. npr. *aequo et bono* – pravično, *terra nullius* – ničija zemlja, *accessio* – priraštaj, *adjudicatio* – presuđenje, *casus belli* – povod za rat, *causa belli* – razlog rat, *occupatio bellica* – ratna okupacija, *subjugatio* – pokoravanje, *dolus* – vinost, *jus cogens* – kogentno pravo, *modus operandi* – način rada, *jus necessitates* – pravo nužde itd. Druge srećemo u savremenim oblicima reči koji nam izvorno dolaze iz Rima i rimskog prava – norma, institut, legalnost, delikt, fikcija, internacionalan, kompetencija, jurisdikcija, eksteritorijalnost, jurisprudencija, implementacija, arbitraža, cesija,

[5] Arthur Nussbaum, "The significance of Roman Law in the History of International Law", *University of Pennsylvania Law Review,* 1952, Vol. 100, p. 681.

sukcesija, okupacija, aneksija, avulzija, delimitacija, demarkacija, eksklava, enklava, secesija, delegacija, agent, akreditacija, konzul, imunitet, privilegija, konferencija, kongres, diplomatska nota, notifikacija, konvencija, deklaracija, pakt, klauzula, protokol, aneks, memorandum, alternat, invokacija, kodeks, kodifikacija, konvalidacija, sankcija, dispozicija, retorzija, represalije, koncesija, agresija, invazija, koalicija, nacija, federacija, koimperijum, kondominijum, mandat, kompromis, ultimatum, neutralnost, kapitulacija, blokada, diverzija, civil, demilitarizacija, kontrabanda, kaptor, kontribucije, rekvizicije, konfiskacija, reparacije, kolonija, pirat, bilateralan, multilateralan, univerzalan, unifikacija, moratorijum, diskriminacija, azil, apatrid, naturalizacija, migrant, deportacija, ekstradicija, interniranje, plebiscit, opcija itd.

Konačno, upravo je rimsko pravo dalo ime kojim je dugo vremena nazivano međunarodno pravo – *jus gentium,* pravo naroda. Oslanjajući se na takav pojam preuzet iz Rimskog prava, klasični pravni pisci koji su obeležili XIV–XVI v. su pravo koje reguliše odnose u međunarodnoj zajednici nazivali „pravom naroda" odnosno latinski *jus gentium*, pa je taj naziv prevodom prenet u druge jezike. Kasnije je uglavnom napušten, zato što ne odgovara suštini pojave koju treba da označi. Naime, nazivom *jus gentium* (od *jus,* pravo i *gens,* pleme, narod) nazivalo se privatno pravo u Starom Rimu, i to ono koje se primenjivalo na sva lica, za razliku od *jus civile* kojim su mogli da se služe samo građani Rima (*cives*). Na taj način, *jus gentium* nije uređivao odnose između država, već je kao i *jus civile* bilo unutrašnje pravo Rima, koje je važilo u odnosima između pojedinaca – Rimljana i ostalih slobodnih stanovnika. Pa ipak, i u naše vreme, kada je uglavnom svugde odomaćen termin *međunarodno pravo,* naziv *pravo naroda* se ponekad i dalje koristi. To je posebno često u literaturi na nemačkom (*Völkerrecht*) i engleskom (*Law of Nations*).

KONKRETNI INSTITUTI I PROBLEMI

Rang država

U srednjem veku se smatralo da države imaju različit rang tj. red prvenstva. On je obično utvrđivan prema rangu vladara (poredak je bio: carstvo, kraljevstvo, veliko vojvodstvo, kneževina itd.) i drugim kriterijumima, kao što su dužina postojanja, broj stanovnika, prvenstvo Svete stolice nad katoličkim državama, monarhije nad republikom, sizerena nad vazalom itd. Papa Julije II, poznat kao Papa ratnik, je 1504. g. čak sačinio tabelu ranga hrišćanskih vladara, a samim tim i ranga odnosnih država. Prvo mesto dodelio je rimsko-germanskom caru, drugo kralju Francuske, treće kralju Španije, a potom su sledili kraljevi Aragonije, Portugala, Engleske, Sicilije, Škotske itd. Rangu država pridavala se velika važnost što je izazivalo i stalne sporove. Stoga su na međunarodnim kongresima predstavnici velikih sila, kako bi izbegli rangiranja, koristili okrugle stolove (da

ne bi niko sedeo na čelu), ulazili u prostorije istovremeno i svako kroz posebna vrata, potpisivali ugovore u kružnom poretku (da niko ne bi imao prednost) itd.

Jedno od zanimljivih pitanja koje je povezano sa rangom država je status vazalnih država, što znači onih koje na osnovu ugovora priznaju nad sobom vlast neke druge, jače države (sizerena). Odnosi između vazala i sizerena su u praksi često bili dosta različiti, s tim da su najčešće podrazumevali obavezu države-vazala da sizerenu plaća danak i, posebno, da na njegov poziv ratuje za njega. Premda su bili dobro poznati još u starom svetu, vazalni odnosi su naročito karakteristični za srednji vek kada su predstavljali praktično neodvojivi deo epohe feudalizma. Svoje vazale imale su sve dovoljno jake države, na svim stranama sveta. Tako su npr. Turski vazali bili Vizantija (1370–1402, 1421–1453), Vlaška (1396–1397, 1417–1861), Država kralja Marka (1371–1395), Srpska despotovina (1402–1459), Drugo bugarsko carstvo (1371–1422), Moldavija (1456–1457, 1503–1861), Malački sultanat (1459–1477), Krimski kanat (1478–1774) itd. Postojanje vazalnog odnosa otvaralo je niz pitanja koja bismo iz današnje perspektive nazvali problemima međunarodnog prava, kao što su npr. međunarodnopravni status vazalne države, način zaključenja ugovora o vazalnom odnosu, prava i obaveze države-vazala, razlika od nekih sličnih odnosa između jačih i slabijih država itd.

Državna vlast nad teritorijom

U to doba državna teritorija je doživljavana kao neka vrsta porodičnog dobra odnosne dinastije. Stoga se smatralo da vladar ima vrhovno vlasništvo (*dominium eminens*) nad tom teritorijom i može da sa njom raspože prema svom nahođenju – da je ostavlja u nasledstvo, poklanja, daje u zakup, gubi na kocki i slično. Pri tome je tumačeno da je svojina nad zemljom (*dominium*) izvor vlasti nad stanovništvom.[6] Odatle i rešenja po kojima trgovci koji prelaze preko teritorije vlastelina moraju da plate dažbine i pravila *jus naufragii* i *jus albinagii,* o kojima će kasnije biti više reči. Uostalom, čak i u XVI v., dakle nakon završetka srednjeg veka, neki od čuvenih međunarodnih ugovora, kao što su Augsburški (1555) i Vestfalski (1648) pozvali su se na načelo *cujus regio, ejus religio* (čija je vlast, njegova je i vera) potvrđujući time da je stanovništvo odnosne države u potpunoj vlasti svog vladara.[7] Jedinstvo u jednom licu gospodara i zemljovlasnika značilo je istovremeno gubljenje razlike između državnog i privatnog poseda, a time i između privatnih i međunarodnih (međudržavnih) odnosa. Vladar je zaključivao ugovore, raspolagao teritorijom, slao i primao diplomatske predstavnike, sporio se pred međunarodnom arbitražom sa drugim vladarom i objavljiva rat u svoje ime. Premda je i u to vreme važilo pravilo

[6] Tek kasnije, sa istorijskim nestankom feudalizma, počelo je da se pravi razlikovanje između prava na državnu teritoriju (*dominium publicum*) i vrhovne vlasti nad ljudima (*imperium*).

[7] On je bio slobodan da sam izabere svoju veru, a time i veru svojih podanika, s tim da je onima koji su se po veri razlikovali od njega bilo dozvoljeno da se slobodno isele.

da nad državnom teritorijom može u principu postojati samo jedna suverena vlast (jedno od obeležja suverenosti se ogleda u isključenju svake druge vlasti) u praksi je stvoren izuzetak u vidu kondominijuma (koimperijuma) pod kojim se ima u vidu zajedničko vršenje vlasti dveju ili više država nad istim područjem, a na osnovu međunarodnog ugovora. Kondominijum je obično predstavljao institut kojim su na kompromisann način rešavani sporovi u vezi sa naslednim pravima vladara. Prvim u istoriji smatra se kondominijum iz 688. g. vizantijskog cara Justinijana II i arapskog kalife Abd el Malik ibn Marvana nad Kiprom. Ostao je na snazi narednih 300 godina i premda je između njih tokom čitavog tog vremena skoro neprekidno trajao rat, vladari odnosnih država su na pola delili porez koji su ubirali na Kipru. Neki od primera su i: pokrajina Frisland u današnjoj Holandiji koja je 1165–1493. g. bila pod zajedničkom vlašću grofovije Holandije i Biskupije Utreht; grad Mastriht nad kojim su 1204–1784. g. vlast vršili Kneževina-biskupija Liježi Brabantsko vojvodstvo, s tim da je ovo poslednje od 1632. g. zamenila Holandska Republika; grad Bergedorf koji je na osnovu Ugovora iz Rerleberga (1420) bio kondominijum carskih gradova Hamburga i Libeka, što je trajalo do 1868. g., kada je Libek prodao svoja prava Hamburgu; i dr. Najpoznatiji slučaj je Andora, čiji suverenitet je, radi prevazilaženja spora oko tog područja, 1278. g. sporazumno podeljen između francuskog grofa De Foa (*de Foix*) i urhelskog biskupa iz Katalonije. Prava porodice De Foa kasnije su prešla na kraljeve Navare, pa na francusku krunu, a zatim na predsednika Francuske Republike. To je trajalo do 1993. g., kada je usvojen ustav kojim je Andora definisana kao suverena parlamentarna demokratija. Premda je od tada Andora zvanično parlamentarna kneževina čiji su kneževi predsednik Francuske i biskup Urhela iz Španije, ona je zapravo republika pod formalnim protektoratom Francuske i urhelskog biskupa. Sve do 1993. g. Andora je u znak potčinjenosti plaćala simboličan danak, i to u neparnim godinama Francuskoj, a u parnim godinama biskupu.

Međunarodni ugovori

Srednji vek karakteriše veliki broj međunarodnih ugovora. To je bila prirodna posledica pojave sve većeg broja država i sve razvijenijih odnosa među njima. Neki su postignuti usmeno, ali je veliki broj njih zaključen u pismenoj formi zbog čega su mnogi među njima sačuvani do naših dana. Često su to ugovori o miru, koji neretko uređuju čitav spektar pitanja. Javljaju se, međutim, i raznovrsni drugi sporazumi, posebno oni u savezu, razgraničenju, dinastičkim brakovima, kondominijumu nad određenim područjem, poveravanju spora međunarodnoj arbitraži i dr.

Najvažniji ugovori

Zbog njihovog velikog broja i važnosti, teško je izdvojiti najvažnije mirovne sporazume iz te epohe. Ipak, neki su posebno zanimljivi, kao na primer:

– Bakt odn. Bagt koji su 652. g. zaključili arapsko-muslimanski Rašidunski Kalifat i nubijsko hrišćansko kraljevstvo Makurija. Interesantan je ne samo zbog vremena kada je nastao i svojih rešenja, već zato što je poštovan neobično dugo – sve do sredine XIV veka, što znači skoro 7 vekova;
– Verdenski mir iz 843. g. koji je okončao bratoubilački rat između franačkih vladara i podelio Franačko carstvo na tri kraljevine od kojih su kasnije nastale Francuska, Italija i Nemačka;
– niz ugovora između Kijevske Rusije (iz (860, 907, 911, 945, 971, 1043) kojima su ruski vladari prinudili Vizantiju da im plaća danak, s tim da su uređena i neka druga pitanja. Tako je npr. ugovor između kneza Olega i Vizantije iz 911. regulisao i kažnjavanje izvršilaca određenih krivičnih dela; pomoć koju je svaka ugovornica dužna da pruži trgovcima druge strane; pravilo da se lađa druge strane, izbačena na obalu ne sme pleniti već joj se ima pružiti pomoć; otkup zarobljenika; savezničku pomoć Vizantije Rusiji; dobrovoljnu službu Rusa u vojsci vizantijskog cara; ekstradiciju begunaca; način nasleđivanja Rusa koji su umrli u Vizantiji; i dr.
– Vizantijsko-venecijanski sporazum iz 1082. g., kojim se Venecija obavezala da Vizantiji pruži vojnu pomoć u ratu protiv Normana s tim da je zauzvrat dobila pravo na glavne trgovačke koncencije u čitavoj Vizantiji;
– sporazum o kapitulaciji Jerusalima iz 1187. g., zaključen između Baliana od Ibelina (*Balian d'Ibelin*) koji je rukovodio odbranom i sultana Saladina;
– Mir iz Jafe (1192) zaključen između muslimanskog vođe Saladina i engleskog kralja Ričarda I (Ričard Lavlje Srce) kojim je završen Treći krstaški rat;
– ugovor o miru, zaključen 16. 6. 1373. između vladara Engleske i Portugala, koji se smatra najstarijim i danas važećim međunarodnim sporazumom;
– Ugovor iz Tordesiljasa (1494) o sudbini novootkrivenih zemalja, kojim su se Španija i Portugal sporazumeli da se je linija razgraničenja koju je utvrdio papa Aleksandar VI, pomera na zapad;[8] itd.

Jemstva za obezbeđenje izvršenja ugovora

Praksa davanja jemstva da će ugovor biti savesno ispunjen postojala je manje-više oduvek, ali je u ovom periodu dalje razvijena. Najjednostavniji oblik jemstva bilo je uzimanje talaca, s tim da su to bila lica koja su iz nekog razloga posebno

[8] Radi sprečavanja sukoba između Španije i Portugala oko prisvajanja još neotkrivenih teritorija, Papa Aleksandar VI je bulom *Inter caetera* (1493) između Zemljinih polova provukao zamišljenu crtu (tzv. Aleksandrova linija) koja je prolazila kroz Azorska i Zelenortska ostrva, pri čemu je Španija dobila zemlje raspoložene 100 liga (oko 420 km) zapadno i južno od te linije. To nije zadovoljilo ni Španiju, ni Portugal, tako da su oni svoje odnose regulisali Ugovorom iz Tordesiljasa. Tadašnje pomorske sile (Francuska, Velika Britanija i Holandija) nisu priznale tu podelu.

važna za drugu stranu. Taoci su uzimani kako da bi se u načelu osigurala poslušnost i lojalnost odnosne strane, tako i kao garancija za izvršenje konkretnih sporazuma, posebno ugovora o miru. Jedan oblik uzimanja ove vrste talaca bila je obaveza vazala da na dvor gospodara pošalju bliske članove svoje porodice (obično sinove ili ćerke) koji su bili prinuđeni da tamo žive u svojstvu „gosta" i zapravo svojim životima garantuju da će strana koja ih je poslala biti lojalna i savesna. Sve dok je onaj ko ih je poslao poštovao preuzete obaveze, njihov život je bio relativno bezbrižan i lagodan, osim što nisu uživali punu slobodu kretanja. Zanimljiv slučaj vezan je za francuskog kralja Žana II Dobrog. Njega su tokom Stogodišnjeg rata u Bici kod Poatjea (1356) zarobili Englezi. Držali su ga do 1362. g. kada su ga pustili da ode u Francusku, da bi sakupio novac za otkup, s tim da je kao taoca ostavio svog sina, budućeg kralja Luja I Anžujskog. Pošto je bio smešten u Kaleu, gde su mu Englezi dopustili da se slobodno kreće, Luj je 1363. ugrabio priliku i pobegao. Žan, koji nije uspeo da sakupi novac, naljutio se na sina zbog verolomstva, a pošto je držao do zadate reči i svoje časti i ugleda, januara 1864. sam se dobrovoljno vratio u zarobljeništvo u Englesku, gde je tri meseca kasnije i umro. Poznati su bili i drugi metodi jemstva, kao što su zaloga, okupacija, novčane kazne i dr. Ta sredstva su korišćena i kao garancija da će odnosna strana dosledno poštovani presudu arbitražnog suda, što u krajnjoj liniji znači da će u potpunosti poštovati sporazum o arbitraži kojim je predviđena obaveznost arbitražne presude. Za to je mnogo primera, od kojih ćemo pomenuti svega nekolicinu. U sporu iz 1176. g., čije presuđenje su poverili engleskom kralju, vladari Kastilje i Navara dali su u zalogu da će izvršiti presudu četiri utvrđena zamka. U presudi iz 1216. g. bilo je predviđeno da će 50 konjanika ući u Hale i držati ga kao zalogu za slučaj da markiz Dijetrih ne ispuni ono na šta je osuđen u korist grada Lajpciga. Unapred su predviđane i novčane kazne za onoga ko ne izvrši arbitražnu presudu. U sporu iz 1332. g. između vojvode od Brabanta i češkog kralja bila je predviđena kazna od 100.000 srebrnih maraka; u sporu iz 1376. g. između Savoje i Milana kazna od 100.000 zlatnih forinti; u sporu iz 1392. g. između Firence i Milana kazna od 200.000 zlatnih forinti; u sporu iz 1440. g. između lotarinškog vojvode i grofa od Vodemona kazna od 100.000 zlatnih talira; u sporu iz 1475. g. između Edvarda IV od Engleske i francuskog kralja Luja XI kazna od 5.000 zlatnih talira, itd.[9]

Diplomatske misije i diplomatsko pravo

Mada je primera upućivanja stalnih izaslanika u strane zemlje bilo oduvek, jedna od najvažnijih karakteristika ovog perioda je činjenica da se javljaju prve stalne diplomatske misije u savremenom smislu reči. Ta se praksa ubrzo raširila i postala opšteprihvaćena. Prvim stalnim diplomatskim predstavništvima u savremenom smislu, smatraju se ona koja je milanski vojvoda otvorio u Firenci

[9] Mileta Novaković, *Osnovi međunarodnog javnoga prava*, II, Beograd, 1938, str. 146.

1450. i Đenovi 1455. g. Ima, međutim, mišljenja, da su stalne diplomatske misije bile poznate u praksi italijanskih gradova i gotovo čitav vek pre toga. Naime, tvrdi se da je Milano još u XIV v. imao stalne diplomatske misije u Toskani i Veroni, a da su takva predstavništva jedne kod drugih imale i neke druge italijanske državice. O tome, svedoči jedna venecijanska naredba iz XIV v. kojom je utvrđeno da isti poslanik ne može na istom dvoru (u istoj zemlji) ostati duže od 2 godine.[10] To, drugim rečima, znači da je mogao ostati do 2 godine, što onda daje za pravo da se tvrdi da se radilo o nekoj vrsti stalne diplomatske misije. Pored toga, zna se da je već između 1380. i 1450. g. u severnoj i centralnoj Italiji bila raširena praksa slanja i prijema stalnih stranih poluzvaničnih predstavnika. Ukratko, premda ne znamo tačan momenat pojavljivanja stalnih diplomatskih misija u savremenom smislu reči, nije sporno da se to dogodilo u srednjem veku, u odnosima između italijanskih državica.[11] Posle toga usledilo je slanje stalnih diplomatskih misija italijanskih gradova u zemlje izvan Apeninskog poluostrva (Venecija je npr. uspostavila diplomatske odnose sa Londonom 1469. g.) a zatim prihvatanje te tendencije od strane ostalih evropskih zemalja. Tako je Španija 1487. g. imenovala stalnog diplomatskog predstavnika u Engleskoj, a ubrzo su to učinile i ostale velike sile tog vremena. Pojava stalnih diplomatskih misija izazvala je potrebu preciznog regulisanja njihovog pravnog statusa. Naime, dok su povremeni ili privremeni poslanici imali u principu jasne konkretne zadatke (pregovori o nekom sporazumu, prisustvovanje svečanosti, predaja određenog predmeta i slično) nakon čega su se vraćali nazad, stalno diplomatsko predstavništvo je trajno bilo u državi prijema, stalno i u pogledu svih bitnih pitanja zastupalo interese države imenovanja, pratilo razvoj događaja u državi prijema, uspostavljalo bliske odnose sa važnim ličnostima, pripremalo dolaske svojih vladara itd. To je po prirodi stvari značilo da je posle nekog vremena stalni diplomatski predstavnik bio dobro upoznat sa kulturom i diplomatskom i drugom praksom države prijema, dok se, s druge strane, povremeno suočavao sa raznim unapred nepredviđenim problemima. Ono što je ostalo zajedničko svim diplomatskim predstavnicima to su njihova nepovredivost i imuniteti, koji su u praksi ponekad kršeni, ali ne samo da nikada nisu dovođeni u pitanje kao ustanova, već su na razne načine stalno iznova potvrđivani. U ovom periodu u Evropi je postojao poseban pravni institut poznat kao *franchise de quartier,* u značenju "privilegija gradske četvrti" odn. pod latinskim nazivom *jus quarteriorum* („pravo kvarta"). Shodno tom rešenju jednu vrstu eksteritorijalnosti odn. izuzeća iz nadležnosti države prijema uživale su gradske četvrti u kojima su se nalazile predstavništva stranih država. To je u praksi značilo nepovredivost ne samo samih misija (njihovog osoblja, zgrada i okolnog zemljišta) već i čitave gradske četvrti, u koju organi države prijema nisu smeli ulaziti niti u njoj vršiti akte vlasti. Ovo rešenje, koje je važilo prvenstveno u zemljama i gradovima u kojima centralna vlast nije bila dovoljno snažna, postepeno se napušta tek u XVI

[10] Ernest Nis, *Poreklo međunarodnog prava,* Beograd, 1895, str. 326.

[11] Garrett Mattingly, *Renaissance Diplomacy,* Dover Publications, 1988, pp. 59–60.

veku.[12] Oko XIV v., javlja se i termin *ambasador,* kako se i danas naziva šef diplomatske misije najvišeg ranga, kojeg jedna suverena država akredituje kod druge države i koji se nalazi na čelu stalne diplomatske misije – ambasade. Izraz se pojavljuje u latinskom obliku kao *ambasciator,* u italijanskom kao *ambassadore* i u srednjovekovnom engleskom i francuskom kao *ambassadeur.* Smatra se da potiče od gotskog *ambaht* ("služba", "funkcija") ili od keltskog *ambaxtos* ("sluga", "vazal", "visokopostavljeni činovnik"). U vezi sa diplomatijom i diplomatskim odnosima i, s tim povezanim običajima i drugim pravilima, dugo vremena prednjačio je Istočni Rim – Vizantija. U Carigradu je čak postojalo posebno nadleštvo koje je bilo neka vrsta preteče kasnijih ministarstava inostranih poslova. Premda to ne predstavlja posebnu novinu, s obzirom na činjenicu da je takvih sastanaka bilo i ranije, treba pomenuti i to da su povremeno održavani višestrani međunarodni skupovi, što znači jedan vid multilateralne diplomatije. Najčešće je povod bilo nastojanje da se putem neposrednih pregovora i posredovanja dođe do zaključenja mirovnog sporazuma. Primer je Lodijski mir, kako se naziva ugovor o miru koji su 1454. g. na skupu održanom u italijanskom gradu Lodi, dogovorili i potpisali predstavnici Milana, Venecije, Napulja i Firence.

Konzuli

Usled razvoja međunarodne trgovine, nastaje i sve više se uobličava ustanova konzula. Do toga dolazi tako što u X-XI v. u lučkim gradovima na Mediteranu, a zatim i zemljama Istoka trgovci iz pojedinih zemalja osnivaju svoja udruženja, koja uspevaju da od teritorijalnih vlasti izdejstvuju za sebe izvesnu autonomiju. Na osnovu toga, a u skladu sa tada važećim principom personaliteta zakona, sporove u okviru takvih udruženja, pa čak i krivične stvari, rešavale su njihove izborne starešine (tzv. magistrati), U njihovu nadležnost spadali su i za nadzor nad međunarodnom trgovinom i rešavanje trgovačkih sporova odn. sporova koji su u vezi se prevozom robe morem, pa se otuda javljaju i pod imenima „konzularne sudije" (*juges consules*), „konzuli trgovaca" (*consules mercatorum*) ili „konzuli mora" (*consules maris*). Tokom vremena se za njih uobičajio naziv „konzuli", po ugledu na ime magistrata (visokih funkcionera) u srednjovekovnoj Italiji. To su, po mnogima, bile preteče savremenih konzula.[13]

---

[12] И. С. Искевич , А. В. Подольский, *Дипломатическое и консульское право,* Тамбов, 2014, С. 40–41.

[13] Lassa F. Oppenheim., *International Law, A Treatise,* vol. I, „Peace", ed. by Ronald F. Roxburgh, Longmans, Green and co., London, 1920, p. 589; Luke T. Lee, *Consular Law and Practice,* Stevens & Sons, 1961, pp. 4–5; Stevan Đorđević, Miodrag Mitić, *Diplomatsko i konzularno pravo,* Beograd, 2000, str. 161-162; Alexander H. De Groot, „The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries", *Oriente Moderno,* 2003, No. 3, pp. 575–604; Luka Gašparović, "Osnove sustava kapitulacija kao međunarodnih ugovora *sui generis* u Osmanskom carstvu (XVI. – XVIII. st.)", *Zbornik Pravnog fakulteta u Zagrebu,* 2009, No. 4, str. 679–716.

Međunarodna arbitraža

Među načinima mirnog rešavanja sporova, kao što su pregovori, posredovanje i slično, posebno mesto dobija je arbitraža tj. mirno rešavanje međunarodnog spora putem suda koji su izabrale same strane u sporu. Arbitraža se naglo razvila u XII i cvetala u XIII i XIV, da bi od XV v. doživela privremeni pad. Iz tog perioda (XII-XV v.) poznato je oko 160 što arbitražnih presuda, što ugovora o arbitraži, od čega 5 u XII, 28 u XIII, 63 u XIV i 64 u XV veku.[14] U ulozi arbitra javljale su se ugledne ličnosti-pojedinci koje su po rangu bile jednake parničarima ili iznad njih - verski poglavari, vladari, sizereni i slično. Jedan od najpoznatijih slučajeva je onaj iz 1298. g. u kojem je papa Bonifacije VIII arbitrirao u sporu između Filipa Lepog i Ričarda Lavljeg Srca.[15]

Bilo je i arbitražnih sudova, sastavljenih od dvojice i više sudija, s tim da je svaka strana imenovala jednak broj arbitara (obično po jednog ili dva). Pošto takva arbitraža u slučaju podele glasova, nije mogla obezbediti rešenje spora, predviđana su posebna pravila za izlazak iz te situacije. Tako npr. ugovor između Francuske i Engleske iz 1546. g. u sporu oko duga od 542.000 zlatnih talira, predvideo je da će rešavanje spora biti povereno dvojici predstavnika koje imenuju strane u sporu, s tim da ako se oni u roku od 3 meseca ne slože, tada će vladari izabrati 2 pravnika, tuđa (neutralna) podanika, čije će rešenje vezati oba vladara i njihove naslednike.[16] Jednom vrstom arbitraže može se smatrati mešoviti sud koji je u Srednjem veku rešavao sporove između Srbije, Zete, Bosne, Huma, s jedne, i Dubrovnika, s druge strane. Reč je o telu koje se zvalo "stanak" (lat. *stanicium*) a bilo je sastavljeno od podjednakog broja predstavnika obeju strana. Državne sporove rešavao je "veliki stanak" (*stanicium magnum, plenarium*) a sporove između pojedinaca raspravljao je "mali stanak" (*stanicium parvum, proprium*). Kada je reč o srpsko-dubrovačkim sporovima, "stanak" se sastajao kod crkve svetog Tripuna u Šumetu, kod crkve svetog Mihaila na Kresti, a od XIII v. najčešće na Železnoj ploči kod Brgata. Zasedao je između jesenjeg svetog Arhangela (21. novembar) i Đurđevdana (6. maj).[17]

Međunarodni krivični sudovi

Shvatanja da postoje određeni zločini koji su takvi da imaju univerzalno značenje odn. spadaju u ono što danas nazivamo međunarodnim krivičnim delima javila su se već u prethodnom razdoblju, u pogledu takvi zlodela kao što su

[14] Mileta Novaković, *op. cit.*, str. 143–154.

[15] Ernest Nis, *op. cit.*, str. 59.

[16] *Ibid.*, str. 60.

[17] Mileta Novaković, *op. cit.*, str. 147–146; Milenko R. Vesnić, "Međunarodno pravo u odnosima Južnih Slovena Srednjeg veka", u: Nis Ernest, *Poreklo međunarodnoga prava,* Beograd, 1895, str. 527–528.

piratstvo i određeni ratni zločini. Tu je, međutim, odluka o kažnjavanju bila u rukama domaćeg (nacionalnog) suda odnosne države, a vrlo često je o svemu brzo i jednostavno odlučivao sam vladar. Međutim, u srednjem veku susrećemo se, istina izuzetno, sa prvim međunarodnim krivičnim sudovima, sastavljenim od sudija iz raznih država. To su bili *ad hoc* sudovi koji su sudili za ono što savremeno međunarodno pravo naziva zločinom agresije odnosno ratnim zločinima ili zločinima protiv čovečnosti. Posle Bitke kod Taljakoca 23. 8. 1268, u kojoj ga je porazio Šarl I Anžujski (*Charles d'Anjou*) 16-godišnji nemački vojvoda Konradin fon Hoenštaufen (*Conradin von Hohenstaufen*) izveden je pred specijalno za tu priliku stvoreni međunarodni sud (Veliki savet) sastavljen od francuskih plemića i predstavnika italijanskih gradova. Proglašen je krivim za vođenje nezakonitog tj. agresorskog rata i ubijanje italijanskih civila koje je počinila njegova vojska, osuđen na smrt i pogubljen 29. 10. 1268. Istine radi, ima mišljenja da se radilo o političkom suđenju, u prilog čemu se ističe da je od četvorice sudija samo jedan odmah bio za smrtnu kaznu, dok su ostali popustili tek pod pritiskom Šarla koji je i sastavio sud. On je smrću Konradina ugasio vladarsku dinastiju Hoenštaufena i preuzeo Siciliju.[18] Dva veka kasnije, međunarodni *ad hoc* krivični sud, sastavljen od 28 sudija iz gradova–državica Alzasa, Nemačke i Švajcarske sudio je 1474. g. Peteru fon Hagenbahu (*Peter von Hagenbach*) guverneru okupiranog grada Brajzaha, zbog kršenja „Božjih i ljudskih zakona" - ubistava, silovanja, zlostavljanja, krivokletstva, nezakonite konfiskacije privatne imovine i drugih zlodela koja su po njegovom naređenju izvršila lica pod njegovom komandom u vreme kada nije bilo neprijateljstava. Proglašen je krivim, lišen plemstva, osuđen na smrt i obezglavljen.[19]

Kodifikacija pomorskog prava

Jačanje međunarodne trgovine dovelo je do daljeg razvoja običajnih pravila u oblasti pomorskog prava, a zatim i do prvih kodifikacija ove materije. To su bili skupovi propisa koji su objavljivani i primenjivani u lokalnom uslovima, ali su stekli i širi značaj. Pomenućeno neke od najpoznatijih. Vizantijski Pomorski zakon odn. Rodoski pomorski zakon (grč. *Nomos Rhodion Nautikos,* lat. *Lex Rhodia*) bio je skup kodifikovanih propisa koji su u Vizantijskom carstvu u VII–XII v. regulisali plovidbu trgovačkih brodova i pomorsku trgovinu, kao i sa time

[18] Edoardo Greppi, „The evolution of individual criminal responsibility under international law", *International Review of the Red Cross*, 1999, No. 835, p. 533; Cherif M. Bassiouni, *Introduction to International Criminal Law*, Martinus Nijhoff Publishers, 2012, pp. 1047–1048; Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, 2013, pp. 131–132.

[19] Georg Schwarzenberger, *International Law as Applied by Courts and Tribunals*, London, 1968, pp. 462-466; Gregory S. Gordon, „The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law", in: Kevin Jon Heller, Gerry Simpson (eds.), *The Hiden Histories of War Crimes Trials*, Oxford University Press, 2013, pp. 13–49.

povezana pitanja. Uticao je na pomorsko pravo srednjovekovnih italijanskih gradova, a time i na pravo i praksu u Sredozemlju. Naziv duguje tome što se zasnivao na pomorskom običajnom pravu koje između 1.000. i 800 g. pre n. e., nastalo na Rodosu,[20] a zatim, sa određenim izmenama, uneto u Justinijanov kodeks (*Corpus Iuris Civilis*). Ticao se pravila koja važe na brodu; učešća posade u dobiti; podele odgovornosti (između brodovlasnika, vlasnika robe koja se prevozi i putnika) u slučaju krađe, oštećenja ili propasti tereta ili broda (npr. za štetu nastalu time što je tokom bure, radi spasavanja broda i ljudi, kapetan bacio teret u more).[21] Amalfijska ploča (lat. *Tabula Amalphitana*) je poznata zbirka sredozemnih pomorsko-pravnih običaja koje se sakupila i publikovala pomorska kurija (pomorski sud) italijanskog grada Amalfi. Naziv "ploča" po svemu sudeći dolazi od toga što se tekst ovog dokumenta izlagao u javnosti u okviru pričvršćenom na spoljnim vratima pomorske kurije. Ima 66 poglavlja, od kojih su prvih 21 na latinskom, a ostalih 45 na italijanskom jeziku. Smatra se da je latinski deo zvanični tekst koji je priredila sama kurija krajem XI ili početkom XII v., a da je italijanski deo dodat u prvoj polovini XIV v. od strane nekog stručnjaka u pomorskim poslovima. Zbirka je imala široku primenu, posebno u Tirenskom moru, sve do početka XVII v. Mnogo savršeniji bio je *Consolato del mare* ("Kodeks dobrih običaja mora") koji je nastao na području Mediterana između XII i XIV v. Premda prevashodno sadrži norme privatnog prava, u njemu su svoje mesto našla i pravila međunarodnog javnog prava – npr. ona o zapleni neprijateljskog broda, o zabrani zaplene neutralnog broda i dr. Poznat je i pod francuskim nazivom *Consulat de la mer*, a tako se obično naziva i njime predviđeni sistem zaplene neprijateljske imovine prema kojem je dozvoljena zaplena neprijateljskog broda i robe, ali ne i neutralnog broda ili robe. Snažno je uticao na kasniji razvoj međunarodnog prava u ovoj materiji. Oleronska pravila (fr. *Rôles d'Oleron*) kodifikovala su običajna pravila pomorskog prava koja su važila u severozapadnoj Evropi – Francuskoj, Španiji, Portugaliji, Engleskoj, Škotskoj i Holandiji. Nastala su na Oleronu, najvećem francuskom ostrvu u Atlantiku krajem XII ili početkom XIII v. i prvobitno služila za regulisanje izvoza vina iz Bretanja i Normandije u Englesku, Škotsku i Flandriju. Ubrzo su postala popularna, tako da su se na njima zasnivali praktično svi kasniji pomorski zakonici Severne Evrope.[22] Ima, međutim, mišljenja da nisu svugde primenjivana u punoj

[20] Rodos je bio kolonija Feničana, čuvenih pomoraca i trgovaca antičkog doba.

[21] Robert D. Benedict, „The Historical Position of the Rhodian Law", *Yale Law Journal,* 1909, No. 4, pp. 223–242; Anna Tarwacka, "Using *Lex Rhodia* in the case of a Pirrate Attack", *Gdańskie studia prawnicze,* 2019, No. 3, pp. 81-90; Jacek Wiewiorowski, "Universality of the Rhodean Maritime Law from the Standpoint of Neoevolutionism", *Gdańskie studia prawnicze,* 2019, No. 3, pp. 217–230.

[22] Timothy J. Runyan, „The Rolls of Oleron and the Admiralty Court int he Fourthteen Century England", *American Journal of Legal History,* 1975, No. 2, pp. 95–111; Marcin Böhm, "The Rolls of Oléron, Maritime Assizes of the Kingdom of Jerusalem as a Heritage of the Rhodian Sea Law in the Anglo-Norman World in the Cases of Murders, Robberies, and Maritime Piracy",

meri, s tim da se posebno ukazuje da je u srednjem veku Severna Evropa bila podeljena na nekoliko lokalnih, regionalnih i nacionalnih jurisdikcija od kojih je svaka koristila različita pravila.[23] Zajednička karakteristika pomenutih i sličnih zbornika jeste to da se, strogo uzev, u principu radilo o unutrašnjim propisima, a ne o kodifikacijama međunarodnog prava u savremenom smislu, te da su prvenstveno regulisana pitanja koja spadaju u privatno pravo. Ipak, ti propisi su imali širi značaj već zbog toga što su se ticali međunarodne trgovine. Pored toga, zbog univerzalne prirode pravnih problema vezanih za pomorstvo, prevoz robe morem, napade pirata, brodolome i slično, pravila i principi ovih zbornika primenjivani su i van granica jurisdikcije ne samo konkretnih pomorskih sudova već i odnosnih država. Štaviše, pojedina od tih rešenja opstala su sve do naših dana. Konačno, premda su se bavili prvenstveno onim što se ticalo međunarodne pomorske trgovine, ovi zakonici doticali su se i određenih pitanja koja spadaju u domen međunarodnog prava, kao što su npr. pitanje jurisdikcije, obaveza spasavanja na moru i dr.

Položaj ljudi

Mada postepeno dolazi do napuštanja robovlasničkih odnosa, u feudalizmu i dalje nema pravne jednakosti ljudi. Naprotiv, još uvek srećemo dve osnovne kategorije ljudi - slobodno i neslobodno stanovništvo - u okviru kojih se može govoriti o nekakvom dodatnom razlikovanju, između ostalog i prema državljanstvu i poreklu. S tim u vezi i pitanje položaja stranaca i pripadnika manjina. Stranci su u prvo vreme sasvim obespravljeni. Ne samo da nisu uživali nikavu pravnu zaštitu, niti su mogli sticati nekretnine, već su se razvili i posebni instituti na štetu stranaca. Konkretno, rasprostranjeno je bilo pravilo prema kojem se zaostavština stranca nije mogla nasleđivati, pa ni na osnovu testamenta, već je feudalcu pripadala sva imovina umrlog stranca koja se nalazila na njegovoj teritoriji (*jus albinagii*). Ako bi strani brod pretrpeo brodolom, njegove ostatke i teret plenio je vladar obale, koji je često zarobljavao i posadu broda (*jus naufragii*). Ipak, jačanje međunarodnih odnosa, a posebno razvoj trgovine doveli su kasnije do poboljšanja položaja stranaca, u prvom redu trgovaca, hodočasnika, misionara i drugih. To se, između ostalog, postizalo zaključivanjem posebnih ugovora kojima je zabranjeno posezanje na ličnost i imovinu stranaca, obezbeđeno je pravo stranaca da im sude izabrane sudije i slično. Pojedini vladari su za svoje podanike koji se nalaze u drugim zemljama izdejstvovali poseban,

Gdańskie studia prawnicze, 2019, No. 3, pp. 129-137; Dorota Pyć, "The Laws of Oleron as the Rules Governing Maritime Labour. Have We Learned a Lesson Ffrom the Past?", *Gdańskie studia prawnicze,*, 2019, No. 3, pp. 161–175.

[23] Edda Frankot, "Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea", in: Juan Pan-Montojo and Frederik Pedersen (eds.) *Communities in European history: representations, jurisdictions, conflicts*, Piza, 2007, pp. 151–172.

privilegovani položaj. Tako je na primer Karlo Veliki uspeo da 799. g. preko svoje misije koju mu je poslao, dobije od abasidskog (bagdadskog) kalifa Harun al Rašida određene povlastice za svoje podanike. Sa druge strane, u srednjovekovnoj Srbiji povlastice građana slobodnog grada Dubrovnika bile su zajamčene kako jednostranim aktima (npr. povelja kralja Milutina iz 1302. g.), tako i međunarodnim ugovorima (npr. ugovor srpskog cara Stefana Dušana sa Dubrovnikom iz 1349. g.). Dubrovčani su uživali punu slobodu trgovine, bila je predviđena zabrana represalija prema njima, za sporove između njih i srpskih podanika bilo je predviđeno posebno sudstvo, međusobne sporove Dobrovčana presuđivali su dubrovački konzuli, za štetu pričinjenu Dubrovčanima odgovarala je župa u kojoj je šteta pričinjena odnosno obližnje selo, a kasnije se car obavezao da će im on lično nadoknaditi štetu koju u njegovoj državi pretrpe, s tim da će se on regresirati od krivca.[24] U ovom periodu nailazimo i na začetke zaštite manjina, mada se još uvek ne može govoriti o manjinama u današnjem smislu reči (jer je osnovna podela stanovništva na slobodno i neslobodno) a posebno ne o nekakvoj institucionalizovanoj zaštiti manjina. Ipak, već tada zaštita verskih manjina postaje predmet izvesnih međunarodnih ugovora, sklopljenih mahom između evropskih država i određenih zemalja Istoka. Tako je npr. mirovni ugovor između vizantijskog cara Justinijana i persijskog cara Horesa I, zaključen 562. g., sadržao jamčenje zaštite nekim verskim manjinama na teritorijama dveju imperija.[25] Slično tome, rimske pape su u XIII v. sklapale specijalne sporazume sa mongolskim vladarima u cilju zaštite hrišćanskih misija na Istoku.[26] Iako se radilo o dokumentima koji su imali ograničeni domašaj kako u pogledu kruga država koje su obavezivali (dvostrani sporazumi) tako i subjekata zaštite (konkretne verske manjine) oni su predstavljaju važnu stepenicu na putu razvoja instituta zaštite manjina.

Ratovi i ratno pravo

Ratovi i, u vezi s tim, brojni nestabilni savezi su bitna obeležja srednjeg veka. Iako se povremeno zaključuju „večni" mirovi, oni u praksi predstavljaju samo zatišja do nekog novog sukoba. Verovatno se neće pogrešiti ako se konstatuje da se nikada, ni pre, ni posle. nije ratovalo toliko mnogo i to po čitavom svetu, kao u doba srednjeg veka. Ovde ćemo se ukratko zadržati na samo tri problema: 1) uslovima za vođenje (pravednog) rata, 2) ograničenjima vezanim za sredstva i načine borbe i 3) nekim posebnim ograničenjima.

---

[24] Dragoš Jevtić, Dragoljub Popović, *Pravna istorija jugoslovenskih naroda*, Beograd, 1994, str. 64–65.

[25] Ion Diaconu, „Minorities in International Law", *Romanian Journal of International Affairs,* 2001, No. 3–4, pp. 17–19.

[26] Ilija Pržić, *Novo međunarodno pravo*, Beograd, 1934, str. 77.

Pravedni ratovi

Shvatanje o tome da su samo neki ratovi moralno i pravno opravdani, javlja se još u antičkom svetu. Ideja o podeli ratova na pravedne i nepravedne zadržala se u delima filozofa, stavovima crkve i teologa, ali i u praksi i u srednjem veku. Kriterijum „pravednosti" razlikovao se od slučaja do slučaja, ali se, generalno, pravednim najčešće smatrao onaj rat koji ima pravedan motiv i cilj. Problem je, međutim, bio u tome što se pravednost motiva i cilja različito shvatala i tumačila. Stoga je u Zapadnoj Evropi razvijena doktrina pravednog rata koja je imala je za cilj da uvede određena ograničenja u smislu preciziranja ko, zašto i kako može da vodi rat. Sa druge strane, u to vreme kada je rat bio svakodnevna pojava, ona je služila njegovom opravdanju – pravedan rat nije bio greh. U razvijenom obliku, teorija o pravednim i nepravednim ratovima je, da bi se rat mogao označiti kao pravedan, zahtevala zadovoljenje niza uslova koji se mogu svrstati u dve grupe: 1) one pod kojima je dozvoljeno započinjanje pravednog rata (*jus ad bellum,* pravo na rat) i 2) one pod kojima se rat koji se vodi može smatrati pravednim (*jus in bello,* ratno pravo). Prvi, dakle, ograničavaju slobodu pribegavanja sili oružja, a drugi ograničavaju slobodu dejstva u ratu. Premda su postojale razne varijacije shvatanja o konkretnim uslovima pod kojima se rat može smatrati pravednim, to se može sažeti na istovremeno ispunjenje sledećih zahteva: 1) Legitimna vlast (*auctoritas principis*) – ratu može da pribegne samo legitimna vlast, ona koju kao takvu priznaju stanovništvo odnosne zemlje i druge države, tako da to pravo nemaju obični pojedinci i grupe; 2) Pravedan razlog *(justa causa)* – rat mora imati pravedan i opravdan uzrok, što je slučaj kada se javlja kao odgovor na očitu, veliku i trajnu nepravdu, sa namerom da se ona ispravi; 3) Ispravne namere (*recta intentio*) – rat mora imati ispravan motiv i cilj, mora se voditi za pravednu stvar (npr. nije pravedan rat koji se vodi radi pljačke); 4) Poslednje sredstvo (*ultima ratio*) – obraćanje sili oružja mora biti poslednja mogućnost, nakon što je bezuspešno pokušano da se spor reši mirnim putem; 5) Izgledi na uspeh - mora postojati razumna verovatnoća da će biti postignut uspeh (ulazak u rat koji nema nikakvih izgleda da se dobije, bio bi nerazuman, a time i neopravdan pošto bi proizveo nepotrebne žrtve); 6) Srazmernost (*debitus modus*) – nasilje mora biti u skladu sa najnužnijim potrebama tj. mora postojati proporcija između upotrebljenih sredstava i ciljeva; 7) Poštovanje pravila ratovanja – moraju se poštovati utvrđena pravila ratnog prava (*jus in bello*) tj. zakoni i običaji rata kojima su sredstva i metodi ratovanja unekoliko ograničeni, a određenim kategorijama lica i objekata pružena najnužnija zaštita.[27] Mada je

[27] Ernest Nis, *op. cit.*, str. 187-190; Joachim Von Elbe, „The Evolution of the Concept of Just War in International Law", *American Journal of International Law,* 1939, No. 3, pp. 665-688; Frederick H. Russell, *The Just War in the Middle Ages,* Cambridge University Press, 1975; John Langan, „The Elements of St. Augustine's Just War Theory", *Journal of Religious Ethics,* 1984, No. 1, pp. 19-38; John F. Coverdale, „An Introduction to the Just War Tradition", *Pace International Law Review,* 2004, No. 2, pp. 221–277; Michael Walzer, *Just and Unjust Wars,* Basic Books, 2006; Robert E. Jr. Williams, Dan Caldwell, „*Jus Post Bellum:* Just War Theory and the Principles of Just Peace", *International Studies Perspectives,* 2008, No. 4, pp. 309–320;

razvijana tokom dugog vremena, doktrina o pravednim ratovima imala je u srednjem veku samo delimičan značaj, zato što je sadržala određene nedorečenosti i protivrečnosti.[28] Pored toga, uglavnom je važila u hrišćanskom svetu, u prvom redu u odnosima između zapadnih zemalja, dok su ratovi protiv nevernika posmatrani su na drugi način. Štaviše može se reći da je ideja o pravednim ratovima mnogo puta zloupotrebljena za opravdanje osvajačkih pohoda, jer je bilo mnogo lakše motivisati vojnike, pa i čitavo stanovništvo ako im se utuvi da vode ispravan, pravedan rat, da su Bog i pravda na njihovoj strani. U potvrdu tome dovoljno je podsetiti na krstaške ratove, kako se jednom rečju naziva niz pohoda koje su u XI–XIII v. pokretali pape i evropski vladari da bi od muslimana preoteli Svetu zemlju. Čak i u odnosima između zapadnih država, jača strana je obično bila u poziciji ne samo da dobije rat, već i da mu nametne svoju kvalifikaciju, proglašavajući ga pravednim. Ipak, u praksi su mnoga pravila u većoj ili manjoj meri poštovana, kao što je i sama doktrina o podeli ratova na pravedne i nepravedne odigrala pozitivnu ulogu u razvoju ideje o ograničenju prava na rat i obavezi poštovanja zakona i običaja ratovanja.

Zabrana određenih sredstava i načina ratovanja

U Evropi su nastala tzv. riterska pravila (viteški kodeks) kojima su utvrđena striktna pravila za borbu odn. za časno postupanje u ratu. Ona su, međutim, važila samo između vitezova, ali ne i u sukobima sa "nevernicima" ili kmetovima. Svojevrsni viteški kodeksi u to doba postoje i u drugim kulturama, u prvom redu tamo gde postoje posebne ratničke kaste. Primer je japanski *Bušido* (jap. *Put ratnika)* koji propisuje pravila ponašanja samuraja u svakodnevnom životu i borbi. Zabeleženo je i da su određena ograničenja precizirana ugovorom između zaraćenih strana. To se događalo bilo tako što se takav sporazum zaključivao odmah po objavi rata, bilo tako što je postizan neposredno pred bitku ili boj. Ograničenja slobode ratovanja su ponekad imala širi značaj (važila za niz država) posebno onda kada su se odnosila na zabranu nekih konkretnih oružja. Tako je npr. u srednjem veku u Zapadnoj Evropi bio zabranjen samostrel. Njime se gađalo veoma precizno, a pošto su njegove strele imale izuzetnu probojnu moć i veću debljinu od običnih strela, šansa da se preživi ranjavanje bila je mnogo manja u poređenju sa ranjavanjem strelom iz luka. Stoga ne čudi što je u to doba on bio poznat kao "đavolsko oružje". Nakon što je već papa Urban II 1097. g. posebnim kanonom osudio upotrebu samostrela, Drugi lateranski kongres (1139) je kanonom 29 pod pretnjom anateme zabranio upotrebu samostrela, kao "ubilačku veštinu, mrsku Bogu".[29] Zabrana je,

Tomasz Widłak, „From Vladimiri's Just War to Kelsen's Lawful War: The Universality of the Bellum Justum Doctrine", *Studia Prilosophiae Christianae,* 2017, No. 3, pp. 77–96.

[28] Boris Krivokapić, *Mir i rat umeđunarodnim odnosima i pravu,* Beograd, 2017, str. 482–488.

[29] *The Canons of the Second Lateran Council, 1139,* Fordham University, 1996, *fordham.edu/halsall/basis/lateran2.asp,* 9. 8. 2023.

međutim, važila samo u ratovima među hrišćanima, a ne i protiv drugih naroda, pa je čak i u ratovima između hrišćana često kršena. Uostalom, s pravom se primećuje da je jedan od glavnih razloga zabrane samostrela bio taj što je njime i običan seljak mogao da se bezbedne daljine ubije viteza.[30]

Božji mir i Božje primirje

Poseban vid ograničenja slobode ratovanja obezbedila je katolička crkva. Pošto su brojni privatni ratovi evropskih feudalaca[31] nanosili štetu mnogima, pa i njoj samoj, ona je od kraja X v. počela da pribegava ustanovi Božjeg mira, a nešto kasnije i Božjeg primirja kojima su uvedena važna ograničenja vođenja tih ratova u smislu zabrane nasilja prema određenim licima i vremenskog i prostornog sužavanja samog prava na rat. Božji mir (lat. *Pax Dei*) značio je zaštitu i nedodirljivost u ratu određenih kategorija ljudi (sveštenici, hodočasnici, putnici, trgovci, žene, seljaci) i njihove imovine. Proglašen je 975. g. na koncilu katoličke crkve održanom u Le Pij an Vele[32] i prvi put je primenjen 1027. g. u Rusiljonu u južnoj Francuskoj. Zatim je prihvaćen i u Italiji, Španiji, Nemačkoj, Engleskoj i drugim katoličkim zemljama. Dodatni značaj dobio je 1095, g. kada ga je Papa Urban II na crkvenom koncilu u Klermonu proglasio obaveznim za čitav hrišćanski svet. Božji mir je unet u kanonsko pravo i 1179. g. usvojen kao opšte crkveno pravilo. Ova ograničenja dopunjena su sredinom XI v. Božjim primirjem (lat. *Treuga Dei*) koje je prvi put proklamovano na crkvenom koncilu u Tuluzu 1027. g. Radilo se o ustanovi koja je zabranjivala ratovanja određenih dana – u izvesne praznične dane (pred Božić, pred Uskrs) a takođe od 21 časova u subotu, do 3 sata u ponedeljak ujutro. Zatim je zabrana proširena na period od srede uveče do ponedeljka ujutro. Pošto se ratovati nije smelo ni u druge za veru važne dane (drugi hrišćanski praznici i dani posta) na kraju je za privatne ratove feudalaca godišnje ostalo svega 80 dana. Pored toga, neka mesta su proglašena neprikosnovenim u smislu da nisu mogla biti predmet odn. mesto nasilja. To su u prvom redu bile crkve i manastiri, ali i druga područja i objekti. Između ostalog, na raskrsnicama puteva podizani su masivni kameni krstovi koji su na tom prostoru pružali putnicima zaštitu od napada. Dok je Božji mir u principu važio

[30] Martin Van Creveld, „The Clausewitzian Universe and the Law of War", *Journal of Contemporary History,* 1991, Nos. 3/4, p. 416.

[31] I u vreme kada je rat bio pravno dozvoljen, smatralo se da pravo ratovanja pripada samo državi. Međutim, u srednjovekovnoj Evropi, usled feudalne razdrobljenosti i odsustva snažne centralne vlasti, ko god se osećao dovoljno moćnim smatrao je da ima pravo da vodi sopstvene ratove, kada god veruje da mu je povređeno neko pravo. Videti: Ernest Nis, *op. cit.*, str. 87-104.

[32] Loren C. MacKinney, „The People and Public Opinion in the Eleventh-Century Peace Movement", *Speculum,* 1930, No. 2, pp. 181–206; Head Thomas, „The Development of the Peace of God in Aquitaine (970–1005)", *Speculum,* 1999, No. 3, pp. 656-686; Gergen Thomas, „The Peace of God and its legal practice in the Eleventh Century", *Cuadernos de Historia del Derecho,* 2002, Vol. 9, pp. 11–27.

uvek, ali se svodio samo na zaštitu odnosnih lica i dobara, Božje primirje je bilo na snazi povremeno, ali je štitilo sve. Premda su Božji mir i Božje primirje važili širom Zapadne Evrope, često su kršeni u praksi. Stoga je počev od 1123. g. kao sankcija za nepoštovanje ovih pravila pretila ekskomunikacija. Pojava snažnih centralizovanih država dovela je do ukidanja privatnih ratova i time učinila suvišnim institute Božjem mira i Božjeg primirja. Oni se gube već u XIII v. Čak i ako je njihov domašaj u praksi bio ograničen, te ustanove su uticale na promenu mentaliteta srednjovekovnih ljudi i jačanje svesti o tome da i u ratu moraju da važe određena pravila i ograničenja.

NAUKA MEĐUNARODNOG PRAVA

Napred izloženom moglo bi se prigovoriti da su mnogi od pojmova i načela koji su u međunarodno pravo preuzeti iz Rimskog prava, tu dospeli zahvaljujući predstavnicima nauke međunarodnog prava koja se razvila u kasnijem periodu – posle srednjeg veka. I zaista, to je donekle tako. Pravi polet nauka koja se bavi međunarodnim pravom, a time i prilagođavanjem Rimskog prava za njegove potrebe, dobila je tek počev od XVI veka. Pa ipak, stvari nisu tako jednostavne. Pre svega, već u srednjem veku neki od stručnjaka za Rimsko pravo, poznatih kao glosatori i postglosatori, bavili su se raznim pitanjima od značaja za međunarodno pravo. Primeri su Bartolus (*Bartolo da Sassoferrato,* 1313–1357), Baldus (*Baldo degli Ubaldi*, (1327-1400) i Lenjano (*Giovanni da Legnano*, 1329–1383) za koje mnogi smatraju da su bili prvi teoretičari međunarodnog prava. Pored njih, postojali su i drugi koji su proučavali međunarodno pravo, među kojima i Kristina Pizanska (fr. *Christine de Pisan,* 1354–1430) koju pojedini nazivaju majkom međunarodnog prava.[33] Pomenuti pisci i oni koji su došli za njima nisu poput arheologa negde iznenada „otkopali" Rimsko pravo, kao nešto što je nekada bilo, ali je zatim napušteno i zaboravljeno. Premda je pretrpelo mnoge izmene, to pravo je u većoj ili manjoj meri ostalo da važi i posle propasti Rima. Tim pre se to može reći za njegove institute i principe koji, kao opšta pravila, i inače uvek imaju širu i trajniju vrednost od konkretnih normi. Proučavanje međunarodnog prava u srednjovekovnoj Evropi nije se svodilo samo na svojevrsnu recepciju rešenja i principa Rimskog prava. Premda to nije vršeno sa pozicija jasno definisane doktrine međunarodnog prava, već u sklopu drugih disciplina pravne nauke, filozofije ili teologije, predmet proučavanja bila su razna pitanja koja su se ticala međunarodnih ugovora, diplomatskih predstavnika, mirnog rešavanja sporova i dr. Tako su npr. zanimljive osvrte na pravedne ratove

[33] Moratiel Villa Sergio, „The philosphy of international law: Suárez, Grotius and epigones", *International Review of the Red Cross*, 1997, Vol. 37, Special Issue 320, pp. 539–552; Maria Teresa Guerra Medici, „The mother of international law: Christine de Pisan", *Parliaments, Estates and Representation,* 1999, No. 1, pp. 15–22; Dante Fedele, *The Medieval Foundations of International Law,* Brill / Nijjhof, 2021.

dali su mnogi teolozi među kojima naročito Sveti Avgustin (*Aurellius Augustinus,* 354–430), Isidor Seviljski (*San Isidoro de Sevilla,* 560–636), Sveti Rejmond od Penaforta (*Sant Ramon de Panyafort,* 1180–1275) i Toma Akvinski (*Tomaso d'Aquino,* 1225–1274). Sa druge strane, kada se već dotičemo stručnjaka za međunarodno pravo te epohe, moramo se setiti da je život tekao i izvan granica evropskog kontinenta. U tom smislu zanimljivo je primetiti da je još u VIII v. arapski pravnik Muhamed Al-Šajbani (*Muhammad al-Shaybani*) koga neki nazivaju ocem muslimanskog međunarodnog prava, izvršio svojevrsnu kodifikaciju međunarodnog prava. Radilo se zapravo o zbirci slučajeva i prakse toga vremena. Njegov rad nastavili su brojni učenici.

ZAKLJUČAK

Nije moguće u radu ograničenog obima, kakav je ovaj članak, osvrnuti se na sva zanimljiva pitanja koja se tiču međunarodnog prava u srednjem veku. Uostalom, stvarno ozbiljan osvrt zahtevao bi se ne samo mnogo veći prostor, već bi morao biti plod zajedničkog rada tima istraživača među kojima su specijalisti za pojedine kulture, određene periode i razne oblasti međunarodnih odnosa i međunarodnog prava. Ipak, nadamo se da i ovaj skromni prilog dovoljno svedoči da je u srednjem veku postojalo i razvijalo se međunarodno pravo i to na raznim prostorima i u raznim domenima. Istina je da bi se moglo prigovoriti da su neka od pravila o kojima je bilo reči formalno bila deo lokalnog ili unutrašnjeg prava. Međutim, ona su primenjivana u međunarodnim odnosima i to izvan granica odnosne države, što znači da su makar prećutno prihvaćena kao neka vrsta zajedničkih običajnih pravnih pravila. Uostalom, svrha svakog prava, pa i međunarodnog, jeste da njime predviđena rešenja budu ostvarena u praksi. Čak i ako se to ne postiže uobičajenim putem (zaključnjem i izvršenjem međunarodnog sporazuma) već se radi o nekakvoj manje-više spontanoj unifikaciji pravila, taj cilj je postignut. Tome valja dodati da su međunarodnopravni običaji i danas jedan od dva najvažnija izvora međunarodnog prava. Konačno, nadamo se da smo dovoljno ukazali i na nesumnjive norme i institute srednjovekovnog međunarodnog prava, kao što su međunarodni ugovori, garancije za izvršenje ugovora, međunarodna arbitraža, stalne diplomatske misije, konzuli i dr. Međunarodno pravo je nastalo u dalekoj prošlosti, uporedo sa prvim državama. Srednji vek je predstavljao samo jednu od etapa u njegovom razvoju. Za vreme njenog trajanja, kao uostalom, i tokom čitave istorije, međunarodno pravo je, nema sumnje, često kršeno (svako pravo se ponekad krši) ali je neuporedivo više poštovano. Da nije tako, vladao bi rat svih protiv svih i ne samo da ne bi bilo međunarodnog prava, već ne bi bilo ni civilizacije, pa ni nas da se danas bavimo ovim pitanjima.

INTERNATIONAL LAW OF THE MIDDLE CENTURY

ABSTRACT

One part of theorists still believes that international law is a relatively new phenomenon, which was created at the Congress of Westphalia (1648). Disagreeing with such a position, the author gives a general overview of the Middle Ages and international law, and then deals with specific institutes and problems. Such as the rank of states, state power over territory and population, the most important international treaties, guarantees for ensuring the execution of treaties, diplomatic missions and diplomatic law, consuls, international arbitration, international criminal courts, codification of maritime law, the position of people, wars and wartime law and, in general, the development of the science of international law. After citing a number of examples, some of which are less well-known, the author concluded that international law originated in the distant past, alongside the first states, and that the Middle Ages represented only one of the stages in its development. During this stage, as well as throughout history, international law was, no doubt, often violated and incomparably more respected. If it were not so, there would be a war of all against all and not only would there be no international law, but there would also be no civilization.

Key words: International law, history, Middle Ages, doctrine, Diplomatic law

REFERENCE

1. Bassiouni Cherif M. *Introduction to International Criminal Law*, Martinus Nijhoff Publishers, 2012.
2. Bederman David J., „International law in the ancient world“, in: Armstrong David (ed.): *Routledge Handbook of International Law,* Routledge 2009.
3. Benedict Robert D., „The Historical Position of the Rhodian Law“, *Yale Law Journal,* 1909, No. 4.
4. Böhm Marcin, “The Rolls of Oléron, Maritime Assizes of the Kingdom of Jerusalem as a Heritage of the Rhodian Sea Law in the Anglo-Norman World in the Cases of Murders, Robberies, and Maritime Piracy”, *Gdańskie studia prawnicze,* 2019, No. 3, pp. 129–137.
5. Brierly J. L., *Law of Nations,* Oxford, Clarendon Press, 1955.
6. Bring Ove, “The Westphalian Peace Tradition in International Law: From *Jus ad Bellum* to *Jus Contra Bellum*; *International Law Studies*, 2000, Vol. 75, pp. 57–80.
7. Coverdale John F., „An Introduction to the Just War Tradition”, *Pace International Law Review,* 2004, No. 2.
8. Данилов И. Б., *Международное право,* Новосибирск, 2015.

9. De Groot Alexander H., „The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries“, *Oriente Moderno,* 2003, No. 3.
10. Diaconu Ion, „Minorities in International Law“, *Romanian Journal of International Affairs,* 2001, No. 3–4.
11. Đorđević Stevan, Mitić Miodrag, *Diplomatsko i konzularno pravo,* Beograd, 2000.
12. Fedele Dante, *The Medieval Foundations of International Law*, Brill / Nijjhof, 2021.
13. Фердросс А., *Международное право,* Москва 1959.
14. Foster John W., „The Evolution of International Law“, 1909, *Yale Law Journal,* No. 3, pp. 149–164.
15. Frankot Edda, "Medieval Maritime Law from Oléron to Wisby: Jurisdictions in the Law of the Sea", in: Juan Pan-Montojo and Frederik Pedersen (eds.) *Communities in European history: representations, jurisdictions, conflicts*, Piza, 2007.
16. Gašparović Luka, "Osnove sustava kapitulacija kao međunarodnih ugovora *sui generis* u Osmanskom carstvu (XVI.–XVIII. st.)", *Zbornik Pravnog fakulteta u Zagrebu,* 2009, No. 4.
17. Gergen Thomas, „The Peace of God and its legal practice in the Eleventh Century", *Cuadernos de Historia del Derecho,* 2002, Vol. 9.
18. Gordon Gregory S., „The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law", in: Kevin Jon Heller, Gerry Simpson (eds.), *The Hiden Histories of War Crimes Trials*, Oxford University Press, 2013.
19. Greppi Edoardo, „The evolution of individual criminal responsibility under international law", *International Review of the Red Cross*, 1999, No. 835.
20. Grzebyk Patrycja, *Criminal Responsibility for the Crime of Aggression*, Routledge, 2013.
21. Guerra Medici Maria Teresa, „The mother of international law: Christine de Pisan“, *Parliaments, Estates and Representation,* 1999, No. 1.
22. Head Thomas, „The Development of the Peace of God in Aquitaine (970–1005)", *Speculum,* 1999, No. 3.
23. Искевич И. С. Подольский А. В., *Дипломатическое и консульское право,* Тамбов, 2014.
24. Jevtić Dragoš, Popović Dragoljub, *Pravna istorija jugoslovenskih naroda*, Beograd, 1994.
25. Krivokapić Boris, Mir i rat u međunarodnim odnosima i pravu, Beograd, 2017.

26. Krivokapić Boris, „Značaj Vestfalskog kongresa (1648) za međunarodno pravo“, *Revija Kopaoničke škole prirodnog prava,* 2023, No. 1.
27. Langan John, „The Elements of St. Augustine's Just War Theory", *Journal of Religious Ethics,* 1984, No. 1.
28. Le Fir Luj, *Međunarodno javno pravo*, Beograd, 1934.
29. Lee Luke T., *Consular Law and Practice,* Stevens & Sons, 1961.
30. MacKinney Loren C., „The People and Public Opinion in the Eleventh-Century Peace Movement", *Speculum,* 1930, No. 2.31.
31. Malanczuk Peter, *Akehurts'sAkehurst's Modern Introduction to International Law,* Routledge, 1997.
32. Mattingly Garrett, *Renaissance Diplomacy,* Dover Publications, 1988.
33. Nis Ernest, *Poreklo međunarodnog prava*, Beograd, 1895.
34. Novaković Mileta, *Osnovi međunarodnog javnoga prava*, II, Beograd, 1938.
35. Nussbaum Arthur, "The significance of Roman Law in the History of International Law", *University of Pennsylvania Law Review,* 1952, Vol. 100.
36. Oppenheim L., *International Law, A Treatise,* vol. I, „Peace“, edited by Ronald F. Roxburgh, Longmans, Green and co., London, 1920.
37. Pržić Ilija, *Novo međunarodno pravo*, Beograd, 1934.
38. Pyć Dorota, "The Laws of Oleron as the Rules Governing Maritime Labour. Have We Learned a Lesson Ffrom the Past?", *Gdańskie studia prawnicze,*, 2019, No. 3.
39. Runyan Timothy J., „The Rolls of Oleron and the Admiralty Court int he Fourthteen Century England“, *American Journal of Legal History,* 1975, No. 2.
40. Russell Frederick H., *The Just War in the Middle Ages,* Cambridge University Press, 1975.
41. Schwarzenberger Georg, *International Law as Applied by Courts and Tribunals*, London, 1968.
42. Shaw Malcolm N., *International Law*, Cambridge University Press, 2017.
43. Tarwacka Anna, "Using *Lex Rhodia* in the case of a Pirrate Attack", *Gdańskie studia prawnicze,* 2019, No. 3.
44. The Canons of the Second Lateran Council, 1139, Fordham University, 1996, *fordham.edu/halsall/basis/lateran2.asp,* 9. 8. 2023.
45. Trinidade Antônio Augusto Cançado, *International Law for Humankind: Towards a New Jus Gentium,* Martinus Nijhoff, 2013.
46. Vajs Albert, Kandić Ljubica, *Opšta istorija države i prava*, Beograd, 1974.
47. Van Creveld Martin, „The Clausewitzian Universe and the Law of War", *Journal of Contemporary History,* 1991, Nos. 3/4.

48. Vesnić M. R., "Međunarodno pravo u odnosima Južnih Slovena Srednjeg veka", u; Nis Ernest, *Poreklo međunarodnoga prava,* Beograd, 1895.
49. Villa Sergio Moratiel, „The philosphy of international law: Suárez, Grotius and epigones", *International Review of the Red Cross*, 1997, Vol. 37, Special Issue 320.
50. Von Elbe Joachim, „The Evolution of the Concept of Just War in International Law", *American Journal of International Law,* 1939, No. 3.
51. Walzer Michael, *Just and Unjust Wars,* Basic Books, 2006.
52. Widłak Tomasz, „From Vladimiri's Just War to Kelsen's Lawful War: The Universality of the Bellum Justum Doctrine", *Studia Prilosophiae Christianae,* 2017, No. 3.
53. Wiewiorowski Jacek, "Universality of the Rhodean Maritime Law from the Standpoint of Neoevolutionism", *Gdańskie studia prawnicze,* 2019, No. 3.
54. Williams Robert E. Jr., Caldwell Dan, „*Jus Post Bellum:* Just War Theory and the Principles of Just Peace", *International Studies Perspectives,* 2008, No. 4.

75th ANNIVERSARY OF UNIVERSAL DECLARATION OF HUMAN RIGHTS – UNIVERSALITY OF HUMAN RIGHTS

Tijana ŠURLAN*

ABSTRACT

The paper is dedicated to the celebration of the 75th anniversary of the Universal Declaration of Human Rights. The Declaration, as a milestone document of human rights law, is regularly celebrated at its anniversaries, contemplated, and analysed. Within the paper the author gives reflections on the process of creation of the document, underlining the most significant members of the drafting team and their specific influence on the formulation of provisions. The focus of the paper is the quality of the universality of the Declaration and the human rights enshrined in it. The author analyses formal and substantive universality, as well as the importance of the notion of universality. Differentiation in terms of universality is drawn from among the formal and material sources of law, as well as among principles and rules. The author highlights different conclusions on the universality issue as stemming from different theories of law and scholars, such as naturalists, positivists, or constructivists. Substantive universality has been presented from the angle of the importance of the human rights listed in the Declaration for every human being, accentuating that those rights are equally important for everyone no matter of their cultural, moral, religious background or the political and legal system that they live in. The authors, bearing in mind those human rights are still being violated on a large scale, pointed out the importance of their implementation.

Key words: Fundamental human rights, sources of law, principles, universality, resolution, treaty

INTRODUCTION

If curiosity to learn more about the UDHR leads readers to the web site of the UN Human Rights Office of the High Commissioner, powerful facts would overwhelm and amaze them.[1] It is described as a milestone document in the

* Professor of the University of Criminalistics and Police Studies, Department of Criminalistics, Belgrade; Constitutional Court; UN Human Rights Committee. E-mail: tijana.surlan@kpu.edu.rs

[1] "Universal Declaration of Human Rights", Retrieved from: www.ohchr.org/en/universal-declaration-of-human-rights, 3.3.2023.

history of human rights, with the power of ideas to change the world that inspires one to continue working to ensure that all people can gain freedom, equality and dignity. UDHR consists of 30 articles, which were adopted by 48 votes, 8 abstentions and 2 non-voting states of the then members of the UN. It is the most translated document in the history of UN, into more than 500 languages.[2] It is also described as the document that inspired more than 80 international human rights treaties and declarations. The essential power of the UDHR and therefore all the epithets that follow, rest on what is prescribed under that famous heading. The Universal Declaration of Human Rights is a collection of core principles of human rights "as a common standard of achievement for all peoples and all nations". It is built on the understanding that a "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". On the other hand, when marking the 70 years of the UDHR, the UN itself posed serious questions – are the provisions of the UDHR still valid? And if they are, how do they relate to the world we live in today?[3] Every anniversary is always the symbolic time to contemplate and revise whether these inspiring and enthusiastic words meet reality. The UDHR, although a legal document, has been subjected to multidisciplinary study or study from the perspective of disciplines other than the law, such as political science, economics, sociology, philosophy, and international relations. Hence, conclusions tend to differ from acclamation to denunciation. The strongest opponents to the significance and achievements of the UDHR have always been those seeing the world only from the perspective of real politics or from the perspective of states who are ready to abandon human rights if they pose obstacles to their interests and goals.[4] Scholars studying the human rights law are generally inclined to hail the UDHR. Its significance, impact and longevity offer strong ground for praising the Declaration. Reality that a contemporary world is not the ideal place and the fact that human beings still can find themselves living in poor conditions does not mean that the law does not exist. It means that implementation of the law is insufficient. For an international human rights

[2] "Universal Declaration of Human Rights (1948): 30 Articles – 30 Documents: Exhibit for the 75th Anniversary". Retrieved from:https://research.un.org/udhr75, 7.09.2023.

[3] "30 Articles, 30 Documents: the UDHR at 70". Retrieved from: www.un.org/en/library/30-articles-30-documents-udhr-70, 7.09.2023.

[4] Stephen Hopgood, *The Endtimes of Human Rights*, Cornell University Press, 2013; Jack Donnelly, *Universal Human Rights in Theory and in Practice*, Cornell University Press, 2013; Ingrid Wuerth, "International Law in the Post-Human Rights Era", *Texas Law Review,* Vol. 96, Issue 2, 2017, pp. 279–349; Lord Hoffmman, "The Universality of Human Rights", *Judicial Studies Board Annual Lecture*, 19 March 2009; Nick Goetschalckx, "The mythic universality of the Universal Declaration on Human Rights: revisiting the drafting history of the UDHR in search of a foundational theory", in: Jan Wouters, Koen Lemmens, Thomas Van Poecke, Marie Bourguignon (eds.), *Can We Still Afford Human Rights? - Critical Reflections on Universality, Proliferation and Costs,* Edward Elgar Publishing 2021, pp. 27–46.

lawyer, the existence of law should not be denied on the grounds of its violations. An international lawyer should vigorously defend the law, even if states try to escape from it. We know that the law prescribes the world as it should be and that is why it is there. We also know that there is no law that can make by itself the world a better place. It is thus up to lawyers to stay firmly on the path of strengthening the implementation of those norms that have been created. In the text that follows, I will stick to the approach, as worded by the famous international human rights lawyer Sir Nigel Rodley, that even with the risk of appearing hopelessly naïve, the UDHR and the whole human rights machinery will be powerful as much as we defend it and praise its significance in the contemporary world.[5] The approach that I will apply in the text that follows tends to reconcile the interaction of theory and practice. In other words, it will show that universality of rights is not diminished by the relativity of duties of states. Universality of rights is not diminished by differences of cultural or moral values in various parts of the world. There are values common to the whole world and important for every human being, no matter in what state or a part of the world they live. The fact that there are differences in legal orders is strengthening not diminishing the concept of universality of rights. The fact is that the Universal Declaration of Human Rights is not a legally binding document, which does not impose legal obligations. However, its preamble proclaims, "a common standard of achievement for all peoples and nations," which manifests itself as the most useful concept for universality and its longevity.

LESSONS FROM THE DRAFTING PROCESS

It is worth repeating that the drafting of the Declaration took two years. Although the UDHR was created in the immediate post-War period, in a brief period of euphoria following the defeat of Nazi Germany, it was not an easy task. Main positions of states differed from the point of the usefulness or uselessness of creating a non-binding document, from different concepts of relations between a state and an individual or different understanding of some specific human rights.[6] Looking back at that period of the history of humankind, it becomes clear that the success of the endeavour rested on two facts – the special moment of fragile unity among states that lasted very shortly after the World War II, and on special individuals that created the Declaration.[7] It is also worth special mention

[5] Sir Nigel Rodley, "The Universal Declaration of Human Rights: Learning from Experience", *Essex Human Rights Review,* Vol. 5 No. 1 July 2008, pp. 1–6.

[6] William A. Schabas (ed.), *The Universal Declaration of Human Rights – The Travaux Preparatoires*, Cambridge University Press, 2013.

[7] Ashild Samnoy, "The Origins of the Universal Declaration of Human Rights", in: Gudmundur Alfredsson, Asbjorn Eide (eds.), *The Universal Declaration of Human Rights – A Common Standard of Achiev*ement, Martinus Nijhoff Publishers, 1999, pp. 3–22.

that although the adoption of the Declaration was followed by adoption of Resolution 217 (III) relating to the preparation of a draft Covenant and draft measures of implementation, it took almost two decades to adopt international treaties that would strengthen protection of human rights, and another decade for their entry into force. That fact could lead us to the conclusion that although the momentum was special, it nevertheless was productive only for the adoption of a non-binding document, whereas the world was not ready for stronger devotion and creation of obligations. In such an atmosphere, it was even more important that at least a declaration was adopted.

Celebrating the anniversary, it is also worth mentioning the names of the creators of the UDHR. Several UN bodies were in charge of drafting the Declaration,[8] but certain names remain specifically remembered: John Humphrey from Canada, who prepared the first draft, the one that was the starting point for deliberation;[9] Eleanor Roosevelt, USA delegate, who for her own endowment gained a title – the first lady of the world;[10] Rene Cassin, the French delegate, who afterwards won a Nobel Peace Prize in acknowledgment of his contribution;[11]Peng Chun Chang, a professor at Nanking in China and diplomat, described as "master of the art of compromise";[12] Hernan Santa Cruz, Chilean representative, one of the strongest defenders of the inclusion of economic and social rights;[13] Charles Malik, a Lebanese professor of philosophy, described as one of the most independent people ever to sit on the Commission, dedicated to human rights;[14] Omar Loufti of Egypt, Ambassador Hansa Mehta of India; Carlos Romulo from Philippines; Alexie P. Pavlov, from the Union of Soviet Socialist Republics, who also belonged to the inner core of drafters.[15] Although Yugoslavia did not vote for the Declaration, it is important for us in Serbia to remember the

[8] The most important bodies were Commission on Human Rights and the Drafting Committee. First composition of the Commission were by representatives of 18 states: Australia, Belgium, Byelorussia, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippine, Ukraine, the United Kingdom, the United States, the USSSR, Uruguay and Yugoslavia.

[9] Gudmundur Alfredsson, Asbjorn Eide, "Intorduction", in: Gudmundur Alfredsson, Asbjorn Eide (eds.), *The Universal Declaration of Human Rights – A Common Standard of Achievement,* Martinus Nijhoff Publishers, 1999, p xxvii; There is other information on the author of the first draft of the Declaration. Rene Cassin gained a reputation as the "father of the Declaration" and it was based on the belief that he was the first official drafter. Later, Humphrey opposed to Cassin`s role, pointing to his own role as a first drafter, see: Ashild Samnoy, *op.cit.*

[10] Susan Muaddi Darraj, *The Universal Declaration of Human Rights*, Infobase Publishing, 2010, pp. 7–14.

[11] William A. Schabas, *op.cit*., p. 63.

[12] Ashild Samnoy, *op.cit.,* p. 7.

[13] Ashild Samnoy, *op.cit.*

[14] Johanes Morsink, *The Universal Declaration of Human Rights – Origins, Drafting and Intent*, University of Pennsylvania Press, 1999, p. 30.

[15] Joanes Morsink, *op.cit.,*p. 30.

representatives of Yugoslavia, Vladislav Ribnikar and Ljuba Radevanovic, and their achievement, aiming to promote socialist values and understanding of human rights, especially the needs to widen the traditional categories of human rights and the establishment of social rights.[16] The Yugoslav position, critical as it was, also encountered the view that the Declaration was an instrument of international codification rather than an instrument that opened a new and bright future for the individual in the vast field of social rights.[17] All of them were representatives of their respected states, bringing into the drafting process specificities of their own legal systems and their own understanding of human rights. For P.C. Chung it was important that all were being made aware of the writings of Confucius.[18] For A.P. Pavlov, insistence on non-discrimination language, the fight for the right to be protected from unemployment, for the rights to housing and medical care, support for women's rights and his attempts to rid the document of sexist language were important.[19] For Vladislav Ribnikar, social principle must come first – "If it has one purpose, it is to create conditions necessary to the fulfilment of the interest of every individual. The special ideal is the ideal of the enormous majority of the world and it is in the identity of the interest of society and of the individual."[20] Contributions from each of them rested with the conclusion that the strength of the Declaration was in the collective dimension of its authorship.[21] For critics and sceptics, who tend to undermine the significance of the Declaration, or to present it as "a parochial expression of European and especially Christian values" in an attempt to create a "church of human rights", the composition and impact of these significant individuals are the basis for just an opposite argument.[22]The Declaration was drafted by individuals representing a variety of legal systems and with different professional backgrounds. Finally, it was adopted by 48 states members of the UN General Assembly, the Assembly that consisted of states of all continents, belonging to different political and legal systems.

Universality, as the most important value of the Declaration, which is even highlighted in its title, is still questioned.[23] Rethinking its universality, it is worth

---

[16] Gudmundur Alfredsson, Asbjorn Eide, *op.cit.,* pp. xxvii-xxviii.

[17] *Yearbook of the United Nations* 1948-49, November 1950, p. 533.

[18] Johanes Morsink, *op.cit*., p. 30.

[19] Johanes Morsink, *op.cit*., p. 31.

[20] "The UNESCO Courier – Many Voices, One World". Retrieved from: www.en.unesco.org/courier/2018-4/three-fundamental-dilemmas, 9.09.2023.

[21] William A. Schabas*, op.cit*.,p. 65.

[22] Stephen Hopgood, *The Endtimes of Human Rights*, Cornell University Press, 2013, pp.31-37.

[23] Nick Goetschalckx, "The mythic universality of the Universal Declaration on Human Rights: revisiting the drafting history of the UDHR in search of a foundational theory", in: Jan Wouters, Koen Lemmens, Thomas Van Poecke, Marie Bourguignon (eds.), *Can We Still Afford Human Rights? – Critical Reflections on Universality, Proliferation and Costs*, Edward Elgar Publishing 2021, pp. 27–46.

mentioning that from the outset of the drafting process, the Declaration was titled first as "United Nations Declaration of Human Rights" and then "International Declaration of Human Rights". Aiming to shift the attention away from the states as creators of the document to the addressees of the document, a new title was adopted – Universal Declaration of Human Rights.[24] The Declaration was considered by its creators to be universal in its origin and aim. In the words of Rene Cassin, it was "the first document about moral value adopted by an assembly of the human community".[25] Cassin also expressed that "the chief novelty of the declaration was its universality, because it is universal".[26] One of the aspects of universality that all delegates supported was its language, the style of expressions that should be, in the words of Hansa Mehta, "understood by the common man" or in words of P.C. Chang "should be as simple as possible and in a form which was easy to grasp".[27] Eleanor Roosevelt repeated on many occasions that the Declaration "was not intended for philosophers and jurists but for the ordinary people".[28] Being aware of the aim of the creators, the fact that "man" in previous documents in the Declaration became "everyone", the fact that numerous governments had changed in an ever changing world, and the fact that rights as enumerated in the Declaration are not outdated, strengthen the conclusion of universality of rights set out in the Declaration and their belonging to the peoples.

UNIVERSALITY–FORMAL AND/OR SUBSTANTIVE

International law understands the term "universality" as a principle in terms of jurisdiction[29] or as a quality of a law being universal.[30] Whether a law is universal could be decided on the quantity of states parties to a treaty or as a quality describing an international customary law.[31] Therefore, universality is relatively easy to understand and to apply as a value when we use it in its formal sense, as a formalistic quality of a source of law. On the other hand, the quality of universality is used as a substantive value of certain international law principles,

[24] UN GA, Third Committee, Draft International Declaration of Human Rights, France: Amendments, A/C.3/339, 15 November 1948.

[25] *Yearbook of the United Nations* 1948-49, November 1950, p. 421.

[26] Johanes Morsink, *op.cit*., p. 33

[27] William A. Schabas, *op.cit*., p. 67.

[28] Johanes Morsink, *op.cit*., p. 34.

[29] Bruno Simma, Andreas Th. Muller, "Exercise and Limits of Jurisdiction", in: James Crawford, Martti Koskenniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, 2012, pp. 134-157.

[30] Malcolm Shaw, *International Law,* Cambridge University Press, 2003, pp. 67; 199; Hugh Thirlway, *The Sources of International Law*, Oxford University Press, 2019, p. 157.

[31] Milenko Kreća, Tijana Šurlan, *Međunarodno javno pravo*, Kriminalističko-policijski univerzitet, Beograd, 2019, pp. 18–19.

ius cogens norms or *erga omnes* obligations.[32] Besides that, human rights law uses the term universality as the substantive quality of its whole *corpus*, shifting its significance above the usual formal or substantive meaning.[33] If there is any legal document capable of merging both sides of universality then it is certainly the Universal Declaration of Human Rights. The UDHR has been studied from its formal aspect in different directions. Being adopted in the form of a resolution, it is inevitably most often titled as a non-binding document or a "soft-law".[34] The passage of time, its significance, and the influence that it provoked led not one scholar to develop the understanding of the Declaration as becoming a part of the customary international law and therefore "hard law".[35] Those who are more cautious refrain from claiming that the Declaration as such has changed its legal nature. They claim that certain human rights referred to in the Declaration have become norms of customary international law. The reason for constant elaboration of the legal nature of the Declaration rests on the unevenness of the significance and impact of the Declaration on one hand, and on the other hand the fact that it is not "hard law", meaning that it does not specify who carries the responsibilities corresponding to the rights it enumerates. Another reason for this debate rests on the different theoretical groundings for exploration. With the positivist theory as a dominant theory, it is understandable that formal legalistic aspects are of the utmost importance.[36] Nevertheless, international law scholars have developed different theories, some of them rather new, trying to explain a certain specificity of international law from different perspectives.[37] This becomes specifically important when exploring human rights law as a specialist area of international law or a subsystem of international law.[38] Solving the puzzle of the described discrepancy, one of the possible solutions could be to decide first whether to refer to its formal nature separately from treaties that were built on it or to refer to it as

---

[32] Hugh Thirlway, *op.cit.,* p. 160.

[33] James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 2012, p. 312; Robert Spano, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, Human Rights Law Review, Volume 14, Issue 3, 2014, pp. 487–502.

[34] Malcolm Shaw,*op.cit.,* pp.259-260; Darko Simović, Dragutin Avramović, Radomir Zekavica, *Ljudska prava,* Kriminalisitčko-policijska akademija, Beograd, 2013, p. 80.

[35] James Crawford, *op.cit*., p. 522.

[36] Further reading: Adriana Sinclair, *International Relations Theory and International Law: A Critical Appro*ach, Cambridge University Press, 2010; Gideon Boas, *Public International Law-Contemporary Principles*, Edward Elgar Publishing, 2023.

[37] Gideon Boas, *Public International Law-Contemporary Principles,* Edward Elgar Publishing, 2023; Frédéric Mégret, *International Human Rights Law Theory* (January 20, 2010), Retrieved from: https://ssrn.com/abstract=1539591 or http://dx.doi.org/10.2139/ssrn.1539591; Juta Brunee, Toope Stephen J., "International Law and Constructivism: Elements of an Interactional Theory of International Law", *Columbia Journal of Transnational Law,* 2000, Vol. 39, Retrieved from: https://ssrn.com/abstract=1432539, 9.09.2023.

[38] Hugh Thirlway, *op.cit.,* 173; Frédéric Mégret, *op. cit.*

a part of a wider human rights law. Legalistic and strictly formal, a formalistic approach would incline to refer to the Declaration as an autonomous legal document, leading as a result to the only possible conclusion that the Declaration is by its legal nature a resolution, hence a formally non-binding document. That would mean that it cannot be breached, and no subject could be found responsible for its breach. That would also mean that the Declaration provokes no legal consequences. The most cynical conclusion would then be that it is not important whether it exists at all. Opposed to the previous conclusion, there is a perception that through the other human rights documents stemming from the Declaration, the Declaration itself gained the power of a universally binding document. Besides the previously cited statement that the Declaration inspired the creation of more than 80 international treaties and declaration, there is also a specific bond with some of them, the bond that inspired the creation of a term International Bill of Human Rights.[39] This term covers three documents – the Declaration and two covenants: International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. These two covenants present the direct fulfilment of Resolution 217 (III) relating to the preparation of a draft Covenant and draft measures of implementation that were also adopted by the UN GA on 10 December 1948. The covenants are grounded on the UDHR and they present developed human rights rules. Besides that, they have developed monitoring mechanisms – committees that cover not only specific covenants provisions, but also the Declaration provisions.[40]At present, the covenants are most often understood as universal.[41] The ICCPR has 173 state parties and 6 states that have signed it, leaving the total number of 18 states (UN members) that are not tied to it in any form.[42] The ICESCR has 171 states parties, 4 signatories and 22 states that have not tied themselves to this covenant.[43] Placing the Declaration into the same group of documents with universal treaties grounds the perception of its formal universality. The UDHR has also been recognised at regional level.[44]

---

[39] Rhona K.M. Smith, *International Human Rights Law,* Oxford University Press, 2022, pp. 59–74.

[40] Tijana Šurlan, *Univerzalna međunarodna ljudska prava: mehanizmi zaštite,* Kriminalističko-policijska akademija, 2014.

[41] Rhona K.M. Smith, *op.cit.*

[42] "International Covenant on Civil and Political Rights, 1966. Retrieved from: https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND, 8.08.2023.

[43] "International Covenant on Economic, Social and Cultural Rights", Retrieved from: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4, 8.08.2023.

[44] Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law", *Georgia Journal of International and Comparative Law,* Vol. 25, Number 1, 1996, pp. 289–352.

It was invoked in preambles of the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. There is a common stand that regional human rights conventions were inspired and modelled on the UDHR.[45] This information should be understood in line with scholarly thoughts that place the UDHR directly into the realm of the UN Charter.[46] The UN Charter's approach to the concept of human rights, their relation with regional international law and regional international organisations was completed with the adoption of the UDHR and its invocation within the regional human rights conventions. From the formal point of view, the full picture should encompass the development of new resolutions that followed the adoption of the UDHR. Values of the Declaration, as a resolution, were strengthen for the first time at its 20th anniversary. The International Conference on Human Rights, organised under the auspices of the UN GA in Teheran in 1968, resulted in the adoption of the Final Act – Proclamation of Teheran. It was a specifically important moment, since two years before, ICCPR and ICESCR had been adopted but not yet entered into force. In such a momentum, Article 2 of the Proclamation bears special significance: "The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of members of the human family and constitutes an obligation for the members of the international community". The Proclamation was endorsed by Resolution 2442 (XXIII) - International Conference on Human Rights, adopted by the UN GA on 19th December 1968 by 115 votes to none, with one abstention.[47] The next World Conference on Human Rights, held in Vienna in June 1993, resulted in the adoption of the Vienna Declaration and Programme of Action, with the aim, *inter alia*, of reaffirming "the commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights". Paragraph 1 is clear and leaves no room for doubts on the understanding of the obligations and universality of human rights: "The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights and international

[45] "Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)", International Court of Justice, Preliminary Objections, Judgment of 4 February 2021, par.104; Gabriel M. Wilner, "Reflections on Regional Human Rights Law", *Georgia Journal of International and Comparative Law*, 1996, Vol. 25, Number 1, pp. 407–426.

[46] "South West Africa Case", International Court of Justice, Second Phase, Judgment of 18 July 1966, Dissenting Opinion of Judge Tanaka: "(…) the Universal Declaration of Human Rights adopted by the General Assembly in 1948, although not binding in itself constitutes evidence of the interpretation and application of the relevant Charter provisions."

[47] Hurst Hannum, *op.cit.,* pp.289–352.

law. The universal nature of these rights and freedoms is beyond question." Throughout the document universality, indivisibility, interdependence, interrelations, non-selectivity of human rights is repeated, reaffirmed and thus strengthened. Bearing in mind that the Vienna Declaration and Programme of Action was adopted 45 years after the UDHR, when the majority of treaties on human rights were already operative, it could be more understandable how the language used became more explicit, clear and firm. Speaking on the references to the UDHR one example is specifically striking. Referring to the importance of incorporating the subject of human rights into education programmes there is a wording that States are "duty-bound, as stipulated in the Universal Declaration of Human Rights (…)".[48] The Vienna Declaration and Programme of Action were endorsed by the General Assembly in Resolution 48/121 adopted at the 85th plenary meeting of the UN GA on 20 December 1993.[49] Concrete results of the reaffirmed significance of human rights for the UN were the creation of a position of High Commissioner for Human Rights. The *ratio* for establishing a new position within the UN system was, *inter alia*, "the need to observe the Universal Declaration of Human Rights (…)".[50] It placed the Declaration into the supervising machinery of the UN, thus not as a document just addressing the states, but a document that the High Commissioner for Human Rights was going to take care of.[51]At present, the UDHR is designated as a normative base for the Universal Periodic Review, conducted by the UN Human Rights Council since 2008.[52] Mentioned resolutions adopted by the UN GA, following the world conferences on human rights, by their own legal power, cannot change the legal nature of the UDHR. On the other hand, expressions of its universality and obligingness show the attitude of states comprising the UN GA towards the UDHR. Devotion to the Declaration and the universality concept of human rights has been repeated in declarations adopted at regional level,[53] such as the Tunis Declaration, Bangkok Declaration, Kuala Lumpur Declaration of Human Rights or San Jose Declaration on Human Rights.[54] All of them together, either adopted

[48] The Vienna Declaration and Programme of Action, par. 33.

[49] Resolution published as: United Nations General Assembly, Distr. GENERAL A/RES/48/121 of 14 February 1994.

[50] UN GA, High Commissioner for the promotion and protection of all human rights, A/RES/48/141 of 7 January 1994; Kriangsak Kittichaisaree, *International Human Rights and Diplomacy*, Edward Elgar Publishing, 2020, pp. 89–94.

[51] Andrew Clapham, "The High Commissioner for Human Rights", in: Frederic Megret, Philip Alston (eds.), *The United Nations and Human Rights,* Oxford University Press, 2020, pp. 667–707.

[52] Kriangsak Kittichaisaree, *op.cit*., pp. 65–75.

[53] Gabriel M. Wilner, "Reflections on Regional Human Rights Law", *Georgia Journal of International and Comparative Law,* 1996, Vol. 25, Number 1, pp. 407–426.

[54] Hurst Hannum, *op.cit*., pp. 289–352.

on universal or regional level, express that the Declaration and human rights enshrined in it have obtained support and approval. Thus, we can conclude that a "party will" and "consent" as the essence for every emerging legal norm is satisfied. Universality from the formal perspective can be elaborated differently. If we leave aside discussions from the point of sources of law and focus on the quality of the norms enumerated in the Declaration, we could find a broad consent that provisions presented in the Declaration are by their legal nature principles. The legal quality of the Declarations' content even gained judicial treatment. The International Court of Justice expressed, without thorough deliberation, their stand that fundamental principles are enunciated in the UDHR.[55] Notwithstanding the fact that what is meant by a "principle" or even more by a "fundamental principle" is itself controversial and the subject of jurisprudential debate,[56] the specific ground and thus the power of the Declaration's principles rests on another widespread agreement that they are themselves interpretation of relevant UN Charter provisions.[57] Thus, the hierarchy of norms regarding human rights law would be structured with the UN Charter relevant provisions at the top, followed by the UDHR, followed by numerous treaties and declarations. Debate on the formal universality appears to be somewhat artificial. Truly, if provisions enunciated in the Declaration have become developed and defined within universal international treaties, then they are binding and they impose obligations on states-parties. What is missing in the debate on formal universality of the Declaration, driven by proponents of positivist legal theory, is taking into account that human rights law is a specialist area or a subsystem of public international law.[58] Expressed in the most general formula, where international law tends to regulate relationships between states, human rights law addresses states on how to organise their relationships with people. Therefore, if we change perspective and study the issue of formal universality, for example from the perspective of constructivist theory, the outcome of the formal universality of the Declaration would be somewhat different. The constructivist theory of human rights law tends to focus on interaction between states – states come to form expectations about others' behaviour. The behaviour of states, in the domain of human rights law, is primarily expressed through their respective national laws. Incorporation of international human rights is the most obvious in constitutions containing human rights provisions. And there we will find that all modern constitutions contain a list of human rights as generally listed in the Declaration. Therefore, the whole debate on universality and obligingness of the UDHR reminds to the debate on whether international law is a law. One can raise a very simple question – why is

[55] "Case Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran)", International Court of Justice, Judgment of 24 May 1980, par. 91.

[56] Ian Brownlie, *Principles of Public International Law,* Oxford University Press, 2003.

[57] Hugh Thirlway, *op.cit*., p. 179.

[58] *Ibidem.*

it so important to claim universality? A simple answer can follow – because then it must be applied as a minimum standard in every territorial political entity throughout the world.[59] The Declaration is written in the way that every state aspiring to become a member of the UN would be able to accept. Contents of provisions allow for each of them to be incorporated within different political and legal systems. They are all common and utterly important for every human being, no matter in what type of a state they live. Thus, I would incline to interpret the Declaration legalistically, to oppose strongly references to the Declaration as a political pamphlet or a tool to impose a concept of liberal democracy as the only acceptable form of governance. If we preclude diverse political and cultural determinants, and different perceptions and probable compliance, then the concept of universality would be essentially endangered. That aim is achievable if we stay firmly on the solid ground of the law as it stems from material sources. That is the best formula to achieve the goal set in the Declaration itself for it to be "a common standard of achievement for all peoples and nations".

SUBSTANTIVE VALUE OF THE DECLARATION

Celebrating the anniversary of the Declaration is even more inspiring if we look into the formulation of human rights as they are set forth in the Declaration. The Declaration covers civil, political, economic, social, cultural, and collective rights. Civil and political rights are covered by Articles 1–21, economic, social and cultural rights by Articles 22–27 and collective and general rights by Articles 28–30. They are equal among themselves, they address individuals and every individual is interested to have all of them protected. It is noticeable that Article 1 gives a leading tone for the rest of the articles to follow and instructs the direction of understanding. Thus, the stand that all human beings are born free and equal in dignity and rights is of the utmost importance for the implementation of all other rights to follow. All of them as formulated are still valid and they are not outdated. Even for the strongest sceptics it would be one very difficult task to oppose the value and necessity of enshrined rights. The essential legal force of the Declaration is in the formulations used, as they are abstract and open for further detailed regulation, as is acceptable in different legal systems. That is merely why the universality of the UDHR when it comes to substance is not questioned. Starting with the formulation of the principle of non-discrimination, the Declaration provides everyone with the right to life, liberty and security, prohibits slavery and torture, and provides for everyone equality before the law, equality before the courts, and fair treatment by independent and impartial tribunals. Mapping the main civil rights the Declaration provides a *habeas corpus* restriction and considers it a right of every person to be presumed innocent until

[59] Gabriel M. Wilner, *op.cit*., p. 419.

proven guilty. Everyone is entitled to the right to privacy, right to movement and residence, right to asylum, right to nationality, right to marry and have family, right to own property. Everyone has the right to freedom of thought, religion, opinion and expression; everyone has the right to assemble and the right to take part in the government of his country. The Declaration includes concrete economic, social and cultural rights. Everyone has the right to social security and social services, the right to work and the right to rest and holiday, the right to be educated and the right to freely participate in the cultural life of the community, enjoy arts and scientific advancements and its benefits. The final articles are styled in a different fashion. Article 28 defines entitlement to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised. Article 29 expresses duties to the community. Article 30 finally addresses states, group or a person prohibiting any activity or act aimed at the destruction of any of the rights and freedoms set forth in the Declaration. Although all rights were placed at the same level within the Declaration, what we now know is that they were not all operationalised afterwards in the same manner. Although the majority of them were defined and detailed in particular international treaties, with somewhat different approaches for their implementation, some of the rights were set aside. The most noticeable example would be the right to own property. The majority of the rights listed in the Declaration were already well known in national legal systems, such as the right to life, the right to liberty, habeas corpus limitations, presumptions of innocence, prohibition of slavery, the right to privacy. Some of them were rather new such as the right to social security, social services, and the right to rest and to holiday. The majority of the rights were formulated in abstract formulation, leaving ground for adaptation to the specificities of each society and state, but some of them were formulated to leave no space for modalities. The most noticeable example would be provision on compulsory elementary education or paid periodic holidays. Some of the rights have undergone tremendous development and served as the ground for the emerging of newer, modern concepts. The most striking example would be the prohibition of slavery, which turned into the prohibition of the modern form of slavery – human trafficking. Finally, some of them are styled in a manner that allows politicisation, such as the right to take part in the government, directly or through freely chosen representatives. In the passage of 75 years, all enumerated rights have been recognised and rooted as well within the national systems, although more or less successfully. Beside their shift into binding international treaties, becoming part of national legal systems grounds the notion of the substantive universality of rights. Trying to picture the concept of substantive universality even stronger, two different characteristics could be highlighted: nature and foundation. Both nature and foundation were tackled in the Preamble of the Declaration. The Preamble opens with recognition of the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. The wording of the first paragraph

allowed criticism as belonging to the outdated theory of natural law. The other paragraph of the Preamble places the concept of "fundamental human rights" on the ground of the UN Charter, pointing that the peoples of the United Nations reaffirmed their faith in the fundamental rights through the Charter. For benevolent positivists it could be just enough to find the legal base for the formulations used in the Declaration. Whatever theoretical concept tries to systematise *ratio* and *telos* of law and offer the best solution for our understanding of the law, what is accepted as a common standard is the differentiation between material and formal sources of law. Looking for the material source of the Declaration there is a human being, an individual, either alone or in a group that strives for its fundamental rights and freedoms to be acknowledged and protected from the overpowered state. I would dare to state that there is no-one who could claim that there is a single person in this world of ours that does not want human rights and freedoms, as listed in the Declaration. It does not matter what is the cultural, moral, religious, social or political pattern, these rights are minimum for decent human existence. Another paragraph of the Preamble refers to states – Member States of the UN who have pledged themselves to achieve, in co-operation with the UN, the promotion of the universal respect for and observance of human rights and fundamental freedoms. And there we find the strongest opposition to the realisation of human rights and strongest opponents to the freedoms. A state is a political being, with its own needs and interests that can be in contrast to the interests of human beings. That is exactly why the law is needed. Each celebration of the Declarations anniversary is also a moment to face challenges to human rights. There is not a single day without violations of human rights or their severe politicisation. As no legal act has the power of the magic wand, the world will not see a day without somebody suffering, being hungry, tortured, discriminated, and deprived of human rights. Modern life raises new issues – climate change, pollution of the environment, use or misuse of technological progress, uncertainty, or even fright from the influence of emerging artificial intelligence. The aim that is achievable though is to diminish the number of those who are deprived of their rights. On the other hand, it must be acknowledged that a long path has been passed. In the majority of states there are laws that have broadly incorporated human rights, giving the ground to individuals to fight for their rights. The modern world in general is a place where, for example, women are more equal to men than they have been before, where people can marry who they want, choose their education and professions, profess their religions more freely, rely on social services, and be protected from the overpowering states in many areas as never before. Although the law is not almighty, we need the law. I wouldn't even try to imagine what the world would be like without human rights predominantly, but all other laws as well and the effort of lawyers devoted to the protection of law. For us lawyers, either sceptics and cynics or hopelessly naïve and delusional, consciousness must be preserved that somewhere out there, there is one who needs protection.

CONCLUSION

Celebrating the 75th anniversary of the UDHR it is obvious that we will celebrate many more anniversaries to come, as we celebrated many of them before. Each anniversary is the time for both celebration and recapitulation. Celebration does not ask for deafness or blindness, but asks for vigour and continuance. This year also marks 30 years of the Vienna Declaration and Programme of Action, building on the UDHR's anniversary.[60] Devotion of the UN system, academia and many states[61] to the UDHR is visible through their own celebrations and use of the momentum to remind to the significance of the 10 December 1948. The UN Office of the High Commissioner has organised "a year-long campaign"[62] under the title "Human Rights 75 Initiative", aiming to "rejuvenate" the Declaration.[63] Universities have organised round tables and conferences.[64] Scholars have offered their own view of the UDHR at present. This paper is yet another contribution, with praise, acknowledgment and devotion, even if might seem -"hopelessly naïve".[65]

---

[60] United Nations International Court of Justice. Retrieved from:https://reliefweb.int/report/world/after-30-years-uns-human-rights-office-force-unity; "Human Rights 75: drumroll of activity gathers pace", UN Human Rights Office of the High Commissioner. https://www.ohchr.org/en/updates/2023/07/human-rights-75-drumroll-activity-gathers-pace, 4.07.2023.

[61] Delegation of the European Union to the UN and other international organisations in Geneva: "75 Universal Declaration of Human Rights – Dignity, Freedom and Justice for all"; The Ministry of Foreign Affairs of the Russian Federation, Statement: "75th Anniversary of the Universal Declaration of Human Rights: Importance of Honoring International Obligations by States". Retrieved from: mid.ru/en/foreign_policy/news/1890688/; PILPG's Circle of Former Ambassadors regarding the 75th anniversary of the Universal Declaration of Human Rights, February 2023.

[62] "Human Rights 75, a year-long initiative for all". Retrieved from: https://www.ohchr.org/sites/default/files/hr75-what-it-is.pdf. 9.09.2023.

[63] Human Rights Day 2023". Retrieved from: https://www.ohchr.org/en/get-involved/campaign/udhr-75; https://www.ohchr.org/en/human-rights-75, 22.09.2023.

[64] Ghent University, Belgium: "The Universal Declaration of Human Rights at 75 / Rethinking and Constructing its Future Together", 6–8 December 2023; Geneva Academy, Academy of International Humanitarian Law and Human Rights, Panel: "Universal Declaration of Human rights at 75 – Reimagining Protection for a World in Turmoil", 12 June 2023; University of Notre Dame, The Nanovic Institute for European Studies: "75th Anniversary of the UDHR", November, 2023; Keane University, Human Rights Institute: "75th Anniversary of the UDHR", 8 December 2023

[65] Commonwealth Parliamentary Association, UN Human Rights Day – 75 years of the Universal Declaration of Human Rights and its impact on the Commonwealth; The John Humphrey Centre for Peace and Human Rights, Commemorating the 75th Anniversary of the United Nations' Universal Declaration of Human Rights, 1–10 December 2023; National Human Rights Commission, The Biennial Conference of National Human Rights Institutions of Asia Pacific, 20–21 September 2023 at Vigyan Bhawan, New Delhi to mark the 75th anniversary of the Universal Declaration on Human Rights

75. GODIŠNJICA UNIVERZALNE DEKLARACIJE O LJUDSKIM PRAVIMA – UNIVERZALNOST LJUDSKIH PRAVA

APSTRAKT

Rad je posvećen obeležavanju 75. godišnjice Univerzalne deklaracije o ljudskim pravima. Deklaracija, kao dokument koji se smatra prekretnicom u oblasti prava ljudskih prava, redovno se obeležava na svoje godišnjice, razmatra i analizira. U prvom delu rada autor se osvrće na proces nastanka dokumenta, ističući najznačajnije članove tima za izradu nacrta Deklaracije i njihov specifičan uticaj na formulisanje odredaba. U fokusu rada je kvalitet univerzalnosti Deklaracije i ljudskih prava sadržanih u njoj. Autorka analizira formalnu i materijalnu univerzalnost, kao i značaj pojma univerzalnosti. Univerzalnost se sagledava sa aspekta razlike između formalnih i materijalnih izvora prava, kao i fundamntalnih principa i pravnih pravila. Autorka osvetljava različite zaključke po pitanju univerzalnosti koji proizilaze iz različitih teorija prava i od različitih teoretičara, kao npr.pripadnika škole prirodnog prava, pozitivnog prava ili konstruktivističke teorije. Sadržajna univerzalnost je predstavljena iz ugla značaja ljudskih prava navedenih u Deklaraciji za svakog čoveka, naglašavajući da su ta prava podjednako važna za sve bez obzira na kulturnu, moralnu, versku pozadinu ili politički i pravni sistem države u kojoj pojedinac živi. Autorka je imajući u vidu da se ljudska prava i dalje krše u velikim razmerama, ukazala na značaj njihovog sprovođenja.

Ključne reči: Osnovna ljudska prava, izvori prava, principi, univerzalnost, rezolucija, ugovor

REFERENCES

1. Alfredsson Gudmundur, Eide Asbjorn (eds.), *The Universal Declaration of Human Rights – A Common Standard of Achievement,* Martinus Nijhoff Publishers, 1999.
2. Alston Philipe, "The Populist Challenge to Human Rights", *Journal of Human Rights Practice,* Volume 9, Issue 1, 1 February 2017.
3. Boas Gideon, *Public International Law-Contemporary Principles,* Edward Elgar Publishing, 2023.
4. Brown Gordon (ed.), "The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World", *A report by the Global Citizenship Commission,* NYU Global Institute for Advance Study, Open Book Publishes, 2016.
5. Brownlie Ian, *Principles of Public International Law*, Oxford University Press, 2003.

6. Brunee Juta, Toope Stephen J., "International Law and Constructivism: Elements of an Interactional Theory of International Law", *Columbia Journal of Transnational Law,* Vol. 2000, 39.
7. Clapham Andrew, "The High Commissioner for Human Rights", in: Frederic Megret, Philip Alston (eds.), *The United Nations and Human Rights,* Oxford University Press, 2020, pp. 667-707.
8. Crawford James, *Brownlie's Principles of Public International Law*, Oxford University Press, 2012.
9. Donnelly Jack, *Universal human rights in theory and in practice*, Cornell University Press, 2013.
10. Etinski Rodoljub, *Međunarodno javno pravo,* Službeni glasnik, 2010.
11. Goetschalckx Nick, "The mythic universality of the Universal Declaration on Human Rights: revisiting the drafting history of the UDHR in search of a foundational theory", in: Jan Wouters, Koen Lemmens, Thomas Van Poecke, Marie Bourguignon (eds.), *Can We Still Afford Human Rights? - Critical Reflections on Universality, Proliferation and Costs*, Edward Elgar Publishing 2021.
12. Hannum Hurst, "The Status of the Universal Declaration of Human Rights in National and International Law", *Georgia Journal of International and Comparative Law,* 1996, Vol. 25, Number 1.
13. Hopgood Stephen, *TheEndtimes of Human Rights*, Cornell University Press, 2013.
14. Kittichaisaree Kriangsak, *International Human Rights and Diplomacy,* Edward Elgar Publishing, 2020.
15. Kreća Milenko, Tijana Šurlan, *Međunarodno javno pravo*, Kriminalističko-policijski univerzitet, Beograd, 2019.
16. Lord Hoffmman, "The Universality of Human Rights", *Judicial Studies Board Annual Lecture,* 19 March 2009.
17. Mégret Frédéric, "International Human Rights Law Theory (January 20, 2010)", Retrieved from: https://ssrn.com/abstract=1539591 or http://dx.doi.org/10.2139/ssrn.1539591
18. Morsink Johanes, *The Universal Declaration of Human Rights – Origins, Drafting and Intent,* University of Pennsylvania Press, 1999.
19. Muaddi Darraj Susan, *The Universal Declaration of Human Rights*, Infobase Publishing, 2010.
20. Paunović Milan, Boris Krivokapić, Ivana Krstić, *Međunardna ljudska prava*, Beograd, 2013.
21. Rodley Sir Nigel, "The Universal Declaration of Human Rights: Learning from Experience", *Essex Human Rights Review,* 2008, Vol. 5 No. 1.

22. Samnoy Ashild, "The Origins of the Universal Declaration of Human Rights", in: Gudmundur Alfredsson, Asbjorn Eide (eds.), *The Universal Declaration of Human Rights – A Common Standard of Achievement,* Martinus Nijhoff Publishers, 1999.
23. Schabas William A. (ed.), *The Universal Declaration of Human Rights*: The *Traveaux Preparatoires*, Cambridge University Press, 2013.
24. Shaw Malcolm, *International Law,* Cambridge University Press, 2003.
25. Simma Bruno, Andreas Th. Muller, "Exercise and Limits of Jurisdiction", in: James Crawford, Martti Koskenniemi (eds.), *The Cambridge Companion to International Law,* Cambridge University Press, 2012.
26. Simma Bruno, "Universality of International Law from the Perspective of a Practitioner", *European Journal of International Law*, 2009, Vol. 20, Issue 2.
27. Simović Darko, Avramović Dragutin, Zekavica Radomir, Ljudska prava, Kriminalističko-policijska akademija, Beograd, 2013.
28. Sinclair Adriana, *International Relations Theory and International Law: A Critical Approach,* Cambridge University Press, 2010.
29. Smith Rhona K.M., *International Human Rights Law*, Oxford University Press, 2022.
30. Spano Robert, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity", *Human Rights Law Review,* 2014, Vol, 14, Issue 3.
31. Šurlan Tijana, *Univerzalna međunarodna ljudska prava: mehanizmi zaštite*, Kriminalističko-policijska akademija, 2014.
32. Thirlway Hugh, *The Sources of International Law*, Oxford University Press, 2019.
33. Wilner Gabriel M., "Reflections on Regional Human Rights Law", *Georgia Journal of International and Comparative Law*, 1996, Vol. 25, Np. 1.
34. Wuerth Ingrid, "International Law in the Post-Human Rights Era", *Texas Law Review,* 2017, Vol. 96, Issue 2.

PREVENTION OF DISINTEGRATION: REVISION AND DEVELOPMENT OF THEORETICAL APPROACHES IN THE LIGHT OF BREXIT CHALLENGES

Dmitriy V. GALUSHKO*

ABSTRACT

A comprehensive study of modern problems of the functioning of integration entities, the development of integration law, and its interaction with national law of member states in the context of the challenges of disintegration was carried out within the paper. The United Kingdom's withdrawal from the European Union – Brexit – is of unprecedented significance for the development and strengthening of not only the EU, but also other integration entities, including for the development of the Eurasian Economic Union. The paper reveals the legal characteristics of disintegration on the example of Brexit. Based on the consideration of the existing theoretical background and approaches to integration, the author formulated the theory of legal regulation of ensuring adaptability to integration, which consists in the need to form a mechanism that ensures stable interaction between the integration entity and its member states, preventing the reverse of integration and disintegration. The author proved that this is achieved by abolishing national legal measures and adopting new ones that can make integration challenging, reversible through ensuring systemic compatibility and the evolution of states and integration subjects, with the effective implementation of the norms of integration law in the national legal order.

Key words: Integration, disintegration, Brexit, European Union. Theory, ensuring, adaptability, membership, interaction, legal order

INTRODUCTION

In general, at the beginning of the 21st century the system of international relations is going through another period of transformation, which brings special challenges and threats. The world community is at the stage of regrouping of

* Associate Professor of the Department of International Law, Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation, Moscow, Russia.

forces associated with the final transition to multipolarity, the crisis of the latest security system, disintegration processes, and the decline of liberal values, accompanied by a new and less predictable stage of the technological revolution. These trends are directly manifested in the European Union, which is going through difficult times. Its main problem, both trivial and fundamental, is the crisis of citizens' trust in supranational institutions and centrifugal tendencies in its governance due to the failure to form single European identity, which is what populists from the "Eurosceptic" cohort of member states are the first to exploit. The EU systemic crisis was expected to be one of the first to resonate among the British public. Moreover, for several years, in the broad international discourse, attention to Brexit has not diminished — the historically unique process of the UK's withdrawal from the EU, which has no analogues in the more than half-century history of this integration entity.[1] Crises contribute to rethinking both the European Union project and the future of its development process itself. It is worth remembering that the EU has faced crises many times before. Indeed, as Robert Schumann pointed out back in 1950, "Europe will not be created all at once or according to a single plan".[2] Crises have shaped the EU into what it is. For example, from the late 1960s to the early 1980s, the Union experienced a period of acute problems, such as the "empty chair" crisis and disagreements regarding the enlargement of the European Communities.[3] Subsequently, the Single European Act and the Maastricht Treaty on the European Union became important steps in the development of European regional integration, with the UK being one of the key driving forces promoting the single market project.[4] The difference between previous crises and Brexit is that they correspond to moments of stagnation in European integration, while the current crisis leads to a process of disintegration of the entire integration project, which has no analogues so far. The Brexit crisis facing the EU, which researchers characterized as the most serious crisis "since the beginning of the integration project", constitutes a "perfect storm" of conditions that make this historical moment in European integration so important for the theoretical, conceptual and empirical understanding of the legal regulation of integration processes.[5] With the Brexit vote, one of the EU's largest

[1] Cabral N. da Costa, J. Gonçalves, Cunha N. Rodrigues, *After Brexit: Consequences for the European Union*, – London: Palgrave Macmillan, 2017, pp. 83–100.

[2] Schuman Declaration, May 1950. Retrieved from: https://european-union.europa.eu/principles-countries-history/history-eu/ 1945-59/schuman-declaration-may-1950_en, 10.10.2023.

[3] Caraffini P. De Gaulle, "The Empty Chair Crisis and the European Movement", *Perspectives on Federalism,* 2015, No. 7, pp. 163-189; Dmitriy V. Galushko, "Vstuplenie Irlandii v Evropejskie Soobshhestva", *Moskovskij zhurnal mezhdunarodnogo prava,* 2006, No. 2, pp. 216–226.

[4] Stephen George, *An Awkward Partner*, Oxford University Press, Oxford, 1998.

[5] Marianne Riddervold, Akasemi Newsome,"Transatlantic Relations in Times of Uncertainty: Crises and EU–US Relations", *Journal of European Integration*, 2018, No. 40, pp. 505-521; Sergio Fabbrini, "The Future of Europe Is Being Decided Now", *Social Europe*, 2020. Retrieved from: https://socialeurope.eu/the- future-of-europe-is-being-decided-now, 10.10.2023.

and most influential member states has decided to leave the Union, creating existential problems for it after sixty years of integration.

THE ESSENCE OF DOCTRINAL APPROACHES TO "INTEGRATION"

The very definition of "integration" raises many questions due to its controversial nature, which it has caused since the second half of the twentieth century. The problem of studying integration processes has gained great popularity. Recently, the term "integration" has become an important element in characterizing political, economic and legal life in many states. It was used to designate processes of international cooperation, from its simplest forms to the formation of supranational entities. According to some researchers, integration processes are due to the growing interdependence of states. They are developing and gradually covering more and more countries, endowing international mechanisms with powers and functions that approach the functions of a world government.[6] There is some disagreement in the scientific literature regarding the clear definition of theories and concepts of regional integration.[7] The main schools have a powerful potential for the formation of scientific and theoretical understanding of integration processes and the corresponding scientific discourse based on the perception and rethinking of basic ideas, within which modern theoretical paradigms of both integration itself and issues of functioning of international integration organizations and issues of their interaction with participating states are developing. At the end of the 1940s in post-war Europe, the concept of political federalism, the ideological inspirer of which was A. Spinelli, the leader of the Italian European Federalist Movement, obtained popularity.[8] In France, the "Committee of Action for the United States of Europe" (J. Monnet), and in Great Britain, with a number of reservations, the "Movement for a United Europe" (W. Churchill) occupied similar positions. However, one must understand that behind the initiatives of the federalists and the existence of overlapping organizations, in some cases, there were hidden mechanisms of the struggle of leading states for influence in the Council of Europe (founded in 1949), thanks to which Great Britain, France and, to a lesser extent, Italy sought to obtain a larger number of mandates compared to with other countries. The work of the famous Romanian researcher David Mitrany, who was the founder of functionalism, argues that integration of various levels takes place in world

[6] A.P. Movchan, *Mezhdunarodnyj pravoporjadok*, IGIP RAN, Moscow, 1996, p. 103.

[7] Ben Rosamond, *Theories of European Integration*, Palgrave Macmillan, Basingstoke, 2000, p. 27.

[8] Andrew Glencross, Alexander H. Trechsel, *EU federalism and constitutionalism: The legacy of Altiero Spinelli*, Lexington Books, Lanham, MD, 2010.

empires, blocs and international organizations.[9] Ernst Haas, who is the founder of the neo-functionalist approach to integration, shared the supranational ideas of D. Mitrany, but also identified as important tools for integration special institutional means with the help of which the states of a particular region can go beyond the boundaries of national systems and participate in the creation of new ones forms of international organizations. In doing so, he defined integration as a process in which the political "actors" of several different national entities cede their allegiances, expectations and political activities to a new large center which institutional process is located above the existing jurisdictions of states.[10] The next approach to characterizing integration is the theory of transactionalism, a prominent representative of which is Karl Deutsch. The content of transactionalism (or security community theory) focuses on the study of international order and security. According to Deutsch, such a community is a group of states that have achieved a significant level of integration with each other, and which have realized the need for a certain unity.[11] The concept of the security community is based on studies of the sequence of historical events in the context of issues of ensuring peace and peaceful relations between States. According to the representatives of this concept, International integration is essentially a multidimensional and multi-vector process, involves a developed and interdisciplinary methodology, because of which it is possible and necessary to use a system of criteria for the depth, speed of integration, a system of criteria for existing and possible obstacles, etc.[12] Another approach is post functionalism, advanced by Liesbet Hooghe and Gary Marks. It contrasts dominant "functional" theories of integration with intergovernmentalism and supranationality, including research on multilevel governance, public opinion, parties and elections.[13] The name of the theory comes from the post-functional logic of distribution of competencies within a multi-level governance system.[14] In general, all the considered theories agree that integration processes occur with the aim of preserving peace, ensuring freedom and democracy, increasing the volume of public goods through the unification of several countries, which is expressed in the institutional form of the structure of the corresponding geographical region, which would be based on the principles of the rule of law, democracy, respect for human freedoms, taking into account the degree of economic development of the

[9] David Mitrany, *A working peace system*, Quadrangle Books, Chicago, 1966.

[10] Martin Griffiths, *Fifty key thinkers in international relations,* Routledge, London, 1999, p. 181.

[11] Karl Deutsch, *Political community at the international level: problems of definition and measurement,* Princeton University, Princeton, 1953.

[12] *Ibidem.*

[13] Liesbet Hooghe, Gary Marks, "A postfunctionalist theory of European integration: from permissive consensus to constraining dissensus", *British Journal of Political Science*, 2009, No. 39(1), pp. 1–23.

[14] *Ibidem.*

member states of the relevant integration entity. Describing the process of European integration, Ernst Haas, noted, "a giant step towards an integrated theory of regional integration (...), could be made if we could clarify the essence of what we propose to explain and/or predict".[15] The difficulty of defining this concept is primarily because it is multidimensional. In a broad sense, interstate integration reflects a certain range of political and economic processes, and therefore is mainly associated with the political-economic dimension. At the same time, integration does not eliminate contradictions that may arise at one or another stage in various forms, and therefore it is important to create an adequate mechanism for their coordination. Integration must be gradual and mutually beneficial, and the goals of the integration entity must meet the interests and capabilities of the participants. Otherwise, it may lead to the reverse process. However, at present, there is a simultaneous development of integration and disintegration processes. Moreover, Brexit is a clear reflection of such multidirectional trends.

DEFINING DISINTEGRATION

Disintegration (from Latin *integer* — whole and French *dés* — a prefix meaning negation) is defined as a concept that defines the process of disintegration of a whole into elements, parts, components. In other words, this category is the opposite of the concept of integration. Scientists rightly believe that integration and disintegration are objective and interrelated processes. The development of integration and disintegration processes constantly affects the functioning of international integration entities. However, disintegration does not always mean destruction. It can encourage modification, the search for new forms of interaction, which, first, can open up new opportunities for integration in various areas, transformation of interaction between the parties, reaching a new level, acquiring new forms, a striking example of which is Brexit. Contemporary world processes encourage the formation of a number of concepts that study the essence and possibilities of limiting the influence of disintegration on relations between countries and integration entities. The main characteristic of disintegration processes are conflicts and contradictions within the entity between its participants, which were laid down from the very beginning of its creation, and which do not allow it to fully develop, and in the future, can completely lead to its complete liquidation. In relation to European integration, because even before Brexit, several crises have occurred recently, the phenomenon of disintegration is in the focus of different studies.[16] The presence of risks of disintegration processes is also recognized at the highest level. Thus, in the preface to the EU

[15] Ernst B. Haas, "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorising", *International Organisation*, 1970, Vol. 4, p. 630

[16] Hans Vollaard, "Explaining European Disintegration", *Journal of Common Market Studies*, 2014, No. 52, Issues 5, pp.1142. etc.

Global Strategy, the head of European diplomacy, Federica Mogherini, once admitted that the very existence of the European Union was called into question.[17] One of the leading European leaders, French President Emmanuel Macron, also recognized the danger of disintegration processes if no reforms of the European Union take place.[18] However, despite the fact that European leaders managed to prevent implementation of the most catastrophic scenarios for the EU disintegration, there are still prerequisites for the growth of disintegration processes within the Union. The highest point in the development of these processes at the moment has been the UK's exit from the European Union. Scientists differently characterize disintegration. Like integration, "disintegration" is seen either as a determinable outcome or as a process leading to an indeterminate outcome.[19] Professor Webber defines disintegration as "a reduction (…), in the range of common or joint policies (…) and/or in the formal (i.e. treaty-based) and de facto capacity of EU bodies to make and implement decisions, if necessary, against the will of individual members".[20] One of the most respected scholars in the field, Hans Vollaard, drawing on Albert Hirschman's classic treatise23, argues that the ultimate expression of actor dissatisfaction is the withdrawal from the systems of which they are a part: "History is full of currency zones, federations, empires and states, which fell apart".[21] However, in the context of regional integration, exit does not necessarily mean that member states leave the political entity.[22] Instead, H. Vollaard argues that "partial" withdrawal can occur when member states withdraw resources or "ignore orders" from the political center.[23] Some studies of differentiated integration only explain why some member states do not join all integration moves, not whether an integration

[17] "Shared Vision, Common Action: A Stronger Europe", A Global Strategy for the European Union's Foreign and Security Policy, European Union External Action Service. June 2016. Retrieved from: https://eeas.europa.eu/sites/eeas/files/ eugs_review_web_0.pdf, 10.10.2023.

[18] Arieane Bogain, "A. Reflections on Macron's Proposals for a Renewed EU", *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades*, 2020. – Vol. 22, No. 45, pp. 207–235.

[19] Ernst Haas, "The Study of Regional Integration: Reflections on the Joys and Anguish of Pretheorizing", in: L.N. Lindberg, S.A (Ed.), *Scheingold Regional Integration: Theory and Research*, Harvard University Press, Cambridge MA, 1971, pp. 3–42.

[20] Douglas Webber, "How likely is it that the European Union will disintegrate? A critical analysis of competing theoretical perspectives", *European Journal of International Relations,* 2014, No. 20(2), p. 342.

[21] Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*, Harvard University Press, Cambridge MA, 1970; Hans Vollaard, "Explaining European Disintegration", *Journal of Common Market Studies,* 2014, No.52, p.1143.

[22] Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union*, Oxford University Press, Oxford, 2005, p. 8.

[23] Hans Vollaard, *op.cit.,* p. 1148.

entity can become less integrated.[24] Most modern integration theories may not even is able to recognize disintegration because they no longer focus on the factors that explain the transformation of the entire integration system.[25] However, discussions about disintegration took place along with the development of the main theoretical approaches to integration that was indicated earlier. Neo-functionalists introduced the concept of "spillback" to refer to the process in which a member state becomes less willing to support integrationist regulation of certain issues due to growing national self-confidence or "dramatic political" resistance caused by gradual, technocratic integration.[26] "Spillback" describes a situation in which a set of specific commitments is abandoned and established integration rules and regulations are no longer regularly applied or observed at all. The scale of activity of the integration entity and its institutional potential are reduced, thereby it is assumed that the less institutionalized the entity is, the greater the spillback will take place, which may generally lead to the loss of the integration project;[27] all political and social processes and expectations will again completely move from the supranational level to the national level of states.[28] Thus, the process of internal differentiation of states is substantiated, which is characterized as "legal exemption from the rules that regulate a certain area of integration policy".[29] Although the concept of "spillback" has been proposed to explain moments of retreat, there are still few scholars actively engaged in research into the dynamics of disintegration, let alone the legal aspects of such a process. According to neo-functionalists, this refers to "the process by which the member state becomes less willing to support European regulation of certain political issues", which implies giving up part of the commitment to integration and the assumption that loyalty and competence will return from European power to nation states while with on the other hand, intergovernmentalism faces the same problem of "state centrism".[30] In theory, it precludes any more permanent deviation from the state pattern of political organization, which otherwise could

[24] Dirk Leuffen, Berthold Rittberger, Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union*, Palgrave Macmillan, Basingstoke, 2013.

[25] Paul Taylor, *The End of European Integration*, Routledge, London, 2008, p. 127.

[26] Ernst B. Haas, Collective Security and the Future International System, University of Colorado Press, Denver, 1968, p. 96.

[27] Walter Mattli, "Ernst Haas's evolving thinking on comparative regional integration: of virtues and infelicities", Journal of European Public Policy, 2005, No.12(2), pp. 327-348.

[28] Thomas Winzen, "Schimmelfennig F. Explaining differentiation in European Union treaties", *European Union Politics*, 2016, No.17 (4), p. 625; Leon N. Lindberg, Stuart A. Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community*, Prentice-Hall, Englewood Cliffs, 1970, p. 137.

[29] Hans Vollaard, "Explaining European disintegration", *Journal of Common Market Studies,* 2014, No.52(5), p. 3.

[30] Ben Rosamond, *op.cit.,* p. 115.

potentially also lead to disintegrative processes.[31] In relation to the transactionalist "security community", some scholars at one stage argued that integration in Europe was driven by the nuclear balance between the United States and the Soviet Union, which prevented wars from breaking out on the continent during the Cold War.[32] Without the participation of these superpowers, nuclear proliferation would be the "most likely scenario" in a multipolar Europe. A revival of mistrust between nation states would undermine any attempt at lasting European cooperation, and full-blown anarchy would return. The collapse of the Soviet Union eliminated the main reason for the relinquishment of sovereign powers in the European integration process: to effectively counterbalance the potential threat from the Soviet Union on the European continent. In this regard, it is expected that the sovereignty of the member states will eventually be fully restored, and in the light of the view of the dominant role of states in international politics, there is no choice but to expect that the European integration project will disintegrate into individual states that will fully independently exercise their sovereign powers in the relevant territory.[33] Some researchers also claim that at a certain stage the European Union may dissolve in a globalizing world, being absorbed into the "American empire" through the mechanisms of the North Atlantic Treaty Organization (NATO) or, for example, through a transatlantic trade alliance.[34] Moreover, adherents of federalist views express the opinion that the borders of the state territories of the countries participating in the integration entity cannot be taken for granted, however, they must be taken into account in the process of disintegration.[35] This is due to the fact that when new sovereign states are created from states with a federal structure, their territory, as a rule, coincides with the territory that was the territory of the corresponding subject of the federation. Representatives of the post-functional movement argue that neo-functionalism and intergovernmentalism, based on the developments of functionalists, emphasize the importance of economic interests in integration processes. At the same time, one of the main factors of disintegration may be the national identity policy and the degree to which it is taken into account within the framework of the integration entity.[36] Such reasoning mainly prevailed during the first three decades of European integration, when the integration project was

[31] Paul Taylor, *op.cit.,* p. 95.

[32] John J. Mearsheimer, "Back to the Future: Instability in Europe after the Cold War", *International Security,* 1990, No. 15(1), p. 13.

[33] Sebastian Rosato, "Europe's Troubles: Power Politics and the State of the European Project", *International Security,* 2011, No. 35(4), pp. 45–86.

[34] Geir Lundestad, *Empire' by Integration: The United States and European Integration, 1945–1997*, Oxford University Press, Oxford, 1998, p. 142.

[35] Lauri Karvonen, "Europe's Spaces and Boundaries", *Comparative European Politics*, 2007, No. 5, p. 457.

[36] Liesbet Hooghe, Gary Marks, *op.cit.,* p. 123.

primarily an economic one. Subsequently, classical integration theories were unable to take into account the growing importance of other European problems and risks when integration went beyond the purely economic dimension. In particular, this was expressed in the growing conflict between the elites and the masses over the necessary jurisdictional architecture for the European integration project, which manifested itself in the results of national elections and popular referendums on European issues, which more often limited, inhibited, rather than catalyzed the integration process.[37] In the theory of decision-making, which is primarily aimed at determining the consequences of disintegration processes, the actions of both one side and the behavior and actions of other players who take part in the disintegration processes are taken into account. The concept of rational preferences has been known since the times of Herodotus and Aristotle. In 1662, the principle of maximum expected value in the decision-making process was formulated. Its essence: "In order to evaluate how to act in order to extract good and avoid evil, it is necessary to discuss not good and evil themselves, but the probability of the occurrence of good and evil, as well as the geometric relationship between them". The theory of decision-making under conditions of uncertainty was continued by Jacob Bernoulli in his book "Art of Conjecturing". It is on Bernoulli's principle of insufficient reason, which states that if the probability distributions of states of nature are unknown, then there is no reason to consider them different, the Bayes-Laplace criterion is based. The most important concept in the theory of decision making under conditions of uncertainty, namely "Pareto optimality", was introduced by the Italian economist and sociologist Vilfredo Pareto. Pareto optimality boils down to the idea that goals that require resources are best achieved in a way that ensures maximum benefit at minimum cost.[38] Thanks to the work of L. Zadeh "Fundamentals of a new approach to the analysis of complex systems and decision-making processes", uncertainty is no longer considered as some external obstacle in the behavior of a complex system, but is interpreted as its integral characteristic. Modern theory is based on the axiomatic principles of rational decision making put forward by F. Ramsey and supplemented by J. von Neumann and O. Morgenstern.[39] In particular, F. Ramsey formulated axioms according to which rational choice can be made under conditions of uncertainty. Each decision maker must be guided

[37] Erik Jones, "The JCMS annual review lecture: European crisis, European solidarity", *Journal of Common Market Studies*, 2012, No. 50, pp. 53-67; "Towards a theory of disintegration*", Journal of European Public Policy*, 2008, No. 25(3), p. 441.

[38] Brian Foley, "The Proportionality Test: Present Problems", *Judicial Studies Institute Journal*, 2008, No. 1, pp. 70–71.

[39] V.A. Surovcev, I. A. Jenns, "F.P. Ramsej i intuicionizm G. Vejlja", *Vestnik Tomskogo gosudarstvennogo universiteta – Filosofija. Sociologija. Politologija,* 2012, No.2(18), pp. 173–187; Dzh., fon Neiman Morgenshtern, *O. Teorija igr i jekonomicheskoe povedenie,* Nauka, Moskva, 1970.

by these axioms, and his actions must be consistent with the principles of maximizing expected value, a certain numerical probability, and a value outcome. The fundamental addition of J. von Neumann and O. Morgenstern was to replace the concept of value with utility, which was more consistent with neoclassical economic doctrine. In the decision-making system and in the disintegration process, the concept of avoiding (eliminating) risks (risk aversion) is important. In this case, first of all, we are not talking about maximizing expected utility, but about avoiding negative consequences. In the context of the loss of a certain number of utility units and the impossibility of compensating them in the short term, one can consider the option of transforming utility into new dimensions and using in this way new decision-making rules that are compatible with the principles of expected usefulness. The Brexit crisis "fits the definition of integration crises: situations that acutely threaten the EU with disintegration, i.e. reduction of its membership or renationalization of its policies".[40] Thus, differences in the degree of applicability of different theories are not surprising, given their somewhat different focus and different ontological assumptions. After all, as the doctrine emphasizes, different theories come from different perspectives, ask different questions, and apply different mechanisms both when studying integration and when trying to understand disintegration, noting that future research should focus on applying alternative theories to developing "contradictory hypotheses that can be systematically tested against each other".[41] Thus, Brexit has proven difficulty to explain based on existing theories of integration. Theories of integration in the EU, faced with the Brexit crisis, cannot fully explain the reverse of integration, do not take into account many legal aspects at both the supranational and domestic levels, suggesting that there is indeed a need to revise the existing theoretical basis in order to more comprehensively analyze disintegration and Brexit, thus, there is room for theoretical innovation.

CONCEPTUALISATION OF THE THEORY OF LEGAL REGULATION OF ENSURING ADAPTABILITY TO INTEGRATION

Brexit has demonstrated that all previous theories that proceeded from the linear nature of integration are incomplete and half-hearted, do not take into account the degeneration of the state in the conditions of development of integration, and largely do not take into account the conditions of disintegration. In this regard, it is necessary to formulate a concept of legal regulation of

[40] Frank Schimmelfennig, "Liberal Intergovernmentalism and the Crises of the European Union", *Journal of Common Market Studies*, 2018, No. 56(7), pp. 1578–1594; "European Integration (Theory) in Times of Crisis", *Journal of European Public Policy*, 2018, No.25(7), pp. 969–989.

[41] Liesbet Hooghe, Gary Marks, "Grand Theories of European Integration in the Twenty-First Century", *Journal of European Public Policy,* 2019, No. 26(8), pp. 1128–1129.

integration processes that would take into account the new reality — the integration and disintegration of Brexit. Crises for integration entity are inevitable; they drive the development of integration, with the exception of the crisis of disintegration, which contradicts the very essence of integration, contributing to the destruction of the integration entity from the inside. Accordingly, a detailed study of Brexit is necessary to formulate a theory that adequately confronts the challenges of disintegration. A theory is needed that would not only explain the causes of disintegration, but would be aimed at solving those problems that become its causes. In our opinion, theory of legal regulation of ensuring adaptability to integration fully solves the identified problems. This theory is based on the multi- vector nature of integration, which consists of interpenetration, achieving systemic compatibility and the evolution of states and integration entities and their legal systems. Legal acts, on the one hand, as an object of integration, and on the other, as its means. Accordingly, it is law, as the Brexit experience shows, that should ensure adaptability to integration, in other words, the stability of interaction between the integration entity and member states, the abolition at the national level of legal mechanisms that complicate integration, interfere with it, make it reversible, and prevent the merging of national and supranational law into a single whole, identifying the prerequisites, thereby helping to level out disintegration, its prevention. In our opinion, in the context of the proposed theory, the integration process itself can be divided into two stages: "conditional integration" and «progressive integration». The goal of the first is to bring the state closer to the integration entity, which is accompanied by bringing the national legal system to the "minimum legal standard", which is necessary for the proper functioning of the state as a part of the integration entity; using the example of the European Union, the implementation of the principle of conditionality. The qualifying point in this process is acceptance as a member of the integration entity, which will mean that the country has achieved the minimum requirements for adapting the state mechanism and the national legal system, which form the basis for ensuring the sustainability of integration. The goal of progressive integration is the process of optimization, evolution and qualitative development of the supranational and national legal orders as a reflection of the sustainability of integration development even under the conditions of state membership in the entity. In general, based on the methodological foundations of system analysis and in the conditions of the conditional and progressive stages of integration, in our opinion, it is possible to distinguish five stages of the functioning of any system, including the state, as a system of power in society, in conditions of membership in an integration entity, on each of which certain changes occur in the state and its legal order: initiation of interaction with the integration entity; the state developing an algorithm for interaction with the integration entity; transformation of the internal structure of the state due to the influence of factors of integration entity; coordinated functioning of the elements of the state as an integral organism in interaction with the integration entity;

transformation by the state of the integration entity and itself. These stages reveal the sequence and content of the transformations that occur in states during their interaction with the integration entity, the entire course of the integration process, and its stages of conditional and progressive integration. The first three stages characterize the essence of the conditional stage of integration, when (1) the state first initiates interaction with the integration entity by submitting an application for membership, then (2) negotiations are held on the state's entry into the integration entity, at the same time (3) measures are taken to adapt the state and its legal system to membership in the association. The essence of the progressive stage of integration is consistently revealed by (4) the entry of the state into the integration entity and its presence in it, (5) its further development, degeneration in the conditions of membership in the integration process, the mutual influence of the national and supranational levels of governance, the development of their symbiotic relationship and the inadmissibility of disintegration in the conditions of progress, strengthening integration. At the first stage of interaction between the public administration system and the external environment, its functioning significantly depends on the action of various factors (political, economic, social, etc.) that determine the need for transformation. As a result, resource provision, operating conditions, needs and interests of service consumers change, which requires a revision of the goals, functions, principles, forms, methods, management procedures, that is, transformation of the internal environment of the public administration system. At the same time, the public administration system itself influences the environment in order to change its state, which leads to the need for a detailed study of the processes that occur in it, the selection of adequate mechanisms for regulating its development, adaptation to new conditions, and coordination of interaction with other systems. Thus, the interaction of the system with the environment determines a problematic situation for the system when it needs to adapt, "submit" to the environment or intensively transform it. At the second stage, the type (model) of interaction of elements (subsystems) of the public administration system with each other and/or with the external environment is formed. As a rule, the choice of interaction algorithm is influenced by the results of an analysis of factors (objective and subjective, basic and situational, internal and external, controllable and uncontrollable, those related to goal setting, and those related to the means of achieving certain goals, etc.) that may affect on the work of the public administration system and its individual elements. The third stage — transformation (adaptation) of the internal structure of the public administration system — provides for the adjustment of its goals and functions in accordance with the goals of social development. This is due to the fact that changing the goals of the public administration system predetermines the need to review and change the content and forms of implementation of functions, improve the structural design and operating principles, as a result of which the state of the system changes and its ability to withstand new loads is formed. At the fourth stage — the stage of coordinating the functioning of the

elements of the system as an integral organism — there should be a redistribution of the load between the elements of the public administration system and coordination of their actions. For example, transformation processes of a subject of public administration must reflect the changes occurring in the object of management. In fact, the processes of internal transformations of the subject and object of management are a response to changes occurring in the external environment, and due to taking into account mutual interests and needs for further development, which already fully manifest themselves at the fifth stage, ensuring adaptability to integration and preventing disintegration tendencies. Joining the EU now means that internal borders between states are being erased and external ones are being strengthened. It turns out that the nation state interacts with the external environment differently than before. Power still lies with national governments, although it is already exercised jointly with EU institutions. As stated in the doctrine, the European Union is a unification of European states rather than their transcendence.[42] The reason we think there is more to it lies in the nature of the European states them. Rather than being nation states that jealously guard their national interests and conflict with each other along national lines, European states are member states, and their membership in the EU plays a decisive role in their existence and further development. In particular, national governments view their power as deriving from their affiliation with the EU policy-making process. Thus, their power is formed horizontally through the relationships they enjoy with other governments in the EU, as well as in the vertical relationships of representation between a government and its own people.[43] R. Herrmann emphasizes that "(...) by integrating a single vector of development, Europe began to form a single legal, economic and financial framework".[44] As a consequence, the development of the European Union within the framework of the progressive stage should continue, but as a united front without forced artificial fragmentation with a greater degree of harmonization of requirements for states, ensuring their greater adaptability to integration. However, the transition from one stage to another depends on the depth and speed of transformations in the social life of the state. The most effective incentive for candidate countries to implement reforms is the EU's proposal to join the union. Typically, the European Union is in no hurry to take this step, offering national governments other forms of partnership with the EU, for example, connecting the candidate country to the general EU policy in a certain area without formal institutional entry into the structures of the Union. This gives the European Union

[42] Christoper J. Bickerton , Dermot Hodson, Uwe Puetter, *The New Intergovernmentalism: States and Supranational Institutions in the Post-Maastricht Era*, Oxford University Press, Oxford, 2015.

[43] Daron Acemoglu, Alberto Alesina, Christoper J. Bickerton, *The Search for Europe: Contrasting Approaches*, OpenMind Project, BBVA, 2016, p. 206.

[44] Richard K. Herrmann, Thomas Risse, Marilynn Brewer, *Transnational Identities: Becoming European in the EU,* Rowman & Littlefield, Lanham, 2004, p. 18.

formal grounds to demand institutional, political and economic changes. At the same time, one should agree with the opinion that the EU's ability to influence the implementation of agreements signed between the Union and the national government is limited, since the position of the latter depends on their interests, available resources, as well as on the subjective assessment of the benefits offered by the EU. The European Union tends to be more successful through «adaptive pressure» in those countries where there is significant compatibility between national regulatory practices and EU legal standards.[45] Under the conditions of participation in an integration entity a modern state is facing radical changes, which are impossible not to notice. State power moves from the phenomenon of a legal compulsory arbiter to the rank of a secondary link in the "society-subject of governance" relationship. Integration subjects of power are gaining dominance; however, in our opinion, it is, of course, premature to talk about the loss of absolute positions by state power. However, many aspects of life in the member states of integration entities are under the regulatory influence of the integration center. At the same time, the variable characteristics of the state- power phenomenon have a dual nature: under the external influence of the factor of membership in integration entities, internal transformations of the very mechanism for the implementation of state power occur. Turning to the previously adopted acts of primary EU law, which created European integration entities and subsequently made changes to them, we will see that they do not contain explicit rules governing the possibility of withdrawal for the states. So, despite active European integration, the EU authorities, together with the participating governments, did not even consider the possibility of terminating membership and leaving the associations, considering European integration an irreversible process. The absence of norms in the founding treaties did not mean that states could not secede from the European Union. The founding treaties are international agreements, and the European Communities/Union have been themselves international organizations *sui generis*. Thus, withdrawal from such organizations can be carried out in accordance with the provisions of the Vienna Convention on the Law of International Treaties of 1969.[46] The 2004 Treaty Establishing a Constitution for Europe first established the right to secede from the European Union, which was subsequently included in the Treaty of Lisbon, article 50 of which establishes that "any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements".[47] A Member State

[45] Tanja Börzel, Thomas Risse, "When Europe Hits Home: Europeanization and Domestic Change", *European Integration online Papers (EIoP),* 2000, Vol. 4, No. 15. Retrieved from: https://ssrn.com/abstract=302768, 10.10.2023.

[46] Vienna Convention on the Law of Treaties, 1969. Retrieved from: http://www.un.org/ru/documents/decl_conv/conventions/ law_treaties.shtml, 10.10.2023.

[47] Treaty establishing a Constitution for Europe. Retrieved from: https://europa.eu/european-union/sites/europaeu/files/docs/ body/treaty_establishing_a_constitution_for_europe_en.pdf, 10.10.2023.

that decides to withdraw shall notify the European Council of its intention». In the light of the guidelines set by the European Council, the Union negotiates and concludes an agreement with the State concerned, which determines the manner in which the latter will withdraw, taking into account the basis of its future relationship with the Union. The Treaties shall cease to apply to the State concerned on the date of entry into force of the withdrawal agreement or, in the absence of such an agreement, two years from the date of notification provided for in paragraph 2, unless the European Council, with the consent of the Member State concerned, unanimously decides to extend this period. The first state to use these provisions was Great Britain. The UK's experience demonstrates that the belated accession to European integration made it impossible for the state to fully influence the EU institutes and policies. Throughout its EU membership, the United Kingdom was perceived for the most part as an "inconvenient partner" in European affairs. Based on its very specific understanding of state sovereignty, Great Britain has developed a more pragmatic and instrumental approach to European integration compared to many of its partners in the integration entity. At the same time, it has played an active role in initiating many integration mechanisms in many important policy areas, such as the single market, trade policy, the development of the Common Foreign and Security Policy and the enlargement of the Union. The analysis of the UK's membership in the European Union demonstrates the low level of its adaptability to integration within the Union.[48] The experience of British membership has shown that the state has not gone through all the stages of either conditional or progressive integration, without sufficiently transforming itself in the conditions of EU membership, without seeking to solve the problem of coordinating national and supranational interests within the Union, while maintaining legal mechanisms at the national level that complicate integration, contributing to the development of disintegration trends. The British government has not carried out work on rethinking the role of the state in European integration processes, which could change the views of the population, change their attitude to the European integration process. This is largely due to the special place of the doctrine of parliamentary sovereignty of Great Britain and its relationship with the country's EU membership, which was initially extremely contradictory, and in the end such a contradiction was largely never resolved. Consideration of the main stages of the UK's integration into the EU shows that the state has sought to reverse integration on many issues, trying to slow down the processes of European integration, reduce it to intergovernmental cooperation. Moreover, the participation of Great Britain in the affairs of the Union has always been selective, in accordance only with its

[48] Dmitriy V. Galushko, "Teorija i praktika pravovogo regulirovanija integracionnyh processov v svete vyzovov Brekzita", Dissertacija na sosiskanie uchjonoj stepeni doktora juridicheskih nauk, Moskva: MGIMO, 2023. Retrieved from: https://mgimo.ru/upload/diss/2023/galushko-dissertacziya.pdf, 10.10.2023.

national interests, mainly in the economic and security spheres. At the same time, the "*a la carte*" concept used by the British government, in the context of the theory of legal regulation of ensuring adaptability to integration, in our opinion, is in contradiction with ensuring sustainability of integration, threatening its further development and success, and thus should be rejected by both the EU and other integration entities as unacceptable, not assuming the accession of the state to the integration core, but on the contrary, on the example of the United Kingdom, showing the reverse of integration and even disintegration. Nevertheless, integration has transformed the world from a collection of separate, isolated states into an integration system, with specific models of power, hierarchy and mutual influence. Integration theorists pointed out that it mainly reflects a certain range of political and economic processes, and therefore is mainly associated with the political-economic dimension. The theories of integration discussed do not adequately take into account the legal dimension. At the same time, one cannot underestimate the role that law plays in integration processes, because it is law, along with political, economic and other interests and needs that is the catalyst and means of integration.

As some scientists note, integration in Western Europe at all its stages was characterized by a fairly high level of legal regulation, and it is law that determines the status and scope of activity of the main actors in the conditions of integration, controls and, if necessary, limits their actions, and plays the role of a kind of normative regulator in the relationships between participants in the integration process, streamlining and stimulating the integration process, consolidating its content and organizational structures.[49] The transformation of old structures into a single whole is associated primarily with solving the most important problem of our time — ensuring adaptability of the state to integration. In our opinion, the emergence of the concept of "ensuring adaptability of the state to integration" and the corresponding theoretical constructs of a profile nature are extremely important, and the concept itself: firstly, is an epistemological source for determining the nature of the state in the context of its legal regime; secondly, in an ontological sense, it determines the main subject and strategic goals of the activities of this state; thirdly, it is aimed at defining the concept for achieving such a goal; fourthly, in the managerial and regulatory context it is aimed at creating a multifaceted, multi-level, complex regulatory mechanism based on intrastate legal relations — national legal support for the state's adaptability to integration. The analyzed transformational trends in the development of states should undoubtedly be taken into account in the practice of the Eurasian Economic Union (EAEU) and other integration entities, at the present stage of development of which there are discussions about expanding the subject

[49] "Integration Through Law: Europe and the American Federal Experience," M. Cappelletti, M. Seccombe, J. Weiler (Eds), *Methods, Tools and Institutions,* Walter de Gruyter, Berlin and New York, 1986, Vol. I, p. 4.

composition of the entity both at the official and doctrinal levels.[50] Thus, ensuring a high degree of adaptability to integration, further successful development of the entire International integration process and preventing its reversal.

EXPLORING FEATURES OF THE THEORY OF LEGAL REGULATION OF ENSURING ADAPTABILITY TO INTEGRATION

Initially, we consider it advisable to determine the linguistic and etymological essence of the terms "adaptability" and "ensuring", the idea of which is widely presented in many encyclopedic publications and scientific literature. The Cambridge dictionary characterizes "adaptability" as "an ability or willingness to change in order to suit different conditions".[51] In turn, the Merriam- Webster Dictionary defines the word "adaptability" in its first meaning as "capable of being or becoming adapted", i.e. "suited by nature, character, or design to a particular use, purpose, or situation", in other words, in the context of this study to crisis conditions, challenges of integration, disintegration.[52] Thus, a high degree of adaptability to integration can not only bring an integration entity out of crisis with minimal consequences, but also predict and prevent crisis phenomena in advance. As for the term "ensuring", in reference literature it has several meanings. For example, the Oxford Dictionary defines "ensure" as "to make sure that something happens or is definite".[53] According to Ozhegov's Explanatory Dictionary, "to ensure" means to make something completely possible, valid, and actually accomplished, to protect.[54] A more understandable and significant definition is given by the dictionary of synonyms of the Russian language by S.E. Aleksandrova, explaining "ensuring" as the corresponding process of creating all the necessary conditions for the implementation of something.[55] It is in this sense that the concept of "ensuring" is widely used in different branches of legal science and legislation. Thus, the analysis of the term "ensuring" demonstrates its multifaceted axiological, teleological functional and praxeological characteristics and orientation, which influenced the content of this category in legal science. It

[50] "Enlargement of the Eurasian Economic Union (EAEU)". Retrieved from: https://mgimo.ru/about/news/departments/konferentsiya-rasshirenie-evraziyskogo-ekonomicheskogo-soyuza-eaes, 10.10.2023; Ju.V. Kosov, V.E. Frolov, "O perspektivah rasshirenija Evrazijskogo jekonomicheskogo sojuza", *Upravlencheskoe konsul'tirovanie,* 2015, No. 11(83), pp. 59–65.

[51] The Cambridge Dictionary. Retrieved from: https://dictionary.cambridge.org/dictionary/english/adaptability, 10.10.2023.

[52] The Merriam-Webster Dictionary. Retrieved from: https://www.merriam-webster.com/dictionary/adapted, 10.10.2023.

[53] The Oxford Dictionary. Retrieved from: https://www.oxfordlearnersdictionaries.com/definition/english/ensure?q=ensure, 10.10.2023.

[54] S. I. Ozhegov, *Tolkovyj slovar' russkogo jazyka* , Azbukovnik, Moskva, 1999, p. 427.

[55] Z. E. Aleksandrova, Slovar' sinonimov russkogo jazyka, Russkij jazyk, Moskva, 1986. p. 291.

should be noted that the evolution of the term "ensuring" and its use in many monuments of political and legal thought were carried out at certain stages of the historical development of state and law. The problematic development of the category "ensuring" is one of the important conditions for the development of jurisprudence, since this category actually denotes the most important socio-legal phenomenon, the disclosure of which is directly related to both the conditions for the normal and stable functioning of society and the state in each historical period, and their progressive development. At the international legal level, the term "to ensure" was implemented in international normative documents of a universal nature that have binding (in particular, Articles 2 and 24 of the UN Charter, Article 2 of the International Covenant on Civil and Political Rights of 1966, Article 2 of the International Covenant on Economic, Social and Cultural Rights of 1966) and no binding (for example, the preamble to the Universal Declaration of Human Rights of 1948) legal force. Thus, the term "ensuring" not only acquired its legalization, but also received the meaning and status of a general legal principle, which has both international legal and domestic content, due to the implementation of the above agreements by member states of the international community. In this context, the very concept of legal support for all social processes is productive, which is associated with implementation, in a narrow sense, of legal norms and, in a broad sense, with implementation of policies in certain areas. This is directly implemented through a specific regulatory mechanism embodied in the legal enforcement mechanism. At the same time, understanding the institution of support as a mechanism makes it possible to consider it as a kind of dynamic, rather than static category, which has a systematic set of elements for the implementation of national and supranational legal regulation of social relations. Modern processes of interstate integration of states occur voluntarily, both on the basis of international and integration law, and national legal norms that ensure the member states' participation in integration processes. Legal regulation of ensuring adaptability to integration is a targeted rule-making and law enforcement activity of the integration entity and member states, their relevant bodies and institutes, that is, in a broad sense — governance activity. Accordingly, the issue of ensuring the processes of interstate integration from a methodological point of view is the most broad, multidimensional, complex, because it reveals the essence of legal ensuring, defines the principles and methodological approaches to building a system of legal ensuring for the formation of interstate integration structures, highlights the most significant regulatory and institutional components of such a structure, determines the formation and implementation of the functional structure of the integration interaction system, determines the structuring (doctrinal, normative, institutional) of the integration legal space, and most importantly, the sustainability of the further development of the entire integration process, preventing the reverse of integration, disintegration. Of particular importance is the study of the supporting activities of adaptability to integration, not only in the ordinary functioning of an

integration entity, but also in extraordinary conditions — for resolving crises, conflicts and contradictions between subjects of legal relations regarding antagonistic or competing interests in the field of interstate integration, which are in the realm of legal mediation. In the mechanism for ensuring such very complex phenomena as interstate integration, it is permissible to use the category of «synergy» to determine the effect of a combined multiplicative impact on an object belonging to several systems. That is, enforcement activity should be considered as a system that has its own structure, which consists of such components as national and supranational subjects of its implementation, the means that are used, the purpose, subject and result of law enforcement activity, a system of legal acts of a specialized nature. It is with this structure that the category of "legal regulation of ensuring adaptability to integration" provides for efficiency and effectiveness.

CONCLUSION

A theoretical analysis of the phenomenon of "legal regulation of ensuring the adaptability to integration" makes it possible to conclude that this expression does not mean governance of someone or something, such as governance of a governed object by a control system. In practice, «legal regulation of ensuring adaptability to integration» is the solution of a certain category of tasks in the areas of preventing or reducing negative consequences in the event of their occurrence, including actions that should reduce uncertainty and randomness factors in the functioning and implementation of the policies of modern integration entities and their member states, to prevent reverse integration, especially disintegration. In its most general form, risk management involves the adoption and implementation of measures aimed at reducing the magnitude of risk and improving positive opportunities. Integration itself is a continuous process of changing characteristics. It is worth considering that within the framework of integration processes there are significant qualitative stages, controversial issues, accelerations or crises, which, according to the logic of stage determinism, remain out of sight. Therefore, legal measures to ensure the sustainability of integration are not discrete acts of making individual decisions, but continuous work in which decisions must be regularly repeated and at the same time situationally change. It should be taken into account that the results of using different mechanisms may be different. In some cases, the measures taken can neutralize the negative effect or transfer situations from the format of «acute problem» to the format of "issues under control". In any case, the withdrawal of states from the integration entity is not necessarily the only possible result of the disintegration process. As a consequence, the conceptualization of disintegration cannot be simply derived from the inverted characterization of the essence of integration. Integration and disintegration are multifaceted processes that include many interrelated aspects

that have different expressions. In general, such a variety of factors influencing the integration process and determining its dialectical nature finds expression in both the internal and external arena, which gives rise to discussions in scientific circles on the issue of mutual influence of integration processes and statehood. Their center is such categories as "state", "sovereignty", "national interests", etc. At the same time, the practical significance and need for appropriate methods of integration or their totality, the impact on statehood and vice versa, are determined by the nature of the interaction of international integration entities and states, their legal systems and governing bodies. The main instrument of integration is integration law, which simultaneously reflects and embodies its results, and is also capable of limiting possible losses. Law determines the status and scope of activity of the main subjects of the integration process, performing supervisory, regulatory and restrictive functions. Thus, effective legal regulation of ensuring adaptability to integration makes it possible to neutralize disintegration risks, ensure the further development of both integration and national legal systems, and most importantly, the appropriate level of integration and its sustainability. The conceptual foundations of the theory of legal regulation of ensuring adaptability to integration based on the Brexit experience can be fully applied to the development of other integration entities, in particular, the EAEU, for the implementation of specific practical tasks, taking into account the interests of states for their strengthening and further dynamism. The EAEU successful development, especially the leveling of some ambivalence regarding the issue of delimitation of competence between the bodies of the integration entity and the member states, which entails ambiguity in interpretations and, consequently, law enforcement, will depend on the success of the process of building a mechanism for the optimal balance of interests and effective interaction between national and integration legal orders while maintaining national priorities, appropriate response to crisis phenomena, preventing stagnation of integration processes and, especially, disintegration.

PREVENCIJA DEZINTEGRACIJE: REVIZIJA I RAZVOJ TEORIJSKIH PRISTUPA U SVETLU IZAZOVA BREGZIT-a

APSTRAKT

U okviru rada sprovedena je sveobuhvatna studija savremenih problema funkcionisanja integracionih subjekata, razvoja integracionog prava i njegove interakcije sa nacionalnim pravom država članica u kontekstu izazova dezintegracije. Istupanje Ujedinjenog Kraljevstva iz Evropske unije – Bregzit – je od neviđenog značaja za razvoj i jačanje ne samo EU, već i drugih integracionih subjekata, uključujući i razvoj Evroazijske ekonomske unije. U radu se otkrivaju pravne karakteristike dezintegracije na primeru Bregzita. Na

osnovu sagledavanja postojeće teorijske pozadine i pristupa integraciji, autor je formulisao teoriju pravnog uređenja obezbeđivanja prilagodljivosti integraciji, koja se sastoji u potrebi formiranja mehanizma koji obezbeđuje stabilnu interakciju između subjekta integracije i njegovih država članica, kao što je i sprečavanje obrnutog procesa integracije - dezintegracije. Autor je dokazao da se to postiže ukidanjem nacionalnih zakonskih mera i usvajanjem novih koje integraciju mogu učiniti izazovnom, reverzibilnom kroz obezbeđenje sistemske kompatibilnosti i evoluciju država i integracionih subjekata, uz efikasno sprovođenje normi integracionog prava u nacionalnom pravnom poretku.

Ključne reči: Integracija, dezintegracija, Bregzit, Evropska unija. Teorija, obezbeđenje, prilagodljivost, članstvo, interakcija, pravni poredak

REFERECES

1. "Enlargement of the Eurasian Economic Union (EAEU)". Retrieved from: https://mgimo.ru/about/ news/departments/konferentsiya-rasshirenie-evraziy skogo-ekonomicheskogo-soyuza-eaes, 10.10.2023; Ju.V. Kosov, V.E. Frolov, "O perspektivah rasshirenija Evrazijskogo jekonomicheskogo sojuza", *Upravlencheskoe konsul'tirovanie,* 2015, No. 11(83).
2. "European Integration (Theory) in Times of Crisis", *Journal of European Public Policy*, 2018, No.25(7).
3. "Integration Through Law: Europe and the American Federal Experience," M. Cappelletti, M. Seccombe, J. Weiler (Eds), *Methods, Tools and Institutions,* Walter de Gruyter, Berlin and New York, 1986, Vol. I.
4. "Shared Vision, Common Action: A Stronger Europe", A Global Strategy for the European Union's Foreign and Security Policy, European Union External Action Service. June 2016. Retrieved from: https://eeas.europa.eu/sites/eeas/ files/ eugs_review_web_0.pdf, 10.10.2023.
5. "Towards a theory of disintegration*", Journal of European Public Policy*, 2008, No. 25(3).
6. Acemoglu, Daron, Alesina, Alberto, Bickerton, Christoper J., *The Search for Europe: Contrasting Approaches*, OpenMind Project, BBVA, 2016.
7. Aleksandrova, Z. E.. Slovar' sinonimov russkogo jazyka, Russkij jazyk, Moskva, 1986.
8. Bartolini, Stefano, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union*, Oxford University Press, Oxford, 2005.
9. Bickerton, Christoper J., Hodson, Dermot, Puetter, Uwe, *The New Intergovernmentalism: States and Supranational Institutions in the Post-Maastricht Era*, Oxford University Press, Oxford, 2015.

10. Bogain, Arieane, "A. Reflections on Macron's Proposals for a Renewed EU", *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades*, 2020. – Vol. 22, No. 45.
11. Börzel, Tanja, Risse, Thomas, "When Europe Hits Home: Europeanization and Domestic Change", *European Integration online Papers (EIoP),* 2000, Vol. 4, No. 15. Retrieved from: https://ssrn.com/abstract=302768, 10.10.2023.
12. da Costa, Cabral N., Gonçalves, J., Rodrigues, Cunha N., *After Brexit: Consequences for the European Union*, - London: Palgrave Macmillan, 2017.
13. De Gaulle, Caraffini P., "The Empty Chair Crisis and the European Movement", *Perspectives on Federalism,* 2015, No. 7.
14. Deutsch, Karl, *Political community at the international level: problems of definition and measurement,* Princeton University, Princeton, 1953.
15. Fabbrini, Sergio, "The Future of Europe Is Being Decided Now", *Social Europe*, 2020. Retrieved from: https://socialeurope.eu/the- future-of-europe-is-being-decided-now, 10.10.2023.
16. Foley, Brian, "The Proportionality Test: Present Problems", *Judicial Studies Institute Journal*, 2008, No. 1.
17. Galushko, Dmitriy V., "Teorija i praktika pravovogo regulirovanija integracionnyh processov v svete vyzovov Brekzita", Dissertacija na sosiskanie uchjonoj stepeni doktora juridicheskih nauk, Moskva: MGIMO, 2023. Retrieved from: https://mgimo.ru/upload/diss/2023/galushko-dissertacziya.pdf, 10.10.2023
18. Galushko, Dmitriy V., "Vstuplenie Irlandii v Evropejskie Soobshhestva", *Moskovskij zhurnal mezhdunarodnogo prava,* 2006, No. 2.
19. George, Stephen, *An Awkward Partner*, Oxford University Press, Oxford, 1998.
20. Glencross, Andrew, Trechsel, Alexander H., *EU federalism and constitutionalism: The legacy of Altiero Spinelli*, Lexington Books, Lanham, MD, 2010.
21. Griffiths, Martin, *Fifty key thinkers in international relations,* Routledge, London, 1999.
22. Haas, Ernst B., Collective Security and the Future International System, University of Colorado Press, Denver, 1968.
23. Haas, Ernst B., "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorising", *International Organisation*, 1970, Vol. 4.
24. Haas, Ernst, "The Study of Regional Integration: Reflections on the Joys and Anguish of Pretheorizing", in: L.N. Lindberg, S.A (Ed.), *Scheingold Regional Integration: Theory and Research*, Harvard University Press, Cambridge MA, 1971.

25. Herrmann, Richard K., Risse, Thomas, Brewer, Marilynn, *Transnational Identities: Becoming European in the EU,* Rowman & Littlefield, Lanham, 2004.
26. Hirschman, Albert O., *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*, Harvard University Press, Cambridge MA, 1970; Hans Vollaard, "Explaining European Disintegration", *Journal of Common Market Studies,* 2014, No. 52.
27. Hooghe, Liesbet, Marks, Gary, "A postfunctionalist theory of European integration: from permissive consensus to constraining dissensus", *British Journal of Political Science*, 2009, No. 39(1).
28. Hooghe, Liesbet, Marks, Gary, "Grand Theories of European Integration in the Twenty-First Century", *Journal of European Public Policy,* 2019, No. 26(8).
29. Jones, Erik, "The JCMS annual review lecture: European crisis, European solidarity", *Journal of Common Market Studies*, 2012, No. 50.
30. Karvonen, Lauri, "Europe's Spaces and Boundaries", *Comparative European Politics*, 2007, No. 5.
31. Leuffen, Dirk, Rittberger, Berthold, Schimmelfennig, Frank, *Differentiated Integration: Explaining Variation in the European Union*, Palgrave Macmillan, Basingstoke, 2013.
32. Lindberg, Leon N., Scheingold, Stuart A., *Europe's Would-Be Polity: Patterns of Change in the European Community*, Prentice-Hall, Englewood Cliffs, 1970.
33. Lundestad, Geir, *Empire' by Integration: The United States and European Integration, 1945–1997*, Oxford University Press, Oxford, 1998.
34. Mattli, Walter, "Ernst Haas's evolving thinking on comparative regional integration: of virtues and infelicities", Journal of European Public Policy, 2005, No.12(2).
35. Mearsheimer, John J., "Back to the Future: Instability in Europe after the Cold War", *International Security,* 1990, No. 15(1).
36. Mitrany, David, *A working peace system*, Quadrangle Books, Chicago, 1966.
37. Morgenshtern, Dzh., fon Neiman, *O. Teorija igr i jekonomicheskoe povedenie,* Nauka, Moskva, 1970.
38. Movchan, A.P., *Mezhdunarodnyj pravoporjadok*, IGIP RAN, Moscow, 1996.
39. Ozhegov, S. I., *Tolkovyj slovar' russkogo jazyka* , Azbukovnik, Moskva, 1999.
40. Riddervold, Marianne, Newsome, Akasemi,"Transatlantic Relations in Times of Uncertainty: Crises and EU–US Relations", *Journal of European Integration*, 2018, No. 40.
41. Rosamond, Ben, *Theories of European Integration*, Palgrave Macmillan, Basingstoke, 2000.

42. Rosato, Sebastian, "Europe's Troubles: Power Politics and the State of the European Project", *International Security,* 2011, No. 35(4).
43. Schimmelfennig, Frank, "Liberal Intergovernmentalism and the Crises of the European Union", *Journal of Common Market Studies*, 2018, No. 56(7).
44. Schuman Declaration, May 1950. Retrieved from: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en, 10.10.2023.
45. Surovcev, V.A., Jenns, I. A., "F.P. Ramsej i intuicionizm G. Vejlja", *Vestnik Tomskogo gosudarstvennogo universiteta – Filosofija. Sociologija. Politologija,* 2012, No.2(18).
46. Taylor, Paul, *The End of European Integration*, Routledge, London, 2008.
47. The Cambridge Dictionary. Retrieved from: https://dictionary.cambridge.org/dictionary/english/adaptability, 10.10.2023.
48. The Merriam-Webster Dictionary. Retrieved from: https://www.merriam-webster.com/dictionary/adapted, 10.10.2023.
49. The Oxford Dictionary. Retrieved from: https://www.oxfordlearnersdictionaries.com/definition/english/ensure?q=ensure, 10.10.2023.
50. Treaty establishing a Constitution for Europe. Retrieved from: https://europa.eu/european-union/sites/europaeu/files/docs/ body/treaty_establishing_a_constitution_for_europe_en.pdf, 10.10.2023.
51. Vienna Convention on the Law of Treaties, 1969. Retrieved from: http://www.un.org/ru/documents/decl_conv/conventions/ law_treaties.shtml, 10.10.2023.
52. Vollaard, Hans, "Explaining European disintegration", *Journal of Common Market Studies,* 2014, No.52(5).
53. Vollaard, Hans, "Explaining European Disintegration", *Journal of Common Market Studies*, 2014, No. 52, Issues 5.
54. Webber, Douglas, "How likely is it that the European Union will disintegrate? A critical analysis of competing theoretical perspectives", *European Journal of International Relations,* 2014, No. 20(2).
55. Winzen, Thomas, "Schimmelfennig F. Explaining differentiation in European Union treaties", *European Union Politics*, 2016, No.17 (4).

(ATTEMPTED) TARGETED KILLING AS A METHOD OF TRANSNATIONAL REPRESSION OF DIASPORAS –THE ATTEMPTED MURDER OF THE SKRIPALS: USE OF FORCE VS. ARMED ATTACK

Andrej CONFALONIERI*

ABSTRACT

This paper examines the international legal implications of the attempted murder of Sergei and Yulia Skripal, specifically focusing on whether this act can be classified as a use of force or an armed attack under international law. In the event that Russia is found responsible for the attack, understanding this distinction carries significant consequences in areas such as self-defence, countermeasures, peremptory norms, and obligations *erga omnes*. If the case of the Skripals really represents the use of force based on historical precedents and the Commentary of the International Committee of the Red Cross, as well as the strategic motives of states to downplay such actions, the question of international legal responsibility arises. This is because there is concern that the introduction of such a threshold could lead to an increase in targeted killings of the diaspora. On the other hand, if the case of the attempted murder of the Skripals would not be legally qualified as an armed attack due to the absence of the goal of one state to attack another, according to the standards of the International Court of Justice, the dilemma remains open regarding the legal qualification of the act. All the more so, because the absence of high-ranking officials and the act based on nationality excludes the existence of an armed attack, even if the assassination attempt can be attributed to Russia.

Key words: Skripal, use of force, armed attack, targeted killing

INTRODUCTION

Across the globe, leaders of autocratic states often target persons who courageously and openly talk about and criticise repression in those countries.[1] Autocrats employ various forms of transnational repression: silencing these

* Pre-PhD and LLM graduate (Leiden University). E-mail: andrej.confalonieri@gmail.com.

[1] Yana Gorokhovskaia, Nate Schenkkan, Grady Vaughan, *Still Not Safe: Transnational Repression in 2022*, Freedom House, Washington DC, 2023, p. 1.

individuals may be done, inter alia, by violent conduct or threats directed at both nationals abroad and their families at home, by illegally deporting or detaining them, coercing them by proxy, or digitally threatening them.[2] Sometimes states also kill exiles or members of their diasporas abroad by intentionally, premeditatedly and deliberately using lethal force "acting under colour of law". These situations fall under the definition of "targeted killing".[3] This is the most extreme way of transnational repression.[4] This method is employed by states such as China, Rwanda, Uzbekistan, Syria, Turkey, Turkmenistan, Tajikistan, Saudi Arabia, and the Russian Federation (Russia).[5] In particular, the latter state has been accused of "an ongoing administrative practice (…) of State-authorised targeted assassination operations against perceived opponents [thereof]".[7] This practice includes cases such as the alleged attempted murder of Sergei and Yulia Skripal (the Skripals) on the territory of the United Kingdom (UK) in 2018, for which it has not yet been established that it has been committed by Russia.[6] After the failed attempted murder of the Skripals, "carefully" choosing her words,[7] at

---

[2] Dana M. Moss, "Transnational Repression, Diaspora Mobilization, and the Case of The Arab Spring*", Social Problems*, Vol. 63(4), p. 480; Yana Gorokhovskaia, Nate Schenkkan, Grady Vaughan, *Still Not Safe: Transnational Repression in 2022*, op. cit., p. 1.

[3] UN Human Rights Council (HRC), "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston" (28 May 2010) UN Doc A/HRC/14/24/Add.6, para. 1.

[4] Nate Schenkkan, "Introduction", in: Nate Schenkkan, Isabel Linzer, Saipira Furstenberg, John Heathershaw (eds), *Perspectives on "Everyday" Transnational Repression in an Age of Globalization*, Freedom House, Washington DC, 2020.

[5] Yana Gorokhovskaia, Nate Schenkkan, Grady Vaughan, *Still Not Safe: Transnational Repression in 2022*, op. cit., p. 1. See also Baser, Bahar, Ahmet Erdi Ozturk, "Positive and Negative Diaspora Governance in Context: From Public Diplomacy to Transnational Authoritarianism", Middle East Critique, Vol 29(3), p. 326; Tsourapas, Gerasimos, "Global Autocracies: Strategies of Transnational Repression, Legitimation, and Co-Optation in World Politics", *International Studies Review*, Vol. 23(3), pp. 616ff; European Court of Human Rights, "New inter-State application brought by Ukraine against Russia", Internet: https://hudoc.echr.coe.int/engpress#{%22itemid%22:[%22003-6946898-9342602%22]}, accessed 7 June 2023. See also Marko Milanovic, "Extraterritorial Investigations in Hanan v. Germany; Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia", Internet: https://www.ejiltalk.org/extraterritorial-investigations-in-hanan-v-germanyextraterritorial-assassinations-in-new-interstate-claim-filed-by-ukraine-againstrussia/, 31.05. 2023.

[6] The UK has previously encountered various instances of transnational repression, e.g., poisonings of Russian exiles (see also Carter v Russia App No 20914/07 (European Court of Human Rights, 21 September 2021), para. 170), attacks on Saudi dissidents or the harassment of activists by Chinese and Bahraini officials (Gorokhovskaia, Yana, Linzer Isabel, "Case Study: United Kingdom", in Yana Gorokhovskaia, Isabel Linzer (eds), *Defending Democracy in Exile: Policy Responses to Transnational Repression*, Freedom House, Washington DC, 2022, pp. 1-5). Also see e.g., Mark Weller, "An International Use of Force in Salisbury?", Internet: https://www.ejiltalk.org/an-international-use-of-force-in-salisbury/, accessed 1 June 2023.

[7] Marko Milanovic, "The Salisbury Attack: Don't Forget Human Rights", Internet: https://www.ejiltalk.org/the-salisbury-attack-dont-forget-human-rights, 31.05.2023.

the time UK Prime Minister May asserted the high likeliness of Russia's responsibility for the acts involving the Skripals.[8] She further proceeded to suggest that two options were possible: Russia either directly acted against the UK or mishandled Novichok, allowing it to get into the wrong hands.[9] May added that the UK would deduce that Russia unlawfully used force against the former state in case the Kremlin did not provide any "credible response".[10] The UK also adopted various non-forcible measures, such as expelling 23 Russian diplomats.[11] Conversely, Russia denied the UK's accusations, and both states accused each other of not respecting the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.[12] The statements by the UK open up several legal questions, such as whether the attempted murder of the Skripals amounts to a use of force (Article 2(4) of the Charter of the United Nations)[13] and/or an armed attack (Article 2(4) UN Charter). Answering these questions is significant because of the implications in various fields of international law, such as the possibility to use self-defence and justify the attack as a countermeasure.[14] In case it is established it is a use of force, it also opens the question of whether a peremptory norm or an obligation *erga omnes* has been breached.[15] This paper examines both the questions posed in the previous paragraph, asserting that the targeted assassination of the Skripals constitutes a use of force but not an armed attack. The first chapter provides a brief overview of the facts of the case. Whilst the second analyses the question of whether the planned killing of the Skripals amounts to a use of force, the third explains if it constitutes an armed attack. For the purposes of this paper, it is assumed that the attack is attributable to Russia.

---

[8] "Oral statement to Parliament PM: Commons statement on Salisbury incident: 12 March 2018", Internet: https://www.gov.uk/government/speeches/pm-commons-statementon-salisbury-incident-12-march-2018, 1.06.2023

[9] *Ibid.*

[10] *Ibid.*

[11] Tom Ruys, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", Internet: https://www.justsecurity.org/53924/license-killsalisbury-state-sponsored-assassinations-jus-ad-bellum/, 1.06.2023.

[12] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45. See Marko Milanovic, "The Salisbury Attack: Don't Forget Human Rights", op. cit.

[13] Charter of the United Nations (adopted 26 June 1945, entered into force 26 October 1945), 1 UNTS XVI (UN Charter).

[14] Dapo Akande, "The Use of Nerve Agents in Salisbury: Why does it Matter Whether it Amounts to a Use of Force in International Law?", Internet: https://www.ejiltalk.org/the-use-of-nerve-agents-in-salisbury-why-does-it-matterwhether-it-amounts-to-a-use-of-force-in-international-law/, 1.06. 2023.

[15] *Ibid.*

THE TARGETED KILLING OF THE SKRIPALS – A BRIEF OVERVIEW OF THE FACTS OF THE CASE

Sergei Skripal, formerly a Russian KGB/FSB agent, was first convicted of spying for the West by the Russian authorities. He was then exchanged in a spy swap and relocated to the UK. On 4 March 2018, he was discovered senseless with his daughter Yulia on a bench in Salisbury. Scientists determined that the Skripals and various others in their vicinity[16] had been exposed to Novichok, a series of nerve agents developed between 1971 and 1993 by Russia (Soviet Union).[17] It is believed that five Novichok agents have been modified for military purposes. The Russian scientists who helped modify them also suggest that they are the most lethal nerve agents ever modified In any case; the Skripals were admitted to the hospital, where the doctors decided to heavily sedate them. Both the Skripals survived. While it has not been established by an international court that Russia is responsible for the attempted killing of the Skripals, there are strong indications that the Russian state is responsible.[18] Recalling the assumption that the act can be attributed to Russia for the purposes of this paper, the next chapters analyse the questions of whether the attempted assassination of the Skripals amounts to a use of force and/or armed attack.

THE TARGETED KILLING OF THE SKRIPALS – A USE OF FORCE?

Article 2(4) UN Charter provides the customary[19] principle of the prohibition on the use of force, which has also been referred to as *jus cogens* both by the International Law Commission (ILC)[20] and the legal doctrine.[21] According to this principle, states cannot use force on the territories of other states. Killings on foreign territory usually happen in specific situations, such as armed conflicts resulting from the search for power in foreign territories, when an effective government is missing, or with the consent of the local government. [22] This latter

[16] Such as police officer Nick Bailey.

[17] Mark Weller, "An International Use of Force in Salisbury?", op. cit.; Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", *Rusi Journal*, Vol. 163(4), p. 10.

[18] See e.g., Mark Weller, "An International Use of Force in Salisbury?", *op. cit.*

[19] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, para. 193.

[20] ILC, 'International Law Commission, "Report of the Commission on the work of the second part of its 18th session" (4 May - 19 July 1966) UN Doc A/6309/Rev.l , Commentary to Article 50 of the Draft Articles on the Law of Treaties, para. 1.

[21] Mark Weller, "An International Use of Force in Salisbury?", op. cit.; Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", *op. cit*., p.13.

[22] Weller suggests that, whilst assassinations by states within their borders are usually referred to "extra-judicial killings", the ones committed abroad by military force in foreign states are called

case is particularly significant given that targeted killings on the territory of another state constitute a violation of the sovereigntyof the latter unless the second state consents to such killings (or if the first state has the right to use force in self-defence). [23] This was also noted by the Security Council (UNSC), which issued Resolution 138 after the abduction of Eichmann by Israel on Argentinean territory and his subsequent transfer to Israel. In the Resolution, the UNSC declared that the concerned acts "affect[ed] the sovereignty of [Argentina]".[24] In other words, it is prohibited, "for whatever reason", "to intervene directly or indirectly in internal or external affairs of other States", unless such states give their consent. Breaches of the principle of non-intervention can also amount to breaches of the principle of the prohibition of the use of force in cases of direct or indirect use of force. [25] The general question is whether a targeted killing (or an attempted one) of a single person on the territory of another state qualifies as a use of force. The case-law is not uniform. On the one hand, there are some practical examples of situations of targeted killing abroad have which have not been characterised as a use of force. For instance, in 1986, police from Switzerland chased several offenders and shot them on the territory of France. The latter state required an explanation, and Switzerland regretted its decision. This case is not considered a use of force under Article 2(4) UN Charter.[26] The more famous example is the one concerning the sinking of the Rainbow Warrior vessel in 1985. In this case, France admitted having ordered the drowning of the Rainbow Warrior ship after the arrest of two French agents in New Zealand. These agents had sunk the vessel, killing a Portuguese/Dutch photographer in the process.[27] Despite France using

"targeted assassinations" (Mark Weller, "An International Use of Force in Salisbury?", *op. cit*.). Also see: Ashley Deeks, Daskal Jennifer, Goodman Ryan, "Strikes in Syria: The International Law Framework", Internet: https://www.lawfareblog.com/strikes-syriainternational-law-framework, 1.06. 2023; Mark Weller, "An International Use of Force in Salisbury?", op. cit.; Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", *op. cit.,* p. 13; UN General Assembly (UNGA), "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" (18 September 2013) UN Doc A/68/389", para. 52.

[23] The HRC contends that, when states conduct targeted killings in the territories of other states with which the former are not in armed conflict, the question of whether there has been a breach of the sovereignty of the latter states is answered applying the legal rules concerning the use of force (HRC, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston", paras. 34 and 35 referring to arts 2(4) and 51 UN Charter.

[24] UNSC Res 138 (1960) [1].

[25] UNGA Res 2625 (1970) 123; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, *op. cit.,* paras. 205 and 209. See also UNGA Res 2625 (n 32) 123.

[26] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, Hart, Oxford, 2010, p. 54.

[27] *Case Concerning the Differences Between New Zealand and France Arising from the "Rainbow Warrior" Affair (New Zealand v France)*, 19 UNRIAA 199 (1986), p. 199.

military force, New Zealand chose not to cite Article 2(4) UN Charter, instead declaring that both its sovereignty and the UN Charter had been seriously violated.[28] The rationale for not mentioning the principle prohibiting the use of force may be the fact that France notified New Zealand that it had no plans to engage in military action against it.[29] On the other hand, some examples of targeted killings on the territories of other states have been considered to fall in the scope of Article 2(4) UN Charter. For instance, in 1985, the South African Defence Force carried out an airborne raid in Gaborone, Botswana, killing 12 individuals. The UNSC "strongly condemned" the conduct of South Africa by issuing two Resolutions. In the Resolutions, it stated that this was an act of aggression and therefore a breach of Article 2(4).[30] Additionally, border-crossing Israeli and Portuguese raids during the '70s and '80s have been regarded as falling under the purview of the rule prohibiting the use of force.[31] For example, in 1988, Israeli commandos covertly entered Tunis, assassinating one of the leading officials of the Palestinian Liberation Organization. They then returned to Israel avoiding participating in combat.[32] The UNSC vigorously condemned this operation, stating that it was an "aggression (…) against the sovereignty and territorial integrity of Tunisia".[33] The viewpoints of the legal doctrine and independent finding missions are also not uniform. Different answers have indeed been given to the issue of whether targeted killings of single individuals on foreign territory amount to a use of force. They range from opinions that the use of force needs to have a minimum threshold to ones suggesting that any targeted killing on foreign territory is a use of force. Supporting the first approach, the Independent International Fact-Finding Mission on the Conflict in Georgia opines that only "physical force [surpassing] a minimum threshold of intensity" is

[28] Memorandum of the Government of New Zealand to the UN Secretary-General, ibid, p. 201.

[29] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, *op. cit.,* pp. 86-87.

[30] UN Security Council, Resolution 568 (21 June 1985) UN Doc S/Res/568, para. 1, amended and affirmed by UNSC Resolution 572 (30 September 1985) UN Doc S/Res/572, para. 1. See also Sascha-Dominik Bachmann, "Targeted Killings: Contemporary Challenges, Risks and Opportunities", *Journal of Conflict & Security Law*, Vol 18(2), p. 282; Sascha-Dominik Bachmann, "Targeted Killings: Contemporary Challenges, Risks and Opportunities", op. cit., p. 282.

[31] *Ibid;* Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?", *American Journal of International Law*, Vol. 108(2), p. 193.

[32] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, *op. cit*., p. 74. See also Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?", *op. cit*., p. 193.

[33] UNSC, Resolution 611 (25 April 1988) UN Doc S/Res/611 (1988), para. 1. See also the preamble of the Resolution.

covered by Article 2(4) UN Charter.[34] It adds that solely "very small incidents" such as targeted killings of an individual do not meet the threshold.[35] Corten also supports the idea of the existence of a threshold for the application of Article 2(4).[36] He contends that the threshold is not met if the use of force continues to be small-scale, if direct clashes with the territorial state are avoided, and if there is no intention to target the territorial state.[37] Weller maintains that the principle prohibiting the use of force has been mainly understood to encompass situations of uses of "kinetic force of sufficient intensity administered across borders through regular or irregular military means".[38] In addition, he holds that the prohibition on the use of force is usually not deemed to cover situations of state agents killing persons outside of armed conflicts.[39] I disagree with the former stance. Four main reasons lead to the conclusion that no threshold is necessary for establishing that force has been used. First, as some of the previous case-law shows, projecting lethal force by a state on foreign territory without the consent of the other state can qualify as a use of force. This is so even when the targets are private citizens and not any organ of another state and even when the infrastructure of the state is not damaged.[40] Therefore, the attempted murder of the Skripals can amount to a use of force even if they are private citizens of the UK. Second, there is a variety of reasons for which states may decide to abstain from affirming that a targeted killing committed on their territory constitutes a use of force. For instance, they could do so to avoid jeopardising the relationship between them and the other state and prevent possible escalations or because the state on whose territory the killing was committed shares some responsibility for situations leading to targeted assassinations.[41] As suggested above, a plausible reason for which New Zealand did not cite the principle of the prohibition of the use of force after the sinking of

[34] Independent International Fact-Finding Mission on the Conflict in Georgia, "Report II" (September 2009) p. 242.

[35] *Ibid.*

[36] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, *op. cit.,* p. 55.

[37] ibid 85. See also Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?", op. cit., p. 191.

[38] Mark Weller, "An International Use of Force in Salisbury?", *op. cit.*

[39] *Ibid.*

[40] Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", *op. cit.,* p. 14; Tom Ruys, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", *op. cit.*

[41] Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?", *op. cit.,* pp. 170, 193 referring to Corfu Channel (*Corfu Channel case*, Judgment of April 9th,1949, ICJ Reports 1949, p. 4); Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", op. cit., p. 14. See also Tom Ruys, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", *op. cit.*

the Rainbow Warrior could be the fact that France gave assurance that it did not intend to conduct military actions against the latter state.[42] Third, requiring a threshold for determining that force has been used is in contrast with the standpoint of the International Committee of the Red Cross (ICRC). The latter opines that no "specific level of intensity of violence" is required for the existence of an international armed conflict.[43] Considering that every international armed conflict implies also the use of force, it is deducible that no threshold is necessary for establishing that force has been used. Finally, with the existence of a threshold, states could attempt to find justifications for targeted killings of exiles nationals abroad, which mean that their number would increase. [44] Consequently, because no threshold is necessary for determining that force has been employed, the attempted targeted killing of the Skripals constitutes a use of force if the act is attributable to Russia.

THE TARGETED KILLING OF THE SKRIPALS – AN ARMED ATTACK?

While every armed attack also represents a use of force, the opposite is untrue: states can make use of force without it amounting to an armed attack. Indeed, the International Court of Justice (ICJ) contends that the use of force constituting an armed attack must be distinguished from "other less grave forms" of using force.[45] The question is whether the attempted murder of the Skripals constitutes an armed attack under Article 51 UN Charter. Unlike the case-law concerning the question of whether targeted killings of individuals on foreign soil can amount to use of force, the jurisprudence regarding the issue if they can be considered armed attacks is more uniform. While it is true that the threshold for considering a use of force an armed attack should not be excessively high, targeted killings of one individual have seldom been considered an armed attack against other states, even in cases of assassinations of diplomatic envoys or political leaders on the territory of another state.[46] An exception in which a state has deemed a comparable incident

[42] Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, *op. cit.,* pp. 96–97.

[43] ICRC, "Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949: Commentary of 2017" (2017), para. 265.

[44] Tom Ruys, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", *op. cit.*

[45] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, op. cit., para. 191.

[46] E.g., mining one military ship of another country may amount to an armed attack (*Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161, para. 72); Tom Ruys, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", *op. cit.*

"in jus ad bellum terms" is the planned assassination of George Bush by Iraqi intelligence.[47] Bush, former president of the US, travelled to Kuwait in 1993 to receive a decoration following the (first) conflict with Iraq. The US claimed that Bush barely escaped an assassination attempt by Iraqi intelligence. According to the US, the attempted murder constituted an attack on the state and the people thereof. On these grounds, President Bill Clinton decided to launch 23 missiles into the Iraqi intelligence headquarters located in Baghdad.[48] I am convinced that the attempted murder of the Skripals does not qualify as an armed attack on the UK for two fundamental reasons. First, in Oil Platforms, the ICJ implied that, to consider a use of force an armed attack, the act needs to be "aimed specifically" at the other country.[49] Assuming that Russia conducted the attempted assassination, there is no evidence that the aim of the attack was the UK. Given that Sergei Skripal had previously been an agent of the KGB/FSB who was convicted in Russia of spying for the West, the aim of the attack were indeed the Skripals. He was most likely attacked because of his past as a KGB/FSB agent.[50] In other words, it is presumable that the attempted targeted killing took place because of Russia's goal of "[silencing] (…) exiles and diasporas abroad".[51] Second, not only does the case-law show that targeted killings of individuals have usually been deemed outside of the scope of Article 51 UN Charter, but it also seems that the case concerning the planned assassination of Bush substantially differs from the Skripals case. Indeed, notwithstanding the political arguments for which the US declared that the planned targeted killing of Bush was an armed attack, there are many differences between the two cases. While Bush was a high-ranking official, Skripal was not. The latter had British citizenship when his attempted targeted killing took place, but he was not acting in an official capacity. Conversely, Bush was the president of the US.[52] This is a significant difference because of the position heads of state have in their government. Heads of state are indeed a symbol of "the sovereignty and integrity of their [states]".[53] For example, during the 3245th UNSC meeting, New Zealand affirmed that attempted assassinations of foreign heads of state represent acts of aggression.[54] Moreover,

[47] *Ibid.* See also: Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", *op. cit.,* pp. 14–15.

[48] Mark Weller, "An International Use of Force in Salisbury?", *op. cit.*

[49] *Oil Platforms (Islamic Republic of Iran v United States of America)*, para 64.

[50] Stephen Lewis, "Salisbury, Novichok and International Law on the Use of Force", op. cit., pp. 10–11.

[51] Schenkkan, Nate, "Introduction", in: Nate Schenkkan, Isabel Linzer, Saipira Furstenberg, John Heathershaw (eds), *Perspectives on "Everyday" Transnational Repression in an Age of Globalization*, op. cit., p. 1.

[52] Tom Ruys, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", op. cit.

[53] UNSC, Verbatim Record (27 June 1993) UN Doc S/PV.3245, Statement by New Zealand.

[54] *Ibid.*

as aforestated, it is probable that Skripal was attacked due to him being a KGB/FSB defector, not because of his UK nationality. Conversely, Iraqi intelligence decided to target Bush because of his position in the US government. Consequently, assuming that Russia is responsible for the attack on the Skripals, the latter does not represent an armed attack.

CONCLUSION

This paper demonstrates that, should it be shown that Russia is responsible for the attack; the attempted murder of the Skripals constitutes a use of force but not an armed attack. It also explains that establishing this is relevant because it has international legal consequences concerning topics such as self-defence, countermeasures, peremptory norms, and obligations *erga omnes*. The attack on the Skripals constitutes a use of force because there are four reasons leading to the conclusion that no threshold is required to consider that force has been employed. First, several cases have established that the use of lethal force by states on foreign territory without the consent of another state can qualify as a violation of the norm against the use of force. Second, states sometimes refuse to refer to an attack as a use of force guided by different motives, including the will not to escalate the situation or the assurance of a state that there is no intention of any military actions against the first state. Third, requiring a threshold for establishing the existence of a use force is contrary to the Commentary of the ICRC. Fourth, if a threshold was accepted, the number of targeted killings of nationals abroad could grow because states would try to find a way to justify this practice. On the other hand, the attempted murder of the Skripals is not an armed attack. First, the ICJ said that the attack must be "aimed specifically" at the other country, which is not the case with the Skripals, who were targeted because Sergei Skripal had been a KGB/FSB agent. Second, while the majority of the jurisprudence shows that targeted killings of individuals are not enough by themselves to constitute an armed attack, the exceptions suggest that this rule may be changed when a head of state is attacked. Because the Skripals were not high-ranking officials and were not targeted for being British citizens, the attempted targeted killing does not amount to an armed attack even if attributable to Russia.

CILJANO UBISTVO (ILI POKUŠAJ CILJANOG UBISTVA) KAO NAČIN TRANSNACIONALNE REPRESIJE DIJASPORE – POKUŠAJ UBISTVA SKRIPALOVIH: UPOTREBA SILE VS. ORUŽANI NAPAD

APSTRAKT

Ovaj rad ispituje međunarodnopravne implikacije pokušaja ubistva Sergeja i Julije Skripal, fokusirajući na pitanje da li se ovaj slučaj prema pravilima međunarodnog prava može klasifikovati kao upotreba sile ili kao oružani napad. U slučaju da Rusija jeste odgovorna za napad, odgovor na glavna pitanja kojima se ovaj rad bavi nosi značajne posledice u oblastima kao što su samoodbrana, *jus cogens* norme i obaveze *erga omnes*. Ako bi slučaj Skripalovih zaista predstavljao upotrebu sile na osnovu istorijskih presedana i Komentara Međunarodnog komiteta Crvenog krsta, kao i strateških motiva država da umanjuju značaj takvih postupaka, postavlja se pitanje međunarodnopravne odgovornosti. Ovo stoga, što postoji i zabrinutost da bi uvođenje takvog praga moglo dovesti do porasta ciljanih ubistava dijaspore. Sa druge strane, ako se slučaj pokušaja ubistva Skripalovih ne bi pravno kvalifikovao kao oružani napad zbog nepostojanja cilja jedne države da napadne drugu, u skladu sa standardima Međunarodnog suda pravde ostaje otvorena dilemma oko pravne kvalifikacije dela. Tim pre, jer odsustvo visokih zvaničnika i dela zasnovanog na nacionalnosti isključuje postojanje oružanog napada, čak i u slučaju da se pokušaj ubistva može pripisati Rusiji.

Ključne reči: Skripal, Upotreba sile, Oružani napad, Ciljano ubistvo

REFERENCES

1. Akande, Dapo, "The Use of Nerve Agents in Salisbury: Why does it Matter Whether it Amounts to a Use of Force in International Law?", Internet: https://www.ejiltalk.org/the-use-of-nerve-agents-in-salisbury-why-does-it-matterwhether-it-amounts-to-a-use-of-force-in-international-law/, 1.06.2023.
2. Bachmann, Sascha-Dominik, "Targeted Killings: Contemporary Challenges, Risks and Opportunities", *Journal of Conflict & Security Law*, Vol 18(2).
3. Baser, Bahar, Ahmet Erdi Ozturk, "Positive and Negative Diaspora Governance in Context: From Public Diplomacy to Transnational Authoritarianism", *Middle East Critique*, Vol 29(3).
4. Charter of the United Nations (adopted 26 June 1945, entered into force 26 October 1945), 1 UNTS XVI.
5. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45.

6. Corfu Channel case, Judgment of April 9th,1949, ICJ Reports 1949.
7. Case Concerning the Differences Between New Zealand and France Arising from the "Rainbow Warrior" Affair (New Zealand v France), 19 UNRIAA 199 (1986).
8. Carter v Russia App No 20914/07 (European Court of Human Rights, 21 September 2021)
9. Corten, Olivier, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, Hart, Oxford, 2010
10. Deeks, Ashley, Daskal Jennifer, Goodman Ryan, "Strikes in Syria: The International Law Framework", Internet: https://www.lawfareblog.com/strikes-syriainternational-law-framework, 1.06.2023.
11. European Court of Human Rights, "New inter-State application brought by Ukraine against Russia", Internet: https://hudoc.echr.coe.int/engpress#{%22itemid%22:[%22003-6946898-9342602%22]}, accessed 7 June 2023
12. Gorokhovskaia, Yana, Linzer Isabel, "Case Study: United Kingdom", in Yana Gorokhovskaia, Isabel Linzer (eds), *Defending Democracy in Exile: Policy Responses to Transnational Repression*, Freedom House, Washington DC, 2022.
13. Gorokhovskaia, Yana, Nate Schenkkan, Grady Vaughan, *Still Not Safe: Transnational Repression in 2022*, Freedom House, Washington DC, 2023.
14. International Law Commission, "Report of the Commission on the work of the second part of its 18th session" (4 May – 19 July 1966) UN Doc A/6309/Rev.l
15. Independent International Fact-Finding Mission on the Conflict in Georgia, "Report II" (September 2009).
16. International Committee of the Red Cross, "Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949: Commentary of 2017" (2017)
17. Lewis, Stephen, "Salisbury, Novichok and International Law on the Use of Force", *Rusi Journal*, Vol. 163(4).
18. Milanovic, Marko, "Extraterritorial Investigations in Hanan v. Germany; Extraterritorial Assassinations in New Interstate Claim Filed by Ukraine against Russia", Internet: https://www.ejiltalk.org/extraterritorial-investigations-in-hanan-v-germanyextraterritorial-assassinations-in-new-interstate-claim-filed-by-ukraine-againstrussia/, 31.05. 2023
19. Milanovic, Marko, "The Salisbury Attack: Don't Forget Human Rights", Internet: https://www.ejiltalk.org/the-salisbury-attack-dont-forget-human-rights, accessed 31 May 2023.

20. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986.
21. Moss, Dana M., "Transnational Repression, Diaspora Mobilization, and the Case of The Arab Spring", *Social Problems*, Vol. 63(4).
22. Oil Platforms (Islamic Republic of Iran v United States of America), Judgment, ICJ Reports 2003.
23. "Oral statement to Parliament PM: Commons statement on Salisbury incident: 12 March 2018", Internet: https://www.gov.uk/government/speeches/pm-commons-statementon-salisbury-incident-12-march-2018, 1.06.2023.
24. Ruys Tom, "'License to Kill' in Salisbury: State-sponsored assassinations and the jus ad bellum", Internet: https://www.justsecurity.org/53924/license-kill salisbury-state-sponsored-assassinations-jus-ad-bellum/, accessed 1 June 2023
25. Ruys, Tom, "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?", *American Journal of International Law*, Vol. 108(2).
26. Schenkkan, Nate, "Introduction", in: Nate Schenkkan, Isabel Linzer, Saipira Furstenberg, John Heathershaw (eds), *Perspectives on "Everyday" Transnational Repression in an Age of Globalization*, Freedom House, Washington DC, 2020
27. Tsourapas, Gerasimos, "Global Autocracies: Strategies of Transnational Repression, Legitimation, and Co-Optation in World Politics", *International Studies Review*, Vol. 23(3).
28. UN Human Rights Council, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston" (28 May 2010) UN Doc A/HRC/14/24/Add.6 .
29. UN General Assembly, Resolution 2625 (XXV) (24 October 1970).
30. UN General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" (18 September 2013) UN Doc A/68/389.
31. UN Security Council, Resolution 138 (23 June 1960) UN Doc S/Res/138
32. UN Security Council, Resolution 568 (21 June 1985) UN Doc S/Res/568
33. UN Security Council, Resolution 572 (30 September 1985) UN Doc S/Res/572
34. UN Security Council, Resolution 611 (25 April 1988) UN Doc S/Res/611
35. UN Security Council, Verbatim Record (27 June 1993) UN Doc S/PV.3245
36. Weller, Marc, "An International Use of Force in Salisbury?", Internet: https://www.ejiltalk.org/an-international-use-of-force-in-salisbury/, 1.06.2023.

MEĐUNARODNA ODGOVORNOST DRŽAVE U DIGITALNOM (SAJBER) PROSTORU

Ljubomir TINTOR*

APSTRAKT

Sajber prostor je domen čije je korišćenje neophodno za celu ili bar značajan deo globalne populacije. Svedoci smo da je sajber prostor zbog svoje specifičnosti pogodan za hakerske napade na države. Uživanje ljudskih prava takođe može biti ograničeno ili onemogućeno usled hakerskih napada. Sajber prostor dovodi u pitanje opšta načela međunarodnog prava uključujući suverenitet, neintervenciju i jurisdikciju. Sve ovo otvara pitanje međunarodne odgovornosti države u sajber prostoru. U radu će najpre biti ukazano na specifičnosti sajber prostora. Potom će se analizirati mogućnost uspostavljanja međunarodne odgovornosti u sajber prostoru s obzirom na specifičnosti elementa pripisivosti usled čega će biti razmotren i značaj principa dužne pažnje kao alternative za uspostavljanje odgovornosti. Na kraju biće sagledano koje obaveze ima država u pogledu zaštite ljudskih prava u sajber prostoru. U zaključnim razmatranjima ponudiće se potencijalna rešenja za uočene probleme.

Ključne riječi: Sajber prostor, međunarodna odgovornost države, princip dužne pažnje, zaštita ljudskih prava

UVOD

Digitalni prostor je postao sastavni deo svakodnevnog života, a razvoj digitalne tehnologije pruža nove mogućnosti, ali i nove izazove za međunarodno pravo. S obzirom na brzi razvoj digitalne tehnologije, međunarodno pravo se suočava sa stalnom potrebom da trenutne međunarodne pravne okvire prilagodi kako bi se osigurala efikasna zaštita ljudskih prava i sigurnost u digitalnom prostoru. Primetno je da se sajber prostor pokazao kao idealna meta za napade hakerskih grupa na države. Sajber prostor ima sve veći značaj za međunarodnu

* Istraživač saradnik na Institutu za uporedno pravo. E mail: lj.tintor@iup.rs , ORCID 0009-0005-7565-154X. Rad je nastao kao rezultat naučnoistraživačkog rada Instituta za uporedno pravo koji finansira Ministarstvo nauke, tehnološkog razvoja i inovacija Republike Srbije prema Ugovoru o realizaciji i finansiranju naučnoistraživačkog rada NIO u 2023. godini (evidencioni broj: 451-03-47/2023-01/200049 od 3. 2. 2023).

bezbednost jer je postao centar svetske ekonomije, društva i politike. Ovaj prostor omogućava zemljama da komuniciraju i razmenjuju informacije brzo i efikasno, ali takođe predstavlja rizik za bezbednost država.Sajber napadi, krađa podataka i druge nezakonite aktivnosti u sajber prostoru mogu da izazovu veliku ekonomsku štetu, utiču na stabilnost finansijskih sistema, naruše javnu bezbednost i zaštitu i predstavljaju pretnju. Iz tog razloga, sajber bezbednost se smatra jednim od glavnih izazova savremenog sveta, a međunarodna zajednica preduzima napore da obezbedi bezbednost u sajber prostoru. Sajber prostor se pokazao kao vrlo pogodan za preduzimanje vojnih operacija i kao prostor za novi oblik konflikata poznat kao sajber ratovanje. Uživanje ljudskih prava takođe može biti ograničeno ili onemogućeno usled hakerskih napada. Sajber prostor dovodi u pitanje opšta načela međunarodnog prava važna za ljudska prava, uključujući suverenitet, neintervenciju i jurisdikciju države. Sajber prostor je alat u kome pojedinci mogu da ostvare svoja ljudska prava, ali sajber prostor ne može da garantuje našu slobodu. Sve ovo otvara pitanje međunarodne odgovornosti države u digitalnom prostoru. Jedno od ključnih pitanja na koje treba dati adekvatan odgovor je kako primeniti norme međunarodnog prava u digitalnom prostoru. Međunarodno pravo je razvijeno za primenu u tradicionalnom međunarodnom okruženju i nije uvek primenljivo u sajber prostoru. Međunarodno pravo se bavi pitanjima kao što su teritorijalni suverenitet, upotreba sile i zaštita ljudskih prava, ali ne postoje precizna pravila o primeni ovih principa u sajber prostoru. Iz tog razloga posebna pažnja se posvećuje razvijanju međunarodno-pravnog okvira koji će omogućiti saradnju među državama u borbi protiv sajber kriminala i drugih nezakonitih aktivnosti u sajber prostoru. Prvo će u radu biti ukazano na specifičnosti sajber prostora. Potom će se u radu analizirati mogućnost uspostavljanja odgovornosti u sajber prostoru s obzirom na specifičnosti elementa pripisivosti, zatim biće ukazano i na značaj primene principa dužne pažnje za uspostavljanje odgovornosti. Peti deo rada baviće se obavezama države da zaštite ljudska prava u sajber prostoru i odgovornosti za propuste. U zaključnim razmatranjima ponudiće se potencijalna rešenja za uočene probleme imajući u vidu da je ovo oblast međunarodnog prava koja će se rapidno razvijati.

DEFINISANJE (SAJBER) DIGITALNOG PROSTORA I NJEGOVE SPECIFIČNOSTI

Sajber (digitalni) prostor je virtuelni komunikativni prostor kreiran digitalnim tehnologijama.[1] Ovaj prostor nije ograničena na rad računarskih mreža, već obuhvata i sve društvene aktivnosti u kojima se primenjuju digitalne informaciono-komunikacione tehnologije. Sajber prostor je termin koji je nastao zajedno sa pojmom interneta i odnosi se na svet na mreži kao na svet razdvojen

[1] Termin „sajber prostor" prvi put je upotrebio pisac naučne fantastike Vilijam Gibson (William Gibson) u noveli Burning Chrome iz 1982. godine.

od svakodnevne stvarnosti.[2] Termin sajber prostor postao je konvencionalno sredstvo za opisivanje svega što je povezano sa internetom i raznolikom internet kulturom. Iako se u naučnoj literaturi i u zvaničnim vladinim izvorima može pronaći nekoliko definicija sajber prostora, još uvek ne postoji potpuno usaglašena zvanična definicija. Američko ministarstvo odbrane (*Department of Defence – DoD*) definiše sajber prostor kao „područje u informacionom okruženju koji se sastoji od nezavisnih mreža informacionih infrastruktura, uključujući Internet, telekomunikacione mreže, računarske sisteme, ugrađene procesore i kontrolere" odnosno „zamišljeno okruženje u kojem se digitalni podaci prenose pomoću računarskih mreža"[3] Benedikt (*Michael Benedikt*) sajber prostor definiše kao „novi univerzum, paralelni stvoren univerzum, koji je održavan pomoću 'svetskih računara' i komunikacionih linija".[4] Sa druge strane Hjuz (*Kevin Hughes*) je definisao sajber prostor kao „međusobno povezano računarsko okruženje koje predstavlja sve prethodno kreirane medije".[5] Jedna od najprihvatljivih definicija je da se sajber prostor sastoji od tri sloja: fizičkog sloja sastavljenog od sajber infrastrukture, drugi sloj softverske logike i treći sloj podataka.[6] Sajber prostor se razlikuje od tradicionalnih oblika prostora po tome što ne postoji jasna teritorijalna granica, niti fizički oblik. On je takođe karakterističan po tome što omogućava anonimnu i brzu razmenu informacija, što može biti i prednost i nedostatak, u zavisnosti od konteksta. Ono što je jedna od osobenosti sajber prostora je da se ljudi mogu sakriti iza lažnih identiteta i na taj način pokušati da nekažnjeno nanose štetu drugoj državi. Sajber prostor je heterogen i kompleksan, što predstavlja izazov za regulisanje i zaštitu prava i bezbednosti u tom prostoru. Sajber prostor je više definisan društvenim interakcijama nego njegovom tehničkom implementacijom. Procenjuje se da sajber prostor ima više pojedinaca nego bilo koja druga zemlja na svetu, ali da je bez ikakve centralizovane uprave ili bilo koje vrsti normi što usled čega nastaju poteškoće u zaštiti ljudskih prava. Fizička infrastruktura koja podržava Internet i sajber aktivnosti se uglavnom nalaze na suverenoj teritoriji i podležu jurisdikcija teritorijalne države. Zbog međusobno povezanih, interoperabilne prirode sajber prostora, operacije koje ciljaju na

[2] Cyberspace Definition of cyberspace in US English by Oxford Dictionaries. Internet: https://web.archive.org/web/20130218185858/http://oxforddictionaries.com/us/definition/american_english/cyberspace, 01.08.2023.

[3] Joint Publication 1-02, DoD Dictionary of Military Terms, Washington, D.C.: Joint Staff, Joint Doctrine Division, J-7, October 17, 2008. www.dtic.mil./doctrine/jel/new_pubs/1_02.pdf, 01.03.2023.

[4] Michael Benedikt (Ed.), Introduction and Cyberspace: some proposals, in Cyberspace, First Steps, MIT Press, London, 1992, pp. 119-133.

[5] Volker Schneider, Dirk Hyner, *The Global Governance of Cybercrime: Issue Space and the Transnational Policy Network*, University of Konstanz, Germany, 2003, p. 4.

[6] Lior Tobanksy, "Basic concepts in cyber warfare", *Military and Strategic Affairs,* 2011, Vol. 3, pp.75–92.

umrežene informacione infrastrukture u jednoj zemlji mogu stvoriti efekte u drugoj zemlji.[7] Još jedna specifičnost sajber prostora da on prevazilazi državne granice, iako neke države poput Kine promovišu sajber suverenitet .[8].Kineski pristup sajber suverenitetu proteže se na sajber infrastrukturu pod njenom jurisdikcijom, nad svim aktivnostima na mreži koje se odvijaju unutar kineske jurisdikcije i nad ljudima unutar njih jurisdikcija Kine. Pored toga, suverenitet se proteže na informacije koje ulaze ili postaju dostupne unutar suverenog domena Kine.[9] Teorijski prihvatljivije bi bilo sajber prostor posmatrati kao globalno zajedničko dobro. Globalno dobro podrazumeva da je u pitanju resurs koji je pod internacionalizovanim vlasništvom kao što je na primer morsko dno pod upravom Vlasti koja simbolizuje međunarodnu upravu.[10] Međutim za sada sajber prostor nije dobio nikakav poseban status u međunarodnom pravu, iako smo ukazali na određene specifičnosti. Iako preovladava stav da je suverenitet prihvaćen nad sajber prostorom još uvek postoje različita tumačenja njegovog obima. Primena principa državnog suvereniteta u sajber prostoru ima svoje glavno obrazloženje u činjenici da vrhovni organi države moraju da regulišu bilo koju sajber infrastrukturu koja se nalazi na njenoj teritoriji. Fizički sloj sajber prostora je stoga podložan suverenitetu teritorijalne države, dok virtuelni domen sajber prostora ne potpada pod suverenitet određene države prema trenutnom shvatanju. Državni suverenitet u sajber prostoru predstavlja složen problem koji zahteva međunarodnu suradnju i uspostavu novih pravila i standarda u digitalnom okruženju kako bi se osigurala sigurnost, stabilnost i zaštita prava u sajber prostoru. Očigledno da će se pitanju suvereniteta u digitalnom prostoru u budućnosti morati posvetiti veća pažnja kako bismo dobili čvršća pravila i ujednačenija shvatanja.Kada se govori o sajber prostoru neophodno je naglasiti da u njemu deluju različiti akteri poput Timova mamaca (*troll army*) su subjekt, sponzorisani od strane države, koji koristeći lažne identitete učestvuju u blogovima, internet forumima i društvenim mrežama u cilju propagande, formiranja percepcije javnog mnjenja, podrivanja disidentskih struktura.[11] Drugu

[7] Harold H Koh, "International Law in Cyberspace", *Harvard International Law Journal,* 2012, Vol 54, No. 1, p. 6,

[8] Nart Villeneuve, "Barriers to Cooperation: An Analysis of the Origins of International Efforts to Protect Children Online" in Ronald Deibert, *et al,* Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace, *MIT Press*, 2010, p. 57. Druga mogućnost stvaranja suvereniteta nad sajber prostorom je odvajanje nacionalnih mreža ka čemu teže neke države poput Irana i Rusije.

[9] *Ibid.*

[10] Moderna instancija koncepta globalnog zajedničkog dobra može se naći u članovima 87, 89. i 139. Konvencije Ujedinjenih nacija o pravu mora iz 1982. godine. Videti: United Nations Convention on the Law of the Sea (signed 10 December 1982).

[11] Patrick Duggan, "Harnessing cyber-technology's human potential", *Special Warfare: The Professional Bulletin of the John F. Kennedy Special Warfare Center & School,* 2015, Vol. 28 Issue 4, p. 14.

grupu značajnih aktera u sajber prostoru čine timovi za formiranje grupnog mišljenja (*swarm stream teams*) su agresivno orijentisana grupa ljudi koja preko sajber prostora širi viralni (virusni) video s ciljem formiranja kolektivnog mišljenja.[12] Praksa država po tome što su smatrale da su sve sajber operacije koje utiču na kompjuterske sisteme u inostranstvu kršenje teritorijalnog suvereniteta država.[13]

PROBLEM PRIPISIVOSTI U SAJBER PROSTORU KAO USLOV MEĐUNARODNE ODGOVORNOSTI

Izvršenje sajber operacije podrazumeva umešanost jednog ili više ljudskih izvršilaca i kompjuterskih sistema. U jednu ruku, kompjuterski sistemi se mogu koristiti za kreiranje, pokretanje ili tranzit sajber operacije. S druge strane, uvek je čovek uključen u vršenje sajber operacija, čak i kada one podrazumevaju veliki nivo automatizacije.Akteri u sajber prostoru su države, pojedinci, drugi nedržavni akteri i njihovi punomoćnici.[14] Štetne međunarodne sajber operacije mogu se klasifikovati u različite vrste. Prvo, štetna prekogranična sajber aktivnost može biti označena kao sajber kriminal, delo počinjeno sa kriminalnom namerom i kao špijunaža.[15] Međunarodna odgovornost države nastala je po analogiji iz privatnog prava i dugo se razvijala kroz istoriju. Svoje osnovne elemente dobija kroz slučaj *Factory at Chorzów* koji se pojavio pred Stalnim međunarodnim sudom pravde, u kom je naznačeno da je za uspostavljanje međunarodne odgovornosti države neophodno da je došlo do povrede međunarodne obaveze i da se protivpravan akt može pripisati države.[16] Ova pravila su dosta kritikovana jer odgovornost država ne posmatra kao isključivu obrazac bilateralnih odnosa između počinioca i oštećene države. Odgovornost države dobija javnu dimenziju jer naglasak se stavlja na protivpravnost dela, a ne na nastalu štetu ili posledice prema žrtvi.[17] Atribucija ili pripisivost je pravno-tehnička operacija povezivanja uzročne veze između

[12] *Ibid*. p. 15

[13] *Ibid*.

[14] Jason Andress, Steve Winterfeld, Lillian Ablon*, Cyber Warfare: Techniques, Tactics and Tools for Security Practitioners*, Elsevier, 2014, pp.83-101.

[15] Štetna međunarodna sajber operacija se takođe može identifikovati kao sajber napad. To je namerna akcija,politički ili strateški motivisani, preuzeti korišćenjem računarskih mreža da ometaju, manipulišu ili uništavaju informacije koje se nalaze u ciljnom informacionom sistemu.

[16] "The Factory at Chorzów Claim for Indemnity-Germany v. Poland", PCIJ, 1928, Ser. A, No 17, para. 29. Ovaj stav je prihvaćen i u članu 2 Nacrta pravila o odgovornosti države za protivpravan akt. Videti: "International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries", Official Records of the General Assembly, Fifty-sixth session, Supplement, 2001, No 10 (A/56/10)", art.2.

[17] Postoje stavovi u doktrini međunarodnog prava da je pored pomenutih elemenata u Pravilima neophodno i postojanje štete kao i odsustvo osnova za isključenje protivpravnosti.

kršenja međunarodne obaveze i aktivnosti (propusta) države. Pripisivanje se odnosi na dodeljivanje dela državi. Prema trenutno važećim pravilima međunarodnog prava država bi odgovarala ako se dokaže aktivnom učešću državnih službenika u sajber napadima jer se radnje zakonodavnih, izvršnih i sudskih organa pripisuju državi. Država je odgovorna za ponašanje nedržavnog aktera koje nanosi štetu drugoj državi samo ako ponašanje može se pripisati državi. Prema međunarodnom pravu, sajber operacija nedržavnog aktera može se pripisati državi, posebno u sledeće tri okolnosti. Kada sajber čin izvrši lice ili entitet ovlašćen od strane države da vrši javna ovlašćenja.[18] Sajber operacija se smatra činom države ako država izričito priznaje i usvaja operaciju kao svoju. Obaveza sprečavanja štetnih međunarodnih operacije se takođe primenjuju u odnosu na one operacije pokrenute iz sajber infrastrukture koja je izvan teritorije države, ali je ipak pod isključivom kontrolom država, na primer u vojnom postrojenju u stranoj zemlji, na platformi na otvorenom moru ili u međunarodnom vazdušnom prostoru, ili u diplomatskim prostorijama.[19] Atribucija je generalno veoma zahtevna i komplikovana radnja i to je još vidljivije u sajber prostoru zbog prirode sajber domena. Atribucija je generalno veoma zahtevna i komplikovana radnja i to je još vidljivije u sajber prostoru zbog prirode sajber domena. Prva karakteristika sajber prostora koja otežava pripisivost je anonimnost, da autori sajber operacija mogu sakriti svoj identitet. Specifičnost u sajber prostoru je ogromno prisustvo aktivnih i sofisticiranih nedržavnih aktera.[20] Ovi akteri u velikoj meri nalaze se izvan dosega članova o odgovornosti države i tako uživaju relativan stepen nekažnjivosti za štetne posledice svojih sprovesti. Drugi uočeni problem je višestruka radnja tačnije problem da se protivpravni akt može izvršiti paralelno sa više računarskih mreža koje mogu biti smeštene u više država dakle nalaziti se pod više različitih jurisdikcija. Treći uočeni problem je brzina kojom se može izvršiti protivpravan akt u sajber prostoru i sam obuhvat napada. Da bi se pripisala odgovornost državi za akte privatnih lica neophodno je da su oni bili pod kontrolom države mada nije jasno utvrđeno koji stepen kontrole je dovoljan, efektivna ili opšta kontrola. Ako bi se standardi o pripisivosti koje su primenjivali međunarodni sudovi u dosadašnjim slučajevima koristili, u sajber prostoru teško da bi smo mogli dobiti adekvatne rezultate.[21] Iako ideja koncepta opšte kontrole izgleda privlačno ovaj

[18] International Law Commission (ILC) Draft *op.cit*., Art. 5

[19] Benedikt Pirker, "Territorial Sovereignty and Integrity and the Challenges of Cyberspace", In: K. Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace,* Tallinn: NATO CCD COE Publication 2013, pp. 189–216.

[20] Michael N Schmitt, "Grey Zones in the International Law of Cyberspace", *Yale Journal of International Law Online,* 2017, Vol. 42, p. 11.

[21] Grupe koje su u Gruziji (2008.godine) i Estoniji (2007.godine) izvršili sajber napade nisu se mogle povezati sa državom jer oni nisu označeni kao državni organi po ruskim zakonima i nisu u stanju potpuna zavisnost od vlasti. Štaviše, oni nisu delegirani da vrše državna ovlašćenja. Videti: I. Traynor, Russia accused of unleashing cyberwar to disable Estonia. *The Guardian.* Internet: https://www.theguardian.com/world/2007/may/17/topstories3.russia, 22.03.2023.

koncept je doveden u pitanje različitim tumačenjem praga potrebne kontrole Haškog tribunala za bivšu Jugoslaviju[22] i Međunarodnog suda pravde. Test efektivne kontrole (a ne ukupne kontrole) države nad aktivnostima privatnih grupa je u skladu sa ustaljenom jurisprudencijom, jer bi sprečio države od neozbiljnog optuživanja za sajber napade. Ovo je naročito značajno ako država koja je napadnuta želi da ovaj sajber napad iskoriste za protivudar u vidu samoodbrane.[23] Država bi prema odredbama Pravila međunarodne odgovornosti države za protivpravan akt mogla odgovarati za postupke privatnih lica ukoliko je pružala instrukcije za vršenje sajber napada. Kada se govori o sajber prostoru treba imati na umu da operacije koje sprovodi organ države koji je stavljen na raspolaganje drugoj državi mogu se pripisati ovoj potonjoj kada organ deluje u vršenju elemenata vlasti države na čijoj teritoriji deluje.[24] Država je odgovorna za pomoć drugoj državi u izvršenju međunarodno protivpravnog dela kada država pruža pomoć ili pomoć znajući za okolnosti međunarodnog protivpravnog dela i delo bi bilo međunarodno protivpravno da ga je sama počinila, kao i u situaciji kad kontroliše ili primorava drugu državu.[25] Pravila o pripisivosti ne odražavaju iskustva država o proksi ratovima koje vode nedržavni akteri u sajber prostoru.[26] Tri komponente atribucije pripisivanje mašini,pripisivanje čoveku i pripisivanje državi su nezavisni jedni od drugih. Identifikacija računarskog sistema možda neće pomoći da se identifikuje ljudski počinilac ili država koja sponzoriše sajber operacija.[27] U nekim slučajevima, identifikacija čoveka iza mašine Operacija je prvi korak ka identifikaciji države sponzora, ali nije preduslov. U svakom slučaju, pripisivanje odgovornosti državi nije sama sebi svrha, to je pre sredstvo za postizanje cilja Jedna velika razlika između sajber prostora i realnog prostora je u

[22] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)", Judgment, ICJ Reports 2007: 43. Internet: https://www.icj cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf , 07.03.2023.

[23] Marco Roscini, "World Wide Warfare – Jus ad bellum and the Use of Cyber Force", *(eds.), A. von Bogdandy and R. Wolfrum in* Max Planck Yearbook of United Nations Law , Martinus Nijhoff, 2010, Vol. 14, pp. 85-130.

[24] International Law Commission (ILC) Draft *op.cit* art. 17.

[25] *Ibid.* art 18.

[26] Proksi serveri omogućavaju korisnicima da sakriju svoju IP adresu tuneliranjem svih specifičnih tipova saobraćaja preko drugog servera, a host kojem se pristupa ne mora biti veb server. Postoji i drugi metod je korišćenje anonimnih mreža sa tehnikom „rutiranja luka", korišćenjem više javnih ili privatnih proksi servera za prenošenje šifrovanih podataka preko mnogih nasumično odabranih čvorova na mreži anonimnosti sa više slojeva enkripcije primenjene na prenete podatke, tako se podaci dešifruju do konačnog korisnika kome su namenjeni.

[27] Pripisivanje mašini ili ljudskom počiniocu može čak biti važno ključno u nekim slučajevima, za utvrđivanje da li je sajber operacija sponzorisana ili sprovedena od strane države. François Deleure, *Cyber Operations and International Law*, Cambridge University Press, Cambridge, 2020. pp. 353–376.

tome što u sajber prostoru pojedinci mogu delovati kao potpuno samodovoljni entiteti, te im nije potreban bilo kakav oblik državne pomoći i kontrole. Sajber oružje u obliku virusa i njihove ekvivalente mogu izmisliti nedržavni akteri, oni su lako nabavljivi. Sajber-grupa može da deluje na koordinisan način ili da primaju naređenja od virtuelnog rukovodstva, ali je jako teško utvrditi od koga primaju informacije i lanac komande može biti veoma raširen. Sajber napadi mogu biti veoma lako preusmereni što otežava pripisivost, koja su zasnovano na konvencionalnim shvatanjima okruženja kroz koje deluju otelotvoreni entiteti fizičke radnje u stvarnom svetu. Specifičnost kod sajber prostora je u tome što se pripisivost protivpravnog dela vrši na osnovu lociranja *IP* adrese, koja identifikuje njegovu tačnu lokaciju. Stoga se čini da se međunarodno protivpravno delo u sajber prostoru pripisuje određenom računaru, dok se identitet osobe koja njime koristi dok se lice koje upravlja može samo pretpostaviti, značajno povećava sposobnost aktera da se uključi u napade sa „verovatnim poricanjem", delujući preko zastupnika i sugerisao da je ovaj izazov „više pitanja tehničke i političke prirode nego isključivo ili pretežno pitanje prava. U svrhu atribucije u sajber prostoru, mora se identifikovati izvor komunikacije prelaskom preko rute kojom komunikacija može doći uz obavezu identifikovanja lica ili entiteta koji stoji iza toga, i da li je to lice/entitet usmeravano ili kontrolisano od strane drugog lica, entiteta ili države.[28] Stav SAD u vezi sa „proksi akterima" u sajber prostoru je u skladu sa testom efektivne kontrole.[29] Čini se da nova praksa država u reagovanju na sajber operacije koje sponzoriše država pokazuje da su države sve više svesne svoje optužbe treba da potkrepe dokazima da države, a ne individue stoje iza sajber napada. Neki počinioci su čak ubacili pogrešne nagoveštaje u kompjuter kod virusa u pokušaju da se krivica prebaci na treću stranu. Države se sve više oslanjaju na međunarodne komisije za utvrđivanje činjenica nakon međunarodnih incidenata koji su možda doveli do međudržavnih sporova, a ovaj razvoj se ogleda u različitim granama i aspektima međunarodnog prava.[30] U svakom slučaju, pripisivanje odgovornosti državi nije sama sebi svrha, to je pre sredstvo za postizanje cilja. Jedna velika razlika između sajber prostora i realnog prostora je u tome što u sajber prostoru pojedinci mogu delovati kao potpuno samodovoljni entiteti, te im nije potreban bilo kakav oblik državne pomoći i kontrole. Sajber oružje u obliku virusa i njihove ekvivalente mogu izmisliti nedržavni akteri, oni su lako nabavljivi. Sajber-grupa može da deluje na koordinisan način ili da primaju naređenja od

[28] Ovo uključuje lociranje IP adrese ili adresa, određivanje tačke kontakta i namamljivanje hakera da otkrije više detalja o svom identitetu. Što je haker veštiji, to je manje uspešno praćenje postaje teže.

[29] Države su zakonski odgovorne za aktivnosti koje se preduzimaju preko „proki aktera", koji deluju po njima uputstvima države ili pod njenom upravom ili kontrolom. "International Law in Cyberspace", US Department of State, US CYBERCOM Inter-Agency Legal Conference, Ft. Meade, MD, 18 Sept. 2012.

[30] Joseph C. Witenberg, "La théorie des preuves devant les juridictions internationales", RCADI, Vol. 56, No. 1, 1936, pp. 6–7.

virtuelnog rukovodstva, ali je jako teško utvrditi od koga primaju informacije i lanac komande može biti veoma raširen. Sajber napadi mogu biti veoma lako preusmereni što otežava pripisivost, koja su zasnovano na konvencionalnim shvatanjima okruženja kroz koje deluju otelotvoreni entiteti fizičke radnje u stvarnom svetu. Specifičnost kod sajber prostora je u tome što se pripisivost protivpravnog dela vrši na osnovu lociranja *IP* adrese, koja identifikuje njegovu tačnu lokaciju. Stoga se čini da se međunarodno protivpravno delo u sajber prostoru pripisuje određenom računaru, dok se identitet osobe koja njime koristi dok se lice koje upravlja može samo pretpostaviti, značajno povećava sposobnost aktera da se uključi u napade sa „verovatnim poricanjem", delujući preko zastupnika i sugerisao da je ovaj izazov „više pitanja tehničke i političke prirode nego isključivo ili pretežno pitanje prava. Ali atribucija je pretežno pitanje zakona i ono se ne utvrđuje „na osnovu pukog priznavanja veze činjenične uzročnosti".[31] Sajber operacije mogu biti jedinstveno složene, skupe i dugotrajne. Višestepene sajber operacije predstavljaju jedan od glavnih izazova uproces identifikacije sajber operacija. Postoji mnogo različitih oblika višestepenih sajber operacija. Shodno tome, ne postoji konsenzus o velikim sajber napadima i njihovom povezanošću sa državom. Preovladavajuća pretpostavka iz današnje perspektive je da će se pitanje pripisivosti u sajber prostoru biti rešena novim tehnološkim rešenjima.[32] Ako sajber operaciju pokrenu privatni akteri sa nekim nivoom države umešanosti, kako bi se ta operacija pripisala upravo državi koji nivo učešća države će biti potreban. Dodatna komplikacija kod pripisivanja u sajber prostoru može nastati kada sajber operaciju ponovo pokrenu privatni akteri sa teritorije države, ali ovaj put je država preduzela neophodne mere da spreči (iako bez uspeha) dotične operacije može proizvesti međunarodnu odgovornost države. Uprkos navodima da su nedržavni akteri, kao i koordinirani transnacionalni sajber akteri kao što je *Anonimous,* učestvovali u velikim sajber operacijama unutar država kao što su SAD, Rusija, Kina, Izrael, ostaje upitno ko će snositi odgovornost za štetu koju oni pričine. Država bi mogla odgovarati samo ako se dokaže da ove grupe imaju javna ovlašćenja koja im je poverila ili ukoliko je u potpunosti kontrolisala njihove aktivnosti.[33] Identifikacija računara koji se koristi za dizajniranje i pokretanje sajber-a operacija nije neophodan preduslov za identifikaciju. Poteškoće sa pripisivošću u sajber prostoru stvorilo je ideju da se međunarodna odgovornost države uspostavi kroz imputiranu odgovornost. Ovaj novi koncept koji nastoji da

[31] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries pp. 38–9.

[32] Robin Geiß, Henning Lahmann, "Freedom and Security in Cyberspace: Shifting the Focus away from Military Responses towards Non-Forcible Countermeasures and Collective Threat-Prevention", in K. Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace: International Law*, International Relations and Diplomacy CCDCOE, Tallinn, 2014., p. 623.

[33] Nicholas Tsagourias, Michael Farrell, "Cyber attribution: Legal and technical approaches and challenges", *European Journal of International Law*, 2020, Vol. 31, p. 946.

državi pripiše odgovornost za sajber napade koji potiču sa teritorije države bez obzira ko ih preduzima.[34] Ovaj oblik odgovornosti zasnivao bi se na tome da država nije bila dovoljno agilna i preduzela odgovarajuće mere da spreči privatna lica na svojoj teritoriji da čine protivpravna dela. U skladu sa ovim idejama pojavila su se i tumačenja da ako država ne spreči hakere na svojoj teritoriji od pokretanja napada unutar svojih granica, ne mora se poštovati tradicionalni zahtev za međunarodnu atribuciju države kako bi se država smatrala odgovornom. U pitanju bi bila apsolutna odgovornost u sajber prostoru.[35] Prema odredbama međunarodnog prava država treba da se pridržava pravila *no harm* uspostavljenog u sporu oko Krfskog kanala prema kome država ne sme „svesno da dozvoli da se njena teritorija koristi za deluje protivno pravima drugih država".[36] Ovo bi podrazumevalo da država ne dozvoli sa njene teritorije koriste za sajber napade na druge države, tačnije država mora da vrši kontrolu svoje internet infrastrukture.[37] Povreda te obaveze može postaviti pitanje međunarodnu odgovornost te države. određeni akti mogu krše suverenitet druge države ili drugih država, u smislu mešanja u oblastima nadležnosti koje su isključivo rezervisane za svaku državu. Ovo može biti povezano sa incidentima elektronskog nadzora ili špijunaže vladinih službi i osoblja druge države.[38] Međutim, po ovom pitanju ne postoji konsenzus, jer postoje ozbiljne razlike u tumačenjima s obzirom da sajber špijunaža nije izričito zabranjena međunarodnim pravom. Ipak, mnoge države su prepoznale potrebu za zaštitom od sajber špijunaže i usvojile su nacionalne zakone koji zabranjuju takve aktivnosti.[39] Takođe, postoje inicijative da se uvedu međunarodni standardi i zakoni koji bi regulisali ovu oblast. Pored toga, postoji praksa međunarodnih organizacija, kao što su UN i NATO, da se sajber špijunaža smatra nelegalnom aktivnošću i da se preduzimaju mere za njeno sprečavanje i kažnjavanje.[40] Sajber napadi mogu

[34] Zhxiong Huang, "The Attribution Rules in ILC's Articles on State Responsibility: A Preliminary Assessment on Their Application to Cyber Operations", *Baltic Yearbook of International Law Online* Vol.14/1, *Brill- Nijhoff,* 2015, pp. 41–54.

[35] Vincent-Joel Proulx, "Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?", *Berkeley Journal of International Law*, 2005, Vol. 23, pp. 643–653.

[36] "International Court of Justice Reports of Judgments, Corfu Channel case (The United Kingdom v. Albania)", Merits, Judgment of 9 April 1949, p. 22.

[37] Michael Schmitt, Tallinn *Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, p. 26.

[38] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, The Lawbook Exchange, Ltd, 2002, p. 53.

[39] Nacionalni zakoni koji se bave sajber špijunažom, poput američkog Zakona o zaštiti računarskih podataka "Computer Fraud and Abuse Act", A BILL, May 25, 2017 To improve the prohibitions on money laundering, and for other purposes. Internet: https://www.congress.gov/bill/115th-congress/senate-bill/1241/text, 10.08.2023.

[40] Kada je reč o praksi međunarodnih organizacija, UN je usvojio Deklaraciju o suverenitetu u sajber prostoru u kojoj se naglašava da je sajber špijunaža nelegalna aktivnost koja može ugroziti međunarodni mir i bezbednost. The Application of International Law to State Cyberattacks. Internet: https://www.chathamhouse.org/2019/12/application-international-law-state cyberattacks /2-application-sovereignty-cyberspace, 11.08.2023.

izazvati opasnost po unutrašnje i spoljne poslove napadnute države. Ovo ukazuje na još jedan i možda u nekim slučajevima jedini osnov za zasnivanje odgovornost povreda obaveze dužne pažnje koja proizilazi iz principa da nijedna država može svesno dozvoliti da se njena teritorija koristi za ili da bude izvor, dela štetnih za druge države.[41] Jedan od najvećih problema kod pripisivosti ilustruje situacija prekogranične štete, gde država porekla, a ne država žrtva, kontroliše i ima nadležnost nad računarima i računarskim mrežama iz kojih je prekogranična šteta nastala.[42] Pošto sajber šteta može biti trenutna i razorna, najefikasniji način za ublažavanje takvih šteta je njihovo sprečavanje. Za razliku od mnogih drugih prekograničnih šteta, sajber akcije se mogu odvijati gotovo trenutno. Sama Pravila nisu prilagođena specifičnostima subjekata koji vrše protivpravne radnje u sajber prostoru, pa države vrlo često u manjoj ili većoj meri podržavaju i podstiču takve aktivnosti narušavajući suverenitet drugih država. Na ovaj način, adekvatan pravni odgovor na izazove atribucije u sajber prostoru mora da se pozabavi sa dva problema: prvo, kada države nose štetne sajber operacije u strateške svrhe treba ih zadržati odgovorni za svoje ponašanje uprkos gore navedenim poteškoćama i drugo, kada nedržavni akteri izvode štetne sajber operacije, ciljane protiv država one bi, u odgovarajućim okolnostima, trebale biti u mogućnosti da pribegnu mehanizmima za ulaganje pravnih lekova i rešavanje sporova proizašlih iz ovih aktivnosti.

PRINCIP DUŽNE PAŽNJE KAO ZAMENA PRIPISIVOSTI U SAJBER PROSTORU

Princip dužne pažnje predstavlja normu običajnog prava i dovoljno se fleksibilni tumači, pa je eventualna primena moguća i u sajber prostoru. Jedna od najvećih bojazni je da bi princip dužne pažnje mogao dovesti državu da ima apsolutnu odgovornost u sajber prostoru. Ipak zagovornici korišćenja principa dužne pažnje za uspostavljanje odgovornosti tvrde da bi država odgovarala pod precizno određenim uslovima.[43] Široko tumačenje obaveze dužne pažnje sprečilo bi državu da opravda nemarno ponašanje sa argumentima da država nije imala saznanja o preduzetim aktivnostima koje su u suprotnosti sa pravima druge

[41] Marco Mayer et al., "International Politics in the Digital Age:Power Diffusion or Power Concentration?", Working paper, University of Florence, 12-14 September 2013, pp. 1-64.

[42] Sajber špijunaža od strane hakerskog broda države A dok se pretpostavlja da koristi pravo na nevini prolaz u pomorskoj zoni obalske države (država B) usmeren na treću Država (država C) može prekršiti obavezu dužne pažnje države B da svesno ne dozvoli teritoriju koja će se koristiti protiv države C. Doktrina ide toliko daleko da to postavlja da nijedna sajber aktivnost koju preduzima brod dok je u nevinom prolazu ne sme ugrožavaju odnose obalne države sa drugim državama i njene dužnosti u pogledu druge države.

[43] Michael Schmitt, "In Defense of Due Diligence in Cyberspace", *The Yale Law Journal Forum,* 2015, pp. 68–80.

države, posebno kada država ima ograničen kapacitet da detektuju protivpravne sajber aktivnosti.[44] U izvesnom smislu, svaki element principa deluje kao razumno ograničenje potencijalne odgovornosti države. Prvi element, znanje, može se zadovoljiti i stvarnim i konstruktivnim znanjem. U skladu sa ovim principom pretpostavlja se da država ima znanje o svim aktivnostima na njenoj teritoriji. Svakako da država ima veće informacije o aktivnostima na javnoj nego na privatnoj infrastrukturi. Ukoliko se sajber napadi ponavljaju kroz domaću mrežu neke države mogu poslužiti kao dokaz da je država tranzita znao ili je trebalo da zna za napade. Shodno tome, ako država zna ili je trebalo da zna za štetnu sajber operaciju koja putuje kroz njenu teritoriju, obavezuje ga obaveza da pokušaj da se prekine.[45] Princip dužne pažnje bi se bavio samo sajber operacijama koje predstavljaju međunarodno protivpravno delo, a koje bi za posledicu imale ozbiljne štetne posledice po državu koja je žrtva ciljnog napada.[46] Treći element, koji se tiče izvodljivih mera, predviđa da države odgovaraju po osnovu propusta dužne pažnje samo u situacijama kada propuste da intervenišu u sajber operaciji kada imaju kapacitet da to učine i kada je to razumno u datim okolnostima. Ovaj element nudi najveću zaštitu državama od nametanja apsolutne odgovornosti.[47] Obim same obaveze za svaku državu variraće u zavisnosti od pojedinačnih kapaciteta svake države koji se ogledaju kroz financijske resurse, tehnološku opremljenost, te obučenosti kadrova kako bi mogli odgovoriti hakerskim napadima. Države neće kršiti međunarodno pravo ako nije sprečila složenu sajber operaciju za koje nema sposobnost da kontroliše.[48] Još jedan uslov znatno ograničava obaveze države u pogledu dužne pažnje u sajber prostoru tako država neće odgovarati ni u slučajevima kada države imaju kapacitet da spreče štetne sajber operacije sprovedene na njihovoj teritoriji, ako bi to u datim okolnostima bilo previše opterećujuće i nerazumno.[49] Na ovaj način, princip dužne pažnje može delovati kao standard pripisivanja u jasno propisanom spletu okolnosti. Države će biti odgovorne samo za sajber operacije sa ozbiljne štetne posledice, koje imaju kapacitet da identifikuju i odgovori na njih.[50] Država bi svoje obaveze u pogledu dužne pažnje dakle ispunila ako bi u datim okolnostima uradila ono

[44] *Ibid.*

[45] Scott Russell, et al.,"Unpacking the International Law on Cybersecurity Due Diligence: Lessons from the Public and Private Sectors", *Chicago Journal of International Law,* 2016, Vol. 17(1), pp. 1–50.

[46] Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations,* Cambridge University Press 2017, p. 30 (Rule 6)

[47] *Ibid.* pp. 74–75.

[48] Karine Bannelier, ''Cyber Diligence: A Low-Intensity Due Diligence Principle for Low-Intensity Cyber Operations?'' *Baltic Yearbook of International Law,* 2014, Vol. 14, pp. 23–39.

[49] *Ibid.*

[50] Michael Schmitt, Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, *op.cit*., p. 106.

što se od nje može „razumno očekivati".[51] Utvrđivanje da li je država postupila razumno u suočavanju sa pretnjom ili, događajem, štetnog sajber ponašanja zahteva razmatranje niza faktora, pre svega usvajanje svih raspoloživih sredstava od strane države. Ocenjivanje ovih faktora se svodi na subjektivni element. Treba naglasiti da je većina sajber prostora u vlasništvu privatnih kompanija koje njime upravljaju. Stoga će država često morati da traži od privatnih aktera koji deluju na njenoj teritoriji da preduzmu neophodne mere da spreče ili prekinu štetno međunarodno sajber ponašanje. Država je dužna da preduzme samo mere koje su „razumno dostupne" i u okviru njenih sposobnosti.[52] U takvim slučajevima, ako država svesno propusti da smanji štetu naneta susednoj državi bila bi odgovorna. Da bi se procenilo da li država postupa sa maksimalnim naporima treba sagledati stanje svake države u pogledu svih pomenutih relevantnih parametara. Stručnjaci međunarodnog prava iznose argumente u korist stvarnog znanja države u kontekstu principa dužne pažnje u sajber prostoru. Dosadašnje odluke međunarodnih pravosudnih organa su takođe uspostavili državni odgovornost na osnovu dokaza o stvarnim znanja.[53] Ovo nije univerzalno prihvaćeno tumačenje, a norma bi takođe mogla biti podložna širem tumačenju. Shodno tome, moglo bi se tvrditi da država ne uspeva ispuniti normativno očekivanje kada ono ne ulaže najbolje napore da spreči a sajber operacija o kojoj bi trebalo da zna. Jurisprudencija ovaj koncept označava kao konstruktivno znanje. Šire tumačenje dužne pažnje moglo bi državu sa čije teritorije potiču štetne aktivnosti u sajber prostoru izjednačiti sa državama tranzita.[54] Prihvaćeni standard pažnje, kada se primenjuje dužna pažnja, je jedan od razumnih sposobnosti, iako postoji neslaganje oko toga da li ovaj standard u bilo kom određenom slučaju objektivan ili subjektivan, čak i prema tumačenju da dužne pažnje, države ne bi bile odgovorne za svaki sajber čin koji potiče sa njihove teritorije. Pored neodgovornosti za minorna dela. primećuje se da države obično polažu dužnu pažnju da spreče štetu ako država ima saznanja o situaciji.[55] Iako neke države, poput Nemačke, Indije, Holandije,[56] odražavaju opšti zahtev da se osigura da se

[51] European Court of Human Rights Osman v United Kingdom application 87/1997/871/1083, Judgment 28 October1998, para. 116.

[52] *Ibid.*

[53] Alabama claims of the United States of America against Great Britain (1871, 125–134); ICJ (1980), paras. 125–134.

[54] Podrška za proširenje normativna očekivanja prema državama tranzita u pogledu dužne pažnje iznosi Francuska, dok druge države nemaju čvrsto izgrađene stavove po ovom pitanju.

[55] Sean Kanuck,"Sovereign Discourse on Cyber Conflict under International Law", *Texas Law Review,* 2010, Vol. 88, pp. 1571–1597.

[56] The Netherlands. 2019. Letter to the parliament on the international legal order in cyberspace.5 July 2019, Appendix 1. Internet: https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace, 26.03.2023.

sajber aktivnosti i sajber prostor države ne koristi za prekograničnu štetu, malo je dokaza da su države prihvatile ovu dužnost kao pitanje međunarodnog prava.[57] Trenutno najvažniji multilateralni sajber ugovor je Konvencija o Evropskom sajber kriminalu koja umesto uspostavljanja proaktivnih zahteva za sprečiti, je gotovo čisto proceduralna konvencija koja uspostavlja metodologije saradnje nakon sajber događaja kako bi se omogućila transnacionalna međunarodna istraga i krivično gonjenje.[58] Povećano prihvatanje Konvencije i pridržavanje njenih odredbi može čak dovesti do opšteg prihvatanja stvaranja domaćih zakona koji zabranjuju određene sajber akte, ali izgleda da takav konsenzus tek treba da se uspostavi. stručnjaci su tvrdili da mnoge od sajber-specifičnih obaveza nisu zasnovane na „izrazitoj primarnoj obavezi u pogledu štetnih sajber operacija kao takvih", već nego na „opštem principu dužne pažnje u sajber kontekstu. Iako se na prvi pogled princip dužne pažnje čini kao odlična alternativa za uspostavljanje odgovornosti u sajber prostoru nekoliko aspekata sajber operacija čini trenutnu primenu dužne pažnje od strane država neefikasnih u ograničavanju prekogranične štete nanete drugoj državi. Anonimnost akcija na internetu omogućavaju i državnim i nedržavnim akterima da sprovode sajber operacije. Za identifikovanje počinioca u sajber prostoru potrebno je dugo vremena, što obesmešljava eventualnu nadoknadu štete.[59] Usled toga pojavile su se ideje da se postupak pripisivanja pokuša ustanoviti u dosta ranijoj fazi, ako bi država koja je oštećena mogla ukazati na nedostatak dužne pažnje od strane države iz koje su potekle sajber operacije, atribucija bi se mogla pretpostaviti i stoga učiniti to stanje potencijalno odgovoran za štetu prouzrokovanu sajber aktivnostima. Primena dužne pažnje se u sajber prostoru ograničava sa težnjom da država strože shvati da ozbiljnije shvate svoju obavezu dužne pažnje. Činjenica da sajber napadi mogu imati trenutno dejstvo vremenska priroda sajber operacije dodaje nivo složenosti u određivanju i karakterizacije i namere sajber aktivnosti koje potkopavaju efikasnost tradicionalnih pojmova dužne pažnje.[60] Evolucija dužne pažnje svakako ima potencijal da se razvije na takav način kako bi se opravdala represija nad ljudskim pravima, rizik koji je takođe preti od strane države. Kako međunarodna zajednica jača obavezu država da prati svoje sajber aktivnosti takođe mora osigurati da postoje stroge zaštitne mere kako bi se sprečilo da države

[57] Andraž Kastelic, *Due diligence in cyberspace Normative expectations of reciprocal protection of international legal rights,* UNIDIR, 2021, p. 13.

[58] "Council of Europe Convention on Cybercrime, (The Budapest Convention) 23 November 2001", ETS, No. 185.

[59] Ako državni ili nedržavni akteri veruju da njihov žrtve neće moći da ih identifikuju kao sajber aktere mesecima ili čak godinama nakon događaja, mnogi će biti spremni da prihvate potencijalne rizike u nadi da će eventualni odgovori na odloženo pripisivanje će biti prigušeni tokom vremena.

[60] Eric Talbot Jensen, "Due dilligence in cyber activities", H. Krieger et al. (ed.) in *Due Diligence in the International Legal Order*, 2020, pp. 252–268.

koriste ovu dužnost za cenzuru komunikacija koje su kritične nastrojene prema politikama države.[61] Snažnija primena dužne pažnje u sajber sektoru, po uzoru na primenu principa u drugim sektorima, značajno bi povećala odgovornost država da spreče zlonamerne sajber radnje i posledično poboljšati sposobnost međunarodnog prava da obezbedi red i stabilnost u međunarodnom sistemu.[62] Jedina efikasna preventiva od štetnih sajber aktivnosti ogleda se kroz pristup jačanja državne odgovornosti kroz poštovanje dužne pažnje. Druga mogućnost je da države preduzmu protivmere u sajber prostoru protiv druge države koja preti sajber napadima. Proaktivna primena dužne pažnje u sajber sektoru, po uzoru na primenu principa u drugim sektorima, značajno bi povećala odgovornost država da spreče zlonamerne sajber radnje i posledično povećati sposobnost međunarodnog prava da obezbedi red i stabilnost u međunarodnom sistemu. Unapređenje principa dužne pažnje u sajber kontekstu bi se mogao postići prenošenjem rigoroznijeg oslanjanja na prevenciju sa drugih pristupa specifičnih za oblast životne sredine i usađivanjem u sajber sektor.[63] Mora se napraviti ravnoteža između prirode, razmera i obim potencijalne štete za teritorijalnu (ili tranzitnu) državu i štetu po državu žrtvu kako bi se utvrdilo da li je razmatrana radnja neophodna i proporcionalna.[64] Države to rade na osnovu izbora najboljih mera koje treba preduzeti, s obzirom na okolnosti, da pokušaju da spreče ili zaustave sajber zloupotrebu njihove teritorije.

OBAVEZA DRŽAVE DA ZAŠTITI LJUDSKA PRAVA U SAJBER PROSTORU

Sajber napadi mogu imati značajnog uticaja na uživanje ljudskih prava. U sajber prostoru mogu biti ograničeni pravo na mišljenje i izražavanje. S obzirom da država ima obavezu da obezbedi svim ljudima pod njenom jurisdikcijom uživanje ljudskih prava u punom obimu kompleksnost digitalnog doba i sajber prostora nameće ozbiljne izazove državi čije neprevazilaženje može povući i njenu odgovornost.[65] Ljudska prava u sajber prostoru ne treba da se artikulišu samo kao individualna prava, već treba da budu priznata i kao individualna i kao

[61] European Union, Joint Communication to the European Parliament and the Council, Resilience, Deterrence and Defence, "Building Strong Cybersecurity for the EU"', JOIN/2017/0450 final, 13 September 2017, p.18.

[62] *Ibid.*

[63] Karine Bannelier, "Cyber Diligence: A Low-Intensity Due Diligence Principle for Low-Intensity Cyber Operations?" *op.cit.,* p. 29.

[64] Robert Kolb, "Reflections on Due Diligence Duties and Cyberspace." *German Yearbook of International Law* 2015, Vol 58, p.126.

[65] Međunarodno pravo ljudskih prava je podstaklo nesuglasice oko stepena do kojeg obaveze države u pogledu ljudskih prava ograničavaju njen suverenitet nad njenom teritorijom i koliko dozvoliti drugim državama da se mešaju u njene unutrašnje poslove.

kolektivna prava. Ljudska prava se podjednako primenjuju na internetu i u fizičkom prostoru. Digitalne tehnologije su otvorile mnoge nove i zanimljive načine izražavanja ideja, razmene informacija, udruživanja, protesta i drugih sličnih sloboda u okviru ljudskih prava. Ova prava uživaju univerzalnu zaštite i pripadaju svima, bez obzira na poreklo, status i druge lične osobine. Istovremeno, digitalizacija naše komunikacije i svakodnevnih poslova je takođe omogućio razvoj sredstava za zloupotrebe i povrede prava. Poteškoće sa kojima se susreću pri pripisivanju sajber akcija određenim akterima kako se zahteva prema principima države odgovornost izazvali su zabrinutost da vlade iskorištavaju ovaj problem i krše ljudska prava (npr. sprovođenje nadzora nad političkim protivnicima preko punomoćnika). Postoje nedoumice da li je s obzirom na učešće velikog broja nedržavnih aktera moguće u sajber prostoru imajući u vidu da ugovori o ljudskim pravima nameću obaveze jedino državama. Ipak bez obzira na ove nedostatke, međunarodno pravo ljudskih prava obavezuje teritorijalnu državu da preduzme sve mere u okviru svojih ovlašćenja da zaštiti ljudska prava u oblasti van njene efektivne kontrole.[66] Neiscrpna je lista ljudskih prava koja su posebno značajna u sajber prostoru, dodatno mnogi sajber prostor vide kao krucijalan za uživanje ekonomskih, socijalnih i kulturnih prava. Zavisnost od sajber prostora daje onlajn informacijama sve veću važnost u progresivnim ostvarivanje ovih prava pa se obezbeđivanje pristupu informacijama kao krucijalan za uživanje ljudskih prava u sajber prostoru.[67] Iako Komitet za ekonomska socijalna i kulturna pitanja pristup sajber prostoru uzima kao relevantan za ocenjivanje napretka u pogledu ostvarivanja i poštovanja ljudskih prava u državi, odnos između sajber prostora i ove grupe ljudskih prava treba prvenstveno gledati kroz prizmu buduće ostvarive perspektive, jer trenutno mnoge države imaju problema sa ostvarivanjem ekonomske grupe ljudskih prava za koje sajber prostor i pristup internetu su irelevantni poput obezbeđivanja adekvatne hrane, lekova, smeštaja, kanalizacije. Zamera se da je digitalno doba dovelo do diskriminacije u uživanju ekonomskih i socijalnih prava iz prostog razloga što je došlo do ogromnog jaza između razvijenih zemalja i zemalja u razvoju u pogledu pristupa internetu i informacionim tehnologijama. Sajber prostor je postao

[66] UN Human Rights Committee, "Concluding Observations: Russian Federation (28 April 2015), UN Doc CCPR/C/RUS/CO/7, para. 23(b) Human Rights Council, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)", 25 September 2017, UN Doc A/HRC/36/CRP.3, paras. 154–161.

[67] Kao primer se može uzeti uživanje prava na zdravlje, država ima dužnost poštovanja znači da vlada ne može ograničiti ili uskratiti ljudima pristup važećim zdravstvenim informacijama. Država je dužna da sve pojedince pod svojom jurisdikcijom zaštiti od prevare u pogledu lažnih informacija vezanim za zdravstveni sistem, kao i da proširi pristup Internetu informacijama i uslugama koje pružaoci zdravstvenih usluga i pojedinci mogu koristiti za poboljšanje zdravlja. ''International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3"; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. Internet: http://www.escr-net.org/docs/i/425445 , 23.08.2023.

nezamenjiv za ostvarivanje efikasne borbe protiv nejednakosti i ubrzanje razvoja i ljudski napredak. Tipični oblici izražavanja koji inače ne bi trebalo da budu podložni ograničenjima, bilo van mreže ili onlajn, uključuju diskusiju o vladi politike i političke debate; izveštavanje o ljudskim pravima, aktivnostima vlade i korupcija u vladi, angažovanje u predizbornim kampanjama mogu biti ugroženi od strane države u sajber prostoru.[68] Pravo na privatni život podrazumeva kontrolu nad informacijama o nama, tj kontrolu da li će i ko znati koja mesta posećujemo, ko smo, gde živimo i sa kim se dopisujemo. Privatnost je nesporna važna za ličnu autonomiju svakog pojedinca i pretnje sa kojima se može suočiti postao sve očigledniji u digitalnom prostoru. Čitanje i zadržavanje sadržaja namenjenih onlajn komunikacijama biti poverljiv svakako ometa pravo na privatnost. Pravo na privatnost bi prema normama koje regulišu ljudska prava zahteva da integritet i poverljivost prepisku treba garantovati *de iure i de facto*."[69] Prepiska treba dostaviti adresatu bez presretanja i bez da se otvorena ili na drugi način pročitana."[70] Uokvirivanje pristupa sajber prostoru na ovaj način je u skladu sa sagledavanjem tehnologija kao sredstva za zaštitu i unapređenje ljudskih prava. Sve više je zagovornika teze da je pristup sajber prostoru i internetu novo ljudsko pravo, jer predstavlja preduslov za ostvarivanje prava mišljenja i izražavanja. Sa pojavom interneta, protok komunikacije među ljudima je postao povećao, posebno imajući u vidu da možemo da komuniciramo sa više ljudi na u isto vreme i da se mogu nalaziti na različitim kontinentima. Eklatantan primer uticaja pristupu sajber prostoru možemo videti kroz ostvarivanje prava na obrazovanje. Mark Zakerberg (*Mark Zuckerberg*), osnivač Facebook-a, tvrdio je da je internetska povezanost u sajber prostoru ljudsko pravo jer takva povezanost jeste sredstvo za postizanje političkih, ekonomskih i društvenih ciljeva koje režim ljudskih prava teži da ostvari.[71] Savet UN za ljudska prava je zauzeo stav da ljudi imaju ista ljudska prava na mreži kao i van mreže.[72] Ovaj stav ima implikacije na odgovornost države jer država ima obavezu da na isti način štiti ljudska prava, te njeni propusti za sobom povlače odgovornost. sajber prostor omogućava pojedincima da vrlo lako ugrožavaju ljudska prava i slobode. Neke od opasnosti koje u sajber prostoru prete pojedincima su sajber rasizam i homofobija.[73] Pored

[68] "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression", May 16, 2011.

[69] "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 16-18, U.N. Doc. A/69/397 (Sept. 23, 2014).

[70] *Ibid.*

[71] C. Kang, M. Isaac, Defiant Zuckerberg says Facebook won't police political speech', New York Times. Internet: https://www.nytimes.com/2019/10/17/business/zuckerberg -facebook-free-speech.html , 16.03.2023.

[72] "Human Rights Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet", UN Doc A/HRC/RES/32/13. 18 July 2016.

[73] Sajber rasizam može biti u obliku pojedinaca koji objavljuju rasističke komentare ili učestvuju na grupnim stranicama koje su posebno postavljene u rasističke svrhe.

pozitivnih obaveza države da u sajber prostoru štiti uživanje ljudskih prava pojedinaca od napada trećih osoba. Negativne obaveze nastavljaju da nameću teritorijalnoj državi, na primer, dužnost da ne krši pravo na život pojedinaca putem sajber napada, zabrana mučenja i nehumanog ili ponižavajućeg postupanja putem onlajn sredstava, i zabrane slobode izražavanja, uključujući podsticanje na rasnu mržnju ili terorizam.[74] Budućnost ljudskih prava u sajber prostoru zavisi od evolucije zakona i njegovog tumačenja od strane nacionalnih i međunarodnih upravnih tela. Savet bezbednosti UN je 22. maja 2020. u svojoj raspravi o sajber bezbednosti istakao potrebu da se sajber napadi prepoznaju kao jedno od pitanja ljudskih prava. Tok akcije koji je detaljno opisan ukazuje da potezi kao što su gašenje internet pristupa od strane vlade i hakovanje uređaja neistomišljenika, mogu dovesti do ozbiljnog kršenja ljudskih prava.[75] Osim toga sajber prostor omogućava određeni stepen anonimnosti, npr. možemo kreirati profile koji ne otkrivaju naš identitet i zbog toga mnogi mnogo slobodnije komuniciraju u sajber prostoru, smatrajući da posledice ponašanja na mreži ne moraju biti iste kao u fizičkom prostoru. Usled ove mogućnosti digitalni prostor je idealan za širenje ksenofobije i govora mržnje. Cenzura koja se javlja kroz filtriranje i blokiranje sadržaja i kojima pribegavaju razne države i korporacije, takođe predstavlja ozbiljan problem, jer nam onemogućava slobodan pristup informacijama. Sadržaj se može uređivati ne samo kroz cenzuru, već i njegovo postavljanje, tj. algoritmi mogu odlučiti koji tip sadržaja će biti vidljiv kom korisniku. Kao nov način komunikacije su kreirani, a broj načina da se oni ograniče rapidno se povećava, zaštita slobode izražavanja u digitalnom kontekstu stoga može biti posebno izazovna.[76] Nedostatak slobode izražavanja ima štetan uticaj na društvo jer ograničava pristup različitim idejama i informacijama koje mogu biti od javnog značaja. To može sprečiti napredak i otežati prepoznavanje društvenih problema. S druge strane, sloboda izražavanja uključuje i potrebu za reguliranjem potencijalne manipulacije i širenja lažnih informacija. Sloboda izražavanja je ključna za razvoj društva jer omogućuje razmjenu ideja, otvorenu raspravu i otkrivanje novih rešenja za društvene probleme. Kada ljudi mogu slobodno izražavati svoje misli, doprinosi se inovacijama, kritičkom razmišljanju i napretku. Bez slobode izražavanja, društvo može biti zatvoreno, neprogresivno i nesvesno važnih problema. Jedan od uočenih problema je i da država vrlo često nema adekvatne kapacitete kako bi odgovorila ugrožavanju ljudskih prava u sajber prostoru. Postavlja se pitanje kada postoji povreda osnovnih ljudskih prava

[74] UNGA, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (10 August 2011), UN Doc A/66/290, para. 81.

[75] Deborah Brown, It's Time to Treat Cybersecurity as a Human Rights Issue, Internet:https://www.hrw.org/news/2020/05/26/its-time-treat-cybersecurity-human-rights-issue, 21.05.2023.

[76] Share Foundation, Introduction to Digital Rights. Internet: https://www.sharefoundation.info/wp-content/uploads/Digital-rights-intro_ENG-1.pdf , 18.08.2023.

pojedinca. Da li odgovornost treba da padne samo na nalogodavca ili bi teret trebalo da bude i na provajderu Internet usluga, te da li se u ovim slučajevima odgovornost može pripisati državi. Odgovor bi se mogao pronaći samo u širokom tumačenju obaveze poštovanja principa dužne pažnje. Radi lakše zaštite ljudskih prava u sajber prostoru i sve raznovrsnih telekomunikacionih sistema etablira nova generacija ljudskih prava poznata i kao digitalna ljudska prava.[77]

ZAKLJUČAK

Pravila o odgovornosti države za međunarodno protivpravna dela su veoma teško primenjiva u sajber prostoru jer postoje ozbiljne poteškoće prilikom samog pripisivanja protivpravnog akta jer su se Pravila razvijala tokom prošlog veka dok još sajber prostor nije bio u povoju i značajan kao danas. Specifičnosti velikog broja privatnih samodovoljnih pojedinaca koji mogu potpuno odvojeno delovati vrlo je teško uspostaviti odgovornost države. Težnje velikih geopolitičkih sila da formiraju sopstvene internet sisteme uspostavljanje međunarodne odgovornosti učiniće praktično nemogućim. Dodatan problem koji će se morati rešiti jeste postići konsenzus kako bi se uspostavila ujednačena pravila vezana za pitanje jurisdikcije i suvereniteta nad sajber prostorom. Iako se princip dužne pažnje čini kao adekvatna alternativa za nedostatke koji su primetni u primeni Pravila u sajber prostoru, dublja analiza ipak ukazuje da i primena principa dužne pažnje u sajber prostoru za uspostavljanje odgovornisti ipak ima određene zapreke koje nisu baš lako premostive. Usled toga države tek treba da postignu sporazum o obimu norme, uslovi potrebnog znanja sajber aktivnosti na njenoj teritoriji i pragovima potrebnim da bi se ustanovila odgovornost za propuste dužne pažnje u sajber prostoru. Sajber prostor je danas postao krucijalan za uživanje velikog broja ljudskih prava, ali istovremeno i pogodan prostor za njihovo ograničenje. Zbog svega toga pojavile su se ideje da se neometan pristup internetu proglasi za fundamentalno ljudsko pravo te da se stvori i nova generacija digitalnih ljudskih prava. Sajber prostor je idealan za širenje ksenofobije, rasizma i drugih oblika koji ugrožavaju ljudska prava, te je primetno da države nemaju dovoljno kapaciteta da bi zaštitile pojedince pod svojom jurisdikcijom, što dovodi do kršenja međunarodnih obaveza i dovodi do međunarodne odgovornosti države. Informacione tehnologije i regulisanje sajber prostora je u rapidnom razvoju stoga treba očekivati da će se Pravila odgovornosti države prilagođavati specifičnostima sajber prostora kroz verovatno usvajanje dodatnih protokola na postojeća pravila kako bi se prevazišle postojeće barijere.

[77] Wolfgang Kleinwächter, Do we need a new generation of Human Rights for cyberspace? Internet: https://www.orfonline.org/expert-speak/do-we-need-a-new-generation-of-human-rights-for cyberspace/, 16.07.2023.

INTERNATIONAL RESPONSIBILITY OF THE STATE IN CYBERSPACE

ABSTRACT

Cyberspace is a domain whose use is necessary for the whole or at least a significant part of the global population. We are witnessing that the cyberspace is suitable for hacker attacks on states due to its specificity. The enjoyment of human rights can also be restricted or disabled due to hacker attacks. Cyberspace calls into question the general principles of international law important for human rights. All this raises the question of the international responsibility of the state in cyberspace. First, the specifics of cyberspace will be pointed out in the paper. The paper will then analyze the possibility of establishing responsibility in cyberspace with regard to the specifics of the element of attribution, as a result of which the importance of the principle of due diligence as an alternative to establishing responsibility will be considered. At the end, it will be reviewed what obligations the state has in terms of protecting human rights in cyberspace.

Key words: Cyberspace, international responsibility of the state, principle of due diligence, protection of human rights

REFERENCES

1. "Alabama claims of the United States of America against Great Britain (1871)", ICJ 1980.
2. Andress, Jason, Winterfeld, Steve, Ablon, Lillian, *Cyber Warfare: Techniques, Tactics and Tools for Security Practitioners,* Elsevier, Amsterdam, 2014.
3. "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)", Judgment, *ICJ Reports,* 2007. Internet: https://www.icj cij.org/public/files/case-related /91/091-20070226-JUD-01-00-EN.pdf, 07.03.2023.
4. Bannelier, Karine, "Cyber Diligence: A Low-Intensity Due Diligence Principle for Low-Intensity Cyber Operations?" *Baltic Yearbook of International Law,* 2014, Vol. 14.
5. Benedikt, Michael, (Ed.), *Introduction and Cyberspace: some proposals, in Cyberspace,* First Steps, MIT Press, London, 1992.
6. Benedikt, Pirker, "Territorial Sovereignty and Integrity and the Challenges of Cyberspace", in: K. Ziolkowski (Ed.), *Cyberspace,* NATO CCD COE Publication, Tallinn, 2013.
7. Brown, Deborah, "It's Time to Treat Cybersecurity as a Human Rights Issue". Internet: https://www.hrw.org/news/2020/05/26/its-time-treat-cybersecurity-human-rights-issue, 21.05.2023.

8. "Computer Fraud and Abuse Act", A BILL, May 25, 2017 To improve the prohibitions on money laundering, and for other purposes see Internet: https://www.congress.gov/bill/115th-congress/senatebill/1241/text,10.08.2023.
9. "Council of Europe Convention on Cybercrime, (The Budapest Convention), 23 November 2001", ETS, No. 185.
10. "Cyberspace Definition of cyberspace in US English by Oxford Dictionaries". Internet: https://web.archive.org/web/20130218185858/http://oxforddictionaries.com/us/definition/american_english/cyberspace, 01.08.2023.
11. Deleure François*, Cyber Operations and International Law,* Cambridge University Press, 2020.
12. Duggan, Patrick, "Harnessing cyber-technology's human potential", *Special Warfare: The Professional Bulletin of the John F. Kennedy Special Warfare Center & School*, 2015, Vol. 28 Issue 4.
13. European Union, Joint Communication to the European Parliament and the Council, Resilience, Deterrence and Defence, 'Building Strong Cybersecurity for the EU', JOIN/2017/0450 final, 13 September 2017.
14. Geiß, Robin, Henning Lahmann, "Freedom and Security in Cyberspace: Shifting the Focus away from Military Responses towards Non-Forcible Countermeasures and Collective Threat-Prevention", in: K. Ziolkowski (Ed.), *Peacetime Regime for State Activities in Cyberspace: International Law*, International Relations and Diplomacy CCDCOE, Tallinn, 2014.
15. Huang, Zhxiong, "The Attribution Rules in ILC's Articles on State Responsibility: A Preliminary Assessment on Their Application to Cyber Operations", *Baltic Yearbook of International Law Online*, 2015, Vol.14/ 1.
16. Human Rights Council, The Promotion, Protection and Enjoyment of Human Rights on the Internet, UN Doc A/HRC/RES/32/13. 18 July 2016.
17. International Court of Justice Reports of Judgments, "Corfu Channel case (The United Kingdom v. Albania)", Merits, Judgment of 9 April 1949.
18. "International Law in Cyberspace", US Department of State, US CYBERCOM Inter-Agency Legal Conference, Ft. Meade, MD, 18 Sept. 2012.
19. "International Covenant on Economic, Social and Cultural Rights", 16 December 1966, 993 UNTS 3".
20. "International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries 2001", Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10)".
21. Joint Publication 1-02, DoD Dictionary of Military Terms, Washington, D.C.: Joint Staff, Joint Doctrine Division, J-7, October 17, 2008. Internet: www.dtic.mil./doctrine/jel/new_pubs/1_02.pdf, 01.03.2023.

22. Kang, C. Isaac, M., Defiant Zuckerberg says Facebook won't police political speech', New York Times. Internet: https://www.nytimes.com/2019/10/17/business/zuckerberg -facebook-free-speech.html, 16.03.2023.
23. Kanuck, Sean, "Sovereign Discourse on Cyber Conflict under International Law", *Texas Law Review,* 2010, No. 88.
24. Kastelic, Andraž, *Due diligence in cyberspace Normative expectations of reciprocal protection of international legal rights,* UNIDIR, 2021.
26. Kleinwächter, Wolfgang, "Do we need a new generation of Human Rights for cyberspace?". Internet: https://www.orfonline.org/expert-speak/do-we-need-a-new-generation-of-human-rights-for cyberspace/, 16.07.2023.
26. Koh, Harold, H, "International Law in Cyberspace", *Harvard International Law Journal* 2012, Vol 54, No. 2.
27. Kolb, Robert, "Reflections on Due Diligence Duties and Cyberspace." *German Yearbook of International Law,* 2015, Vol 58.
28. Lauterpacht, Hersch, *Private Law Sources and Analogies of International Law*, The Lawbook Exchange, Clark NY, 2002.
29. "Letter to the parliament on the international legal order in cyberspace", 5 July 2019, Appendix 1. The Netherlands. 2019. Internet: https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace, 26.03.2023.
30. "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights". Internet: http://www.escr-net.org/docs/i/425445 , 23.08.2023.
31. Mayer, Marco, et al.,"International Politics in the Digital Age:Power Diffusion or Power Concentration?", Working paper, University of Florence, 12-14 September 2013.
32. "Osman v United Kingdom application 87/1997/871/1083", European Court of Human Rights, Judgment 28 October 1998.
33. Proulx, Vincent-Joel, "Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?", *Berkeley Journal of International Law,* 2005, Vol. 23.
34. "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" (May 16, 2011).
35. "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism", 16-18, U.N. Doc. A/69/397 (Sept. 23, 2014).
36. "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression", (May 16, 2011).

37. Roscini, Marco, "World Wide Warfare – Jus ad bellum and the Use of Cyber Force", in: A. von Bogdandy, R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law ,* Martinus Nijhoff, Leiden, 2010, Vol. 14.
38. Russell, Scott et al."Unpacking the International Law on Cybersecurity Due Diligence: Lessons from the Public and Private Sectors", *Chicago Journal of International Law,* (1): 2016, Vol. 17.
39. Schmitt Michael, Tallinn *Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.
40. Schmitt, Michael N, "Grey Zones in the International Law of Cyberspace",*Yale Journal of International Law Online,* 2017, Vol. 42.
41. Schmitt, Michael, "In Defense of Due Diligence in Cyberspace", *The Yale Law Journal Forum*, 2015.
42. Schmitt, Michael, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations ,Cambridge University Press 2017.*
43. Schneider,Volker, Hyner, Dirk, *The Global Governance of Cybercrime: Issue Space and the Transnational Policy Networ,.* University of Konstanz, Germany, 2003.
44. Share Foundation, Introduction to Digital Rights. Internet: https://www.sharefoundation.info/wp-content/uploads/Digital-rights-intro_ENG-1.pdf, 18.08.2023.
45. Talbot Jensen, Eric, "Due dilligence in cyber activities", in: H. Krieger et al. (eds), *Due Diligence in the International Legal Order*, 2020.
46. "The Application of International Law to State Cyberattacks". Internet: https://www.chathamhouse.org/2019/12/application-international-law-state-cyberattacks/2-application-sovereignty-cyberspace, 11.08.2023.
47. "The Factory at Chorzów Claim for Indemnity-Germany v. Poland", PCIJ, 1928, Ser. A No. 17.
48. Tobanksy, Lior, "Basic concepts in cyber warfare", *Military and Strategic Affairs,* 2011, Vol. 3.
49. Tsagourias Nicholas, Farrell Michael, "Cyber attribution: Legal and technical approaches and challenges", *European Journal of International Law,* 2020, Vol. 31.
50. UN Human Rights Committee, "Concluding Observations: Russian Federation (28 April 2015), UN Doc CCPR/C/RUS/CO/7, para 23(b) Human Rights Council, Situation of Human Rights in the Temporarily Occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine)", 25 September 2017, UN Doc A/HRC/36/CRP.3.
51. UNGA, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression", 10 August 2011, UN Doc A/66/290

52. United Nations Convention on the Law of the Sea (signed 10 December 1982)
53. Villeneuve, Nart, "Barriers to Cooperation: An Analysis of the Origins of International Efforts to Protect Children Online" in: Ronald Deibert, *et al.* (eds), *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace*, MIT Press, Cambridge, 2010.
54. Witenberg, Joseph C, "La théorie des preuves devant les juridictions internationales", *RCADI*, 1936, Vol. 56, No. 1.

THE RIGHT TO EDUCATION OF CHILDREN FROM THE PERSPECTIVE OF THE CONVENTION ON THE RIGHTS OF THE CHILD AND HUMAN RIGHTS DOCUMENTS

Milad KASHI KOMIJANI*

ABSTRACT

The right to education is one of the basic rights at the global level, confirmed by many conventions and declarations, including the Universal Declaration of Human Rights. These international legal documents emphasize that the right to education is a basic pillar for other rights and a condition for the perfection of the human personality of each person. In the field of human rights, children's right to education is of particular importance. Thus, the Convention on the Rights of the Child introduces criteria for the right to education as well as conditions for member countries of the Convention. Those criteria include non-discrimination, free education, compulsory education and the application of education for life. In Iranian law, these criteria are also contained. Generally speaking, children's education should be guaranteed at the domestic legislative level. The right to education includes respect for the principles of basic human rights and fundamental human freedoms. A system that accepts these principles can serve humanity. Namely, the right to education of children is one of the key rights that can change life and society. Without education, children are deprived of the opportunity to develop their full potential and to play a constructive role in the family and communities of their country and the world. A special question is, to what extent is the right to education guaranteed by international legal documents and do they meet children's needs? In the following study, the author will try to clarify this dilemma from the perspective of the Convention on the Rights of the Child and human rights documents.

Key words: Right to education, documentation of fundamental human rights, Convention on the Rights of the Child, free and compulsory education

INTRODUCTION

In the second half of the 19th century, children's right to education found its way through the human rights documents at the national level and within the countries and received support for it The first support for children's right to

* Master's student of public law at Qom University, Iran. E-mail: M.Kashi@stu.qom.ac.ir

education was done at the international level after the First World War by the United Nations. In 1924, the League of Nations approved the Declaration of the Rights of the Child, which is known as the Geneva Declaration. Of course, this declaration .did not support the right to education in a clear and explicit way and only implied this right In spite of these principles mentioned in this declaration, the basis for the formation of subsequent documents in the field of children's rights was established Including the 1959 declaration of; children's rights, which examined children's right to education in a more precise and detailed manner.[1] In our country during the constitutional period in the amendment to the constitution, the establishment of schools at the expense of the government and compulsory education were foreseen. In the second parliament, the basic and administrative law of culture was established and all schools came under the supervision of the government and it was decided that primary education for children should be compulsory. Provisions of free and compulsory education were all part of the goals of the government in this period, which were not realized due to political disturbances. But with the emergence of relative stability in the political and administrative situation and the government's efforts to expand education the number of educational institutions increased and laws were approved to prepare the budget and allocate it to schools. In point a) of Article 1 of the UNESCO Declaration from 1974, it is confirmed that education is "a complete course of social life through which individuals and social groups learn to develop all their personal abilities and abilities in national and international communities". This flow is not limited to any specific activity. The 1989 Convention on the Rights of the Child also supports education in its Article 28 by mentioning educational levels, and in Article 29, the goals of education, including the full development of a child's personality, talents and abilities, respect for human rights and fundamental freedoms, etc. The lack of a single definition of education is something that was mentioned in the World Conference on Education for All 2(EFA) held in 1990, and the difference of different criteria in different societies. But the question that is raised here is that the right to education in other levels (other than elementary) is also free? The American Declaration of Human Rights stipulates in its Article 12 that" education must be free at least in the initial stages" and Article 17 of the Declaration of the Rights of the Child also states the same. Paragraph 1 of Article 26 of the Declaration of Human Rights also states that" Education should be free at least in the primary and elementary stages" and it follows the procedure of the previous two documents . The article mentioned in all the documents shows that the governments should also be ready to expand the provision of free education in sections above the elementary level. Part C of Clause 2, Article 13 of the Covenant :on Economic, Social and Cultural Rights stipulates" Secondary education, including technical .and professional education,

[1] Sima Sharifi, *Supporting children's right to education in the light of international documents* , Master's thesis of Payam Noor University, Tehran 1989, p. 87.

should be made available to all in general and by any possible means Even if possible, it should be provided for free. The 1989 Convention on the Rights of the Child also supports education in its Article 28 by mentioning educational levels, and in Article 29, the goals of education, including the full development of a child's personality, talents and abilities, respect for human rights and fundamental freedoms, etc. mentions The lack of a single definition of education is something that was mentioned in the World Conference on Education for All (EFA) held in 1990, and the difference of different criteria in different societies was mentioned as one of the reasons for this.[2] But the question that is raised here is that the right to education in other levels (other than elementary) is also free? The American Declaration of Human Rights stipulates in its Article 12 that" education must be free at least in the initial stages" and Article 17 of the Declaration of the Rights of the Child also states the same. Paragraph 1 of Article 26 of the Declaration of Human Rights also states that" Education should be free at least in the primary and elementary stages" and it follows the procedure of the previous two documents . The article mentioned in all the documents shows that the governments should also be ready to expand the provision of free education in sections above the elementary level. Part C of Clause 2, Article 13 of the Covenant :on Economic, Social and Cultural Rights stipulates" Secondary education, including technical .and professional education, should be made available to all in general and by any possible means Even if possible, it should be provided for free.[3]

THE RIGHT TO EDUCATION

The right to education is often classified under economic, social and cultural rights. It is said to impart the skill and moral rules that enable the group to live. This right is only in the category of support rights but not freedom, which is also a negative right. However, what is expected of this right in modern human rights is that this right is seen as a positive right, a right that can be demanded from the authorities. The government should take care of food and health, but also education, which shows the great importance of this right among economic, social and cultural rights. Education plays an important role in empowering people and preparing them for participation in social life, and a person deprived of education can hardly grow and progress in society. On the other hand, education has a multiple role and function both as a human right and as a necessary tool for

[2] Education for all: World Conference was held in 1990 in Jamatin, Thailand, organized by five international organizations UNESCO, UNICEF, UN Population Fund, World Bank and United Nations Development Program.

[3] Asma Akbari, Atefeh Abbasi, "An approach to the right of children to be educated by parents in domestic laws and international documents", *Academic jurisprudence and Rights Family* , 2017, No. 74, p. 233.

understanding other human rights. Education is the basic tool without which low-income and marginalized adults and children cannot improve their living standards and participate seriously in society. Education can play a very important role in empowering women in protecting children from economic exploitation and sexual abuse, promoting human rights and democracy and protecting the environment as well as population control.[4]

The right to education from the point of view of international legal documents on the fundamental human rights

This right is in the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Articles 13 and 14). The Convention on the Rights of the Child (Article 28) and the European Convention on Human Rights and Fundamental Freedoms Article 2 of the first protocol and many other international and regional declarations and documents have been defined. However, many people are still deprived of access to this important right. Nearly 93 million children in the world are deprived of access to education. Also, more than 760 million adults around the world are deprived of access to education. In such a situation, the right to basic education is very important.[5] Hence, it is the duty of governments to implement basic education programs within the framework of fulfilling international obligations to respect economic, social and cultural rights. The Committee of economic, social and cultural rights also in its interpretation No. 13, pointed out that primary education should be the minimum in terms of compliance with international obligations. Otherwise, such behavior will be treated as a breach of contract.

CONVENTION ON THE RIGHTS OF THE CHILD

In 1959, the United Nations published the Declaration of the Rights of the Child in which an effort was made to support all the different aspects of the rights of the child. But since this declaration did not create an enforceable obligation for countries as it should, it is necessary to have a legal document in this area that can properly support the rights of the child. The United Nations Declaration of 1959 had only the value of the resolutions of the United Nations General Assembly and was not able to support children's rights as expected. On the other hand, the increase in the exploitation and abuse of children, the cruelty towards them, made the adoption of a new legal instrument even more necessary. Until

[4] Mohsen Zabihi, *A comparative study of the right to education of children in Iranian, French and international laws,* Master's thesis of Payam Noor University, Tehran, 2015, p. 83.

[5] Mehdi Anoushe, *The right to minimum education in the framework of the international human rights system,* Master's thesis of Allameh Tabatabai University, Tehran, 2019, p. 45.

1978, Poland proposed works on child protection and prepared a draft and submitted it to the United Nations Commission on Human Rights. This draft was presented by the Secretary-General of the United Nations to member countries and organizations to give their opinions in this regard.[6] Finally, after long studies and 10 years of discussion and dialogue among members on the Convention, its text was approved by the United Nations General Assembly in 1989 in the form of a resolution. Our country also conditionally approved the Convention in March 1972 by the Islamic Council. The adoption of the Convention was conditioned by the fact that the government of Iran considered the condition of accession in such a way that the purpose of the Convention contradicts domestic laws and Islamic standards in any case and at any time. It was decided that this would not be necessary for the Islamic Republic of Iran.[7] In other words, the government of Iran did not make a fundamental distinction between internal laws and the provisions of the Convention, and only in some minor cases where there was a conflict following internal laws and Islamic standards. Following the approval of the Guardian Council, the Government of Iran submitted the instrument of ratification to the United Nations and its provisions entered into force on 22 August 1998. Before the adoption of the Convention on the Rights of the Child in 1989, the exact limit of the rights of the child was not precisely defined and the protections that should be provided to this vulnerable group were not implemented. But by approving the Convention, the international community took an effective step forward and identified solutions to support children and their rights. Also, this task was created for countries to take steps to implement and realize the objectives of the Convention by determining the position of the Convention on their territory.[8] One of the most important features of the Convention is its breadth and scope. This means that its content includes all the children of the world, regardless of their gender, ethnic group or race. Also, this Convention has an effort to support the rights of the child in all their different aspects. There is no hierarchy or superiority between the principles of this Convention.[9]

---

[6] Nahid Baligh, *The Convention on the Rights of the Child and Its Effectiveness in Iran's Domestic Law*, Faculty of Law and Political Sciences of Tehran University, 1st edition, 1983, p. 4.

[7] Mohammad Ali Amiri, *Thinking about the future developments of education and training,* Organization publications, Tehran 1986, p. 72.

[8] Joel H. Spring, *The Universal Right to Education: Justification, Definition and Guidelines,* Lawrence Associates, 2000.

[9] Convention on the Rights of the Child, UNGA, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, retrieved from: https://www.refworld.org/docid/3ae6b38f0.html, 5.5. 2023.

Interpretation of the provisions of the Convention on the Rights of the Child

Paying attention to children's right to education, like their other rights, is one of the topics covered by the Convention. In its articles 28 and 29, the Convention deals with the category of children's right to education.

Article 28 states:

"1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3.States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries".

It follows from the above that the Convention, like most existing international documents in the field of the right to education, divided the educational phases into three phases: primary, secondary and higher. The Convention declared education at the primary stage to be free and compulsory. The governments of the contracting states are obliged to provide education in the other two phases so that it is accessible to all. Of course, the benefits of higher education depend on people's talents and abilities.[10] Article 28 of the Convention is no mention basic education and it seems from there that there is a vacuum in this field. In fact, the Convention leaves the situation of this group without a task by not mentioning basic training, and it can be said that it is not clear that from the point of view of the Convention, these people should be trained. Education should be in the elementary section or in another section. Documents such as the Covenant of Economic Social, Cultural Rights or the Convention on Combating Discrimination in the Matter of Education, in addition to referring to different

[10] Nahid Baligh, *op.cit.,* p. 4 .

sections of education, have referred to basic education and so on. The arrangement also supports adults who have not benefited from primary education. This article is a weakness that can be seen in this article of the Convention.[11] Point b) of the first paragraph of Article 28 "Professional training of lawyers" mentions one of the examples of secondary education. All other documents that have dealt with the category of children's right to education have used the phrase "technical and professional education". Technical and professional education is meant to teach the skills needed by children and issues that need to be used in the field of work. But regarding what is meant by general education and what issues does this type of education include, I must say that I have not found any document or source in this field that defines this form of education. But it seems that since this type of training comes along with professional training, it has a concept almost similar to it. That is, the training of skills that a person needs in his daily life and when facing different issues. Teaching issues such as methods of solving everyday problems, how to use today's technologies, etc., can be considered as part of general education.

Article 29 of the Convention also states:

"1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State".[12]

The education that the child has the right to benefit from is an education that develops the child's talents and abilities both physically and mentally, giving him

[11] Eugee Verhellen, *Convention on the Rights of the Child: Background, Motivation, Strategies,* Garant Publishers, 2001, p. 22 .

[12] Sharon Detrick, *Commentary on the United Nations Convention on the Rights of the Child,* Martinus Nijhoff Publishers, The Hague, 1999, p. 18.

the skills he needs in his daily life learn to respect parents, cultural identity, values. Therefore, the mere access of children to education and the fact that they have the right to education is not enough, what the child learns and in other words, the content of education is not lower in importance than having the right to education. What can be said in general about this article is that the Convention tries to eliminate all ethnic national and religious boundaries in the field of education. In this sense First of all, it recognizes the right to education for all children without any discrimination. In this regard, there should be no difference between girls and boys, physically or mentally disabled children with normal children. Secondly, the Convention tries to teach the principle of" non-discrimination and equality" to the child, and this can be clearly deduced from the points c) and d) of the first paragraph of the Article. Since the contents mentioned in this article are described in general terms and their details are not specified precisely, some countries may avoid legislation in this field, but a committee which was formed in 2001 to interpret the Convention on the Rights of the Child has strongly advised the countries to set laws and regulations in order to implement the provisions in Article 29.

EXAMINING THE PRINCIPLE OF COMPULSORY, FREE AND UNIVERSAL EDUCATION

As mentioned earlier, the progress of today's societies and the diversity of human needs have caused more attention to be paid to education. There is, therefore, education is offered at the general level become in societies where the principle of universal education is accepted, benefiting from a certain ceiling of education is considered the right of all individuals, and the institution that is responsible for public education is a duty rather than a means. Following the principle of universality of education, another principle is proposed, which is that education should be compulsory and free.[13] A task and responsibility is created for the families, according to which the family is obliged to participate in the realization of this principle. It is for this reason that it is seen in different societies that following the principle of universality of education, it is mandatory to enjoy this right up to a certain curriculum. Another principle that is tied to the principle of compulsory education is that it should be free. Why the family can't be forced to work which entails a financial commitment. Also, it can be determined that the family fulfills its financial obligations, but because of this there is a failure in the application of the principle of universal education.

Free education

The duty of governments to provide free education for children varies according to the educational stage in which the child is. In this sense, their duty in

[13] Ebrahim Kazemipour, Education in the Information Society, Iran's UNESCO National. Commission, Tehran, 1984, p. 12.

providing free education in the primary stage is heavier and decisive. After all, this is indicated by the regulations, which reduces the intensity of action. Paragraph 1 of Article 26 of the Universal Declaration of Human Rights stipulates that education should be free at least in the initial stages. A similar solution is in Article 28 of the Convention on the Rights of the Child. According to paragraph 1, article 2 of the International Covenant on Economic, Social and Cultural Rights, the countries that are parties to the covenant, which have not been able to make education in the elementary section compulsory and free in their country, should compile a program for a period of 2 years and spread it all over the country. Article 14 of the Covenant states that governments should determine the time period in which they would make elementary and primary education compulsory and free. The reasons why this time period is justified are defined in more detail in the program. Countries that have accepted the principles of compulsory and free primary education, but have not yet implemented it, should also prepare and compile this program.[14] Article 30 has supported the principle of free education.[15] The constitution of our country has also confirmed this principle. In the third paragraph of the third principle of the Constitution, the government is obliged to provide free education and physical training for everyone at all levels and to generalize and facilitate higher education. Article 30 states that the Government is obliged to provide free education facilities for all the people until the end of secondary school and expand the facilities of higher education free of charge to the extent of the country's self-sufficiency. By interpreting the third paragraph of the third principle, it is not possible to distinguish what is the government's obligation regarding the coverage of free education and at what level? Because in the first part of this article, the government is obliged to provide free education for everyone at all levels, but in the rest of the article, the generalization and facilitation of higher education is mentioned. The question is does the duty of providing free education include all levels and even higher education? Considering only the third principle of the Constitution, both of the following interpretations can be defended First; The duty of the government regarding the provision of free education includes all levels of education and extends to higher education as well, and the generalization and facilitation of this type of education while providing it for free is not considered an allocation to the first part. The duty of governments in the field of providing free education includes only primary and secondary levels, and the second part of this paragraph is the assignment of the first part. In other words, in the first part of this paragraph, the legislator stated the general rule, which is that education is free at all levels, and in the second part, by stating that higher

[14] Manouchehr Tabatabai Motmani, *Human Rights and Public Freedoms*, Tehran University Press, 2012, p. 322.

[15] Article 3 of the Constitution of the Islamic Republic of Iran states: "The government of the Islamic Republic of Iran is obliged to provide free education and physical training for all, at all levels, and to facilitate and generalize higher education".

education should be generalized and facilitated, he presented a special rule that exists regarding higher education.[16] As it was mentioned earlier, if the third paragraph of the three principles of the Constitution is considered alone, the existence of ambiguities is unavoidable, but if the third principle of the law is placed next to the mentioned principle is ensured free education at all levels. The second part of this principle clearly states that expanding the means of higher education to the extent of the country's self-sufficiency for free is one of the duties of the government in the field of education and upbringing. With the explanation that in our country, the government is responsible for providing free education and training at all levels of education, including higher education, the establishment of non-governmental schools and universities that their management through fee collection is against the main principles of the Constitution. It seems that the way for the continuation of the education of the prosperous class has been opened and it is considered unfair to the middle and weak classes of the society with principles such as principle 19, the principle 20 and paragraph 9 of the third principle of the Constitution with which it is in conflict.[17]

Mandatory education

It is not disputed that at the international level, providing education for children who reach a certain age is considered one of the government's obligations. On the other hand, the reality is quite different in developing countries. In many of them, children for various reasons, including inability to pay for education, unwillingness of families to educate their children, long distances between schools and homes, are unable to secure free education. They are deprived of education even at the primary level. Compulsory education is prescribed in many international documents. Thus, Article 26 of the Universal Declaration of Human Rights stipulates that, "primary education is mandatory. Secondary education should become common, and higher education should be open to all with full equality, so that everyone can benefit from it according to his talent". Article 28 of the Convention on the Rights of the Child also refers to compulsory education and the provision of secondary and higher education. In all the mentioned instruments of international law, it only talks about compulsory basic education. Compulsory education at the secondary and higher level depends on opportunities, primarily on the economic situation in the country. The first step governments take to make education compulsory is to make it free. Therefore, primary education is mostly compulsory, while higher education depends on the will and ability of the people, until governments reach an appropriate economic level to be able to bear the costs

[16] Mohammad Esdinejad et al., "The right to education and upbringing of children in Iran's laws and human rights documents", *Scientific Journal of Jurisprudence and Family Law,* , 2014, Vol. 20, No. 64, p. 182 .

[17] Seyyed Mohammad Hashemi, *Human Rights and Basic Freedoms,* Mizan Publishing House , Tehran, 2013, p. 218 .

of studies. On the other hand, the economic status of families largely determines the possibility of secondary and higher education. For the majority of families who do not have sufficient income, their children do not have the opportunity for education if there is not already an organized system of free education.

ERP IN ELIMINATING DISCRIMINATION AND IMPROVING THE EDUCATIONAL STATUS OF CHILDREN PROJECT

In addition to supporting the rights of children to enjoy compulsory, free education, there have been positive actions in this field that have a practical aspect at different levels and in different regions. Among them is the Education Right Project, in short - ERP. This project was initiated in November 2000 by the Center for Legal Studies (an institution with more than 20 years of experience in the field of human rights in South African countries) and the Educational Policy Unit (which has been in operation since1987). Project was launched and its goal is to promote compulsory education and make it free in South African countries. The ERP project removes any discrimination in terms of gender, economic status and other differences. The project plans free and equal education for everyone as a basic right. The project confirms that the current education system is not aligned with international human rights standards (the Convention on the Rights of the Child and the African Charter on the Rights of the Child, which are accepted by South African countries). Numerous difficulties and large bureaucratic procedures were observed in the implementation of the ERP project. However, the project itself has increased the efforts of people from different communities who have become active in the field of education, which gives hope that the situation will change.[18]

THE RIGHT TO EDUCATION OF CHILDREN IN THE CONSTITUTIONS OF DIFFERENT COUNTRIES

At the national and domestic level, the Constitutions of many countries guarantee everyone's right to education. If the basic or regular laws of the country do not support the right to education, but the country adheres to international standards in this area, it can be considered that the right to education is guaranteed. The purpose of guaranteeing this right is only to mention it in laws, and not to guarantee the benefits of this right in practice. In the following, we briefly present the solutions present in the Constitutions of some countries:

Italy

Article 34 of the Italian Constitution stipulates that "education is free for everyone". Primary education is compulsory and free for at least 8 years.

[18] Sima Sharifi, *Supporting children's right to education in the light of international documents*, *op.cit.,* p. 39.

Deserving and talented people have the right to complete higher academic degrees even in the case of financial incapacity. In order to achieve this right, the republic has the right to decide on educational scholarships and allocating rights for families and other types of assistance that must be done through the holding of the entrance exam.

Belgium

Clause 3 of Article 24 of the Belgian Constitution establishes: "Everyone has the right to education in order to respect fundamental freedoms and rights. Education is free until the end of the compulsory education period. All students in compulsory education have the right to receive moral or religious education at the expense of society".[19]

Spain

According to Article 27 of the Constitution of this country, "all people have the right to education and knowledge." Primary education is compulsory and free".

Japan

Principle 26 of the Japanese Constitution is devoted to the category of education and upbringing and it states: "All people have the right to the same education according to their ability, in the order that the previous law. All people are obliged to provide their boys and girls with Conventional education in accordance with the law. This training will be compulsory and free".

South Korea

The matter of education and upbringing is included in principle 31 of South Korea's constitution and indicates: "All citizens have the right to receive equal education according to their abilities and talents." All citizens are obliged to provide at least elementary education and other education prescribed by law for their dependent children. Compulsory education is free and the government encourages permanent education of citizens".

Algeria

The guarantee of the right to receive free education and upbringing is considered in principle 53 of the Algerian constitution. This is the determining principle: "The right to benefit from education and upbringing is guaranteed. Education and upbringing are free under the conditions specified in the law. Primary education is compulsory and the government supervises equal access to education and vocational training".

[19] Reza Vakili Fard Amir, The Constitution of Belgium, Publications of the Office of International Agreements of the President, Tehran 1984, p.12 .

Egypt

Articles 18, 19, and 20 of the Egyptian Constitution deal with the issue of education. They stipulate: Article 18: "The government is responsible for guaranteeing public education especially primary education, which is compulsory, and should try to guarantee other stages of education as well". Principle 19 prescribes: "Religious education is one of the important subjects of public education". Principle 20 confirms that: "Educational institutions and schools are free at different levels".

Swiss

The Swiss Federal Constitution also deals with education and upbringing. It stipulates that: States provide the necessary facilities for elementary education, which must be completed and under the management of government officials. The mentioned course is compulsory and free in public schools".

Iran

The principle of CMM of our country's constitution has also supported the right to education with this statement: "The government is responsible for providing free education and training facilities for the entire nation until the end of the medium period and to expand the facilities of higher education for free up to the country's self-sufficiency".

EDUCATIONAL RIGHTS OF REFUGEE AND ASYLUM-SEEKING CHILDREN

The Convention on the Rights of the Child contains provisions dedicated to refugees.[20] Article 22 stipulates that the signatory governments of this treaty, by taking appropriate measures, guarantee the rights of children who are recognized as refugees in terms of domestic or international laws. These rights include humanitarian assistance in the direction of The realization of all the rights contained in this agreement and other regional and international agreements that are based on the provision of human rights of the child and regardless of whether the child is alone or with parents or with another person. The parties to the Convention shall make every effort to provide, through cooperation with the

[20] The first paragraph of Article 22 of the Convention on the Rights of the Child stipulates: "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties".

United Nations or its affiliated organizations or with the help of other responsible regional or extra-regional organizations that are in the field of child protection or in connection with the United Nations provide all benefits for children. There is an obligation to look after refugee children and help them find their parents or next of kin. This applies to all categories of children. Since Article 28 of the Convention guarantees children's right to education, governments are obliged to recognize this right for children, especially in relation to the acquisition of primary education. Also in terms of vocational education that can be cheap or free for people with low incomes. Governments are obliged to facilitate enrollment in higher education, as well as career counseling that would be available for children. Namely, such solutions try to reduce the number of children who drop out of school. At the same time, measures are being taken to ensure regular school attendance. The member governments of the Convention are obliged to do their best to ensure the process of education in schools in a decent manner in accordance with the provisions of this Convention. Governments welcome international cooperation in educational affairs, and especially pursue the goal of eradicating illiteracy and expanding technology and knowledge and in this case, more attention is paid to the needs of developing countries. One gets the impression that the provisions of the aforementioned international Conventions include refugee children and children who do not have this status. Education should be free for all categories of children. The Convention on the Rights of the Child obliges all member states to respect these rights for refugee children, which additionally enables respect for children's right to education. The measures taken to realize this right since 1989 have focused on free primary education and encouraging the development of various forms of secondary education, the availability of educational and professional information and guidelines for all children. In this sense, international cooperation should contribute to the eradication of ignorance and illiteracy. Modern education is one of the duties of the countries party to the Convention.[21] Article 29 The Convention also deals with matters such as the full development of the personality, talents and mental abilities of children and the development of respect for human rights and freedom. The basic principles mentioned in the United Nations Charter are the development of respect for the child's parents and the cultural identity of the child's language and values and the national values of the country in which he lives. Preparing children to lead a responsible life in free universities and developing respect for the natural environment is a part of the Convention on the Rights of the Child (22 of Article 1 Paragraph). With regard to the education of refugee children, states that countries that are members of international human rights Conventions or the Convention on the Rights of the Child must provide guarantee the rights of refugee children.

[21] Abbas Momeni, Refugee children and the right to education in the international human rights system, Master's thesis of Payam Noor University, Tehran, 2012, p. 83.

EDUCATIONAL RIGHTS OF MENTALLY DISABLED CHILDREN

The history of paying attention to disabled people in the international field goes back to the Universal Declaration of Human Rights, which was approved by the United Nations General Assembly in 1948. Paragraph 1 of Article 26 of this document declares: "Everyone has the right to benefit from education. Education should be free to the extent that it is related to elementary approved and basic education"; also, the Universal Declaration of the Rights of the Child adopted in 1959 by the General Assembly, in its five principles, calls for special attention to the education of physically and mentally challenged children. The Convention on Economic, Social and Cultural Rights also deals with the issue of compulsory education for all. In Article 13 of the Convention, it is stipulated: "(...) the countries party to this covenant acknowledge that in order to fulfill this right a) primary education must be made available to the public free of charge, b) Secondary education in its various forms, including technical education and secondary professional should be generalized and made available to the public with all appropriate means, especially the gradual normalization of free education, c) Higher education should be made available to the public by all appropriate means, especially the gradual normalization of free education with complete equality based on everyone's talent, e) The development of the network of schools in all grades should be actively pursued and (...)" This principle is perhaps the most important international documents rule-making related to the right to education. The Convention on Economic, Social and Cultural Rights elaborates in more detail the obligations of governments regarding the implementation of compulsory free education. Also, the United Nations General Assembly approved in 1971, education for all. On December Declaration on the Rights of Mentally Handicapped Children, stipulates rights for mentally handicapped children and tasks for the government. Declaration from 1975, guarantees security and having and practicing a profession. On December Declaration on the Rights of the Disabled was approved by the United Nations General Assembly, which in its introduction It has pointed to the observance of human rights and fundamental freedoms so that it can be considered as a basis for supporting the power of the petitioner. Contracting parties to the Convention on the Rights of the Child are obliged to pay attention to persons with disabilities.[22] It supports their presence in society and their individual growth through the provision of educational, health

[22] Clause 3 of Article 23 of the Convention stipulates: "Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development".

and rehabilitation services. Such a solution is only intended to consolidate the rights recognized in international documents regarding the applicant's power. In addition, the tone of this provision has the force of recommendation, which means that it is not mandatory *stricto sensu*. It allows for a broad interpretation of the government's duty to provide special protection for children. However, governments are obliged to provide compulsory and free primary education for all and to encourage the development of various forms of secondary education.[23] In 1999, the Committee for Economic, Social and Cultural Rights in Action Plans for Basic Education issued Comment No. 11 that it should not be mandatory as such. The defined mandatory element highlights the fact that neither parents nor guardians nor the state have the right to consider the decision on a child's access to primary education as optional. Also, the committee supported the rights of persons with disabilities through general recommendation number 5. According to this recommendation, the Committee on Economic, Social and Cultural Rights was obliged to monitor the implementation of the government's obligations to ensure that persons with disabilities can enjoy their rights. There is also the possibility of submitting petitions in this regard. The 2006 Convention on the Rights of Persons with Disabilities further encourages member state governments to take appropriate measures to ensure that persons with disabilities can enjoy guaranteed rights.[24] Article 24 of the Convention stipulates that:

"1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

c. Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

---

[23] Mohammad Ali Pour Motaghi et al., "The right to the education of mentally challenged children from the perspective of international human rights documents and Iranian rights", *Children's Rights Quarterly,* 2019, Vol. 2, No. 7, p. 8.

[24] K.D. Beiter,*The protection of the right to education by international law, Social and Cultural Rights,* Martinus Nijhoff, The Hague, 2006.

b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

c) Reasonable accommodation of the individual's requirements is provided;

d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deaf blind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities".[25]

[25] Convention on the Rights of Persons with Disabilities, UNGA, 13 December 2006, A/RES/61/106, Annex I, retrieved from: https://www.refworld.org/docid/4680cd212.html, 5.5. 2023; M. Bigdeli, *The rights of children and children with disabilities in domestic and international law,* Educational Science: Education of exceptional, 2007.

PRACTICAL MEASURES FROM THE CONVENTION ON THE RIGHTS OF THE CHILD

Education is the right of every child and one of the key rights guaranteeing the right of children to change their lives and their society. Without education, children are deprived of the opportunity to develop their full potential and to play a constructive role in the family and communities of their country and the world. The basic importance of the right to education in international conventions has been realized. The meanings of Articles 29 and 28 of the Convention on the Rights of the Child have been clarified in numerous declarations. According to Article 25 of this Convention, primary education must be free and accessible to all. If there is no demand for the right to education for refugee children, the only way is to realize this right.[26] Increasing education is one of the most important means available for empowering women in the family and society. In addition, educated women are less likely to die during childbirth. It is more likely that an educated family will have healthier children, that they will be better able to protect themselves and to eliminate the danger of human trafficking or other risks or forms of violence. Civil, political, social, economic and cultural rights are guaranteed in the United Nations Covenants on Human Rights. The rights of the child from the Convention cover all basic rights that belong to children up to the age of 18. These rights should also be guaranteed in the internal legal systems of the states. Monitoring the implementation of children's rights is the responsibility of the UN Committee on the Rights of the Child, which includes the member states of this universal world organization. This Committee submits annual reports on the respect of children's rights to the Third Committee of the UN General Assembly, which is usually accompanied by the release of a statement by the Chairman of the Committee on the adoption of a resolution on children's rights.[27] All governments of member states of the Convention on the Rights of the Child are required to submit regular reports. Based on those reports, the Committee reviews progress in the implementation of the Convention on the Rights of the Child. The Committee can give certain opinions and comments, express concern in certain cases regarding the deterioration of the situation. Certain information and findings are provided on this and are publicly published on the Committee's website. Non-enforcement of children's right to education, as a rule, also affects their other guaranteed rights. In a case study of the urban policy of the United Nations High Commissioner for Refugees (UNHCR) in Cairo, Stephen Sperl made it clear that government integration of the majority of refugees is the only solution to the realization and availability of these rights.

---

[26] Absjorn Eide, *Economice, social and cultural Rights*, Norwejian institut of Human rights, Norway, 2001.

[27] John Daniel, *Right to education: scope and implementation; General comment 13 on the right to education, Art. 13 of the International Covenant on Economic, Social and Cultural Rights,* Economic and Social Council, 2003, pp. 1–28.

THE INTERNATIONAL RESPONSIBILITY OF GOVERNMENTS FOR THE RIGHT TO EDUCATION

International responsibility is an obligation imposed by international law on a government to compensate another government for damages caused by a violation of international law caused by an act or omission. The given definition mentions only the responsibility of a government towards another government, but when governments assume obligations in the field of human rights, individuals or natural persons, and sometimes legal entities, acquires certain rights on the basis of which they can exercise their rights due to violations of their human rights. The right to education is also one of the basic human rights. Human beings have committed themselves to each other to guarantee human rights. This also applies to the governments of the countries where these persons enjoy human rights. States are in principle obliged to fulfill their international obligations regarding the protection of human rights of their own and foreign citizens on their territory. Regarding the exercise of the right to education, there is no adequate guarantee of the implementation of good practice. Those countries that violate this obligation usually come under pressure from the international community. Experience has shown that this pressure is often effective as it acts as a powerful lever to compel governments to fulfill their international obligations to respect human rights. With the pressure of public opinion, the international community is thus able to positively influence state governments to respect human rights, which, according to the author, is one of the most important elements of respecting human dignity.

CONCLUSION

From the previous analysis, it follows that in international legal documents, as is the case with the Universal Declaration of Human Rights, and then with the Convention on the Rights of the Child, education is elevated to the pedestal of a basic human right. Primary education is considered mandatory and universal; states may also have obligations to provide education in later stages as well. This is why secondary and higher education wants to be made and promoted accessible. The actions of organizations supporting children's rights, such as UNESCO and UNICEF, are also summarized in this framework. The provisions of documents recently approved in the field of the right to education are similar to the Universal Declaration of Human Rights in terms of general and fundamental rules, and differ only in some minor provisions, although more than half a century has passed since its adoption. Despite the social changes that have befallen humanity in the meantime, the need for education has remained the same. It is noted, however, that legislation supporting children's rights to education is not far advanced. Thus, the right to education guaranteed by the Universal Declaration of Human Rights is often ignored in international practice. There is

an obvious economic, social and cultural inequality between countries, and only some children benefit from this guaranteed right. Many children in the world are deprived of the possibility of its realization due to social conditions of life. It is true that currently around the world there are around 100 million children deprived of education, but the mere existence of these children and ignoring other living conditions that have changed and improved a lot since the aforementioned Declaration cannot be an excuse. Therefore, the right to education is objectively a necessity to meet the needs of children. This right as a human right states that all people - children and adults have the right to use education that is designed to empower them in the direction of their scientific, cultural, social and human growth and development. This type of education brings the necessary skills for an individual's active participation in life and provides the basis for social security, strengthening human rights, respect for opposing opinions, and expanding the provision of peace and sustainable development. Education must be of high quality. Quality education does not only mean physical access to schools and educational institutions, which shows the fulfillment of the government's obligations in the field of the right to education, but also education that must meet the conditions that guarantee quality education. If the right to basic education is not realized, children will not have the necessary skills for an honorable life in the social arena. There is a deep connection between the right to education and human rights, which has led international legal documents to pay special attention to this right. It is obvious that refugee children are the most helpless category of persons who cannot exercise their guaranteed human rights. Although this category of children should have equal rights with children in the host country according to the Convention on the Rights of the Child, they remain denied. Primary education would help here if it were free and compulsory. Article 28 of the Convention has no dilemma in this respect. However, the realization of this right in practice remained debatable, going from country to country. Some governments formally recognize the right to education for primary school education. At the same time, they confirm that it is mandatory and free of charge. However, the question is, with what capacities and possibilities they can achieve this right without significantly affecting its quantity and quality. According to the content mentioned in this article, the protection of children's right to education in international documents and declarations on human rights and the Convention on the Rights of the Child is not achievable to the extent to guarantee children's needs for their normal development. Although more than 30 years have passed since their adoption, these documents are not in accordance with the needs of today's age and the scientific progress of mankind. There are many shortcomings in guaranteeing children's rights that require new decisions and commitment from society that moves between international institutions and institutions that decide on human rights.

PRAVO NA OBRAZOVANJE DECE IZ PERSPEKTIVE KONVENCIJE O PRAVIMA DETETA I DOKUMENATA O LJUDSKIM PRAVIMA

APSTRAKT

Pravo na obrazovanje je jedno od osnovnih prava na globalnom nivou kojeg potvrdjuju mnoge konvencije i deklaracije, uključujući Univerzalnu deklaraciju o ljudskim pravima. Ovi medjunarodni pravni dokumenti ističu da je pravo na obrazovanje osnovni stub za druga prava i uslov za savršenstvo ljudske ličnosti svake osobe. U oblasti ljudskih prava, pravo dece na obrazovanje ima poseban značaj. Tako, Konvencija o pravima deteta, uvodi kriterijume za pravo na obrazovanje kao i uslove za zemlje članice Konvencije. Ti kriterijumi uključuju nediskriminaciju, besplatno obrazovanje, obavezno obrazovanje i primenu obrazovanja za ceo život. U iranskom pravu, ovi kriterijumi su takođe sadržani. Generalno uzevši, obrazovanje dece treba da bude garantovano na unutrašnjem zakonodavnom nivou. Pravo na obrazovanje uključuje poštovanje principa osnovnih ljudskih prava i fundamentalnih ljudskih sloboda. Sistem koji prihvata ove principe može služiti čovečanstvu. Naime, pravo na obrazovanje dece predstavlja jedno od ključnih prava kojim se može menjati život i društvo. Bez obrazovanja, deca su lišena mogućnosti da razviju svoj puni potencijal i da igraju konstruktivnu ulogu u porodici i zajednicama svoje zemlje i sveta. Posebno pitanje je, koliko je pravo na obrazovanje garantovano međunarodnim pravnim dokumentima i da li oni ispunjavaju dečje potrebe? U studiji koja sledi, autor će pokušati da razjasni ovu dilemu iz perspektive Konvencije o pravima deteta i dokumenata o ljudskim pravima.

Ključne reči: Pravo na obrazovanje, dokumentacija osnovnih ljudskih prava, Konvencija o pravima deteta, besplatno i obavezno obrazovanje

REFERENCES

1. Akbari, Asma, Abbasi, Atefeh, "An approach to the right of children to be educated by parents in domestic laws and international documents", *Academic jurisprudence and Rights Family* , 2017, No. 74.
2. Amir, Reza Vakili Fard, *The Constitution of Belgium, Publications of the Office of International Agreements of the President*, Tehran 1984.
3. Amiri, Mohammad Ali, *Thinking about the future developments of education and training, Organization publications,* Tehran 1986.
4. Anoushe, Mehdi, *The right to minimum education in the framework of the international human rights system,*Master's thesis of Allameh Tabatabai University, Tehran, 2019.

5. Baligh, Nahid, *The Convention on the Rights of the Child and Its Effectiveness in Iran's Domestic Law,* Faculty of Law and Political Sciences of Tehran University, 1st edition, 1983.
6. Beiter, K.D. *The protection of the right to education by international law, Social and Cultural Rights,* Martinus Nijhoff, The Hague, 2006.
7. Bigdeli, M., *The rights of children and children with disabilities in domestic and international law,* Educational Science: Education of exceptional, 2007.
8. Convention on the Rights of Persons with Disabilities, UNGA, 13 December 2006, A/RES/61/106, Annex I, retrieved from: https://www.refworld.org/docid/4680cd212.html, 5.5. 2023.
9. Convention on the Rights of the Child, UNGA, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, retrieved from: https://www.refworld.org/docid/3ae6b38f0.html, 5.5. 2023.
10. Daniel, John, *Right to education: scope and implementation; General comment 13 on the right to education, Art. 13 of the International Covenant on Economic, Social and Cultural Rights,* Economic and Social Council, 2003.
11. Detrick, Sharon, *Commentary on the United Nations Convention on the Rights of the Child,* Martinus Nijhoff Publishers, The Hague, 1999.
12. Education for all: World Conference was held in 1990 in Jamatin, Thailand, organized by five international organizations UNESCO, UNICEF, UN Population Fund, World Bank and United Nations Development Program.
13. Eide, Absjorn, *Economice, social and cultural Rights*, Norwejian institut of Human rights, Norway, 2001.
14. Esdinejad, Mohammad et al., "The right to education and upbringing of children in Iran's laws and human rights documents", *Scientific Journal of Jurisprudence and Family Law,* 2014, Vol. 20, No. 64.
15. Hashemi, Seyyed Mohammad, *Human Rights and Basic Freedoms,* Mizan Publishing House, Tehran, 2013.
16. Kazemipour, Ebrahim, Education in the Information Society, Iran's UNESCO National Commission, Tehran, 1984.
17. Momeni, Abbas, Refugee children and the right to education in the international human rights system, Master's thesis of Payam Noor University, Tehran, 2012.
18. Motaghi, Mohammad Ali Pour et al., "The right to the education of mentally challenged children from the perspective of international human rights documents and Iranian rights", *Children's Rights Quarterly*, 2019, Vol. 2, No. 7.
19. Motmani, Manouchehr Tabatabai, *Human Rights and Public Freedoms*, Tehran University Press, 2012.

20. Sharifi, Sima, *Supporting children's right to education in the light of international documents,* Master's thesis of Payam Noor University, Tehran 1989.
21. Spring, Joel H., *The Universal Right to Education: Justification, Definition and Guidelines,* Lawrence Associates, 2000.
22. Verhellen, Eugee, *Convention on the Rights of the Child: Background, Motivation, Strategies,* Garant Publishers, 2001.
23. Zabihi, Mohsen, *A comparative study of the right to education of children in Iranian, French and international laws,* Master's thesis of Payam Noor University, Tehran, 2015.

CONTESTATION OF UNILATERAL SANCTIONS IN INTERNATIONAL COURTS: DEVELOPING PRACTICE OF STATES

Olga MAGOMEDOVA*
Antonina LEVASHENKO**

ABSTRACT

Although legal aspects of unilateral sanctions are widely examined, one question still remains unanswered: is there any point in imposing unilateral sanctions from the perspective of international legal argumentation among States? According to the concept of international legal policy of States, the theses of which underlie the present research work, States strive for 'refinement' of existing international legal norms through argumentation and persuasion of other States. However, unilateral sanctions are not designed to persuade, but to coerce. It means that unilateral sanctions can influence international legal argumentation only to the extent that they create extra-legal factors, which a State has to consider by developing its international legal policy. The article advances the hypothesis that States may override proliferation of sanctions regimes by delegitimizing the very practice of imposing unilateral sanctions. For this end States can contest coercive measures of their counterparts in international courts or at the sites of other authoritative international institutions. Although this tactics of struggling with imposed sanctions is yet in progress, it is important to systemize gained experience of States and assess the developing approach of international adjudicators in treatment of coercive measures. Therefore the article overviews experience of Qatar, Iran, and Venezuela in seizing international courts and other institutions for contesting sanctions imposed on them. However, practice of elimination of unilateral sanctions via international legal proceedings may differ among States due to particularities of their international legal policies. The article explores applicability of the shaped practice for other States with example of Russia.

Key words: Unilateral sanctions, international legal policy, international courts, legal argumentation, legitimation

* Russian Foreign Trade Academy of the Ministry of Economic Development of Russia (VAVT), expert of the Russia-OECD VAVT Club. E-mail: olga.magomedova.96@mail.ru

** The Russian Presidential Academy of National Economy and Public Administration (RANEPA), head of the Russia-OECD RANEPA Center. E-mail: antonina.lev@gmail.com

INTRODUCTION

Over the last 20 years there is a visible explosion of works on unilateral sanctions and their legal regime.[1] This scholarly interest responds to proliferation of sanctions regimes in the world: by some estimates use of sanctions grew at an exponential rate, as far as number of sanctions doubled twice since 1985 to 2000 and since 2000 to 2010.[2] Nowadays, it is even possible to mount maps of States under sanctions: for instance, at the moment the EU base of imposed sanctions includes 33 jurisdictions, 42% of which are not sanctioned on the UN level.[3] However, while unilateral sanctions are a success only in 4 per cent of cases of their application,[4] they are much condemned by international experts for their negative effects on international economy and quality of life of ordinary people.[5] The UN Special Rapporteur, Alena Douchan, concludes on inherent contradiction of sanctions to principles of international law and values of democracy and human rights, in the name of which sanctions are imposed.[6] Nevertheless, scholarly reasoning on illegality of unilateral sanctions passes by the problem of legitimation of initially illegal practice'.[7] Hanspeter Neuhold characterizes this phenomenon as 'a qualitative jump' from frequently repeated unlawful behavior to a new international legal rule.[8] It means that frequency of use of unilateral sanctions under different pretexts over the last thirty years made them a daily

---

[1] Iryna BogdaNo.va, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the Impact of the Priciple of Common Concern of Humankind.* Brill Nijhoff, Leiden. Boston, 2022, pp. 378, etc; Unilateral Sanctions in International Law, edited by Surya P. Subedi, Hart Publishing, Oxford, 2021, pp.xiv + 364.

[2] Nicholas Mulder, The ecoNo.mic weapon: the rise of sanctions as a tool of modern war, 2022, p. 295 as cited in Avidan Cover, "Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia", Case Western Reserve University, School of Law Scholarly Commons, Faculty Publications, 2023, Vol. 100, No. 2189, p. 445.

[3] EU Sanctions Map. Retrieved from: https://www.sanctionsmap.eu

[4] In the well-kNo.wn critical assessment of the study of efficacy of ecoNo.mic sanctions introduced over the period from 1914 to 1990, Robert A. Pape estimated that sanctions succeeded only in 5 cases out of 115. See Robert A. Pape "Why EcoNo.mic Sanctions Do No.t Work." *International Security*, 1997, Vol. 22, No. 2, pp. 90–136.

[5] See Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan "Unilateral coercive measures: No.tion, types and qualification". A/HRC/48/59. 8 July 2021

[6] Most unilateral sanctions violate international law, says UN expert, XinhuaNet, July 13, 2021. Retrieved from: https://english.news.cn/20220714/70944b5f76484feea2384c5ed11a8c69/c.html

[7] Hanspeter Neuhold, "Legitimacy: A Problem in International Law and for International Lawyers?", In: Wolfrum, R., Röben, V. (eds) *Legitimacy in International Law*. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 194, Springer, Berlin, Heidelberg, 2008, pp. 335–352, P. 337.

[8] Ibid.

routine of interstate interactions as far as they stayed uncontested in international legal terms. In this regard two important questions should be addressed. The first question is whether application of unilateral sanctions can be in any way justified to keep tolerating them in existing international legal order. And, if not, the second question is how States under sanctions can counter their persistent rooting in international practice of States. These questions can be considered within the scope of the concept of international legal policy (hereafter – concept of ILP). According to the concept, every sovereign State conducts its individual policy in regard of international law by means of argumentation in order to reason or refute some position or action in view of other interlocutors. Therefore within the concept the matter of resistance to unilateral sanctions translates into the matter of place of unilateral sanctions in international legal argumentation of States. Part I of the present research work will summarize estimates of unilateral sanctions from the perspective of their justifiability in international legal discourse. Therefore our object of interest is possible contribution of unilateral sanctions into the international legal discourse on the underlying conflict. The purpose of sanctions is usually to change conduct of a targeted State, however, with coercion, not with persuasion. Therefore the interstate conflict fraught with sanctions regimes should be brought back to the dialogue in international legal terms, that is to say, to the dialogue on the *pari passu* basis. In this regard Part II exposes reasons to address institutions of international justice as a mean to settle the conflict on the basis of existing international legal rules. Part III overviews developing State practice of moving from a mere political rhetoric to legal argumentation in international courtrooms. This Part covers experience of Qatar, Iran, and Venezuela in contesting unilateral sanctions before international authorities. In the Part IV the article raises the question whether Russia could use these practices to resist offensive sanctions and what still impedes the State to resort to international judges. The concluding Part of the article exposes reflections on possible limitations for delegitimation of unilateral sanctions in international law.

CRITICAL ASSESSMENT OF UNILATERAL SANCTIONS

The question about meaningfulness of unilateral sanctions from the perspective of the concept of international legal policy of States is the question about possibility to work on international legal positions of States in other way than through argumentation. According to the classical concept of international legal policy of State, every step contributes to implementation of this policy, which is designed to influence common understanding of international legal rules in a way that other States could accept international legal positions or actions of the concerned State as legitimate.[9] But this legitimizing effect is achievable only through persuasion.[10]

[9] Guy Ladreit de Lacharrière, *La politique juridique extérieure*, Paris: EcoNo.mica, 1983, pp. 231.

As Ian Hurd explains, legitimation demands internationalization of values underlying a State's claim[11]. It means that other States can consider a position legitimate, if they get convinced that this position is appropriate in existing international legal order. Therefore a State should not declare its position, but argue it. Accordingly, international law develops in the argumentative practice of States.[12] As to unilateral sanctions, which have become a part of ordinary practice of States, their place among tools of implementation of international legal policy of State is questionable. On the one side, the application of unilateral sanctions may go with expression of a concrete international legal position, first of all, disagreement with practice of another State.[13] Moreover, the application of unilateral sanctions can have a particular *declared* goal to resist some intolerable conduct.[14] In terms of argumentation theory of international legal practice this objective translates to prevention of legitimation of inappropriate practice. But on the other side, unilateral sanctions operate not through persuasion, but through coercion of a State. To some extent persuasion and coercion seem able to bring the same results – an expected change in the conduct of the targeted State. However, from the perspective of development of international legal argumentation among States imposition of unilateral sanctions turns out useless. "Coercion is just incompatible with legitimation, which marks mutual understanding of what is acceptable or necessary in modern international law".[15] In fact sanctions do not contribute to development

---

[10] David Hughes, "How States Persuade: An Account of International Legal Argument Upon the Use of Force", *Georgetown Journal of International Law*, 2019, Vol. 50, No. 4, pp. 839–946.

[11] Ian Hurd, "Legitimacy and Authority in International Politics", *International Organization*, 1999, Vol. 53, p. 386.

[12] Ingo Venzke, International Law as an Argumentative Practice: On Wohlrapp's Concept of Argument. *Transnational Legal Theory*, 2016, Vol. 7, No. 1, pp. 9-19.

[13] As Abdul G.Koroma, the former judge of the ICJ, No.tes, that some can justify imposition of unilateral sanctions by the purpose to rectify a deviant conduct, however, in this case resort to sanctions presupposes determination of aNo.ther State's conduct as a violation of international law. It means, that a bare disagreement in positions is No.t eNo.ugh to introduce sanctions as a reasonable reaction. P. xvi. Abdul G.Koroma, "Foreword". In: EcoNo.mic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy and Consequences, eds. by Ali Z. Marossi, Marissa R. Bassett. Asser Press, Springer, the Hague, 2015. Subedi explains, that this view is based on Kelsen's statement that sanctions are a reaction to illegality, while in practice States apply unilateral sanctions for any political or ecoNo.mic reasons. See Unilateral sanctions in International Law, ed. by Surya P. Subedi, Hart Publishing, 2021, p. 8.

[14] No.tably, A.F. Lowenfeld referres to the purpose of unilateral sanctions by defining them as "measures of an ecoNo.mic character taken by states to express disapproval of the acts of the target state or to induce that state to change some policy or practice or even its governmental structure". Andreas F. Lowenfeld, *International EcoNo.mic Law*, Oxford University Press, 2002, p. 698.

[15] In this regard D. Bodansky opposes legitimacy to two other bases of influence in conduct of aNo.ther State – power and rational persuasion. See Daniel Bodansky, "Legitimacy in International Law and International Relations". Chapter. In Interdisciplinary Perspectives on International Law and International Relations: The State of the Art, edited by Jeffrey L. DuNo.ff and Mark A. Pollack, Cambridge: Cambridge University Press, 2012, p. 326.

of international law neither in case of consent of a targeted State to pursue the imposed mode of conduct nor in case of failure of attempts of unilateral coercion. If imposed economic constraints ultimately make this State agree to take certain steps, these actions performed under external pressure may come from consent, but not from free will.[16] It means that these actions are *apriori* derived of the capacity to legitimation. Accordingly, enforced international legal practice cannot contribute to development of international law for the lack of persuasive power which is essential for establishment of practice in the international legal order. Moreover, tools of coercion trammel argumentative practice of States. Their purpose is to influence the conduct of the targeted State without due reasoning. This is the root of the problem – unilateral sanctions address the State's conduct, but not its grounds which lie in the international legal policy of this State. Thus, unilateral sanctions bring no argument in them. At first glance may seem surprising that unilateral sanctions cannot be used as an argument. Given that States apply sanctions with a clear goal of counteraction to certain practices in a concrete context. Nevertheless the instrument of unilateral sanctions has no essential attributes of an argument. First of all, an argument should be addressed to a concrete subject, since the argumentation is *inter-subjective* practice.[17] It means that an argument should be at least laid down in the way that the targeted audience could perceive it as meaningful. However, unilateral sanctions are a tool of 'indiscriminate effect'. They affect mostly ordinary people and enterprises, those, who do not have even leverages over officials, whose decisions could have induced this negative reaction.[18] In this regard, it is notable how American officials reasoned the usefulness of unilateral sanctions against Venezuela by referring to their limited effect: the concerned sanctions were designed to target 'individuals from Maduro's government and its enablers'.[19] But at any rate sanctions do not intend *a State*, as a relevant destine. Secondly, an argument should concern a concrete object. Accordingly an argument should bring a response to a concrete question or an evaluative statement on a particular position. However, unilateral sanctions are usually introduced to affect a socio-economic situation in this State. The field of application and character of unilateral sanctions do not correspond directly to the accused position or actions of the respective state. In fact unilateral sanctions may be introduced for any reason, even non-declared one, but their scope of effects is

[16] Alain Pellet, "The No.rmative Dilemma: Will and Consent in International Law-Making", *Australian Yearbook of International Law*, 1989, vol. 2, No. 12, pp. 22–53.

[17] Ian Johnstone, *The Power of Deliberation*, Oxford University Press, 2011, pp. 240, P. 15.

[18] See the series of reports by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Alena Douhan. Retrieved from: https://ap.ohchr.org/documents/dpage_e.aspx?m=215

[19] Clare Ribando Seelke, Venezuela: Overview of U.S. Sanctions.Congressional Research Service. August 8, 2023. Retrieved from: https://crsreports.congress.gov/product/pdf/IF/IF10715?__cf_chl_tk=ZFC9vQWXMrHtkbMipvxkcSJZPNZ0zbonLtasc9HMnFk-1693804756-0-gaNycGzNC7s

independent of the original ground for their introduction. Thirdly, an argument should be formulated so as to *persuade an audience* in the best way possible. But, as has been noted above, types of applied unilateral sanctions are indifferent to the cause. Therefore there is no correlation between character of unilateral sanctions and probable 'message' in their introduction. Accessible tools of coercion depend exclusively on existing structures of interstate relations, such as energy dependence, and some objective (natural) factors, such as an outlet to the sea. Choice of particular measures depends on cost-and-value analysis rather on character of opposed practice. All things considered we cannot but conclude that unilateral sanctions are no different than any other *forms* of disagreeing. If unilateral sanctions are positioned as an argument, then this argument is pointless. In this way the concept of international legal policy explains why sanctions cannot ultimately deplete a problem in the international legal dimension – they do not address international legal positions of States. For this reason continuous exchange of sanctions is a dead-end way of managing misunderstandings and serious conflicts between States. Their application blocks renewal of interstate dialogue in the sense of robust substantive argumentation. While States continue making use of coercive measures, the conflict in international legal positions remains unresolved. This utter futility of unilateral sanctions draws them into a paradox, where long State's practice perceived illegal and condemnable in the existing international legal order becomes habitual in the international legal practice.[20] For that reason the sanctions regime can last for so long, and deliver no expected results. This is the case of unilateral sanctions of the United States against Iran, which endure more than forty years, but the tension between two States is still at an impasse.[21] Over this period Iran has adapted to continuing external pressure, but did not change its positions, which caused a protest of the United States in the form of unilateral sanctions. In a given setting it would be reasonable to try to clear this 'sanctions' hurdle blocking international legal argumentation by resorting to some third parties who do not speak another language than that of international law – exactly, to international judges.

GOOD REASONS TO APPEAL TO INTERNATIONAL COURTS

From the perspective of the ILP concept recourse to international courts is a risky affair. According to the classical theses of the concept submission of a dispute to an international court contradicts the active character of the international

[20] Hanspeter Neuhold, "Legitimacy: A Problem in International Law and for International Lawyers?". Op. cit.

[21] See Review of the United States' sanctions against Iran in Farzaneh Dashti, Bizhan Mirzaie, Jasieh Jahanmanesh, "The United States Sanctions against the Islamic Republic of Iran; from Unilateralism to Violations of International Human Rights", *Journal of Contemporary Research on Islamic Revolution*, Vol. 2, No. 5, Summer 2020, pp. 117–142. Retrieved from: https://jcrir.ut.ac.ir/article_77797_e45dd8b795e94c79bd4fdaaeed93b8a2.pdf

legal policy.[22] States are expected to be actively engaged in international legal discourse to argue their positions, support shared views of other States and provide meaningful counterarguments against adverse positions. But in case of lack of strong *legal* arguments States can invoke *non-legal* pertinent factors to strengthen conclusive force of their arguments. Moreover, States' arguments do not need perfectly fit in meaning of existing international legal norms as far as States can convince the audience in the necessity to adopt new norms or to reconsider meaning of valid ones. For this reason negotiations might be a preferable form of settling interstate conflicts.[23] At the same time arrangements achieved in international legal discourse are not definitive, it means that States can come back to a complicated question with time if they are not satisfied with current results or not ready to agree upon any scenario for solving a problem. However, in case of recourse to international justice States literally give up on all these advantageous options: in a courtroom States address their legal arguments to independent judges, therefore they cannot rely on non-legal factors, cannot influence legal reasoning of judges, receive a judgment based only on existing international law (except for cases where parties demand to judge *ex aequo et bono*) and have to accept judges' conclusions as final and binding.[24] What is all of it for? In fact the recourse to an international court may be a strategically weighted step. In this case States regard engagement of an international authority as a part of legitimization process. Yet in 1966 Claude pointed to the possibility of deliberate recourse to international institutions in the search of legitimacy. The researcher conceptualizes the legitimizing function of the United Nations organs which States use to gain an approval/ disapproval upon some actions and policies in international relations.[25] Here Claude focuses on the political legitimacy. From this point of view even the recourse to an international court reflects the demand for authoritative support of positions at political sites rather than intent to transfer the dispute to the judicial realm. In support of the thesis the scholar gives an example of the South West Africa case initiated by Ethiopia and Liberia in the ICJ in 1960 in order to legitimize their claims concerning the continued existence of the League of Nations Mandate of South Africa for the South West Africa made in the General Assembly.[26] However, in the concept of international legal policy the submission of a situation to an international court is a more artful mean of legal argumentation, where the possibility to refer to the authoritative judgment of an international court in the political discourse is only a side-effect of the

[22] De Lacharrière G. L. Politique Juridique Extérieure. Op. Cit. P. 198.

[23] *Ibid.,* p. 137.

[24] *Ibid.,* pp. 162-176.

[25] Inis L. Claude, I. "Collective Legitimization as a Political Function of the United Nations", *International Organization*, 1966, vol. 20, No. 3, p. 373.

[26] *Ibid.,* p. 371.

regularity which Venzke articulated as 'legality begets legitimacy'.[27] It means that an international court contributes to legitimization process as an authority which reasons in terms of international law, which embodies *accepted* standards of legitimate conduct. Consequently, States can turn to institutions of international justice for de-/legitimizing effects of their judgments. If the question in dispute is set in mode of zero sum game, the judgment will probably favorize one position over another. But in case of claim about a clear breach of international law stakes are even higher. International court can qualify the concerned action as a violation or not. In this regard all implications of which State could be wary (like a taken away opportunity to persuade audience in good reasons behind its positions) may be turned against its counterpart. The State initiates judicial proceedings to *delegitimize* a contended practice of another State. This is the case of contestation of unilateral sanctions. A courtroom might be an appropriate place for challenging sanctions for the following reasons. Foremost, format of 'duel', by words of Lacharrière, suits as well as possible the task to refute 'legitimability' of contested practice once and for all.[28] Assuming that 'legality begets legitimacy', the authoritative qualification of practice as unlawful disables legitimation process. Secondly, given that sanctions regimes can last for decades, the decision of bringing the issue under a court's consideration may significantly accelerate search of solution to the problem. In this regard the example of Qatar is especially valuable, since international legal proceedings were followed by practical removal of sanctions imposed against the State. Thirdly, the recourse to international justice is more advantageous for the State under sanctions, since before the court the legal argumentation prevails over all other considered factors, while at the negotiating table the State under sanctions would be in a known worse situation than the opposite party. Finally, this is the matter of a way in which question is put. Although the application of sanctions is widely condemned (at national level as well as at international sites), in practice regime of economic sanctions seems to come into common use.[29] These circumstances bring risks that 'shared perceptions of the legitimacy of an illegal practice' lead 'to the eventual emergence of the necessary *opinio juris*' for its 'legalization through the process of customary law'.[30]

---

[27] Ingo Venzke, "Why Use the Language of the Law in Global Politics? On the Legitimacy Effects of Claiming to Act Legally: Ingo Venzke", in Ian Johnstone, and Steven Ratner (eds), *Talking International Law: Legal Argumentation Outside the Courtroom,* Oxford University Press, 2021, New York, p. 31.

[28] De Lacharrière G. L. *Politique Juridique Extérieure. op. cit.,* p. 137.

[29] Mohamat R. clarifies how No.rms and principles of international law get breached with imposition of unilateral coercive measures. See Rahmat Mohamad, "Unilateral Sanctions in International Law: A Quest for Legality", In Ali Z. Marossi, Marisa R. Bassett (eds.) *EcoNo.mic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*. T.M.C. Asser Press, 2015, pp. 71–82.

[30] Hanspeter Neuhold, "Legitimacy: A Problem in International Law and for International Lawyers?". *op.cit.,* p. 338.

Consequently, it is necessary at the least to declare 'persistent objection' –as a disagreement not even with application of this tool to them, but with illegal nature of the much applied instruments. In consideration of the foregoing, the international courts can be regarded as suitable mechanisms for resistance to unilateral sanctions at the least in the international legal field. But the possibility to benefit from work of this mechanism is predicated upon the *legitimacy* of concerned international adjudicatory institutions. Unlike the intersubjective argumentation which is based on use of different techniques of persuasion, conclusions of an international court may be not so much a strong argument due to its persuasiveness as a weighty opinion due to reverence of the audience before its authority.[31] Yuval Shany calls such transfer of social evaluations from adjudicators to their decisions the *'legitimacy-conferring function'* of international courts.[32] Certainly this effect belongs to a general phenomenon where a governance structure shapes legitimacy of outcomes with its decision-making process.[33] For this reason international legal scholars pay much attention to determining necessary criteria of legitimacy of international courts.[34] Indeed, in search for legitimizing effects States put a high value on characteristics of an institution exercising agency of legitimation. This pattern could explain why a State may prefer to present a dispute right to an international court instead of following the procedure in a relevant conventional body. This is the case of Qatar which directly addressed the ICJ with claims about violations of the Convention on the Elimination of All Forms of Racial Discrimination without waiting for findings of the CERD Committee (more details in sections *The case of Qatar*). The problem is that, unlike authority of international political bodies that of international courts much depends upon substantive and procedural evaluations of their judgments. Therefore cumulated jurisprudence and elaborated approaches in legal reasoning also determine the choice of States not only between means of dispute settlement, but also among institutions for examination of a dispute.[35] The

[31] In this regard Bodansky distinguishes legitimacy from persuasion as two different basis of compliance with orders of an authority: while persuasion appeals to rationality, perception of something as legitimate is No.t necessarily based on its rational assessment. Daniel Bodansky, "The Concept of Legitimacy in International Law" In *Legitimacy in International Law*, Rüdiger Wolfrum, Volker Röben (eds.), Berlin: Springer Verlag, 2008, p. 312.

[32] Yuval Shany, "Assessing The Effectiveness Of International Courts: A Goal-Based Approach", *The American Journal of International Law* , 2012, vol. 106, No. 2, p. 246.

[33] Daniel C. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", *Yale Law Journal*, 2006, Vol. 115, p. 1490, P. 1519.

[34] Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman, Geir Ulfstein, "Legitimacy and International Courts – A framework", In *Legitimacy and International Courts*, Cambridge University Press, 2018, Cambridge, pp. 1–39.

[35] Nieke Grossman, "Solomonic Judgements and the Legitimacy of the International Court of Justice", In *Legitimacy and International Courts*, edited by Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, Geir Ulfstein, Cambridge: Cambridge University Press, 2018, pp. 43–61.

more interesting is the first practice of international institutions to consider unilateral economic sanctions under some or other international legal norms.

PRACTICE OF CONTESTING UNILATERAL SANCTIONS

The practice of contestation of unilateral sanctions in international courts is unique for every State. First of all, outside the context of unilateral coercive measures every State has a particular international legal policy and experience of engagement in international legal proceedings, which determine a State's attitude to international justice and, consequently, its disposition toward submitting a dispute to an international court. Secondly, reasons for which States face sanctions regimes much differ, accordingly, every State starts out from different background in its assessments of relevance of an appeal to international justice in its individual circumstances. Thirdly, States have at their dispose different legal instruments to contest unilateral sanctions in function of international agreements and international organizations to which they have acceded. Therefore the present article reviews cases of contestation of unilateral sanctions by concrete States – Qatar, Iran, and Venezuela.

The case of Qatar

Although before the diplomatic crisis in the Persian Gulf Qatar had little experience with settling disputes in international courts, but this experience can be estimated as successful. In 1991 Qatar initiated legal proceedings on a dispute with Bahrain about territorial sovereignty and maritime delimitation in the ICJ. And ten years later, the verdict remained quite favorable for Qatar's position.[36] In this regard Qatar had certain encouragement to seize international judicial institutions to settle a new conflict. In 2017 Qatar fell under a vast number of restrictions imposed by Saudi Arabia, the United Arab Emirates (hereinafter – the UAE), Bahrain and Egypt. The four States justified this concerted pressure on Qatar as a response to alleged violations of the Riyadh Agreements by Qatar. Notably, the States put the blame on Qatar for sponsoring terrorism, and therefore delivered ultimatum – to cease funding the media, activity of which undermined the security in the Gulf region, in return for lifting the economic and transport blockade.[37] In the situation of the diplomatic crisis Qatar opted for the way of legal contestation of imposed sanctions. In the absence of international legal rules prohibiting imposition of sanctions Qatar decided to contest each kind of

[36] Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the Qatar/Bahrain Case", *The International and Comparative Law Quarterly,* 2003, vol. 52, No. 1, pp. 53–80.

[37] Patrick Wintour, Qatar given 10 days to meet 13 sweeping demands by Saudi Arabia. The Guardian, June 23, 2017. Retrieved from: https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade

restrictive measures separately on the ground of relevant international legal rules. Consequently, every complaint has produced its special results. Firstly, complaints about violations of the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter – the CERD) against the UAE were even presented to consideration of two international institutions at the same time - the ICJ and the CERD Committee. Thereby Qatar benefited from the lack of a clear rule in the convention on conditions of resort to the ICJ, such as mandatory procedures aimed at bilateral settlement of a dispute or order of appeals to international institutions (articles 11-13, article 22). However, the ICJ and the CERD Committee came to opposing conclusions on the question whether the provisions of the CERD Convention cover measures imposed in regard of media companies: the CERD Committee confirmed that unequal treatment based on the nationality criterion constitutes discrimination in the meaning of the Convention, while the ICJ in his judgment on preliminary objections pointed to inapplicability of the Convention to the restrictive measures of the UAE. In this regard the ICJ came under criticism of legal scholars for inconsistency of legal reasoning.[38] Consequently, 'discriminatory restrictions' applied within the sanctions regime stay under examined in the international judicial practice. Secondly, complaints about restrictions for air transport were presented in the International Civil Aviation Organization (hereafter – the ICAO) for consideration by the ICAO Council on the grounds of the Chicago Convention on International Civil Aviation of 1944 (Article 84, hereafter – the Chicago Convention),[39] and of International Air Services Transit Agreement (Article 2, hereafter - IASTA).[40] Qatar claimed that airspace restrictions imposed by Saudi Arabia, Egypt, Bahrain and the UAE on Qatar's registered aircrafts breached their international obligations under the Chicago Convention and the IASTA. The counterparts raised objections against jurisdiction of the Council to consider the case for two reasons. The first reason is that the issue under consideration went beyond the subject scope of the international treaties on air space as far as the main issue is non-compliance of Qatar with Riyadh Agreements, while measures challenged by Qatar were only countermeasures to its conduct. The second reason is that Qatar did not meet the requirement of negotiations prior to the seizure of the Council. The dismissal of these objections by the Council led to contestation of the decision by the respondent States in the ICJ. However, the ICJ almost unanimously concluded on validity of the Council's reasoning by rejecting both claims about absence of

[38] Kaijun Pan, "Difference between the ICJ and the CERD Committee: A Comment on the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) Case", *Chinese Journal of International Law*, 2022, vol. 21, No. 1, pp. 209-210.

[39] Convention in International Civil Aviation. Done at Chicago, December 7, 1944.

[40] International Air Services Transit Agreement. Opened for signature at Chicago, on 7 December 1944.

the Council's jurisdiction as well as about procedural errors. It is notable, how the ICJ mirrored its approach to distinction of legal and extra-legal questions of a dispute formulated in the Nicaragua case of 1986 in its reasoning about capacities of the Council to treat the dispute, core questions of which fall outside the scope of the Chicago Convention and IASTA.[41] The Court pointed that 'the integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction'.[42] Such understanding of a complicated dispute works in favor of States which appeal to international justice to settle a politically colored controversy, although effectiveness of such settlement may be doubted.[43] Thirdly, complaints about trade-related restrictions were submitted to the Dispute Settlement Body of the World Trade Organization (hereafter – the DSB WTO) on the grounds of GATT, GATS and TRIPS provisions. Qatar requested consultations with the UAE (DS526),[44] Bahrain (DS527),[45] and Saudi Arabia (DS528; DS567).[46] Among four initiated proceedings only the dispute with Saudi Arabia about measures concerning the protection of intellectual property rights led to adoption of the panel's report in 2020.[47] But the conclusions supported the position of Qatar in

[41] ICJ. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment of 26 No.vember 1984, 1984 ICJ Rep. 293. P. 431–436, paras. 89–98. In the Judgement of 1984 the international judges No.ted, that political and legal dimensions of a dispute are No.t mutually exclusive, there it is possible to consider the same situation in different international institutions at the same time, that is to say *pari passu* (para. 93).

[42] ICJ. Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on Inter – national Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar). Judgement of 14 July 2020, para. 61.

[43] Dmitry V. IvaNo.v, Vladislav G. Donakanyan, "The ICAO Council as a Dispute Settlement Body: Theoretical and Practical Issues", *Moscow Journal of International Law*, 2022, No. 3, pp. 33–48. P. 42.

[44] DS526: United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. Retrieved from:https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm

[45] DS527: Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds527_e.htm

[46] DS528: Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. Retreived from : https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds528_e.htm; DS567: Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights. Retrieved from: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm

[47] Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. Report of the Panel. WT/DS567/R. Retrieved from: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567R.pdf&Open=True

the dispute. Qatar claimed that Saudi Arabia breached the provisions of TRIPS and GATT by refusing to apply criminal procedures and penalties to the company be out which practiced copyright piracy on a commercial scale, and by refusing to accord to Qatari nationals treatment not less favorable than to other foreigners. In result Qatari nationals were denied of possibilities to seek remedies for enforcement of their intellectual properties rights[48]. Saudi Arabia responded that it acted on the ground of *security exemptions* as provided in Article 73(b) (iii) of the TRIPS Agreement[49]. The panelists followed the arguments of the panel in the case *Russia – Measures Concerning Traffic in Transit* about applicability of security exemptions to measures 'taken in time of emergency in international relations' and even specified that 'emergency' covers 'severance of diplomatic, consular and economic relations' and thereupon concluded on presence of a relevant situation in relations between Qatar and Saudi Arabia.[50] But panelists refused to recognize measures taken by Saudi Arabia as related to protection of essential security interests.[51] International lawyers appraise conclusions of the DSB WTO, since they prevent unreasoned use of security exemptions to justify politically motivated actions.[52] Fourthly, complaints about suspension of postal relationships the four States and Qatar were submitted to the Universal Postal Union to institute an arbitration tribunal pursuant to the Article 32 of the Constitution of the Universal Postal Union[53]. After the meeting of the postal representatives of the concerned countries under the auspices of the Union in January of 2020, the States agreed to restore postal relations[54]. Without a direct transport link among countries on the back of Qatar's blockade the postal correspondence had to be transported through the territory of Oman.[55] Moreover, the interstate conflict went along with international proceedings with participation of private actors.[56] In 2018 the Qatari sports broadcaster 'beIN' filed claims

[48] *Ibid.,* paras. 2.46–2.47.

[49] WTO Analytical Index. TRIPS Argument – Article 73. Retrieved from: https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art73_jur.pdf

[50] *Ibid.,* paras. 7.257–7.266; 7.268

[51] *Ibid.,* para. 7.293

[52] Olga Kadysheva, "Neizvestnaya "sanktsionnaya voyna" i vozmozhNo.sti mezhdunarodNo.go parvosudiya" [UnkNo.wn "sanctions war" and the possibilities of international justice], *MezhdunarodNo.e pravosudie [International Justice]*, vol. 12, No. 4, p. 99.

[53] Arbitration pursuant to Article 32 of the Constitution of the Universal Postal Union (The State of Qatar v. The Kingdom of Bahrain). Retrieved from: https://pca-cpa.org/en/cases/250/

[54] Statement by the Director General of the Universal Postal Union. Published: 25.02.2020. Retrieved from: https://www.upu.int/en/Press-Release/2020/2/Statement-by-the-Director-General-of-the-Universal-Postal-Union

[55] Saudi, Egypt, Bahrain to resume Qatar post services despite dispute. Reuters. February 24, 2020. Retrieved from: https://www.reuters.com/article/uk-gulf-qatar-post-idUKKCN20I21V

[56] Ammar Saed Aldien, "Qatar: A new beginning for International Law in the Middle East", International Law and Politics, 2020, Vol. 52, pp. 685–693.

against Saudi Arabia on the ground of the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC Investment Agreement of 1981).[57] In 2019 Saudi Arabia was again invited to the arbitration proceedings by the Qatari pharmaceutical company 'Qatar Pharma'. The company sought to challenge the decision of the Saudi government to repudiate the tender contracts under which Qatar Pharma provided products in the amount of 24 million dollars. Qatar also seized commercial courts to resist the measures of private financial institutions, taken in support of Qatar's blockade. Qatar filed lawsuits against three banks of Luxembourg-based Banque Havilland, the United Arab Emirates' First Abu Dhabi Bank (FAB) and Saudi Arabia's Samba Bank for currency manipulations in the courts of London and of New York.[58] Engagement of banks in conspiracy schemes resulted in enormous penalties.[59] Not all legal proceedings initiated by Qatar led to legal statements (judgments, reports, etc.) on the merits of presented disputes, but Qatar achieved the most important result – elimination of unilateral sanctions without ultimatums and excessive concessions. In 2021 with mediation of Kuwait and the United States the parties of the conflict reached the Agreement on solidarity and stability, which marked the end of three-year blockade of Qatar. The example of Qatar's strategy of resisting to unilateral sanctions has already become canonical, since the State created a number of precedents in the international legal practice. Firstly, this is the first State's experience of *full-on engagement of international bodies* in elimination of 'sanctions regime' with existing legal procedures. Secondly, Qatar established a precedent in use of a mechanism of interstate complaints under the CERD Convention. Thirdly, Qatar contributed to the rare international practice of simultaneous submission of a case with the same facts of the matter and the same legal sources to two different international authorities. However, contrary conclusions of the CERD Committee and the ICJ left unclear whether it is possible to defend national business from the economic sanctions of foreign States with the CERD provisions. Nevertheless it can be concluded that in case of Qatar international legal proceedings have facilitated the elimination of restrictions, if not with authoritative conclusions, but at the least with their 'pacifying effects'.[60]

---

[57] beIN Corporation v. Kingdom of Saudi Arabia, UNCITRAL. Notice of arbitration of 1 October 2018. Retrieved from: https://www.italaw.com/cases/6862

[58] Eric Knecht, Dmitry Zhdannikov, Qatar sues Luxembourg, UAE, Saudi banks in FX manipulation case, Reuters, April 8, 2019. Retrieved from: https://www.reuters.com/article/qatar-currency/qatar-sues-luxembourg-uae-saudi-banks-in-fx-manipulation-case-idINL3N21Q287

[59] Claims of Qatar in the courtrooms led to national investigations of activities of financial institutions. Particularly, in may 2023 the British Financial Conduct Authority fined Banque Havilland £10mn for breaching the principles of integrity. Retrieved from: https://www.fca.org.uk/publication/decision-No.tices/banque-havilland-sa-2023.pdf

[60] Aloysius P. Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", *European Journal of International Law*, 2007, Vol. 18, Issue 5, p. 848.

The case of Iran

Among States seeking support of international justice in struggle against unilateral sanctions Iran is distinguished by considerable experience of participation to international legal proceedings. In first two cases considered by the ICJ Iran stood in as defendant – in Anglo–Iranian Oil Co (1951) and in United States Diplomatic and Consular Staff in Tehran (1979). But in these disputes Iran narrowed down its participation to letters exposing its views on the dispute and jurisdiction of the Court. In further four cases Iran appeared as claimant - Aerial Incident of 3 July 1988 (1989), Oil Platforms (1992), Certain Iranian Assets (2016), Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (2018). The particularity of these cases is that Iran made claims against a State, which usually prefers settling bilateral questions without interference of external opinions. Thereby Iran has contributed to the afore-mentioned regularity that small States opt for engagement of international adjudicators in disputes with powerful States to eliminate risks of extra-legal influence on the outcome of dispute.[61] Indeed, Iran is familiar with strong pressure in case of unsettled conflict: in 1952 the ICJ supported the position of Iran in the Anglo-Iranian Oil Company Case on the lack of jurisdiction to consider claims of the United Kingdom, thereafter the defeated party resorted to force to take over Iranian oil and to overthrow Iran's prime-minister.[62] That is why it is reasonable for Iran to seek dispute settlement in the courtroom for the entire world to hear. The first dispute initiated by Iran in the ICJ concerned the aerial Incident of 3 July 1988 was discontinued as far as the Parties settled the dispute by diplomatic means. The next case about attacks against the Iranian oil platforms did not come to expected results. The judges dismissed Iran's allegations about the United States' breaches of the Treaty of Amity of 1955 and denied reparations to Iran.[63] Scholars' estimates of the outcome are divided. Some international legal scholars criticized the ICJ for playing up to the interests of the United States.[64] Other scholars have appraised international judges for their shrewd judicial diplomacy, since despite refusal to qualify actions of the United States as a breach of a freedom of commerce under the Treaty of Amity between two Parties, international judges nonetheless did not recognize the American attacks on platforms as a proper measure of protection of

[61] De Lacharrière G. L. *Politique Juridique Extérieure*, *op.cit.,* p. 139.

[62] Sundhya Pahuja, Cait Storr "Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited", in James Crawford, Abdul G. Koroma, Said Mahmoudi, Alain Pellet (eds), *The International Legal Order: Current Needs and Possible Responses*, Essays in HoNo.ur of Djamchid Momtaz, Brill Nijhoff, 2017, pp. 53–74.

[63] ICJ. Oil Platforms (Zslamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, p. 161.

[64] Harvey Rishikof, "When Naked Came theDoctrine of "Self-Defense":What Is the Proper Role of theInternational Court of Justice inUse of Force Cases?", The Yale Journal of International Law, 2004, Vol. 29, pp. 291–342. P. 332. https://core.ac.uk/download/pdf/72839331.pdf

security interests. Thereby the judges implicitly qualified the American actions as unlawful use of force.[65] It should be noted that the dispute submitted by Iran in 1992 was much influenced by the general encouragement of small States to bring their controversies with powerful States to international courts on the back of Nicaragua's victory in the case on Military and Paramilitary Activities in and against Nicaragua.[66] In that case the ICJ rejected the claims of the United States about lack of the court's jurisdiction due to political character of questions submitted to the court, and thereby the judges limited possibilities of States to justify their actions otherwise than with international legal rules. The judgment on the merits of Nicaragua's case ultimately recognized the United States accountable for unlawful use of force. Such conclusions should have prevented the possibility of the United States to legitimize these and any similar actions against other States. For these reasons the not successful experience of Iran in the Oil Platforms case did not turn Iran from the means of international justice. In 2016 Iran resorted to the ICJ to dispute the measures taken by the United States against Iran and Iranian companies running business on the American territory. The challenged actions include unfair and discriminatory treatment of Iranian entities on the ground of national designation of Iran as a State sponsoring terrorism. The reason for initiating the dispute was a series of decisions of the US courts against Iran and its entities with a total sum of awarded damages of 56 billions of US dollars and consequent enforcement proceedings which led to seizure of Iranian state-owned companies.[67] Thereupon Iran claimed the violations of the Treaty of Amity of 1955 by the United States. In 2019 the ICJ rejected the preliminary objections of the United States in regards of the court's jurisdiction over the case.[68] In March 2023 the ICJ issued the Judgment on merits where it concluded that actions of the United States (which can be regarded as unilateral sanctions for the purpose of this research paper) violated the following provisions of the bilateral treaty:

– Recognition of juridical status of companies constituted under the applicable laws and regulations of either contracting Party (Article III, paragraph 1). The

[65] Seyed Jamal Seifi, "Judgment of the International Court of Justice in the Oil Platforms Case: Judicial Diplomacy in International Justice", *Journal of Legal Research*, 2003, Vol. 2, No. 4, pp. 43-76. https://jlr.sdil.ac.ir/article_44785.html?lang=en

[66] Natalie Klein, "Iran and Its Encounters with the International Court of Justice", *Melbourne Journal of International Law*, UNSW Law Research Paper No. 21–74, Vol. 2, No. 3, p. 26.

[67] Application Instituting Proceedings filed in the Registry of the Court on 14 June 2016. Certain Iranian Assets(Islamic Republic of Iran v. United States of America, p. 6.

[68] There have been many No.table publications commenting on the ICJ judgement of 2019. See e.g. Federica Paddeu, No.n-Precluded Measures Clause: Substance or Procedure? A comment on Certain Iranian Assets. EJIL Blog, March 6, 2019. Retrieved from: https://www.ejiltalk.org/No.n-precluded-measures-clause-substance-or-procedure-a-comment-on-certain-iranian-assets/ Chimène Keitner, World Court Rules on Iran Challenge to US Suits for Acts of Terrorism: An Explainer. Just Security, February 19, 2019. Retrieved from:https://www.justsecurity.org/62604/unpacking-icj-judgment-certain-iranian-assets/

judges underline that the provision covered all separate juridical entities, 'regardless of Iran's type of degree of control over them';[69]

– Accordance of fair and equitable treatment to nationals and companies of the other Party, and to their property and enterprises; non-application of unreasonable or discriminatory measures that would impair their legally acquired rights and interests; provision of effective means of enforcement of lawful contractual rights in conformity with the applicable laws (Article IV, paragraph 1). By this conclusion the judges emphasize that even assuming a legitimate public purpose of legislative acts and judicial decisions, the measures were 'manifestly excessive' in the prejudice of companies' rights;[70]
– Prohibition of seizure of the property of nationals and companies of the Party except for a public purpose, under condition of prompt payment of just compensation (Article IV, paragraph 2). The judges concluded that unlawful taking of property of Iranian companies resulted not from judicial decisions, but from unreasonable measures of the very legislative and executive acts that the national courts applied;[71]
– Maintenance of freedom of commerce and navigation (Article X, paragraph 1). This conclusion follows from the broad approach of interpretation of the term 'commerce' (as covering 'commercial exchanges in general').[72]

Although the international judges confirmed by majority vote recognized the United States accountable, they much differed in their estimates of some violations and interpretations of the invoked treaty provisions – the judgment on the merits is accompanied with nine separate opinions, three declarations and one dissenting opinion. The remarks concerned the Court's reasoning about establishment judicial expropriation,[73] nature of main activities of concerned entities as a ground for recognition as a company,[74] about interdependence of

[69] ICJ. Certain Iranian Assets (Islamic Republic of Iran v. United States of America). Judgment on the merits. 30 March 2023, para. 150. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf

[70] ICJ. Certain Iranian Assets, *op.cit.,* para. 156.

[71] *Ibid.,* para. 192.

[72] *Ibid.,* para. 215.

[73] Declaration of Judge Bhandari. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-06-EN.pdf

[74] Separate opinion, partly concurring and partly dissenting of Judge Robinson. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-07-EN.pdf ; Declaration of Judge Salam. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-08-EN.pdf ; Separate Opinion of Judge BenNo.una. Available at: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-03-EN.pdf; Separate Opinion of Judge Yusuf. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-04-EN.pdf; Separate Opinion of Judge No.lte. Available at: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-10-EN.pdf;

allegedly violated provisions,[75] interpretation of 'recognition of juridical status', of 'freedom of commerce' between States.[76] In general the main criticism relates to inconsistency of conclusions with international jurisprudence. What is important for States intended to contest imposed sanctions is that none of judges disagrees with conclusions on 'unreasonableness' of the measures.[77] On the ground of the found violations the United States shall provide compensation to Iran on a special agreement between parties, which should be achieved within 24 months since the issuance of the ICJ judgment (by April 2025) or on conditions which the Court could settle at the request of either Party on case of failure to reach agreement on the question of compensation. As of October 2023 Iran and the United States have not yet proceeded with determining conditions of prescribed compensation.

The case of Venezuela

Unlike Qatar and Iran, Venezuela did not gain impressive experience of arguing its positions in international courts, before it faced the urge of unilateral economic sanctions in 2017 on the back of political and socioeconomic crisis in the country. In 2017 the EU adopted the Regulation 2017/2063 imposing a range of restrictive economic measures against Venezuela.[78] In particular, the EU prohibited nationals of the EU member States to sell, supply, transfer or export equipment which might be used for internal repression; to provide technical assistance and other services related to goods and technologies listed in the EU Common List of Military Equipment; to provide any financial assistance related to that equipment (Articles 2, 3). The measures were taken 'in view of the continuing deterioration of democracy, the rule of law and human rights in Venezuela' (para.1 of the preamble). The way in which restrictive measures were formulated allowed the General Court of the European Union to reject the action of Venezuela on the ground that the State failed to prove, that it was directly concerned by the contested measures, that

[75] Dissenting Opinion of Judge Sebutinde. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-05-EN.pdf; Declaration of Judge Abraham. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-jud-01-02-en.pdf

[76] Separate Opinion of Judge Tomka. Available at : https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-01-EN.pdf

[77] Judge Charlesworth raises concerns about the use of 'criteria of reasonableness of measures' instead of other criteria of assessment whether States' actions amount to unlawful expropriation and No.tes that contested measures might have violated other provisions of the Treaty, rather than those indicated by the Court. See Separate Opinion of Judge Charlesworth. Retrieved from: https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-11-EN.pdf

[78] Council Regulation (EU) 2017/2063 of 13 No.vember 2017 concerning restrictive measures in view of the situation in Venezuela. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R2063

it had legal interest in bringing proceedings, and could be qualified as 'natural or legal person' within the meaning of Article 263 of the Treaty on the Functioning of the European Union.[79] As the court indicated in its judgment of 20 September 2019, 'the contested provisions are likely to have indirect effects' on the Venezuela, to the extent that the nationals of the EU countries were limited to provide goods and services to the Venezuelan market.[80] Therefore the Venezuela had to prove its locus standing to contest unilateral sanctions in its statement of appeal. In its note of appeal in regard of the 'legal personhood' question Venezuela argued that the wording of the article 263 does not exclude a State from the concept of 'legal person'.[81] But it should be noted, that the difficulty to resolve this question consisted not so much in interpretation of the Article 263 as in consideration of legal consequences of the allowance of third States outside the EU to bring proceedings to the European courts on par with natural and legal persons. The EU Council declared unacceptable recognition of the legal standing of third States to bring actions against acts of the EU institutions, since it could 'put the EU at a disadvantage vis-à-vis its international partners', which could challenge decisions taken within the foreign policy of the EU.[82] This view is shared by the Greek, Polish, Slovenian, Slovak and Swedish governments. At the same time the Belgian, Bulgarian, German, Estonian, Latvian, Lithuanian and Netherlands governments opposed to the restrictive interpretation of the Article 263, which excludes a State from the concept of legal person, since denial of the legal standing of third States in the EU courts amounts to refusal of the right to effective judicial protection of legitimate rights and interests.[83] By approaching the question the Grand Chamber put emphasize on international legal personality of a State. The Grand Chamber also underlined that in the light of principles of effective judicial review and the rule of law the Article 263 could not be interpreted in restrictive way. Moreover the question on recognition of legal personhood of State should not translate into the question on reciprocity and access of the EU to the courts of third States.[84] With these considerations, the judges qualified Venezuela as a 'legal person' within the meaning of the Article 263.[85] In regard of the effects from restrictive measures Venezuela proved that in spite of the fact Venezuela was not listed among persons

[79] ECJ. Case T-65/18, Venezuela v Council, 20 September 2019, para. 23. Retrieved from: https://curia.europa.eu/juris/document/document.jsf;jsessionid=C092A815956A4BF0105CE85275C75FDD?text=&docid=218021&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1602154

[80] *Ibid.,* paras. 31–33.

[81] ECJ. Case C-872/19 P, Venezuela v Council, 22 June 2021, para. 25. Retrieved from:https://curia.europa.eu/juris/document/document.jsf?text=&docid=243242&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1618664

[82] *Ibid.,* para. 29.

[83] *Ibid.,* paras. 33–36.

[84] *Ibid.,* para. 51.

[85] *Ibid.,* para. 53.

against which the EU applies restrictive measures, the contested provisions had 'significant direct factual and legal effects towards it'.[86] The Advocate General supported the arguments of Venezuela. In his Opinion it is mistaken to dismiss the claims of Venezuela on the pretext normal absence of the mentioning of the State, as far as *de facto* prohibitions covered trade with any person located in Venezuela, including the government, public authorities and public officials.[87] Moreover, he criticized conclusions of the General Court only on indirect effects of the provisions, since prohibition of the right to provide goods and services directly limits the corollary right to receive these goods and services.[88] The Grand Chamber agreed with this reasoning by drawing on the extensive jurisprudence on recognition of contested measures as a subject matter of direct concern to natural or a legal person and decided to set aside the judgment under appeal.[89] Consequently, in result of the proceedings on appeal the case was referred back to the General Court of the EU for judgment on the merits. Although expected judicial proceedings have not yet produced results, the diplomatic tensions have down trended. At the least in November 2022 after fifteen months of intense negotiations between Venezuela and the EU, the Norwegian facilitator announced the breakthrough and arrival of the Parties to arrangements on the UN-managed financial fund to combat the humanitarian crisis in Venezuela.[90] In this regard one could call successful Venezuela's experience of use of judicial proceedings against unilateral restrictive measures by seizing the regional international court of the integration association, which imposed the challenged measures.

In 2020 Venezuela went steps even further and resorted to the International Criminal Court by virtue of the Article 14 (1) of the Rome Statute.[91] In the letter to the court the president of Venezuela called economic sanctions of the United States against Venezuela 'crimes against humanity committed against the Venezuelan people'.[92] However, the attempt to challenge unilateral economic

[86] ECJ. Opinion of Advocate General Hogan, Case C-872/19 P, Venezuela v Council, 20 January 2021, para. 93. Retrieved from: https://curia.europa.eu/juris/document/document.jsf?text=&docid=236702&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1

[87] *Ibid.,* para. 110.

[88] *Ibid.,* para. 111, para. 84 of conclusions.

[89] ECJ. Case C-872/19 P, Op. Cit., paras. 61–74.

[90] Quinten Jansen, Can Eased Sanctions Against Venezuela Lead To A EU-Venezuela Energy-Partnership? The Organization for World Peace, No.vember 29, 2022. Retrieved from: https://theowp.org/can-eased-sanctions-against-venezuela-lead-to-a-eu-venezuela-energy-partnership/

[91] Federico Wynter, US Sanctions in Venezuela: EcoNo.mic Crimes Against Humanity? Opinio Juris. May 23, 2020. Retrieved from: http://opiniojuris.org/2020/05/23/us-sanctions-in-venezuela-ecoNo.mic-crimes-against-humanity/; Rome Statute of the International Criminal Court of 17 July 1998. Retrieved from: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

[92] Letter of the Venezuelan president to the International Criminal Court, February 12, 2020. Retrieved from: https://www.icc-cpi.int/sites/default/files/itemsDocuments/200212-venezuela-referral.pdf

sanctions in the ICC was not enough considered. Although the decision to engage means of international criminal justice fits into the general scholarly trend for extension of crimes against humanity to new fields,[93] Venezuela's claims have been much criticized for irrelevance and inconsistency of reasoning.[94] But the more Venezuela's arguments are critically scrutinized, the more valuable are received remarks for followers. Some scholars consider that Venezuela failed to prove matching of challenged measures to key markers of alleged 'crimes' articulated in the jurisprudence of the ICC.[95] First of all, the contested actions do not satisfy to criteria of purpose to commit acts of murder, extermination, etc., since their actual purpose, as Venezuela indicated, is regime change in the State. Therefore contested actions are merely political, but do not amount to international crimes. Secondly, the contested actions are to be 'a substantial cause' of death and other consequences for victims, while introduced economic sanctions targeted public officials and institutions and their impact on population apart from other factors in the country is hard to trace. Thirdly, economic sanctions as 'a crime against humanity' do not satisfy to the criteria of intention and of awareness of concrete consequences, since any probable influence of imposed sanctions on mortality rate are only side effects, which could not be expected with certainty. Fourthly, the effects of economic sanctions on the increasing migration streams from Venezuela cannot amount to the crime of 'forced deportation' for the lack of 'coercion', since migrating Venezuelans may take the decision to leave the country on their own for many reasons other than effects of economic sanctions. The evident weaknesses in legal reasoning of Venezuela seem result from the common problem of every invocation of available specific provisions to treat the more comprehensive situation. However, unlike the problem of 'Cinderella's shoe' (as Christopher Greenwood calls State's practice of using jurisdictional clauses of specific conventions to accede international justice for settlement of a more complicated dispute),[96] engagement of international criminal institutions exceed the efforts of delegitimation of some acts in State's international practice. The claimant declares the contested acts not only breaches of international law (efforts to deprive the acts of normative legitimacy), but international crimes (efforts to deprive the acts of moral legitimacy). Thereby the State seeks to prevent any use of the formula 'illegal but legitimate' or other its variations in the

[93] Elias Davidsson, "EcoNo.mic Oppression as an International Wrong or as Crime against Humanity". *Netherlands Quarterly of Human Rights,* 2005, Vol.23, No. 2, pp. 173–212.

[94] Federico Wynter, US Sanctions in Venezuela: EcoNo.mic Crimes Against Humanity? Op. Cit.; Dany Bahar, Sebastian Bustos, Jose R. Morales, Miguel A. Santos, Impact of the 2017 sanctions on Venezuela. Revisiting the evidence. Policy Brief. The global ecoNo.my and development at Brookings. May 2019. Retrieved from: https://www.brookings.edu/wp-content/uploads/2019/05/impact-of-the-2017-sanctions-on-venezuela_final.pdf

[95] Federico Wynter, US Sanctions in Venezuela: EcoNo.mic Crimes Against Humanity? Ibid.

[96] Christopher Greenwood, "Challenges of International Litigation". Friday Lunchtime Lecture, Lauterpacht Centre for International Law, 10 October 2011.

justificatory discourse of a responding State.[97] In this regard, even in case of failure of Venezuela to come up with the ICC judgment on individual criminal responsibility of the U.S. decision-makers, such precedent could contribute to strengthening views on unilateral sanctions as undermining international values. Despite above-mentioned fallacies in Venezuela's claims, the ICC Prosecutor opened a preliminary examination in 2018 and after official visits to Venezuela announced an investigation in 2021. As of September 2023 the investigation continues (after being resumed on decision of the Pre-Trial Chamber)[98].

COULD RUSSIA FOLLOW EXAMPLES OF QATAR, IRAN OR VENEZUELA?

The examples of Qatar and Iran may inspire States under unilateral sanctions to contest others' countermeasures on the ground of existing international law. Nevertheless there are some deterrents to formation of a wide judicial practice on the issue, including those related to specific international legal policy of a State. Indeed, every State risks becoming a hostage of its own habitual mode of conduct in a conflict situation, which would impede achievement of a compromise. Reluctance to outspokenly discuss escalating issues at the international sites may turn into an obstacle for contesting unilateral sanctions in international courts. For instance, Russia has less practice in using special international legal instruments (in the sense of procedural or institutional tools) for asserting its international legal positions. Russia's mode of conduct in situations of misattunement with other States includes characteristic patterns. Firstly, Russia rarely raises highly sensitive issues at the sites of international institutions. For instance, Russian diplomats are an outspoken critic of the use of notion 'rules-based order' in the political rhetoric on the international arena, as far as reference to 'rules-based order' instead of international law contributes to expansion of double standards in international relations[99]. However, these concerns are mainly raised by Russian scholars within the national community[100]. While other States preferring to invoke rules-based

[97] The formula 'illegal, but legitimate' was first advanced in the report of the International Commission on Kosovo. The formula became classical example of justification of State's acts breaching international law with extra-legal criteria, such as humanitarian necessity, etc. The Kosovo Report. The Independent International Commission on Kosovo. October 23, 2020. Retrieved from: https://reliefweb.int/report/albania/kosovo-report

[98] In 2022 Venezuela demanded to stop investigation by the ICC Prosecutor as far as it conducted its own investigations in regard of the U.S. sanctions. Thereby Venezuela invoked the principle of complementarity, under which national investigation of alleged crimes are in priority before international ones.

[99] Sergei V. Lavrov, "On law, rights and rules". Russia in Global Affairs, 2021, No. 4. Retrieved from: https://eng.globalaffairs.ru/articles/the-law-the-rights-and-the-rules/

[100] Alexander N. Vylegzhanin, et als. "The Term "Rules-based International Order" in International Legal Discourses", *Moscow Journal of International Law*, 2021, No. 2, pp. 35–60.

order use this term openly on the sites of international organizations and interstate forums, Russia promotes its position on the issue within more confident bilateral relations[101]. Thereby the State limits its own outreach. Secondly, Russia rarely appeals to international procedures and any other forms of international engagement to voice international problems of its special concern. The tactics of participation of Russia in the Security Council is illustrative. Russia uses its veto power more often than the other permanent members. Since 1991 (the starting year of the modern history of Russia) till the end of 2022 Russia resorted to the veto power 33 times, while the United States vetoed 17 resolutions for the same period, China – 16 resolutions. At the same time Russia submits drafts of resolutions for adoption by the Security Council estimably less frequently than the United Kingdom, the United States and France – at the least those drafts of resolutions which got ultimately adopted by the Security Council.[102] For instance, in 2021 the share of draft resolutions submitted to the Security Council by Russia accounted for 14 per cent (in comparison to 45, 6 per cent of the United States), in 2022 the Russia's share accounted for 3, 7 per cent (in comparison to 38, 9 per cent of the United Kingdom in the same year). Thirdly, Russia rarely takes the lead to bring international conflicts before international judges, although international stringent situations involving national interests of Russia appear under consideration of international courts, such as case on allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia, ICJ, 2022); case on application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia, ICJ, 2017); case on application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia, ICJ, 2008), four cases submitted to the International Tribunal for the law of the Sea (except for the 'Volga case' of 2002); fourteen inter-state applications at the European Court of Human Rights. Indeed, there are a small number of cases where Russia has taken the role of applicant - the only dispute at the ITLOS is the 'Volga case' of 2002; the only inter-state application to the ECHR is the case against Ukraine of 2021. Therefore the turn of Russia to the means of international justice causes skepticism about the State's will to receive international legal estimates of a dispute. When in 2021 Russia for the first time lodged an interstate-application against Ukraine under Article 33 of the European Convention on Human Rights,[103]

[101] The Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law. June 26, 2006.

[102] Statistics is based on data drawn from the annual reports of the Security Council. Retrieved from: https://www.un.org/securitycouncil/content/sc_annual_reports

[103] The application covered a range of alleged violations by Ukraine of rights to life, liberty, security, education, free elections, for respect of private life and freedom from discrimination. Retrieved from: https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7085775-9583164%22]}

international legal scholars estimated this application not as an initiative, but as a response to preceding steps of the counterpart to allege violations of this Convention by Russia.[104] For the most part the practice of Russia confirms de Lacharrière's observations on poor motivation of strong countries to appeal to international justice.[105] According to the concept of international legal policy self-positioning of a State as a 'powerful State' prevents it from involving international adjudicators as far as 'powerful States' reckon to use in their argumentation non-legal factors – their power of some kind (economic, territorial, etc.). However, strong States do not necessarily stay off international legal proceedings, but more carefully consider conditions and implications of these proceedings. If resort to international judges does not bring about risks of binding judgment without appeal, States may be more propense to settle a conflict within a courtroom, since the most important factor for powerful States is the possibility to keep the last word. In this regard it is illustrative how statistics of disputes on the WTO law involving Russia stands apart from the regular Russia's practice of dispute settlement without assistance of independent experts. At the date of September 2023 Russia has stood as a disputing party in 19 cases brought in the WTO Dispute Settlement Body, of which 8 disputes were initiated by Russia.[106] The explanation may lie in the conditions of dispute settlement in the WTO.[107] First of all, within the WTO dispute settlement system States are not bound by mandatory jurisdiction of panels and do not need determine their optional clauses. Secondly, consultations on *pari passu* basis are an obligatory stage before a dispute could be regarded by the panelists.[108] In other words, raise of claims at the WTO site does not automatically mean engagement in legal proceedings. Thirdly, conclusions of the panel are not binding on disputing parties: they are adopted in form of recommendations or rulings, which disputing parties can implement[109]. Fourthly, conclusions of panelists are not a final valuation of a dispute, since they may be submitted to the consideration of the WTO Appellate Body. Aside from the fact that this relative flexibility of WTO dispute settlement system does not dispense it from risks of States' backlash, statistics of engagement of Russia in disputes in the WTO suggests that strong States do not always oppose to dialogue in clear legal terms, and moreover they may need facilities to conduct a such dialogue. This is the matter of available

[104] Marko MilaNo.vic, Russia Files Interstate Complaint Against Ukraine in Strasbourg, EJIL Blog, July 26, 2021, Retrieved from: https://www.ejiltalk.org/russia-files-interstate-complaint-against-ukraine-in-strasbourg/

[105] *De Lacharrière G. L.* Politique Juridique Extérieure. Op. Cit. P.137.

[106] WTO. ChroNo.logical list of disputes cases. Retrieved from: https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

[107] Understanding on rules and procedures governing the settlement of disputes. Annex 2 of the WTO Agreement. Articles 3. Retrieved from: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

[108] *Ibid.,* Article 4.

[109] *Ibid.,* Article 21.

procedures and their consequences for a State-claimant. It means that a strong State may consider contestation of unilateral sanctions at the site of authoritative *specialized institutions* on the basis of *particular international legal norms* (especially those constituting self-contained regimes) as the most appropriate mean for delegitimization of contested measures without evident risks for own international legal positions. In this regard it is not surprising that the first international authority to which Russia appealed for this purpose is the ICAO, UN specialized agency. On 10 October of 2023, one and a half years after many Western states closed their airspaces to Russian aircrafts, Russia filed an application to the Council of ICAO about violations of the Chicago Convention by thirty seven States, including member States of the EU, the United States, the United Kingdom, Canada, Albania, Iceland, Monaco, Norway, North Macedonia, Montenegro and Switzerland. According to the statement of the Russian Ministry of Foreign Affairs, these States violated civil aviation safety rules with 'unlawful unilateral restrictive measures of discriminatory character against the Russian Federation and its airlines'[110]. Contested measures comprise bans on the use of airspace for aircrafts of Russian airlines, bans on the supply of aircrafts and spare parts for them, bans on the maintenance and provision of insurance services for aircraft, the detention of aircraft abroad, and restriction of access to meteorological information for air navigation. After the ICJ confirmed the jurisdiction of the Council of ICAO to entertain application about restrictive measures related to the aviation sector in 2020[111], Russia does not have to worry about objections of responding States related to the context of introduction of contested measures. The Council of ICAO in its turn wins the chance to contribute to the developing practice of international authorities in precluding non-compliance with international legal obligations within sanctions regimes, since in case of Qatar's application the ICAO Council never touched upon the subject. Indeed, the international legal policy of State is ever-evolving. While the ILP of Russia in regard of international dispute settlement can be generally characterized as 'avoiding' involvement of external experts, nowadays the State demonstrates an apparent interest to public settlement of the pending issue of restrictive measures. Definitely, it does not mean disruption with former principles of conducting the ILP, since the factors for 'avoiding' model of conduct are still present. Firstly, this is the matter of self-positioning as a powerful State which does not concede its last word in any question. Secondly, there is a significant factor of previous experience of engagement with international authorities: the question is whether this experience was positive or at the least whether it was enough sound. Thirdly, the ILP in regard of international justice is

[110] Press release about lodging a statement to the Council of ICAO over violation of the Chicago Convention by a range of States. 11 October 2023. Retrieved from: https://mid.ru/ru/foreign_policy/news/1908724/

[111] ICJ. Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar. Judgement of 14 July 2020, *op.cit.*

not autonomous and fits in with other general patterns of interaction with international authorities – in other words, reluctance to leverage procedures in some institutions may translate into ignorance of advantages of international judicial proceedings. Nevertheless, what has changed is common international legal practice of struggling with unilateral sanctions. So, even if Russia would not replicate experience of Qatar or Iran it is arguable that these States have already contributed to practice of activating international legal proceedings to resist to sanctions regimes. In fact, available means of contestation depend on a State's membership and participation to international agreements. In this regard Russia would never follow the experience of Venezuela in demanding investigation by the Prosecutor of the International Criminal Court as far as Russia withdrew its signature from the Rome Statute yet in 2016.[112] But nowadays Russia can contest imposed sanctions in the human rights treaty bodies like the CERD, in the UN specialized agencies like the ICAO, in the dispute settlement bodies like that in the WTO. The interesting question is whether Russia could appeal the ICJ in regard of unilateral sanctions. As the overview of practice of Iran and Qatar has shown, their motivation to appeal to the ICJ was much predetermined by previous positive experience of settling disputes. In this regard, Russia does not have such motivating factor. Moreover, Russia may be on the contrary distrustful of the ICJ in the context of recent decisions by the ICJ. In June of 2023 Russian Ministry of Foreign Affairs expressed its disappointment about the decision of the ICJ on admissibility of the declarations of intervention from thirty two States in the case 'Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide' (Ukraine v. Russian Federation).[113] However, negative attitude to an institution in view of recent failures to defend some positions on its site should not prevent a State from using advantages of institution's procedures to uphold its other national interests like overriding unilateral sanctions. As it could be seen, Russia's failure to hold a seat in the ICAO Council in March of 2023 (for the first time in the history of Russia's membership in the ICAO) did not prevent the State from taking the reasonable decision to contest violations of the Chicago Convention by other States.[114] Therefore the foregoing observations give some basis to expect that Russia will consider appealing to international courts not excepting the ICJ.

---

[112] Decree of the President of the Russian Federation № 361-rp of 16.11.2016 "On the Russian Federation's intention No.t to become a party to the Rome Statute of the International Criminal Court".

[113] Press Release of the Russian MFA "On the decision of the International Court of Justice on the intervention of States as third parties into the case 'Ukraine against Russia under the CERD Convention". Retrieved from: https://www.mid.ru/ru/foreign_policy/news/1886515/

[114] Russia to again seek ICAO Council seat in 2025 - Rosaviatsiya. Interfax. 14 March 2023. Retrieved from: https://interfax.com/newsroom/top-stories/88659/

CONCLUSION

The present research work provides only brief overview of some tested strategies of struggling against foreign coercive measures with international legal means. In fact every conflict with application of unilateral sanctions is a unique multi-layered situation, therefore tactics and legal arguments which seem strong in one case may turn out useless or inapplicable in another case. Nevertheless concise summarizing of international practice to challenge unilateral sanctions by virtue of international institutionalized procedures helps to understand why resort to any coercive measures aggravates international conflicts. As it can be seen unilateral sanctions do not contain any substantive argument in them and present a form of refusal to accept actions of a State. Therefore dismissal of 'pointless argument' of unilateral sanctions by their delegitimation in courtrooms may have positive effects for a core conflict: it serves as an invitation to *reason* disagreement. Thereby the international courts enable return to the dialogue. Then it might seem strange that States continue to apply unilateral sanctions, once they are evidently useless. The problem is that they are useless for international legal argumentation, but they are definitely able to create so called *extra-legal factors* which a State has to consider by developing its international legal policy. Hence the conclusion that unilateral sanctions are designed to make the state more concessive. But all this constitutes only preparation before States could come to the negotiating table both literally and figuratively. Unilateral sanctions *per se* cannot contribute to settlement of a dispute at its core. The fact that States have only recently begun to resort to international courts to contest unilateral sanctions may be explained in two ways. From the pessimistic view States' resort to international justice means recognition by conflicting parties of deadlocks in their communication – in other words, unsettled problems fraught with the sanctions regimes reached critical mass. From another perspective on the back of turbulence in international relations States begin to look for a firm ground. For lack of international legal norms on application of unilateral sanctions States raise concerns about possibility of their use in international legal practice in principle – i.e. about their legitimacy. Persistent practice of contestation of unilateral sanctions in international courts indeed could shape a stable pattern of their treatment in international legal field, determine clear conditions for lawful resort to any kind of coercion and thereby bring to naught any attempts to apply unilateral sanctions under the guise of 'legitimate purpose'. However, this development meets certain limitations. Firstly, by appealing to international courts a State seeks to eliminate sanctions with the help of institutionalized legal instruments, but do not raise the question whether its own challenged actions conform to its international legal obligations and whether actions taken by its counterparts could be lawful as countermeasures in the meaning of Draft Articles on Responsibility of States for Internationally Wrongful Acts.[115]

[115] Olga Kadysheva, "Neizvestnaya "sanktsionnaya voyna" i vozmozhNo.sti mezhdunarodNo.go parvosudiya" [UnkNo.wn "sanctions war" and the possibilities of international justice], *op.cit*., pp. 102–104.

Secondly, States do not use the same terms by characterizing similar coercive measures, which impedes formation of a sole notion of 'unilateral sanctions' for qualification of relevant State actions. It is illustrative that Qatar in his appeals to international bodies did not use the single term to describe challenged measures. For instance, in the request for consultation with the UAE at the site of WTO Qatar indicated the measures at issue as 'all written and unwritten, published and unpublished measures adopted in the context of *coercive attempts at economic isolation* imposed by the UAE against Qatar' (emphasize added by the authors),[116] whereas in the first written submission in the DS567 case against Saudi Arabia measures were indicated as 'a scheme of coercive economic measures against Qatar'.[117] In this regard Qatar's practice of countering foreign coercive measures did not clarify the legal status of unilateral sanctions in international law. Thirdly, unilateral sanctions only go with the main conflict between States, it means that their purpose can be revealed only by delving into the root of a general problem, while scope of questions for consideration by international courts is limited with those submitted by disputing parties. Therefore, international adjudicators keep to a nominal approach in legal assessment of contested measures. For instance, by clarifying the meaning of 'emergency in international relations' (para. 7.259) arbiters indicated that the scope of their consideration is limited to determining existence of 'emergency' in the presented case (para. 7.268).[118] This is what Jed Odermatt would call 'a pattern of avoidance' to judge on political questions, with which judges avoid of risking the authority of the judicial institution.[119] For States seeking delegitimating effects of international jurisprudence, it means that States can contest only concrete patterns of conduct of their counterparts, but not a scheme of unilateral sanctions itself. Nevertheless reasoning of international adjudicators (such as conclusions of the ICJ on challenged decision of the ICAO Council or arguments of the WTO panelists in the report on the dispute DS567) is indicative of their propensity to prevent misuse of international legal rules by States to justify their sanctioning practice. Such development of international jurisprudence is a material factor for States to strengthen their interaction with international institutions in the struggle against unilateral sanctions.

[116] United Arab Emirates – Measures relating to trade in goods and services, and trade-related aspects of intellectual property rights. Request for consultations by Qatar, WT/DS526/1, G/L/1180S/L/415, IP/D/354, August 2017, para 4.

[117] As cited in Report of the Panel, Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights. WT/DS567/R, 16 June 2020, para. 2.18.

[118] *Ibid.,* paras. 7.259, 7.268.

[119] Jed Odermatt, "Patterns of Avoidance: Political Questions before International Courts", *International Journal of Law in Context*, 2018, Vol. 14, No. 2, pp. 221–36.

OSPORAVANJE UNILATERALNIH SANKCIJA U MEĐUNARODNIM SUDOVIMA: RAZVOJ PRAKSE DRŽAVA

APSTRAKT

Iako se pravni aspekti jednostranih sankcija naširoko ispituju, jedno pitanje i dalje ostaje bez odgovora: Ima li smisla nametati jednostrane sankcije iz perspektive međunarodno-pravne argumentacije među državama? Prema konceptu međunarodno-pravne politike država, čije teze su u osnovi ovog istraživačkog rada, države nastoje da „prečiste" postojeće međunarodno pravne norme kroz argumentaciju i ubeđivanje drugih država. Međutim, jednostrane sankcije nisu osmišljene da ubede, već da prinude. To znači da jednostrane sankcije mogu uticati na međunarodno-pravnu argumentaciju samo u onoj meri u kojoj stvaraju vanpravne faktore, koje država mora uzeti u obzir razvijajući svoju međunarodno-pravnu politiku. U članku se postavlja hipoteza da države mogu nadjačati proliferaciju režima sankcija tako što će delegitimisati samu praksu nametanja jednostranih sankcija. U tu svrhu države mogu osporiti mere prinude svojih kolega na međunarodnim sudovima ili na sajtovima drugih autoritativnih međunarodnih institucija. Iako je ova taktika borbe sa nametnutim sankcijama tek u toku, važno je sistemizovati stečeno iskustvo država i proceniti razvojni pristup međunarodnih sudija u tretmanu prinudnih mera. Stoga se u članku daje pregled iskustva Katara, Irana i Venecuele u zauzimanju međunarodnih sudova i drugih institucija u osporavanju sankcija koje su im nametnute. Međutim, praksa ukidanja jednostranih sankcija putem međunarodnog pravnog postupka može se razlikovati među državama zbog specifičnosti njihove međunarodnopravne politike. U članku se istražuje primenljivost oblikovane prakse za druge države na primeru Rusije.

Ključne reči: Jednostrane sankcije, međunarodnopravna politika, međunarodni sudovi, pravna argumentacija, legitimacija

REFERENCES

1. Bogdanova, Iryna, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: the Impact of the Priciple of Common Concern of Humankind.* Brill Nijhoff, Leiden. Boston, 2022.
2. Unilateral Sanctions in International Law, edited by Surya P. Subedi, Hart Publishing, Oxford, 2021.
3. Cover, Avidan, "Sanctions and Consequences: Third-State Impacts and the Development of International Law in the Shadow of Unilateral Sanctions on Russia", Case Western Reserve University, School of Law Scholarly Commons, Faculty Publications, 2023, Vol. 100, no. 2189.
4. Pap,e Robert A., "Why Economic Sanctions Do Not Work." *International Security*, 1997, Vol. 22, No. 2.

5. Neuhold, Hanspeter, "Legitimacy: A Problem in International Law and for International Lawyers?", In: Wolfrum, R., Röben, V. (eds) *Legitimacy in International Law*. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 194, Springer, Berlin, Heidelberg, 2008.
6. Ladreit de Lacharrière, Guy, *La politique juridique extérieure*, Paris: Economica, 1983.
7. Hughes, David, "How States Persuade: An Account of International Legal Argument Upon the Use of Force", *Georgetown Journal of International Law*, 2019, Vol. 50, No. 4.
8. Hurd, Ian, "Legitimacy and Authority in International Politics", *International Organization*, 1999, Vol. 53.
9. Venzke, Ingo, International Law as an Argumentative Practice: On Wohlrapp's Concept of Argument. *Transnational Legal Theory*, 2016, Vol. 7, No. 1.
10. Koroma, Abdul G., "Foreword". In: Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy and Consequences, eds. by Ali Z. Marossi, Marissa R. Bassett. Asser Press, Springer, the Hague, 2015.
11. Lowenfeld, Andreas F., *International Economic Law*, Oxford University Press, 2002.
12. Bodansky, Daniel, "Legitimacy in International Law and International Relations". Chapter. In Interdisciplinary Perspectives on International Law and International Relations: The State of the Art, edited by Jeffrey L. Dunoff and Mark A. Pollack, Cambridge: Cambridge University Press, 2012.
13. Pellet, Alain, "The Normative Dilemma: Will and Consent in International Law-Making", *Australian Yearbook of International Law*, 1989, vol. 2, no. 12.
14. Johnstone, Ian, *The Power of Deliberation*, Oxford University Press, 2011.
15. Ribando Seelke, Clare, Venezuela: Overview of U.S. Sanctions. Congressional Research Service. August 8, 2023. *Revolution*, Vol. 2, No. 5, Summer 2020, pp. 117-142. Retrieved from: https://crsreports.congress.gov/product/pdf/IF/IF10715?__cf_chl_tk=ZFC9vQWXMrHtkbMipvxkcSJZPNZ0zbonLtasc9HMnFk-1693804756-0-gaNycGzNC7s
16. Dashti, Farzaneh, Mirzaie, Bizhan, Jahanmanesh, Jasieh, "The United States Sanctions against the Islamic Republic of Iran; from Unilateralism to Violations of International Human Rights", *Journal of Contemporary Research on Islamic Revolution*, Vol. 2, No. 5, Summer 2020, pp. 117–142. Retrieved from: https://jcrir.ut.ac.ir/article_77797_e45dd8b795e94c79bd4fdaaeed93b8a2.pdf
17. Claude, Inis L., "Collective Legitimization as a Political Function of the United Nations", *International Organization*, 1966, vol. 20, no. 3.

18. Venzke, Ingo, "Why Use the Language of the Law in Global Politics? On the Legitimacy Effects of Claiming to Act Legally: Ingo Venzke", in Ian Johnstone, and Steven Ratner (eds), *Talking International Law: Legal Argumentation Outside the Courtroom,* Oxford University Press, 2021, New York.
19. Mohamad, Rahmat, "Unilateral Sanctions in International Law: A Quest for Legality", In Ali Z. Marossi, Marisa R. Bassett (eds.) *Economic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*. T.M.C. Asser Press, 2015.
20. Bodansky, Daniel, "The Concept of Legitimacy in International Law" In *Legitimacy in International Law*, Rüdiger Wolfrum, Volker Röben (eds.), Berlin: Springer Verlag, 2008.
21. Shany, Yuval, "Assessing The Effectiveness Of International Courts: A Goal-Based Approach", *The American Journal of International Law* , 2012, vol. 106, no. 2.
22. Esty, Daniel C., "Good Governance at the Supranational Scale: Globalizing Administrative Law", *Yale Law Journal*, 2006, Vol. 115.
23. Grant Cohen, Harlan, Follesdal, Andreas, Grossman, Nienke, Ulfstein, Geir, "Legitimacy and International Courts – A framework", In *Legitimacy and International Courts*, Cambridge University Press, 2018, Cambridge.
24. Grossman, Nieke, "Solomonic Judgements and the Legitimacy of the International Court of Justice", In *Legitimacy and International Courts*, edited by Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, Geir Ulfstein, Cambridge: Cambridge University Press, 2018.
25. Tanaka, Yoshifumi, "Reflections on Maritime Delimitation in the Qatar/Bahrain Case", *The International and Comparative Law Quarterly,* 2003, vol. 52, no. 1.
26. Pan, Kaijun, "Difference between the ICJ and the CERD Committee: A Comment on the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) Case", *Chinese Journal of International Law*, 2022, vol. 21, no. 1.
27. Ivanov, Dmitry V., Donakanyan, Vladislav G., "The ICAO Council as a Dispute Settlement Body: Theoretical and Practical Issues", *Moscow Journal of International Law*, 2022, no. 3.
28. Kadysheva, Olga, "Neizvestnaya "sanktsionnaya voyna" i vozmozhnosti mezhdunarodnogo parvosudiya" [Unknown "sanctions war" and the possibilities of international justice], *Mezhdunarodnoe pravosudie [International Justice]*, vol. 12, no. 4, pp. 91–107(In Russian).
29. Aldien, Ammar Saed, "Qatar: A new beginning for International Law in the Middle East", International Law and Politics, 2020, Vol. 52.

30. Llamzon, Aloysius P., "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", *European Journal of International Law*, 2007, Vol. 18, Issue 5.
31. Pahuja, Sundhya, Storr, Cait, "Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited", in James Crawford, Abdul G. Koroma, Said Mahmoudi, Alain Pellet (eds), *The International Legal Order: Current Needs and Possible Responses*, Essays in Honour of Djamchid Momtaz, Brill Nijhoff, 2017.
32. Rishikof, Harvey, "When Naked Came theDoctrine of "Self-Defense":What Is the Proper Role of theInternational Court of Justice inUse of Force Cases?", The Yale Journal of International Law, 2004, Vol. 29.
33. Seifi, Seyed Jamal, "Judgment of the International Court of Justice in the Oil Platforms Case: Judicial Diplomacy in International Justice", *Journal of Legal Research*, 2003, Vol. 2, No. 4.
34. Klein, Natalie, "Iran and Its Encounters with the International Court of Justice", *Melbourne Journal of International Law*, UNSW Law Research Paper No. 21–74, Vol. 2, No. 3, pp. 1–33.
35. Paddeu, Federica, Non-Precluded Measures Clause: Substance or Procedure? A comment on Certain Iranian Assets. EJIL Blog, March 6, 2019. Retrieved from: https://www.ejiltalk.org/non-precluded-measures-clause-substance-or-procedure-a-comment-on-certain-iranian-assets/ Chimène Keitner, World Court Rules on Iran Challenge to US Suits for Acts of Terrorism: An Explainer. Just Security, February 19, 2019. Retrieved from:https://www.justsecurity.org/62604/unpacking-icj-judgment-certain-iranian-assets/
36. Jansen, Quinten, Eased, Can, Sanctions Against Venezuela Lead To A EU-Venezuela Energy-Partnership? The Organization for World Peace, November 29, 2022. Retrieved from: https://theowp.org/can-eased-sanctions-against-venezuela-lead-to-a-eu-venezuela-energy-partnership/
37. Wynter, Federico, US Sanctions in Venezuela: Economic Crimes Against Humanity? Opinio Juris. May 23, 2020. Retrieved from: http://opiniojuris.org/2020/05/23/us-sanctions-in-venezuela-economic-crimes-against-humanity/
38. Davidson, Elias, "Economic Oppression as an International Wrong or as Crime against Humanity". *Netherlands Quarterly of Human Rights,* 2005, Vol.23, No. 2.
39. Bahar, Dany, Bustos, Sebastian, Morales, Jose R., Santos, Miguel A., Impact of the 2017 sanctions on Venezuela. Revisiting the evidence. Policy Brief. The global economy and development at Brookings. May 2019. Retrieved from: https://www.brookings.edu/wp-content/uploads/2019/05/impact-of-the-2017-sanctions-on-venezuela_final.pdf

40. Greenwood, Christopher, "Challenges of International Litigation". Friday Lunchtime Lecture, Lauterpacht Centre for International Law, 10 October 2011.
41. Lavrov, Sergei V., "On law, rights and rules". Russia in Global Affairs, 2021, No. 4. Retrieved from: https://eng.globalaffairs.ru/articles/the-law-the-rights-and-the-rules/
42. Vylegzhanin, Alexander N., et als. "The Term "Rules-based International Order" in International Legal Discourses", *Moscow Journal of International Law*, 2021, No. 2.
43. Milanovic, Marko, Russia Files Interstate Complaint Against Ukraine in Strasbourg, EJIL Blog, July 26, 2021, Retrieved from: https://www.ejiltalk.org/russia-files-interstate-complaint-against-ukraine-in-strasbourg/
44. Odermatt, Jed, "Patterns of Avoidance: Political Questions before International Courts", *International Journal of Law in Context*, 2018, Vol. 14, no. 2.

RAZDVAJANJE PRAVA EVROPSKE UNIJE OD MEĐUNARODNOG JAVNOG PRAVA

Slobodan ZEČEVIĆ*

APSTRAKT

Ugovori o osnivanju Evropskih zajednica i Evropske unije, zaključeni su i menjani u skladu sa tehnikama predviđenim međunarodnim javnim pravom. Na prvi pogled moglo bi da se zaključi da je pravo Evropske unije proisteklo iz međunarodnih ugovora o njenom osnivanju, zapravo sastavni deo međunarodnog javnog prava. Međutim, izvorne specifičnosti osnivačkih ugovora i pravna praksa Suda pravde Evropske unije išle su u sasvim drugom pravcu. Ugovori o osnivanju Evropske unije proglašeni su za tekst ustavne prirode, što je pak značilo da odredbe ugovora o osnivanju vrše funkciju ustavnih normi, odnosno najvišeg pravnog akta hijerarhijski uređenog pravnog poretka nalik onome koji imaju federalne države. Polazeći od pomenutih političko-pravnih pretpostavki, Sud pravde Evropske unije u svojim presudama krenuo je u izgradnju federalnog pravnog poretka, suštinski različitog od međunarodnog javnog prava. Načelo integracije prava Evropske unije u nacionalno pravo, njegovo prvenstvo u odnosu na pravo država članica, princip direktnog dejstva koji da je mogućnost građanima Unije da se pozivaju na odredbe prava Unije pred nacionalnim sudovima, nedvosmisleno govore onjegovim federalnim ciljevima.

Ključne reči: Međunarodno pravo, pravo Evropske unije, ustav, hijerarhija normi, federalizam

UVOD

Države su učesnici i međunarodnim odnosima i kreatori međunarodnog javnog prava. Međunarodni ugovori, izvor međunarodnog javnog prava koje zaključuju suverene države, su bili instrument osnivanja Evropske zajednice za ugalj i čelik u Parizu 1951. godine, te Evropske ekonomske zajednice i Evropske zajednice za atomsku energiju u Rimu 1957. godine. Isto važi i za Evropsku uniju koja je osnovana ugovorom iz Mastrihta iz 1992. godine. Današnja Evropska unija počiva na dva međunarodna ugovora zaključena 2007. godine u Lisabonu: Ugovoru o

* Profesor i naučni savetnik, Institut za evropske studije, Beograd. E-mail: szecevic5@gmail.com

Evropskoj uniji i Ugovoru o funkcionisanju Evropske unije. Ugovorima iz Lisabona zapravo su izmenjene odredbe ugovora o Evropskoj uniji i Evropskoj zajednici koji je do tada još bio na snazi. Od stupanja na snagu ugovora iz Lisabona 2009. godine, Evropska unija je jedinstveni entitet u okviru kojeg se odvija proces evropske integracije. Prilikom zaključivanja prethodno pomenutih ugovora korišćene su klasične tehnike međunarodnog javnog prava. Tekstovi ugovora o osnivanju pripremani su u okviru međuvladinih konferencija predstavnika država članica koji su ih i potpisali na kraju pregovaračkog procesa. Osnivački ugovori stupili su na snagu na osnovu postupka ratifikacije utvrđenim nacionalnim pravnim normama. Negde je za ratifikaciju dobijena saglasnost u Skupštini, a negde se potvrđivanje vršilo izjašnjavanjem građana na referendumu. Interesantno je da je za stupanje na snagu osnivačkih ugovora Evropskih zajednica i Evropske unije bila potrebna ratifikacija u svim državama potpisnicima, iako to nije opšte pravilo predviđeno međunarodnim javnim pravom. Naime međunarodni ugovori često stupaju na snagu kada ih ratifikuje dve trećine država potpisnica. Ovo zahtevno uslovljavanje bilo je prisutno zbog visokog intenziteta osnivačkih ugovora, odnosno zbog zahteva za ustupanjem dela državnog suvereniteta u korist Zajednica, a kasnije i Unije. Za izmenu osnivačkih ugovora na kojima počiva Evropska unija potrebna je takođe saglasnost svih njenih država članica. Na prvi pogled mogli bi da zaključimo da je pravo Evropske unije proisteklo iz međunarodnih ugovora o njenom osnivanju zapravo sastavni deo međunarodnog javnog prava. Međutim, izvorne specifičnosti osnivačkih ugovora i pravna praksa Suda pravde Evropske unije išle su u sasvim drugom pravcu. Ugovori o osnivanju Evropske unije proglašeni su tekstom ustavne prirode, što je pak značilo da njihove odredbe vrše funkciju ustavnih normi, odnosno najvišeg pravnog akta hijerarhijski uređenog pravnog poretka nalik onome koji imaju federalne države.

SPECIFIČNOSTI UGOVORA O OSNIVANJU EVROPSKIH ZAJEDNICA I EVROPSKE UNIJE U ODNOSU NA DRUGE MEĐUNARODNE UGOVORE

Pravo Evropske unije je u neposrednoj vezi sa međunarodnim javnim pravom utoliko što Unija počiva na međunarodnim ugovorima. Uobičajeni postupci međunarodnog javnog prava se primenjuju čim se menjaju osnivački ugovori ili se zaključuju novi.[1] Međutim pravni sistem Evropske unije svesno je udaljen od međunarodnog javnog prava. Sud pravde je u svojoj pravnoj praksi podvlačio specifičnost ugovora o osnivanju Evropskih zajednica u odnosu na „obične međunarodne ugovore." U presudi *Van Gend en Loos,* Sud je podvukao da je „ugovor o Evropskoj ekonomskoj zajednici više od sporazuma koji stvara međusobne obaveze među državama, jer Zajednica uspostavlja novi pravni poredak međunarodnog prava u čiju korist su države u određenim oblastima

[1] Philippe Manin, *L'Union européenne,* Pedone, Paris, 2005, p. 73.

ograničile svoja suverena prava i čiji su subjekti ne samo države već i njihovi građani."[2] U presudi *Costa/Enel,* Sud pravde je odustao od termina „međunarodno pravo" u određivanju pravnog sistema uspostavljenog ugovorima o osnivanju Evropskih zajednica, zamenjujući ga izrazom „sopstveni pravni poredak."[3] Pravni poredak Evropske unije je samostalan kako u odnosu na međunarodno javno tako i na nacionalno pravo država članica. Sud pravde bio je posebno posvećen zaštiti integriteta pravnog poretka Evropske unije. Države članice ne mogu da zaključivanjem međunarodnih ugovora sa trećim državama i međunarodnim organizacijama ugrožavaju autonomiju i efikasnost pravnog poretka Evropske unije. Međunarodni ugovor koji zaključuje Evropska unija ili njene države članice moraju biti u saglasnosti sa odredbama osnivačkih ugovora. Proveru njihove ustavnosti vrši Sud pravde. Tumačenje i primena osnivačkih ugovora razlikuje se od rešavanja sporova u međunarodnom javnom pravu. Naime ugovori o osnivanju Evropske unije ne dozvoljavaju državama članicama da pribegnu načinima međusobnog rešavanja sporova predviđenim međunarodnim pravom poput pregovora, pomirenja, medijacije, arbitraže, obraćanja Međunarodnom sudu pravde.[4] Sporovi unutar Unije rešavaju se isključivo metodama predviđenim njenim osnivačkim ugovorima, gde glavnu ulogu imaju Komisija i Sud pravde Evropske unije. Države članice ne mogu primera radi, da se pozivaju na kršenje osnivačkih ugovora od strane druge države članice da bi izbegle svoje obaveze. U ovom slučaju država članica biće sankcionisana na osnovu člana 258. Ugovora o funkcionisanju Evropske unije koji pravo da deluje daje isključivo Evropskoj komisiji i Sudu pravde Evropske unije, a na na osnovu akcije zbog neispunjenja ugovornih obaveza. Pravni poredak Evropske unije nameće državama članicama obavezu lojalne saradnje. Naime prema članu 4. stav 3. Ugovora o Evropskoj uniji, Unija i države članice su dužne da se poštuju i međusobno pomažu u ispunjavanju zadatak predviđenih osnivačkim ugovorom. Štaviše, države članice moraju da preduzmu sve mere ne bi li ispunile obaveze predviđene osnivačkim ugovorom i zakonodavnim aktima donetim u institucijama Unije. Povrh toga, države članice se uzdržavaju od svih mera koje bi mogle da dovedu u pitanje ostvarivanje ciljeva Unije. Dakle, pravo Evropske unije nameće državama članicama obavezu ne samo da lojalno učestvuju u radu evropskih institucija i u donošenju normi prava Unije, kao i da ih verno sprovode u život, već i da se udržavaju od poteza koja bi potencijalno mogli da ugroze logiku funkcionisanja pravnog sistema Unije.[5] Pojam lojalne saradnje široko je tumačena u presudama Suda pravde, u smislu nametanja obaveze državama članicama činjenjem ili nečinjenjem, samo da ne bi bila ugrožena logika funkcionisanja pravnog sistema Unije kao celine. S tim u vezi, mogli bi da zaključimo da obaveze koje državama

[2] CJCE, 05.02.1963., aff. 26/62, Rec. P. 3.

[3] CJCE, 15.07.1964., aff. 6/64, Rec. P. 1141.

[4] Philippe Manin, *op.cit.,* p. 74.

[5] Edouard Dubout, *Droit constitutionnel de l'Union européenne,* Bruylant, Paris, 2021, p. 103.

članicama pravo Evropske unije nameće, ne odgovaraju onim u međunarodnom javnom pravu. Ove poslednje se često izvrdavaju, dok obaveze nametnute ugovorima o osnivanju Evropske unije imaju ustavnu prirodu i snagu.

Dualizam i monizam u unosu međunarodne norme u nacionalni pravni poredak

Međunarodno pravo nalaže državama da poštuju međunarodne ugovore koje su zaključile, odnosno da nacionalni zakonodavni, izvršni i sudski organi primene njihove odredbe.[6] Međutim, međunarodno pravo ne uredjuje način na koji će norme sadržane u međunarodnim ugovorima biti unete u nacionalni pravni poredak da bi bile primenjene od nacionalnih organa. Dakle državama je ostavljeno suvereno pravo da unesu međunarodnu normu na način na koji shvataju odnos između međunarodnog i nacionalnog prava. Među državama članicama Evropskih zajednica, bile su prisutne razlike kad je reč o prijemu međunarodnog prava.[7] Jedne su poput Velike Britanije, Irske, Danske, Nemačke i Italije usvojile tzv. „dualistički koncept" kojim se radikalno odvajao međunarodni i nacionalni pravni poredak. U ovim državama, da bi se međunarodna norma primenjivala na nacionalnoj teritoriji, bilo je nepohodno da se preobrazi (transformiše) odnosno uvede u nacionalno pravo pomoću nacionalnih zakonskih ili drugih normi. Države članice poput Francuske, Belgije, Holandije, Luksemburga, Grčke, Španije i Portugalije su naprotiv, pravo tretirale kao univerzalnu i jedinstvenu pojavu čije sastavne delove čine međunarodno i unutrašnje pravo (tzv. monistički koncept), te nije bila potrebna nikakva mera „pretvaranja". Ove države su priznavale direktno pravno dejstvo normi međunarodnog prava, s tim što su mogle da odrede uslove koje treba da ispunjava međunarodna norma da bi ovo direktno dejstvo proizvela. U presudi *Van Gend en Loos*, Sud pravde se načelno opredelio za monistički koncept ulaska komunitarnog prava u nacionalne pravne sisteme. Sud je rezonovao na sledeći način. S obzirom da se komunitarno pravo odnosi i na građane i na države članice, odnos između prava Zajednice i nacionalnog prava je takav da se komunitarni pravni poredak „integriše" u pravne sisiteme država po stupanju na snagu Ugovora o osnivanju i samim tim nameće njihovim sudskim organima. Isti odnos se javlja između federalnog prava i prava federalnih jedinica. Opredeljenje za primenu načela integracije Sud pravde je obrazložio u mišljenju koje je izdao u vezi sa zaključivanjem sporazuma između Zajednice i država članica EFTA o jedinstvenom evropskom ekonomskom prostoru. Sud naime smatra, da Ugovor o Evropskoj ekonomskoj zajednici, iako zaključen u obliku međunarodnog sporazuma, nije ništa manje od *ustavne povelje* jedne pravne zajednice.

---

[6] Član 26. Bečke konvencije.

[7] Slobodan Zečević, *Institucionalni sistem i pravo Evropske unije,* Institut za evropske studije, Beograd, 2015, str. 508–8511.

Hijararhijski uređen pravni poredak Evropske unije

Pravo koje stvaraju međunarodne organizacije je osobeno po tome što nastaje usvajanjem velikog broja akata različite pravne snage i često se ne zna koji od njih ima višu ili nižu pravnu snagu. Dakle poredak međunarodnog javnog prava je često haotičan i neuređen. Kad je reč o pravu Evropske unije stvari stoje drugačije. U presudi „Ekološka partija – zeleni" Sud pravde naglašava da „Ugovor o Evropskoj ekonomskoj zajednici iako zaključen u obliku međunarodnog ugovora, predstavlja osnovnu ustavnu povelju jedne pravne zajednice".[8] Sud pravde ne zanemaruje inicijalnu međunarodnu prirodu konstitivnih ugovora, ali ukazuje na sledeće. Ugovori o osnivanju Zajednica i Evropske unije predstavljaju osnovu samostalnog, hijerarhijski uređenog pravnog poretka, onakvog kakav imaju federalne države. Isti vrše ustavnu funkciju, jer su najviši pravni akt i izvor prava. Institucije Unije donose zakonodavne akte (uredbe, direktive odluke), u okviru nadležnosti koje su im poverene Ugovorima o osnivanju Evropske unije, ali akti izvedenog prava ne mogu biti u suprotnosti sa odredbama Ugovora o osnivanju. Poput Vrhovnog suda u federalnoj državi, proveru usklađenosti zakonodavnih akata sa Ugovorima o osnivanju vrši Sud pravde Evropske unije.

ODNOS IZMEĐU PRAVA UNIJE I PRAVA DRŽAVA ČLANICA

Princip integracije prava Evropske unije u pravo država članica

Za razliku od ustava federalnih država, ugovori o osnivanju ne sadrže odredbe koje pravu Unije daju prvenstvo u odnosu na pravne norme država članica.[9] Stoga sudske vlasti Unije nemaju neposredno ovlašćenje da poput Vrhovnog suda u klasičnoj federalnoj državi poništе nacionalnu normu koja je u suprotnosti sa pravom Unije. Iz prethodno iznetog moglo bi se zaključiti da je odnos između prava Unije i država članica uređen na isti način kao i odnos međunarodnog prava sa nacionalnim pravima država. Države članice načelno priznaju prednost međunarodnog u odnosu na nacionalno pravo. Međutim, među njima ima i onih koje su opredeljene za dualistički koncept prema kome međunarodna norma nema nikakvu unutrašnju vrednost ukoliko nije uvedena u nacionalni pravni poredak pomoću nacionalne norme. Značaj i vrednost međunarodne norme u hijerahiji normi unutrašnjeg prava u ovom slučaju zavisi od prirode akta kojim se ova prva uvodi u nacionalno pravo.[10]

U presudi *Costa* međutim, Sud pravde je odbacio primenu dualističkog koncepta, pa samim tim i stavove po kojima bi odnos između komunitarnog prava

[8] CJCE, 23.04.1986., aff. 249/83, Rec., p. 1339.

[9] Denis Simon, *Le système juridique communautaire*, PUF, Paris, 2001, p. 407; Slobodan Zečević, *op.cit.,* str. 508.

[10] Philippe Manin, *Les Communautés européennes, L' Union européenne*, Pedone, Paris, 1996, p. 293.

i prava država članica mogao da se zasniva na odnosu između međunarodnog i unutrašnjeg nacionalnog prava. Integracija prava Unije u nacionalno pravo država članica znači da nije potrebna konverzija, nikakav prijem i transformacija odredbe prava Unije u nacionalno pravo da bi ova prva imala pravno dejstvo.[11] Odnos između prava Unije i prava država članica i njihovih građana zapravo je blizak federalnom konceptu. Sud pravde je oštro osudio Italiju na počecima evropske integracije zbog dualizma. Prema sudu pravde, neposredna primena uredbe koje su donele institucije Zajednice/Unije podrazumeva da se njeno stupanje na snagu i primena u korist pravnih subjekata odvija bez ijedne mere prijema u nacionalno pravo. Države članice u skladu sa obavezeam koje proističu iz osnivačkog ugovora ne smeju da ometaju direktno dejstvo evropskih uredbi kao i drugih normi prava Unije.[12]

Princip prvenstva prava Unije u odnosu na pravo država članica

Princip prvenstva prava Unije u odnosu na pravo država članica po shvatanju Suda pravde je između ostalog, bio zasnovan na specifičnoj prirodi komunitarnog prava, prenosu ovlašćenja i na trajnom ograničenju suvereniteta država članica u korist Evropske unije. Postoje i dublji praktični razlozi za ovakvo shvatanje Suda. Naime, ako bi države članice potonjim nacionalnim normama mogle da ospore ili umanje dejstvo odredbi prava Unije, onda bi njihovo obavezivanje bilo samo uslovno. Sledila bi zatim razna odstupanja čime bi uspostavljanje i funkcionisanje Unutrašnjeg evropskog tržišta bilo dovedeno u pitanje. Obaveze predviđene ugovorima o osnivanju nisu eventualne već bezuslovne, odstupanje od normi Unije je moguće samo ukoliko je to predviđeno njenim preciznim, pravnim odredbama. Nacionalna norma ne može da izmeni komunitarno pravo Unije koje ima poseban samostalan izvor, jer bi se time dovela u pitanje pravna osnova Unije. Sud smatra da pravo Unije treba da se primenjuje jednoobrazno u svim državama članicama, odnosno da norme ovog prava bilo da se radi o izvornom ili izvedenom pravu moraju u svim državama članicama da imaju isto značenje, istu obavezujuću snagu i isti nepromenljiv sadržaj.[13] Princip prvenstva odnosi se na sve izvore prava Unije, kako na odredbe Ugovora o osnivanju, tako i na izvedeno pravo i primenjuje se na sve izvore nacionalnog prava.[14] Tako čak ni ustavna odredba država članica ne može da spreči primenu prava Unije.[15] Prema stavu Suda pravde eventualna nesaglasnost odredbe prava Unije sa ustavom i ili opštim pravnim načelima važećim u jednoj od država članica, ne sme da ugrozi validnost

[11] Albelkhaleq Berramdane, Jean Rossetto, *Droit de l'Union européenne,* LGDJ, Paris, 2017, p. 82.

[12] CJCE, 10.11.1973., *Variola,* aff. 34/73, Rec., p. 981.

[13] Denis Simon, *op.cit.,* p. 409.

[14] Philippe Manin, *op.cit.,* p. 295; Denis Simon, *op.cit.,* p. 260.

[15] CJCE, 17.12.1970., *Internationale Handelsgesellschaft*, aff. 11/70, Rec., p. 1125.

kao ni dejstvo odredbe prava Unije na njenoj teritoriji.[16] Ovaj stav Suda pravde pokušavao je da ospori nemački Federalni ustavni sud svojim presudama u poslednjih dvadesetak godina, čime je ušao u sukob sa Sudom pravde Evropske unije.[17] Prema stavu Suda pravde obaveza usklađenosti nacionalnog sa pravom Evropske unije je neupitna, države članice u svakom trenutku moraju da je ostvare u praksi. Ukolko to ne čine protiv njih će biti pokrenuta pravna akcija zbog neispunjenja obaveza predviđenih pravom Evropske unije, koja u krajnjoj liniji može dovesti do finansijskih sankcija.

Princip direktnog dejstva prava Evropske unije

Budući da nije postojala norma koja bi odredbama ugovora o osnivanju dodeljivala direktno dejstvo, postojalo je mišljenje da će sami nacionalni sudovi o tome da odlučuju od slučaja do slučaja.[18] Međutim, Sud pravde je preuzeo ovu nadležnost zauzevši stav o direktnom dejstvu odredbi Ugovora o osnivanju u presudi *Van Gend en Loos*. U pitanju je bila tužba kojom je holandski trgovac Van Gend en Loos osporio pravo svom nacionalnom carinskom organu da na uvezeni formaldehid iz Nemačke primeni veću carinsku stopu od 8 odsto, koja je ranije iznosila samo 3 odsto. Do povećanja je došlo stupanjem na snagu carinske odluke od 1. marta 1960. godine, na osnovu Briselskog protokola zaključenog između Belgije, Holandije i Luksemburga. Međutim, članom 12. Ugovora o Evropskoj ekonomskoj zajednici bilo je zabranjeno povećanje carina među državama članicama. U tom smislu, uvoznik je stavio primedbu carinskom inspektoru koja je odbijena, a zatim se žalio i Carinskom sudu u Amsterdamu. Pozivajući se na, u to vreme važeći član 177. Ugovora o Evropskoj ekonomskoj zajednici (prejudicijelno pitanje tumačenja), Carinski sud je od Suda pravde zatražio da mu protumači odredbe člana 12. Ugovora o Evropskoj ekonomskoj zajednici uz odgovor na sledeće pitanje: Da li odredbe člana 12. imaju unutrašnju primenu koju podrazumeva tužilac, odnosno da li građani mogu neposredno da vuku prava iz navedenog člana, koja štite nacionalni sudovi?

Sud pravde je u odgovoru na postavljeno pitanje pre svega napomenuo da je predmet Ugovora o Evropskoj ekonomskoj zajednici da uspostavi i obezbedi delovanje Zajedničkog tržišta, što ne zahteva učešće samo država već i drugih privrednih subjekata.[19] Ugovor o Evropskoj ekonomskoj zajednici dakle ne može da se posmatra kao sporazum koji stvara isključivo obaveze za države članice koje su ga potpisale. Iako to njime nije izričito predviđeno, Ugovor o Evropskoj

[16] CJCE, 17.12.1970., *Internationale Handelsgesellschaft,* aff. 11/70, Rec., 1125.

[17] Christine Langenfeld, *La jurisprudence récente de la Cour constitutionnelle allemande relative au droit de l'Union européenne*, 16.05.2023. Internet: https://www.cairn.info; Slobodan Zečević, *op.cit.,* str. 511–513.

[18] Radovan Vukadinović, Pravo Evropske unije, IMPP, Beograd, 1996., str. 60.

[19] Jean Boulouis, R-M. Chevalier, Grands arrets de la CJCE, Dalloz, Tome 1, 5 edition, p. 148.

ekonomskoj zajednici se očigledno direktno odnosi i na državljane država članica. Da bi potvrdio ovu tezu Sud pravde je naveo sledeće argumente: "Zajednica ima institucije na koje su države članice prenele određene nadležnosti, a koje se ne tiču samo država članica već i pojedinaca; Evropski parlament i Ekonomsko-socijalni komitet institucionalizuju učešće građana u stvaranju komunitarnog prava; Ugovorom o osnivanju predviđen je postupak prosleđivanja prejudicijelnih pitanja od nacionalnih sudova ka Sudu pravde u cilju tumačenja odredbi komunitarnog prava, koji inače ne bi postojao da pojedinci ne mogu da se pozivaju na ove odredbe pred nacionalnim sudovima". Sud zaključuje da pravo Zajednice, nezavisno od zakonodavstva država članica, stvara prava i obaveze u korist njihovih državljana. Ova prava i obaveze proizilaze iz izričitih ovlašćenja predviđenih Ugovorom, ali i iz precizno određenih obaveza koje Ugovor nameće državama članicama i institucijama Zajednice. Zbog toga su nacionalni sudovi dužni da obezbede vršenje pomenutih prava i poštovanje tih obaveza. Nešto kasnije u presudi *Costa/ENEL,* Sud pojačava prethodno izložen stav tvrdnjom da se pravo Zajednice integriše u pravni sistem država članica, te se samim tim nameće njihovim sudskim organima. Kada je reč o konkretnom pitanju koje se odnosi na član 12. ugovora o Evropskoj ekonomskoj zajednici, Sud zaključuje da njegove odredbe izražavaju jasnu i bezuslovnu naredbu nečinjenja jer je reč o zabrani uvođenja novih ili povećanja postojećih carina, te da iste ne zahtevaju usvajanje internog pravnog akta radi izvršenje. Takođe, Sud naglašava da odredbe ne traže zakonodavno delovanje država. Sledstveno, Sud zaključuje da je zabrana iz člana 12. Ugovora o Evropskoj ekonomskoj zajednici, usled svoje prirode, u potpunosti podesna da proizvede direktno dejstvo u odnosima između država članica i njihovih pravnih subjekata. Sud još napominje da će zahvaljujući ovom direktnom dejstvu biti bolje zajemčeno poštovanje komunitarnog prava pošto će nacionalni sudovi moći da nadziru njegovu primenu.

Stav Suda pravde u slučaju *Van Gend en Loos* bio je predmet posebne pažnje pa i kritika.[20] Naime, analiza teksta člana 12. Ugovora o Evropskoj ekonomskoj zajednici navodi na zaključak da se ovaj izričito odnosi na države članice. Pored toga, bilo je jasno da će polazeći od mišljenja Suda pravde pojedinci doći u situaciju da pred nacionalnim sudovima sankcionišu države zbog „neispunjavanja obaveza predviđenih komunitarnim pravom", iako je prema odredbama Ugovora o Evropskoj ekonomskoj zajednici za to bio predviđen poseban postupak koji je mogla da pokrene Komisija ili druge države članice pred sudskim vlastima Zajednice. Bez obzira na prethodno navedeno, presuda u slučaju *Van Gend en Loos* je odlučujuća u pogledu priznavanja direktnog dejstva komunitarnog prava.

[22] Jean Boulouis, Droit institutionnel de l' Union européenne, Montchrestien, 5 édition, Paris, 1995., p. 248.

ZAKLJUČAK

Robert Šuman, ministar spoljnih poslova Francuske i autor deklaracije od 9. maja 1950. godine, o stvaranju Evropske zajednice za ugalj i čelik, koja se smatra dokumentom začetnikom današnje Evropske unije ukazao je na sledeće. Doprinos organizovane Evrope civilizaciji neophodan je za održanje mira u međunarodnim odnosima. Francuska u prethodnih 20 godina bila je predvodnik ideje ujedinjene Evrope radi dostizanja suštinskog zadatka, održanja mira. Evropa nije ostvarena i dobili smo rat. Evropa se neće ustanoviti jednim potezom, niti celovitom izgradnjom, već konkretnim ostvarenjima u određenim oblastima, tj. međusobnom solidarnošću u praksi. Zajednička proizvodnja uglja i čelika obezbediće osnovu ekonomskog razvoja, prve stanice ka osnivanju evropske federalne države. Iz prethodno iznetog uočavaju se političke ambicije i ciljevi međunarodnih ugovora o osnivanju Evropskih zajednica i Evropske unije. Ugovorom iz Mastrihta iz 1993. godine, Evropske zajednice su stavljene pod kapu Evropske unije. Ugovorima iz Lisabona iz 2009. godine, Evropska unija ostaje jedini entitet u okviru koje se odvija proces evropskih integracija. Upotreba termina Unija nije bezazlena. Tvorci američkog Ustava iz 1878. godine su, da bi označili raskid sa prethodno postojećim Konfederalnim savezom, koristili termin *Union* za svoju novu federalnu državu. Tvorci Evropske unije u Ugovoru o osnivanju naglašavaju da je njen osnovni cilj „neprestano stvaranje što bližih veza između evropskih naroda." Upotrebljena formulacija posredno govori o snažnoj, integrativnoj federalnoj dinamici, otuda britansko protivljenje pomenutoj odrebi. Naime, britanski premijer Dejvid Kameron *(David Cameron)*,2016. godine, kao uslov ostanka Britanije u Uniji tražio je poseban status. Ovaj je podrazumevao da se član 1. Ugovora o Evropskoj uniji ne primenjuje u Ujedinjenom Kraljevstvu. Polazeći od prethodno pomenutih političkih pretpostavki, Sud pravde Evropske unije je u svojim presudama krenuo u izgradnju federalnog pravnog poretka, suštinski različitog od međunarodnog javnog prava. Načelo integracije prava Evropske unije u nacionalno pravo, njegovo prvenstvo u odnosu na pravo država članica, princip direktnog dejstva koji daje mogućnost građanima Unije da se pozivaju na odredbe prava Unije pred nacionalnim sudovima, nedvosmisleno govore o federalnim ciljevima Suda pravde. Ovakve ambicije ušle su posle ujedinjenja dve Nemačke u koliziju sa nemačkim nacionalnim interesima i vladom Angele Merkel. Naime poslednji federalistički projekta bio je uvodjenje jedinstvene evropske valute i Evropske centralne banke ugovorom iz Mastrihta 1993. godine. Pomenuti program okončan je 2002. godine, sa ulaskom u opticaj jedinstvene evropske valute. Nemačka kao populacijski i privredno najjača država članica Evropske unije izgubila je interes za daljim ustupanjem državnog suvereniteta institucijama u Briselu. Otuda i pokušaju nemačkog Ustavnog suda da ospori federalnu prirodu prava Evropske unije. U ovom trenutku, izložena sukcesivnim krizama, od one finansijkse, migrantske, sanitarne, pa i krize proširenje, Evropska unija se nalazi pred dilemom

u vezi sa daljim ustavnim reformama. U zavisnosti od političkih kretanja u državama članicama, institucije Evropske unije biće izložene daljoj fedralizaciji ili pak, konfederalizaciji u funkciji očuvanja i zaštite nacionalnih suvereniteta.

SEPARATION OF EUROPEAN UNION LAW FROM INTERNATIONAL PUBLIC LAW

ABSTRACT

The treaties establishing the European Communities and the European Union were concluded and amended in accordance with the techniques provided by international public law. At first glance, it could be concluded that the law of the European Union arose from the international treaties on its establishment, in fact it is an integral part of international public law. However, the original specificities of the founding treaties and the legal practice of the Court of Justice of the European Union went in a completely different direction. The founding treaties of the European Union were declared to be of a constitutional nature, which meant that the provisions of the founding treaty perform the function of constitutional norms, that is, the highest legal act of a hierarchical legal order similar to that of federal states. Starting from the aforementioned political and legal assumptions, the Court of Justice of the European Union in its rulings set out to build a federal legal order, fundamentally different from international public law. The principle of integration of European Union law into national law, its priority over the law of member states, the principle of direct effect, which gives the citizens of the Union the opportunity to refer to the provisions of Union law before national courts, unequivocally speak to its federal goals.

Key words: International law, European Union law, constitution, hierarchy of norms, federalism

REFERENCE

1. Berramdane Abdelkhaleq, Rosseto Jean, *Droit de l'Union européenne,* 3 édition, LGDJ, Paris, 2017.
2. CJCE, 05.02.1963., Van Gend en Loos, aff. 26/62, Rec. p. 3.
3. CJCE, 10.11.1973., Variola, aff. 34/73, Rec. p. 981.
4. CJCE, 15.07.1964., Costa/Enel, aff. 6/64, Rec. P. 1141.
5. CJCE, 23.04.1986., Partie écologiste les Verts, aff. 249/83.
6. CJCE, AETR, 31.03.1971., Commission/Conseil, aff. 22/70.
7. Dubout Edouard, *Droit constitutionnel de l'Union européenne,* Bruylant, Paris, 2021.

8. Hiks Sajmon, *Politički sistem Evropske unije,* Službeni glasnik, Beograd, 2007.
9. Isaac Guy, Blanquet Marc, *Droit général de l'Union européenne,* Sirey, Paris, 10 édition, 2012.
10. Jean Boulouis, *Droit institutionnel de l' Union européenne,* Montchrestien, 5 édition, Paris, 1995.
11. Manin Philippe, *L'Union européenne,* Pedone, Paris, 2005.
12. Marković Ratko, *Ustavno pravo,* Pravni fakultet -Univerzitet u Beogradu, Beograd, 2017.
13. Moreau Defarges Philippe, *Les institutions européennes,* Armand Colin, Paris, 1998.
14. Raz Joseph, Between Authority and Interpretation, Oxford OUP, 2009.
15. Samardžić Slobodan, *Politički sistem Evropske unije,* FPN, Beograd, 20022.
16. Sauron Jean-Luc, *Comprendre le Traité de Lisbonne – Texte consolidé intégral des traités, Explications et commentaires*, Gualino éditeur, Paris, 2008.
17. Schmitt Carl, *Theorie de la Constitution,* PUF, Paris, 1993.
18. Simon Denis, *Le système juridique communautaire,* PUF, 3 édition, Paris, 2001.
19. Ugovor o Evropskoj uniji, Internet: https://www.mei.gov.rs, 10.03.2023.
20. Ugovor o funkcionisanju Evropske unije, Internet: https://www.mei.gov.rs, 10.03.2023.
21. Vukadinović Radovan, *Pravo Evropske unije,* IMPP, Beograd, 1996.
22. Zečević Slobodan, *Institucionalni sistem i parvo Evropske unije,* Institut za evropske studije, Beograd, 2015.

UGOVOR ILI USTAV? NAČELO SUPREMATIJE U PRAVU EU I USTAVNI SUDOVI DRŽAVA ČLANICA UNIJE

Duško LOPANDIĆ*

APSTRAKT

U tekstu se razmatra pitanje odnosa između pravnih normi Evropske unije (često nazivanih i tekovine EU – *aquis communataire*) i nacionalnih pravnih propisa, u skladu sa tumačenjima Suda pravde EU s jedne strane, odnosno pojedinih Ustavnih sudova država članica, sa druge strane. Kao što je poznato, pravni sistem EU se razvijao sa praksom Suda pravde EU, posebno kada su u pitanju neka osnovna načela iz prava EU, poput načela direktnog dejstva ili načela prvenstva odnosno supremacije (nadređenosti) normi EU. Postavlja se pitanje, šta je starije, norma EU čija obaveza proističe iz logike međunarodnog i evropskog prava o prenosu nadležnosti i ograničenju državnog suvereniteta ili nacionalna ustavna norma, kao pravni kamen temeljac iz kog proizilazi i putem kog se tumače svi propisi u nacionalnom zakonodavstvu? Ovo je dilema na koju se ponekad različito odgovara – zavisno od ugla posmatranja i pozicije posmatrača – u uvek živoj dinamici i evoluciji odnosa evropskog i nacionalnog prava. Posmatrano iz ugla prakse Ustavnih sudova može se zaključiti da u ovom momentu, o pitanjima odnosa komunitarnog prava i ustavnih normi ne postoji primena jedinstvenog načela nadređenosti, nego neka vrsta „pluralizma" u interpretacijama ovog načela od strane različitih Ustavnih sudova. U pravnoj praksi redovnih nacionalnih jurisdikcija (u primeni prava EU), ove razlike nemaju velike posledice. Radi se u prvom redu o doktrinarnim razlikama oko efekata elemenata federalizma u pravno-političkom i ustavnim sistemima sistemu Evropske unije i njenih država članica, oko čega se debata na različite načine vodi još od samog nastanka Evropskih zajednica.

Ključne reči: Pravo EU, načelo supremacije, Sud EU, Ustav

UVOD

Predmet ovog članka je pitanje odnosa između pravnih normi Evropske unije (često nazivanih i tekovine EU – *aquis communataire*) i nacionalnih pravnih propisa, u skladu sa tumačenjima Suda pravde EU (SPEU), s jedne strane,

* Redovni profesor. Univerzitet „Privredna akademija", Pravni fakultet za privredu i pravosuđe, Novi Sad. E-mail: dulopand@yahoo.com.br

odnosno pojedinih Ustavnih sudova država članica, sa druge strane. Kao što je poznato, pravni sistem EU se razvijao sa praksom SPEU, posebno kada su u pitanju neka osnovna načela iz prava EU, poput načela direktnog dejstva ili načela prvenstva odnosno supremacije (nadređenosti) normi EU, koja (ova pravna načela) do zaključenja Ugovora iz Lisabona nisu bila ni pomenuta u tekstovima osnivačkih Ugovora EU (odnosno ranijih Evropskih zajednica).[1] U presudi Evropskog suda (Sud EU – SEU), u slučaju *Simmenthal* iz 1978. godine kaže se da je, „nacionalni sud koji je u okviru svojih nadležnosti pozvan da primeni odredbe prava Zajednice obavezan da pruži puno dejstvo ovim odredbama, tako što će, ukoliko je to potrebno, po službenoj dužnosti uskratiti primenu svakoj suprotnoj odredbi nacionalnog zakona (...).”[2] Drugim rečima, u slučaju da se suprostavljaju odredbe evropskog i nacionalnog propisa, administracije i sudovi država članova su u obavezi da primene propis EU, bez obzira da li je u pitanju primarno ili sekundarno zakonodavstvo Unije, odnosno koja je vrsta nacionalne pravne norme, uključujući tu i ustavne propise država članica. Ipak, iako se načelo supremacije smatra jednim od osnovna pravnog sistema EU, ono nije prihvaćeno bez rezervi od strane pojedinih nacionalnih sudova – posebno kada su u pitanju Ustavni sudovi i primena ključnih odredbi nacionalnih ustava. Dok se sudija Evropskog suda oslanja na kontekst pravnog sistema EU, koji potiče od osnivačkih Ugovora EU i iz politika koje su protekle iz većeg ili manjeg prenosa suverenih prava sa država članica na Uniju i njene organe, sudija nacionalnog Ustavnog suda neminovno će polaziti od odredbi nacionalnog ustava kao pravnog temelja – „alfe i omege” za nastanak i tumačenje svake pravne norme u okvirima nacionalnog sistema. Postavlja se pitanje šta je starije, norma EU čija obaveza proističe iz logike međunarodnog i evropskog prava o prenosu nadležnosti i ograničenju državnog suvereniteta, ili nacionalna ustavna norma, kao pravni kamen temeljac iz kog proizilazi i putem kog se tumače svi propisi u nacionalnom zakonodavstvu? Ovo je dilema na koju se ponekad različito odgovara – zavisno

[1] Ovo načelo (engl. *primacy of EU la*”, franc. *primaute de droit communataire*), na različite načine prevodi se u srpskom jeziku, pri čemu su se ustalili izrazi *„supremacija”* ili *„primat”* prava EU. U zvaničnom prevodu konsolidovane verzije Ugovora o EU objavljenom na sajtu Ministarstva za ekonomske integracije Republike Srbije koristi se izraz „supremacija”. Videti: Ugovor o Evropskoj uniji, str. 337, Internet: https://www.mei.gov.rs/upload/documents/eu_dokumenta/2023/ueu_ufeu.pdf. U hrvatskom prevodu Ugovora o EU koristi se izraz „nadređenost”. Videti: Ugovor o Europskoj uniji, Službeni list Europske unije, C 202 od 7.6.2016. Prema našem mišljenju ovi prevodi nisu adekvatni. Suština odnosa između dve pravne norme najbolje bi mogla da se iskaže pojmom „prvenstvo (ili primat) prava EU”, posebno imajući u vidu da engleski tekst ugovora eksplicitno koristi izraz *primacy*, a ne *supremacy.* Videti: “La primauté de droit de l’Union européenne, Etude, Parlement européen, Direction générale des politiques internes de l’Union, Strasbourg, 2022, PE 732.474. Ipak mi ćemo u ovom radu nadalje koristiti izraz koji je kod nas službeno usvojen. Da dodamo da ne postoji usklađena terminologija u našim udžbenicima prava EU odnosno od strane naše doktrine kada je u pitanju ovaj termin.

[2] Radovan Vukadinović, *Uvod u instiitucije i pravo EU,* Udruženje za evropsko pravo, Kragujevac 2012, str. 160.

od ugla posmatranja i pozicije posmatrača – u uvek živoj dinamici i evoluciji odnosa evropskog i nacionalnog prava. U članu 4, paragraf 2. Ugovora o EU kaže se da: „Unija poštuje jednakost država članica pred Ugovorima, kao i njihov nacionalni identitet, neodvojiv od njihovih temeljnih političkih i ustavnih Sistema". Ovim se ipak ne odgovara na pitanje ko ima poslednju reč kada se radi o poštovanju nacionalnog ili ustavnog identiteta države članice, Evropski sud ili Ustavni sud države članice? Treba dodati da član 267. Ugovora o funkcionisanju EU predviđa da je SPEU nadležan za prethodno odlučivanje u slučaju tumačenja Ugovora o EU i drugih akata EU i da je nacionalni sud koji odlučuje u poslednjoj instanci (odluka bez pravnog leka), dužan da se u takvom slučaju obrati Sudu prave EU. Ipak i u ovakvim slučajevima se povremeno (iako retko) dešava da nacionalni sud „proceni" da pitanje nije u nadležnosti SPEU, pa da sam donese odluku. U nastavku ćemo najpre razmotriti delovanje načela suprematije u sudskoj praksi kao i u primarnim propisima – Ugovoru EU, a zatim ćemo razmotriti stavove pojedinih nacionalnih jurisdikcija, poput Ustavnih sudova Nemačke, Danske, Poljske, Mađarske i dr.

NAČELO SUPREMATIJE U PRAVNOM SISTEMU EVROPSKE UNIJE

Već sama monistička teorija međunarodnog prava, primenjena u nacionalnoj praksi, podrazumeva da međunarodni Ugovori u načelu imaju prioritet pred nacionalnim propisima.[3] Sa osnivanjem Evropske ekonomske zajednice, nakon 1957. godine, pred tadašnjim Sudom pravde EZ su se pojavila pitanja neusklađenosti nacionalnih normi država članica EZ sa propisima EEZ. Sud je u slučaju *Humblet v. Belgium* iz 1960. godine obavezao Belgiju da promeni svoje fiskalne mere koje su bile u suprotnosti sa komunitarnim pravom, zasnivajući se na monističkoj teoriji međunarodnog prava, odnosno na činjenici da je država članici u obavezi da primeni međunarodni Ugovor koji je ratifikovala i koji tako ima prioritet nad nacionalnim pravom. Posebno važan korak napred u zaokruživanju koncepta komunitarnog prava kao specifičnog i autonomnog pravnog poretka napravljen je od strane SPEZ uvođenjem načela o direktnom dejstvu pravnih pravila EZ, uključujući i Ugovore o EZ. U slučaju *Van Gend en Loos* iz 1963. godine, holandski uvoznik se žalio na činjenicu da je holandska carina podigla carinu za određeni proizvod (urea) koji se uvozio iz SR Nemačke, što je bilo suprotno članu 30 Rimskog Ugovora o EEZ-u. Holandska država je tvrdila da uvoznik nema pravo da se poziva na odredbe koje su se odnosile na međunarodne obaveze između država (Ugovore), a ne na pravna ili fizička lica – državljane država članica. Sud je, u verovatno istorijski najpoznatijoj odluci koju je ikada doneo, protumačio da odredbe Ugovora EEZ-a imaju direktno pravno

[3] Marion Gaillard*, l'Union européenne, Institutions et politiques*, La Documentnation francaise, Paris, 2022, p. 93.

dejstvo na državljane zemalja EEZ-a koji se mogu pozivati na te odredbe pred nacionalnim sudovima. Osim toga, Sud je istakao da: „Zajednica je stvorila novi pravni poredak međunarodnog prava u okviru kog su države članice ograničile svoja suverena prava u određenim, ograničenim pitanjima". EEZ je, dakle, predstavljala specifičan pravni poredak koji nije identičan poretku koji reguliše međunarodno pravo. Kako je to istaknuto u teoriji, načelo direktnog dejstva predstavlja „jedno od osnovnih obeležja *sui generis* konstitucionalne prirode pravnog poretka EU (...), direktno dejstvo predstavlja kičmu pravnog poretka Unije i najvažniju krakteristiku nadnacionalne ideje tvoraca Unije".[4] U drugim, isto tako čuvenom slučaju, *Costa v. ENEL* iz 1964. godine , Sud je utvrdio doktrinu pravne supremacije (prvenstva, prioriteta, prmata, nadređenosti) prava EEZ-a nad pravnim normama država članica: „Za razliku od međunarodnih Ugovora, Ugovor o EEZ-u je stvorio svoj vlastiti poredak koji je integrisan u nacionalne pravne poretke država članica od momenta kada je Ugovor stupio na snagu i, kao takav, on ima obavezujući efekat. Stvarajući Zajednicu neograničenog trajanja, koja ima svoje sopstvene organe, svoju pravnu ličnost i svoje pravne nadležnosti (...), države članice su ograničile svoja suverena prava i stvorile pravni poredak koji se primenjuje direktno na njihove državljane, kao i na njih same (...). Pravo nastalo iz Ugovora, kao nezavisan izvor prava (...), ne može biti promenjeno nacionalnim propisima (...)." Iz načela o suprematiji Sud pravde EU je izveo i obavezu nacionalnih sudova da obezbede puno dejstvo pravila EU. To podrazumeva i obavezu i ovlašćenja nacionalnih sudova da po svojoj inicijativi odbiju primenu nekog nacionalnog propisa koji je suprotan normama EU, bez obzira da li je usvojen pre ili posle odgovarajućeg propisa Unije. Ovaj princip pravne supremacije kasnije je, presudom iz 1970. godine, u slučaju 11/70 *Internationale Handgeselshaft*, proširen i na odnos evropskog prava prema nacionalnim ustavima. „Validnost mera EZ ili njihovi efekti u nekoj državi članici ne mogu biti pod uticajem stava da su oni suprotni osnovnim pravima koje određuje ustav te države ili načelima koja proizilaze iz njene ustavne strukture". Presude *Van Gend en Los, Costa protiv Enela, Internationale Handgeselshaft* i one koje su sledile, predstavljale su revuluciju za pravnike, kao i za nacionalne pravne poretke država članica. Možda više nego bilo koja odluka Saveta ministara ili Komisije, presude Suda pravde EU, odnosno način na koji je Sud tumačio odredbe Rimskih Ugovora, udahnule su život, odnosno krvotok u pravni sistem EZ. Time pravni poredak EZ-a nije posmatran samo kao deo međunarodnog pravnog poretka. On je nešto novo i nešto drugo. Zahvaljujući sudijama iz Luksemburga, sistem EZ-a je postao originalno komunitarno pravo – specifičan sistem koji predstavlja istovremeno način na koji se regulišu odnosi među državama članicama, ali sadrži i pravna pravila koja su integrisana u nacionalne pravne poretke.

[4] Vladimir Medović, *Evropska unija, pravo i institucije,* Univerzitet Privredna akademija, Pravni fakulteta za privredu i pravosuđe, Novi Sad, 2018, str. 188; Jelena Vukadinović Marković, „O primatu prava EU. Iz ugla SRN", *Constitutio lex superior*, *Sećanje na profesora Pavla Nikolića,* IUP, Beograd, 2021, str. 363–375.

NAČELO SUPREMATIJE I UGOVORI O EVROPSKOJ UNIJI

Presude SEU su izazivale različite komentare, kritike ili kontraverze koje nisu sasvim prestale ni do danas. Kako je istaknuto, pravna načela koje ja utvrdio SPEU su zaživela i široko se primenjuju. Ipak zbog dinamičnog i evolutivnog karaktera procesa odlučivanja Evropske unije, kao i zbog posledica koje je tumačenje Ugovora EU od strane SPEU povremeno se javljaju inicijative da se načela proistekla iz sudske prakse SPEU kodifikuju.

Tako se prilikom pregovora o Ugovoru o ustavu EU (koji nikada nije stupio na snagu), a zatim tokom pregovora o Ugovoru o EU iz Lisabona (2009), pojavila inicijativa da se osnovna načela koja je proglasio SPEU (poput direktnog dejstva i načela supremacije) budu eksplicitno uključena u Ugovor. Do toga ipak nije došlo usled rezervisanosti pojedinih država članica. Trebalo bi ukazati da se ovo desilo u periodu (sredina prve decenije ovog veka), kada je federalistički dinamizam u razvoju Evropske unije upao u krizu, nakon neuspeha u postupku usvajanja Ugovora o Ustavu EU. Ipak, uz završni akt konferencije na kojoj je usvojen Ugovor iz Lisabona (13.12.2022), priložena je Deklaracija br. 17 o načelu nadređenosti (prvenstva, supremaciji), u kojoj se kaže da: „Konferencija podseća na to da, u skladu sa ustaljenom sudskom praksom Suda pravde Evropske unije, Ugovori i pravo koje je Unija usvojila na osnovu Ugovora imaju supremaciju (prvenstvo) nad pravom država članica, pod uslovima utvrđenim u pomenutoj sudskoj praksi". Uz ovaj stav, priloženo je i mišljenje pravne službe Saveta EU od 22.6.2007. godine, u kome se kaže: „Prema sudskoj praksi Suda pravde, supremacija prava EZ je osnovno načelo prava Zajednice. Prema mišljenju Suda, ovo načelo je svojstveno posebnoj prirodi Evropske zajednice (...)." Gornji slučaj potvrđuje da su države članice EU s jedne strane odustale od ideje da se osnovna načela koja je proklamovao SEU „uklešu u kamen", odnosno usvoje kao ugovorne obaveze, ali ih, s druge strane, ipak nisu na ovom nivou suštinski dovele u pitanje. Kako je to naglašeno u doktrini, iako Deklaracija uz Ugovor nema pravno obavezujući karakter, ona predstavlja izraz jedinstvenog pravnog stava izraženog zajednički od strane svih država članica EU.[5]

PRAKSA USTAVNIH SUDOVA DRŽAVA ČLANICA I NAČELO SUPREMATIJE PRAVA EU

U celini, kako se ističe u pojedinim komparativnim analizama, praksa Ustavnih sudova država članica u odnosu na pitanje komunitarnog prava nije bila sasvim uniformna i oscilirala je tokom vremena. U načelu može se zaključiti da Ustavni sudovi ipak nikada nisu do kraja prihvatili doktrinu nadređenosti prava EU, posebno kada su u pitanju ključna ustavna načela (ustavni identitet) i pitanja primene osnovnih ljudskih prava koja garantuje nacionalni ustav. Posmatrano po

[5] "La primauté de droit de l'Union européenne, *op.cit,* p. 15.

pojedinim državama članicama, zemalje Beneluksa (Belgija, Holandija, Luksemburg), praktično su prihvatile ideju neposrednog dejstva kao i supremacije prava Evropske unije. To je delimično bila i posledica njihove monističke prakse u odnosu na primenu međunarodnopravnih obaveza. Prihvatanje načela supremacije prava EU u Italiji je bilo nešto složenije. U početku je najviši italijanski sud odbio da prihvati nadređenost prava EU pa je tako izbegao da uputi prethodno pitanje Sudu pravde EU pravdajući ovaj postupak tezom da su italijanski pravni poredak i poredak EZ nezavisni i paralelni pravni sistemi. Ipak, 1984. godine, italijanski Ustavni sud je presudio da, i pored toga što EU nema moć da poništava italijanske zakone, u slučajevima kada propisi EU i Italije regulišu istu oblast, italijanski sud treba da prihvati pravo EU. Slično ovome, u prvom periodu ni francuski visoki sudovi nisu dosledno prihvatali načela koja je proglasio SPEU. Francuski vrhovni sud (Conseil d'Etat) do 1989. godine, odbijao je da prizna primat komunitarnog prava nad kasnije donetim propisima unutrašnjeg prava. S druge strane, francuski Kasacioni sud u vodećem slučaju *Jacques Vabre* iz 1975. godine, prihvatio je načelo nadređenosti komunitarnog prava nad unutrašnjim pravom pozivajući se na odredbe člana 55. francuskog Ustava. U toj presudi, Kasacioni sud je naveo da je Ugovorom o osnivanju EEZ, „stvoren poseban pravni sistem integrisan u pravne sisteme država članica. Zbog svoje posebne prirode tako stvorena pravila su direktno primenljiva na državljane u državama članicama i obavezuju nacionalne sudove da ih primenjuju". U Ustavni sud Danske je u više presuda naglasio da je prenos dela suvereniteta danske države na Evropsku uniju ograničen i da je u pitanjima kod kojih propisi EU ne poštuju granice prenesenih nadležnosti, Ustavni sud Danske, a ne Sud EU, taj koji će tumačiti pravo (bez obzira da li je Sud EU već doneo presudu u pravnom pitanju koje razmatra Ustavni sud). U ovom slučaju radi se o primeni tzv teorije *ultra vires* (tj. da institucije EU razmatraju pitanja za koja nisu nadležna). Ovo načelu Ustavni sud Danske je između ostalog ponovio u presudi koja se odnosila na Lisabonski Ugovor o EU od 20.2.2013. U presudi povodom slučaja *Højesteret* iz 2016. godine, Ustavni sud je odbio da prihvati premenu jedne odluke SPEU ističući da čin ratifikacije Ugovora o pristupanju Danske Uniji nije dovoljan da bi se prihvatilo dinamično tumačenje prava EU koje je dao SPEU. Drugim rečima, danski Ustavni sud se čak nije pozvano ni na Ustav, već na nacionalni akt o ratifikaciji Ugovora o EU kako bi ograničio domet presude SPEU.[6] U istom smislu, Ustavni sud Češke je u jednom slučaju iz 2012. godine, odbacio mišljenje SPEU.[7] Stav Ustavnog suda Češke takođe sadrži, s jedne strane, prihvatanje načela nadređenosti prava EU, a s druge strane naglašava da ovo načelo ne može da utiče na „suštinu državnog suvereniteta

[6] Presuda Ustavnog suda Danske br. 199/2012 od 20.2.2013. Videti: H.P. Olsen, "The Danish supreme Court s Decision on the Constitionality of Danmark s ratification of the Lisbon Treaty", *Common Market Law Review*, 2013, Vol. 50, p. 150.

[7] "Decisions 2012/01/31 – Pl. ÚS 5/12: Slovak Pensions". Internet:https://www.usoud.cz/en/decisions/2012-01-31-pl-us-5-12-slovak-pensions, 1.8.2023.

Češke Republike ili na suštinske osobine demokratske države zasnovane na vladavini prava.[8] U Mađarskoj, Ustavni sud je u jednoj presudi iz decembra 2021. godine, u postupku pokrenutom od strane mađarske vlade (pitanje realokacije imigranata), i nakon presude SPEU, istakao da načelo spram atije prava EU može biti ograničeno ako je ugoržen „ustavni identitet ili suveren karakter Mađarske kao države, odnosno ako su povređena neka osnovna prava, garantovana Ustavom. Čini se da je u ovoj presudi mađarski sud sledio doktrinu *ultra vires* koju je primenio i nemački Ustavni sud. Sudska praksa nemačkog Saveznog Ustavnog suda (SUS) izazvala je najviše dilema kada se radi o primeni konstitutivnih pravnih načela iz prakse SPEU. Praksa SUS je imala određeni uticaj i na druge ustavne sudove država članica EU. Nemački Savezni Ustavni sud (SUS) je prvobitno prihvatio da je SPEU proglasio sistem EZ za „samostalni pravni sistem". Međutim, već 1974. godine, ovaj Sud je izjavio da u slučaju sukoba komunitarnog i nacionalnog prava Savezni Ustavni sud SRN može odrediti granice nadležnosti prava EZ. U presudama *Solange* I i II iz 1974. i 1975. godine, Sud je naglasio da u pitanjima poštovanja ljudskih prava komunitarno pravo nije iznad odredbi nemačkog Ustava, ali da je moguće prihvatiti evropsku zaštitu ovih prava ukoliko je ona u skladu sa nemačkim ustavnim principima.[9] U ključnoj presudi *Brunner* iz 1993. godine, koja se odnosila na ustavnost Ugovora iz Mastrihta, SUS je presudio da nemački Osnovni zakon ograničava prenos nadležnosti na EZ/EU, da je EU organizacija *sui generis*, a ne država zasnovana na demokratskim principima. SUS je stoga za sebe zadržao pravo da nadgleda obim nadležnosti EZ/EU i njihovu usklađenost u odnosu na Osnovni zakon SRN. Sud je ipak presudio da Nemačka može da ratifikuje Ugovor iz Mastrihta, pošto nemački parlament zadržava pravo prenosa (i povlačenja) nadležnosti (odnosno suvereniteta) vlade SRN na organe EZ/EU. Sud je istovremeno upozorio da EU može legitimno postati federalna država samo ukoliko postane demokratska, sa uspostavljenom parlamentarnom demokratijom, i jasno definisanom hijerarhijom prava i jedinstvenim demosom. Ovo je još detajnije razjašnjeno u presudi Ustavnog suda povodom ratifikacije Ugovora iz Lisabona. Zanimljivo je da je tom prilikom Sud hipotetično istakao da „Nemačka ne bi mogla da se uključi u Evropsku federalnu državu na osnovu Osnovnog zakona, nego bi morala da takvom slučaju da usvoji novi Ustav"[10]. SUS je ovom prilikom razradio tzv. teoriju „ustavnog identiteta" koji bi sadržao suštinska ustavna pitanja koja su otporna na efekte komunitarnog prava. Ova teorija

[8] Slučaj „kvote za šećer" Ustavnog suda Češke, br. 50/04 od 8.3.2006.

[9] Žaklina Novičić, *Prvenstvo prava EU i nacionalna kontrola prekoračenja nadležnosti EU – slučaj Nemačke,* IMPP, Beograd, 2013; Jelena Vukadinović *Marković*, *op. cit*; Camille White, *National Constitutional Courts and the EU The Evolution of the Conseil Constitutional and the Bundesverfassungsgericht*, Civitas, 2014, NationalConstitutionalCourtsandtheEU.pdf.

[10] Dieter Grimm et al, "European Constitutionalism and German Basic Law", in: Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, Asser Press, Springer, Berlin., p. 421.

je imala dosta uticaja i na presude drugih Ustavnih sudova u državama EU. U poslednje vreme, Ustavni sud Nemačke je potvrdio stav iz svoje sudske prakse da je nadležan da ocenjuje legalnost primarnog i sekundarnog zakonodavstva EU, što ponekad predstavlja direktno suprostavljanje stavovima SPEU. Presudom iz 2014. godine, tokom finansijske krize, u pitanju koje se odnosilo na pitanje nadležnosti Evropske centralne banke – ECB (slučaj *OMT programme*) Ustavni sud je istakao da program Evropske centralne banke „OMT" nije u skladu sa nadležnostima ECB. Ova presuda je obnovila široku debatu pravnih teoretičara u SRN i šire u EU na temu poštovanja načela suprematije komunitarnog prava, uključujući i isključivu nadležnost Suda EU da u krajnjoj instanci tumači propise EU. U novijem slučaju iz 2020. godine (dr *Weiss o*d 5.5.2020), došlo je do daljeg zaoštravanja suprostavljenih stavova.[11] SUS sud je ovom presudom na neki način objavio direktni „rat" Sudu pravde EU, donoseći presudu koja formalno i sadržinski odstupa od komitarnog prava. Presuda je naime objavljena nakon što je Sud EU usvojio prethodno mišljenje koje je predstavljalo odgovor na pitanja od strane tog istog Saveznog Ustavnog suda SRN. Slučaj se odnosio na praksu Evropske centralne banke tokom finansijske krize da uspostavi program otkupa državnih hartija od vrednosti (Public Sector Asset Purchase Programme (*PSPP*) u cilju stabilizacije finansijskog tržišta. U pomenutom prethodnom mišljenju SEU je zaključio da je ECB delovala u skladu sa svojim nadležnostima i ovlašćenjima i da nije bilo kršenja prava EU. Međutim, umesto da samo prihvati, odnosno primi k znanju presudu SPEU, nemački Sud je zasnivajući se na stavu da je SPEU delovao izvan svojih nadležnosti (teorija *ultra vires*) doneo sopstvenu presudu u kojoj je usvojio suprotne zaključke: da je ECB delovala izvan ovlašćenja kao i to da Sud EU takođe nije na odgovorajući način tumačio pravo EU.[12] Ovom presudom, nemački SUS je očigledno napravio iskorak od ranije prakse koja ipak nije tako drastično dovodila u pitanje pravne tekovine EU. Evropska komisija je presudu iz slučaja *Wiess* Saveznog Ustavnog suda u Karlsruhea protumačila kao oblik kršenja odredbi Ugovora o EU od strane Nemačke. U skladu sa ovim, pokrenula je redovni postupak protiv države članice koja ne poštuje propise Unije kako se to predviđa članom 258. Ugovora o funkcionisanju EU. Tako je Evropska komisija u junu 2021. godine, uputila „obrazloženo mišljenje" Nemačkoj, što predstavlja prvu fazu postupka iz člana 258. Međutim, postupak je obustavljen nakon formalne izjave nemačke vlade. U izjavi, nemačka vlada „prihvata načela autonomije, supremacije, efektivnosti i jedinstvene primene prava EU. Ona takođe

[11] Case C-493/17 Weiss of 11 December 2018.

[12] Pavlos Eleftheriadis, "The German Constitutional Court's Weiss judgment is a Failure of German Constitutionalism", May 2020 *Policy Brief,* 2020, No. 116. Za drugačiji stav zasnovan na teoriji ustavnog pluralizma videti: Capeta, Tamara, *The Weiss/PSPP Case and the Future of Constitutional Pluralism in the EU* Exploring the social dimension of Europe, Essays in honour of Nada Bodiroga-Vukobrat, Verlag Dr Kovač, 2021. Internet: https://ssrn.com/abstract=3719419 or http://dx.doi.org/10.2139/ssrn.3719419.

eksplicitno priznaje nadležnost SPEU, činjenicu da mere koje usvajaju organi EU ne mogu biti predmet ustavne nadležnosti u državama članicama, čiji sudovi bi trebalo da se u takvim slučajevima obrate za prethodno mišljenje SPEU u skladu sa članom 267. Ugovora o funkcionisanju EU, uključujući i pitanje da li mere EU krše nadležnost EU ili mogu da ugroze nacionalni identitet države članice, suprotno odredbi člana 4, paragraf 2. Ugovora o EU". Drugim rečima, u sporu u kome je došlo do skoro direktnog suočeljavanja stavova jurisdikcija EU i SRN, umešala su se izvršna tela (vlade) i praktično izgladile dalji sukob.[13]

PRAKSA USTAVNOG SUDA POLJSKE – NOVI IZAZOVI ZA PRIMENU NAČELA SUPREMATIJE U PRAVU EU

Za razliku od SUS Nemačke ili nekih drugih Ustavnih sudova koji su načelo nadređenosti komunitarnog prava dovodili u pitanje u pojedinim konretnim slučajevima, presuda Ustavnog suda Poljske od 7.10. 2021. godine, išla je mnogo dalje jer je u potpunosti odbacila sve odredbe osnovnih Ugovora o EU koje se suprotne poljskom Ustavu kada je u pitanju tumačenje pravosudnih reformi u Poljskoj. Ova presuda je donesena kao posledica radikalnih promena u poljskom političkom i pravnom sistemu od 2015. godine, nakon dolaska na vlast desničarske i evroskeptične stranke „Zakona i pravde" (PiS). Poljska izvršna vlast je od tada sprovela niz pravosudnih reformi sa ciljem povećanja kontrole nad sudskim vlastima, posebno jačajući ulogu tzv. „disciplinskog odelenja" Ustavnog suda. Ove reforme su bile predmet razmatranja pred Sudom pravde EU , koji je u nekoliko slučajeva zaključio da promene u Poljskoj utiču na nezavisnost i nepristrasnost sudova, čime su dovode u pitanje načela iz članova 2. i 19. Ugovora o EU (vladavina prava i obezbeđenje delotvorne pravne zaštite prava EU). Ovim povodom SPEU je usvojio i privremene mere čiji je cilj suspenzija odgovarajućih pravila o pravosuđu u Poljskoj. Imajući u vidu da Poljska nije primenila privremene mere, SPEU je, na zahtev Evropske komisije, u oktobru 2021. godine, usvojio odluku o finansijskim sankcijama protiv Poljske u iznosu od 1 milion evra dnevno. Nakon određenih izmena poljskih propisa, ova mera je ove godine (2023), smanjena na 500.000 evra dnevno. Kao reakcija na presude Suda EU, predsednik vlade Poljske je pokrenuo postupak pred poljskim Ustavnim sudom oko usklađenosti propisa EU sa poljskim Ustavom. Mišljenjem o usklađenosti određenih odredbi Ugovora o EU sa poljskim Ustavom (K. 3/21) Ustavni sud Poljske je istakao da su članovi 1. i 19. u vezi sa članovima 4. i 19. Ugovora o EU (na osnovu kojih je Sud pravde EU izneo svoje stavove o određenim pravima i mogućnosti delovanja poljskih sudija), u suprotnosti sa Ustavom Poljske. Prema većini analiza, ova presuda poljskog Ustavnog suda predstavlja potpuno odbacivanje načela suprematije prava EU. Navedena presuda Ustavnog suda

[13] "Rule of Law Report; Country Chapter on the rule of law situation in Germany", European Commission, Luxembourg, 13.7.2022 SWD(2022) 505 final, p. 22.

Poljske predstavlja samo jedan od elemenanta političko-pravnog nadmetanja koje se već nekoliko godina vodi između institucija EU u Briselu i Varšave (od 2015. godine), i koja je imala trend eskalacije do momenta burnih geopolitičkih promena u Evropi, koje je uzrokovao rat u Ukrajini (24. februar 2022). U reakciji od 7.10. 2021. godine, na presudu poljskog Ustavnog suda, Evropska komisija je ponovila da pravni poredak EU počiva na načelima suprematije komunitarnog prava i činjenici da su sve presude Suda EU obavezujuće za države članice, uključujući i za nacionalne sudove. Evropska komisija je potvrdila svoj institucionalni položaj „čuvara pravnih obaveza" koje proizilaze iz pravnih tekovina EU. U decembru 2021. godine, Evropska komisija je pokrenula postupak protiv Poljske pred Sudom pravde EU za nepoštovanje prava EU, kao posledicu presude Ustavnog suda Poljske. U najnovijoj presudi SPEU od 5. juna 2023. godine, Sud je zaključio da su sve odredbe zakona o organizaciji sudova iz 2019. godine, koje je Evropska komisija dovela u pitanje, krše pravo EU.[14]

ZAKLJUČAK

Iako bi iz prethodnog pregleda moglo izgledati da je pravni sistem EU opterećen konfrontacijom normi EU i ustavnih normi država članica, odnosno razlikama u stavovima SPEU i pojedinih Ustavnih sudova država članica, ovaj utisak bi trebalo znatno ublažiti iz sledećih razloga. Većina pravnih pitanja u primeni prava EU pred nacionalnim sudovima završavaju u proceduri traženja prethodnog mišljenja od strane Suda EU u skladu sa članom 267. Ugovora o funkcionisanju EU. Prema jednoj analizi službi Evropskog parlamenta, svake godine nacionalni sudovi (različite instance) upućuju oko dve do četiri stotine predmeta Sudu pravde EU[15]. Mišljenja SPEU u postupku iz člana 267. nacionalni sudovi u principu uvek prihvataju. Prema tome, pitanja primene prava EU retko dolaze do nivoa Ustavnih sudova. Kada su u pitanju sukobi između normi EU i ustavnih normi, Ustavni sudovi u svojim presudama najčešće ne odbacuju samo načelo suprematije prava EU, nego koriste doktrinu *ultra vires,* odnosno zasnivaju svoju presudu na tumačenju da je organ EU (uključujući i sam Sud pravde EU, kako smo videli prilikom prikaza odluka nemačkog suda) prekoračio svoje nadležnosti, pa se na osnovu ovakve procene odbacuje primena norme EU ili tumačenje od strane SPEU. Naravno, zamerka ovakvom pristupu je u činjenici da je pitanje nadležnosti (prekoračenja i sl.), u pravu EU ostavljeno za tumačenje samog SPEU. Drugim rečima, iz ugla prava EU već sa činjenicom da se nacionalni sud upušta u bilo kakvo tumačenje norme EU – a da pri tome nije prethodno zatražio tumačenje SPEU – dolazi do prekoračenja nadležnosti od

[14] "Case C-204/21, Commission v. Republic of Poland"; "Rule of Law Report Country Chapter on the rule of law situation in Poland", European Commission, Brussels, 5.7.2023 SWD(2023) 821 final, p.3.

[15] "La primauté de droit de l'Union européenne, *op.cit,* p. 29.

strane nacionalne jurisdikcije. Kada je u pitanju neki Ustavni sud, on će se naravno u načelu držati stava da je primena neke norme u nacionalnom pravnom sistemu - bez obzira na njeno poreklo (međunarodni Ugovor, evrospki akt i sl) – podložna ustavnopravnoj kontroli. Najzad treba istaći i da je u praksi funkcionisanja pravnih sistema u EU odavno uspostavljen tzv. *pravosudni dijalog* između SPEU i visokih nacionalnih jurisdikcija . Ovo podrazumeva, kako neformalni doktrinarni dijalog između predstavnika sudova (u vidu konferencija i sl.), tako posebno i činjenicu da odgovarajući sudovi (Evropski sud i ustavni ili vrhovni sudovi zemalja EU) izbegavaju da dođe do sukoba rešenja u u primeni presuda u nekim konkretnim pitanjima. Drugim rečima te se presude tako formulišu da njihov sadržaj može biti načelno doktrinarno suprostavljen, ali su njihovi praktični efekti ograničeni. U jednoj odluci Ustavnog suda Španije iz 2004. godine napravljena je sledeća distinkcija između ustavne i komunitarne norme, sa ciljem izbegavanja konflikta između dva uzajamno isprepletana pravna sistema: ustavne norme su u načelu iznad ostalih propisa nacionalnog prava i one su hijerarhijski nadređene svim drugim pravnim propisima u nacionalnom sistemu (bez obzira na poreklo norme). Međutim, samom primenom ustavnih pravila, prihvaćen je pravni sistem EU (kao integralni deo španskog sistema) što za posledicu ima da primena komunitarnih normi ima prednost (prvenstvo, primat) u odnosu na nacionalnu normu, što dakle postalo ustavnopravna kategorija.[16] Postavlja se pitanje, da li je i funkcionisanje pravnog sistema EU, onako kako ga određuju Ugovori EU i praksa Suda pravde EU, došlo u krizu pod pritiskom naraslog nacionalizma u pojedinim državama članicama koji neminovno, osim političke sfere, prodire i u druge državne institucije, uključujući i pravosuđe. U tom pogledu, posebno osetljivu ulogu imaju Ustavni sudovi država članica, koji su, više nego drugi delovi pravosudnog sistema posebno osetljivi i uticajni kada je u pitanju funkcionisanje državnog poretka, kao i artikulisanje nacionalnog pravnog sistema u kontaktu sa spoljnim činiocima. Stoga se, posmatrano iz ugla prakse Ustavnih sudova može zaključii da u ovom momentu, u pitanjima odnosa komunitarnog prava i ustavnih normi ne postoji primena jedinstvenog načela nadređenosti, nego neka vrsta „pluralizma" u interpretacijama ovog načela od strane različitih Ustavnih sudova . Kako je istakla M. Klas, „dok je načelo nadređenosti primenjeno u osnovnom nacionalnom zakonodavstvu uglavnom prihvaćeno, isto se ne može reći kada je u pitanju primena ustavnih pravila. U ovom slučaju, trendovi idu u suprotnom pravcu, pošto sve više država članica uslovljava primenu prava EU njegovom usklađenošću sa osnovnim načelima nacionalnih ustava".[17] Iako smo u ovom članku nastojali u prvom redu da ukaženo na pomenute razlike u stavovima Suda pravde EU, s jedne strane, i pojedinih Ustavnih sudova država članica, sa druge

[16] Tribunal Constitucional, 13 décembre 2004, DTC n 1/2004. Videti: "La primauté de droit de l'Union européenne, *op. cit*, p. 30.

[17] Monica Claes, "The Primacy of EU Law in European and National Law" in: A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, Oxford Press, 2015, p. 178.

strane, kada je u pitanju primena načela supremacije (prvenstva) evropske norme, možemo zaključiti da u pravnoj praksi redovnih nacionalnih jurisdikcija (u primeni prava EU), ove razlike nemaju velike posledice. Radi se u prvom redu o doktrinarnim razlikama oko efekata elemenata federalizma u pravno-političkom i ustavnim sistemima sistemu Evropske unije i njenih država članica, oko čega se debata na različite načine vodi još od samog nastanka Evropskih zajednica. Jedno od ključnih pitanja je, u kojoj meri EU treba da postane nadnacionalna zajednica zasnovana na vladavini prava ili pak, suprotno, da se njena evolucija treba da ograničiti na podršku delovanju država nacija. Ostaje da se vidi da li će odgovor biti sadržan u svojevrsnom pravnom „dijalogu" najviših pravosudnih organa u EU koji do danas nije sasvim okončan.

TREATY OR CONSTITUTION? THE PRINCIPLE OF SUPREMACY IN EU LAW AND THE CONSTITUTIONAL COURTS OF THE MEMBER STATES OF THE UNION

ABSTRACT

The text examines the issue of the relationship between the legal norms of the European Union (often referred to as the acquis of the EU – *aquis communitaire*) and national legal regulations, in accordance with the interpretations of the EU Court of Justice on the one hand, that is, of individual Constitutional Courts of the member states, on the other. As is known, the EU legal system developed with the practice of the EU Court of Justice, especially when it comes to some basic principles from EU law, such as the principle of direct effect or the principle of primacy or supremacy of EU norms. The question arises, which is older, the EU norm whose obligation stems from the logic of international and European law on the transfer of jurisdiction and the limitation of state sovereignty, or the national constitutional norm, as the legal cornerstone from which all regulations in national legislation are derived and interpreted? This is a dilemma that is sometimes answered differently – depending on the angle of observation and the position of the observer – in the ever-living dynamics and evolution of the relationship between European and national law. Observed from the point of view of the practice of the Constitutional Courts, it can be concluded that at this moment, there is no application of a single principle of supremacy, but a kind of "pluralism" in the interpretations of this principle by different Constitutional Courts. In the legal practice of regular national jurisdictions (in the application of EU law), these differences have no major consequences. It is primarily about doctrinal differences regarding the effects of elements of federalism in the legal-political and constitutional systems of the European Union and its member states, which has been debated in various ways since the very beginning of the European Communities.

Key words: EU law, principle of supremacy, EU Court, Constitution

REFERENCE

1. Cartou, Louis, *Communautés européennes*, Dalloz, Paris, 1979,
2. Claes, Monica. "The Primacy of EU Law in European and National Law" in: A. Arnull, D. Chalmers (ed), *The Oxford Handbook of European Union Law*, Oxford Press, 2015.
3. Eleftheriadis, Pavlos, "The German Constitutional Court's Weiss judgment is a Failure of German Constitutionalism", May 2020 *Policy Brief,* No. 116/2020, ELIAMEP, Athens.
4. European Commission, *2023 Rule of Law Report,* Brussels, 5.7.2023; COM(2023) 800 final
5. Gaillard, Marion, *l'Union européenne, Institutions et politiques*, La Documentnation francaise, Paris, 2022
6. Grimm Dieter et al, "European Constitutionalism and German Basic Law", in: Anneli Albi, Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law,* Asser Press, Springer, Berlin.
7. Hiks, Sajmon. *Politički sistem Evropske unije*, Beograd, Službeni glasnik, 2007.
8. Lopandić, Duško, „Lisabonski ugovor i reforma Evropske unije" u: B. Babić (ur.), *Vodič kroz pravo Evropske unije*, IMPP, Sl. Glasnik, Pravni fakultet, Beograd, 2009.
9. Lopandić, Duško, *Evropska integracija između nacije i globalizacije*, Arhipelag, Beograd, 2018.
10. Medović Vladimir (ur.), *Pojmovnik EU*, Delegacija EU, Beograd 2018.
11. Medović, Vladimir, *Evropska unija, pravo i institucije,* Univerzitet Privredna akademija, Pravni fakulteta za privredu i pravosuđe, Novi Sad, 2018.
12. Olsen, H.P. "The Danish supreme Court s Decision on the Constitionality of Danmark s ratification of the Lisbon Treaty", *Common Market Law Review,* 2013, Vol. 50.
13. Petersen N. and P. Waslicyk, *The primacy of EU Law and the Polish constitutional law judgment, study,* Directorate General for Internal Politics, European Parliement, June 2022.
14. Vukadinović Marković, Jelena, „O primatu prava EU. Iz ugla SRN", *Constitutio lex superior,* Sećanje na profesora Pavla Nikolića, IUP, Beograd, 2021.
15. Vukadinović, Radovan, *Uvod u institucije i pravo Evropske unije*, Udruženje za evropsko pravo, Kragujevac, 2012.
16. White, Cammile, *National Constitutional Courts and the EU: The Evolution of the Conseil Constitutionnel and the Bundesverfassungsgericht*, Civitas, 2014, National Constitutional Courts and the EU.pdf.

DOGMATIKA JURISDIKCIONOG IMUNITETA U GRAĐANSKIM STVARIMA – UTICAJ RAZVOJA MEĐUNARODNOG PRAVA NA RAZLIKOVANJE SUDBENOSTI I MEĐUNARODNE NADLEŽNOSTI

Marko S. KNEŽEVIĆ*

APSTRAKT

Jurisdikcioni imunitet u međunarodnom pravu dominantno se razmatra u supstancijalnom smislu. U domaćoj literaturi je do sada na margini ostalo centralno dogmatičko pitanje – prirode imuniteta u smislu procesnog prava. U radu se izlažu osnovni teorijski pravci, i to učenje o pojmovnom razlikovanju međunarodne nadležnosti i sudbenosti, u okviru koje imunitet predstavlja njen izuzetak, i učenje o pojmovnom jedinstvu, koje podrazumeva da postoji samo međunarodna nadležnost koju ograničavaju pravila o imunitetu. Potom se analiziraju dosadašnji glavni argumenti u prilog jedne i druge koncepcije i to spram onih argumenata koji na ovaj ili onaj način uzimaju kao merodavno međunarodno javno pravo i njegov razvoj. U rezultatu se pokazuje da je za srpsku procesnu dogmatiku primerenije učenje o pojmovnom razlikovanju sudbenosti i direktne međunarodne nadležnosti.

Ključne reči: Jurisdikcioni imunitet, sudbenost, jurisdikcija, međunarodna nadležnost

UVOD

Pod imunitetom se u međunarodnom javnom pravu podrazumeva privilegija određenih subjekata. Iz te perspektive, jursidikcioni imunitet je takođe privilegija subjekata međunarodnog prava i njihovih organa: oni su izuzeti od sudske vlasti druge države.[1] S obzirom na to da se putem jurisdikcionog imuniteta zabranjuje

* Vanredni profesor, Pravni fakultet u Novom Sadu, Univerzitet u Novom Sadu. E-mail: mknezevi@pf.uns.ac.rs
Redovnim profesorima Pravnog fakulteta u Novom Sadu, dr Maji Stanivuković, dr Sanji Đajić i dr Petru Đundiću, srdačno se zahvaljujem na izdvojenom vremenu za diskusije, kao i na vrednim sugestijama. Razume se, odgovornost za iznete stavove je isključivo moja.

[1] Rodoljub Etinski, Sanja Đajić, Bojan Tubić, *Međunarodno javno pravo*, 9. Izdanje, Pravni fakultet u Novom Sadu, Novi Sad, 2021, str. 180.

suđenje određenim licima, neminovno je njegovo smeštanje u procesne okvire. Štaviše, imunitet je "granično područje na raskrsnici međunarodnog javnog i građanskog procesnog prava".[2] Stoga nimalo nije čudno da je reč o pitanju koje, čini se, kao nijedno drugo nalazi svoju obradu i u okviru nacionalne procesne doktrine, bila ona klasična doktrina građanskog procesnog prava, ili međunarodnog građanskog procesnog prava. Upravo na tom polju su postojali, a gledano iz domaće perspektive još uvek postoje, sporovi o osnovnim pojmovnim pitanjima. Najjednostavnije postavljeno pitanje glasi: da li je imunitet tuženog nedostatak posebne procesne pretpostavke, ili je to samo jedan vid nepostojanja međunarodne nadležnosti? U tom smislu, po jednom shvatanju razlikuju se sudbenost (jurisdikcija) kao jedna, samostalna procesna pretpostavka, i direktna međunarodna nadležnost, kao druga, isto tako posebna procesna pretpostavka; imunitet ograničava sudbenost, a ne međunarodnu nadležnost. Po drugom shvatanju, imunitet je samo ograničenje međunarodne nadležnosti, tako da postoji samo jedna procesna pretpostavka, a to je međunarodna nadležnost. Pre 30 godina Varadi je pošao od teze da postoje osnove za koncepcijsko razlikovanje pitanja imuniteta i pitanja međunarodne nadležnosti, ali je ujedno – na osnovu tadašnjih tendencija u nacionalnom i konvencijskom pravu o imunitetu – doveo u pitanje rečeno, ostavljajući odgovor budućem razvoju.[3] Period od tri decenije je dovoljno dug da se učini pokušaj davanja odgovora, koji je za dogmatiku (međunarodnog) građanskog procesnog prava od kardinalnog značaja. Već je na ovom mestu nužno ukazati na terminološke izazove. Pod jurisdikcijom se danas, pod uticajem literature na engleskom jeziku, podrazumeva više pojmova. Svakako da se jurisdikcija dominantno koristi kao sinonim za nadležnost uopšte, ili međunarodnu nadležnost,[4] ali povrh toga, nije neuobičajeno da se na taj način označavaju, prosto, nacionalni pravni poreci. U tom smislu, govori se često o "stranim jurisdikcijama", misleći na strane pravne sisteme. S druge strane, termin sudbenost je gotovo iščezao iz srpskog pravnog diskursa.[5] Ipak, u ovom radu se on primarno koristi, upravo zbog višeznačnosti termina "jurisdikcija". Uostalom, i iz perspektive međunarodnog javnog prava, u kome "jurisdikcija" (eng. *jurisdiction*) podrazumeva genusni pojam "vlasti", opravdano je govoriti o posebnom, užem pojmu, koji označava sudsku vlast. Čini se da trenutno nema boljeg termina od sudbenosti, jer bi "sudska jurisdikcija", makar na planu jezičke ekonomije, bila manje prihvatljiva.

---

[2] Peter Mankowski, „Besprechung von Sigrid Lorz: Ausländische Staaten vor deutschen Zivilgerichten", *Juristenzeitung*, 2018, Vol. 73, Nr. 9, p. 456.

[3] Tibor Varadi, „Savremene tendencije u razvoju imuniteta država", *Anali Pravnog fakulteta u Beogradu*, 1983, Vol 31, br. 1–4, str. 142–144.

[4] Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, Službeni list SCG, Beograd, 2004, str. 180.

[5] Odrednica „sudbenost" postoji u Rečniku srpskoga jezika Matice srpske: „sudska nadležnost, delokrug suda".

OSNOVNE DOGMATIČKE POZICIJE

Sudbenost i međunarodna nadležnost kao različiti pojmovi

Ishodište ovog teorijskog pravca, vladajućeg pre svega u porecima nemačkog govornog područja, jeste međunarodno javno pravo, i tamošnji pojam sudbenosti (ili jurisdikcije). On se, potom, zbog konteksta transponuje u (međunarodno) procesno pravo, i dobija svoje zasebno dogmatičko mesto, naročito u odnosu na međunarodnu nadležnost. Ovo učenje potiče još iz međuratnog perioda, bilo je inspirisano praktičnim razlozima,[6] a slobodno se može reći da je otac učenja Pagenšteher (*Pagenstecher*).[7] Prema pisanju autora sa nemačkog govornog područja, i u drugim kontinentalnopravnim sistemima se zastupa slično shvatanje;[8] štaviše, govori se o jednom "kontinentalnopravnom" poimanju.[9] Sudbenost (*facultas iurisdictionis*) u međunarodnopravnom smislu predstavlja izraz teritorijalne suverenosti države.[10] Reč je o ovlašćenju adjudikativnog karaktera na sopstvenoj teritoriji, ovlašćenju koje proističe iz suvereniteta,[11] i zbog toga je principijelno neograničeno. Otuda, za sudbenost se koriste, doduše ne tako često, i sinonimi poput "sudske vlasti" (nem. *Gerichtsgewalt*)[12] ili sudske suverenosti (nem. *Gerichtshoheit*).[13] Pravila o imunitetu predstavljaju ograničenje tako

[6] Nemačka vrhovna instanca tog vremena (Sud Rajha, nem. *Reichsgericht*) isprva je negirala samostalni status sudbenosti kao procesne pretpostavke; za nju to pitanje je bilo ništa drugo do pitanje stvarne nadležnosti, što je povlačilo poseban, ograničeni režim pobijanja odluka o stvarnoj nadležnosti. Videti: Max Pagenstecher, „Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen", *Zeitschrift für ausländisches und internationales Privatrecht*, 1937, Vol. 11, pp. 346–348.

[7] Max Pagenstecher, „Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen", *op. cit.*, p. 348–358. Ubrzo nakon objavljivanja njegovog rada, i sam Sud Rajha je izričito odstupio od svoje dotadašnje prakse, pozivajući se isto tako izričito na Pagenštehera. Videti: Reichsgericht, 16. 5. 1938 – I 232/37, *RGZ* 157, 389 (394). O zaslugama Pagenštehera za nemačko međunarodno građansko procesno pravo videti: Wolfgang Hau, „*Zur Prüfung der internationalen Zuständigkeit – eine Reminiszenz an Max Pagenstechers grundlegenden Beitrag*" in Rolf A. Schütze (ed), *Fairness Justice Equity: Festschrift für Reinhold Geimer zum 80. Geburtstag*, C.H. Beck, München, 2017, pp. 189–198.

[8] Za stanje u francuskoj i italijanskoj doktrini videti: Walter Habscheid, „Die Immunität ausländischer Staaten nach deutschem Zivilprozeßrecht" in *Berichte der deutschen Gesellschaft für Völkerrecht 8*, C. F. Müller, Karlsruhe, 1968, p. 166.

[9] Gerhard Walter, Tanja Domej, *Internationales Zivilprozessrecht der Schweiz*, Haupt Verlag, Bern/Stuttgart/Wien, 2012, p. 91.

[10] Tako već *The Case of the S.S. "Lotus"*, PCIJ Series A No. 10, pp. 18–19; Videti: Reinhold Geimer, *Internationales Zivilprozessrecht*, 7. Auflage, Dr. Otto Schimdt, Köln, 2015, p. 196.

[11] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, I.C.J. Reports 2012, p. 124, para. 57.

[12] Na tom terminu insistira Šak. Videti: Heimo Schack, *Internationales Zivilverfahrensrecht*, 8. Auflage, C.H. Beck, München, 2021, p. 70.

[13] Upor. Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 196; Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, Mohr Siebeck, Tübingen, 2017, p. 69; Abbo Junker, *Internationales Zivilprozessrecht*, 3. Auflage, C.H. Beck, München, 2016, p. 35.

shvaćene sudbenosti. Subjekti kojima je priznat imunitet su oslobođeni od sudbenosti, oni joj nisu podvrgnuti. Tako uobličen koncept sudbenosti se transponuje u procesnu dogmatiku, iz samorazumljivog razloga – jurisdikcioni imunitet je procesne, a ne materijalnopravne prirode.[14] Reč je, stoga, o procesnoj pretpostavci – da bi bilo kakvo meritorno rešenje spora bilo moguće, nužno je da postoji sudbenost, a nje nema ako tuženi uživa jurisdikcioni imunitet; u nedostatku sudbenosti, tužba se odbacuje kao nedopuštena. Pri tome, u nemačkom i švajcarskom pravu ne postoje posebne odredbe o tome, štaviše, termin sudbenost se uopšte ni ne spominje u odnosnim zakonima o parničnom postupku. Drugačije je stanje u austrijskom pravu, u kojem se još uvek iz istorijskih razloga u zakonu koristi jedan termin ("domaća sudbenost", nem. *inländische Gerichtsbarkeit*), koji se odnosi kako na sudbenost, tako i na međunarodnu nadležnost. No, to nije prepreka za tamošnju literaturu i sudsku praksu da zastupaju stav o jasnom pojmovnom razlikovanju, imajući u vidu da su od 1997. godine predviđene različite pravne posledice, odnosno različiti procesni režimi.[15] Tako shvaćena sudbenost se prema ovom teorijskom pravcu rigorozno[16] razdvaja od međunarodne nadležnosti, koja je posebna procesna pretpostavka.[17] Međunarodna nadležnost uređuje u pogledu sporova sa elementom inostranosti raspodelu poslova između

[14] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, I.C.J. Reports 2012, p. 124, para. 58, p. 140, para. 93; Hazel Fox, Philippa Webb, *The Law of State Immunity*, 3rd Edition, Oxford University Press, Oxford, 2013, p. 21; upor. i Helmut Damian, *Staatenimmunität und Gerichszwang*, Springer, Berlin/Heidelberg, 1986, pp. 72–73: „imunitet ne predstavlja oslobođenje od materijalnopravnog poretka".

[15] Peter Mayr, „Die ´inländische Gerichtsbarkeit´ im österreichischen Zivilverfahrensrecht" in Sebastian Kubis, Karl-Nikolaus Peifer, Benjamin Raue, Malte Stieper (eds), *Ius Vivum: Kunst – Internationales – Persönlichkeit: Festschrift für Haimo Schack zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 2022, pp. 783, etc.

[16] Burkhard Hess, *Staatenimmunität bei Distanzdelikten*, C.H. Beck, München, 1992, p. 387: „u nijednom drugom pravnom poretku se tako rigorozno ne sprovodi razdvajanje sudbenost i međunarodna nadležnost kao u nemačkom pravu".

[17] Za nemačko pravo videti:: Walter J. Habscheid, „Die Immunität ausländischer Staaten nach deutschem Zivilprozeßrecht", *op. cit.*, pp. 163–166; Reinhold Geimer, *Zur Prüfung der Gerichtsbarkeit und der internationalen Zuständigkeit bei der Anerkennung ausländischer Urteile*, Gieseking, Bielefeld, 1966, pp. 69–70; Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, pp. 359–360; Haimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, pp. 69–70, 82; Abbo Junker, *Internationales Zivilprozessrecht*, *op. cit.*, p. 34; Heinrich Nagel, Peter Gottwald, *Internationales Zivilprozessrecht*, 7. Auflage, Dr. Otto Schmidt, Köln, 2013, p. 48; Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, p. 70. – Za švajcarsko pravo videti: Gerhard Walter, Tanja Domej, *Internationales Zivilprozessrecht der Schweiz*, *op. cit.*, p. 91; Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, Stämpfli, Bern, 1998, pp. 106, 451 i dalje; Karl Spühler, Rodrigo Rodriguez, *Internationales Zivilprozessrecht*, 3. Auflage, Schulthess, Zürich, 2022, p. 17. – Za austrijsko pravo videti.: Peter Mayr, „Die ´inländische Gerichtsbarkeit´ im österreichischen Zivilverfahrensrecht", *op. cit.*, p. 783 sa daljim upućivanjima: „jednodušno shvatanje doktrine".

domaće i strane sudske vlasti. U tom smislu, navodi se centralna strukturalna razlika između sudbenosti i međunarodne nadležnosti, uobličena u često citiranoj Šakovoj (*Schack*) formuli: dok pravila o sudbenosti određuju da li sud uopšte sme da reši spor, pravila o međunarodnoj nadležnosti određuju da li sud mora da reši spor.[18] Drugim rečima, međunarodno pravo nameće ograničenje sudbenosti, ali kada ona postoji, država uređuje principijelno slobodno u kojoj meri će zaista vršiti svoju suverenu vlast. Zbog toga je vladajuće shvatanje[19] ono koje u sudbenosti vidi "logički prioritet" u odnosu na međunarodnu nadležnost: da bi se odgovorilo na pitanje da li je domaće sudstvo pozvano da raspravi jedan spor sa elementom inostranosti, nužno je da prethodno postoji sudbenost. No, iz toga ne treba zaključivati da teorijski pogled nužno vodi kategoričkom sledu postupanja. Postoje autori koji nesputano od teorijskih stega teleološki rezonuju, te priznaju mogućnost da se tužba odbaci zbog nepostojanja međunarodne nadležnosti i bez prethodnog rešavanja pitanja sudbenosti.[20]

Jedan od ključnih faktora razlikovanja sudbenosti i međunarodne nadležnosti je osnov važenja (nem. *Geltungsgrund*). Pitanje sudbenosti je uređeno međunarodnim običajnim pravom, i predstavlja imperativ; svakako, dolaze u obzir i međunarodni ugovori, kojima država pristupa dobrovoljno. Obrnuto, međunarodna nadležnost, tvrdi ovaj pravac, nije determinisana međunarodnim običajnim pravom. Polazna tačka je negiranje – u ishodu – međunarodnopravnog karaktera međunarodne nadležnosti: ili se prosto negira postojanje pravila

[18] Heimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, p. 69. Neki, poput Linkea i Haua, smatraju da Šakova formula zahteva relativizaciju, utoliko što ona važi samo iz perspektive tužioca, dok je iz ugla tuženog uvek pitanje da li sud „sme" da sudi. Videti: Hartmut Linke, Wolfgang Hau, *Internationales Verfahrensrecht*, 8. Auflage, Dr. Otto Schmidt, Köln, 2021, p. 54.

[19] Za nemačko pravo videti: Bundesgerichtshof, 19. 12. 2017 – XI ZR 796/16, NJW 2018, 854 para. 15 sa daljim upućivanjima na sudsku praksu; Reinhold Geimer, *Zur Prüfung der Gerichtsbarkeit und der internationalen Zuständigkeit bei der Anerkennung ausländischer Urteile*, *op. cit.*, pp. 69–70; Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 359; Haimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, p. 82; Abbo Junker, *Internationales Zivilprozessrecht*, *op. cit.*, p. 34; Heinrich Nagel, Peter Gottwald, *Internationales Zivilprozessrecht*, *op. cit.*, p. 48; Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, p. 71. – Za švajcarsko pravo videti:: Jolanta Kren Kostkiewitz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 112. – Za austrijsko pravo videti: Peter Mayr, „Die ´inländische Gerichtsbarkeit´ im österreichischen Zivilverfahrensrecht", *op. cit.*, p. 787.

[20] Tako, primera radi, za nemačko pravo: Walter J. Habscheid, „Die Immunität ausländischer Staaten nach deutschem Zivilprozeßrecht", *op. cit.*, p. 189; Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, pp. 359–360; Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, pp. 71–72 sa daljim upućivanjima. – Za švajcarsko pravo: Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 482. – Za austrijsko pravo: Peter Mayr, „§ 42 JN" in Walter Rechberger, Thomas Klicka (eds.), *Zivilprozessordnung*, 5. Auflage, Verlag Österreich, Wien, 2019, p. 203.

međunarodnog običajnog prava o imperativu unutrašnje veze,[21] ili se zaključuje da je nemoguće doći do koliko-toliko opipljivih pravila o tome.[22] Smatra se da se iz još uvek šarolike nacionalne prakse ne može utvrditi postojanje običajnog prava koje bi bilo koji kriterijum za zasnivanje međunarodne nadležnosti učinilo međunarodnopravno neprihvatljivim. To važi i za one tačke vezivanja koje su tradicionalno etiketirane kao prekomerne.[23] Na kraju, razlikovanje između sudbenosti i međunarodne nadležnosti se vrši na osnovu različitih pravnih posledica.[24] U nemačkom i švajcarskom pravu se kao najznačajnija ističe ništavost presude (presuda bez dejstva), pri čijem donošenju je zanemaren imunitet tuženog.[25] Drugim rečima, nedostatak sudbenosti se ne sanira formalnom pravnosnažnošću presude,[26] što nije slučaj sa deficitom međunarodne nadležnosti – takva presuda razvija u punom vidu kako dejstvo materijalne pravnosnažnosti, tako i ostala dejstva. Principijelno je isto u austrijskom pravu, utoliko što u potonjem slučaju presuda takođe ima sva dejstva, dok u slučaju previda

[21] Tako, primera radi, Franz Matscher, „Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit" in Hans W. Fasching, Andreas Konecny (eds), *Kommentar zu den Zivilprozessgesetzen, Bd. I*, 3. Auflage, Manz, Wien, 2013, pp. 69–71; Haimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, p. 91.

[22] Često citirana misao Šredera (Schröder) glasi: granice koje međunarodno javno pravo postavlja u odnosu na međunarodnu nadležnost se „gube bilo gde u magli praktične neupotrebljivosti", cit. prema Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 57.

[23] Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, pp. 207–208.

[24] Upor. samo Franz Matscher, „Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit", *op. cit.*, pp. 83–85.

[25] Max Pagenstecher, „Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen", *op. cit* ., p. 344.

[26] Rečeno ni u nemačkom, ni u švajcarskom pravu nije pokriveno bilo kojom pisanom normom, niti je u zakonima uopšte spominje figura ništavih presuda. Pa ipak, reč je o vladajućem shvatanju, koga sledi i nemačka sudska praksa. Videti: Bundesverfassungsgericht, 17. 3. 2014 – 2 BvR 736/13, NJW 2014, 1723 para. 28; Bundesgerichtshof, 9. 7. 2009 – III ZR 46/08, NJW 2009, 3164 para. 20 sa daljim upućivanjima; Leo Rosenberg, Karl-Heinz Schwab, Peter Gottwald, *Zivilprozessrecht*, 17. Auflage, C.H. Beck, München, 2010, pp. 99, 326; Heinrich Nagel, Peter Gottwald, *Internationales Zivilprozessrecht*, *op. cit.*, p. 51; za švajcarske autore videti: Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 513 fn. 1742. – Manjinsko shvatanje relativizuje osnovnu tezu, tako da negira ništavost presude onda kada je u njoj izričito negirano postojanje imuniteta. Videti: Othmar Jauernig, *Das fehlerhafte Zivilurteil*, Vittorio Klostermann, Frankfurt am Main, 1958, p. 162; u istom smislu danas Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 261; *Haimo Schack*, *Internationales Zivilverfahrensrecht*, *op. cit.*, pp. 82–83; Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, pp. 514–515. – Takođe, postoje shvatanja koja u potpunosti negiraju ništavost presude, te priznaju samo mogućnost njenog napadanja putem tužbe za poništaj (pandan predlogu za ponavljanje postupka prema srpskom pravu), i to na osnovu analogne primene. Videti: Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, pp. 317–325, 410–415 sa daljim upućivanjima.

sudbenosti saveznom ministarstvu pravde stoji na raspolaganju vremenski neograničeno pravno sredstvo, na osnovu kojeg se presuda poništava, a tužba odbacuje.[27] Uz rečeno, nema spora da u pogledu sudbenosti – za razliku od međunarodne nadležnosti – ne postoji ustaljivanje, tako da sticanje imuniteta tuženog tokom postupka vodi odbacivanju tužbe.[28] Nema sumnje da je u domaćoj literaturi Jakšić jedini reprezent doslednog sleđenja prikazanog učenja.[29] Jedina razlika, i to konceptualne prirode, je u tome što za njega međunarodna nadležnost logički prethodi sudbenosti.[30] Ipak , važno je istaći da je u procesnoj literaturi odavno prisutno shvatanje o sudbenosti i međunarodnoj nadležnosti kao posebnim pojmovima, iako ne značajno razvijeno. Tako Poznić – nakon početnog kolebanja u prvim izdanjima udžbenika – dosledno zastupa shvatanje da postoji samostalna procesna pretpostavka, očito različita od međunarodne nadležnosti, koju on označava kao "podređenost tuženog domaćem pravosuđu (postojanje imuniteta u parničnom postupku)",[31] odnosno "podređenost tuženog domaćem sudu".[32] S druge strane, deo domaće literature koja obrađuje međunarodno privatno pravo, čini se, ima u osnovi isti pristup, ali ne sasvim jasno artikulisan. I za Varadija i dr., i za Kitića, problem imuniteta je zaseban problem u odnosu na međunarodnu

[27] Više o tome Peter Mayr, „§ 42 JN", *op. cit.*, pp. 205–209. Austrijski Vrhovni sud, s pozivom na literaturu, cilj ovakvog koncepta vidi u postventivnom otklanjanju posledica „međunarodno pravnog neprava". Videti: Oberster Gerichtshof, 14. 12. 2004 – 10 Ob 53/04y, SZ 2004/176.

[28] Za nemačko pravo, u kojem nema izričite norme o tome, videti: Max Pagenstecher, „Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen", *op. cit.*, pp. 353–354, i pod njegovim uticajem Reichsgericht, 16. 5. 1938 – I 232/37, RGZ 157, 389 (394);); Leo Rosenberg, Karl-Heinz Schwab, Peter Gottwald, *Zivilprozessrecht*, *op. cit.*, p. 99; Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, pp. 355–366 sa daljim upućivanjima. – Za švajcarsko pravu, u kojem takođe nema izričite odredbe, umesto svih videti: Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 112. – U austrijskom pravu je negiranje ustaljivanja sudbenosti izričito predviđeno zakonom (§ 29 Jurisdiktionsnorm).

[29] Upor. Aleksandar Jakšić, *Međunarodno građansko procesno pravo*, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2016, str. 77–80 131, 151–152; Aleksandar Jakšić, *Međunarodno privatno pravo*, Službeni glasnik, Beograd, 2021, str. 377, 387–388; Aleksandar Jakšić, *Građansko procesno pravo*, 9. izdanje, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2017, str. 381.

[30] Aleksandar Jakšić, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 131, 151, 153; Aleksandar Jakšić, *Međunarodno privatno pravo*, *op. cit.*, str. 388, 390. Zbog toga on smatra da je pri ispitivanju procesnih pretpostavki sud dužan prvo da oceni međunarodnu nadležnost, a tek potom pitanje imuniteta tuženog. Videti: Aleksandar Jakšić, *Građansko procesno pravo*, *op. cit*., str. 386.

[31] Borivoje Poznić, Vesna Rakić-Vodinelić, *Građansko procesno pravo*, 17. izdanje, Pravni fakultet Univerziteta Union u Beogradu/Službeni glasnik, Beograd, 2015, str. 53. Poznić zapravo, nemački termin *Gerichtsbarkeit*, inače višeznačan, ovde prevodi kao „pravosuđe", a ne kao „sudbenost".

[32] Borivoje Poznić, *Komentar Zakona o parničnom postupku*, Službeni glasnik, Beograd, 2009, str. 399.

nadležnost. Doduše, izlaganja o striktnom pojmovnom razlikovanju nedostaju, ali je već sam način izlaganja materije rečit: imunitet se ne obrađuje u okviru međunarodne nadležnosti, već nakon toga, zasebno.[33] Uz to, čini se da Kitić dosledno koristi termin "jurisdikcija" kao sinonim za sudsku vlast, a to je ništa drugo do sudbenost. Otuda, kada obrađuje imunitet, govori o "imunitetu od jurisdikcije".[34]

Jedinstveni pojam međunarodne nadležnosti

Drugi teorijski pravac odnos pravila o imunitetu i međunarodne nadležnosti ne vidi kao odnos dva zasebna instituta, već je reč o jedinstvenom pojmu. U ishodu, postoji samo međunarodna nadležnost, koja podrazumeva kako tradicionalna pravila koja su determinisana tačkama vezivanja, tako i pravila o imunitetu. Ukoliko tuženi uživa imunitet, to je samo osnov međunarodne nenadležnosti, odnosno, imunitet tuženog je isključenje, odnosno ograničenje međunarodne nadležnosti.[35] Prema shvatanju mnogih, reč je o anglo-američkom pristupu koji se razlikuje od prikazanog "kontinetalno-pravnog" poimanja.[36] Jer, principijelno u common law sistemima postoji samo jedan pojam, i to "*jurisdiction*", i tek se iz konteksta može zaključiti da li je reč o – iz kontinetalnopravne perspektive – sudbenosti ili o klasičnoj međunarodnoj nadležnosti.[37] Tamošnja literatura je svesna deficita terminologije, te zaključuje da tako nešto ne služi na čast.[38] Prema ovom shvatanju, odnos imuniteta i međunarodne nadležnosti u smislu "logičkog redosleda" drugačiji je u odnosu na učenje o sudbenosti i međunarodnoj nadležnosti kao posebnim institutima. U tom smislu, logički *primus* je

---

[33] Tibor Varadi, Gašo Knežević, Bernadet Bordaš, Vladimir Pavić, *Međunarodno privatno pravo*, 17. izdanje, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2018, str. 484 i dalje (međunarodna nadležnost) i str. 563 i dalje (pitanje imuniteta); Dušan Kitić, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Union u Beogradu/Službeni glasnik, Beograd, 2016, str. 237 i dalje („međunarodna nadležnost") i str. 311 i dalje („imunitet od jurisdikcije").

[34] Dušan Kitić, *Međunarodno privatno pravo*, *op. cit.*, str. 311 i dalje.

[35] Đuro Vuković, *Međunarodno građansko procesno pravo*, Informator, Zagreb, 1987, str. 32; Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske Unije i EFTA*, Pravni fakultet u Novom Sadu, Novi Sad, 1995, 139 i dalje; Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, 7. izdanje, Službeni glasnik, Beograd, 2021, str. 212–213.

[36] Gerhard Walter, Tanja Domej, *Internationales Zivilprozessrecht der Schweiz*, *op. cit.*, p. 91.

[37] Heimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, p. 70; upor. i Martin Illmer, "Jurisdiction (PIL)" in *MaxEuP 2012*, https://max-eup2012.mpipriv.de/index.php/Jurisdiction_(PIL) (10. 10. 2023). – O višeznačnosti termina „jurisdikcija" iz engleskog ugla videti: Adrian Briggs, *Private International Law in English Courts*, Oxford University Press, Oxford, 2014, pp. 168–175.

[38] Adrian Briggs, *Private International Law in English Courts*, *op. cit.*, p. 172: "It is, however, hardly a strength of the common law that its lexicon is so short of technical terms that it has to use and re-use a single word to convey a number of very distinct legal ideas".

međunarodna nadležnost prema opštim pravilima, i tek kada ona postoji, može se postaviti pitanje imuniteta.[39] U domaćem pravu dobar deo literature međunarodnog građanskog procesnog prava u osnovi sledi prikazani pravac, što se očituje pre svega u načinu izlaganja materije. Kod brojnih autora izlaganje o imunitetu je samo deo partije o međunarodnoj nadležnosti.[40] Uz to, termin "jurisdikcija" je samo sinonim za međunarodnu nadležnost, tako da se i latinski naziv koristi shodno tome.[41] Većina u domaćoj literaturi koja pripada ovom pravcu ne daje razloge za pojmovno jedinstvo. Polazi se, izgleda, od toga da je samorazumljivo da se za pojam nadležnosti koristi sinonim u vidu jurisdikcije.[42] Međutim, kao što je već rečeno, Varadi je još pre ravno 30 godina jasno postavio problem, te je u tadašnjem razvoju pravila o imunitetu stranih država video mogući oslonac za osporavanje tradicionalnog kontinentalnopravnog poimanja.[43] Reč je o fenomenu stapanja klasičnih pravila o međunarodnoj nadležnosti u pravila o imunitetu. Švajcarska sudska praksa je već u to vreme uobličila doktrinu po kojoj doduše važi relativni imunitet stranih država, ali to nije dovoljno: da bi se negirao imunitet nužno je i da povrh spora o komercijalnim aktivnostima postoji "unutrašnja veza", tipični kriterijum međunarodne nadležnosti. Istim putem se pošlo u Evropskoj konvenciji o imunitetu država (1972), kao i u SAD. Naslanjajući u određenom smislu na Varadija, Stanivuković je dalje razvila doktrinu o jedinstvu pojma. Polazeći od stava francuskih autora koji razdvajaju pravila o imunitetu od pravila o međunarodnoj nadležnosti, smatra da je tako nešto ostatak nekadašnje teorije apsolutnog imuniteta, po kojem su države uživale neograničeni imunitet. Uz to, ističe sistematizacijske razloge, jer su pravila o imunitetu "ranije po sistematizaciji uglavnom pripadala Međunarodnom javnom pravu za razliku od ostalih ograničenja nadležnosti". U tom smislu, zaključuje da "[se] pokazalo, [da] i pored nesumnjivog značaja Međunarodnog javnog prava u određivanju polazne postavke o imunitetu ili neimunitetu stranih država, razrada ovog instituta pripada nacionalnim međunarodno privatnim ili procesnim normama", s obzirom na to da "u savremenim uslovima, sud u postupku utvrđivanja svoje nadležnosti rešava po

[39] Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske Unije i EFTA*, *op. cit.*, str. 148.

[40] Đuro Vuković, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 32 i dalje; Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, *op. cit.*, str. 212 i dalje; Gašo Knežević, Vladimir Pavić, Marko Jovanović, *Međunarodno privatno pravo*, 10. izdanje, Službeni glasnik, Beograd, 2022, str. 57 i dalje.

[41] Stoga, i ustaljivanje međunarodne nadležnosti je za ovaj pravac „*perpetuatio iurisdictionis*" (tako Gašo Knežević, „Perpetuatio iurisdictionis u novijoj jugoslovenskoj pravnoj misli", *Anali Pravnog fakulteta u Beogradu*, 1988, Vol. 36, br. 3, str. 238–244), a ne, kao za suprotnu, germansku teoriju, „*perpetuatio fori*" (tako, primera radi, Haimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, p. 184–185).

[42] Moglo bi da se pretpostavi da je to nečujan, ali snažan uticaj literature na engleskom.

[43] Tibor Varadi, „Savremene tendencije u razvoju imuniteta država", *op. cit.*, str. 142–144.

prigovoru imuniteta primenom norme svoga nacionalnog prava".[44] Jedini koji je u nemačkoj literaturi odstupao od vladajućeg shvatanja, i koji je izričito zastupao stav o jedinstvenom pojmu međunarodne nadležnosti, jeste Hes. U svojoj doktorskoj disertaciji (1992) on je istakao brojne primedbe vladajućem shvatanju. Prvo, došlo je do konvergencije osnova važenja pravila o imunitetu, time i sudbenosti s jedne, i pravila o međunarodnoj nadležnosti s druge strane; sve je više međunarodnih ugovora koji uređuju obe oblasti, tako da više ne može da se govori o različitim osnovima važenja. Drugo, ni strukturalno gledano nema značajne razlike, jer je i međunarodna nadležnost ograničenje sudbenosti u međunarodnopravnom smislu; međunarodno običajno pravo zahteva postojanje istinske teritorijalne veze. Treće, on podržava manjinsko shvatanje po kojem formalno pravnosnažna presuda u kojoj nije uočen imunitet tuženog nije ništava, tako da i u tom kontekstu nema razlike u odnosu na međunarodnu nadležnost. Na osnovu rečenog, on se zalagao da nemačka dogmatika napusti radikalno razlikovanje sudbenosti i međunarodne nadležnosti, te da se preuzme tadašnji austrijski koncept, koji je podrazumevao jedan pojam.[45] Ipak, već na ovom mestu je nužno učiniti par napomena. S jedne strane, njegovo zalaganje za preuzimanje austrijskog koncepta je doživelo drugačiju sudbinu – Austrijanci su ti koji su preuzeli nemački koncept.[46] S druge strane, Hesovo shvatanje u ovom domenu ne samo da nije naišlo na pristalice, već se u literaturi i sudskoj praksi gotovo ni ne spominje.[47] S treće strane, pitanje je da li je sam Hes ostao pri svom stavu, s obzirom na to da u udžbeniku koji je preuzeo od Jauerniga (Jauernig), zastupa stav da su sudbenost i međunarodna nadležnost različite procesne pretpostavke.[48]

Ekskurs: shvatanja domaće sudske prakse

Domaća sudska praksa je poslednjih decenija imala više puta prilike da se izjašnjava o jurisdikcionom imunitetu stranih država. Iako je težište bilo na supstancijalnim pravilima, izričito ili prećutno bilo je i izjašnjenja o problemu ovog rada. Vrhovni sud Srbije je 2003. godine imunitet strane države izričito

[44] Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske Unije i EFTA*, *op. cit.*, str. 139–140.

[45] Burkhard Hess, *Staatenimmunität bei Distanzdelikten*, *op. cit.*, pp. 387–391.

[46] Peter Mayr, „Die ´inländische Gerichtsbarkeit´ im österreichischen Zivilverfahrensrecht", *op. cit.*, pp. 780–783.

[47] Ne spominje se čak ni u delima takvog formata kakvi su habilitacioni radovi, upor. Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*; Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit*. Samo Gajmer spominje Hesovu tezu o jedinstvu pojma, i to sa kritičkom opaskom da je reč o „slabo uverljivim argumentima". Videti: Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 360 fn. 7.

[48] Othmar Jauernig, Burkhard Hess, *Zivilprozessrecht*, 30. Auflage , C.H. Beck, München, 2011, p. 135.

kvalifikovao kao stranačku nesposobnost.[49] Reč je o konstrukciji koja je već u pristupu pogrešna. Stranačka sposobnost nema nikakve veze sa imunitetom, jer su svi imaoci imuniteta stranački sposobni, uključujući i stranu državu – ona je pravno lice.[50] Iako je kasnije vrhovna instanca napustila učenje o imunitetu kao stranačkoj nesposobnosti tuženog, ona i dalje nije došla do bilo koje od dve prikazane teorijske koncepcije. Samo naizgled se sledi teorija o jedinstvenom pojmu. Naime, za razliku od tog dela domaće literature, koji svesno u imunitetu vidi odstupanje od inače postojeće direktne međunarodne nadležnosti, VKS u izostanku imuniteta strane države kao tužene, vidi jedan od alternativnih osnova direktne međunarodne nadležnosti. To je vidljivo već u poznatoj odluci iz 2014. godine. U njoj – terminološki ne razlikujući pojmove – VKS prvo konstatuje da tužena uživa imunitet, a potom nastavlja dalje, i ispituje druge moguće osnove nadležnosti.[51] Prema tome, za VKS, da je bio ispravnog shvatanja o direktnoj međunarodnoj nadležnosti, izgleda da bi tužba ipak bila dopuštena, iako je zaključio da tužena uživa imunitet. Reakcija na takvo shvatanje je usledila u "poslednjoj instanci". Ustavni sud je istakao da odredbe o međunarodnoj nadležnosti u klasičnom smislu nisu relevantne "za ocenu međunarodne nadležnosti domaćeg suda kada se radi o sporovima u kojima svojstvo stranke imaju stranci koji uživaju imunitet u Republici Srbiji, strane države i međunarodne organizacije", već da se "u takvim parnicama za rešavanje navedenog procesnog pitanja isključivo primenjuju pravila međunarodnog prava".[52] Iako je rečeno bila reakcija na zanemarivanje međunarodnog običajnog prava od strane VKS, i dalje je primetna pojmovna konfuzija. Ako bi se citirani stav US doslovno shvatio, došlo bi se do zaključka da međunarodna nadležnost u tim slučajevima zavisi samo od pitanja imuniteta. Tako nešto je očigledno pogrešno.

UTICAJ MEĐUNARODNOG PRAVA NA DOGMATIKU JURISDIKCIONOG IMUNITETA

Ako se ostave po strani uticaji jednog ili drugog pravnog kruga, te terminološki deficiti ili suficiti, prikaz dva suprotstavljena teorijska pravca pokazao je da se pri zauzimanju dogmatičkih stavova na ovaj ili onaj način akcentuju razvojne tendencije pravila o imunitetu u ukupnosti kao relevantni faktor. Reč je o sledećim aspektima: prelazak sa apsolutnog na relativni imunitet

[49] VSS, 20. 11. 2003 – Rev 3226/03, *Izbor sudske prakse*, 2005, br. 12, str. 65.

[50] Shvatanje VSS je razumljivo, ne i opravdano, samo ako se ima u vidu jedan prilično rigidni tekstualistički pristup. Naime, s obzirom na to da se odavno u odredbi ZPP o imunitetu tuženog (sadašnji čl. 25 ZPP) izričito ne spominje odbacivanje tužbe, bilo je nužno pronaći normu koja to predviđa, a izbor je pao na normu o stranačkoj nesposobnosti (sadašnji čl. 80 st. 5 ZPP).

[51] VKS, 10. 12. 2014 – Rev2 485/14, Bilten VKS 1/2015, str. 343 (344).

[52] US, 3. 12. 2020 – Už 4474/16, *Službeni glasnik Republike Srbije* 7/2021, str. 55 (58) = Bilten US 2020, 919 (930/931).

država, poreklo normi, tj. osnov važenja, te na kraju i struktura pravila o imunitetu, u smislu inkorporacije tačaka vezivanja međunarodne nadležnosti. Uz to, ne treba nikako ostaviti po strani i naglašavanje različitih pravnih posledica, što se takođe vraća – u osnovi – na međunarodno pravo. Imajući u vidu rečeno, svakom od spomenutih argumenata će biti poklonjena pažnja, kako bi se ispitalo da li je za srpsko procesno pravo primerenije govoriti o sudbenosti kao posebnom pojmu u odnosu na međunarodnu nadležnost, ili je opravdano da se imunitet svede na pojavni oblik ograničenja međunarodne nadležnosti.

Uticaj razvoja koncepta imuniteta stranih država

Prema shvatanju zastupljenom u domaćoj literaturi, razvoj pravila o imunitetu strane države oličen u uspostavljanju teorije relativnog imuniteta govori u prilog učenju o jedinstvenom pojmu. Kao što je već istaknuto, Stanivuković je stava da je strogo razdvajanje sudbenosti i direktne međunarodne nadležnosti eho vremena u kojem je vladala teorija apsolutnog imuniteta. Stoga, prelaskom na koncept relativnog imuniteta prestala je potreba razlikovanja sudbenosti i međunarodne nadležnosti, odnosno imunitet je samo ograničenje međunarodne nadležnosti.[53] Pitanje je, međutim, da li postoji takva međuzavisnost, po kojoj bi opseg imuniteta države uticao na jedno ili drugo shvatanje o odnosu sudbenosti i međunarodne nadležnosti. Ako bi se ona uopšte priznala, pre bi moglo da se kaže da je učenje o relativnom imunitetu države dovelo do potrebe razlikovanja sudbenosti i međunarodne nadležnosti. Dok je država načelno uživala neograničeni imunitet od sudske vlasti druge države, nije ni bilo potrebe da se instituti razdvajaju.[54] Sada je to drugačije, jer se principijelno polazi od teze da je sasvim moguće da tužena država ne uživa imunitet, te da time postoji sudbenost, ali da i pored toga nema direktne međunarodne nadležnosti.[55] Ipak, prikazana dilema nije od značaja onda kada se stvar sagleda iz šire, sistemske perspektive. Mesto jednog instituta ne bi

---

[53] Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske unije i EFTA*, *op. cit.*, str. 139.

[54] Na to ukazuje Higins (Higgins) i iz engleske perspektive, kada ističe je tamošnje razlikovanje tužbi *in personam* i *in rem*, koje ima uticaja na međunarodnu nadležnost, bilo irelevantno u vreme važenja teorije apsolutnog imuniteta. Videti: Rosalyn Higgins, "Recent Developments in the Law of Sovereign Immunity in the United Kingdom", *American Journal of International Law*, 1977, Vol. 71, p. 423.

[55] Walter J. Habscheid, „Die Immunität ausländischer Staaten nach deutschem Zivilprozeßrecht", *op. cit.*, p. 164; Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 113. Stoga, Vrhovni kasacioni sud greši kada smatra da ne postoji međunarodna nadležnost u sporu povodom otkaza ugovora o radu u ambasadi na teritoriji Srbije. Videti: VKS, 10. 12. 2014 – Rev2 485/14, Bilten VKS 1/2015, str. 343 (344); za opravdanu kritiku videti: Vladimir Đerić, „Sudski imunitet strane države, posebno u radnim sporovima" u Tibor Varadi et al. (ur), *Liber Amicorum Gašo Knežević*, Pravni fakultet Univerziteta u Beogradu/Udruženje za arbitražno pravo, Beograd, 2016, str. 238: međunarodna nadležnost u svakom slučaju na osnovu čl. 60 u vezi sa čl. 26 st. 2 ZPP.

trebalo da se rešava s obzirom samo na jedan njegov pojavni oblik. Ovde nije pitanje procesne kvalifikacije imuniteta tužene strane države, već imuniteta bilo kog tuženog. Drugim rečima, konkretna pravila o imunitetu država (apsolutni ili relativni imunitet) ne utiču na dogmatičko mesto međunarodnih pravila o imunitetu tuženog. Ne treba zaboraviti da još uvek postoje slučajevi u kojima postoji jedna vrsta "apsolutnog imuniteta". Šefovi stranih država su za vreme svog mandata principijelno u potpunosti izuzeti od sudbenosti drugih država, bez obzira na to da li je reč o *acta iure gestionis* ili *acta iure imperii*.[56] Takođe, prema dominantnom shvatanju, i imunitet međunarodnih organizacija je apsolutan.[57] Kraće: opseg imuniteta, koji varira spram subjekata koji ga uživaju,[58] ne može da pruži relevantne iskaze o njegovom dogmatičkom mestu.

Osnov važenja pravila

Tradicionalno kontinentalnopravno učenje, po kojem se razlikuju sudbenost i međunarodna nadležnost, obrazlaže se različitim osnovima važenja (nem. *Geltungsgrund*): pravila o sudbenosti i njenom ograničenju pripadaju međunarodnom javnom pravu, i to pre svega običajnom, dok su pravila o međunarodnoj nadležnosti domen nacionalnog prava. Suprotno, učenje koje negira razliku između sudbenosti i međunarodne nadležnosti, negira i različitost osnova važenja relevantnih pravila. Doduše, u okviru ovog pravca su prisutna dva dijametralno suprotna shvatanja u pogledu ishoda. Prema jednom, suštinski, i jedna i druga pravila su nacionalnog karaktera[59] – već okolnost da su brojne države imunitet stranih država uredile zakonima, ali i da tamo gde to nije slučaj,

[56] Tako izričito smatra austrijski Vrhovni sud, i to u sporu protiv lihtenštajnskog princa radi utvrđenja da je tužilja vanbračna ćerka njegovog preminulog oca, Oberster Gerichtshof, 14. 2. 2001 – 7 Ob 316/00x, SZ 74/20. Međutim, integralni deo stava je dodatni aspekat, a to je da će se imunitet priznati samo ako u stranoj državi čiji je tuženi šef postoji mogućnost vođenja postupka. Dodatno se u odluci navodi da je apsolutni imunitet uživaju i članovi najuže porodice šefa strane države, koji žive u njegovom domaćinstvu. – Doktrina o apsolutnom imunitetu šefa države nije nesporna; opširnije videti: Martin Spitzer, „Inländische Gerichtsbarkeit und Immunität", *Österreichische Juristen Zeitung*, 2008, pp. 873–876; Roger O'Keefe, "Article 3" in Roger O'Keefe, Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press, Oxford, 2013, p. 84–88.

[57] O tome, naročito u kontekstu prava na pristup sudu tužioca, August Reinisch, „Das Recht auf Zugang zu Gericht und völkerrechtliche Immunitäten in Österreich" in Clemens Jabloner et al. (eds), *Vom praktischen Wert der Methode. Festschrift für Heinz Mayer*, Manz, Wien, 2011, pp. 631–648.

[58] O tome da je nemoguće opseg imuniteta prema međunarodnom pravu svesti na zajednički imenitelj videti: Franz Matscher, „Art IX EGJN" in Hans W. Fasching, Andreas Konecny (eds), *Kommentar zu den Zivilprozessgesetzen, Bd. I*, 3. Auflage, Manz, Wien, 2013, p. 126.

[59] Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske Unije i EFTA*, *op. cit.*, str. 139–140.

sudovi kreiraju pravo, govori u prilog tome, s obzirom na to da su norme o međunarodnoj nadležnosti svakako uređene zakonima. Po drugom shvatanju, promene koje su usledile u trećoj četvrtini prošlog veka vode zaključku da je i u jednom i u drugom pogledu principijelni osnov važenja međunarodno ugovorno pravo: sve je više međunarodnih konvencija o imunitetu, čime se smanjuje značaj međunarodnog običajnog prava, a uz to sve je više konvencija o međunarodnoj nadležnosti, čime se smanjuje značaj nacionalnog prava, tako da dolazi do konvergencije.[60]

Pravila o imunitetu kao nacionalno pravo?

Na opštem planu u svakom slučaju ne može da se govori o postojanju zaokruženog sistema pravila međunarodnog prava o jurisdikcionom imunitetu, jer je dobar deo materije, primera radi imunitet stranih država, njihovih šefova i organa poput predsednika vlade ili ministara, još uvek uređen difuznim međunarodnim običajnim pravom. U tom domenu, stoga, nacionalno pravo i/ili nacionalna sudska praksa i dalje ima veliki značaj. Ipak, i pored toga jurisdikcioni imunitet je i dalje pravilo međunarodnog prava.[61] Nedostatak široko prihvaćenih međunarodnih ugovora ne sprečava postojanje međunarodnog običajnog prava, već suprotno, kao i uvek, nacionalni pristupi ga formiraju.[62] Uz to, ukoliko bi se negirala pripadnost pravila o imunitetu međunarodnom običajnom pravu, došlo bi se do zaključka da država koja je negirala imunitet drugoj državi nikada ni ne može na taj način da izvrši povredu međunarodnog prava. Pri tome, iz te perspektive, sasvim je svejedno da li je do toga došlo kroz primenu nacionalnog prava, ili kroz pogrešnu primenu međunarodnog običajnog prava. Skorašnji slučaj to pouzdano pokazuje: Italija je izgubila spor pred Međunarodnim sudom pravde (MSP) samo zato što je ishod sudskih postupaka bio takav da se pogrešno, iz vizure međunarodnog običajnog prava, negirao imunitet Nemačkoj.[63] Odluka MSP ne bi bila drugačija da su, hipotetički, italijanski sudovi negirali imunitet Nemačkoj na osnovu italijanskog zakona, a ne, kao što se desilo, kroz pogrešan zaključak o međunarodnom običajnom pravu. Međutim, rečenim se ne negira

---

[60] Burkhard Hess, *Staatenimmunität bei Distanzdelikten*, *op. cit.*, p. 388.

[61] Upor. James Crawford, *Brownlie's Principles of Public International Law*, 9th Edition, Oxford University Press, Oxford, 2019, p. 471; Markus Krajewski, *Völkerrecht*, 3. Auflage, Nomos, Baden-Baden, 2023, p. 177.

[62] Xiadong Yang, *State Immunity in International Law*, *op. cit.*, p. 26: "The rules and principles regarding State immunity have evolved chiefly *from within* the States, not *between* them; that is, such rules are primarily the result of hundreds of cases decided by various domestic courts in their handling of claims brought against (and, in rare cases, by) foreign States [naglašavanje u originalu]"; slično Rosalyn Higgins, *Themes and Theories*, Oxford University Press, Oxford, 2009, p. 370.

[63] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, I.C.J. Reports 2012, p. 145, para. 107.

ispravnost stava Maje Stanivuković o nacionalnom karakteru pravila o imunitetu, utoliko što se procesna operacionalizacija zâhteva koje postavlja međunarodno pravo vrši nacionalnim pravom. Međunarodno pravo zahteva samo rezultat, a to je nevršenje sudske vlasti, te u slučaju vršenja (donošenja presude), i saniranje povrede međunarodnog prava na nacionalnom planu. Na koji način će se to ostvariti, ostavljeno je državama da urede.[64] U tom smislu, primera radi, strogo nacionalni karakter ima čl. 25 st. 2 ZPP, po kojem sud u slučaju sumnje o postojanju ili obimu imuniteta može da zatraži obaveštenje od ministarstva pravde. To nije nikakvo pravilo međunarodnog običajnog prava, što pokazuju drugi pravni sistemi.[65] Isto tako, austrijski koncept po kojem u slučaju previda imuniteta savezno ministarstvo pravde ima na raspolaganju vremenski neograničeno pravno sredstvo na raspolaganju, kojim se traži poništaj pravnosnažne presude, ne predstavlja međunarodno običajno pravo.[66]

Konvergencija osnova važenja: međunarodno ugovorno pravo?

Stav Hesa po kojem razvoj kako pravila o imunitetu, tako i o međunarodnoj nadležnosti, pokazuje konvergenciju osnova važenja potiče iz vremena kada se optimistički gledalo na buduću kodifikaciju pravila o imunitetu država. Razvoj je ipak pokazao da ne može da se govori o promeni osnova važenja na opštem planu. Konvencija UN o jursidikcionim imunitetima država je usvojena pre dvadesetak godina (2005), ali još uvek nije stupila na snagu, štaviše, za sada joj je neizvesna sudbina. No, sve i da je stupila na snagu, to i dalje ne znači da je time međunarodno običajno pravo izgubilo na značaju. Slično važi i u drugom smeru: okolnost povećanog broja konvencija o međunarodnoj nadležnosti ne znači da je nacionalno pravo marginalizovano. U svakom slučaju, Hesovo tadašnje shvatanje se mora razumeti spram konteksta, jer je svoj stav dao za

[64] Franz Matscher, "Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit", *op. cit.*, p. 84.

[65] Obraćanje jednom organu uprave radi pomoći u saznavanju relevantnog međunarodnog prava potiče iz austrijskog prava, a u domaće pravo je prispelo gotovo doslovnom recepcijom austrijskih građanskih procesnih zakona u Kraljevini Jugoslaviji. U drugim državama problem saznavanja međunarodnog običajnog prava je drugačije rešen. Primera radi, u Nemačkoj u analognom slučaju sudovi se obraćaju Saveznom ustavnom sudu, a njegov stav o stanju međunarodnog prava vezuje sud (čl. 100 st. 2 Grundgesetz); ipak, dopušta se *praetor legem* obraćanje ministarstvu inostranih poslova, koje – kao i u domaćem i austrijskom pravu – ne vezuje sud; o tome više Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, pp. 258–259. S druge strane, postoje države u kojima ne postoji nikakva institucionalizovana pomoć redovnim sudovima u saznavanju međunarodnog običajnog prava, a primer je Švajcarska.

[66] Međunarodno običajno pravo samo zahteva rezultat, a to je da formalno pravnosnažna presuda ne razvija dejstva. Na koji će se način tako nešto postići (kroz formalno ukidanje presude [austrijski model], ili kroz figuru uništave presude [nemački, odnosno švajcarski model]), ostavljeno je državama; u tom smislu i Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 243.

nemačko pravo, i to s obzirom na tadašnje važenje Briselske konvencije o nadležnosti i izvršenju sudskih odluka u građanskim i privrednim stvarima (1968), odnosno Konvencije iz Lugana (1988). Gledano iz srpske perspektive, međutim, ne bi trebalo da bude sporno da pravila o imunitetu i međunarodnoj nadležnosti imaju različite osnove važenja. Dok su pitanja jurisdikcionog imuniteta uređena isključivo međunarodnim pravom (običajnim ili ugovornim, čl. 25 st. 1 ZPP),[67] međunarodna nadležnost je dominantno regulisana zakonima.

Stapanje pravila o međunarodnoj nadležnosti i pravila o imunitetu

Brojni primeri u nacionalnom i međunarodnom ugovornom pravu pokazuju da supstancijalna pravila o imunitetu sadrže i tipične tačke vezivanja, tj. tradicionalna pravila međunarodne nadležnosti koja izražavaju "teritorijalnu vezu". U tom smislu, govori se o stapanju sudbenosti i međunarodne nadležnosti. Kako je već rečeno, to je dalo za povoda Varadiju još pre ravno tri decenije da predvidi, eventualno, napuštanje tradicionalnog razlikovanja sudbenosti i međunarodne nadležnosti. Pitanje je, međutim, da li je razvoj međunarodnog običajnog prava doveo do takvog ishoda. Švajcarska sudska praksa, i to tamošnji Savezni sud (nem. *Bundesgericht*), predstavlja bez sumnje generator ovog pristupa. Još je 1918. doneta odluka u kojoj je, između redova,[68] zauzet stav da za uskraćivanje imuniteta stranoj državi teorija relativnog imuniteta nije dovoljna. Da bi postojala sudbenost (uskraćivanje imuniteta), nije dovoljno da je reč o komercijalnim aktivnostima, već povrh toga nužno postojanje "unutrašnje veze" (nem. *Binnenbezug*) predmeta spora sa domaćom teritorijom. Kasnije je izričito uobličen ovakav stav, s tim da švajcarska vrhovna instanca ne negira da je to nacionalni koncept; ne tvrdi da međunarodno običajno pravo tako nešto zahteva, već smatra da je to (nepisani) zahtev švajcarskog prava.[69] Razlog nije pravne

[67] Da se pod „međunarodnim pravom" u čl. 25 st. 1 ZPP misli kako na ugovorno, tako i na običajno, nesporno je u literaturi. Videti: umesto svih Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, *op. cit.*, str. 213. U makar dve odluke VKS previđa tako nešto, te u ishodu pod „međunarodnim pravom" podrazumeva samo međunarodno ugovorno pravo. Videti: VKS, 10. 12. 2014 – Rev2 485/14, Bilten VKS 1/2015, str. 343; u poslednjoj objavljenoj odluci koja se bavi problemom imuniteta, vrhovna instanca protivrečno postupa, s obzirom na to da prvo ističe, ispravno, da se pod međunarodnim pravom misli i na međunarodno običajno pravo, da bi potom zaključila da Republika Srbija nije ratifikovala nijedan međunarodni ugovor o imunitetu stranih država, čime se okončava svaka diskusija o imunitetu tužene; Videti: VKS, 23. 11. 2022 – Rev 1008/21, dostupno u zvaničnoj bazi sudske prakse www.vk.sud.rs (10. 10. 2023). S druge strane, u odluci iz 2019. godine, izričito priznaje relevantnost međunarodnog običajnog prava. Videti: VKS, 14. 3. 2019 – Rev 942/19, Bilten VKS 4/2019, str. 107; isto rezonuje i Privredni apelacioni sud. Videti: PAS, 20. 9. 2017 – Pž 3576/17, baza podataka *Pravno-informacioni system RS*. Ustavni sud decidirano smatra da je međunarodno običajno pravo obuhvaćeno „međunarodnim pravom" u smislu čl. 25 st. 1 ZPP. Videti: US, 3. 12. 2020 – Už 4474/16, *Službeni glasnik Republike Srbije* 7/2021, str, 55 = Bilten US 2020, str. 919.

[68] Bundesgericht, BGE 44 I 49.

[69] Bundesgericht, BGE 106 Ia 142 E. 3b.

prirode, već političke.[70] Međutim, usled učestale i intenzivne kritike doktrine nije više sigurno da li će opstati prikazano shvatanje, ili će švajcarski Savezni sud smestiti uslov unutrašnje veze tamo gde i dogmatički pripada – u međunarodnu nadležnost.[71] Švajcarski pristup bio je redakcijski uzor[72] za Evropsku konvenciju o imunitetu država iz 1972. godine.[73] U njoj je za svaku grupu slučajeva umetnuta odgovarajuća tačka vezivanja, pa i za ugovorne sporove. Prema čl. 4 st. 1, imunitet u ugovornim sporovima postoji samo ako se ugovor ima ispuniti u državi foruma. Međutim, razlog za stapanje pravila o međunarodnoj nadležnosti u pravila o imunitetu ovde nije isti kao u švajcarskom slučaju. Evropska konvencija o imunitetu država u tom domenu je razumljiva samo ako se ima u vidu šira slika. Postoji međuzavisnost mešanja pravila o imunitetu i međunarodne nadležnosti s jedne, i obezbeđivanja priznanja sudskih odluka u ostalim članicama konvencije s druge strane.[74] Drugim rečima, suštinski, umetanje teritorijalne veze u pravila o imunitetu je uređenje indirektne međunarodne nadležnosti.[75] U svakom slučaju, tako nešto nije bilo inspirisano međunarodnim običajnim pravom.[76] U američkom

[70] Izričito Bundesgericht, BGE 106 Ia 142 E. 3b: „interesi Švajcarske ne zahtevaju takvo postupanje [uskraćivanje imuniteta u slučaju komercijalnih transakcija strane države, onda kada nema razumne intenzivne unutrašnje veze, prim. aut.]; obratno, na taj način bi lako mogle da nastanu politički i drugi problemi".

[71] Odgovarajući na kritike Kren Kostkievic, Savezni sud u poslednjoj odluci u kojoj se bavi pitanjem imuniteta (2018) prvo ukazuje na sopstvenu odluku iz 2007. u kojoj je nedostatak unutrašnje veze tretiran kao pitanje nadležnosti, a ne imuniteta, da bi potom izričito ostavio otvorenim pitanje dogmatičkog mesta unutrašnje veze. Razlog je taj što i u jednoj i u drugoj varijanti nedostaje procesna pretpostavka, a samo je to bilo relevantno u konkretnom slučaju. Videti: Bundesgericht, BGE 144 III 411 E. 6.3.3.

[72] Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, p. 154.

[73] Konvenciju je ratifikovalo svega osam država: Austrija, Belgija, Kipar, Holandija, Luksemburg, Nemačka, Švajcarska i Ujedinjeno Kraljevstvo.

[74] *Explanatory Reports to the European Convention on State Immunity and Additional Protocol*, Council of Europe, Strasbourg, 1972, p. 10, para. 10.1: "The list of cases incorporates a series of connecting links, which are designed to prevent proceedings being instituted against a State in the courts of another State where the dispute is not sufficiently closely related to the territory of the State of the forum to justify the exercise of jurisdiction by a court in that State. These links are also necessary to establish bases of jurisdiction which would be accepted when the foreign judgment comes to be submitted for recognition and enforcement". Nesporno je i u doktrini. Videti: Peter D. Trooboff, "Foreign State Immunity: Emerging Consensus on Principles", *Recueil des Cours*, 1986, Vol. 200, p. 342; Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, pp. 466–470; Helmut Damian, *Staatenimmunität und Gerichtszwang*, *op. cit.*, p. 66.

[75] Burkhard Hess, „Probleme der Staatenimmunität bei grenzüberschreitenden Unterlassungsklagen", *Juristische Blätter*, 1989, p. 288.

[76] *Explanatory Reports to the European Convention on State Immunity and Additional Protocol*, *op. cit.*, p. 14, para. 26: "According to the procedural law of some States, the jurisdiction of a court depends on the place where the disputed contractual obligation arose or where it was discharged or falls to be discharged. Other States do not recognise this basis of jurisdiction or do so only in special circumstances. The connecting link in Article 4 therefore represents a compromise".

pravu je prilikom donošenja Zakona o imunitetu stranih suvereniteta (1976),[77] inače prvog nacionalnog propisa koji uređuje imunitet stranih država, modelski identično postupljeno. Pravila o imunitetu stranih država su skopčana sa tačkama vezivanja, tipičnim primerima međunarodne nadležnosti, tj. posebne norme o međunarodnoj nadležnosti čine neraskidivu celinu sa normama o imunitetu.[78] Razlog za ovakav koncept je osoben i razumljiv je samo iz američke perspektive. Reč je o kodifikovanju pravila o jednom vidu tamošnje međunarodne nadležnosti (*personal jurisdiction* ili *jurisdiction in personam*), vodeći računa o standardu pravičnog suđenja (*due process of law*).[79] Drugim rečima, ni američki zakonodavac nije pošao od međunarodnog običajnog prava koje bi zahtevalo uslovljavanje sudbenosti minimalnim kontaktima predmeta spora sa teritorijom države suda.

Svim prikazanim primerima je zajedničko da su pravila o imunitetu država obogaćena uslovima koji su ništa drugo do uslovi zasnivanja međunarodne nadležnosti. Ali ni u jednom od ova tri slučaja razlozi za tako nešto nisu isti. Doktrina švajcarske sudske prakse je prema sopstvenom stavu inspirisana političkim, a ne pravnim razlozima. Koncept Evropske konvencije o imunitetu država je uslovljen obezbeđivanjem priznanja sudske odluke u državi čiji je imunitet negiran. Američki pristup je razumljiv samo ako se ima u vidu da tamo nisu ni postojala kodifikovana i unifikovana pravila o međunarodnoj nadležnosti na saveznom nivou. Prema tome, već na osnovu rečenog bi teško moglo da se govori o jednom konceptu, koji bi mogao da posluži kao osnov za međunarodno običajno pravo, tim pre što nema naznaka da su motivi bili usklađivanje sa međunarodnim običajnim pravom. Međutim, sve i da je po sredi jedan koncept, praksa drugih država pokazuje suprotno, što iznova dovodi u pitanje postojanje međunarodnog običajnog prava. U nemačkom i austrijskom pravu se odavno odlučno negira uslovljavanje imuniteta izostankom teritorijalne veze, tj. tačkama vezivanja međunarodne nadležnosti. Ni holandska sudska praksa ne rezonuje drugačije, već izričito negira da je teritorijalna veza spora uslov za uskraćivanje imuniteta.[80] Srpska sudska praksa, onda kada je na dogmatički prihvatljivom putu,

---

[77] U originalu „The Foreign Sovereign Immunities Act", 28 U.S.C. 1602. O američkom pravu imuniteta stranih država na srpskom jeziku videti: Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske unije i EFTA*, *op. cit.*, str. 142–150.

[78] Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske unije i EFTA*, *op. cit.*, str. 148 sa daljim upućivanjima.

[79] Committee on the Judiciary, "Jurisdiction of United States Courts in Suits Against Foreign States: Report Including Cost Estimate of the Congressional Budget Office to Accompany H.R. 11315", *International Legal Materials*, 1976, Vol. 15, p. 1405. Za takvu ocenu videti: Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 470.

[80] Hoge Raad der Nederlanden, 26. 10. 1973 – Societe Europeene d'Etudes et d'Entreprises v. Yugloslavia, *International Legal Materials*, 1975, Vol. 14, p. 75; Gerechtshof Den Haag, 28. 11. 1968 – N.V. Cabolent v. National Iranian Oil Company, *International Legal Materials*, 1970, Vol. 9, p. 159.

imunitet tretira odvojeno od međunarodne nadležnosti i njenih tačaka vezivanja.[81] Konačno, postoje brojne države koje u svojim zakonima o imunitetu stranih država ne uslovljavaju uskraćivanje imuniteta postojanjem teritorijalnog neksusa.[82] Ostaje da se vidi da li je Konvencija UN o jurisdikcionim imunitetima pokazatelj razvoja koji bi opravdao stapanje sudbenosti u međunarodnu nadležnost. Čini se da ona ne pruža dovoljan oslonac u tom pravcu. Pre svega, treba napomenuti da se za svaku grupu slučajeva u kojima se ne priznaje imunitet izričito pretpostavlja međunarodna nadležnost.[83] Ipak, u većini slučajeva u kojima se imunitet ne priznaje, sadržana je povrh toga tipična tačka vezivanja. Primera radi, u sporovima o naknadi štete zbog smrti ili povrede fizičkog lica, odnosno oštećenja ili uništenja stvari, imunitet se neće priznati samo ako je štetna radnja preduzeta, delimično ili u celosti, na teritoriji države suda i ako je učinilac u tom trenutku bio prisutan na toj teritoriji (čl. 12). Međutim, za sporove povodom ugovora (komercijalne transakcije), nikakav teritorijalni neksus se ne traži za uskraćivanje imuniteta (čl. 10), što je ključna razlika u odnosu na Evropsku konvenciju o imunitetima država.[84] Prema tome, teško je govoriti o jednom koherentnom sistemu koji bi bio podloga međunarodnom običajnom pravu. Za možda najznačajniju grupu slučajeva, izričito se negira uključivanje teritorijalne veze u pravila o imunitetu. U zaključku, treba se složiti sa tradicionalnim kontinentalnopravnim učenjem,[85] koje nalazi odjeka i u engleskoj doktrini,[86] da je teritorijalna veza predmeta spora isključivo problem međunarodne nadležnosti, a ne imuniteta, time i sudbenosti.

---

[81] Privredni apelacioni sud u odluci iz 2017. godine pri primeni teorije relativnog imuniteta uopšte ne spominje uslov teritorijalne veze. Videti: PAS, 20. 9. 2017 – Pž 3576/17, baza podataka *Pravno-informacioni sistem RS*.

[82] Reč je o Kanadi, Australiji, Argentini i Izraelu. Videti: Stephan Wittich, "Article 10 Commercial Transactions" in Roger O'Keefe, Christian J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press, Oxford, 2013, p. 176 fn. 49.

[83] Uglavnom je redakcija odredaba prilično jasna, s obzirom na to da se predviđa da država ne može pozvati na imunitet „pred sudom druge države koji je inače nadležan u postupku (...)." Na engleskom: "a State cannot inovoke immunity from jurisdiction before a court of another State which is otherwise competent in proceeding (...)". Videti: čl. 11 st. 1, 12, 13, 14, 15, 16 st. 1 i 17. Samo je za slučaj sporova povodom komercijalnih transakcija (*i.e.* privatnopravnih ugovora) upotrebljena jedna čudna formulacija (čl. 10 st. 1), ali koja izražava istu misao; tako i Stephan Wittich, "Article 10 Commercial Transactions", *op. cit.*, p. 175; Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, p. 94–95.

[84] Prema Higins, međunarodno pravo ne uslovljava imunitet u pogledu komercijalnih transakcija izostankom veze sa teritorijom foruma. Videti: Rosalyn Higgins, *Themes and Theories*, Oxford University Press, Oxford, 2009, p. 342.

[85] Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, pp. 471, 476; Jolanta Kren Kostkiewicz, „Schiedsklausel und ihre Bedeutung für den Immunitätsverzicht sowie für die Voraussetzung der Binnenbeziehung im Erkenntnis- und Vollstreckungsverfahren" in Pascal Grolimund, Alfred Koller, Leander D. Loacker, Wolfgang Portmann (eds.), *Festschrift für Anton K. Schnyder*, Schulthess, Zürich/Basel/Genf, 2018, p. 216.

[86] Rosalyn Higgins, *Themes and Theories*, Oxford University Press, Oxford, 2009, p. 378.

Razlikovanje pravnih posledica

Oblikovanje pravnih pojmova, inherentni zadatak dogmatike, zavisi pre svega, ili isključivo, od njihove upotrebljivosti. Oštro razlikovanje sudbenosti, gde spadaju i pravila o imunitetu, i međunarodne nadležnosti, imalo bi opravdanja samo onda kada bi tako nešto bilo smisleno u tom kontekstu. Isto važi, *vice versa*, za teoriju o jedinstvu pojma oličenom u međunarodnoj nadležnosti. Upravo za to pitanje Mačer (Matscher) kaže:

[u]spostavljanje pravnih pojmova je samo onda smisleno, kada jedno činjenično stanje, element koji ih gradi, izaziva specifične pravne posledice. To važi i za procesnopravne pojmove, čije je uspostavljanje, dakle, opravdano samo onda kada oni dobijaju određene procesne oblike.[87] Prema tome, nužno je ispitati da li je i u srpskom pravu, i to prvenstveno na osnovu međunarodnog javnog prava, smisleno odvajanje sudbenosti i međunarodne nadležnosti.

Zajedničko obeležje: pripadnost apsolutnim procesnim pretpostavkama

Zajedničko za oba instituta jeste pripadnost apsolutnim procesnim pretpostavkama – uslovima od kojih zavisi dopuštenost (dozvoljenost) tužbe, time i dozvoljenost presuđenja, a na koje sud pazi po službenoj dužnosti.[88, 89] Na to ne utiče dikcija dela domaće literature koja budi utisak da na postojanje imuniteta, time i sudbenosti, sud ne pazi po službenoj dužnosti. Često se, naime, isključivo akcentuje odbrana tuženog (po pravilu, ili gotovo uvek, strane države), te se posledično govori o "prigovoru imuniteta", ili o mogućnosti da se tuženi "pozove na imunitet",[90] što bi neko mogao da protumači kao stav da je to jedini način da

[87] Franz Matscher, „Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit", *op. cit.*, p. 83.

[88] O podeli procesnih pretpostavki na apsolutne i relativne, umesto svih, Aleksandar Jakšić, *Građansko procesno pravo*, *op. cit.*, str. 383. – Sama podela potiče iz austrijske teorije, upor. samo Hans W. Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts*, 2. Auflage, Manz, Wien, p. 382; drugačije je u Nemačkoj, gde se za apsolutne procesne pretpostavke koristi termin, prosto, „procesna pretpostavka" (*Prozessvoraussetzung*), a za relativne „procesna smetnja" (*Prozesshindernis*). Videti: Leo Rosenberg, Karl-Heinz Schwab, Peter Gottwald, *Zivilprozessrecht*, *op. cit.*, p. 510.

[89] Za nemačko pravo videti: samo Bundesgerichtshof, 19. 12. 2017 – XI ZR 796/16, NJW 2018, 854 para. 15 sa daljim upućivanjima na sudsku praksu; Haimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, p 82. – Za švajcarsko pravo videti: BGE 144 III 411 E. 6.3.3. sa daljim upućivanjima na sudsku praksu; Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 480. – U austrijskom pravu je tako nešto izričito predviđeno zakonom (§ 42 st. 1 Jurisdiktionsnorm).

[90] U tom smeru Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, *op. cit.*, str. 213; Maja Stanivuković, *Međunarodna nadležnost sudova u pravu SAD, Evropske unije i EFTA*, *op. cit.*, str. 139–140; slično i Gašo Knežević, Vladimir Pavić, Marko Jovanović, *Međunarodno privatno pravo*, *op. cit.*, str. 58.

se imunitet tuženom prizna.[91] Za takvu tezu, međutim, nema ni zakonskog oslonca, a ni, možda važnije, oslonca u međunarodnom pravu. Prvo, u ZPP nema odredbe koja bi govorila tome u prilog, štaviše, analogna primena odredbe o ispitivanju međunarodne nadležnosti (čl. 16 st. 3 ZPP) je više nego primerena. Sudbenost koja zavisi od postojanja imuniteta, značajnija je od međunarodne nadležnosti, jer svako pogrešno uskraćivanje imuniteta predstavlja povredu međunarodnog prava[92] i time eventualnu odgovornost države na tom planu,[93] dok obrnuto ne važi: greška suda u stavu da postoji međunarodna nadležnost teško, ili nikako, sama za sebe može da dovede do takvog ishoda.[94] Prema tome, ako se već izričito predviđa *ex offo* ispitivanje međunarodne nadležnosti, tim pre to važi za ispitivanje sudbenosti. Drugo, čini se da je *ex offo* vođenje računa o imunitetu deo međunarodnog običajnog prava,[95] s obzirom na to da je sudbinski vezano za nesporan stav da se strana država (a tim pre i drugi titulari imuniteta) svojom pasivnošću ne odriče imuniteta, uz isto tako nesporno pravilo o prećutnom odricanju od imuniteta u slučaju bezrezervnog (bezprigovornog) upuštanja u meritorno raspravljanje.[96] U tom smislu, shvatanje o prigovornoj prirodi imuniteta bi bilo protivurečno stavu da se tuženi koji je pasivan ne odriče imuniteta. Primera radi, ukoliko bi se tužila strana država radi naknade štete koju su, prema tvrdnjama tužioca, pričinili pripadnici oružanih snaga tužene tokom ratnih dejstava, a ona ne bi odgovorila na tužbu (potpuna pasivnost), negiranje ispitivanja imuniteta po

[91] Svakako, niko od autora citiranih u prethodnoj fusnoti tako nešto ne tvrdi izričito, ali isto tako nema izričitog stava da sud na imunitet pazi po službenoj dužnosti. Otuda ovde iskazana bojazan od pogrešnog tumačenja prikazanog pristupa. – S druge strane, literatura engleskog govornog područja često čitav problem imuniteta predstavlja kao fenomen „pozivanja na imunitet" (eng. *plea of immunity*); primera radi, videti: Hazel Fox, Philippa Webb, *The Law of State Immunity*, *op. cit.*, pp. 18–21.

[92] Bundesgerichtshof, 26. 9. 1978 – VI ZR 267/76, NJW 1979, p. 1101.

[93] S obzirom na značaj imuniteta tuženog u smislu sužavanja prava na pristup sudu tužiocu, važilo bi i obratno: priznavanje imuniteta tuženom preko granica koje određuje međunarodno pravo predstavljalo bi kršenje međunarodnog ugovornog prava, i to EKLjP, te posledičnu odgovornost države. Za takve primere videti: *Cudak v. Lithuania* [GC], no. 15869/02, §§ 54–75, ECHR 2010-III; *Radunović and others v. Montenegro*, nos. 45197/13 and 2 other, §§ 61–82, 25 October 2016.

[94] Prema Mačeru, ni povreda pravila o međunarodnoj nadležnosti koja su sadržana u međunarodnom ugovoru ne povlači za sobom iste posledice kao povreda pravila o imunitetu, jer samo potonja imaju osnov u međunarodnom običajnom pravu. Videti: Franz Matscher, „Zur prozessualen Behandlung der inländischen Gerichtsbarkeit" in Birgit Bachmann et al. (eds), *Grenzüberschreitungen. Festschrift für Peter Schlosser zum 70. Geburtstag*, Mohr Siebeck, Tübingen, 2005, p. 572.

[95] U tom smeru rezonuje Šak, s obzirom da – u ishodu – u odredbi Evropske konvencije o imunitetima država (čl. 15), odnosno Konvencije UN o jurisdikcionim imunitetima (čl. 6 st. 1) vidi međunarodno običajno pravo, upor. Heimo Schack, *Internationales Zivilverfahrensrecht*, *op. cit.*, 82 fn. 68.

[96] Svakako onda, i samo onda, kada tuženi kao takav može prećutno da se odrekne imuniteta.

službenoj dužnosti bi značilo da se širom otvaraju vrata presudi zbog propuštanja. Drugim rečima, stvorila bi se opasnost od kršenja međunarodnog prava, s obzirom na to da u prikazanom sporu tužena država uživa imunitet.[97] No, nemoguće je zastupati prigovornu prirodu imuniteta onda kada je nesporno pravilo međunarodnog običajnog prava da pasivnost imaoca imuniteta ne znači prećutno odricanje.

Razlika br. 1: ustaljivanje međunarodne nadležnosti i neustaljivanje sudbenosti

Ustaljivanje nadležnosti (*perpetuatio fori*) podrazumeva procesnu irelevantnost promene okolnosti od kojih zavisi nadležnost. Ukoliko je u određenom trenutku ona postojala, kasnije promene nemaju nikakvog dejstva. Jednom zasnovana nadležnost se ustalila. U ZPP je nesporno predviđeno ustaljivanje mesne nadležnosti, delimično i stvarne. Relevantna odredba ZPP (čl. 15 st. 2) na jezičkom planu ne daje oslonac za ustaljivanje međunarodne nadležnosti. Ni Zakon o rešavanju sukoba zakona ne uređuje ovo pitanje izričito, već samo određuje trenutak na osnovu kojeg se ispituje međunarodna nadležnost (čl. 81 ZRSZ). Uprkos tome, u literaturi je ovladao pozitivan stav,[98] tako da postoji ustaljivanje međunarodne nadležnosti. Sudska praksa rezonuje na isti način.[99] Iz teze da je imunitet tek ograničenje međunarodne nadležnosti bi proizlazilo da i u slučaju naknadnog sticanja imuniteta važi pravilo o ustaljivanju tako shvaćene međunarodne nadležnosti. Jer, ako je u relevantnom trenutku ona postojala, svaka promena nema nikakvog uticaja na jednom zasnovanu i ustaljenu nadležnost. Svakako, ni pripadnici učenja o imunitetu kao ograničenju međunarodne nadležnosti tako nešto ne zastupaju,[100] i to s pravom. Protivno je međunarodnom pravu priznati ustaljivanje sudbenosti, jer se time obesmišljava koncept

---

[97] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, pp. 39–40, paras. 77–79.

[98] Đuro Vuković, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 31; Gašo Knežević, „Perpetuatio iurisdictionis u novijoj jugoslovenskoj pravnoj misli", *Anali Pravnog fakulteta u Beogradu*, 1988, Vol. 36, br. 3, str. 243; Mihajlo Dika, „Član 81" u Mihajlo Dika, Gašo Knežević, Srđan Stojanović, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Beograd, 1991, 261–263; Tibor Varadi, Gašo Knežević, Bernadet Bordaš, Vladimir Pavić, *Međunarodno privatno pravo*, *op. cit.*, str. 520; Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, *op. cit.*, str. 186; Dušan Kitić, *Međunarodno privatno pravo*, *op. cit.*, 239; Aleksandar Jakšić, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 254; Aleksandar Jakšić, *Međunarodno privatno pravo*, *op. cit.*, str. 442–443.

[99] VSS, 3. 7. 1996 – Rev 2331/96, Bilten VSS 4/1996, str. 16, sa dodatkom da se međunarodna nadležnost ustaljuje već u trenutku podnošenja tužbe; VS u Beogradu, 29. 5. 2014 – Gž 943/14, *ParagrafLex*.

[100] G. Knežević, „Perpetuatio iursdictionis u novijoj jugoslovenskoj pravnoj misli", *op. cit.*, str. 243; Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo*, *op. cit.*, str. 186.

imuniteta.[101] Imunitet postoji – u slučajevima u kojima je uopšte zamislivo da dođe do naknadnog sticanja imuniteta – radi obezbeđivanja nesmetanog ostvarivanja funkcija koje obavlja imalac imuniteta.[102] U tom smislu, sasvim je irelevantno da li tuženi u vreme nastupanja litispendencije ili kasnije tokom postupka obavlja funkciju koja je dostojna imuniteta.[103] No, upravo rečeno je relevantna strukturalna razlika sudbenosti u odnosu na međunarodnu nadležnost. Drugim rečima, to nije tek izuzetak od opšteg pravila o ustaljivanju međunarodne nadležnosti, već režim koji dovoljno govori u prilog pojmovnoj različitosti sudbenosti u odnosu na međunarodnu nadležnost.[104]

Razlika br. 2: strukturalne razlike u pogledu raspolaganja

Nema spora da prema međunarodnom pravu postoji mogućnost odricanja od imuniteta.[105] Ono podrazumeva da je reč o sporu u kojem zaista ne postoji sudbenost, tj. tuženi prema pravilima međunarodnog prava uživa imunitet, ali pre ili tokom spora dolazi do odricanja koje ima konstitutivnu prirodu – dolazi do proširenja sudbenosti.[106] Obrnuto, ako je reč o sporu u kojem tuženi ne uživa imunitet, odricanje ima tek deklarativno dejstvo,[107] što ne umanjuje njegov značaj

---

[101] Max Pagenstecher, „Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen“, *op. cit.*, pp. 353–354.

[102] Martin Spitzer, „Inländische Gerichtsbarkeit und Immunität“, *op. cit.*, p. 880.

[103] Vredi ukazati na shvatanje Špicera, dato doduše za austrijsko pravo, po kojem postoje ozbiljni stvarni razlozi – uprkos naizgled jasnoj zakonskoj odredbi austrijskog zakona – da se u tom slučaju drugačije postupa: tužba tada ne bi trebala da se odbaci, već da se odredi prekid postupka koji će trajati sve dok tuženi ne izgubi imunitet; Videti: Martin Spitzer, „Inländische Gerichtsbarkeit und Immunität“, *op. cit.*, pp. 878–882; njega sledi Peter Mayr, „§ 29 JN“ in Walter Rechberger, Thomas Klicka (eds), *Zivilprozessordnung*, 5. Auflage, Verlag Österreich, Wien, 2019, p. 160.

[104] Ukoliko bi se za važeće srpsko pravo prihvatilo spomenuto Špicerovo shvatanje (videti: fn. 103), i dalje bi postojala strukturalna razlika u odnosu na međunarodnu nadležnost.

[105] I to kako izričito, tako i – ali samo za određene subjekte – konkludentno, prećutno; tipičan primer za potonje je zaključivanje prorogacionog ili arbitražnog sporazuma od strane države, umesto svih Jolanta Kren Kostkiewicz, „Schiedsklausel und ihre Bedeutung für den Immunitätsverzicht sowie für die Voraussetzung der Binnenbeziehung im Erkenntnis – und Vollstreckungsverfahren“, *op. cit.*, p. 211.

[106] Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 381 sa daljim upućivanjima. U kontekstu imuniteta strane države, Habšajd u odricanju od imuniteta vidi povećanje suvereniteta na strani države foruma, i smanjenje suvereniteta na strani tužene države. Videti: Walter Habscheid, „Die Immunität ausländischer Staaten nach deutschem Zivilprozeßrecht“, *op. cit.*, p. 217.

[107] Bundesverfassungsgericht, 6. 12. 2006 – 2 BvM 9/03, NJW 2007, 2605 para. 65; upor. već Tibor Varadi, „Savremene tendencije u razvoju imuniteta država“, *op. cit.*, str. 139. – Drugačije je bilo u vreme teorije apsolutnog imuniteta, kada je značaj odricanja bio neuporedivo veći. Videti: Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis – und im Vollstreckungsverfahren nach schweizerischem Recht*, *op. cit.*, p. 381.

na praktičnom planu – odricanje ima razjašnjavajuću funkciju, jer često složeno ispitivanje postojanja imuniteta (npr. ocena da li je reč o *acta iure imperii* ili *acta iure gestionis*) postaje suvišno.[108] Relativno skorašnji primer iz Austrije to odlično pokazuje.[109] Grube konceptualne paralele postoje i u pogledu raspolaganja međunarodnom nadležnošću. Tuženi može "pristati" – izričito ili prećutno – na nadležnost domaćeg suda, iako inače nije ispunjen nijedan drugi uslov (*arg.* čl. 16 st. 3 ZPP). Današnje vladajuće shvatanje priznaje mogućnost ovakvog zasnivanja međunarodne nadležnosti ne samo u onim slučajevima u kojima se izričito tako nešto predviđa, već uopšte.[110] U odnosu na "raspolaganje imunitetom" razlika se pokazuje na subjektivnom planu. Raspolaganje međunarodnom nenadležnošću je, može se figurativno reći, stranački-koncentrično koncipirano. Tuženi je taj od čije volje zavisi zasnivanje međunarodne nadležnosti. Čim on izričito izjavi da pristaje na nadležnost srpskog suda, došlo je do zasnivanja međunarodne nadležnosti; isto tako, čim se on bezrezervno (bezprigovorno) upusti u raspravljanje o predmetu spora, zasnovana je međunarodna nadležnost. Kraće: tuženi, kao stranka u sporu, i to u formalnom smislu, je jedini vlastan da svojom voljom zasnuje međunarodnu nadležnost. Na opštem planu kod sudbenosti je drugačije. Tuženi koji uživa imunitet neće uvek biti taj koji ujedno može njime da raspolaže. To je principijelno uvek slučaj sa fizičkim licima koja uživaju imunitet – ona kao takva jesu nominalno nosioci imuniteta, ali je on njima priznat ne zbog njihovog interesa, već radi omogućavanja da se obavljaju suvereni zadaci države. Primera radi, od imuniteta diplomatskog ili konzularnog predstavnika može se odreći samo država odašiljanja, a ne oni sami.[111] Takođe, od imuniteta bivšeg šefa

[108] Helmut Damian, *Staatenimmunität und Gerichtszwang*, *op. cit.*, p. 34; Jolanta Kren Kostkiewicz, „Schiedsklausel und ihre Bedeutung für den Immunitätsverzicht sowie für die Voraussetzung der Binnenbeziehung im Erkenntnis – und Vollstreckungsverfahren", *op. cit.*, p. 212.

[109] U jednom naslednopravnom sporu tuženi, češki i švajcarski državljanin, tokom revizijskog postupka je postao ministar inostranih poslova Republike Češke. Izjava predsednika češke vlade o odricanju od imuniteta je poštedela austrijski Vrhovni sud eventualnog mukotrpnog posla, upor. Oberster Gerichtshof, 12. 6. 2007 – 2 Ob 258/05p, SZ 2007/94. Naime, treba napomenuti da pojedini komentatori ove odluke smatraju da tuženi nije uživao imunitet, tako Martin Spitzer, „Inländische Gerichtsbarkeit und Immunität, *op. cit.*, 876–878.

[110] Više o ovom problemu Borivoje Poznić, *Komentar Zakona o parničnom postupku*, *op. cit.*, str. 67–68 sa daljim upućivanjem.

[111] Čl. 32 st. 1 Bečke konvencije o diplomatskim odnosima (1961), odnosno čl. Bečke konvencije o konzularnih odnosima (1963). Stoga, Jakšić je protivurečan kada smatra da se u tom slučaju zahteva „i izričita izjava države otposlanja", da bi potom istakao „naravno, i sam diplomatski predstavnik može bilo izričito, bilo prećutno da se odrekne jurisdikcionog imuniteta"; Videti: Aleksandar Jakšić, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 152. Kao ovde, da je izjava države jedina relevantna: Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th Edition, Oxford University Press, Oxford, 2016, pp. 273–278, sa upućivanjima na francusku i špansku sudsku praksu.

države se može odreći samo država.[112] Prema tome, prikazana strukturalna razlika predstavlja značajni faktor u dogmatičkom razmatranju. Ukoliko se, primera radi, tuženi koji je konzularni predstavnik bezrezervno upusti u raspravljanje, a reč je o sporu u kojem uživa imunitet, nije došlo do odricanja od imuniteta, a time ni do uspostavljanja sudbenosti. Ali, u slučaju da nije postojala međunarodna nadležnost prema opštim pravilima, na taj način je svakako došlo do njenog zasnivanja.

Ništavost presude protiv stranke koja uživa imunitet: razlika br. 3?

Kako je već rečeno, vladajuće shvatanje u nemačkom i švajcarskom pravu odriče bilo kakvo dejstvo presudi donetoj uz povredu pravila o sudbenosti.[113] Ona ne samo da ne postaje izvršna, već ne proizvodi dejstvo materijalne pravnosnažnosti. Takva presuda je ništava (bez dejstva), pri čemu izričitih odredaba o tome nema. Reč je o dogmatičkoj figuri koju priznaje i sudska praksa.[114] Suprotno, presuda doneta u sporu u kojem nije postojala međunarodna nadležnost, podobna je za sticanje svih dejstava. Principijelno je isto stanje u srpskom pravu. Nema dileme da međunarodna nenadležnost ne utiče na materijalnu pravnosnažnost presude. Izričitih odredaba o ništavosti presude protiv lica koje uživa imunitet nema. Većinska literatura, bez sumnje po uzoru na nemačku, odriče takvoj presudi bilo kakvo dejstvo.[115] Pitanje je, ipak, da li je tako nešto važeće pravo. Podrobnije razmatranje ovog problema bi znatno premašilo granice ovog rada, već iz razloga što dogmatika ništave presude (presude bez dejstva) u domaćem pravu nije ni izbliza izgrađena kao u nemačkom ili švajcarskom pravu.[116] Samo nekoliko napomena je stoga primerno. Sve i da se

---

[112] *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108 (4th Cir. 1987). Stav je zasnovan i na analognoj primeni čl. 32 st. 1 Bečke konvencije o diplomatskim odnosima.

[113] Videti: fn. 26.

[114] Videti: fn. 26.

[115] Videti: već Borivoje Poznić, *Građansko procesno pravo*, 2. Izdanje, Savremena administracija, Beograd, 1965, str. 245, kao i Borivoje Poznić, Vesna Rakić-Vodielić, *Građansko procesno pravo*, *op. cit.*, str. 282; Aleksandar Jakšić, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 151; Aleksandar Jakšić, *Međunarodno privatno pravo*, *op. cit.*, str. 388; upor. i Siniša Triva, Velimir Belajec, Mihajlo Dika, *Građansko parnično procesno pravo*, 6. izdanje, Narodne novine, Zagreb, 1986, str. 565.

[116] Nema ni saglasnosti o osnovnim pojmovnim pitanjima. Tako Triva pod ništavim presudama podrazumeva samo nepravnosnažne presude opterećene bitnim povredama postupka, ali i one su podobne za materijalnu pravnosnažnost; ono što nemačka doktrina naziva ništavim presudama (presudama bez dejstva), on naziva „nepostojećim, ingezistentim". Videti: Siniša Triva, Velimir Belajec, Mihajlo Dika, *Građansko parnično procesno pravo*, *op. cit.*, str. 564–565. Izgleda da na isti način Jakšić rezonuje, jer je i za njega reč o „nepostojećoj presudi". Videti: Aleksandar Jakšić, *Međunarodno građansko procesno pravo*, *op. cit.*, str. 151. Suprotno Poznić, koji u svemu sledi nemačku doktrinu.Videti: Borivoje Poznić, *Građansko procesno pravo*, *op. cit.*, str. 245–246, kao i Borivoje Poznić, Vesna Rakić-Vodinelić, *Građansko procesno pravo*, *op. cit.*, str. 281–283.

zauzme stav u tom pravcu, moglo bi da se govori samo o načelnoj ništavosti presude. Trebalo bi se složiti sa manjinskim shvatanjem nemačke doktrine,[117] po kojem ne dolazi u obzir ništavost presude onda kada je sud poslednje instance izričito negirao imunitet tuženog. U protivnom, pitanje imuniteta bi večno moglo da ostane otvoreno, što nikako nije u skladu sa principom pravne sigurnosti. Druga opcija bi bila priklanjanje drugom delu manjinske nemačke doktrine – priznavanje dozvoljenosti predloga za ponavljanje postupka.[118] U svakom slučaju, uputno bi bilo da se ovo pitanje reši na način koji je najprimereniji, tj. zakonom. Uzor bi mogao da se nađe u austrijskom pravu, koje u najvećoj meri nastoji da pomiri pravnu sigurnost s jedne, i nužnost nacionalnog odgovora na zahteve međunarodnog prava s druge strane. Prema tome, trebalo bi uvesti poseban vanredni pravni lek vrhovnog javnog tužioca, koji bi mogao da traži ukidanje pravnosnažne presude onda kada se kasnije ispostavi da je doneta protiv stranke koje uživa imunitet. Ukoliko bi se imunitet izričito negirao u presudi, ne bi bilo mesta ovakvom pravnom leku.

ZAKLJUČAK

Jurisdikcioni imunitet, kao ustanova koja predstavlja "granično područje na raskrsnici međunarodnog javnog i građanskog procesnog prava", zahteva svoje dogmatičko mesto u (međunarodnom) građanskom procesnom pravu. Globalno gledano, svakako uz rezervu generalizacije koja ostavlja prostor za greške, prisutna su dva pristupa: kontinentalnopravni, koji u imunitetu vidi ograničenje sudbenosti u međunarodnopravnom smislu, i shodno tome sudbenost tretira kao zasebnu procesnu pretpostavku u odnosu na međunarodnu nadležnosti, i angloamerički, koji poznaje samo jedan pojam jurisdikcije, koji objedinjava i međunarodnu nadležnost, i sudbenost u međunarodnopravnom smislu. U domaćoj literaturi su oba pravca zastupljena, pri čemu, ipak, dominantno ni ne postoji svest o razlikama; spor je samo latentan. Analiza jednog i drugog pristupa pokazuje da su pravila međunarodnog prava o imunitetu, te razvoj međunarodnog prava, značajni, ako ne i presudni faktori u pogledu njihovog obrazloženja. Preispitivanje argumentacija u tom smislu vodi zaključku da je za srpsku procesnu dogmatiku prihvatljivije klasično kontinentalnopravno učenje. Prema tome, sudbenost (jurisdikcija) je samostalna procesna pretpostavka u odnosu na međunarodnu nadležnost. Sudbenost principijelno uvek postoji, jer ishodi iz međunarodnog običajnog prava (teritorijalni suverenitet države); ona je ipak ograničena isto tako međunarodnopravnim pravilima o imunitetu. Međunarodna nadležnost, s druge

[117] Othmar Jauernig, *Das fehlerhafte Zivilurteil*, *op. cit.*, p. 162; Reinhold Geimer, *Internationales Zivilprozessrecht*, *op. cit.*, p. 261; *Haimo Schack*, *Internationales Zivilverfahrensrecht*, *op. cit.*, pp. 82–83.

[118] Sigrid Lorz, *Ausländische Staaten vor deutschen Zivilgerichten*, *op. cit.*, pp. pp. 317–325, 410–415 sa daljim upućivanjima.

strane, postoji samo ako postoje neke od predviđenih tačaka vezivanja, predviđenih mahom zakonom. Sudbenost se od međunarodne nadležnosti razlikuje, otuda, prema osnovu važenja, ali i prema funkciji. Uz to, sudbenost kao takva, tj. nepriznavanje imuniteta, ne zavisi od veze predmeta spora sa domaćom teritorijom. Konačno, sudbenost i međunarodna nadležnost imaju zaseban procesni režim, koji se manifestuje nesporno kroz različite pravne posledice: za razliku od ustaljivanja međunarodne nadležnosti, ne postoji ustaljivanje sudbenosti; međunarodnom nadležnošću raspolaže isključivo stranka u postupku, dok imunitetom, i u tom smislu sudbenošću, ponekad stranka, a ponekad neki drugi subjekat. Striktno razlikovanje sudbenosti i međunarodne nadležnosti bilo bi od koristi domaćoj sudskoj praksi, koja još uvek nije na čisto sa osnovnim pojmovima. Iako i učenje o imunitetu kao ograničenju međunarodne nadležnosti dolazi do istih praktičnih rezultata, pojmovno razlikovanje sudbenosti i međunarodne nadležnosti bi smanjilo rizik od eventualnih grešaka domaćih sudova.

THE DOGMATICS OF JURISDICTIONAL IMMUNITY IN CIVIL MATTERS – THE INFLUENCE OF INTERNATIONAL LAW DEVELOPMENT ON DISTINGUISHING JUDICIAL AUTHORITY AND INTERNATIONAL JURISDICTION

ABSTRACT

Jurisdictional immunity in international law is predominantly considered in a substantial sense. In domestic literature, the central dogmatic question – the nature of immunity in terms of procedural law – has so far remained on the margins. This work presents the basic theoretical approaches, namely the doctrine of conceptual distinction between international jurisdiction and jurisdiction as such, within which immunity represents its exception, and the doctrine of conceptual unity, which implies the existence of only international jurisdiction limited by immunity rules. Subsequently, the main arguments in favour of each conception are analysed, considering those arguments that in one way or another take into account international public law and its development as relevant. The result shows that for Serbian procedural legal theory, the doctrine of conceptual distinction between jurisdiction as such and direct international jurisdiction is more appropriate.

Key words: Jurisdictional Immunity, Jurisdiction, International Jurisdiction

REFERENCE

1. Briggs Adrian, *Private International Law in English Courts*, Oxford University Press, Oxford, 2014.
2. Committee on the Judiciary, "Jurisdiction of United States Courts in Suits Against Foreign States: Report Including Cost Estimate of the Congressional Budget Office to Accompany H.R. 11315", *International Legal Materials*, 1976, Vol. 15.

3. Crawford James, *Brownlie's Principles of Public International Law*, 9th Edition, Oxford University Press, Oxford, 2019.
4. Damian Helmut, *Staatenimmunität und Gerichtszwang*, Springer, Berlin/Heidelberg, 1985.
5. Denza Eileen, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th Edition, Oxford University Press, Oxford, 2016.
6. Dika Mihajlo, „Član 81" u Dika Mihajlo, Knežević Gašo, Stojanović Srđan, *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Beograd, 1991.
7. Đerić Vladimir, „Sudski imunitet strane države, posebno u radnim sporovima" u Tibor Varadi et al. (urs), *Liber Amicorum Gašo Knežević*, Pravni fakultet Univerziteta u Beogradu/Udruženje za arbitražno pravo, Beograd, 2016.
8. *Explanatory Reports to the European Convention on State Immunity and Additional Protocol*, Council of Europe, Strasbourg, 1972.
9. Etinski Rodoljub, Đajić Sanja, Tubić Bojan, *Međunarodno javno pravo*, 9. izdanje, Pravni fakultet u Novom Sadu, Novi Sad, 2021.
10. Fasching Hans W., *Lehrbuch des österreichischen Zivilprozeßrechts*, 2. Auflage, Manz, Wien, 1990.
11. Fox Hasel, Webb Philippa, *The Law of State Immunity*, 3rd Edition, Oxford University Press, Oxford, 2013.
12. Geimer Reinhold, *Internationales Zivilprozessrecht*, 7. Auflage, Dr. Otto Schimdt, Köln, 2015.
13. Geimer Reinhold, *Zur Prüfung der Gerichtsbarkeit und der internationalen Zuständigkeit bei der Anerkennung ausländischer Urteile*, Gieseking, Bielefeld, 1966
14. Illmer Martin, "Jurisdiction (PIL)" in *MaxEuP 2012*. Internet: https://max-eup2012.mpipriv.de/index.php/Jurisdiction_(PIL), 10. 10. 2023.
15. Hau Wolfgang, "Zur Prüfung der internationalen Zuständigkeit - eine Reminiszenz an Max Pagenstechers grundlegenden Beitrag" in Schütze Rolf A. (ed), *Fairness Justice Equity: Festschrift für Reinhold Geimer zum 80. Geburtstag*, C.H. Beck, München, 2017
16. Hess Burkhard, *Staatenimmunität bei Distanzdelikten*, C.H. Beck, München, 1992.
17. Hess Burkhard, "Probleme der Staatenimmunität bei grenzüberschreitenden Unterlassungsklagen", *Juristische Blätter*, 1989.
18. Higgins Rosalyn, "Recent Developments in the Law of Sovereign Immunity in the United Kingdom", *American Journal of International Law*, 1977, Vol. 71.
19. Higgins Rosalyn, *Themes and Theories*, Oxford University Press, Oxford, 2009.

20. Jakšić Aleksandar, *Građansko procesno pravo*, 9. izdanje, Univezitet u Beogradu – Pravni fakultet, Beograd, 2017.
21. Jakšić Aleksandar, *Međunarodno građansko procesno pravo*, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2016.
22. Jakšić Aleksandar, *Međunarodno privatno pravo*, Službeni glasnik, Beograd, 2021
23. Jauernig Othmar, *Das fehlerhafte Zivilurteil*, Vittorio Klostermann, Frankfurt am Main, 1958.
24. Jauernig Othmar, Hess Burkhard, *Zivilprozessrecht*, 30. Auflage, C.H. Beck, München, 2011.
25. Kitić Dušan, *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Union u Beogradu/Službeni glasnik, Beograd, 2016.
26. Knežević Gašo, „Perpetuatio iurisdictionis u novijoj jugoslovenskoj pravnoj misli", *Anali Pravnog fakulteta u Beogradu*, 1988, Vol. 36, br. 3.
27. Knežević Gašo, Pavić Vladimir, Jovanović Marko, *Međunarodno privatno pravo*, Službeni glasnik, Beograd, 2022.
28. Krajewski Markus, *Völkerrecht*, 3. Auflage, Nomos, Baden-Baden, 2023.
29. Kren Kostkiewicz Jolanta, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, Stämpfli, Bern, 1998.
30. Kren Kostkiewicz Jolanta, "Schiedsklausel und ihre Bedeutung für den Immunitätsverzicht sowie für die Voraussetzung der Binnenbeziehung im Erkenntnis- und Vollstreckungsverfahren" in Grolimund Pascal, Koller Alfred, Loacker Leander D., Portmann Wolfgang (eds.), *Festschrift für Anton K. Schnyder*, Schulthess, Zürich/Basel/Genf, 2018.
31. Linke Hartmut, Hau Wolfgang, *Internationales Verfahrensrecht*, 8. Auflage, Dr. Otto Schmidt, Köln, 2021.
32. Lorz Sigrid, *Ausländische Staaten vor deutschen Zivilgerichten*, Tübingen, Mohr Siebeck, 2017.
33. Mankowski Peter, "Besprechung von Sigrid Lorz: Ausländische Staaten vor deutschen Zivilgerichten", *Juristenzeitung*, 2018, Vol. 73, Nr. 9.
34. Matscher Franz, "Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit" in Fasching Hans W., Konecny Andreas (eds), *Kommentar zu den Zivilprozessgesetzen, Bd. I*, 3. Auflage, Manz, Wien, 2013.
35. Matscher Franz, "Art IX EGJN" in Fasching Hans W., Konecny Andreas (eds), *Kommentar zu den Zivilprozessgesetzen, Bd. I*, 3. Auflage, Manz, Wien, 2013.
36. Matscher Franz, "Zur prozessualen Behandlung der inländischen Gerichtsbarkeit" in Birgit Bachmann et al. (eds), *Grenzüberschreitungen. Festschrift für Peter Schlosser zum 70. Geburtstag*, Mohr Siebeck, Tübingen, 2005.

37. Mayr Peter, "Die ´inländische Gerichtsbarkeit´ im österreichischen Zivilverfahrensrecht" in Kubis Sebastian, Peifer Karl-Nikolaus, Raue Benjamin, Stieper Malte (eds), *Ius Vivum: Kunst – Internationales – Persönlichkeit: Festschrift für Haimo Schack zum 70. Geburtstag*, Tübingen, Mohr Siebeck, 2022.
38. Mayr Peter, "§ 29 JN" in Rechberger Walter, Klicka Thomas (eds.), *Zivilprozessordnung*, 5. Auflage, Verlag Österreich, Wien, 2019.
39. Mayr Peter, "§ 42 JN" in Rechberger Walter, Klicka Thomas (eds.), *Zivilprozessordnung*, 5. Auflage, Verlag Österreich, Wien, 2019.
40. Nagel Heinrich, Gottwald Peter, *Internationales Zivilprozessrecht*, 7. Auflage, Dr. Otto Schmidt, Köln, 2013.
41. O'Keefe Roger, "Article 3" in O'Keefe Roger, Tams Christian J. (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press, Oxford, 2013.
42. Pagenstecher Max, "Gerichtsbarkeit und internationale Zuständigkeit als selbständige Prozeßvoraussetzungen", *Zeitschrift für ausländisches und internationales Privatrecht*, 1937, Vol. 11.
43. Poznić Borivoje, Rakić-Vodinelić Vesna, *Građansko procesno pravo*, 17. izdanje, Pravni fakultet Univerziteta Union u Beogradu/Službeni glasnik, Beograd, 2015.
44. Poznić Borivoje, *Građansko procesno pravo*, 2. izdanje, Savremena administracija, Beograd, 1965.
45. Poznić Borivoje, *Komentar Zakona o parničnom postupku*, Službeni glasnik, Beograd, 2009.
46. Reinisch August, "Das Recht auf Zugang zu Gericht und völkerrechtliche Immunitäten in Österreich" in Jabloner Clemens et al. (eds), *Vom praktischen Wert der Methode. Festschrift für Heinz Mayer*, Manz, Wien, 2011.
47. Rosenberg Leo, Schwab Karl-Heinz, Gottwald Peter, *Zivilprozessrecht*, 17. Auflage, C.H. Beck, 2010.
48. Schack Heimo, *Internationales Zivilverfahrensrecht*, 8. Auflage, C.H. Beck, München, 2021.
49. Spitzer Martin, "Inländische Gerichtsbarkeit und Immunität", *Österreichische Juristen Zeitung*, 2008
50. Spühler Karl, Rodriguez Rodrigo, *Internationales Zivilprozessrecht*, 3. Auflage, Schulthess, Zürich, 2022.
51. Stanivuković Maja, *Međunarodna nadležnost sudova u pravu SAD, Evropske Unije i EFTA*, Pravni fakultet u Novom Sadu, Novi Sad, 1995.
52. Stanivuković Maja, Živković Mirko, *Međunarodno privatno pravo*, Službeni list SCG, Beograd, 2004.

53. Stanivuković Maja, Živković Mirko, *Međunarodno privatno pravo*, 7. izdanje, Službeni glasnik, Beograd, 2021.
54. Triva Siniša, Belajec Velimir, Dika Mihajlo, *Građansko parnično procesno pravo*, 6. izdanje, Narodne novine, Zagreb, 1986.
55. Trooboff Peter D., "Foreign State Immunity: Emerging Consensus on Principles", *Recueil Des Cours*, 1986, Vol. 200.
56. Varadi Tibor, „Savremene tendencije u razvoju imuniteta država", *Anali Pravnog fakulteta u Beogradu*, 1983, Vol 31, br. 1–4.
57. Varadi Tibor, Knežević Gašo, Bordaš Bernadet, Pavić Vladimir, *Međunarodno privatno pravo*, 17. izdanje, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2018.
58. Vuković Đuro, *Međunarodno građansko procesno pravo*, Informator, Zagreb, 1987.
59. Walter Gerhard, Domej Tanja, *Internationales Zivilprozessrecht der Schweiz*, 5. Auflage, Haupt Verlag, Bern/Stuttgart/Wien, 2012.
60. Wittich Stephan, "Article 10 Commercial Transactions" in O'Keefe Roger, Tams Christian J. (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press, Oxford, 2013.

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

341.215(082)
327(082)

SRPSKI godišnjak za međunarodno pravo = The Serbian yearbook of international law / Duško Dimitrijević (ur.). - 3. izd. - Beograd : Srpsko udruženje za međunarodno pravo =Serbian International Law Association, 2023 (Beograd : Pharmalab laboratorija). - 404 str. ; 25 cm

Radovi na srp. i engl. jeziku. - Tiraž 30. - Str. 9-11: Predgovor = Foreword / Duško Dimitrijević. - Napomene i bibliografske reference uz tekst. - Bibliografija uz većinu radova. - Abstracts ; Apstrakti.

ISBN 978-86-903836-2-7

1. Димитријевић, Душко, 1965- [уредник] [аутор додатног текста]
а) Међународно право -- Зборници б) Међународни односи -- Зборници

COBISS.SR-ID 131449353

ISBN-978-86-903836-2-7