1.02 Review article

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

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ABSTRACT

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

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

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1 Introduction

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

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

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

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

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

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

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

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

2 Definition of the Problem

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

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

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

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

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

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

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

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

4 Identifying the Contents of Generally Accepted Principles of International Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Direct Applicability of Generally Accepted Principles of International Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The second formulation is as follows:

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

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

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

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

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

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

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

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

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

8 Conclusion

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

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

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

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

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