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HRVATSKA AKADEMIJA ZNANOSTI I UMJETNOSTI
JADRANSKI ZAVOD
Z A G R E B

POREDBENO POMORSKO PRAVO

COMPARATIVE MARITIME LAW

PPP god. 62, broj 177, str. 1 – 378, Zagreb, 2023.

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SADRŽAJ / CONTENTS

RIJEČ UREDNIKA

Poštovani čitatelji i čitateljice,

pred vama je novi broj časopisa *Poredbeno pomorsko pravo = Comparative Maritime Law* u koji je, kao i uvijek, uloženo mnogo truda i predanog rada. Ovaj je broj poseban po tome što sadrži znanstvene radove domaćih i inozemnih stručnjaka iz područja međunarodnog prava izložene na Međunarodnoj znanstvenoj konferenciji *in memoriam* prof. emer. Vladimir-Đuro Degan, održanoj 31. ožujka 2023. godine u Rijeci. Konferenciju su organizirali Pravni fakultet Sveučilišta u Rijeci i Jadranski zavod Hrvatske akademije znanosti i umjetnosti kako bi iskazali poštovanje životu i djelu profesora Degana (1935. – 2022.) koji je, među ostalim, bio dugogodišnji upravitelj, a potom voditelj Jadranskog zavoda te *professor emeritus* Pravnog fakulteta Sveučilišta u Rijeci. Osim navedenih radova, u ovom su broju časopisa sadržani i prilozi iz područja pomorskog prava koje su pripremili istaknuti domaći pomorskopravni stručnjaci. U njima možete pročitati dva izvorna znanstvena rada i šest preglednih znanstvenih radova, prikaze triju knjiga, četiri sudske presude, tematsku bibliografiju i dva nekrologa.

U izvornom znanstvenom radu »Annex G of the 2001 Agreement on Succession Issues: Self-executing or Not?«, prof. dr. sc. Vesna Crnić-Grotić, prof. dr. sc. Sandra Fabijanić Gagro i izv. prof. dr. sc. Petra Perišić analiziraju mjerodavne odredbe Bečke konvencije o pravu međunarodnih ugovora iz 1969. godine i sudsku praksu država sljednica kako bi odgovorile na pitanje je li samoizvršiv Ugovor o pitanjima sukcesije iz 2001. godine, sklopljen nakon raspada bivše SFRJ.

Izvorni znanstveni rad pod naslovom »Globalisation with a Human Face and the Role of the United Nations«, izv. prof. dr. sc. Lénárda Sándora, istražuje moderne izazove u zaštiti ljudskih prava i iznosi pregled povijesnog razvoja međunarodne pravne regulative i suvremenih regulatornih inicijativa radi utvrđenja odgovornosti države za zaštitu ljudskih prava u kontekstu odnosa poslovnog sektora prema ljudskim pravima.

Pitanjima zaštite ljudskih prava bavi se i izv. prof. dr. sc. Nives Mazur Kumrić u preglednom znanstvenom radu »Upholding United Nations Global Legitimacy in Human Rights Protection and Humanitarian Assistance within the European Union: A Legal Overview of the EU-UN Natural Partnership«. Autorica analizira pravni okvir za partnerstvo Europske unije i Ujedinjenih naroda radi ostvarenja zaštite ljudskih prava i neometanog pristupa humanitarnoj pomoći.

Rad prikazuje primjere takvog partnerstva, poput onoga o ranom oporavku zajednica pogođenih ratom u Ukrajini putem Programa Ujedinjenih naroda za razvoj.

Pregledni znanstveni rad pod naslovom »The General Assembly Resolution ´Protection of the Environment in Relation to Armed Conflicts´ of 2022: Where We Stand 30 Years after«, prof. dr. sc. Vesne Barić-Punda i Irene Nišević, mag. iur., bavi se pitanjem standarda štete za okoliš koju je zabranjeno prouzročiti u oružanim sukobima. Autorice razmatraju mjerodavna načela Rezolucije »Zaštita okoliša u vezi s oružanim sukobima« usvojene u Općoj skupštini Ujedinjenih naroda 2022. godine i nude moguća rješenja za uređenje pitanja zaštite okoliša u vezi s oružanim sukobima.

Autorica preglednog znanstvenog rada »Application and Interpretation of the Genocide Convention in the Recent Jurisprudence of the International Court of Justice: Issues of Jurisdiction«, doc. dr. sc. Rutvica Rusan Novokmet, analizira neka pitanja o utvrđivanju odgovornosti država prema Konvenciji o sprječavanju i kažnjavanju zločina genocida iz 1948. godine i najnovije slučajeve koji se razmatraju pred Međunarodnim sudom. Unatoč tomu što u tim slučajevima još nije odlučeno o *meritumu*, autorica navodi kako će donesene odluke o pitanjima preliminarnog karaktera imati znatan utjecaj na ispravnu i učinkovitu primjenu Konvencije u budućnosti.

Kad je riječ o pomorskopravnim temama, u ovom broju časopisa, autorica prof. dr. sc. Petra Amižić Jelovčić u preglednom znanstvenom radu pod naslovom »Gvinejski zaljev – žarište piratskih napada i nova prijetnja međunarodnoj sigurnosti plovidbe« proučava sigurnost plovidbe u okolnostima piratskih napada u području Gvinejskog zaljeva, koje je danas jedno od najrizičnijih plovnih područja na svijetu. Autorica iznosi pregled najvažnijih međunarodnih dokumenata usvojenih radi ograničavanja i suzbijanja piratskih napada, s posebnim naglaskom na regulatornu ulogu Europske unije.

Autori preglednog znanstvenog rada »Posebnosti ugovaranja leasinga plovila u pravnom prometu u Republici Hrvatskoj«, izv. prof. dr. sc. Marija Vidić i dr. sc. Miho Baće, razmatraju posebnosti ugovaranja u poslu leasinga plovila u Republici Hrvatskoj u usporedbi s drugim pokretninama. Naglasak je na poslovnoj praksi, odnosno na općim uvjetima poslovanja koji čine dio ugovora o leasingu plovila. Autori kritički razmatraju u njima predviđena rješenja.

Zoran Tasić, mag. iur., autor je preglednog znanstvenog rada »Posljedice Brexita za pomorsko pravo Europske unije« u kojemu analizira utjecaj Brexita na pomorsku industriju u vezi s mjerodavnim pravom i nadležnosti za rješavanje

sporova. Unatoč tomu što su u Velikoj Britaniji prestali važiti propisi Europske unije na temelju kojih se automatski priznaju i izvršavaju presude sudova država članica, autor iznosi tvrdnje u prilog sklonosti dionika pomorske industrije daljnjem ugovaranju primjene engleskog prava i nadležnosti engleskih sudova.

Osim znanstvenih radova, ovaj broj časopisa sadrži i prikaze triju knjiga. Knjiga *Pomorsko pravo*, autora prof. dr. sc. Dragana Bolanče i prof. dr. sc. Petre Amižić Jelovčić, bavi se širokim rasponom pomorskopravnih tema, a namijenjena je prvenstveno studentima pravnih i pomorskih fakulteta za upoznavanje s materijom istoimenog kolegija te će biti korisno štivo za sve koji se žele upoznati sa zanimljivim svijetom pomorskog prava. Autor prikaza je prof. dr. sc. Jasenko Marin. Prikazane su i dvije monografije koje se bave pravnim uređenjem prijevoza robe, uključujući posebno i pomorski prijevoz. Radi se o knjizi autorice dr. sc. Vesne Polić Foglar pod naslovom *The Carriage of Goods in Swiss Law: A Comprehensive Overview of the Swiss Legal System, the Liability of Carriers and Freight Forwarders and the Marine and Liability Insurance*, čiji je prikaz izradila izv. prof. dr. sc. Adriana Vincenca Padovan i knjizi *A Modern Lex Mercatoria for Carriage of Goods by Sea*, autora dr. sc. Petra Kragića i Diane Jerolimov, dipl. iur., koju je prikazala dr. sc. Vesna Skorupan Wolff. Obje monografije uvaženih hrvatskih pomorskopravnih stručnjaka pisane su na engleskom jeziku i bave se međunarodno relevantnim pomorskopravnim temama, pa će zasigurno pronaći i međunarodnu čitalačku publiku.

Prikazane su i četiri presude hrvatskih sudova – Vrhovnog suda Republike Hrvatske i Visokog trgovačkog suda Republike Hrvatske. Autorica navedenih prikaza, dr. sc. Vesna Skorupan Wolff, analizira sudsku praksu o različitim pomorskopravnim pitanjima. Prikazi recentne sudske prakse od neizmjerne su važnosti za znanstvenike i praktičare radi ispravnog tumačenja pozitivnog prava.

U ovom broju časopisa objavljujemo i tematsku bibliografiju iz područja cestovnog i željezničkog prava, prava osiguranja transportnih rizika, tržišnog natjecanja u području transporta, multimodalnog prijevoza te turizma i prava putnika. Autorica bibliografije je Aleksandra Čar, mag. spec., viša knjižničarka. Bibliografija obuhvaća reference odabranih članaka i radova objavljenih u domaćim i inozemnim znanstvenim i stručnim časopisima te knjiga i poglavlja u knjigama u izdanju hrvatskih i inozemnih (uglavnom europskih) nakladnika.

Na kraju, s dubokim poštovanjem opraštamo se od prof. dr. sc. Drage Pavića i prof. dr. sc. Hrvoja Kačića. U nekrolozima koje su pripremili prof. dr. sc. Ranka Petrinović i dr. sc. Petar Kragić, prisjećamo se njihovih značajnih doprinosa znanosti i struci pomorskog prava i prava osiguranja. Sav njihov profesionalni

integritet, stručnost te posvećenost unaprjeđenju pomorskopravne znanosti ostaju trajni izvor inspiracije za akademsku zajednicu.

Čestitamo i zahvaljujemo svim autorima na njihovim izvrsnim prilozima koji su obogatili ovaj broj časopisa. Takvoj su kvaliteti objavljenih priloga nedvojbeno pridonijeli znanje i marljivost recenzenata i urednika kojima iskazujemo posebnu zahvalnost. Na kraju, ali ne manje važno, raduje nas zanimanje čitatelja za naš časopis među već ustaljenim čitateljstvom, kao i među onima koji su to tek postali.

Akademik Jakša Barbić, glavni urednik

EDITORIAL

Dear Readers,

In front of you is the new issue of the journal *Poredbeno pomorsko pravo = Comparative Maritime Law*, in which, as always, great effort and dedicated work has been invested. This issue is special in that it contains academic papers by Croatian and foreign scholars and experts in the field of international law presented at the international scientific conference held in Rijeka on 31 March 2023 in memory of Professor Emeritus Vladimir-Đuro Degan. The conference was organised by the Faculty of Law of the University of Rijeka and the Adriatic Institute of the Croatian Academy of Sciences and Arts in order to show respect for the life and work of Professor Degan (1935-2022), who was a long-term director of the Adriatic Institute and Professor Emeritus at the Faculty of Law, University of Rijeka. In addition to the aforementioned papers, this issue of the journal also contains contributions from the field of maritime law prepared by prominent Croatian maritime law experts. In all, there are two original scientific papers and six review articles, reviews of three books, four court rulings published in this issue of the journal, selective bibliography, and two obituaries.

Professor Vesna Crnić-Grotić, PhD, Professor Sandra Fabijanić Gagro, PhD, and Associate Professor Petra Perišić, PhD, co-authored the original scientific paper ″Annex G of the 2001 Agreement on Succession Issues: Self-executing or Not?″, in which they analyse the relevant provisions of the Vienna Convention on the Law of Treaties of 1969 and the jurisprudence of the successor States in order to respond to the question of whether the Agreement on succession issues of 2001, concluded after the dissolution of the former SFRY, is indeed self-executing.

Professor Lénárd Sándor, PhD, is the author of the original scientific paper entitled ″Globalisation with a Human Face and the Role of the United Nations″. The author investigates various modern challenges in the protection of human rights, and provides an overview of the historical development of international legal regulation, as well as contemporary regulatory initiatives, in order to clarify the States′ duties and responsibility to protect human rights in the context of business and human rights.

Issues of human rights protection are further dealt with by Associate Professor Nives Mazur Kumrić, PhD, in the review article entitled ″Upholding United Nations Global Legitimacy in Human Rights Protection and Humanitarian

Assistance within the European Union: A Legal Overview of the EU-UN Natural Partnership". The author analyses the legal framework for partnership between the European Union and the United Nations in order to achieve the protection of human rights and unhindered access to humanitarian aid. The author also presents examples of such partnership, such as the early recovery of war-affected communities in Ukraine through the United Nations Development Programme.

Professor Vesna Barić-Punda, PhD, and Irena Nišević, LLM, are co-authors of the review article "The General Assembly Resolution 'Protection of the Environment in Relation to Armed Conflicts' of 2022: Where We Stand 30 Years after", in which they deal with the threshold of prohibited environmental damage in armed conflicts. They consider and analyse the relevant principles of the Resolution "Protection of the Environment in Relation to Armed Conflicts" adopted by the General Assembly of the United Nations in 2022. The authors propose possible solutions for the regulation of environmental protection related to armed conflicts.

Assistant Professor Rutvica Rusan Novokmet, PhD, is the author of the review article "Application and Interpretation of the Genocide Convention in the Recent Jurisprudence of the International Court of Justice: Issues of Jurisdiction". The paper examines certain questions about determining the responsibility of States according to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the most recent cases before the International Court of Justice. Despite the fact that the merits have not yet been decided in these cases, the author states that the decisions made so far on questions of a preliminary nature will have a significant impact on the correct and effective application of the Convention in the future.

Among the maritime law topics in this issue of the journal, Professor Petra Amižić Jelovčić, PhD, deals with the issue of navigation safety in circumstances of pirate attacks, in the area of the Gulf of Guinea, which today is the riskiest navigable area in the world. In the review article entitled "The Gulf of Guinea: A Piracy Hot Spot and a New Threat to the International Safety of Navigation", the author presents an overview of the most important international documents adopted to limit and suppress piracy attacks, with special emphasis on the regulatory role of the European Union.

Associate Professor Marija Vidić, PhD, and Miho Baće, PhD, are the authors of the review article "Special Features of Vessel Leasing Contracts in Legal Transactions in the Republic of Croatia". The authors consider the peculiarities of the contracts in the vessel leasing business in the Republic of Croatia in

comparison with other movables. They place emphasis on business practice, in particular on the general terms and conditions of vessel leasing contracts and critically an-alyse the solutions provided therein.

Zoran Tasić, LLM, is the author of the review article ″The Consequences of Brexit for the Maritime Law of the European Union″, in which he considers the impact of Brexit on the maritime industry in relation to issues of the applicable law and jurisdiction. Even though the European Union regulations on the basis of which the judgments of the courts of the Member States are automatically recognised and enforced have ceased to be valid in the United Kingdom, the author gives arguments in support of the tendency of maritime industry stakeholders to continue to choose English law and jurisdiction in their commercial transactions.

In addition to academic papers, this issue of the journal contains the reviews of three books. The book *Maritime Law* authored by Professor Dragan Bolanča, PhD, and Professor Petra Amižić Jelovčić, PhD, deals with a wide range of maritime law topics. It is intended primarily for students of law and maritime studies, but it will be useful for any reader who wishes to become better acquainted with this interesting subject. The author of the review is Professor Jasenko Marin, PhD. Two monographs dealing with the legal regulation of carriage of goods, including maritime transport in particular, are also presented in this issue. The review of the book *The Carriage of Goods in Swiss Law: A Comprehensive Overview of the Swiss Legal System, the Liability of Carriers and Freight Forwarders and the Marine and Liability Insurance* by Vesna Polić Foglar, PhD, was prepared by Associate Professor Adriana Vincenca Padovan, PhD, and the book entitled *A Modern Lex Mercatoria for Carriage of Goods by Sea* by Petar Kragić, PhD, and Diana Jerolimov, dipl. iur., is presented by Vesna Skorupan Wolff, PhD. Both monographs by acknowledged Croatian maritime law experts are written in English and deal with internationally relevant maritime law topics, so they will surely find an international readership.

Four judgments of Croatian courts, including the High Commercial Court of the Republic of Croatia and the Supreme Court of the Republic of Croatia, are presented in this issue. The author of these notes is Vesna Skorupan Wolff, PhD, who analyses court practice on various maritime legal issues. Reviews of recent judicial practice are of immense importance for scholars and practitioners for the proper interpretation of positive law.

In this issue of the journal we also publish a selected bibliography in the field of road and railway transport law, the law of insurance of transport risks,

market competition in the field of transport, multimodal transport, and tourism and passenger rights. The compiler of the bibliography is Aleksandra Čar, MSc, spec., senior librarian. The bibliography includes references to selected articles and papers published in Croatian and foreign academic and professional journals, as well as books and book chapters published by Croatian and foreign (mainly European) publishers.

Finally, it is with profound respect that we remember our late colleagues, Professor Drago Pavić, PhD, and Professor Hrvoje Kačić, PhD. In the obituaries prepared by Professor Ranka Petrinović, PhD, and Petar Kragić, PhD, we recall their significant contributions to maritime and insurance law. Their professional integrity and their expertise and dedication to the advancement of maritime legal science remain a permanent source of inspiration for the whole of the academic community.

We congratulate and thank all the authors for their excellent contributions that enrich this issue of the journal. Of course, the knowledge and diligence of the peer-reviewers and editors, to whom we express special gratitude, undoubtedly contribute to the quality of the published articles. Finally, we duly acknowledge and appreciate the interest shown in our journal by those who form part of its already established readership and those who are new to it.

Professor Jakša Barbić, Editor-in-Chief

ČLANCI / ARTICLES

THE GENERAL ASSEMBLY RESOLUTION ″PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS″ OF 2022: WHERE WE STAND 30 YEARS AFTER

Prof. VESNA BARIĆ PUNDA, PhD*
IRENA NIŠEVIĆ, LLM**

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After the adoption of the General Assembly Resolution ″Protection of the Environment in Times of Armed Conflict″ in 1992, this United Nations organ adopted another resolution on the subject matter in 2022 entitled ″Protection of the Environment in Relation to Armed Conflicts″. The new Resolution is a result of efforts made within the International Law Commission which issued its ″Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with Commentaries″ in the same year. Comments and observations to the Draft principles received from the governments of the great military powers are of special importance to the regulation of the subject matter. This work puts emphasis on Principle 13 of the Resolution which, subject to applicable international law, prohibits widespread, long-term and severe damage to the environment. The authors analyse whether such a threshold is too high and restrictive, consequently preventing the Resolution from effectively protecting the environment in accordance with its goals. On the basis of the results of such an analysis, the authors offer possible solutions to the related problems.

Keywords: *international environmental law; the law of armed conflict; International Law Commission; General Assembly; Additional Protocol I.*

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1. INTRODUCTION

The General Assembly adopted without a vote the Resolution ˝Protection of the Environment in Relation to Armed Conflicts˝[1] at its seventy-seventh session on 7 December 2022. The Resolution is based on the work of the International Law Commission (hereinafter: ILC) which issued its Draft principles on protection of the environment in relation to armed conflicts, with commentaries,[2] in the same year. In its Resolution, the General Assembly recalls the recommendation of the United Nations Environment Programme that the ILC examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded.[3]

The existing international environmental law, which has evolved primarily through treaty law,[4] has contributed to the protection of the environment in general. This field of international law has seen dynamic development. As such, it has always implied a challenge for international law experts. The problems which these experts are facing need to be dealt with by both traditional legal institutes and new legal concepts. At the same time, it has to be borne in mind that the protection of the environment represents a global interest and not just a national one.

There are positive examples of international cooperation, especially in the field of protection of the marine environment. The United Nations Convention on the Law of the Sea[5] plays a huge role at the international level. At the regional level, there are also positive examples confirming that the protection of the environment goes beyond national interests, such as the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols.[6]

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1 A/RES/77/104 (hereinafter: GA Resolution of 2022).

2 ILC, Report on the Work of the Seventy-third Session (2022), A/77/10, Chapter V (hereinafter: Draft principles).

3 United Nations Environment Programme, Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law, 2009, Recommendation 3, p. 53.

4 Birnie, P. W.; Boyle, A. E.; Redgwell, C., *International Law and the Environment*, Oxford University Press, Oxford, 2009, p. 24.

5 Adopted on 10 December 1982, entered into force on 16 November 1994, https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 24 August 2023).

6 Adopted on 16 February 1976, entered into force on 12 February 1978, amended on 10 June 1995, https://wedocs.unep.org/bitstream/handle/20.500.11822/31970/bcp2019_web_eng.pdf (accessed 24 August 2023).

When referring to international environmental law conventions, one must analyse whether they continue to apply during armed conflict. Hence, in order to define the law governing the protection of the environment in relation to armed conflicts, one should analyse the relationship between international environmental law and the law of armed conflict. The first step is to examine the convention at hand in accordance with the rules of treaty interpretation set under the Vienna Convention on the Law of Treaties[7] which are regarded as customary international law. Secondly, the rules of law of armed conflict should also be taken into account.

It is considered that no treaty is *ipso facto* terminated or suspended due to an outbreak of hostilities.[8] Therefore, each treaty must be examined separately. Considering that the majority of international environmental law conventions do not expressly exclude their application during armed conflict, it could be concluded that they apply not only in peace, but that they continue to apply in armed conflict as well. On the other hand, it could be argued that the absence of an express clause regulating the effect of armed conflicts would mean that conventions cannot continue to apply in armed conflict.

The International Court of Justice in its Advisory Opinion of 1996 *Legality of the Threat or Use of Nuclear Weapons*[9] dealt with this question incidentally. The Court did not focus on the question of whether international environmental law conventions continue to apply during armed conflict. Rather, the Court was of the opinion that the issue before it was whether these conventions were *intended* to impose obligations of total restraint during military activities.[10] It concluded that international environmental law conventions could not be construed in such a way as to deny a State the right to use armed force in self-defence or to entail obligations of total restraint in armed conflict.[11] The Court's reasoning thus favours the view that the law of armed conflict operates as *lex specialis* in regard to international environmental law.

In the General Commentary to the Draft principles, it is stated that ˝the draft principles were prepared bearing in mind that the law of armed conflict,

[7] Adopted on 23 May 1969, entered into force on 27 January 1980, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 24 August 2023).

[8] ILC, Report on the Work of the Sixty-third Session (2011), A/66/10, Chapter VI, Draft Articles on the Effects of Armed Conflicts on Treaties, with commentaries, Art. 3.

[9] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

[10] *Ibid*., p. 242, para. 30.

[11] *Ibid*.

where applicable, is *lex specialis* but that other rules of international law, to the extent that they do not enter into conflict with it, also remain applicable˝.[12] In this paper, the authors will analyse the relevant rules of the law of armed conflict regulating the protection of the environment in order to compare them with the principles of the GA Resolution of 2022.

Customary law rules of the law of armed conflict, which contribute both to the direct and indirect protection of the environment, should be further stressed. The environment enjoys general protection from direct attack as a civilian object.[13] Recognition of the environment as a civilian object has done more to protect it than any environmentally specific rule of the law of armed conflict.[14] As in the case with other civilian objects, the environment is only *prima facie* a civilian object and, therefore, it can become a legitimate military objective as well.[15] From the definition of a legitimate military objective, there follows a negative definition of a civilian object: a civilian object is any object that is not a military objective. Furthermore, it is important to consider whether all parts of the environment which do not qualify as military objectives are necessarily civilian objects. In order not to leave space for grey areas in regard to the status of parts of the environment, the ILC took the position that all parts of the environment constitute a civilian object.[16]

Being a civilian object, the environment is protected by the customary international law principle of distinction between civilian objects and military objectives[17] and by the principle of precautions.[18] In particular, those who plan or decide upon an attack must do everything feasible to verify that the objectives to be attacked are not civilian objects, but are military objectives. Moreover,

12 *Op. cit.* in fn. 2, General Commentary, para. 4.

13 This conclusion is derived from positioning Art. 55, para. 1 in Chapter III of Section I of Part IV (titled ˝Civilian objects˝) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977, entered into force on 7 December 1978 (hereinafter: Additional Protocol I), https://ihl-databases.icrc.org/en/ihl-treaties/api-1977 (accessed 24 August 2023).

14 Hulme, K., Taking Care to Protect the Environment against Damage: A Meaningless Obligation?, *International Review of the Red Cross*, vol. 92 (2010), no. 879, p. 678.

15 Art. 52, para. 2 of Additional Protocol I defines legitimate military objectives as ˝those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage˝.

16 *Op. cit.* in fn. 2, p. 143, para. 10.

17 Art. 48 of Additional Protocol I.

18 Art. 57 of Additional Protocol I.

they must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental damage to civilian objects. Furthermore, the environment is protected by the customary international law principle of proportionality. In particular, this principle prohibits an attack even against a legitimate military objective if it may be expected to cause incidental damage, *inter alia*, to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.[19] In this way, the aim is to protect the environment from becoming, as a civilian object, a collateral victim of an attack aimed at a military objective.

Additionally, the environment is protected by the customary international law principle of prohibition of destruction of enemy property, except where such destruction is rendered absolutely necessary by military operations.[20] However, invoking a military necessity could not rule out the illegality of destruction of enemy property if it did not constitute a legitimate military objective. Unlike the rule on the prohibition of employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment,[21] this principle prohibits any destruction of enemy property, regardless of the nature and extent of the damage it might cause.[22]

In addition to the general protection which the environment enjoys by its legal status as a civilian object, it also enjoys protection on the basis of the provisions of Additional Protocol I aimed at the protection of other civilian objects. In particular, these are Arts. 53 (Protection of cultural objects and of places of worship), 54 (Protection of objects indispensable to the survival of the civilian population) and 56 (Protection of works and installations containing dangerous forces). These rules can provide both direct and indirect protection to the environment. Direct protection is provided to the environment

19 Arts. 51, para. 5 (b) and 57, para. 2 (a) (iii) of Additional Protocol I.

20 Art. 23 (g) of the Hague Regulation to the Convention (IV) respecting the Laws and Customs of War on Land, adopted on 18 October 1907, entered into force on 26 January 1910, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907 (accessed 24 August 2023) and Art. 53 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949, entered into force on 21 October 1950, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=default (accessed 24 August 2023).

21 Arts. 35, para. 3 and 55, para. 1 of the Additional Protocol I.

22 Therefore, in the analysis of the Iraqi burning of Kuwaiti oil platforms in the Gulf War, this customary international law principle had been considered in the case where the restrictive threshold under Art. 35, para. 3 and Art. 55, para. 1 of Additional Protocol I providing a direct protection to the environment could not be applied.

when a civilian object specifically protected by these rules also forms part of the environment. For instance, agricultural areas as objects indispensable to the survival of the civilian population are an integral part of the environment and, thus, Art. 54, by prohibiting the attack, destruction, removal or rendering useless of such objects, also offers direct protection to the environment. Similarly, Art. 53 can also afford direct protection to the environment when an object forming part of the environment qualifies as cultural property. Furthermore, there could be room for the indirect protection of the environment in the situation of an attack on dams, dykes and nuclear electrical generating stations, which is prohibited under Art. 56, considering that any release of dangerous forces capable of causing severe losses among the civilian population is also likely to damage the environment in which the population lives.[23]

The protection of the environment granted under Arts. 53, 54 and 56 of Additional Protocol I also applies in non-international armed conflicts in accordance with Arts. 14, 15 and 16 of Additional Protocol II.[24] This protection under Additional Protocol II is particularly important taking into account that Additional Protocol II does not contain provisions directly protecting either the environment (such as Art. 35, para. 3 and Art. 55, para. 1 of Additional Protocol I[25]) or civilian objects in general.[26] Notwithstanding that both international and non-international armed conflicts can cause equally harmful consequences to the environment, it should be borne in mind that there ought to be a clear distinction between these two types of armed conflicts with respect to the applicable law. The fact that there are separate legal regimes for international and non-international armed conflicts under the law of armed conflict cannot be disregarded.[27]

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[23] International Committee of the Red Cross, Guidelines on the Protection of the Natural Environment in Armed Conflict, 25 September 2020, p. 68 (hereinafter: ICRC Guidelines of 2020), https://shop.icrc.org/guidelines-on-the-protection-of-the-natural-environment-in-armed-conflict-pdf-en.html (accessed 24 August 2023).

[24] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977, entered into force on 7 December 1978 (hereinafter: Additional Protocol II), https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977 (accessed 24 August 2023).

[25] *Infra* 3.2.

[26] For more details on the current legal framework on the protection of the environment in non-international armed conflicts, see Pretorius, J., Enhancing Environmental Protection in Non-International Armed Conflict: The Way Forward, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 78 (2018).

[27] However, this was one of the most controversial issues when the ILC decided not to distinguish between the law applicable to international and non-international armed conflicts in its Draft principles. See *infra* 3.1.

There are several other legal instruments directly apposite to the protection of the environment in warfare. Along with Additional Protocol I and Additional Protocol II, adopted under the International Committee of the Red Cross (hereinafter: ICRC), significant efforts have been made under the United Nations as well. Among these instruments, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques[28] should be mentioned, as well as the Rome Statute of the International Criminal Court,[29] Protocol III to the 1980 Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects,[30] and, finally, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction[31] adopted under the Organisation for the Prohibition of Chemical Weapons.

In this paper the authors will focus on the efforts made within the General Assembly to enhance the protection of the environment. The analysis will start with a review of the 30 years preceding the new GA Resolution of 2022.

2. THE GENERAL ASSEMBLY RESOLUTION ˝PROTECTION OF THE ENVIRONMENT IN TIMES OF ARMED CONFLICT˝ OF 1992

There is certainly a casual nexus between the adoption of relevant international instruments regulating the protection of the environment on one hand and damage to the environment preceding this law regulation on the other. Such was the case with the adoption without a vote of the General Assembly Resolution ˝Protection of the Environment in Times of Armed Conflict˝ of 1992.[32]

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[28] Adopted on 10 December 1976, entered into force on 5 October 1978 (hereinafter: ENMOD Convention), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-1&chapter=26&clang=_en (accessed 24 August 2023).

[29] Adopted on 17 July 1998, entered into force on 1 July 2002, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en (accessed 24 August 2023).

[30] Adopted on 10 October 1980, entered into force on 2 December 1983, https://treaties.unoda.org/t/ccwc_p3 (accessed 24 August 2023).

[31] Opened for signature on 13 January 1993, entered into force on 29 April 1997, https://www.opcw.org/sites/default/files/documents/CWC/CWC_en.pdf (accessed 24 August 2023).

[32] A/RES/47/37 adopted at the forty-seventh session, on 25 November 1992 (hereinafter: GA Resolution of 1992).

In particular, during Iraq´s retreat from occupied Kuwait in the Gulf War (1990-1991), Iraq opened the valves of oil terminals causing a huge oil spill into the Persian Gulf and set on fire Kuwaiti oil wells causing immense atmospheric pollution. Consequently, the General Assembly in its Resolution of 1992 ˝expressed its deep concern about environmental damage… during recent conflicts˝. The General Assembly further stressed that ˝destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law˝. The General Assembly in this Resolution of rather short text recognised the importance of the existing international law applicable to the protection of the environment in times of armed conflicts. At the same time, it welcomed the activities on further development in this field. Furthermore, the General Assembly urged States to ensure compliance with the existing provisions of international law applicable to the protection of the environment in times of armed conflicts, especially by incorporating these provisions into their military manuals.[33] The text of the GA Resolution of 1992 is not revolutionary in the sense that the General Assembly offered a set of specific instructions or rules of behaviour of States in regard to the protection of the environment. It rather noted the state of the protection of the environment at the time of its adoption and put emphasis on only one important provision – the aforementioned prohibition of destruction of the environment which is not justified by military necessity and which is carried out wantonly.

The International Court of Justice in its Advisory Opinion of 1996 cited this provision on the prohibition of destruction of the environment.[34] Although the General Assembly Resolutions are not binding as such, the International Court of Justice emphasised that they can ˝provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*˝.[35] Indeed, it is considered that the aforementioned provision of the GA Resolution of 1992 reflects the customary international law. It was reiterated in other documents as well, such as the San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994.[36]

The General Assembly Resolutions are not a source of international law. They rather represent a recommendation. However, it would be wrong to deny

[33] *Infra* 4.4.

[34] *Op. cit*. in fn. 9, p. 242, para. 32.

[35] *Ibid*., pp. 254-255, para. 70.

[36] Adopted on 12 June 1994, https://ihl-databases.icrc.org/en/ihl-treaties/san-remo-manual-1994 (accessed 24 August 2023), Art. 44.

any legal effect to them.[37] When referring to the aforementioned rule of the GA Resolution of 1992, it should be noticed that its text is short and clear, which is useful for customary process. Such definitions summarising a legal rule should have priority over extensive and enumerative definitions.[38]

The GA Resolution of 1992 was innovative in the field of protection of the environment in relation to armed conflicts. Previous attempts in the regulation of the subject matter, referring here primarily to Additional Protocol I, have not achieved such acceptance for them to be considered to form part of customary international law. Although Additional Protocol I has been ratified by 174 States,[39] it is worth noting that this high number of ratifications does not include the great military powers, such as the United States of America and Israel. Likewise, the United Kingdom and France have made reservations on the provisions of the Additional Protocol I regulating the subject matter.[40] Therefore, the customary law status of its relevant provisions is disputed.[41] Consequently, the protection of the environment in relation to armed conflicts is thus weakened considering that customary international law can contribute more effectively to certain aspects of environmental protection than treaty law. The latter is a static source of international law which cannot easily be modified in accordance with changing circumstances. On the other hand, customary international law is a more appropriate source of international law to achieve the goal of the effective protection of the environment in relation to armed conflicts. This is because problems related to environmental protection require flexible solutions which

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37 Degan, V. Đ., *Sources of International Law*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1997, p. 194.

38 *Ibid*., p. 199.

39 https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties?activeTab=undefined (accessed 24 August 2023).

40 United Kingdom of Great Britain and Northern Ireland, Declarations and Reservations Made upon Ratification of Additional Protocol I, 28 January 1998, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2 (accessed 26 April 2023); France, Declarations and Reservations Made upon Ratification of Additional Protocol I, 11 April 2001, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=D8041036B40EBC44C1256A34004897B2 (accessed 26 April 2023).

41 However, the ICRC in its Study on Customary International Humanitarian Law considers the relevant rule on prohibition of the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment as a norm of customary international law. See Rule 45: Causing Serious Damage to the Natural Environment, https://ihl-databases.icrc.org/en/customary-ihl (accessed 26 April 2023).

take into account new scientific knowledge, new technologies, political priorities and different circumstances in States.[42]

Since the time of the adoption of the GA Resolution of 1992, it has been considered that existing international law regulating the protection of the environment in relation to armed conflicts should be further strengthened, especially by effective mechanisms for the prevention of environmental disputes.[43] In the 30 years between the two GA Resolutions at hand (the GA Resolution of 1992 and of 2022), the General Assembly has been active on the subject matter. It has adopted many resolutions aimed not only at the protection of the environment in general,[44] but at the protection of the environment in relation to armed conflicts as well. It has dealt continuously, albeit separately, with environmental issues arising before, during or after an armed conflict, such as the issue of the prevention of the exploitation of the environment in war[45] or the issue of remnants of war which can have a potential impact on human health.[46]

However, the protection of the environment in relation to armed conflicts requires further regulation which covers a broader field of issues, such as peacekeeping operations, human rights law, environmental peacebuilding, etc.[47] There were other initiatives under international law preceding the ILC´s work on the Draft principles which focused on the same subject matter.[48] However, the ILC

42 *Op. cit.* in fn. 4, p. 17.

43 Adede, A. O., Protection of the Environment in Times of Armed Conflict: Reflections on the Existing and Future Treaty Law, *Annual Survey of International & Comparative Law,* vol. 1 (1994), no. 1, pp. 172-174.

44 See A List of the General Assembly´s Resolutions and Decisions on Environmental Protection, https://digitallibrary.un.org/search?ln=en&as=0&p=subjectheading:[ENVIRONMENTAL+PROTECTION] (accessed 26 April 2023).

45 A/RES/56/4 adopted at the fifty-sixth session on 5 November 2001, Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict.

46 A/RES/65/149 adopted on 20 December 2010, A/RES/68/208 adopted on 20 December 2013, A/RES/71/220 adopted on 21 December 2016, A/RES/74/213 adopted on 19 December 2019, Cooperative Measures to Assess and Increase Awareness of Environmental Effects Related to Waste Originating from Chemical Munitions Dumped at Sea.

47 Sjöstedt, B.; Dienelt, A., Enhancing the Protection of the Environment in Relation to Armed Conflicts – the Draft Principles of the International Law Commission and Beyond, *Goettingen Journal of International Law,* vol. 10 (2020), no. 1, p. 16.

48 ICRC, Guidelines for Military Manuals and Instruction on the Protection of the Environmental in Times of Armed Conflict, Annex to the Report of the Secretary-General, United Nations Decade of International Law, A/49/323, 19 August 1994 (hereinafter: ICRC Guidelines of 1994). See the updated version of the Guidelines in fn. 23.

seemed to be the most suitable forum to deal with the topic in accordance with the UNEP recommendation.[49] Therefore, the ILC took up the subject matter in 2011[50] to provide a basis for the adoption of the new General Assembly Resolution.

3. THE GENERAL ASSEMBLY RESOLUTION ˝PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS˝ OF 2022

3.1. The ILC´s Draft Principles on ˝Protection of the Environment in Relation to Armed Conflicts˝ of 2022

At its sixty-fifth session, in 2013, the ILC decided to include the topic ˝Protection of the Environment in Relation to Armed Conflicts˝ in its programme of work and appointed Marie Jacobsson as Special Rapporteur for the topic. Due to the end of Jacobsson´s mandate in the ILC, in 2017 Marja Lehto was appointed as the new Special Rapporteur.

One of the first challenges the ILC faced was how to structure the work. It decided to structure the topic into three temporal phases, determining the rules applicable before, during and after an armed conflict. In this way, the ILC was able to deal with the subject matter from a more general international legal perspective, instead of being restrained by the issue of fragmentation of international law. Therefore, the scope *ratione temporis* is set under Principle 1 which states that ˝…draft principles apply to the protection of the environment before, during or after an armed conflict˝. It uses the disjunctive ˝or˝ to underline that not all draft principles would be applicable during all phases. However, there is also a certain degree of overlap between the three phases. In particular, several draft principles are relevant to more than one phase. These are the principles of general application, such as Principle 13.[51]

In regard to the scope *ratione materiae,* the aforementioned Principle 1 refers to the term ˝protection of the environment˝ in relation to armed conflict. It makes no distinction between international and non-international armed conflicts. Hence, Principle 1 sets out both a temporal and a substantive framework without limitations.

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[49] *Supra* text referred to in fn. 3.

[50] *Op. cit.* in fn. 8, Annex E, Protection of the Environment in Relation to Armed Conflicts, pp. 351-368.

[51] *Infra* 3.2.

Finally, the scope *ratione personae* is set under several principles, which are addressed not only to States, but also to international organisations, or to parties to an armed conflict and other relevant actors.

The ILC took groundbreaking steps when it included some controversial topics in its Draft principles, such as prohibition of reprisals[52] or indigenous peoples´ rights.[53] On the other hand, it was reluctant to include some other issues in its work, such as weapons.[54] Due to technological development, the environment is at great risk of damage which could be caused both by weapons of mass destruction and by conventional means and methods of warfare. However, the issue of nuclear weapons was not addressed in the Draft principles. Nevertheless, the great nuclear powers were determined to challenge the legitimacy of those draft principles aimed indirectly at the potential prohibition of the use of nuclear weapons. The ILC was aware of these controversial issues and, therefore, it carefully worked on the preparation of the Draft principles with the aim of moving on and not being stopped during its work.

Despite its ambition and hard work, it was clear from the beginning that the ILC would not be able to deal with such a comprehensive subject matter appropriately. This is due to its limited mandate restricted to making recommendations to the General Assembly for the purpose of promoting the progressive development of international law and its codification.[55]

At its seventy-first session, in 2019, the ILC adopted, on the first reading, the entire set of draft principles on protection of the environment in relation to armed conflicts, which comprised 28 draft principles, together with commentaries thereto.[56] In accordance with Arts. 16 to 21 of its Statute, the ILC decided to transmit the draft principles to governments, international organisations and others for comments and observations.

At its seventy-third session, in 2022, after an analysis of the comments and observations received from governments, international organisations and

52 Principle 15.

53 Principle 5.

54 ILC, Summary Record of the 3188th Meeting, A/CN.4/3188, 30 July 2013, p. 122, para. 37.

55 Arts. 1 and 23 of the Statute of the ILC, adopted by the General Assembly in Resolution 174 (II) of 21 November 1947, as amended by Resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981, https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf (accessed 26 April 2023).

56 ILC, Report on the Work of the Seventy-first Session (2019), A/74/10.

others[57] and of the third report of the Special Rapporteur,[58] the ILC adopted the Draft principles containing 27 principles with commentaries and a preamble. It decided to recommend that the General Assembly ˝take note of˝ them, to ˝annex˝ them ˝to the resolution˝ and to ˝encourage their widest possible dissemination˝. Additionally, the ILC decided to recommend that the General Assembly ˝commend the Draft principles˝, together with the commentaries thereto, ˝to the attention˝ of States and international organisations and all who may be called upon to deal with the subject.[59]

These are intermediary types of recommendations that have emerged in practice. The focus of such a recommendation is not on the conclusion of a convention. Rather, this approach is more reasonable since it takes into account that States would not be keen to adopt a general convention on the subject matter. One of the controversial issues dealt with it in the Draft principles which favours the aforementioned view can be found in Principle 13 of the GA Resolution of 2022 which will be further analysed.

3.2. Principle 13 of the GA Resolution of 2022[60]

Principle 13 consists of three paragraphs which provide protection of the environment during armed conflict. It emphasises the obligation to respect and protect the environment, the duty of care and the prohibition of the use of certain methods and means of warfare and, finally, the prohibition of attacks against any part of the environment, unless it has become a military objective. Similar wording which was used in Principle 13, such as ˝respect for the environment˝

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57 ILC, Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organisations and Others, A/CN.4/749 (2022).

58 ILC, Third Report on Protection of the Environment in Relation to Armed Conflicts, by Marja Lehto, Special Rapporteur, A/CN.4/750 + Corr.1, + Add. 1 (2022).

59 *Op. cit.* in fn. 2, p. 91, C. Recommendation of the Commission.

60 Principle 13, General protection of the environment during armed conflict:
˝1. The environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict.
2. Subject to applicable international law:
(a) care shall be taken to protect the environment against widespread, long-term and severe damage;
(b) the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited.
3. No part of the environment may be attacked, unless it has become a military objective.˝

had already been used when referring to the subject matter, for instance in the previously mentioned ICJ Advisory Opinion of 1996. The Court stated that ˝respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality˝.[61] Similar wording of Principle 13 can be found elsewhere, especially in Additional Protocol I. In its Art. 35, para. 3 and Art. 55, para. 1, Additional Protocol I protects the environment against intentional and non-intentional damage, provided that the consequences for the environment are foreseeable.

Neither Art. 35 nor 55 of Additional Protocol I or Principle 13 prohibit a particular weapon when providing protection to the environment. The words ˝methods and means of warfare˝ relate both to weapons and to the way in which they are used in the widest sense. However, the accompanying wording of the aforementioned articles of Additional Protocol I and Principle 13 designate the prohibition of use of such methods and means of warfare ˝…which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment˝. Considering the restrictiveness of the set threshold, it is to be expected that such damage to the environment would be the result only of the use of weapons of mass destruction in the armed conflict.[62] Therefore, the great nuclear powers, such as the United States of America, the United Kingdom, France and Israel, are interested in preventing the rule on the prohibition of methods and means of warfare which are intended or may be expected to cause such damage to the environment from acquiring customary law status. The USA and Israel are not States parties to Additional Protocol I, while the UK and France are, but with reservations to its articles relevant for the subject matter.[63] Moreover, among States which deny the customary law status of the aforementioned rule is Canada which actually is a State party to Additional Protocol I, without reservations to its articles regulating the subject matter.

3.3. Problems Related to the High Threshold Set under Principle 13 of the GA Resolution of 2022

When compared to the regulation of the protection of the environment in the GA Resolution of 1992, the situation with the GA Resolution of 2022 is more complex.

[61] *Op. cit*. in fn. 9, p. 242, para. 30.

[62] Bothe, M.; Partsch, K. J.; Solf, W. A., *New Rules for Victims of Armed Conflicts,* Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, p. 348.

[63] *Supra* in fn. 40.

Under the latter, not every case of destruction or damage is prohibited. This is due to the high threshold set under its Principle 13. In order to analyse this Principle, the authors will focus on two of the main problems related to the threshold.

The first problem is the lack of definition of the components of the threshold, i.e., what is meant under the terms ″widespread″, ″long-term″ and ″severe″. Regarding the three elements of the threshold – scope of area affected, duration and degree of damage – it can be noticed that only the element of duration (″long-term″) was explained during the preparatory work on Additional Protocol I.[64] It is considered to be measured in decades. The remaining two elements (″widespread″ and ″severe″) have, thus, been left without a definition by the drafters of Additional Protocol I.

However, regardless of the definition provided by the drafters, one must take into account that current scientific knowledge of the environmental processes and of the effects of damage has increased since the time of the drafting in the 1970s. There is now more scientific data on the interrelationship between the different parts of the environment and of the interdependent nature of environmental processes.[65] Furthermore, the cumulative effects of the harm should be considered along with individual effects in order to determine whether the damage meets the threshold.[66] Finally, the impact of climate change must also be taken into account.[67]

The second problem is the fact that these three elements, which are not even properly defined, need to be met cumulatively. This makes the threshold too high and too restrictive and thus practically leaves the environment unprotected from damage caused by conventional weapons. In this way, environmental protection is weakened. In particular, it often happens that environmental damage meets one or two of the conditions of the threshold, but not the third. For example, in the case of destruction of all members of a species which occupies only a limited region, the damage would be long-term and severe (since it is irreversible) but perhaps it would not meet the ″widespread″ criterion considering that the range of the species is spatially restricted.[68]

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64 *Op. cit*. in fn. 62, p. 346.

65 *Op. cit*. in fn. 23, p. 32, para. 54.

66 *Ibid*.

67 Similar standing can be found in another General Assembly Resolution A/RES/70/1, Transforming Our World: the 2030 Agenda for Sustainable Development, adopted at its seventieth session, on 25 September 2015, which regulates the issue of sustainable development in general.

68 Schmitt, M. N., War and the Environment: Fault Lines in the Prescriptive Landscape, *Archiv des Völkerrechts*, vol. 37 (1999), no. 1, pp. 43-44.

The rule cited in Principle 13 is a clear example of indeterminacy in the law of armed conflict.[69] The prohibition of widespread, long-term, and severe damage to the environment is incomplete since it applies to damage that is unlikely to occur in an armed conflict and it is silent on the many other environmental devastations.[70]

4. POSSIBLE SOLUTIONS OF THE PROBLEMS RELATED TO THE THRESHOLD SET UNDER PRINCIPLE 13 OF THE GA RESOLUTION OF 2022

4.1. A Definition of the Three Elements of the Threshold under the ENMOD Convention

One of the possible solutions to the problem of a high threshold could be to lower the threshold by using the disjunctive (which means the word ˝or˝ instead of ˝and˝. Such was the case with the ENMOD Convention which was adopted a couple of months before Additional Protocol I. Under the ENMOD Convention, States parties undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State party.[71] The ENMOD Convention enumerates the three elements of damage by using terms which are almost identical to those in Additional Protocol I (a slight difference can be noticed in regard to the term ˝long-lasting˝ used in the ENMOD Convention), with the aforementioned difference in using the disjunctive. In accordance with the Understanding attached to the ENMOD Convention, the term ˝widespread˝ relates to ˝an area on the scale of several hundred square kilometres˝, ˝long-lasting˝ relates to ˝a period of months, or approximately a season˝ and, finally, ˝severe˝ is defined as ˝serious or significant disruption or harm to human life, natural and economic resources or other assets˝. These definitions contribute to a clear interpretation of the related treaty.

However, it is stated explicitly in the Understanding that its definitions are intended exclusively for the ENMOD Convention. Therefore, the definitions of the three elements contained in the Understanding cannot be used for an interpretation of the same or similar terms in Additional Protocol I. Terms have

[69] On the issues of indeterminacy in the law of armed conflict, see Fleck, D., The Martens Clause and Environmental Protection in Relation to Armed Conflicts, *Goettingen Journal of International Law*, vol. 10 (2020), no. 1, pp. 252-253.

[70] *Ibid*., p. 252.

[71] *Op. cit.* in fn. 28, Art. 1.

different meanings in treaties due to their different scopes and objectives related to environmental protection. For instance, in regard to weaponry, whereas the ENMOD Convention protects the environment only against environmental modification techniques, Additional Protocol I is of wider scope given that it protects the environment against all types of weapons.[72] Additionally, when the existing definitions of the terms used in the two treaties are compared, there is a difference in the required duration of damage. Unlike the ENMOD Convention under which damage is counted in months, Additional Protocol I demands that the effects of damage be counted in decades.

Therefore, the question of the lack of definition of the threshold remains open. Interpretation of these terms primarily affects the decision makers who balance the principles of distinction, proportionality, precautions, and prohibition of the destruction of enemy property on the one hand, and military advantage on the other. In order to provide guidelines for these decision makers, other solutions to the problems of the threshold set under Principle 13 should be considered as well. Some of the possible solutions might be found in the GA Resolution of 2022 itself.

4.2. The Martens Clause

The environmental Martens Clause is contained in Principle 12 of the GA Resolution of 2022. It is based on the original Martens Clause which appeared first in the preamble to the Hague Convention (II) with Respect to the Laws and Customs of War on Land of 1899 and which was restated in several later treaties.[73] The General Assembly has already invoked the Martens Clause in regard to

[72] *Supra* 3.2.

[73] Art. 63 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted on 12 August 1949, entered into force on 21 October 1950, https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949?activeTab=1949GCs-APs-and-commentaries (accessed 24 August 2023); Art. 62 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted on 12 August 1949, entered into force on 21 October 1950, https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949?activeTab=1949GCs-APs-and-commentaries (accessed 24 August 2023); Art. 142 of the Convention (III) Relative to the Treatment of Prisoners of War, adopted on 12 August 1949, entered into force on 21 October 1950, https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949?activeTab=1949GCs-APs-and-commentaries (accessed 24 August 2023); Art. 158 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949, entered into force on 21 October 1950, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=default (accessed 24 August 2023); Art. 1, para. 2 of the Additional Protocol I.

the subsidiary protection of the environment in relation to armed conflicts. In particular, in its Resolution of 1994[74] it invited all States to disseminate the ICRC Guidelines of 1994 which contain the environmental Martens Clause.[75] The ICRC Guidelines of 2020 also invoke it.[76] In particular, the ICRC emphasised the importance of the Martens Clause since it underlines the dynamic factor of the law of armed conflict.[77]

The objects of the protection provided by the original Martens Clause are civilians and combatants, whereas Principle 12 aims at the protection of the environment in relation to armed conflicts. The role of the Martens Clause is to emphasise that these objects, in cases not covered by the treaty rule, are not deprived of protection. Instead, their protection is granted under the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. This means that the parties to the conflict are not *ipso facto* entitled to use certain means or methods of warfare based on the fact that these acts of war are not expressly prohibited by the treaty or customary rule of the law of armed conflict. In particular, reference is made to the principles of humanity and to the dictates of public conscience.

In regard to ˝the principles of humanity˝, one can wonder whether there is a link between the protection of the environment and the principles of humanity. The General Assembly in its recent Resolution on the human right to a clean, healthy and sustainable environment[78] recognised that the protection of the environment, including ecosystems, contributes to and promotes human well-being and the full enjoyment of all human rights, for present and future generations. It can be considered that humanitarian and environmental concerns are interrelated. Without discussing here the difference between the anthropocentric and biocentric approach to the protection of the environment, we focus only on the possible function of such principles in serving both human beings and the environment in relation to armed conflict.

Furthermore, when analysing the meaning of ˝dictates of public conscience˝, there is a tendency to consider the notion of intergenerational equity. The understanding of the environmental effects of armed conflict has developed since the

74 A/RES/49/50, adopted at the forty-ninth session, on 9 December 1994.

75 *Op. cit.* in fn. 48, p. 50, Guideline 7.

76 *Op. cit.* in fn. 23, Rule 16.

77 *Ibid.*, p. 79, para. 200.

78 A/RES/76/300, The Human Right to a Clean, Healthy and Sustainable Environment, adopted at the seventy-sixth session, on 28 July 2022.

time of the codification of the law of armed conflict. A modern understanding of the dictates of public conscience emphasises the effective protection of the environment in light of the responsibility towards future generations.[79]

Although the ILC in its commentary to Principle 12 explicitly states that the inclusion of that principle does not mean, or imply, that the ILC is taking a position on the various views regarding the legal consequences of the Martens Clause,[80] several States were of the opposite view. In their comments on Draft principle 12, they referred to the controversial issue of the ILC´s interpretation of the Martens Clause as an autonomous source of law. Invoking this clause, which would be able to establish prohibitions, in particular in relation to certain categories of weapons, even in the absence of applicable treaty or customary law rules, is, according to the comments of these States,[81] questionable and leads to uncertainty as to the exact scope of the obligations of the parties to the conflict.

Inclusion of the environmental Martens Clause in the GA Resolution of 2022 has required more reflection and explanation on the part of the ILC and GA. The term ˝principles of humanity˝ requires further clarification so as not to leave room for misleading interpretations when compared to the term ˝principle of humanity˝, as one of the two main principles of the law of armed conflict. In addition, the historical context of the Martens Clause and the *lex specialis* nature of the law of armed conflict have been disregarded. Accordingly, it seems that the environmental Martens Clause is not an appropriate solution for filling the legal gaps in the protection of the environment in relation to armed conflicts. Therefore, other possible solutions should also be examined.

4.3. ˝The Fifth Geneva Convention˝

In order to further protect the environment in relation to armed conflicts, it was even considered to adopt a completely new specialised convention regulating the subject matter. Such proposals have been made either by international environmental law experts[82] or by scientists from various biology institutes, and

[79] *Op. cit*. in fn. 23, p. 266.

[80] *Op. cit.* in fn. 2, p. 97, para 4.

[81] *Op. cit.* in fn. 57. See the comments and observations of France and Israel, pp. 64-67.

[82] Plant, G. (ed.), *Environmental Protection and the Law of War: A Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict?*, Belhaven Press, London and New York, 1992.

the like.[83] Many of them have expressed concern about armed conflicts which continue to destroy megafauna and push species to extinction.[84] Their proposals were directed at adopting the so-called Fifth Geneva Convention to uphold environmental protection during armed conflicts. Such a multilateral specialised treaty would incorporate explicit safeguards for biodiversity and legal instruments for site-based protection of crucial natural resources.

Opponents of adopting a Fifth Geneva Convention argue, among other reasons, that advances in the protection of the environment are only possible when based upon reliable and complete scientific understanding of the relevant issues.[85] Hence, if the initiative of adopting that Convention has already come from scientists who have acquired wide-ranging scientific understanding of the relevant issues, then this initiative should no longer face resistance. However, the legal experts are still against the adoption and base their arguments on several other grounds. Beside the problem related to the definition of damage to the environment, they argue that there is still no consensus on several other important legal issues. For instance, they raise the problem of distinguishing between intentional, collateral and completely unexpected damage to the environment or of whether certain kinds of destruction might be permissible in certain circumstances.[86]

Although the idea of adopting a systematic and innovative convention is worth considering, the peculiarity of treaty law should be kept in mind. Acceptance of new obligations in such a field of law is not an easy task, especially not in the form of *lex scripta.* Therefore, governments should be encouraged to deal with the subject matter in a more convenient way.

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83 List of Signatories to Stop Military Conflicts from Trashing Environment, https://media.nature.com/original/magazine-assets/d41586-019-02248-6/16964846 (accessed 26 April 2023).

84 Brito, J. C. *et al.,* Armed Conflicts and Wildlife Decline: Challenges and Recommendations for Effective Conservation Policy in the Sahara-Sahel, *Conservation Letters,* vol. 11 (2018), no. 5.

85 Richards, P. J.; Schmitt, M. N., Mars Meets Mother Nature: Protecting the Environment during Armed Conflict, *Stetson Law Review*, vol. 28 (1999), no. 4, p. 1090.

86 Roberts, A., Chapter XIV. Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War, in: Grunawalt, R. J. *et al.* (eds.), *Protection of the Environment during Armed Conflict*, International Law Studies, vol. 69, Naval War College, Newport, Rhode Island, 1996, p. 268, cited in *ibid*., p. 1089.

4.4. Military Manuals

A more realistic solution which should be considered is the inclusion of definitions of the three elements of the threshold in military manuals. This would be of great importance for military officials. Moreover, this could contribute to the generation of customary international law in the case of emerging State practice accompanied by *opinio iuris*.

New scientific knowledge on environmental processes and the rapid development of technologies require strong and rapid answers for the problems related to the protection of the environment in armed conflicts. In this regard, military manuals could prove more effective than the treaty-making process. In particular, the abundance of international instruments regulating the protection of the environment, as in the case of conventions adopted under international environmental law, causes either overlaps and incoherence or legal gaps.[87] Admittedly, military manuals also risk being multiplied, thus offering different interpretations of what the underlying rule is. Consequently, there is the potential risk that the most convenient manual could be invoked. Still, military manuals represent a form in which legal scholars can contribute to the progressive development of law. This is particularly true for the law of armed conflict where State practice of a few dominant States in the field is of overriding importance.[88] Hence, it is worth considering military manuals as an appropriate remedy for dealing with environmental challenges in relation to armed conflicts. They can focus on filling the gaps in the existing law and propose further development of the law. Military manuals have a strong influence on the practice of military State actors. Definitions included in military manuals could influence State practice by citation and reference to them. Therefore, military manuals could play a significant role in the process of the regulation of the protection of the environment in relation to armed conflicts.

Meanwhile, the United Nations should act as a forum for defining the three elements of damage. It should encourage States to engage in filling the gaps in the existing law. UNEP and other relevant parts of the UN system should receive information from States on their national legislation and recent case law relevant to the subject matter. Such cooperation, which takes into account current views of the States, could enhance the protection of the environment.

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87 Degan, V. Đ., *Međunarodno pravo*, Školska knjiga, Zagreb, 2011, p. 396.

88 Jennings, R.; Watts, A., *Oppenheim´s International Law*, 9th Edition, Volume I, Longman, London, 1992, p. 29.

5. CONCLUSION

The consequences of armed conflicts on the environment have increased awareness of the importance of the appropriate regulation of its protection. When regulating a subject matter, various fields of international law must be taken into account. Environmental challenges are thus undoubtedly related to debates on the fragmentation of international law.

Under the law of armed conflict, many efforts have been made to protect the environment directly or indirectly. The General Assembly Resolution of 2022 took a step forward in affirming the importance of its protection as well. Its Principle 13 follows the wording of Additional Protocol I of 1977 where it states that it is prohibited to use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the environment. As a result of such a high threshold, this new General Assembly Resolution of 2022, when compared to the General Assembly Resolution of 1992, does not prohibit every case of destruction or damage to the environment. It is thus important to define the three elements of damage in order to clearly interpret the threshold.

In this regard, more effort should be made, especially under the United Nations. In particular, it needs to be kept in mind that new scientific knowledge affects the definition of the threshold. Additionally, the effects of environmental damage are now being compounded by the climate crisis. Therefore, consideration might be given to include a definition of the three elements of the threshold in military manuals. This would be of great importance for those who plan or decide on an attack. Moreover, this could contribute to the generation of customary international law in the case of emerging State practice accompanied by *opinio iuris*. Customary international law, given its flexibility, is a more appropriate source of international law for achieving the goal of the effective protection of the environment in relation to armed conflicts when compared to treaty law. Therefore, attempts to adopt a specialised convention should be rejected in favour of generating customary international law rules on the protection of the environment in relation to armed conflicts. States should be encouraged to adopt and enforce such solutions which are more practical and which could thus be more easily accepted in State practice.

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Sažetak:

REZOLUCIJA OPĆE SKUPŠTINE »ZAŠTITA OKOLIŠA U VEZI S ORUŽANIM SUKOBIMA« IZ 2022. GODINE – TRIDESET GODINA POSLIJE

Nakon usvajanja Rezolucije Opće skupštine »Zaštita okoliša u vrijeme oružanog sukoba« 1992. godine, ovaj organ Ujedinjenih naroda usvojio je i Rezoluciju »Zaštita okoliša u vezi s oružanim sukobima« 2022. godine. Nova Rezolucija temelji se na radu Komisije za međunarodno pravo koja je iste godine usvojila »Nacrt načela o zaštiti okoliša u vezi s oružanim sukobima, s komentarima«. Za uređenje ove materije, posebno su važni komentari i opažanja na Nacrt načela koji su zaprimljeni od vlada najvećih vojnih sila. U ovome se radu ističe Načelo 13 Rezolucije koje, podložno primjenjivom međunarodnom pravu, zabranjuje prostorno znatnu, trajniju i veliku štetu okolišu. Autorice analiziraju je li predmetni standard štete postavljen suviše visoko i restriktivno, onemogućivši time učinkovitu zaštitu okoliša u skladu s ciljevima Rezolucije. Na temelju rezultata takve analize, autorice nude moguća rješenja iznesenih problema.

Ključne riječi: *pravo okoliša; pravo oružanih sukoba; Komisija za međunarodno pravo; Opća skupština; Dopunski protokol I.*

GLOBALISATION WITH A HUMAN FACE AND THE ROLE OF THE UNITED NATIONS

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A large portion of modern-day human rights challenges stems from non-typical situations such as economic and financial crises, or environmental degradation. The rise of globalisation that goes hand in hand with the increasing impacts of business operations on people´s lives and their basic needs, from clean water to communication, certainly adds to this list. The regulatory model offered by the ˝Washington Consensus˝ has further fuelled this phenomenon. The utility provider who violates the right to water, the mining or extraction operations that endanger the right to health, or the digital platform that infringes on the freedom of speech and information all have detrimental impacts on the enjoyment of human rights. The paper explores this human rights challenge along with the historical path of international legal regulation, as well as the current regulatory attempts and treaty-making process to clarify State duty to protect human rights and responsibility in the context of business and human rights.

Keywords: *international human rights; economic globalisation; Washington Consensus; second human rights revolution; UNGPs; treaty on business and human rights.*

1. INTRODUCTION: THE CHALLENGE

One of the areas of public international law that attracted the attention of the late Professor Emeritus Vladimir-Đuro Degan was international human rights.

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Therefore, when I was kindly invited to an international conference that aimed to commemorate Professor Degan, I selected a human rights question that reveals a relevant and timely challenge.

This year marks the 75th anniversary of the Universal Declaration of Human Rights that not only opened a new chapter in the history and development of international law but has also had a significant effect on the general and dominant way of thinking and discourse.[1] Human rights and human rights adjudication have come a long way during these 75 years and achieved many results, but have also been subject to criticism. Furthermore, since the world has changed since the end of the Second World War, human rights adjudication has faced novel and increasingly complex challenges, among which is the rapidly increasing portion of human rights challenges that stem from non-typical situations. The impact on human rights of economic or financial crises, environmental degradation, globalisation, and digitisation has been growing over the past half century and raises increasingly complex issues. Examples, like the one below, are proliferating.

At the beginning of the 2000s, the city government of the largest town and former capital of Tanzania, Dar es Salaam, decided to privatise the operation of its water and sewage system. The main rationale of this privatisation was to remedy the infrastructural and efficiency problems and, at the same time, to improve water quality and access to water. Private sector participation was a condition for the structural aid and credit the World Bank provided.[2] To this end, the city water consortium was comprised of the British company, Biwater, Gauff Engineering from Germany, and a local undertaking called Superdoll. However, the project did not go as originally planned as the price of water soared, and the expected investments in the pipelines and the quality improvements were not realised. Consequently, as a result of the privatisation, access to water even deteriorated and the government decided to take back control of

[1] In her famous book, Mary Ann Glendon refers to the Universal Declaration of Human Rights as a document that ″made the World new″. See, Glendon, M. A., *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House Trade Paperbacks, New York, 2002. At the same time, Robert P. George points out that the dominant discourse today is that of human rights which has become the *″lingua franca″* of almost every discussion of justice, of the boundaries of individual liberties and the contours of the common good, and of the responsibilities one has to others in society. See Sándor, L., *Constitutional Journey in the United States*, MCC Press, Budapest, 2021, pp. 114-116.

[2] See World Bank Document, Report and Recommendations on the Programmatic Structural Adjustment Credit for Tanzania, P-7376-TA, https://documents1.worldbank.org/curated/en/240571468339588291/pdf/multi-page.pdf (accessed 1 July 2023).

the operation of the services. The case was finally brought before an international investment tribunal.[3]

The case does not stand alone as there are similar and increasing situations around the world, from the infamous Bolivian water war[4] to the Cajamarca gold mine,[5] and so forth. The growing scope and strength of transnational business operations since the 1970s pose two fundamental questions. On the one hand, the question can be raised as to what legal or non-legal responsibilities corporations have to host countries and local communities under international human rights law. The other relevant question is what legal duties States have to protect their communities against harmful transnational business operations that have growing impacts on many aspects of people's lives as well as on the environment.

These questions have become increasingly pertinent with the collapse of the centrally planned economic models along with the Soviet Union. The transition of the former socialist economies expanded the geographical scope of economic globalisation and, at the same time, set the stage for the rapid expansion of transnational business operations. It was also fuelled by the then prevailing economic theory, the "Washington Consensus", which encouraged States to liberalise their markets, to privatise services, including public services, and to introduce extensive deregulation. Using an apt description, the late Lord Jonathan Sacks expressed a common experience of the times when he pointed out that "[w]e have now no idea where the world is going, except that it´s going there very fast".[6] This accurately reflects the widening gap between the scope and impact of economic forces along with transnational business activities and the capacity of societies and governments to manage these forces and their adverse impacts.[7]

International economic regulations, including trade and investment law especially, reflect the economic theory of the "Washington Consensus" that aims to restrict the power of the State to control and regulate private commercial property. Based on this theoretical framework, the agreements founding the legal

[3] ICSID, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Case No. ARB/05/22, https://www.italaw.com/cases/157 (accessed 1 July 2023).

[4] See, for example, https://www.ucpress.edu/blog/58831/how-bolivians-fought-for-and-won-water-access-for-all/ (accessed 1 July 2023).

[5] Ruggie, J. G., *Just Business. Multinational Corporations and Human Rights*, W.W. Norton & Company, New York – London, 2013, pp. 26-42.

[6] Available, for example, at https://quotefancy.com/quote/1396781/Jonathan-Sacks-We-have-no-idea-where-the-world-is-going-except-that-it-s-going-there-very (accessed 20 July 2023).

[7] Ruggie, J. G., *Just Business*…, *op. cit.*, pp. 33-36, 81-82.

order of the World Trade Organization (hereinafter: WTO) regime and its dispute settlement mechanisms are committed to promoting liberalisation and free trade with no or little respect for the societal or human rights requirements.[8] The then proliferating bilateral investment treaties and their institutional framework of dispute settlements are designed to provide an exceptionally powerful and extensive adjudicative review of sovereign conduct of the host countries to protect the interests of businesses that are considered to be foreign investors. At the same time, however, neither these investment treaties nor their arbitration mechanisms can ensure adequate protection of societal and human rights.[9] Subsequently, international economic treaties and law can create business and market opportunities for States but at the same time they constrain the States´ economic regulatory discretion by controlling their sovereign right to impose restrictions on trade and investment at their border and within their economy and require them to adhere to certain standards of transnational economic regulation.[10]

In light of this economic and regulatory theory that has become dominant, Bruno Simma observed that public international law has not developed in a symmetrical way with regard to transitional economic activities and business operations.[11] While, as a precondition and also a consequence of economic globalisation, corporations with transnational business operations have been provided with the most powerful and uniquely enforceable mechanism in public international law, their responsibilities and duties have long largely been ignored or neglected in the international legal arena. Recognising this has raised awareness of the need for reforms and new proposals in this area of the law.

[8] See, for example, Joseph, S., Human Rights and International Economic Law, in: Bungenberg, M.; Herrmann, C.; Krajewski, M.; Terhechte, J. P. (eds.), *European Yearbook of International Economic Law 2016*, Springer, Cham, 2016, pp. 461-476.

[9] Krajewski, M., Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty Making Practice, School of law, University of Erlangen-Nurnberg Germany, 15 April 2018, https://ssrn.com/abstract=3133529 (accessed 1 July 2023).

[10] Among these widely recognised substantive standards are national treatment, most-favoured-nation treatment, fair and equitable treatment, or full protection and security of foreign investments.

[11] Simma, B., Foreign Investment Arbitration: A Place for Human Rights?, *International and Comparative Law Quarterly*, vol. 60 (2011), no. 3, pp. 573-596.

2. A SECOND HUMAN RIGHTS REVOLUTION?

The increasing influence of non-State actors and especially transnational business operations on fundamental human rights led Douglass Cassel, a University of Notre Dame professor in the 1990s, to publish his seminal article on the need for a "second human rights revolution".[12] Cassel believed that the major goal of such a revolution was to remedy inefficient protection against human rights violations by corporations (or other non-State actors) who were increasingly involved in such conduct.

The idea refers to the "first human rights revolution" when the human rights conduct of governments became a concern of international law with the adoption of the Universal Declaration of Human Rights (hereinafter: UDHR) in the aftermath of the Second World War, which was followed by the conclusion of international human rights treaties as well as the establishment of their control mechanisms. For historical reasons, the advent of human rights as an area of international attention was accompanied by changes in the idea of the sovereignty of nation-States. The main focus of human rights was on the control of the exercise of sovereign conduct *vis-à-vis* private entities that gave rise to a common misconception that human rights, and especially civil and political rights, do not require positive State action. In other words, the tripartite obligations of States in human rights law were not fully recognised under this misconstruction of the role of sovereignty.[13] With the rise of economic globalisation, however, transnational corporations have become in many ways more influential than some States and have a robust impact on, among other things, fundamental human rights. Based on the observation of John Ruggie that even though transnational corporations barely exist in the eyes of international law as they are generally not recognised as a subject of law and thus do not have international legal personality, they are nevertheless characterised by power, authority, and relative autonomy. These characteristics make them global institutions. Even though they consist of many dozens or even many hundreds of separate legal entities

[12] Cassel, D., Corporate Initiatives: A Second Human Rights Revolution?, *Fordham International Law Journal,* vol. 19 (1995), no. 5, pp. 1963-1984.

[13] The obligations of States under international human rights law generally have three layers: to respect, to protect, and to fulfil human rights. To respect human rights means simply not to interfere with their enjoyment and thus includes a negative obligation. The State duty to protect human rights includes positive measures to ensure that third parties, including corporations, do not interfere with their enjoyment. The fulfillment of human rights means to take steps progressively to realise a given right, in other words to either facilitate or provide for the given right.

that are subject to the laws and regulations of the particular jurisdiction in which each of them is incorporated, they operate as one company under the unity of command and a single global vision and strategy, optimising worldwide operations for efficiencies, market share, and profit.[14] This disjuncture between business reality and legal convention is the single most important contextual framework shaping the global institutional status of multinationals that has led to the creation of a governance gap.

However, largely due to the above-mentioned misunderstanding of the role of sovereignty as well as of the tripartite obligations of States in human rights law, the negative impacts of transnational business operations on human rights increased. Therefore, a ″second human rights revolution″ would both raise and address the question of the State´s duty to protect human rights through regulation and institutions and would also confront the question of the responsibility of transnational corporations under international human rights law. The attempts to adopt regulations to address this issue look back to the post-war era and have been made in various waves and stages throughout the past half century. These regulatory attempts have taken various forms, from mandatory treaty-based regimes to voluntary self-regulation or co-regulation, and have followed different paths and have placed emphasis either on the duty of the State to safeguard and regulate business-related violations or potential responsibility, including the international responsibility of business entities for such violations. The next section will explore these different stages and show their major characteristics.

3. ″IT´S A LONG WAY TO TIPPERARY″

The way economic globalisation has unfolded was foreseen early on in the years following the Second World War. The first regulatory attempt was the proposal to establish the International Trade Organization (hereinafter: ITO) alongside the International Monetary Fund and World Bank during the Bretton Woods international conference at the end of the Second World War.[15] The draft Havana Charter in 1948 would have set standards and limitations on the

[14] Ruggie, J. G., Multinationals as Global Institution: Power, Authority and Relative Autonomy, *Regulations & Governance*, vol. 12 (2017), no. 3, pp. 3-4.

[15] Bronz, G., The International Trade Organization Charter, *Harvard Law Review*, vol. 62 (1949), no. 7, pp. 1090-1092.

operation of businesses, such as labour standards or competition rules.[16] The main idea of the establishment of the ITO was driven by the economic consideration to provide more balanced international commercial and investment relations. However, the Charter was not ratified by the United States Senate, and global trade relations were regulated in the framework of the General Agreement on Tariffs and Trade.

Efforts to regulate the then emerging transnational corporations resurfaced within the framework and structure of international law at the beginning of the 1970s with the adoption of the universal human rights treaties as well as of the New International Economic Order (hereinafter: NIEO). The NIEO adopted as a declaration by the UN General Assembly was designed to limit transnational business operations in order to protect the economic sovereignty of the newly independent colonies.[17] Driven by these new ideas, the UN Centre on Transnational Corporations was established in 1975 with the objective to adopt a draft international treaty to regulate the rights and obligations of transnational corporations.[18] The negotiations centred on the balance between the protection of foreign direct investments and the limitation of transnational business operations. However, by the time the text of the draft treaty was completed, the centrally planned economic model had collapsed and the ″Washington Consensus″ was already gaining strength. As a result of the shift with regard to the dominant economic model, bilateral investment treaties designed to protect the rights of transnational corporations proliferated while no compromise was found with respect to their obligations.[19] Since its draft treaty was not adopted, the UNCTC dissolved and its competences were taken over by the United Nations Conference on Trade and Development (UNCTAD) in 1994.

The next attempt to devise a binding international norm on transnational business operations began under Secretary-General Kofi Annan and in the

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16 The finalised text of the Havana Charter is available at https://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed 30 July 2023).

17 See Sornarajah, M., *The International Law on Foreign Investment*, Cambridge University Press, Cambridge, 2010, pp. 238-242.

18 Pope, P., Transnational Corporations – The United Nations Code of Conduct, *Brooklyn Journal of International Law*, vol. 5 (1979), no. 1, p. 130; Sprote, W., Negotiations on a United Nations Code of Conduct on Transnational Corporations, *German Yearbook of International Law*, vol. 33 (1990), pp. 332-334.

19 Sauvant, K. P., The Negotiations of the United Nations Code of Conduct on Transnational Corporation: Experience and Lessons Learned, *Journal of World Investment and Trade*, vol. 16 (2015), no. 1, pp. 11-87.

framework of the UN Commission on Human Rights. The major driving force of this treaty-making process was the rapid increase of foreign investments around the world. As result of the drafting process, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (hereinafter: Draft UN Norms) were presented in August 2003. The Draft UN Norms constituted an ambitious proposal as they recognised transnational corporations as subject to international law, providing them with international legal personality, and they also recognised their direct obligations under international law. While the Draft UN Norms preserved the primacy of State responsibility for human rights, they would have introduced the idea that business entities have a secondary obligation to observe international human rights and would have established a compulsory control mechanism to enforce these obligations.[20] On the other hand, the scope of the Draft UN Norms was devised to embrace the entirety of a company's supply chain, including its contracting partners.[21] This provision responded to the reality of business operations in a globalised economy where whole supply chains rather than individual companies compete on price, costs, and efficiency. Another important element of the Draft UN Norms is the introduction of an independent, transparent and periodic review or monitoring process that would have provided victims with an individual complaint avenue to remedy rights violations.[22] Based on these important characteristics, the Draft UN Norms were designed to overcome the soft-law approach. However, largely due to these ambitions, the business sector, as well as capital exporting countries, opposed the adoption of the Draft UN Norms as a binding international treaty. As a result, the UN Commission on Human Rights declared the Draft UN Norms to be of a non-binding nature.[23]

[20] See paragraphs A) and E) of the Draft UN Norms: Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/160/08/PDF/G0316008.pdf?OpenElement (accessed 25 July, 2023).

[21] Articles 15 and 29 of the Draft UN Norms. See also Weissbrodt, D.; Kruger, M., Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, *The American Journal of International Law*, vol. 97 (2003), no. 4, pp. 910-911.

[22] Articles 16-18 of the Draft UN Norms. The remedy could include reparations, restitution, compensation and rehabilitation for any damage done or property taken, which shall be prompt, effective and adequate.

[23] UN Commission on Human Rights (CHR), Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, Dec. 2004/116, UN Doc. E/CN.4/DEC/2004/116, 22 April 2004, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=9780 (accessed 20 July 2023).

The fourth and current effort to conclude a legally binding instrument on business and human rights began in 2014. Based on the initiative of Ecuador and South Africa and supported by a number of NGOs,[24] the UN Human Rights Council established an Open-Ended Inter-Governmental Working Group (hereinafter: OEIGWG) to elaborate an international legally binding instrument to regulate, in international human rights law, the operations of business enterprises.[25] Even though the harmful impacts of business operations on human rights are beyond dispute, the need for and structure of an international treaty are the subject of lively academic and also political debate.[26] The possible regulatory concepts show remarkable diversity, from direct to indirect international regulations of transnational corporations, along with the allocation of responsibility for their violations of human rights.[27]

The so-called ″Elements Paper″ outlined the first regulatory concept in 2017.[28] This version was a very ambitious document that includes the direct obligations of transnational corporation and a proposal for the establishment of the International Court on Transnational Corporations and Human Rights. Under this regulatory concept, the newly established international court would provide a venue for human rights adjudication in business-related violations.[29] The ″Elements Paper″ also declares the priority of human rights obligations of States over trade and investment obligations.[30] Because of its ambitious

[24] See Muchlinsky, P. T., *Advanced Introduction to Business and Human Rights*, Edward Elgar Publishing Ltd., Cheltenham, 2022, pp. 160-161.

[25] On 26 June 2014, the Human Rights Council adopted Resolution 26/9 by which it decided ″to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises″.

[26] The argument against the need for a binding international treaty is the previous experiences of the failed treaty-making processes as well as the potential negative effects on the developing soft-law instruments. See Taylor, M., A Business and Human Rights Treaty? Why Activists Should be Worried, Institute for Human Rights and Business, 4 June 2014, https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rights-treaty-why-activists-should-be-worried (accessed 25 July 2023).

[27] Cassel, D.; Ramasastry, A., White Paper: Options for a Treaty on Business and Human Rights, *Notre Dame Journal of International & Comparative Law*, vol. 6 (2016), no. 1, pp. 3-50.

[28] The ″Elements Paper″ is available at https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf (accessed 20 July 2023).

[29] See paragraph 9 of the ″Elements Paper″.

[30] Paragraph 1.2 of the ″Elements Paper″.

provisions, especially its commitment to direct corporate responsibility under public international law and to the establishment of supranational institutions, the ″Elements Paper″ was harshly criticised by academics and was later rethought and substantially revised.[31]

The ″Zero Draft″ and the subsequent three revised draft treaties took a more cautious approach than the ″Elements Paper″, as they leave the States in the driver´s seat and propose the legally binding but indirect regulation of business operations mainly through the concept of the State´s duty to protect human rights without establishing a separate supranational court or commission. The draft treaty texts follow the framework of the United Nations Guiding Principles on Business and Human Rights (hereinafter: UNGPs) by adopting mandatory Human Rights Due Diligence (hereinafter: HRDD) and by establishing direct liability for the human rights abuses of businesses, and indirect liability for the abuses of business partners.[32] States are also required to provide criminal measures under domestic law to ensure corporate liability for human rights abuses that amount to criminal offences.[33]

Beyond reinforcing State duty to protect against human rights violations, the treaty drafts aim to facilitate access to remedies for victims of business violations of human rights, as well as to create an international institutional structure to develop business and human rights norms. As far as effective remedies are concerned, the important novelties include provisions that overcome the doctrine of *forum non conveniens* that may not be used by the court to dismiss legitimate proceedings.[34] The drafts also require the recognition of universal jurisdiction for human rights violations that amount to the most serious crimes.[35] In addition, the draft treaties aim to facilitate the enforcement of judgments by requiring recognition for them under the jurisdictions of States parties.[36] As for the institutional structure, even though the draft treaties do not propose a supranational control mechanism, they would still introduce limited cooperation through the establishment of an expert committee elected by the States parties. The main

[31] Ruggie, J. G., A UN Business and Human Rights Treaty?, Harvard University´s Kennedy School of Government, January 2014, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/UNBusinessandHumanRightsTreaty.pdf (accessed 20 July 2023).

[32] Articles 6 and 8.1 of the Third Revised Draft.

[33] Articles 8.8 to 8.10 of the Third Revised Draft.

[34] Articles 9.3 and 7.3 of the Third Revised Draft.

[35] Article 10.1 of the Third Revised Draft.

[36] Article 7.6 of the Third Revised Draft.

tasks of this committee are to make general comments and recommendations based on periodic reports and information from States parties and other stakeholders.[37]

Throughout the treaty negotiations, views remained divided on whether a treaty-based approach within the framework of the UN was the best or most suitable way forward in business and human rights. The negotiations process has been greatly influenced by the fundamental structure and provisions of the UNGPs set out below, but disagreement remains over the adoption of a binding international treaty.[38] With opposition from the major capital-exporting countries, including the US, UK, Japan, China and India, long discussions can be expected.

4. THE ART OF COMPROMISE: THE UNGPs

As an alternative to the numerous but nevertheless challenging and less successful treaty-making attempts, the soft-law approach offered a remarkable way forward. Within the UN system and under the leadership of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie, it was after the failure of the Draft UN Norms that this path was taken.[39] Instead of polarising debates over the extent of mandatory and norm-based business obligations under international human rights law, the basic approach of John Ruggie was to systematise the already existing international human rights law in the context of business operations. John Ruggie wanted to avoid the failures of previous treaty-making attempts but at the same time sought to overcome the limitations of international law in developing norms applicable to corporate entities. Instead of public legal control that follows a top-down approach, the UNGPs prefer to alter and improve internal business behaviour to be able to respond to external regulatory requirements. The document expresses the important role corporate actors play in upholding human rights in an age of economic globalisation.[40] Accordingly, in the preparatory phase of the

[37] Article 15 of the Third Revised Draft.

[38] Muchlinsky, P. T., *Advanced Introduction to Business...*, *op. cit*., pp. 168-170.

[39] UN Commission on Human Rights (CHR), Resolution 2005/69, Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. E/CN.4/2005/L.87, 15 April 2005, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=10980 (accessed 20 July 2023).

[40] Deva, S., Guiding Principles on Business and Human Rights: Implications for Companies, *European Company Law*, vol. 9 (2012), no. 2, pp. 101-102.

work, Ruggie identified three pillars of a theoretical framework of business and human rights.[41] The UNGPs were not designed to create new international law, but instead to apply the existing and already accepted legal framework of human rights to corporate abuses. This framework consists of ″State duty to protect″ as the first pillar, ″corporate responsibility to respect″ as the second pillar, which are both reinforced by the third pillar, ″access to remedy″. As a result of this universal consensus-seeking effort, the UNGPs were adopted unanimously by the Human Rights Council in 2011.[42]

″State duty to protect″ is based on the traditional concept of public law regulation that attributes the legal responsibilities to uphold human rights to States.[43] This requires positive State actions, including the adoption of preventive measures, as well as the necessary institutional and regulatory framework to investigate and redress violations of human rights. States must act in accordance with a ″standard of conduct″ and will breach this legal obligation if they fail to take appropriate steps to regulate against human rights abuse of businesses.[44] The second pillar is ″corporate responsibility to respect″ which is the major innovation of the UNGPs.[45] Instead of binding legal duties, this pillar focuses on the business inner or intra decision-making process. The underlying idea is that corporations ultimately need a ″social licence to operate″ or a ″social contract″ in the communities where they do business. The core element of this pillar is to require businesses to apply HRDD to assess the adverse impacts on human rights arising out of either their operations or business relationships. Due diligence is expected to integrate human-rights-compliant behaviour into their business operations. Responsibility to respect is a standard of expected business conduct that covers the avoidance and mitigation of human rights risks. The first two pillars are reinforced by the third one that provides access to remedy and

41 Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement (accessed 20 July 2023).

42 UN Human Rights Council, Resolution 17/4, Human Rights and Transnational Corporations and other Business Enterprise, A/HRC/17/L.17/Rev.1, 6 July 2011, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement (accessed 20 July 2023).

43 Paragraphs 1-10 of the UNGPs.

44 Muchlinsky, P. T., *Advanced Introduction to Business…, op. cit.*, pp. 62-66.

45 Paragraphs 11-24 of the UNGPs.

applies both to States and businesses.[46] This includes both legal and non-legal, State-based and non-State-based remedial avenues, including corporate-based grievance mechanisms or other alternative dispute settlement mechanisms. Another important innovation of the UNGPs is to demand consistency and policy coherence with regard to the international legal obligations of States. In terms of international economic agreements, this requires States to maintain adequate regulatory space for meeting human rights obligations.[47]

In the words of John Ruggie, the Human Rights Council's ″endorsement establishes the guiding principles as the authoritative global reference point for business and human rights″.[48] Indeed, similarly to the Universal Declaration of Human Rights, the UNGPs have also begun to become a reference point or an ″important compass″ in the field of business and human rights in the past ten years. From this perspective, it is worth highlighting the unique and complex web of connections the UNGPs created within this field of international law. While they were inspired by the general comment of the Human Rights Committee,[49] the UNGPs have recently begun to influence the case law of some of the human rights control mechanisms, especially the Inter-American and the African systems[50] and have infiltrated the dispute settlement mechanisms of international economic courts. They also play a role in ″gradual legalisation″ and standard setting, as the UNGPs have begun to define the framework of the current treaty-making process. On the other hand, based on the call of the UN Human Rights Council, the UNGPs serve as the basis of national policy making and legislation efforts in this field through their increasing implementation.[51] This continuous ″dialogue″ is necessary to overcome the widespread and persistent conflict of interests characterised by business and human rights.

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46 Paragraphs 25-31 of the UNGPs.

47 Paragraph 9 of the UNGPs.

48 See https://news.un.org/en/story/2011/06/378662 (accessed 15 January 2023).

49 UN Human Rights Committee (HRC), General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, https://www.refworld.org/docid/478b26ae2.html (accessed 20 July 2023).

50 See Inter-American Court of Human Rights, *Kaliña and Lokono Peoples v. Suriname*, Judgment of 25 November 2015 (Merits, Reparations and Costs) and UN Guiding Principles on Business and Human Rights, p. 10. The Impact of the UNGPs on Courts and Judicial Mechanisms (Debevoise & Plimpton LLP, 2021), paragraphs 727-733.

51 The UN Human Rights Council calls for the adoption of ″National Action Plans″ to implement the UNGPs. See Resolution 26/22, Human Rights and Transnational Corporations and other Business Enterprises A/HRC/RES/26/22, 15 July 2014, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/2 (accessed 20 July 2023).

Therefore, a unique interaction has been unfolding between the human rights control mechanisms, the soft-law approach, and the treaty-making process. The consensus-driven UNGPs are at the centre of this interaction and have gradually gained gravitational force. A similar tendency can be seen regarding the UDHR that is now 75 years old. It enjoys State practice followed by a sense of legal obligation (*opinio juris*). It remains to be seen whether some of the elements or principles of the UNGPs will become part of customary international law.

5. CONCLUSION

Increasing economic globalisation along with the intensification of transnational business operations have led to a ″race to bottom″[52] where companies compete to operate in the most lax and lenient regulatory environment. This has consequently contributed to an increase in business-related human rights violations around the world. Furthermore, the recent spread of a platform-based business model has created dominant businesses that have negative impacts on human rights.[53] These phenomena have led to recognition of the need for a ″second human rights revolution″ that can protect against business-related rights violations. From this perspective, instead of protecting business operations, human rights must aim to widen the regulatory scope of States. The challenges to create an accepted regulatory framework are difficult to meet, but for the past two decades, the field of business and human rights has gone a long way and has created an established regime based on the acceptance of the UNGPs. The road to globalisation with a human face will continue to be difficult and challenging, but it is essential to take this road if local communities are to reap the benefits and make globalisation a common success of humanity. The UNGPs have clearly taken the first steps and moved beyond the difficult beginnings.

[52] Zerk, J., *Multinationals and Corporate Social Responsibility*, Cambridge University Press, Cambridge, 2006, p. 154.

[53] Khan, L. M., Amazon´s Antitrust Paradox, *The Yale Law Journal*, vol. 126 (2017), no. 3, pp. 755-783.

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Sažetak:

GLOBALIZACIJA S LJUDSKIM LICEM I ULOGA UJEDINJENIH NARODA

Velik dio suvremenih izazova zaštite ljudskih prava proizlazi iz netipičnih situacija kao što su ekonomske i financijske krize ili degradacija okoliša. Povrh toga, svakako treba navesti uspon globalizacije koji je tijesno povezan sa sve većim utjecajem poslovnog sektora na živote ljudi i njihove osnovne potrebe, od čiste vode do komunikacije. Regulatorni model »Washingtonskog konsenzusa« dodatno je potaknuo ovaj fenomen. Pružatelj komunalnih usluga koji krši pravo na vodu, djelatnosti rudarstva i crpljenja podzemnih izvora koje ugrožavaju pravo na zdravlje ili digitalna platforma koja narušava slobodu govora i informiranja, imaju štetan utjecaj na ljudska prava. Autor istražuje ove izazove zaštite ljudskih prava zajedno s povijesnim razvojem međunarodne pravne regulative, kao i suvremenim regulatornim inicijativama i procesom sklapanja međunarodnih ugovora kako bi razjasnio obvezu i odgovornost države za zaštitu ljudskih prava u kontekstu odnosa poslovnog sektora prema ljudskim pravima.

Ključne riječi: *međunarodna ljudska prava; ekonomska globalizacija; Washingtonski konsenzus; druga revolucija ljudskih prava; UNGP; međunarodni ugovor o poslovanju i ljudskim pravima.*

UPHOLDING UNITED NATIONS GLOBAL LEGITIMACY IN HUMAN RIGHTS PROTECTION AND HUMANITARIAN ASSISTANCE WITHIN THE EUROPEAN UNION: A LEGAL OVERVIEW OF THE EU-UN NATURAL PARTNERSHIP

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Promoting respect for human rights and providing humanitarian assistance exemplify one of the core shared values and objectives of the EU-UN agenda, deeply rooted in the premise that universal values of peace, equal rights, freedom, and human dignity may be effectively defended through efficient multilateralism only. The paper aims to offer a deep analysis of the legal framework underpinning the EU-UN partnership and to underscore the critical intersections of the EU and UN systems of addressing human rights protection and unimpeded access to humanitarian assistance. The research builds on Article 21 of the Treaty on European Union, which sets the basis for the EU´s action on the international scene in line with the principles of the Charter of the UN and international law, including the promotion of multilateral solutions to common issues in the area of human rights and humanitarian assistance. Particular emphasis is put on the EU priorities for the UN, adopted annually by the Council´s conclusions guiding the EU´s yearly work adapted to the UN´s agenda and global affairs. Alongside the examination of the current positive law and corresponding scholarly literature, the paper also provides insight into the best practices of the EU-UN natural partnership on the ground, such as the early recovery of war-affected communities in Ukraine through the UN Development Programme (UNDP). Thus, the paper combines doctrinal legal research with the socio-legal approach in outlining the specificities of the EU-UN multi-layered cooperation with respect to human rights protection and humanitarian assistance.

Keywords: *European Union; United Nations; human rights; humanitarian assistance.*

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1. INTRODUCTION

"2023, the 75th anniversary of the Universal Declaration of Human Rights and 30 years since the adoption of the Vienna Declaration and Programme of Action is the year to turn the tide on human rights and democratic decline. Turning the tide means going back to basics: the need for robust advocacy of the UN Charter, of international law, of international humanitarian law and accountability. […] We celebrate these anniversaries in close partnership with the United Nations, […] and with all who join the cause of upholding and advancing human rights and democracy around the world."

Josep Borrell
High Representative of the European Union
for Foreign Affairs and Security

Upholding and advancing human rights and democracy as well as providing humanitarian assistance worldwide are at the core of the EU´s current external relations. So is true adherence to international cooperation in a spirit of effective multilateralism.[1] However, just over a decade ago, the narrative on the

[1] The subject matters of the protection of human rights, providing humanitarian aid, and cooperation with third countries and international organisations worldwide are the intrinsic elements of the EU´s Common Foreign and Security Policy. See Juncos, A. E.; Friis, A. M., The European Union´s Foreign, Security, and Defence Policies, in: Cini, M.; Pérez-Solórzano Borragán, N. (eds.), *European Union Politics*, 7th Edition, Oxford University Press, Oxford, 2022, p. 280; Lambrinidis, S., The Positive Narrative on Human Rights, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, p. 35-36; Costello, P., Values and Interests in Post-Lisbon European Union Foreign Policy, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, p. 56; Jasiński, F.; Kacperczyk, K., Multilateralism in EU-UN Relations, *Polish Quarterly of International Affairs*, vol. 14 (2005), no. 2, p. 30; Daidouji, R., Inter-organizational Contestation and the EU: Its Ambivalent Profile in Human Rights Protection, *Journal of Common Market Studies*, vol. 57 (2019), no. 5, p. 1131. As Westlake argues, the EU´s external policies in the post-1992 Treaty of Maastricht´s era may be denoted as the EU´s "new" foreign policy in comparison with the time before 1992 because of an array of newly introduced or redefined existing instruments, actors, and initiatives, on the one hand, and the new geopolitical environment with new challenges, on the other hand. See Westlake, M., Introduction: The European Union´s New Foreign Policy, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, pp. 1-2. See also Smith, K. E., The European Union´s Post-Lisbon Foreign Policy Ten Years on, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, pp. 237-251; Westlake, M., Afterword: The European Union´s New Foreign Policy – A Glass Half Full?, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, pp. 253-265; Hosli, M. O.; Haas, M. I., The Development of EU Foreign Policy and External Representation, in: Hosli, M. O. (ed.), *The European Union and the United Nations in Global Governance*, Bristol University Press, Bristol, 2022, pp. 14-28.

EU´s relevance for transnational justice efforts was noticeably more subdued.[2] The 2009 Treaty of Lisbon´s legacy gave major impetus to the EU´s more prominent positioning in the realm of developing, safeguarding, endorsing, and sponsoring the protection of human rights globally. This took effect hand in hand with the enhanced engagement in communication, coordination, and outreach efforts with international partners, especially the UN.[3] Over time, the EU has become one of the leading initiators in multilateral fora in matters concerning human rights and humanitarian assistance,[4] to the point that Leffler denoted it as a champion of multilateralism.[5] The underlying factor for forging alliances with the UN and advocating multilateralism is to potentiate a robust response to attacks on the universal human rights system, as a forceful defence of its integrity and functionality.[6] In Serrano de Haro´s words, ″the EU is well aware that even while bringing together all the capabilities of its Member States, influencing world events also requires cooperation with other partners″, and such a stance ″is firmly ingrained in the EU's nature, and its multilateral creed″.[7]

In the past decade, the EU´s capacity to protect and support was repeatedly tested under the weight of the cumulative effect of multiple and overlapping crises – economic, financial, social, migration, Brexit, COVID-19, war, energy, security, etc.[8] As a side effect, global trust in international institutions, such as the

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2 See Crossley-Frolick, K. A., The European Union and Transitional Justice: Human Rights and Post-conflict Reconciliation in Europe and Beyond, C*ontemporary Readings in Law and Social Justice*, vol. 3 (2011), no. 1, pp. 33, 37.

3 European Union External Action, Report of the High Representative of the Union for Foreign Affairs and Security Policy – 2022 Annual Report on Human Rights and Democracy in the World (hereinafter: 2022 Annual Report), Brussels, 2023, p. 13.

4 *Ibid*., p. 6.

5 See Leffler, C., Championing Multilateralism, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, pp. 23-24, 26-29.

6 2022 Annual Report, *op. cit*., note 3, p. 10.

7 Serrano de Haro, P. A., Working Together for a Safer World, in: Westlake, M. (ed.), *The European Union´s New Foreign Policy*, Palgrave Macmillan, Cham, 2020, p. 78.

8 Cini, M.; Pérez-Solórzano Borragán, N., Introduction, in: Cini, M.; Pérez-Solórzano Borragán, N. (eds.), *European Union Politics*, 7th Edition, Oxford University Press, Oxford, 2022, pp. 1-2; Serrano de Haro, P. A., Working Together…, *ibid*., pp. 61-65; Hosli, M. O.; Lentschig, H.; D´Ambrosio, C., Crises, Integration and the EU as an External Actor, in: Hosli, M. O. (ed.), *The European Union and the United Nations in Global Governance*, Bristol University Press, Bristol, 2022, pp. 29-56; Greer, S.; Gerards, J.; Slowe, R., *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges*, Cambridge University Press, Cambridge, 2018, pp. 39-50.

EU and the UN, gradually declined,[9] while a sense of human rights pessimism rose thereon.[10] The EU is at a critical juncture, with different trends and pressures sabotaging its human rights and humanitarian assistance efforts.[11] Russia´s ongoing military full-scale aggression on Ukraine constitutes a grave attack on the rules-based global order and democracy,[12] which seriously violates the fundamentals of international human rights law and international humanitarian law.[13] Laffan anticipated that by 2030, the EU is likely to be negatively impacted by four overarching emergencies: first, the eurozone crisis; second, Europe´s unstable borderlands and neighbourhood; third, increased contention in and about the EU, and more fragmented and volatile domestic politics; and fourth, profound structural transformations of the international system, leading to the multipolarisation of the world.[14] Undoubtedly, the unifying power of the EU-UN partnership is playing a decisive role in mitigating the repercussions of various crises.

This paper seeks to shed light on the specificities of the EU´s and the UN´s manifold normative, operational, and political intersections in the area of human rights and humanitarian assistance. It aims at advancing existing scholarly literature with fresh theoretical and practical knowledge derived from an in-depth analysis of the latest legal and academic sources as well as personal experience of active engagement in the EU´s institutional landscape. There is a growing body of literature examining various aspects of the EU´s and the UN´s human rights and humanitarian assistance agenda; however, very few pieces offer an all-encompassing and comparative analysis, so the purpose of this paper is to fill the respective gap. The scientific research is divided into six sections (including the introductory and concluding remarks). The first section following the introduction provides a general overview of the EU-UN´s prolific cooperation, with special emphasis on the notion of multilateralism and the modes of the EU´s involvement in the UN´s work. The third section

[9] See Bibbins Sedaca, N.; Kennedy, K., Human Rights: Progress, Opportunities, and Challenges, *Georgetown Journal of International Affairs*, vol. 20 (2019), p. 20.

[10] See Sharp, D. N., Pragmatism and Multidimensionality in Human Rights Advocacy, *Human Rights Quarterly*, vol. 40 (2018), no. 3, pp. 502-505.

[11] Laffan, B., The Future of the EU, in: Cini, M.; Pérez-Solórzano Borragán, N. (eds.), *European Union Politics*, 7th Edition, Oxford University Press, Oxford, 2022, pp. 437-438.

[12] 2022 Annual Report, *op. cit*., note 3, p. 8.

[13] *Ibid*.

[14] Laffan, B., The Future of the EU, *loc. cit*., note 11. See also Leffler, C., Championing Multilateralism, *op. cit*., note 5, pp. 29-32.

focuses on the examination of a legal basis framing the EU-UN´s partnership, i.e. the three founding treaties (the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Economic Community, and the Treaty establishing the European Atomic Energy Community) and ″the Treaties″ (the Treaty on European Union and the Treaty on the Functioning of the European Union). The fourth section outlines seminal legal norms, procedures, mechanisms, entities, and principles of the overarching EU-UN alliance in the human rights endeavour. A similar approach is applied in the fifth section, which analyses the points of the EU-UN´s convergence and synergies in the domain of humanitarian assistance, drawing particular attention to the Russian military aggression on Ukraine as an example of a composite approach to mutually interwoven human rights and humanitarian issues. The paper´s final remarks offer a synthesis of the elaborate findings, recapped in two points.

2. EU-UN COOPERATION AT LARGE

Starting as far-reaching projects of peace and reconciliation after World War II,[15] in the years after, the EU and the UN devoted themselves to a number

[15] According to the Preamble of the Treaty of Paris setting up the European Coal and Steel Community, the signatories considered that world peace might be safeguarded only by creative efforts equal to the dangers which menace it, convinced that the contribution which an organised and vital Europe could bring to civilisation was indispensable to the maintenance of peaceful relations. In that spirit, they resolved to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts, and to lay the bases of institutions capable of giving direction to their future common destiny. See Traité instituant la Communauté Européenne du Charbon et de l´Acier, 1951, available at https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11951K/TXT (accessed 5 July 2023). Six years later, the same commitment to peace was also confirmed in the Rome Treaties, i.e. the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community. Pursuant to the Preamble of the former, the signatories agreed, *inter alia*, to strengthen the safeguards of peace and liberty as well as to abide by the principles of the UN Charter, while the Preamble of the latter emphasises that nuclear energy will permit the advancement of the cause of peace. See Traité instituant la Communauté Economique Européenne, 1957, available at https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT (accessed 5 July 2023); Traité instituant la Communauté Européenne de l´Énergie Atomique, 1957, available at https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957A/TXT (accessed 5 July 2023). Similar to the founding treaties of the EU, the Preamble of the UN Charter stipulates that the peoples of the UN are determined, *inter alia*, to practise tolerance and live together in peace with one another as good neighbours and to unite their strength to maintain international peace and security. See Charter of the United Nations, 1945, 1 UNTS XVI. See also Phinnemore, D., The

of universally shared values and goals, such as the development of friendly relations, the maintenance of international peace and security, the promotion of international cooperation, and safeguarding respect for human rights and fundamental freedoms.[16] In short order, both organisations effectively positioned themselves as pivotal actors of the international community in defining, promoting, and protecting globally accepted standards and principles of peace, equal rights, freedom, and human dignity. To multiply and reinforce their efforts in respective domains, they naturally turned to one another and joined forces through efficient multilateral action.[17]

Multilateralism has a firm and indispensable standing in international law. Ruggie defines multilateralism as ″an institutional form which coordinates relations between three or more states on the basis of generalised principles of conduct″,[18] and Taylor as ″a particular way in which states conduct their relations with each other″.[19] In her outlook on challenges to multilateralism in the context of the shared agendas of the EU and the UN, Hosli portrayed multilateralism as ″a foundation to global cooperation, based on negotiations and the work and activities of international institutions″.[20] In his speech at the 77th session of the UN General Assembly (hereinafter: UNGA) on 23 September 2022, the President of the European Council defined multilateral cooperation as ″collective intelligence in action″, which is part of the ″EU´s DNA″ as well.[21] In

European Union: Establishment and Development, in: Cini, M.; Pérez-Solórzano Borragán, N. (eds.), *European Union Politics*, 7th Edition, Oxford University Press, Oxford, 2022, p. 10; Lambrinidis, S., The Positive Narrative…, *op. cit.*, note 1, p. 34; Hosli, M. O., Introduction, in: Hosli, M. O. (ed.), *The European Union and the United Nations in Global Governance*, Bristol University Press, Bristol, 2022, pp. 1, 4; Greer, S. *et al*., *Human Rights in the Council of Europe and the European Union*…, *op. cit.*, note 8, pp. 5-8.

16 How the European Union and the United Nations Cooperate, United Nations Regional Information Centre for Western Europe (UNRIC), Bonn, 2007, p. 2.

17 For more details, see Leffler, C., Championing Multilateralism, *op. cit.*, note 5, p. 29.

18 As cited in Degrand-Guillaud, A., Actors and Mechanisms of EU Coordination at the UN, *European Foreign Affairs Review*, vol. 14 (2009), no. 3, p. 411.

19 See Taylor, P., Multilateralism, the UN and the EU, *European Review of International Studies,* vol. 1 (2014), no. 2, p. 16.

20 Hosli, M. O., Tackling Challenges to Multilateralism: Shared Agendas of the EU and the UN, in: Hosli, M. O. (ed.), *The European Union and the United Nations in Global Governance*, Bristol University Press, Bristol, 2022, p. 57. For more definitions of multilateralism see Jasiński, F.; Kacperczyk, K., Multilateralism in EU-UN…, *op. cit.*, note 1, pp. 31-33.

21 In the same vein, the President emphasised that the European leadership is about building solutions in partnership with the UN for the purpose of peace, development, and the promotion of human rights. See European Council, Speech by President Charles Michel at

fact, the underlying foundations of both the EU and the UN are the principles of effective multilateralism and rules-based governance.[22]

The EU´s commitment to multilateralism, with the UN and international law at its core, is repeatedly affirmed in the latest 2016 European Union Global Strategy, a comprehensive document guiding the EU´s foreign and security policy within global governance for the 21st century. The Strategy underlines that the EU will ″promote a rules-based global order with multilateralism as its key principle″ and ″strive for a strong UN as the bedrock of the multilateral rules-based order″. Moreover, it particularly accentuates that ″a multilateral order grounded in international law, including the principles of the UN Charter and the Universal Declaration of Human Rights, is the only guarantee for peace and security at home [the EU] and abroad″.[23]

The areas of multilateral cooperation between the EU and the UN are wide and varied, spanning peacebuilding, crisis management and human rights matters, sustainable development and climate change, disarmament and non-proliferation, as well as the administration of migratory and labour issues, to name a few of the most prominent examples.[24] As expected, the coordination of activities between the EU and the UN in such a setting is complex and multifaceted.[25] The EU´s elements are firmly interwoven into the UN´s structure, thus significantly contributing to decision-making processes at the universal level. Since 1974, the EU, formerly the European Communities until the 2009 Treaty of Lisbon,[26] has had the status of a permanent observer at the UNGA,

the 77th Session of the UN General Assembly, 23 September 2022, available at https://www.consilium.europa.eu/en/press/press-releases/2022/09/23/speech-by-president-charles-michel-at-the-77th-un-general-assembly/ (accessed 7 July 2023).

22 Hosli, M. O., Tackling Challenges…, *op. cit*., note 20, p. 60.

23 European Union, Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union´s Foreign and Security Policy, European External Action Service, Brussels, 2016, pp. 8, 10, 15-16.

24 European Union External Action, The EU and the United Nations, EU-UN Cooperation, available at https://www.eeas.europa.eu/eeas/eu-and-united-nations_en (accessed 6 July 2023).

25 See more, Hosli, M. O., Introduction, *op. cit*., note 15, pp. 8-9; Degrand-Guillaud, A., Characteristics of and Recommendations for EU Coordination at the UN, *European Foreign Affairs Review*, vol. 14 (2009), no. 4, pp. 607-622.

26 Pursuant to horizontal amendments to the Treaty establishing the European Community, the words ″European Communities″ were subsequently replaced by ″European Union″ throughout the succeeding Treaty on the Functioning of the European Union. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Official Journal of the European Union, C 306, 17 December 2007, Chapter 1 – General Provisions of the Union´s External Action, Article 2(1) and Article 2(2).

with reinforced participating rights since 2011.[27] Since membership in the UN is reserved for States only, the EU is represented in the UN by the EU Member State holding the rotating six-month Presidency of the Council of the EU. The EU´s voice in the UN is further bolstered and channelled through 27 EU Member States as independent Members of the UN, which together make up around one-eighth of the total votes in the UNGA. Seven EU Member States, i.e. Belgium, Denmark, France, Greece, Luxembourg, the Netherlands, and Poland, were founding members of the UN in 1945, and France´s influence is particularly underscored under the aegis of its permanent membership of the UN Security Council (hereinafter: UNSC).[28] Since the 1990s, while voting in the UNGA, the EU Member States have had predominantly unified views (well over 90%) with respect to the critical matters of the Common Foreign and Security Policy.[29] Furthermore, the EU´s significance in the UN is additionally accentuated by its substantial financial impact. The EU is the UN´s single largest financial contributor, with EU funds totalling more than one-third of the UN

[27] Not long after the Treaty of Lisbon granted the EU full legal personality, on 3 May 2011, at the 88th plenary meeting, the UNGA adopted the Resolution on the enhanced participation of the representatives of the EU, in their capacity as observers, "in the sessions and work of the UNGA and its committees and working groups, in international meetings and conferences convened under the auspices of the UNGA and in UN conferences". The updated rules allowed the EU representatives to present commonly agreed EU positions, be on the list of speakers among representatives of major groups in order to make interventions, participate in the general debate of the UNGA, circulate EU communications directly as official documents of the UNGA, meeting or conference, present proposals and amendments orally as agreed by the EU Member States, and exercise the right of reply regarding positions of the EU. See Participation of the European Union in the Work of the United Nations, A/RES/65/276, 10 May 2011. For more, see Hosli, M. O.; Verbeek, N., The EU in the UNGA and the UNSC, in: Hosli, M. O. (ed.), *The European Union and the United Nations in Global Governance*, Bristol University Press, Bristol, 2022, pp. 81-83; Smith, K. E., EU Member States at the UN: A Case of Europeanization Arrested?, *Journal of Common Market Studies*, vol. 55 (2017), no. 3, pp. 628-644.

[28] In accordance with Article 34(2) of the TEU, in the execution of its duties, France as a member of the UNSC is obliged to keep the other EU Member States and the High Representative fully informed of any matter of common interest and defend the positions and the interests of the EU, without prejudice to its responsibilities under the provisions of the UN Charter. See Consolidated Version of the Treaty on European Union, Official Journal of the European Union, C 326, 26 October 2012. For more, see Hosli, M. O.; Verbeek, N., The EU in the UNGA and the UNSC, *op. cit.*, pp. 86-89; Marchesi, D., EU Common Foreign and Security Policy in the UN Security Council: Between Representation and Coordination, *European Foreign Affairs Review*, vol. 15 (2010), no. 1, pp. 99, 104-105.

[29] How the European Union and the United Nations Cooperate, *op. cit.*, note 16, p. 6. For more, see Degrand-Guillaud, A., Actors and Mechanisms…, *op. cit.*, note 18, pp. 405-430; Hosli, M. O., Verbeek, N., The EU in the UNGA and the UNSC, *op. cit.*, p. 84.

budget over the 2014-2020 financial perspective. For example, combined funding of the EU, the EU Member States, and EU institutions support 38% of the UN´s regular budget, over two-fifths of UN peacekeeping operations, around one-half of all UN Members´ contributions to UN funds and programmes, and 56% of development aid and assistance.[30] As the only non-State party to more than 50 UN treaties, an observer in most of the UN specialised agencies, a full participant in key UN conferences, and a full member of UN bodies (e.g. the Food and Agriculture Organization – FAO and the World Trade Organisation – WTO), the EU contributes profusely to the development and codification of international law.[31]

3. LEGAL BASIS OF THE EU-UN PARTNERSHIP

3.1. Founding Treaties

The legal origins of the EU-UN partnership can be traced back to as early as the 1950s when the three founding treaties of the EU introduced the provision regulating the maintenance of interorganisational relationships. It was Article 93 of the 1951 Treaty establishing the European Coal and Steel Community which first stipulated that ″The High Authority will maintain whatever relationships appear useful with the United Nations and the Organization for European Economic Cooperation, and will keep these organizations regularly informed of the activity of the Community″.[32] In the same vein, Article 229 of the 1957 Treaty establishing the European Economic Community provides that ″The Commission shall be responsible for ensuring all suitable contacts with the organs of the United Nations, of their specialised agencies and of the General Agreement on Tariffs and Trade. The Commission shall also ensure appropriate contacts with all international organisations″.[33] Moreover, the Preamble of the respective Treaty explicitly ties in the EU with the UN Charter, stressing that the solidarity

[30] European Union External Action, The European Union and the United Nations, EU Major Contributor to the UN, available at https://www.eeas.europa.eu/un-geneva/european-union-and-united-nations_en?s=62 (accessed 7 July 2023). It is noteworthy to emphasise that the EU is the single biggest budgetary contributor as regards voluntary contributions to the UN budget. See Leffler, C., Championing Multilateralism, *op. cit*., note 17.

[31] See European Union External Action, The European Union and the United Nations, EU Major Contributor to the UN, *ibid.*

[32] Traité instituant la Communauté Européenne du Charbon et de l´Acier, *op. cit.,* note 15.

[33] Traité instituant la Communauté Economique Européenne, *op. cit*., note 15.

which binds Europe and overseas countries as well as the development of their prosperity will be accomplished in accordance with the Charter´s principles. Finally, Article 199 of the 1957 Treaty establishing the European Atomic Energy Community, with nearly the exact wording as the above-mentioned Article 229, regulates that ″It shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations, of its specialised agencies and of the General Agreement on Tariffs and Trade. The Commission shall also maintain such relations as are appropriate with all international organisations″.[34]

3.2. The Treaties

About half a century later, the narrative on EU-UN cooperation and embedding the UN values into the modern-day EU system substantially broadened, as demonstrated in two principal EU treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

Article 21(1) TEU sets the basis for the contemporary EU´s action on the international scene in line with the principles of the UN Charter, multilateralism, and international law. Incorporated under Chapter 1 on general provisions on the EU´s external action, within the wider Title V on general provisions on the EU´s external action and specific provisions on the common foreign and security policy, Article 21(1) lays down the fundamentals of the EU´s conduct in the international community, prescribing that its action will be governed in line with ″the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law″.[35] As Lambrinidis rightly points out, ″those are Treaty obligations″ but ″also

[34] Traité instituant la Communauté Européenne de l´Énergie Atomique, *op. cit*., note 15.

[35] Consolidated Version of the Treaty on European Union, *op. cit*., note 28. For criticism of such a persistent EU rhetoric on upholding EU-UN priorities to human rights, see Debuysere, L.; Blockmans, S., Crisis Responders: Comparing Policy Approaches of the EU, the UN, NATO and OSCE with Experiences in the Field, *European Foreign Affairs Review*, vol. 24 (2019), no. 3, pp. 261-263. For another example of questioning the EU´s ability to fully comply with the international human rights law, see Hilmy, P., The International Human Rights Regime and Supranational Regional Organisations: The Challenge of the EU, *Michigan Journal of International Law*, vol. 36 (2014), no. 1, pp. 179-218; Keller, H.; Schnell, C., International Human Rights Standards in the EU – A Tightrope Walk between Reception and Parochialism?, *Swiss*

international, universal human rights obligations".[36] Additionally, the successive subparagraph of Article 21(1) establishes a vital link between the EU and the UN in the context of multilateralism, stipulating that the EU will "seek to develop relations and build partnerships with […] international, regional or global organisations which share the principles referred to in the first subparagraph", and "promote multilateral solutions to common problems, in particular in the framework of the United Nations".[37] A detailed list of objectives to be pursued through common EU policies and actions, with a view to achieving a high degree of cooperation in all fields of international relations, is outlined in Article 21(2). The aspirations include, *inter alia*, support for democracy, the rule of law, human rights and the principles of international law; preservation of peace, prevention of conflicts and strengthening international security, in accordance with the purposes and principles of the UN Charter; providing assistance to populations, countries, and regions confronting natural or man-made disasters; and the promotion of an international system based on stronger multilateral cooperation and good global governance.[38] Although it has an exceptional impact on its own, Article 21 can be additionally well enhanced if taken in conjunction with the common provision of Article 3(5) TEU, which regulates the EU's relations with the wider world, specifically referring to the EU's commitment to strictly comply with international law, including the principles of the UN Charter. Namely, Article 3(5) obliges the EU to "contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter" when engaged on the international scene.[39]

Originating as the Treaty establishing the European Economic Community, the TFEU retained some of its initial provisions framing the cooperation between the EU and the UN. Firstly, a clause safeguarding the establishment of all appropriate forms of cooperation with the organs of the UN and its specialised agencies was kept as Article 220(1), moderately modified in its closing part listing the other

Review of International and European Law, vol. 20 (2010), no. 1, pp. 3-38; Gómez Isa, F., EU Human Rights and Democratization Policies in a Changing World, *Inter-American and European Human Rights Journal*, vol. 9 (2016), no. 2, pp. 500-516.

[36] Lambrinidis, S., The Positive Narrative…, *op. cit.*, note 1, p. 35.

[37] Consolidated Version of the Treaty on European Union, *op. cit.*, note 28.

[38] *Ibid*.

[39] *Ibid*.

international partner organisations.[40] Likewise, the segment of the Preamble referring to abiding by the principles of the UN Charter, in the context of solidarity between Europe and overseas countries, was kept in its entirety. The explicit cooperation with the UN is repeatedly affirmed throughout the TFEU, as well as correlating protocols and declarations as regards development cooperation,[41] humanitarian aid,[42] pacific settlements of disputes, and maintenance or restoration of international peace and security.[43] In other words, the EU legal system expressly supports all three key pillars of the UN – peace and security, human rights, and development.[44]

4. EU-UN COOPERATION IN THE DOMAIN OF HUMAN RIGHTS

One of the principal areas in which the EU and the UN share their common agendas and fruitfully cooperate is the protection of human rights.[45] Protection of and respect for human rights and fundamental freedoms are deeply embedded in the EU´s legislative framework and are at the heart of its relations with international organisations and third countries.[46] Article 67(1) TFEU describes the EU as ″an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States″.[47] It is worth noting that, in a general manner, the Preamble of the TEU confirms the EU´s universal ″attachment to the principles of liberty, democracy and respect for human rights and

[40] Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326, 26 October 2012.

[41] See Article 208(2) TFEU, *ibid.*

[42] See Article 214(7) TFEU, *ibid.*

[43] See Preamble and Article 1(b) of the Protocol (No 10) on Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union (annexed to the TEU and the TFEU) and Declaration Concerning the Common Foreign and Security Policy, *op. cit*., notes 28 and 40.

[44] See European Union External Action, United Nations: Address by the High Representative/Vice-President Josep Borrell to the UN Security Council on EU-UN Cooperation, New York, 23 February 2023, available at https://www.eeas.europa.eu/eeas/united-nations-address-high-representativevice-president-josep-borrell-un-security-council-eu_en (accessed 7 July 2023).

[45] Hosli, M. O., Tackling Challenges…, *op. cit.*, note 20, pp. 60-61.

[46] See, for example, Pérez de las Heras, B., EU and US External Policies on Human Rights and Democracy Promotion: Assessing Political Conditionality in Transatlantic Partnership, *Romanian Journal of European Affairs*, vol. 15 (2015), no. 2, pp. 80-96.

[47] Consolidated Version of the Treaty on the Functioning of the European Union, *op. cit*., note 40.

fundamental freedoms and of the rule of law".[48] This is further accentuated in Article 2 TEU, which ratifies that the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Additionally, it underscores that those "values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[49]

The EU's commitment to the protection of human rights, both at the universal and regional level, is repeatedly confirmed, from primary and secondary sources of EU law to other official documents and political speeches of the highest representatives of the EU institutions. However, historically, the beginnings of what is now the EU did not specifically have human rights in their focus.[50] Nonetheless, Article 220 of the Treaty establishing the European Economic Community (EEC), in quite a narrow way limited to national rules on human rights protection only, stipulates that the Member States "shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: – the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals; […]".[51] Contrary to that, the other two founding treaties do not contain any direct reference to the protection of human rights.

The EU's receptiveness to fully comply with the principles of the UN Charter is illustrated in the earlier analysis of the legal framework of the EU-UN partnership. As noted, both of the Treaties establishing the EU explicitly cite the UN Charter as a framework for its actions at the global and regional level, with the roots to

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48 Consolidated Version of the Treaty on European Union, *op. cit.*, note 28.

49 *Ibid.*

50 For more, see Ahmed, T.; De Jesús Butler, I., The European Union and Human Rights: An International Law Perspective, *European Journal of International Law*, vol. 17 (2006), no. 4, pp. 771-802; Greer, S.; Williams, A., Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" and "Institutional" Justice?, *European Law Journal*, vol. 15 (2009), no. 4, p. 471; Defeis, E. F., The Treaty of Lisbon and Human Rights, *ILSA Journal of International and Comparative Law*, vol. 16 (2010), no. 2, pp. 414-415; Lawson, R., The EU and Human Rights: Towards a Third Convention, *Netherlands Quarterly of Human Rights*, vol. 20 (2002), no. 2, p. 159; Muravyov, V.; Svyatun, O., Protection of Human Rights in the European Union, *Law of Ukraine: Legal Journal*, nos. 9-10, 2011, p. 347; Candela Soriano, M.; Cheneviere, C., Le législateur et les droits de l´homme, in: Candela Soriano, M. (ed.), *Les droits de l´homme dans les politiques de l´Union européenne*, Larcier, Bruxelles, 2006, pp. 26-27.

51 Traité instituant la Communauté Economique Européenne, *op. cit.*, note 15.

such an approach in the 1957 founding Treaty of Rome (EEC).[52] Therefore, it is not surprising that both the EU and the UN define democracy, the rule of law, and respect for human rights and fundamental freedoms as a basis for the legitimacy of their actions. Heupel and Zürn argue that ″the spread of human rights protection provisions in IOs will continue – or at least not be reversed – as long as conducive conditions prevail, such as the increased transfer of authority to IOs, the spread of self-confident courts that hold IOs or their member states accountable and the existence of model provisions in some IOs that can be emulated by others″.[53]

The EU is deeply involved in the protection of human rights within the UN system, primarily through a manifold contribution to the UN Human Rights Council and the Third Committee of the UNGA (Social, Humanitarian, and Cultural Issues).[54] It speaks out against human rights violations, coordinates country-specific and thematic statements, negotiates resolutions, carries out fact-finding missions, and makes declarations related to the protection of human rights and fundamental freedoms.[55] Its contribution to establishing and developing the special procedures of the UN Human Rights Council, notably Special Rapporteurs on the promotion and protection of various human rights, has been instrumental. In promoting human rights and democracy as central aspects of its external policy, it uses recommendations issued during the Universal Periodic Review of the UN Human Rights Council, a distinctive mechanism of a peer review of human rights records in the UN Member States every 4.5 years.[56]

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[52] Of particular importance are Article 3(5), Article 21(1), and Article 21(2) TEU. See in this paper Section 3 ″Legal Basis of the EU-UN Partnership″, Subsection 3.2 ″The Treaties″. In the context of the EU's interaction with the UN with regard to human rights protection and the interconnectedness of their human rights provisions, Daidouji critically remarked that: ″While it would be an overstatement to claim that EU and UN human rights policy as a whole has been shaped exclusively by the influence of other IOs, the modification and insertion of some specific articles and clauses can be at least partly explained by inter-organizational interactions″. Daidouji, R., Inter-organizational Contestation and the EU…, *op. cit*., note 1, p. 1143.

[53] Heupel, M.; Zürn, M., The Rise of Human Rights Protection in International Organisations – Results and Theoretical Implications, in: Heupel, M.; Zürn, M. (eds.), *Protecting the Individual from International Authority: Human Rights in International Organisations*, Cambridge University Press, Cambridge, 2017, p. 298.

[54] How the European Union and the United Nations Cooperate, *op. cit*., note 16, p. 9; 2022 Annual Report, *op. cit*., note 3, p. 129. For more, see Tuominen, H., Effective Human Rights Promotion and Protection? The EU and its Member States at the UN Human Rights Council, *Journal of Common Market Studies*, vol. 61 (2023), no. 4, pp. 935-950.

[55] 2022 Annual Report, *op. cit*., note 3, p. 128.

[56] See European Union External Action, The European Union and the United Nations, Human Rights, available at https://www.eeas.europa.eu/un-geneva/european-union-and-

It also conducts dialogues with the Office of the UN High Commissioner for Human Rights.[57] Apart from providing unreserved political support to the UN in the domain of human rights, the EU is also an indispensable provider of financial means for programmes and initiatives advocating human rights at a global level, such as the Global Europe Human Rights and Democracy Programme.[58]

When it comes to the regional legislative framework in the domain of human rights, two treaties form the backbone of the EU´s governance – the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights. According to Article 6(3) TEU, ″fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute part of the Union´s law as general principles″.[59] In respect of the Charter, Article 6(1) TEU underlines that the EU ″recognises the rights, freedoms and principles set out in the Charter of

united-nations_en?s=62 (accessed 9 July 2023); United Nations Human Rights Council, Universal Periodic Review, available at https://www.ohchr.org/en/hr-bodies/upr/upr-home (accessed 9 July 2023).

57 2022 Annual Report, *op. cit.*, note 6.

58 *Ibid*., p. 11. Launched in December 2021, with a total allocation of EUR 1.5 billion for the 2021-2027 financial perspective, the objective of the Global Europe Human Rights and Democracy Programme is to promote universal values of human rights and democracy worldwide. It supports activities in third countries and at a global level, as an important complementary tool to other EU programmes at country, local, and regional levels. One part of its allocation, totalling EUR 144 million, is dedicated to the promotion of a global system for human rights and democracy, which includes enhancing strategic partnerships with the UN High Commissioner for Human Rights and the International Criminal Court (ICC). For more, see European Commission, Strengthening Human Rights and Democracy in the World: EU Launches a €1.5 Billion Plan to Promote Universal Values, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6695 (accessed 9 July 2023).

59 Consolidated Version of the Treaty on European Union, *op. cit.*, note 28. Article 6(2) TEU foresees the EU´s accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, pointing out that the respective act would not affect the EU´s competencies as defined in the Treaties. A separate Declaration on Article 6(2) of the Treaty on European Union, complementary to the Consolidated version of the TFEU, specifies that the EU´s accession should be arranged in such a way as to preserve the specific features of EU law, with a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights. See Consolidated Version of the Treaty on the Functioning of the European Union, *op. cit.*, note 40, Declaration concerning the Charter of Fundamental Rights of the European Union. See also Greer, S. *et al*., *Human Rights in the Council of Europe and the European Union*…, *op. cit.*, note 8, pp. 245-248; Van den Berghe, F., The EU and Issues of Human Rights Protection: Some Solutions to More Acute Problems?, *European Law Journal*, vol. 16 (2010), no. 2, pp. 112-157.

Fundamental Rights".[60] In the Declaration concerning the Charter of Fundamental Rights of the European Union, complementary to the TFEU, the Charter's scope is closely intertwined with that of the Convention. Namely, in line with the Declaration, the Charter confirms the fundamental rights guaranteed by the Convention.[61]

The Charter is a legally binding act, which, in the wording of the Declaration concerning the Charter of Fundamental Rights of the European Union, "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties".[62] It reflects a wide array of diverse civil, political, economic, social, cultural, and solidarity rights and freedoms to which the EU is committed.[63]

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[60] Consolidated Version of the Treaty on European Union, *ibid*. On the rights-principles divide concerning the EU Charter of Fundamental Rights, see Lock, T., Rights and Principles in the EU Charter of Fundamental Rights, *Common Market Law Review*, vol. 56 (2019), no. 5, pp. 1201-1226.

[61] The Declaration concerning the Charter of Fundamental Rights of the European Union is annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007. Consolidated Version of the Treaty on the Functioning of the European Union, *op. cit*., note 40.

[62] *Ibid*. For more, see Greer, S. *et al*., *Human Rights in the Council of Europe and the European Union*…, *op. cit.*, note 8, pp. 248-254; O´Neill, A., The EU and Fundamental Rights – Part 2, *Judicial Review*, vol. 16 (2011), no. 4, pp. 374-398.

[63] The Charter grants and protects human dignity; right to life; right to the integrity of the person; prohibition of torture and inhuman or degrading treatment or punishment; prohibition of slavery and forced labour; right to liberty and security; respect for private and family life; protection of personal data; right to marry and right to found a family; freedom of thought, conscience and religion; freedom of expression and information; freedom of assembly and of association; freedom of the arts and sciences; right to education; freedom to choose an occupation and right to engage in work; freedom to conduct a business; right to property, right to asylum; protection in the event of removal, expulsion, or extradition; equality before the law; non-discrimination; cultural, religious and linguistic diversity; equality between men and women; rights of the child; rights of the elderly; integration of persons with disabilities; workers´ right to information and consultation within the undertaking; right of collective bargaining and action; right of access to placement services; protection in the event of unjustified dismissal; fair and just working conditions; prohibition of child labour and protection of young people at work; family and professional life; social security and social assistance; healthcare; access to services of general economic interest; environmental protection; consumer protection; right to vote and to stand as a candidate at elections to the European Parliament; right to vote and to stand as a candidate at municipal elections; right to good administration; right of access to documents; the European Ombudsman; right to petition; freedom of movement and of residence; diplomatic and consular protection; right to an effective remedy and to a fair trial; presumption

The unique facet of the EU-UN multilateral partnership in promoting, developing, advancing, and protecting human rights is the regular determination of the EU´s priority goals and directions of action within the international human rights framework. Every year, the Council of the EU adopts the EU priorities at the UN and the UNGA, which systematically address the pressing human rights issues in the international community. The last ones were adopted in July 2022 and concerned the EU´s priorities at the UN during the 77th session of the UNGA (encompassing the period of September 2022 to September 2023).[64] Adopted by the Council´s conclusions at some of the historically most challenging moments for global peace and security, such as Russia´s war of aggression against Ukraine, and massive geopolitical fractures and crises caused by the COVID-19 pandemic and climate change, the respective priorities repeatedly call attention to the necessity of upholding the rules-based international order founded on the UN Charter. Point 2 of the Council´s conclusions underlines the binding character of the UN Charter in its entirety and stresses the universality of the UN´s founding principles, with peace and security, human rights, gender equality, human dignity, and equal rights of large and small nations at its core. From the perspective of multilateral action in the area of human rights and fundamental freedoms, particularly relevant is the EU´s reaffirmation of its ″conviction that the major challenges of our time, by their nature and global scope, cannot be addressed by countries acting alone but must be tackled together″.[65] In Point 3 of the Council´s conclusions, the EU accentuates that ″multilateralism and the rules-based international order matter″, and affirms that the EU and its Member States will, together with partners, remain strongly committed to ″defending democracy, human rights, the rule of law and ensuring peace and prosperity″.[66] The EU's assertion that ″multilateralism works in times of crisis″ is included in Point 5 of the Council's conclusions, alongside a direct call to multilateral actors – the UN, international financial institutions, the G7, and the G20 – ″to come together and put forward robust multilateral solutions to address the

of innocence and right of defence; principles of legality and proportionality of criminal offences and penalties; and the right not to be tried or punished twice in criminal proceedings for the same criminal offence. See Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C326, 26 October 2012.

64 EU Priorities at the United Nations during the 77th United Nations General Assembly (September 2022 – September 2023), Council conclusions, 11029/22, Brussels, 18 July 2022.

65 *Ibid.*

66 *Ibid.*

negative impacts and root causes of the interlinked crisis".[67] In general terms, the Council´s conclusions single out two overarching goals in the EU´s year-long focus until September 2023 – ensuring peace and prosperity and preparing better for the future, each with a number of specific priorities. One of them is the EU´s vigorous promotion and defence of the universality and indivisibility of human rights, gender equality, democracy, good governance, the rule of law, and anti-corruption, embedded into the first goal of ensuring peace and prosperity as Points 17-21 of the Council´s conclusions. In Point 17, the EU reiterated "its commitment to equality and non-discrimination and to the entitlement of all persons to enjoy the full range of human rights and fundamental freedoms".[68] To that end, it committed itself to support "Our Common Agenda", the UN Secretary-General´s new vision of enhanced international cooperation, designed to accelerate the implementation of the Sustainable Development Goals and other existing agreements,[69] which "mainstreams human rights across all UN pillars".[70] Additionally, in Point 20, it made a commitment to "make all efforts to put human rights at the centre of the UN agenda" and "promote a strengthened global system for human rights by building deeper alliances with partners".[71] It also explicitly confirmed that it would "continue to advocate effective delivery by the UN Human Rights system and its independence as well as sustainable and adequate funding".[72] EU support for the UN human rights framework is also provided by backing the International Criminal Court as a way of strengthening "transitional justice and accountability for serious violations and abuses of human rights law and violations of international humanitarian law", including through "the call for the universal ratification of the Rome Statute and full cooperation with the ICC".[73]

67 *Ibid*.

68 *Ibid*.

69 United Nations, Our Common Agenda, Report of the Secretary-General, New York, 2021, p. 3.

70 Point 20, EU Priorities at the United Nations during the 77th United Nations General Assembly, *op. cit*., note 64.

71 *Ibid*.

72 *Ibid*.

73 Point 21, *ibid*. See also 2022 Annual Report, *op. cit*., note 3, p. 7.

The Council´s narrative on its stance towards multilateral protection of human rights with the UN at its centre can also be excerpted from political messages conveyed through the annual speeches of the President of the European Council at the UNGA, who has been addressing the UN on behalf of the EU since 2011. In his latest address of September 2022, he focused greatly on human rights violations committed during the Russian aggression against Ukraine. His intervention confirmed the EU´s readiness to extend a hand to all those willing to cooperate for the common good of putting an end to horrors and choosing hope, which is the promise and the foundation stone of both the EU and the UN. Moreover, he warned that ″a robust multilateral system requires mutual trust″, and that ″the current system is not inclusive and is not sufficiently representative″, resolutely calling for the reform of the UNSC. In his view, the suspension of a permanent member of the UNSC should be automatic if the respective country starts an unjustified war explicitly condemned by the UNGA.[74] In the same vein, he supported the UN Secretary-General´s proposals on the Common Agenda, which also accentuates the necessity to reform the UNSC.[75]

The 2022 Annual Report on Human Rights and Democracy in the World, prepared by the EU High Representative for Foreign Affairs and Security Policy, provides another critical overview of the EU´s multilateral policy in the domain of human rights protection. Of particular relevance is Chapter 3 of the Report on promoting a global system for human rights and democracy, which points out the specificities of the EU´s multilateral cooperation with the UN, principally with the UNGA and the UN Human Rights Council. Throughout 2022, the EU had a significant say in the UNGA. For example, it supported and, to a certain extent, facilitated the UNGA´s resolutions on the situation in Ukraine, actively participated in the Third Committee meetings of the 77th session of the UNGA, successfully presented resolutions, initiated the cross-regional Joint Statement on the right to education, digital and human rights, etc.[76] With respect to the Human Rights Council, the EU´s role was instrumental in the successful adoption of the EU-led resolutions and statements, which advanced thematic priorities and

[74] European Council, Speech by President Charles Michel at the 77th Session of the UN General Assembly, *op. cit*., note 21. The analogous request for the reform of the UNSC is also included in Point 44 of the European Parliament´s resolution on human rights and democracy in the world and the European Union´s policy on the matter. European Parliament Resolution of 18 January 2023 on Human Rights and Democracy in the World and the European Union´s Policy on the Matter – Annual Report 2022, 2022/2049(INI).

[75] Our Common Agenda, *op. cit*., note 69, p 77.

[76] 2022 Annual Report, *op. cit*., note 3, pp. 130-132.

addressed country situations of concern (e.g. resolutions concerning Myanmar, North Korea, rights of the child, and freedom of religion or belief, adopted by consensus). It also greatly contributed to upholding existing and creating new reporting mandates on country situations. Along the way, the EU´s work was continuously based on the multilateral premise that cross-regional collaboration and mutual interorganisational support are pivotal for the effective protection of human rights.[77] In order to portray the progress in the implementation of priorities elaborated in the 2022 Annual Report, the Report´s text is fully aligned with the Action Plan on Human Rights and Democracy (2020-2024). The respective Action Plan was adopted and implemented under the guidance of the EU Special Representative for Human Rights,[78] considered, in Lambrinidis´ words, as ″an embodiment of the EU´s abiding commitment to fundamental values, enshrined in the Treaties since 2009″.[79]

The Action Plan on Human Rights and Democracy (2020-2024) is a comprehensive document perceived as the EU´s roadmap for setting a renewed EU five-year operational agenda built on the long-standing experience of the EU´s strong commitment to human rights and democracy, effective participation in multilateral fora and building new cross-regional alliances.[80] It implements the 2012 Strategic Framework on Human Rights and Democracy, defining the central objectives, principles, and priorities of EU external policies.[81] The Action

[77] *Ibid*., pp. 132-133.

[78] The EU Special Representative for Human Rights is mandated to promote and enhance the effectiveness of EU external policy on human rights as well as to advance a positive narrative on human rights. The Special Representative works in close collaboration with the European External Action Service, which provides full assistance in the Representative´s work. One of the primary tasks is to engage with the UN and to deepen political cooperation in promoting the protection of human rights, responding to urgent human rights violations, advocating compliance with international humanitarian law, and supporting international criminal justice. In addition, the Special Representative regularly speaks at international human rights meetings organised by the UN, such as those of the UN Human Rights Council. See 2022 Annual Report, *op. cit*., note 3, pp. 13, 14-20; European Union External Action, EU Special Representatives, available at https://www.eeas.europa.eu/eeas/eu-special-representatives_en (accessed 10 July 2023).

[79] Lambrinidis, S., The Positive Narrative…, *op. cit*., note 1, p. 33.

[80] 2022 Annual Report, *op. cit*., note 3, pp. 6, 129.

[81] Council of the European Union, EU Strategic Framework on Human Rights and Democracy, 11855/12, Luxembourg, 25 June 2012. The 2020-2024 Action Plan was preceded by two action plans on human rights and democracy: 2012-2014 and 2015-2019. See European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, EU Action Plan on Human Rights and Democracy 2020-2024, JOIN(2020) 5 final, Brussels, 25 March 2020, p. 1.

Plan establishes five lines of action, one of them being the promotion of a global system for human rights and democracy through, inter alia, enhancing strategic cooperation with the UN Office of the High Commissioner for Human Rights, supporting the effectiveness of the UN Human Rights Council, and ensuring better synergies with the UNGA Third Committee, and other multilateral human rights fora.[82] The respective lines of action are further translated into more elaborated pragmatic tools in thirteen separate EU Guidelines on Human Rights, adopted for the EU Member States at the ministerial level in 2021. The aim of the Guidelines is to provide an effective framework for the coherent action of EU Member States with respect to thirteen human rights subjects: torture and ill treatment, the death penalty, freedom of religion or belief, rights of the child, children in armed conflict, non-discrimination, protecting human rights of LGBTI persons, violence against women and girls, freedom of expression online and offline, compliance with International Humanitarian Law, human rights defenders, safe drinking water and sanitation, and human rights dialogues.[83]

Another indispensable document setting the direction of the EU´s multilateral approach to promoting respect for human rights and fundamental freedoms worldwide is the annual European Parliament´s Report on human rights and democracy in the world and the European Union´s policy on the matter. In the latest Report, adopted in January 2023, the European Parliament insisted that ″the protection of human rights, fundamental freedoms and the dignity of every human being must be the cornerstone of the Union´s external policy″ and strongly encouraged the EU ″to strive for a continued ambitious commitment to make the protection of human rights a central part of all EU policies […]″.[84] The Parliament´s stance towards the EU-UN partnership in the domain of human rights is elaborated in a separate title dedicated to multilateralism and the EU´s work at a multilateral level (Points 39-44). Some of the most critical views include the Parliament´s reaffirmation that ″the effective protection of human rights around the world requires strong international cooperation at a multilateral level″, with the indispensable involvement of the UN and its bodies ″as

[82] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Annex to the Joint Communication to the European Parliament and the Council, EU Action Plan on Human Rights and Democracy 2020-2024, *ibid.*, p. 10.

[83] Thirteen EU Guidelines are published as separate documents, which are available at European Union External Action, EU Human Rights Guidelines, https://www.eeas.europa.eu/eeas/eu-human-rights-guidelines_en (accessed 10 July 2023).

[84] European Parliament Resolution of 18 January 2023 on Human Rights and Democracy in the World and the European Union´s Policy on the Matter – Annual Report 2022, *op. cit*., note 74.

the main forum which must be able to effectively advance the efforts for peace and security, sustainable development and respect for human rights and international law".[85] Particularly important is the Parliament´s call for the EU and its Member States "to continue supporting the work of the UN, both politically and financially, including all UN human rights bodies, notably the treaty bodies and special procedures" and "to strive to speak with one voice both at the UN and in other multilateral forums, and to promote the highest standards on human rights in this way".[86] The Parliament rightly expressed its concern about "growing attacks against the rules-based global order by authoritarian regimes, including through challenging the universality of human rights, relativising them, claiming them to be an instrument of cultural hegemony deployed by Western countries, eroding international human rights law by reinterpreting it, and undermining the functioning of UN bodies and mechanisms to hold states accountable for human rights violations".[87] To that end, it invited the EU "to lead a pact and work in alliance with other democracies and like-minded partners to strengthen multilateral organisations, and to defend the rules-based global order".[88]

The modes of integrating the universal human rights postulates in all EU policies can be well illustrated in the example of the overarching Cohesion policy, which aims at "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions".[89] In other words, it promotes the EU´s overall harmonious development by setting the framework for manifold actions contributing to strengthening the EU´s economic, social, and territorial cohesion. This includes funding projects supporting a wide array of investment needs, such as economic growth, business competitiveness, job creation, improvements to citizens´ quality of life, and sustainable development. Such a broad and far-reaching mandate requires substantial financial resources, so the Cohesion policy is nowadays the EU´s main

[85] Point 39, *ibid.*

[86] *Ibid.*

[87] Point 43, *ibid.*

[88] *Ibid.*

[89] "The least favoured regions" are particularly "rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions". Article 174, Consolidated Version of the Treaty on the Functioning of the European Union, *op. cit.*, note 40. See also Glossary in Cini, M.; Pérez-Solórzano Borragán, N. (eds.), *European Union Politics*, 7th Edition, Oxford University Press, Oxford, 2022, p. 452.

investment policy.[90] The rules governing the implementation of Cohesion policy funds explicitly oblige the EU Member States to respect the horizontal principles and obligations laid down in principal human rights treaties, both regional and international. For example, Recital 6 of the 2021-2027 Common Provisions Regulation stipulates that, in the implementation of EU funds, the EU Member States should respect the obligations set out in the EU Charter of Fundamental Rights, the UN Convention on the Rights of the Child, and the UN Convention on the Rights of Persons with Disabilities.[91]

5. EU-UN COOPERATION IN THE DOMAIN OF HUMANITARIAN ASSISTANCE

The primary EU provision regulating EU-UN cooperation in the area of humanitarian assistance is Article 214(7) TFEU, which specifies that the EU ″shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system″. Pursuant to paragraph 2 of the same Article, those ″humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination″.[92] The respective provisions are part of Chapter 3 of the TFEU (under Title III ″Cooperation with Third Countries and Humanitarian Aid″), in its entirety codifying the EU´s actions in the field of humanitarian aid ″intended to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations″.[93] The term ″EU´s actions″ encompasses both the EU´s and its Member States´ measures,

[90] The 2021-2027 Cohesion policy´s allocation is EUR 392 billion, which is almost a third of the total 2021-2027 EU budget. See European Commission, Cohesion Policy, available at https://ec.europa.eu/regional_policy/policy/what/investment-policy_en (accessed 11 July 2023).

[91] See Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 Laying Down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, Official Journal of the European Union, L 231, 30 June 2021.

[92] Consolidated Version of the Treaty on the Functioning of the European Union, *op. cit.*, note 40.

[93] Article 214(1), *ibid*.

″which complement and reinforce each other″.[94] The measures implementing the EU´s humanitarian aid are established by the European Parliament and the Council in the ordinary legislative procedure.[95] It is important to note that Article 214(4) TFEU represents a critical extension of Article 21 TEU as it opens up the possibility for the EU to conclude agreements with third countries and competent international organisations aiming to achieve the objectives of Article 21.[96] The involvement of the EU in humanitarian assistance is also stipulated by Article 43(1) TEU on the use of civilian and military means in the context of the common security and defence policy. In accordance with the respective provision, the EU´s missions used outside the EU for peacekeeping, conflict prevention, and strengthening international security in accordance with the principles of the UN Charter include humanitarian and rescue tasks as well.[97]

The latest EU position on humanitarian assistance as a key pillar of the EU´s external action is precisely summarised in the 2021 Communication from the Commission to the European Parliament and the Council on the EU´s Humanitarian Action: New Challenges, Same Principles. The Communication presents how the EU, together with other international partners, can tackle an unprecedented set of humanitarian challenges in times of severe discrepancy between humanitarian needs and available resources. The most commonly identified factors, which initiate and fuel those challenges, include armed conflicts, the COVID-19 pandemic, climate change, global population growth, and failed governance.[98] The EU´s contribution to providing humanitarian assistance is decisive in the international community. Indeed, the EU is the world´s leading

[94] Article 214(1), *ibid.* The shared competence is regulated by Article 4(4) TFEU as well, which lays down the EU´s competence to carry out activities and conduct a common policy in the areas of development cooperation and humanitarian aid, stressing that ″the exercise of that competence shall not result in Member States being prevented from exercising theirs″. In addition, the use of capabilities provided by the Member States in the performance of humanitarian aid outside the EU is foreseen by Article 42(1) TEU on the common EU foreign and security policy. Consolidated Version of the Treaty on European Union, *op. cit*., note 28.

[95] Article 214(3), Consolidated Version of the Treaty on the Functioning of the European Union, *op. cit*., note 40.

[96] According to Article 214(4) TFEU, ″[t]he Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union.″ *Ibid.*

[97] Consolidated Version of the Treaty on European Union, *op. cit*., note 28.

[98] Communication from the Commission to the European Parliament and the Council on the EU´s Humanitarian Action: New Challenges, Same Principles, COM(2021) 110 final, Brussels, 10 March 2021, p. 1.

humanitarian donor,[99] providing around 36% of global humanitarian assistance. For the 2021-2027 financial period, the EU allocated almost EUR 11.5 billion for humanitarian funding purposes. As noted in the Communication, such an active approach to humanitarian assistance enables the EU ″to project its values globally″.[100] In accordance with the partnership principle, the EU´s humanitarian assistance on the ground is secured through more than 200 partners, including the UN agencies. By way of example, the UN Refugee Agency is one of the EU´s principal humanitarian partners.[101] The EU regularly and effectively responds to UN humanitarian appeals. In the past ten years, alongside a few other donors, it intensified its efforts in humanitarian assistance, adding to the increase of global humanitarian funding for UN humanitarian appeals from EUR 4.1 billion in 2012 to EUR 15 billion in 2020. However, disregarding global efforts, there was an immense funding gap of EUR 17.5 billion in 2020, to a great extent instigated by the COVID-19 crisis.[102] The extent of the EU´s humanitarian aid contribution is best illustrated by the data of the Financial Tracking Service managed by the UN Office for the Coordination of Humanitarian Affairs (OCHA). According to the latest statistics, the top ten donors in 2023 included the European Commission as well as the Governments of France, Germany, the Netherlands, and Sweden. Their share in humanitarian assistance accounted for almost one-third of global funding, and of all the ten donors collectively, 83%. Nonetheless, the respective contribution covered only 26.5% of the 2023 UN humanitarian appeals. The funded countries predominantly comprised Ukraine, Syria, Yemen, and Ethiopia, and resources were mostly channelled into food security, health, emergency shelters, camp coordination/management, support services, and multi-sectoral emergencies. The surprising detail is that there are no spending specifications per sector for 10.5% of the overall reported funding published by the OCHA´s

[99] See Hix, S.; Høyland, B., *The Political System of the European Union*, 4th Edition, Bloomsbury Academic, London – New York, 2022, p. 344.

[100] Communication from the Commission to the European Parliament and the Council on the EU´s Humanitarian Action: New Challenges, Same Principles, *op. cit.*, note 98; European Union External Action, Humanitarian & Emergency Response, available at https://www.eeas.europa.eu/eeas/humanitarian-emergency-response_en (accessed 11 July 2023). For a more comprehensive perception of the scope and relevance of the EU´s contribution to humanitarian assistance, it is noteworthy to call attention to the data that the EU represents only 8% of the world´s population and 20% of the world´s economy. See Lambrinidis, S., The Positive Narrative…, *op. cit.*, note 1, p. 37.

[101] European Parliament, Humanitarian Aid, available at https://www.europarl.europa.eu/factsheets/en/sheet/164/humanitarian-aid (accessed 12 July 2023).

[102] Communication from the Commission to the European Parliament and the Council on the EU´s Humanitarian Action: New Challenges, Same Principles, *op. cit.*, note 98, p. 2.

Financial Tracking Service.[103] The distinctive feature of the EU´s humanitarian aid is that it was adapted to the needs of various groups, such as LGBTI populations in Türkiye and Bangladesh, in accordance with human rights and humanitarian principles.[104] As for the EU´s further objectives regarding its fruitful partnership with the UN in the domain of humanitarian assistance, according to the Communication on the EU´s humanitarian action, ″effective multilateralism and UN-led coordination will remain central to the EU´s humanitarian action, as key enablers of a principled and coherent humanitarian response″ in which cooperation with diverse partners ″is essential to make a difference and deliver quality results on the ground″.[105] In that regard, the EU made a commitment to further strengthen its engagement in international dialogues on humanitarian issues with the UNGA, the UN Economic and Social Council, and the governing bodies of UN agencies, funds, and programmes.[106]

Speaking of the European Commission´s significant contribution to providing humanitarian assistance, of vital importance for the Commission´s engagement in that global endeavour is its Directorate-General for European Civil Protection and Humanitarian Aid Operations (DG ECHO). With its roots in the 1992 European Community Humanitarian Office, inaugurated in times of manifold and complex crises – the Kurdish refugee crisis, the Bangladeshi deadly tropical cyclone, African famine, and armed conflicts in the former Yugoslavia – the DG ECHO plays a vital role in providing relief supplies and services through intermediary organisations in regions affected by crises, delivering humanitarian aid, and coordinating the civil protection assistance scheme. With respect to humanitarian aid, the DG ECHO has shared competence with EU Member States. Already in 1997, it established a close link with the UN by appointing the first EU Emergency Relief Coordinator to the UN. Nowadays, for the purpose of providing humanitarian assistance, it closely collaborates with around twenty UN bodies and entities, such as the UN Food Agriculture Organization, the Office of the UN High Commissioner for Human Rights, the UN´s Development

[103] The largest donor in 2023 was the Government of the United States of America (43.7%). The other top ten donors included the governments of Japan, Canada, Saudi Arabia, and Norway. See UN Office for the Coordination of Humanitarian Affairs, Humanitarian Aid Contributions, available at https://fts.unocha.org/ and https://fts.unocha.org/global-funding/overview/2023 (accessed 12 July 2023).

[104] See 2022 Annual Report, *op. cit*., note 3, p. 53.

[105] Communication from the Commission to the European Parliament and the Council on the EU´s Humanitarian Action: New Challenges, Same Principles, *op. cit*., note 98, p. 5.

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

Programme, the UN Office for Disaster Risk Reduction, the UN Educational Scientific and Cultural Organization, the UN Children´s Fund, the Office of the UN High Commissioner for Refugees, the UN Entity for Gender Equality and Empowerment of Women, etc.[107]

The EU´s humanitarian aid operations encompass practically the whole world;[108] however, the EU´s annual humanitarian budget for 2023 of EUR 1.7 billion was largely directed to Africa, the Middle East, and Türkiye.[109] In fact, Africa is also the continent where the EU and the UN cooperate the most.[110]

The example of Ukraine clearly demonstrates the relevance of the EU´s contribution to the global scheme of humanitarian assistance and the necessity of multilateral partnerships for the advancement of its humanitarian efforts. Right from the onset of the illegal Russian invasion of Ukraine in 2014, the EU committed itself to providing substantial humanitarian funding to Ukraine. *In concreto*, in the period of 2014-2021, the European Commission directed EUR 194 million to humanitarian aid programmes in Ukraine, while in 2022 the allocation increased to EUR 485 million. In the first half of 2023, it accounted for EUR 200 million, which means that Ukraine received the largest share of the EU´s humanitarian

[107] European Commission, European Civil Protection and Humanitarian Aid Operations, EU Humanitarian Aid 30th Anniversary, available at https://civil-protection-humanitarian-aid.ec.europa.eu/who/30-years-eu-humanitarian-aid_en (accessed 14 July 2023); European Commission, About European Civil Protection and Humanitarian Aid Operations, available at https://civil-protection-humanitarian-aid.ec.europa.eu/who/about-echo_en (accessed 14 July 2023).

[108] The DG ECHO´s humanitarian assistance is present in Africa (Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of the Congo, Ethiopia, Kenya, Madagascar, Mali, Mauritania, Mozambique, Niger, Nigeria, the Sahel region, Somalia, South Sudan, Southern Africa and the Indian Ocean region, Sudan, Uganda, and Zimbabwe), Asia and the Pacific (Afghanistan, Bangladesh, Central Asian republics – Kyrgyzstan, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan, Iran, Myanmar/Burma, Nepal, North Korea, Pacific Island countries, Pakistan, Philippines, and the Mekong region – Cambodia, Laos, and Vietnam), Europe (Armenia, Azerbaijan, Bosnia and Herzegovina, Moldova, Türkiye, and Ukraine), Latin America and the Caribbean (Caribbean, Central America and Mexico, Colombia, Haiti, South American countries, and Venezuela), and the Middle East and Northern Africa (Algeria, Egypt, Iraq, Jordan, Lebanon, Libya, Palestine, Syria, and Yemen). See European Commission, European Civil Protection and Humanitarian Aid Operations, Where We Work, available at https://civil-protection-humanitarian-aid.ec.europa.eu/index_en (accessed 15 July 2023).

[109] European Commission, European Civil Protection and Humanitarian Aid Operations, EU Humanitarian Aid 30th Anniversary, *op. cit.*, note 107.

[110] See Vale de Almeida, J., EU-UN Cooperation, *Fletcher Forum of World Affairs,* vol. 40 (2016), no. 2, p. 160.

aid funding among affected countries in the world in 2023.[111] Those funds were spent primarily on providing shelter, cash assistance, healthcare, food and basic needs, education in emergencies, water, sanitation and hygiene, mine action, etc.[112] On a number of occasions, the EU and the UN joined efforts to secure the optimal level of support for Ukraine. For example, the European Investment Bank (EIB) provided funds for the first Early Recovery Programme (ERP) multi-sector framework loan to Ukraine, which had a twofold purpose – to support ″early recovery investments on critical infrastructure in conflict-affected areas″ as well as ″basic needs to ensure decent living conditions for displaced people and host communities″.[113] The complexity of the planning and implementation of multi-sector investment schemes prompted the EIB to request the technical assistance of the United Nations Development Programme (UNDP) for capacity development and project cycle support to improve the management of the programme at a regional level and the preparation and implementation of the sub-projects at local government levels. The technical support encompassed around 100 infrastructure projects, which included hospitals, social infrastructure, and municipal residential facilities.[114] Another example of the fruitful EU-UN partnership was the EU´s investment of EUR 35 million into the UNDP´s Resilience Building and Recovery (RBR) Programme for Ukraine in late 2022, the purpose of which is to support the early recovery, rebuilding, and development of Ukraine in line with the UN Sustainable Development Goals. The EU´s funds were directed towards operations designed to enhance access to quality public services (e.g. healthcare facilities), and strengthen community security, public safety, and the social fabric at the local level.[115] Given the horrific scale of war damage and ongoing attacks on Ukrainian territory, the population, and sovereignty in general, in the 2022 Communication on Ukraine Relief and

[111] European Commission, European Civil Protection and Humanitarian Aid Operations, in Ukraine since 2014, available at https://civil-protection-humanitarian-aid.ec.europa.eu/where/europe/ukraine/1-year-eu-solidarity-ukraine_en (accessed 15 July 2023).

[112] See European Commission, European Civil Protection and Humanitarian Aid Operations, Ukraine, available at https://civil-protection-humanitarian-aid.ec.europa.eu/where/europe/ukraine_en (accessed 15 July 2023).

[113] United Nations Development Programme, Ukraine Early Recovery Programme, available at https://www.undp.org/ukraine/projects/ukraine-early-recovery-programme (accessed 15 July 2023).

[114] *Ibid*.

[115] See United Nations Development Programme, European Union Expands Programme of Support to Ukraine, available at https://www.undp.org/european-union/press-releases/european-union-expands-programme-support-ukraine (accessed 15 July 2023).

Reconstruction, the European Commission acknowledged that reconstruction and resilience support, which includes humanitarian aid, may potentially span more than a decade. Nevertheless, it expressed its strong commitment to work closely with international partners, which inevitably includes the UN, in meeting Ukraine´s reconstruction and humanitarian aid needs.[116]

6. CONCLUSION

In an increasingly globalised and interdependent world, effective multilateral cooperation forms the backbone of the international community. There are two major concluding remarks that build upon the respective premise and that can be derived from the paper´s research.

First, the EU and the UN are commonly regarded as a nucleus of the advancement of human rights and humanitarian assistance worldwide. Of different characters, they play different roles in international relations, but in mutual synergies, their objectives related to human rights and humanitarian assistance regularly converge and intertwine. The UN is a universal normative power backed by regional frameworks and actions. The EU´s input in that global endeavour is indispensable – it initiates and actively contributes to the codification of international law, embeds the UN´s principles and values into its own legislation, safeguards and implements the human rights and humanitarian assistance objectives on the ground, and supports the universal system by providing large-scale financial aid. The current challenging landscape provides ample ground for the hypothesis that there is no alternative to the EU-UN partnership. However, their future multilateral efforts should better align with the ″fit-for- purpose″ principle and advocate a higher degree of inclusiveness with other regional organisations.

Second, the recent example of Russia´s military aggression on Ukraine outlines the variety and manifold character of the EU´s and the UN´s measures, which complement each other in efforts to adequately protect human rights and provide humanitarian assistance to the affected population and territories. The magnitude of challenges is enormous and endorses the significance of multilateral power. In fact, the experience of a myriad of armed conflicts worldwide, either international or non-international, confirms the importance

[116] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – Ukraine Relief and Reconstruction, COM(2022) 233 final, Brussels, 18 May 2022, pp. 3, 5.

and indispensability of the EU-UN partnership in the realm of human rights and humanitarian assistance. The essence of these conflicts is best summarised in Degan´s analysis of the basis for the settlement of disputes in the former Yugoslavia, in which this bard of the Croatian academic community in the field of international law argued that:

˝It should be concluded that many difficult and long-lasting disputes arise when one of the parties insists on some of its ´national interests´ that are not legally based and do not represent interests protected by international law (legal rights and interests). Such disputes may or may not degenerate into bloody conflicts, with enormous human and material sacrifices on both sides˝.[117]

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[117] The original wording of the Degan´s conclusion reads as follows: *˝Valja zaključiti da mnogi teški i dugotrajni sporovi izbijaju kada jedna od strana inzistira na nekim svojim ´nacionalnim interesima´ koji nisu pravno utemeljeni i ne predstavljaju interese zaštićene međunarodnim pravom* (legal rights and interests). *Takvi se sporovi mogu, ali ne moraju, izroditi u krvave sukobe, uz goleme ljudske i materijalne žrtve s obiju strana˝*. Degan, V. Đ., Međunarodno pravo kao osnova rješavanja preostalih sporova na području bivšeg SFRJ, *Adrias: zbornik radova Zavoda za znanstveni i umjetnički rad Hrvatske akademije znanosti i umjetnosti u Splitu*, no. 12, 2005, p. 49.

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Sažetak:

PODRŽAVANJE GLOBALNOG LEGITIMITETA UJEDINJENIH NARODA U ZAŠTITI LJUDSKIH PRAVA I HUMANITARNOJ POMOĆI UNUTAR EUROPSKE UNIJE – PRAVNI PRESJEK PRIRODNOG PARTNERSTVA EU-A I UN-A

Promicanje poštovanja ljudskih prava i pružanje humanitarne pomoći primjeri su temeljnih zajedničkih vrijednosti i ciljeva agende EU-a i UN-a, duboko ukorijenjeni u pretpostavci da se zajedničke vrednote mira, jednakih prava, slobode i ljudskog dostojanstva mogu učinkovito braniti samo učinkovitim multilateralizmom. Ovaj članak pruža dubinsku analizu pravnog okvira koji podržava partnerstvo EU-a i UN-a te ističe ključne aspekte sustava EU-a i UN-a koji jamče zaštitu ljudskih prava i nesmetani pristup humanitarnoj pomoći. Istraživanje se nadovezuje na čl. 21. Ugovora o EU-u, koji postavlja temelje djelovanja EU-a na međunarodnoj sceni u skladu s načelima Povelje UN-a i međunarodnog prava, uključujući promicanje multilateralnih rješenja za zajedničke izazove u području ljudskih prava i humanitarne pomoći. Poseban je naglasak stavljen na prioritete EU-a za UN, koji se svake godine usvajaju zaključcima Vijeća radi usmjeravanja godišnjeg rada EU-a, prilagođenog UN-ovoj agendi i općim poslovima. Uz istraživanje trenutačnog pozitivnog prava i podudarne znanstvene literature, članak pruža uvid u najbolje prakse prirodnog partnerstva EU-a i UN-a na terenu, poput ranog oporavka ratom pogođenih zajednica u Ukrajini kroz Program UN-a za razvoj (UNDP). Posljedično, članak kombinira doktrinarna pravna istraživanja sa socio-pravnim pristupom kako bi se istaknule specifičnosti višeslojne suradnje EU-a i UN-a u vezi sa zaštitom ljudskih prava i humanitarnom pomoći.

Ključne riječi: *Europska unija; Ujedinjeni narodi; ljudska prava; humanitarna pomoć.*

ANNEX G OF THE 2001 AGREEMENT ON SUCCESSION ISSUES: SELF-EXECUTING OR NOT?

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Following the dissolution of Yugoslavia, successor States concluded in 2001 the Agreement on Succession Issues, which aimed at resolving different issues arising from the break-up of the State. Specifically, Annex G of the Agreement regulated the issue of the protection of private property and acquired rights of citizens and legal persons of ex-Yugoslavia, requiring their protection by the successor States. Before national courts of the successor States, as well as before international judicial and arbitral bodies, there has been a number of proceedings in which physical and legal persons claimed violation of their protected rights. The principal legal issue in the course of those proceedings was whether the said Annex G constituted a self-executing treaty, apt for application without any further measures being taken, or if it was a non-self-executing one, creating a legal obligation, but not being automatically applicable and justiciable in courts. The question of whether or not an agreement is self-executing depends primarily on its own provisions and their interpretation, in accordance with the 1969 Vienna Convention on the Law of Treaties. By applying the Vienna Convention and examining the relevant national and international case law, the authors conclude that Annex G is not self-executing.

Keywords: *2001 Agreement on Succession Issues; Annex G, successor States; self-executing treaty; 1969 Vienna Convention on the Law of Treaties; case law.*

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1. INTRODUCTION

The dissolution of the Socialist Federative Republic of Yugoslavia was not easy. It was accompanied by bloody wars in Croatia, Bosnia and Herzegovina, and Kosovo, instigated by the Milošević regime in Serbia. After the dissolution, the successor States had many unresolved issues, some connected to the war, such as responsibility for war crimes and war damages, people missing in the war, exchange of prisoners of war, and other issues connected to the succession, such as property, individual rights, nationality, pensions, and many others.

In 2001 the Agreement on Succession Issues (hereafter: ASI) was concluded, attempting to resolve the relevant issues pertaining to property.[1] The ASI consists of seven annexes, each dealing with a specific aspect of succession:

Annex A: Movable and immovable property;

Annex B: Diplomatic and consular properties;

Annex C: Financial assets and liabilities (other than those dealt with in the Appendix to this Agreement);

Annex D: Archives;

Annex E: Pensions;

Annex F: Other rights, interests, and liabilities;

Annex G: Private property and acquired rights.

Annex G gave rise to a number of cases before national courts of the successor States, as well as before international judicial and arbitral bodies in which the applicants claimed violation of the protected rights. In particular, disputes concerned so-called socially owned property (SOP)[2] when the alleged owner was registered in a different successor State. The most interesting property was found in the coastal area of Croatia where many ″socially owned companies″ from all over Yugoslavia had summer resorts. On the other hand, the protection of private property of physical persons in accordance with Annex G did not turn

[1] Agreement on Succession Issues, United Nations, Treaty Series, vol. 2262, p. 251, published in *Narodne novine – Međunarodni ugovori (Official Gazette – Treaties),* no. 2/2004.

[2] In former Yugoslavia, so-called ″socially owned companies″ (*društvena poduzeća*) were given certain quasi-ownership rights over property in social ownership (SOP), such as the right to use it (*pravo korištenja*), the right to administer it (*pravo upravljanja*), or the right to dispose of it (*pravo raspolaganja*). According to the Croatian legislation enforced after 1991 and after independence was gained, socially owned companies had to undergo transformation to (proper) companies in order to own their property. Obviously, the majority of Serbian companies failed to meet these legal requirements since the two countries were at war.

out to be disputable, as these rights were consistently respected, at least where Croatia was concerned.[3]

According to Annex G, the ″acquired rights of citizens and other legal persons of the SFRY shall be protected by successor States″. Croatian courts have almost unanimously taken the stance that Annex G is not automatically applicable and that additional bilateral agreements specifying the mode of implementation need to be concluded. Some successor States have concluded such bilateral agreements, while others have not.[4] The most complex situation exists between Croatia and Serbia, as their relations are burdened by the consequences of the war. There have been attempts by these two States to conclude a relevant bilateral agreement but no success has been achieved so far. They do not seem to be able to agree on certain issues, primarily that of compensation for war damages.

The central dispute between the two States is with regard to interpretation of the two relevant provisions of Annex G – the provisions of Articles 2 and 4. Article 2 guarantees that successor States will recognise, protect and restore the rights to movable and immovable property located in the successor States on 31 December 1990, and, if such restoration is not possible, they will pay compensation. Furthermore, Article 4 provides that ″the successor States shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent authorities″.

The main legal issue here is whether or not Article 4 should be interpreted as requiring extra measures to be taken for the state obligation under Article 2 to be implemented. In other words, can the theory of self-executing and non-self-executing treaties be relevant in this case? To determine the status and applicability of the relevant treaty provisions contained in Annex G, this paper first aims at discussing the position of treaties within the Croatian legal system, which is best known to the authors, and, second, at interpreting those provisions in accordance with the 1969 Vienna Convention on the Law of Treaties (hereafter: Vienna Convention).[5] It further analyses the relevant judicial practice of the national

[3] Statement by the State Secretary Andreja Metelko-Zgombić, 26 February 2019, https://www.slobodnaevropa.org/a/29792070.html (accessed 28 July 2023).

[4] Croatia, Slovenia and North Macedonia have concluded bilateral agreements with each other; Bosnia and Herzegovina executed a bilateral agreement with North Macedonia and exchanged a draft bilateral agreement with Serbia.

[5] Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331 (hereinafter: Vienna Convention). Yugoslavia was a State party, so all successor States are State parties by succession.

courts of Croatia, comparing it to the case law of Serbian and Bosnian national courts to the extent it was available. In addition to national case law, the case law of the European Court of Human Rights (hereafter: ECtHR) is also examined.

Finally, a conclusion on the (non-)self-executing character of Annex G will be presented.

2. STATUS OF TREATIES WITHIN THE CROATIAN LEGAL SYSTEM

Each domestic legal system provides for its own hierarchy of legal norms. Accordingly, the Croatian Constitution in its Article 134 provides that ″international treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over domestic law. Their provisions may be amended or repealed only under the conditions and in the manner specified therein or in accordance with the general rules of international law″.[6] It derives from this constitutional norm that international treaties are hierarchically above the laws, but they retain a sub-constitutional status. What does that mean in terms of classifying Croatia as a state which accepts either a monist or dualist approach towards the relationship between national and international law?

Monist States take the approach that national and international law are part of a unique legal system, in which there can be either the primacy of national law or the primacy of international law. Due to the current development of international law, practically no State advocates at present the primacy of national law.[7] Therefore, the currently existing monist States generally advocate the primacy of international law. In those States, international treaties are an integral

[6] Official translation of the Croatian Constitution by the Constitutional Court of the Republic of Croatia, available at https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf (accessed 21 September 2023). It should be noted, though, that the official translation is imprecise, inasmuch as it says that ″treaties… shall have primacy over domestic law″. Such phrasing implies that treaties are above an entire corpus of domestic law, which is not correct. As explained further on, in the Croatian legal system, treaties are hierarchically above laws *(iznad zakona)* and, consequently, above sub-legal acts, but they are under the Constitution.

[7] Wallace, R. M. M., *International Law*, 5th edn., Sweet & Maxwell, London, 2005, p. 37; Degan, V. Đ., *Međunarodno pravo*, Školska knjiga, Zagreb, 2011, p. 16.

part of the national legal system; they are directly applicable before national courts, and those national courts are obliged to ″interpret and apply″ national laws in a manner not inconsistent with that State´s international obligations.[8]

On the other hand, dualist States consider national and international law as two distinct legal systems. National courts will apply national laws, while international courts will apply international law. If national law is not in conformity with the State´s international obligations, the national court will nevertheless apply national law, whereas a State will bear international responsibility. International law is, therefore, not part of a State´s domestic legal system, although it may be adopted or transformed into domestic law, by an act of the State´s legislative body. In that case, national courts will be obliged to apply those norms, although it will not be considered that those courts apply international law, but domestic law, which has the same content as the international law norm in question.

It may be concluded that Croatia is neither a purely monist, nor a purely dualist State.[9] If it were a monist State, international law would have primacy over national law, which for Croatia is only partly true. The fact is that under Article 134 of the Constitution treaties are part of the Croatian legal system and are hierarchically above the law, which is an element of monism. But there are two circumstances that depart from the monist theory: first, treaties are not above the Constitution, which points to the conclusion that it is ultimately the national law that retains the highest hierarchical value, and, second, it is only treaties and not the entire corpus of international law that have primacy over the national legal system. Customary international law, as well as general principles of law – which both, along with treaties, constitute sources of international law, under the Statute of the International Court of Justice – do not hold such a position in the Croatian legal system.

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[8] Omejec, J., Legal Framework and Case-law of the Constitutional Court of Croatia in Deciding on the Conformity of Laws with International Treaties, Council of Europe, European Commission for Democracy through Law (Venice Commission) in Co-operation with the Constitutional Court of Montenegro and the OSCE, Strasbourg, 17 November 2009, CDL-JU(2009)035, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2009)035-e (accessed 28 July 2023).

[9] As this is often the case with States, the ″monist″ and ″dualist″ approach is sometimes criticised as being ″too dichotomous, since there are various degrees of direct application of treaties″. Jackson, J. H., Status of Treaties in Domestic Legal Systems: A Policy Analysis, *American Journal of International Law*, vol. 86 (1992), no. 2, p. 314.

In spite of the fact that Croatia is not a purely monist State, it is not disputed that international treaties are an integral part of the Croatian legal system.[10] This, however, is not to say that all treaties that are part of the domestic legal system are directly applicable by Croatian courts. The additional requirement is found in what was originally American constitutional theory and practice,[11] but which has now spread across other countries,[12] including Croatia.[13] This theory makes a distinction between self-executing and non-self-executing treaties, depending on whether the treaty needs any additional national action to be justiciable, that is, to be applied by a national judge.[14]

[10] Under Article 115/117 of the Croatian Constitution, ″Courts shall administer justice according to the Constitution, law, international treaties and other valid sources of law″.

[11] Sloss, D., Non-self-executing Treaties: Exposing a Constitutional Fallacy, *U.C. Davis Law Review*, vol. 36 (2002), no. 1, pp. 3-4.

[12] Henckaerts, J. M., Self-executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide, *International Journal of Legal Information*, vol. 26 (1998), nos. 1-3, p. 56; Riesenfeld, S. A., The Doctrine of Self-executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community, *American Journal of International Law*, vol. 67 (1973), no. 3, p. 504.

[13] Croatia is a State party to a number of conventions, which no doubt form part of its domestic law, but require the adoption of extra measures, primarily laws, to be implemented. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide provides in its Article 1 that ″the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish″. One could not say that this provision per se is not part of the Croatian legal system. However, in order for effective prevention and punishment of the crime of genocide, Croatia needs to provide for genocide as a crime under its Criminal Code, and provide sanctions in the case of its commission. This has been done in the Croatian Criminal Code, Article 88. Similarly, Croatia is a State party to the International Convention for the Suppression of the Financing of Terrorism, which in its Article 4 provides that ″each State Party shall adopt such measures as may be necessary: (a) To establish as criminal offences under its domestic law the offences set forth in article 2; (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences″. In regard to this, the Croatian Criminal Code provides for the crime of financing of terrorism, along with sanctions for the commission of such a crime (Article 98 of the Criminal Code).

[14] According to Buergenthal, ″a treaty that, as a matter of international law, is deemed to be directly applicable is not self-executing *ipso facto* under the domestic law of the States parties to it. All that can be said about such a treaty is that the States parties thereto have an international obligation to take whatever measures are necessary under their domestic law to ensure that the specific provisions of the treaty … are accorded the status of domestic law″. Buergenthal, T., Self-executing and Non-self-executing Treaties in National and International Law, *Recueil des cours, Collected Courses of the Hague Academy of International Law,* 1992-IV, Tome 235 de la collection, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, pp. 320-321, quoted in: Nollkaemper, A., The Duality of Direct Effect of International Law, *European Journal of International Law*, vol. 25 (2014), no. 1, p. 121.

3. SELF-EXECUTING TREATIES

The answer to the question about the self-executing character of a treaty provision depends both on national and on international law. A respected legal commentator noted that: ″A treaty provision can only properly be called ′self-executing′ if two requirements are fulfilled: a) the treaty has to be incorporated in national law; b) the treaty provision has to be self-sufficient. The first requirement (incorporation in national law) is determined by the constitutional law of the State party concerned. […] As for the second requirement (the self-sufficient character of the provision) it is possible to give an answer valid for all States parties, since it is a matter of international law″.[15] A ″self-sufficient″ character means that a treaty is ″sufficiently explicit and precise to permit of easy application in domestic legal systems″.[16] In addition, ″there should be minimal scope for different interpretations of the implementation of the international rule″.[17] Conversely, a treaty is not self-executing ″if its terms so indicate[]″.[18] This is precisely the case with Annex G of the ASI. Article 4 of Annex G provides that ″the successor States shall take such action as may be required by general principles of law and otherwise appropriate to ensure the effective application of the principles set out in this Annex, such as concluding bilateral agreements and notifying their courts and other competent authorities″.

When discussing the self-executing character of a treaty provision, it must be stressed that there is no presumption in favour of self-execution.[19] In each particular case it has to be assessed whether or not a treaty is self-executing. In doing so, different factors, such as the drafting history and intent of the parties, as well

[15] Bossuyt, M. J., The Direct Applicability of International Instruments on Human Rights (with Special Reference to Belgian and U.S. Law), *Revue Belge de Droit International*, vol. 2 (1980), p. 319. Similar arguments are found also in Riesenfeld, S. A., The Doctrine of Self-executing…, *op. cit*., pp. 896-897.

[16] Economides, C., The Relationship between International and Domestic Law, Council of Europe, European Commission for Democracy through Law (Venice Commission), Science and Technique of Democracy no. 6, Strasbourg, 1993, CDL-STD(1993)006, p. 5, https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1993)006-e (accessed 28 July 2023).

[17] The Peace and Justice Initiative, https://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist/self-executing-treaties (accessed 28 July 2023).

[18] Paust, J. J., Self-executing Treaties, *American Journal of International Law*, vol. 82 (1988), no. 4, p. 767.

[19] Bradley, C. A., Intent, Presumptions and Non-self-executing Treaties, *American Journal of International Law*, vol. 102 (2008), no. 3, p. 540.

as the textual interpretation of a treaty, must be taken into consideration.[20] We shall, therefore, now reflect on the rules on interpretation of treaties, as codified by the 1969 Vienna Convention.

The principal provision on interpretation is found in Article 31 (General rule of interpretation), paragraph 1, which states: ″A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose″.[21]

With regard to the ordinary meaning of the words, it may first be noted that Article 2(1)(a) of Annex G uses mandatory language. The wording ″shall″ is commonly used in legal discourse to impose a legal duty or obligation.[22] Therefore, Article 2(1)(a) implies States′ obligation to recognise, protect and restore, or compensate for rights to movable and immovable property located on their territories on the cut-off date, i.e. as at 31 December 1990. As far as this obligation refers to legal persons, the protected rights include social ownership, as on the cut-off date it was only that kind of ownership that legal persons could have enjoyed. Although the said legal obligation on the part of successor States is not questionable, Article 2(1)(a) says nothing on the mode of its implementation. Various issues concerning the protected rights, such as the value of the property and the state of the property on the cut-off date and at the time of the possible restoration, etc, are not determined. This is why Article 4 of Annex G points to the need to undertake certain extra measures to effectively implement Annex G. It makes clear that the States parties to the ASI will need to determine what further actions may be required to effectively apply the broad ″principles″ set out in Annex G – bilateral agreements being noted as one such possible measure. Therefore, when interpreting the text of Annex G, it can certainly not be said that its text is ″sufficiently explicit and precise to permit of easy application in domestic legal systems″.[23]

Furthermore, Article 31, paragraph 1 of the Vienna Convention refers to the ″context″ of the terms of the treaty and explains that the ″context″ encompasses

[20] *Ibid.*

[21] Vienna Convention, Article 31(1).

[22] See Krapivkina, O. A., Semantics of the Verb Shall in Legal Discourse, *Jezikoslovlje*, vol. 18 (2017), no. 2, pp. 305-317.

[23] See Economides, C., The Relationship…, *op. cit*., p. 5. Some authors argue that Article 4 of Annex G refers to a ″duty to enter into the necessary arrangements with the states concerned″. Stahn, C., The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia, *American Journal of International Law*, vol. 96 (2002), no. 2, p. 395.

the entire text of the treaty, ″including its preamble and annexes″.[24] In other words, Annex G has to be interpreted by considering the rest of the treaty provisions, including the ASI´s preamble. The preamble of the ASI states, among other things, that the agreement was made ″in the light of agreements between the successor States″.[25] This reference would appear to include an important agreement concluded between Croatia and Serbia prior to the ASI – namely, the 1996 Normalisation Agreement.[26]

The Normalisation Agreement´s object and purpose, as the title suggests, was the normalisation of all aspects of life between Croatia and (now) Serbia after a brutal war between 1991 and 1995. One of the aspects of normalisation was the settlement of damages incurred during that war: i.e., the war damage that Croatia suffered, since the theatre of war had been exclusively on the Croatian territory. According to Article 7 of the Normalisation Agreement, ″the parties shall conclude an agreement on compensation for all destroyed, damaged or lost property″.[27] The Normalisation Agreement, therefore, forms part of the context for the interpretation of the ASI, and its Annex G in particular. It is therefore an error to interpret the ASI by disregarding the consequences of the war between these two States and the Normalisation Agreement. And since an agreement from Article 7 of the Normalisation Agreement has never been concluded, a bilateral agreement based on Article 4 of Annex G should indeed cover the issue of war damages. This would fulfil the object and purpose of the ASI, as this Agreement was also concluded with the aim of settling among the successor States all the issues deriving from the dissolution of Yugoslavia.

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[24] Vienna Convention, Article 31(1).

[25] ASI, Preamble. The relevant paragraph of the ASI´s preamble provides: ″Acting within the framework of the mandate given to the High Representative by the decision of the Peace Implementation Conference held in London, December 8-9, 1995, and in light of the agreements between the successor States and the Declarations adopted by the Peace Implementation Council and its Steering Board []″.

[26] Letter from the Permanent Mission of Yugoslavia to the UN Secretary General Communicating the Agreement on Normalisation of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia (29 August 1996) is available at https://peacemaker.un.org/croatiaserbia-normalizationagreement96 (accessed 28 July 2023). The text of the Agreement is also available at *Narodne novine – Međunarodni ugovori (Official Gazette – Treaties)*, no. 10/1996.

[27] The relevant part of Article 7 of the Normalisation Agreement states: ″Within six months from the date of the entry into force of this Agreement, the Contracting Parties shall conclude an agreement on compensation for all destroyed, damaged, or lost property″.

According to Article 31, paragraph 3 of the Vienna Convention, ″[t]here shall be taken, together with the context: […] b) [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation″.[28] Article 4 of the ASI established the Standing Joint Committee (SJC) as a body competent to monitor the implementation of the treaty and as a forum for discussion. Over the years, the SJC has issued some important recommendations.[29] In particular, two Recommendations from 2009 and 2015 respectively[30] were agreed upon by the States Parties, and they consequently represent ″subsequent practice″ relevant to the ASI for the purposes of Article 31, paragraph 3(b) of the Vienna Convention. According to these Recommendations, the States Parties should (if they deem it necessary) conclude bilateral agreements for the implementation of Annex G. Although the SJC´s Recommendations are not, strictly speaking, legally binding upon the successor States, by recommending the conclusion of bilateral treaties where the States deem it necessary to facilitate the implementation of Annex G of the ASI, the States Parties provided an authoritative interpretation of Annex G and a common understanding of the obligations assumed.

As an additional argument in favour of the unique ″subsequent practice″ of the successor States stands the fact that none of these States initiated proceedings for the peaceful settlement of disputes, although the ASI in its Article 5 provides for an elaborate system of dispute settlement. States´ reluctance to engage in such proceedings is, in our view, indicative of their understanding that the failure to implement Annex G is not a violation of the ASI, but instead, a result of the inability of successor States to reach an agreement on the contents of the additional agreements, referred to in Article 4 of the said Annex.

[28] Vienna Convention, Article 31(2)(b).

[29] The Committee may, if necessary, make appropriate recommendations to the governments of the successor States. ASI, Article 4.

[30] They were cited by the ECtHR in: *Mladost Turist A.D. vs. Croatia*, 73035/14, 30 January 2018, para. 29, and *Vegrad d.d. vs. Serbia*, 6234/08, 27 June 2019, para. 22.

4. IMPLEMENTATION OF ANNEX G BY THE SUCCESSOR STATES

The issues of the application of Annex G have been discussed in a number of cases before the courts of the successor States. In these cases, the applicants usually referred to the existence of the ASI and stressed the need for the direct application of Annex G, as this would enable them to exercise their supposed rights over movable and immovable property in the territory of another successor State. The claims were based on their interpretation of Article 2 of the ASI that these rights ″should be recognized, protected and restored by that state″. The results of such proceedings varied depending on whether or not the courts recognised the self-executing character of Annex G. Despite long-standing challenges in the interpretation and application of Annex G, recent evidence suggests that the judicial practice of the relevant successor States has become more harmonious and coherent, leading to similar conclusions that confirm the inadequacy of Annex G to be directly applicable.

For this study, the case law of the courts of the Republic of Croatia, Serbia and Bosnia and Herzegovina will be examined. However, it should be emphasised that this paper primarily focuses on the Croatian legal system, legislation, and case law. The authors do not address the legal systems and legislation of other successor States (except in cases where the source for reference is considered reliable). The case law of other successor States was taken into account to the extent that it could be deemed relevant and reliable. To this end, some excerpts from the decisions of the ECtHR in which the Court addressed the issue of the applicability of Annex G have also been used.

Croatian case law appears to be consistent and coherent with regard to the application of Annex G. Croatian courts have conceptually reached the same conclusion regarding the applicability of Annex G over the years, confirming its non-self-executing character and suggesting additional measures for its effective implementation, i.e., the conclusion of bilateral agreements as the best measure to be taken.

For a better understanding of the proceedings before the Croatian courts, some reference to the background of the national legislation enacted before the ASI entered into force is needed. One of the documents relevant for further proceedings before the Croatian courts was the Act Prohibiting Transactions with, and Taking Over Assets of, Certain Legal Entities on the Territory of Croatia, from 1994 (hereinafter: the 1994 Act).[31] It was enacted in accordance with the provision of Article 140(2) of

[31] *Narodne novine (Official Gazette)*, nos. 29/1994, 35/1994.

the Constitution of the Republic of Croatia of 1990.[32] According to this provision, the organs of the Republic of Croatia of that time[33] were entitled to take the necessary decisions to protect its sovereignty and interests if its territorial integrity is violated by an act or procedure of a body of the federation or a body of another republic or province that is a member of the federation, or if Croatia is placed in an unequal position in the federation or if its interests are threatened. It should be noted that the above-mentioned values, interests, and rights had already been protected (even before the adoption of the 1994 Act) by a number of regulations of the Croatian government[34] regulating various issues related to the assets of foreign companies or other legal entities (including immovable properties) on Croatian soil in the context of the armed conflict that started in 1991.[35] These regulations have been subject to an assessment of constitutionality and legality before the Constitutional Court.[36] However, since the relevant provisions of the regulations and the 1994 Act are identical, the Constitutional Court concluded that they do not violate the provisions of the Constitution but, on the contrary, protect the economic interests of the Republic of Croatia threatened by the unilateral actions of certain persons, bodies, or institutions on the territory of the predecessor State.[37] It must be emphasised that similar regulations were also issued by other successor States. Thus, the Serbian government also issued several regulations on matters related to assets (including immovable property) located in Serbia.[38]

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32 *Narodne novine (Official Gazette)*, no. 56/1990.

33 At the time of the adoption of this Constitution, the former SFRY still existed and Croatia was one of its republics.

34 E.g., Regulation Prohibiting the Disposal of Real Estate on the Territory of the Republic of Croatia, *Narodne novine (Official Gazette)*, no. 36/1991; or Regulation Prohibiting Transactions with, and Taking over Assets of, Certain Legal Entities on the Territory of Croatia, *Narodne novine (Official Gazette)*, nos. 52/1991, 40/1992, 14/1994.

35 By their adoption, companies or other legal entities with a seat in other successor States were either prohibited from undertaking transactions involving assets (including immovable property) located in Croatia, or assets of entities from Serbia or Montenegro were transferred to the Republic of Croatia.

36 See, e.g., the following decisions of the Constitutional Court of the Republic of Croatia: U-II-326/2000, 12 July 2001; U-2-799/1999, 27 October 1999; U-II-866/1999, 17 November 1999; U-II/1104/2000, 19 September 2001; U-II/629/2015, 9 April 2019, etc. In some of these cases, the Constitutional Court clearly emphasised the importance of the provision of Article 140(2) of the Croatian Constitution as a basis for issuing the above-mentioned regulations.

37 Decision of the Constitutional Court of the Republic of Croatia, U-I-1348/2001, U-I-2529/2001, 4 April 2002, paras. 7 and 8, and related to Article 1 of the 1994 Act.

38 See, e.g., Regulation on arranging issues and transactions regarding assets (including immovable property) located in Serbia from August 1991, and two regulations on the organisation of business units of companies and other legal entities with their seats in Bosnia

One of the most significant decisions in the Croatian system, where the Constitutional Court explicitly referred to the relationship between the 1994 Act and Annex G is its decision in Case U-I/1777/2003 rendered in 2009.[39] This decision found no conflict between these two acts, thus creating a legal and judicial basis for practically all subsequent decisions. Most of the further considerations by the Croatian courts are in line with the conclusions of this decision. In the view of the Constitutional Court, Annex G contains only the fundamental principles on which succession issues are based in relation to the subject-matter of its regulation (succession issues regarding private property and acquired rights).[40] The Court emphasised that this view derives from Article 4 of Annex G.[41] Among measures available to successor States that the Court considers appropriate for ensuring the implementation of principles set forth in Annex G are, for example, the adoption of appropriate legal acts and by-laws, the conclusion of international agreements, etc.[42] The Court also made a reference to the 1996 Normalisation Agreement, noting that its entry into force had not annulled the legal effects created by the above-mentioned regulations from the early 1990s. The Court concluded that the 1996 Agreement is not an act eligible for direct application. It rather constitutes only the foundation for the conclusion of further agreements between Croatia and Serbia regarding the regulation of the procedure for exercising the right to compensation for destroyed, damaged, or missing property.[43]

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and Herzegovina, Slovenia and Croatia, dated February 1992 and May 2001. Under these regulations, companies were prohibited from disposing of their assets without the consent of the Serbian government. See the ECtHR decision in *Vegrad d.d. vs. Serbia, op. cit.*, paras. 5, 6, 15-17.

39 Decision of the Constitutional Court of the Republic of Croatia, U-I/1777/2003, 17 March 2009.

40 In the Court´s opinion, these are the principle of equality in the recognition and protection of acquired rights, the principle of recognition and protection of acquired rights until a certain date, the principle of restitution in kind, the principle of the right to compensation if restitution in kind is not possible, the principle of respect for the standards and norms of international law, etc.

41 Article 4 provides that the successor States shall take such action as may be required by the general principles of law and otherwise appropriate to ensure the effective application of the principles set forth in Annex G.

42 Successor States are also required to implement the provisions of the ASI in good faith, in accordance with the UN Charter and the rules of international law. See more in the decision of the Constitutional Court of the Republic of Croatia, U-I/1777/2003, 17 March 2009, para. 5.3, regarding Article 9 of the ASI.

43 Decision of the Constitutional Court of the Republic of Croatia, U-I/1777/2003, 17 March 2009, para. 5.3.

The conclusions of the Constitutional Court provided in Case U-I/1777/2003 have been the basis for all further deliberations of the Court itself on the application of Annex G.[44] Moreover, numerous subsequent decisions of other Croatian courts[45] have referred to this decision, creating uniform and coherent practice and confirming similar conclusions regarding the measures to be taken by the successor States. These conclusions can be divided as follows:

a) Annex G merely establishes the fundamental principles on which the issues of succession are based with respect to the private property and acquired rights of citizens and legal entities.[46]

b) Annex G is the basis for further bilateral agreements between the successor States but is not an instrument suitable for direct application.[47]

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[44] See, for example, the following decisions of the Constitutional Court of the Republic of Croatia: U-III-5668/2012, 3 April 2014; U-III-2284/2014, 13 May 2015; U-III-1250/2015, 18 November 2015; U-III/191/2016, 25 February 2016; U-III-4721/2016, 8 March 2017, U-III/5808/2013, 20 June 2017; U-III-314/2014, 13 June 2018, U-III/3044/2019, 10 June 2021, etc.

[45] All decisions of the Croatian courts used in this paper are available at https://www.iusinfo.hr/sudska-praksa/pretraga (accessed 26 July 2023).

[46] See, e.g., the decision of the Municipal Court in Slatina, Permanent Service in Orahovica, P-448/10-9, 11 March 2011, referred to by the Constitutional Court of the Republic of Croatia in decision U-III/191/2016, 25 February 2016. See other decisions of the Constitutional Court: U-III/5808/2013, 20 June 2017, para. 9; U-III-314/2014, 13 June 2018, para. 7.3, etc. See also the judgments of the Supreme Court of Croatia: Rev-899/08, 17 May 2012; Rev 2086/2012-4, 10 June 2015; Rev 301/13, 1 September 2015; Rev 1833/13-2, 23 May 2017; Rev-x 1069/14-2, 4 July 2017; Rev-x 110/17-3, 31 January 2018; Rev 85/2015-2, 25 April 2019; Rev 2771/2014-2, 20 May 2020; Rev-x 1172/2015-2, 8 December 2020, etc.

[47] See, e.g., judgments of the Municipal Court in Slatina, Permanent Service in Orahovica, P-448/10-9, 11 March 2011, and the County Court in Bjelovar, Permanent Service in Virovitica, GŽ-3000/2011, 27 September 2012, both referred to by the Constitutional Court of the Republic of Croatia in decision U-III/191/2016, 25 February 2016. See also the conclusions of the Municipal Court in Pazin, P-366/08-7, 17 April 2009, and the County Court in Pula, Gž-1712/10-2, 10 April 2012, both in the decision of the Constitutional Court of the Republic of Croatia U-III-4721/2016, 8 March 2017. See judgments of the Commercial Court in Bjelovar, P-56/2011-4, 14 March 2011 and the High Commercial Court of the Republic of Croatia, Pž-3463/11-3, 18 December 2014, both cited in the decision of the Constitutional Court of the Republic of Croatia, U-III-1250/2015, 18 November 2015. See also judgments of the Supreme Court of the Republic of Croatia: Rev-899/08, 17 May 2012; Rev 1786/2013-2, 21 October 2014; Rev 1292/12-2, 11 March 2015; Rev 2086/2012-4, 10 June 2015; Rev 1481/2013-3, 15 September 2015; Rev 1261/2011-2, 3 November 2015; Revt 164/16-2, 10 July 2018, Rev 809/2015-2, 16 October 2018; Rev 2501/2016-2, 12 March 2019; Rev 1784/2018-2, 19 November 2019; Rev 5209/2019-2, 14 January 2020; Rev 2771/2014-2, 20 May 2020; Rev-x 1172/2015-2, 8 December 2020; Revt 353/2017-2, 30 March 2021; Revt 129/2017-2, 19 October 2021; Revt 448/2017-2, 21 December 2021, etc.

c) These agreements must specify the conditions and procedure for restitution in kind or the right to compensation.[48]

d) Since the application of the fundamental principles contained in Annex G requires additional measures yet to be taken, Annex G does not result in the automatic recognition of the claimants´ property rights, and ownership of the disputed property is not acquired directly on the basis of either the ASI or Annex G. Therefore, the claimants´ property rights have yet to be recognised, and when this is achieved in each particular case, the competent authority should decide whether the disputed property should be returned to the claimant(s) or whether they are entitled to compensation.[49]

The same question of the application of Annex G has also been discussed by the courts of other successor States, which have reached similar conclusions.

The conclusion that bilateral agreements between the successor States are required for the application of Annex G was also supported by the courts of the Republic of Serbia, although immediately after Serbia ratified the ASI, the

[48] Municipal Court in Pazin, P-366/08-7, 17 April 2009 (referred to in the decision of the Constitutional Court of the Republic of Croatia U-III-4721/2016, 8 March 2017). In this decision, the Constitutional Court also refers to the decision of the County Court in Pula, Gž-1712/10-2, 10 April 2012, and of the Supreme Court of the Republic of Croatia, Rev 1883/12-2, 27 January 2016. See, e.g., the decision of the Municipal Court in Slatina, Permanent Service in Orahovica, P-448/10-9, 11 March 2011, referred to by the Constitutional Court of the Republic of Croatia in decision U-III/191/2016, 25 February 2016. See also judgments of the Supreme Court of the Republic of Croatia: Rev-899/08, 17 May 2012; Rev 2086/2012-4, 10 June 2015; Rev 1784/2018-2, 19 November 2019; Rev 5209/2019-2, 14 January 2020; Revt 157/2017-3, 3 July 2018, etc.

[49] See, e.g., the conclusion drawn by the County Court in Bjelovar, Permanent Service in Virovitica, GŽ-3000/2011, 27 September 2012 (cited in Constitutional Court of the Republic of Croatia, U-III/191/2016, 25 February 2016). See also the judgment of the County Court in Pula, Gž-1712/10-2, 10 April 2012 (cited in the decision of the Constitutional Court of the Republic of Croatia, U-III-4721/2016, 8 March 2017). In this decision, the Constitutional Court also refers to the judgment of the Supreme Court of the Republic of Croatia Rev 306/08, 17 December 2008, which interprets the application of Annex G in line with the opinion expressed in the decision of the Constitutional Court in case U-I/1777/2003. The conclusion of the Supreme Court of the Republic of Croatia in case Rev 306/0817, December 2008 has been repeated in numerous other cases before the Supreme Court: Rev 2404/11-2, 16 January 2013; Rev-x 1050/13-2, 15 October 2014; Rev 2086/2012-4, 10 June 2015; Rev 1425/13-2, 15 June 2015; Rev 1601/12-3, 16 June 2015; Rev 1481/2013-3, 15 September 2015; Rev 1261/2011-2, 3 November 2015; Rev-x 1172/2015-2, 8 December 2020; Revt 129/2017-2, 19 October 2021, para. 29; Revt 448/2017-2, 21 December 2021, para. 13, etc.

courts applied it directly.[50] However, since December 2004, the High Commercial Court in Belgrade has been interpreting Annex G and the provisions on reciprocity and bilateral agreements differently. This makes the Serbian case law complex and ″quite inconsistent″.[51] In the said case, the High Commercial Court referred to Articles 4 and 7 of Annex G and emphasised that these Articles point to the intention of the successor States:

> ″to conclude bilateral agreements with a view to regulating the procedure for deciding claims and stipulating those State organs that are to decide on the ... claims, applying the provisions of the Agreement, and to decide on property claims in respect of movable and immovable assets. Only upon the conclusion of the procedure established by the bilateral agreement before the relevant State organs set up by the [bilateral] agreement, in the event that claims are contested, will the court decide on them ... Consequently, the conclusion of a bilateral treaty and the completion of the proceedings set up by it ... [constitute] preliminary legal issues and the further actions of the court depend on their being resolved ...″[52]

Despite some criticism expressed in legal theory,[53] this conclusion and reference to this particular judgment have been repeated in subsequent decisions of the Serbian courts (as well as in the decisions of the ECtHR).[54]

[50] On the different practice of the Serbian courts until 2004, see Vukadinović, R., O direktnoj primeni sporazuma o sukcesiji (Some Open Issues of Direct Impact and Direct Implementation of the Agreement on Succession), in: Dimitrijević, D.; Novičić, Ž.; Vučić, M. (eds.), *Regulisanje otvorenih pitanja između država sukcesora SFRJ (Regulation of Open Issues between Successor States of the SFR Yugoslavia)*, Institut za međunarodnu politiku i privredu, Belgrade, 2013, pp. 71-72, https://www.researchgate.net/publication/323561580_Sporazum_o_pitanjima_sukcesije_SFR_Jugoslavije_i_medunarodno_pravo_Agreement_on_the_issues_of_Succession_of_SFR_Yugoslavia_and_International_Law (accessed 26 July 2023).

[51] Bosanac, R., Sukcesija imovine bivših jugoslovenskih društvenih pravnih lica na teritoriji država sukcesora SFRJ (Succession of Property of Former Yugoslav Socially-owned Enterprises in the Territory of Successor States of SFRY), in: Dimitrijević, D.; Novičić, Ž.; Vučić, M. (eds.), *op. cit*., p. 238.

[52] High Commercial Court in Belgrade, Pž. 6029/2004, 29 December 2004. See more about this decision in Bosanac, R., Succession of Property…, *op. cit*., pp. 240-241.

[53] See, e.g., Vukadinović, R., Some Open Issues of Direct Impact…, *op. cit*., pp. 73, 75.

[54] Since the authors do not have access to the original decisions of the Serbian courts, they rely on the information available in the decisions of the European Court of Human Rights. Thus, see, e.g., the decision in the case of the *Croatian Chamber of Economy vs. Serbia*, 819/08, 25 April 2017, para. 8 (with regard to the decision of the Commercial Court in Belgrade, 3 November 2006) and para. 11 (with regard to the decision of the High Commercial Court in Belgrade, 26 April 2007). See also the decision in the case of *Vegrad d.d. vs. Serbia*,

Furthermore, the recent case law of the Supreme Court of Cassation of the Republic of Serbia also took a similar position in several cases and supported the conclusion of bilateral agreements for the efficient implementation of Annex G, as it is not directly applicable.[55] The protection of the private property and acquired rights of citizens and legal entities of other successor States is possible under the condition of the factual reciprocity among the States concerned.[56] Serbian courts have highlighted that Annex G establishes only framework rules under which the ASI State parties should recognise and protect the private property and other rights of citizens and legal entities with respect to immovable property located on the territory of another successor State. Annex G only establishes certain rights and obligations for the successor States, but does not create direct rights of ownership for their natural and legal entities.[57] The conversion of the right of use into a right of ownership should have been done in accordance with the privatisation regulations of the State concerned (i.e. the Republic of Serbia). Otherwise, the Court concluded that ownership rights can be acquired on the basis of a

op. cit., paras. 9 (with regard to the decision of the Commercial Court in Belgrade, 26 January 2006) and 10 (with regard to the decision of the High Commercial Court in Belgrade, 24 October 2006). Furthermore, in some of the recent decisions, the Serbian courts explicitly refer to the decisions of the European Court of Human Rights. See, for example, the judgment of the Supreme Court of Cassation of the Republic of Serbia: Prev 681/2021, 17 March 2022 or Prev 534/2021, 10 February 2022. Judgments of the Serbian Supreme Court of Cassation are available at https://www.vk.sud.rs/sr-lat/solr-search-page/results?court_type=vks&matter=_none&registrant=_none&subject_number=&date_from%5Bdate%5D=&date_to%5Bdate%5D=&keywords=&phrase=&sorting=by_date_down&redirected=214&level=0&results=10 (accessed 26 July 2023).

[55] The Supreme Court of Cassation of the Republic of Serbia, Prev 510/2019, 24 October 2019. The Court made reference to the judgment of the Commercial Court in Belgrade, P 4189/2017, 12 December 2017, and the High Commercial Court/Commercial Court of Appeal, Pž 1467/18, 26 June 2019. At the same time, the Supreme Court of Cassation emphasises that the same view had already been accepted in its earlier judgment Prev 382/17, 29 June 2018. Furthermore, the Court also referred to the position of the European Court of Human Rights expressed in *Mladost Turist A.D. vs. Croatia*, 73035/14, 30 January 2018.

[56] In 2011, the Supreme Court of Cassation of the Republic of Serbia concluded in its legal opinion ″On the application of Annex G of the ASI″ that Annex G is applicable under the conditions of factual reciprocity, p. 73, https://www.vk.sud.rs/sites/default/files/files/Bilteni/VrhovniKasacioniSud/bilten_2011-1.pdf (accessed 27 July 2023). For more on reciprocity in the judgments of the Supreme Court of Cassation of the Republic of Serbia, see, e.g.: Prev 681/2021, 17 March 2022; Prev 534/2021, 10 February 2022; Prev 552/2020, 25 February 2021, etc.

[57] See, e.g., the Supreme Court of Cassation of the Republic of Serbia, Prev 552/2020, 25 February 2021.

bilateral agreement between the successor States, as Annex G is not directly applicable.[58]

The courts of Bosnia and Herzegovina have also reached similar conclusions with regard to the application of the ASI and Annex G: they merely set out the framework principles that States should follow when concluding further agreements, so they are not sufficient for direct application. Annex G provides the basis for resolving issues related to private property and acquired rights (which existed on 31 December 1990), and guarantees equal access to courts and other institutions and prohibits discrimination based on nationality and citizenship. However, without the conclusion of bilateral agreements between the successor States, i.e., without the existence of reciprocity, Annex G – according to the Bosnian courts – is not directly applicable ″precisely because of its generality″.[59]

In 2010, Republika Srpska, an entity of Bosnia and Herzegovina, adopted the Law on the Implementation of Annex G.[60] It provided that judicial and other proceedings related to the property rights of legal entities of the successor States located in the territory of Republika Srpska will be suspended regardless of the stage of proceedings until the agreements on the resolution of property issues between Bosnia and Herzegovina and other successor States are concluded.[61] The courts decided accordingly and suspended such proceedings. Two years later, however, the Constitutional Court of Bosnia and Herzegovina, in its decision U 16/11, found that the above-mentioned Law of Republika Srpska was unconstitutional because Annex G does not authorise the Bosnian entities to enact additional laws for its

[58] The Supreme Court of Cassation of the Republic of Serbia, Prev 681/2021, 17 March 2022. In this case, reference was made to the judgment of the Commercial Court in Sombor, P 238/19, 18 September 2020 (the first instance judgment) and the judgment of the High Commercial Court / Commercial Court of Appeal, Pž 5440/20, 17 March 2021 (the second instance judgment). The same conclusion is found in the judgment of the Supreme Court of Cassation of the Republic of Serbia, Prev 534/2021, 10 February 2022, in which reference was made to the judgment of the Commercial Court in Kraljevo, P 621/2019, 14 December 2020 (the first instance judgment) and the judgment of the High Commercial Court / Commercial Court of Appeal, Pž 2066/21, 21 April 2021 (the second instance judgment). See also the judgment of the Supreme Court of Cassation of the Republic of Serbia, Prev 552/2020, 25 February 2021.

[59] See, for example, decisions of the Constitutional Court of Bosnia and Herzegovina: AP 3153/15, 31 January 2018, paras. 10, 12, and AP 1849/15, 27 February 2018, paras. 8, 10-12, regarding the decisions of the District Commercial Court in Banja Luka. Decisions of the Constitutional Court of Bosnia and Herzegovina are available at https://www.ustavnisud.ba/bs/odluke?sp=DatumDesc& (accessed 27 July 2023).

[60] *Službeni glasnik Republike Srpske (Official Gazette of Republika Srpska)*, no. 17/2010.

[61] Law on the Implementation of Annex G, Article 4.

implementation.[62] Nevertheless, this Court also concluded that the proceedings were suspended not because of the disputed Law but because of the lack of reciprocity between the successor States in dealing with issues arising from Annex G.[63] The application of the principle of reciprocity,[64] as the Court concluded is, ″if not an obligation, then certainly a possibility to protect the interests of subjects from Bosnia and Herzegovina at all stages of the proceedings before regular courts and other competent bodies″.[65] However, the Court also noted that the practice of temporary suspension of proceedings on property rights until the reciprocity is established can easily be redefined over time; courts must take into account that years of procedural indecision raise the question of a serious violation of the right of access to courts. A temporary procedural deadlock, even if justified at a particular time, cannot become permanent.[66]

Beside the case law of the successor States, the issue of the application of Annex G was also addressed by the ECtHR. In two of its cases (*Mladost Turist A.D. vs. Croatia* and *Vegrad d.d. vs. Serbia*), the ECtHR confirmed the consistent practice of the Croatian and Serbian courts in implementing Annex G, and reaffirmed the conclusion of national courts that Annex G is not an instrument suitable for direct application, but rather that it requires the adoption of measures to

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62 At the end of 2003, in order to comply with its international obligations, Bosnia and Herzegovina adopted the Decision on the implementation of Annex G of the ASI on the territory of Bosnia and Herzegovina (*Službeni glasnik Bosne i Hercegovine (Official Gazette of Bosnia and Herzegovina)*, no. 2/2004). For more, see Constitutional Court of Bosnia and Herzegovina, U 16/11, 13 July 2012, paras. 39-42.

63 Constitutional Court of Bosnia and Herzegovina, U 16/11, 13 July 2012, para. 53. This particular decision was the basis for the Constitutional Court to support, in a series of decisions, the temporary suspension of proceedings on property rights covered by Annex G until reciprocity between the successor States is established.

64 On the view of the various courts of the successor States on reciprocity, see, for example, decisions of the Constitutional Court of Bosnia and Herzegovina: AP 3153/15, 31 January 2018, para. 14; AP 1849/15, 27 February 2018, paras. 29-35; AP 1804/18, 10 September 2019, para. 5; AP 1760/19, 23 June 2021, paras. 7, 9, 10, 27, 29, 30; AP 3212/20, 20 April 2022, paras. 8, 15, 16, 19, 38, 39, 42, etc.

65 The Court did not consider it necessary in the case U 16/11 to answer the question of whether the conclusion of bilateral agreements between successor States was an obligation or merely a possibility. Constitutional Court of Bosnia and Herzegovina, U 16/11, 13 July 2012, para. 53.

66 See, among others, the Constitutional Court of Bosnia and Herzegovina decisions: AP 3212/20, 20 April 2022, paras. 13, 38, 40; AP 1760/19, 23 June 2021, paras. 27-34; AP 1849/15, 27 February 2018, paras. 29-35; AP 3153/15, 31 January 2018, paras. 34-39; U 16/11, 13 July 2012, etc.

facilitate its implementation.[67] Moreover, in both cases, the ECtHR emphasised the importance of the recommendations to the successor States made by the SJC in 2009 and 2015. After determining that the application of Annex G ″was not efficient enough″, the SJC recommended the conclusion of bilateral agreements and advised successor States not to enact legislation or take steps that conflict with Annex G and, if necessary, to adopt measures to enable the effective application of its standards.[68] These two decisions by the ECtHR can be considered as further reinforcing the view that Annex G is not self-executing.

5. CONCLUSION

Since the implementation of Annex G and its interpretation among successor States remains a challenge and leads to different conclusions that practically result in the inapplicability of the Annex, this paper has addressed the issue of interpreting the treaty in accordance with international law and examined the case law of the successor States to determine which measures are most likely to facilitate the application of Annex G and, most importantly, to finally make it effective. Annex G calls upon States parties to take further measures to effectively apply the principles contained therein. It is clear, therefore, that Annex G itself confirms that it is unsuitable for immediate application and directs the ASI States parties to take such further measures as are appropriate (and one might even say necessary) to ensure the effective application of the principles set forth in that Annex. Following the interpretation of the ASI and Annex G, the conclusion of bilateral agreements could be considered as a possible solution, or at least one of the possible solutions. This view is also supported by the recent case law of the successor States. Their highest judicial authorities have expressed support for the suspension of all proceedings concerning Annex G until bilateral agreements between the successor States are concluded. The additional confirmation of this view can also be found in Article 7 ASI, which emphasises that it (i.e., the ASI) provides the final settlement of the mutual rights and obligations of the State parties ″together with any subsequent agreements called for in implementation″ of its Annexes.[69]

[67] ECtHR, *Mladost Turist A.D. vs. Croatia*, *op. cit*., para. 54; ECtHR, *Vegrad d.d. vs. Serbia*, *op. cit*., para. 32.

[68] ECtHR, *Mladost Turist A.D. vs. Croatia, op. cit*., paras. 29, 54; ECtHR, *Vegrad d.d. vs. Serbia*, *op. cit*., paras. 22, 32.

[69] This has already been highlighted by the Supreme Court of the Republic of Croatia. See its judgment Rev 1786/2013-2, 21 October 2014.

This in no way diminishes the importance of the ASI in its entirety and its position in the legal system of the Republic of Croatia (or any other successor State). However, for its effective implementation (and consequently the implementation of Annex G), which will allow for a comprehensive solution to the issue of succession ″in the interests of stability in the region and their mutual good relations″,[70] it is necessary to analyse and respect its own provisions, which leads to the above-mentioned conclusion.

Considering all the relevant circumstances and the time that has elapsed since the ASI entered into force (in June 2004), interpreting Annex G differently and advocating its direct applicability should be considered erroneous and wholly unproductive. It is undeniable that Annex G contains only the principles on which succession issues are based in relation to the private property and acquired rights of citizens and legal entities. It obviously lacks precision, it is too general, and is not clear or explicit enough. Therefore, it is not directly applicable, which is also confirmed by the long-term challenges in its implementation. To encourage the effective application of Annex G, successor States should take further steps to reach agreement on the modalities of its implementation.

However, this is more of a political question and depends on whether or not there is political will to settle the differences over interpretation by mere discussion among the successor States. Such a solution is – as a first possible step – provided for in the ASI itself in Article 5. If the discussion does not lead to an effective solution within the one-month period, the States have other options, either to refer the matter to an independent person of their choice or to the SJC. In addition, the dispute may be submitted to a binding expert solution, either by an individual expert or by the President of the OSCE Court of Conciliation and Arbitration.[71]

According to the information available to the authors of this paper, none of these steps have yet been proposed or taken by any of the successor States.

[70] ASI, Preamble.

[71] See ASI, Article 5(1), (2) and (3).

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Sažetak:

ANEKS G UGOVORA O PITANJIMA SUKCESIJE (2001.) – SAMOIZVRŠIV ILI NE?

Nakon raspada bivše Jugoslavije, države sljednice sklopile su 2001. godine Ugovor o pitanjima sukcesije, radi rješavanja različitih pitanja proizašlih iz raspada države. Pitanje zaštite privatnog vlasništva i stečenih prava građana i pravnih osoba bivše države u državama sljednicama uređuje Aneks G predmetnog Ugovora. Pred nacionalnim sudovima sljednica, kao i pred međunarodnim sudskim i arbitražnim tijelima, vođen je niz postupaka u kojima su fizičke i pravne osobe tražile zaštitu svojih prava, pozivajući se na primjenu Aneksa G. Osnovno pitanje koje se pritom postavlja jest je li Aneks G samoizvršiv ugovor, odnosno prikladan za neposrednu primjenu bez poduzimanja ikakvih daljnjih mjera njegovih strana, ili se, pak, radi o ugovoru koji stvara pravnu obvezu, ali nije neposredno primjenjiv. Odgovor na pitanje je li pojedini ugovor samoizvršiv ili ne prvenstveno ovisi o samim njegovim odredbama i njihovu tumačenju u skladu s Bečkom konvencijom o pravu međunarodnih ugovora iz 1969. godine. Analizom relevantnih odredbi Bečke konvencije i sudske prakse država sljednica, autorice zaključuju da Aneks G nije samoizvršiv.

Ključne riječi: *Ugovor o pitanjima sukcesije; Aneks G; države sljednice; samoizvršivi ugovori; Bečka konvencija o pravu međunarodnih ugovora (1969.); sudska praksa.*

APPLICATION AND INTERPRETATION OF THE GENOCIDE CONVENTION IN THE RECENT JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE: ISSUES OF JURISDICTION

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The author analyses certain questions regarding the jurisdiction of the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide in the most recent cases deliberated before the Court. Special attention is given to the decisions in the cases The Gambia v. Myanmar *and* Ukraine v. Russian Federation *in which the Court discussed issues of a preliminary character relevant for the establishment of its* (prima facie) *jurisdiction. Hence, the author particularly addresses the questions of the existence of a dispute between the parties, the* ratione personae *jurisdiction of the Court, the* erga omnes *character of obligations under the Convention,* jus standi *of the parties before the Court, the relationship between Articles VIII and IX of the Convention, and the problem of the use of force for the purpose of preventing or punishing genocide. In the author´s opinion, despite the fact that it has not yet been decided on the merits in the analysed cases, the decisions made so far are significant in two ways. On the one hand, they strengthen the Convention in terms of reaffirmation of the prerequisites for the establishment of the jurisdiction of the Court, and, on the other, they contribute to the preservation of the fundamental principles of international law and the rules on State responsibility, as well as to the prevention of future acts of genocide.*

Keywords: *Convention on the Prevention and Punishment of the Crime of Genocide; the International Court of Justice; the jurisdiction of the Court; the case of* The Gambia v. Myanmar*; the case of* Ukraine v. Russian Federation.

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1. INTRODUCTION

The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide[1] in 1948 (hereinafter: Genocide Convention, Convention) is considered a tremendous success of the international community that had survived the horrors of World War II, in terms of condemning the most horrific crimes that certain groups of people had suffered, setting the legal definition of the crime of genocide, and providing for the legal prerequisites for the international responsibility of States and individuals for genocide. A total of over 150 States Parties[2] that have ratified or acceded to the Genocide Convention might indicate that the noble goal of States Parties to liberate mankind from ″such an odious scourge″[3] expressed in the Preamble, as well as the idea that this atrocious crime must be prevented, are truly shared between nations and States which are devoted to their duty to prevent it and punish it.[4]

Meanwhile, we have witnessed grave atrocities committed in Cambodia, Rwanda, Bosnia and Herzegovina, and most recently in Myanmar, as well as serious violations of human rights in Ukraine. Although the International Court of Justice (hereinafter: ICJ, the Court) had the unfortunate task of dealing with the application and interpretation of the Genocide Convention connected to armed conflicts conducted on the territory of the former Yugoslavia during the 1990s, its judgments contributed to the clarification of various issues concerning its jurisdiction, as well as the responsibility of States for genocide under the

1 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, UNTS, vol. 78, 1951.

2 The most recent information on the status of the Genocide Convention in State territories of the UN Member States is available at United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/genocide-convention.shtml (accessed 1 June 2023).

3 Genocide Convention, *op. cit*., note 1, Preamble.

4 *Ibid*., Article I. According to Article V, ″The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.″ The obligation not to commit genocide, as well as to prevent it and punish its perpetrators, is also considered as a norm of international customary law which, therefore, binds all States whether or not they have ratified the Convention. See more in Wyler, E.; Castellanos-Jankiewicz, L. A., State Responsibility and International Crimes, in: Schabas, W. A.; Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law,* Routledge Taylor & Francis Group, London and New York, 2011, pp. 397-398. See also United Nations Office on Genocide Prevention and the Responsibility to Protect, https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-ENG.pdf (accessed 10 June 2023).

Convention. However, apart from the aforementioned legal value of the judgments in the cases *Bosnia and Herzegovina v. Serbia and Montenegro* in 2007 and *Croatia v. Serbia* in 2015,[5] one might ask whether legal norms and judicial mechanisms at the national and international level are efficient enough to provide remedy for the most serious violations of human rights and, even more, to prevent future unthinkable crimes which certainly represent a defeat for humanity. One might also ask if the correct interpretation of the Genocide Convention by the ICJ has any weight when it comes to influencing the governments of States, State leaders, and non-state actors to act within the boundaries of the law and human rights protection. Moreover, can the world court in the cases currently being deliberated before it make a difference and, if the facts presented by the parties point to such a conclusion, for the first time declare a State responsible for genocide and truly contribute to the prevention of future commissions of such a crime?

These questions are yet to be answered since the Court still has not decided on the merits in the most recent cases on the application and interpretation of the Genocide Convention. However, in the author´s opinion, issues concerning the jurisdiction of the Court under the Genocide Convention are of particular importance for the effective application of this Convention and, ultimately, for the establishment of State responsibility for genocide. In this context, special attention in this paper is given to the decisions made in the cases *The Gambia v. Myanmar* and *Ukraine v. Russian Federation* in which the Court discussed issues of a preliminary character relevant for the establishment of its (*prima facie*) jurisdiction. Hence, the author particularly addresses questions such as the *ratione personae* jurisdiction of the Court, the existence of a dispute between the parties, the relationship between Articles VIII and IX of the Convention, the *erga omnes* character of obligations under the Convention, the *jus standi* of the parties, and the problem of the use of force for the purpose of preventing or punishing genocide. In the author´s opinion, despite the fact that it has not yet been decided on the merits in the analysed cases, the decisions made so far are significant in two respects. On the one hand, they strengthen the Convention in terms of affirmation of the Court´s interpretation of its provisions given in its previous decisions, and, on the other, they might have a significant impact on the efficient application of the Genocide Convention in the future. This applies particularly in terms of clarification of the prerequisites for the establishment of the jurisdiction of the Court, preservation of the fundamental

[5] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, ICJ Reports, 26 February 2007; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment, ICJ Reports, 3 February 2015.

principles of international law and the rules on State responsibility, as well as in terms of the prevention of future acts of genocide.

2. THE GAMBIA V. MYANMAR

2.1. Case Overview

On 11 November 2019, The Gambia filed an application instituting proceedings before the ICJ and a request for provisional measures against Myanmar.[6] The Gambia bases the jurisdiction of the Court on Article IX[7] of the Genocide Convention which both States are parties to.[8] Furthermore, The Gambia grounds its *jus standi* before the Court on the prohibition of genocide as a *jus cogens* norm of international law and the obligations under the Convention being owed *erga omnes partes*.[9] In its application, The Gambia accuses Myanmar of being responsible for violations of its obligations under the Genocide Convention, particularly for: committing genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempting to commit genocide, failing to prevent genocide, failing to punish genocide, as well as failing to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties for persons guilty of genocide.[10]

According to the facts presented in the application, The Gambia claims that Myanmar is responsible for committing systematic attacks on and persecution of the Rohingya, one of the ethnic and religious minorities living in Myanmar (in Myanmar´s Rohingya State),[11] particularly by denial of legal rights to members of

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6 *Application Instituting Proceedings and Request for Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* ICJ Reports, 11 November 2019.

7 Article IX prescribes: ″Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the Parties to the dispute″. See the Genocide Convention, *op. cit.*, note 1.

8 Myanmar deposited its instrument of ratification on 14 March 1956, while The Gambia deposited its instrument of accession on 29 December 1978. ICJ Reports (2019), *op. cit.*, note 6, para. 17.

9 *Ibid*., para. 20.

10 *Ibid*., para. 111.

11 *Ibid*., paras. 26-28. According to official data of the Embassy of Myanmar, there are eight major national ethnic races and 135 different ethnic groups in Myanmar. See Embassy

the Rohingya group and of conducting hate propaganda against them.[12] However, according to the application, the persecution of the Rohingya population escalated dramatically in October 2016 with the commencement of brutal ″clearance operations″ by the military and security forces of Myanmar, which eventually led to genocidal acts against the Rohingya group in the period from 2016 to 2018.[13] The Gambia submitted a voluminous document with evidence in support of its claims, asserting that these acts were committed with the intent to destroy, in whole or in part, the Rohingya group as such, thus fulfilling the elements of genocide under the Genocide Convention (Article II).[14]

As previously said, The Gambia bases the jurisdiction of the ICJ in Article IX of the Convention, noting in addition that neither party has made a reservation in relation to this Article. On the other hand, Myanmar bases one of its objections to the Court´s jurisdiction on the argument that, although no reservation has been made to Article IX, Myanmar´s reservation to Article VIII precludes the seising of the Court by any contracting party to the Convention that is not an injured State.[15] Further, The Gambia demonstrates in its application that there

of Myanmar, https://www.embassyofmyanmar.be/ABOUT/ethnicgroups.htm (accessed 1 June 2023). The Rohingya minority is, according to the UN, the most persecuted minority in the world. See Sidhu, J. S., The Rohingya: Myanmar´s Unwanted Minority, *European Yearbook of Minority Issues*, vol. 18 (2019), p. 236.

12 ICJ Reports (2019), *ibid*., paras. 29-46. For more on the evidence provided by the UN Fact-Finding Mission on discriminatory policies carried out by Myanmar´s authorities, restricting citizenship rights of the Rohingya, their freedom of movement, and family rights, see General Assembly, Human Rights Council, The Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64, 12 September 2018, paras. 21 *et seq*. The history of the status of the members of the Rohingya ethnic group in Myanmar (Burma) from 1948 when Burma gained independence from Great Britain are presented in Alam, J., The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law, *International Journal on Minority and Group Rights*, vol. 25 (2018), no. 2, pp. 157-182.

13 ICJ Reports (2019), *ibid*., para. 47. See also *Application Instituting Proceedings and Request for Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Memorial by The Gambia, ICJ Reports, 23 October 2020, paras. 5.1.-11.103. For more on the so-called ″clearance operations″, see Becker, M. A., The Plight of the Rohingya: Genocide Allegations and Provisional Measures in the *Gambia v Myanmar* at the International Court of Justice, *Melbourne Journal of International Law*, vol. 21 (2020), no. 2, pp. 430-431; UN Doc. A/HRC/39/64 (2018), *op. cit*., note 12, para. 32.

14 ICJ Reports (2020), *ibid*., para. 1.2. See also Article II of the Genocide Convention, *op. cit*., note 1.

15 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Preliminary Objections of the Republic of the Union of Myanmar, ICJ Reports, 20 January 2021, paras. 355, 373-378, 400, 443, 485. Article VIII reads as follows: ″Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations, as they consider

is a dispute between the parties relating to the interpretation and application of the Genocide Convention and the fulfilment by Myanmar of its obligations to prevent genocide.[16] Myanmar responded that there was no dispute between the Gambia and Myanmar on the date of the filing of the application within the meaning of Article IX, claiming that the requirements for the existence of a dispute, which the Court established in its previous case law,[17] should be even more rigorously interpreted in the case of alleged violations of *erga omnes* obligations, where States not specially affected by the violations also have the right to bring a claim before the Court.[18]

Apart from the invocation of Article IX of the Genocide Convention and the existence of a dispute within the meaning of this article, The Gambia further explains in its application the foundation of its *jus standi in judicio*. It recalls the *jus cogens* character of the prohibition of genocide as well as the *erga omnes* and *erga omnes partes* character of the obligations owed under the Convention, which the Court has confirmed on several occasions.[19] On the other hand, Myanmar denies The Gambia´s standing to bring the case before the Court, arguing that, in comparison to some previous cases (*Bosnia and Herzegovina v. Serbia and Montenegro* and *Croatia v. Serbia*), in this case the applicant has no link to the facts of the case, there is no territorial connection between The Gambia and the alleged violations of the Genocide Convention in Myanmar, and neither is there a link between the purported offenders or the victims with The Gambia.[20] Moreover, Myanmar

appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III", Genocide Convention, *op. cit*., note 1.

16 ICJ Reports (2019), *op. cit*., note 6, paras. 20-24; ICJ Reports (2020), *op. cit*., note 13, paras. 2.7.-2.21.

17 See, for example, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports, 1 April 2011, paras. 29-30; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports, 20 July 2012, para. 46; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports, 5 October 2016, paras. 36-43.

18 Myanmar explains that if this were not so, potentially dozens of States who have no particular connection to the facts of a certain situation would be in a position to initiate separate proceedings before the Court against the same respondent State in relation to the same facts, which would jeopardise the international dispute settlement system. See more in ICJ Reports (2021), *op. cit*., note 15, para. 491.

19 ICJ Reports (2019), *op. cit*., note 6, paras. 15, 123, 127; ICJ Reports (2020), *op. cit*., note 13, paras. 2.11, 2.23, 2.26.

20 ICJ Reports (2021), *op. cit*., note 15, para. 212.

contends that Article IX does not grant non-injured Contracting States standing to claim alleged violations of the Convention.[21]

2.2. Judgment on the Preliminary Objections

After receiving the preliminary objections by the respondent and written observations[22] on these objections by the applicant, the Court delivered the judgment on the preliminary objections[23] on 22 July 2022. In this paragraph, we will present the key issues considered by the Court in the judgment, which are crucial for the determination of the jurisdiction of the Court in this case concerning the application and interpretation of the Genocide Convention.

As regards the issue of the applicant (not) being the ″real applicant″ in this case, the Court refers to Myanmar´s argument that the Court lacks jurisdiction, or that the application is inadmissible, because the ″real applicant″ in the proceedings is the OIC (Organization of Islamic Cooperation), an international organisation which cannot be a party before the Court.[24] Namely, Myanmar argues that The Gambia, as the nominal applicant, actually acts on behalf of an entity other than a State, ″as an organ, agent or proxy″ of the OIC, with the aim of circumventing the limitations of the *ratione personae* jurisdiction of the Court and invoking the compromissory clause of the Genocide Convention.[25] The Gambia contends that the motivation or another entity´s support for the commencement of the proceedings are irrelevant to jurisdictional matters.[26]

The Court rejected Myanmar´s first preliminary objection by clarifying that the legal bases for its *ratione personae* jurisdiction are Articles 34 and 35 of the Statute.[27] Therefore, The Gambia, as a UN Member State and an *ipso facto* party

[21] *Ibid*., paras. 215 *et seq.*

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Written Observations of The Gambia on the Preliminary Objections Raised by Myanmar, ICJ Reports, 20 April 2021.

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Judgment on the Preliminary Objections, ICJ Reports, 22 July 2022.

[24] *Ibid*., para. 34. According to Article 34, para. 1 of the ICJ Statute: ″Only States may be Parties in cases before the Court″. See the Statute of the International Court of Justice, available at United Nations, https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice (accessed 5 June 2023).

[25] ICJ Reports (2022), *ibid*., paras. 35-37.

[26] *Ibid*., paras. 38-41.

[27] Articles 34 and 35, para. 1 of the ICJ Statute, op. cit., note 24. According to Article 93, para. 1 of the UN Charter: ″All Members of the United Nations are *ipso facto* Parties to the

to the statute of the ICJ, meets the required conditions for being a party before the Court.[28] With regards to the question of the ″real applicant″, the Court dismissed Myanmar´s objection, arguing that political motives or a proposal of an international organisation to a State to initiate proceedings before the Court do not abolish its status as applicant before the Court.[29]

The second preliminary objection concerned the question of the existence of a dispute on the date of the filing of the application instituting proceedings. According to Myanmar, the documents and statements provided by The Gambia in its application may not serve as evidence in this context, as they, *inter alia*, did not emanate from Gambian official organs, and Myanmar could not have been aware of any specific legal claims considering its responsibility for the violation of the Convention.[30] The Gambia´s position in these matters can be subsumed in the following: the threshold for the existence of a dispute that Myanmar is trying to introduce is too high and has no support in the Court´s jurisprudence;[31] the respondent´s awareness of the applicant´s opposed views is sufficient to establish the existence of a dispute; the evidence submitted supports the conclusion of the existence of a dispute between the parties at the time of the filing of the application.[32]

The Court rejected Myanmar´s second preliminary objection regarding the (non)-existence of a dispute by recalling its established jurisprudence. The Court explained that the dispute can be defined as ″a disagreement on a point of law or fact, a conflict of legal views or of interests″ between parties.[33] Further, the

Statute of the International Court of Justice″. See Charter of the United Nations, available at United Nations, https://www.un.org/en/about-us/un-charter/ (accessed 5 June 2023).

28 ICJ Reports (2022), *op. cit*., note 23, para. 42.

29 *Ibid*., para. 44. See also *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment on the Jurisdiction of the Court and Admissibility of the Application, ICJ Reports, 20 December 1988, para. 52. Some authors refer to this kind of situation as ″strategic litigation″, explaining this term as a tool which, for example, international organisations use to promote their own goals. Ramsden, M., Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice, *Harvard Negotiation Law Review*, vol. 26 (2021), no. 2, pp. 154-157.

30 ICJ Reports (2022), *ibid*., paras. 52-54.

31 The Gambia claims that the standards of specificity in the claim proposed by Myanmar would significantly restrict access to the Court by requiring States fully to develop their legal and factual claims prior to the seising of the Court. *Ibid*., para. 57.

32 *Ibid*., paras. 59-62.

33 *Ibid*., para. 63. An identical definition is given in the case law of the Permanent Court of International Justice (PCIJ): *Mavrommatis Palestine Concessions*, Judgment No. 2, PCIJ Reports, Series A, No. 2, 30 August 1924, p. 11.

Court recalled its previous argumentation that ″the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations″,[34] and also that a reference to a specific treaty or to its provisions is not required in this regard.[35] For the determination of the existence of a dispute, the Court relied not only on the date of the submission of the application, but also on the subsequent conduct of the parties.[36] By taking all the submitted evidence into account, the Court concluded that a dispute relating to the interpretation, application, or fulfilment of the Genocide Convention existed between the parties at the time of the filing of the application by The Gambia.[37]

The interpretation of the reservation to Article VIII of the Genocide Convention filed by Myanmar and its relationship with Article IX, as well as the legal effects thereof, were discussed in the third preliminary objection before the Court. Namely, Myanmar contends that the wording of Article VIII that ″[a]ny Contracting Party may call upon the competent organs of the United Nations″ includes the Court and forms the basis for its jurisdiction, and that there is nothing in the article that limits the scope of its application to specific (only political) organs of the UN.[38] Thus, the difference in the scope of application of Article VIII and Article IX of the Convention lies in the fact that Article VIII governs the seisin of the Court, while Article IX governs only the Court´s jurisdiction.[39] Therefore, the reservation made has the effect of precluding the seising of the Court by The Gambia.

The Court concluded that it is necessary to read Article VIII as a whole and not merely the words ″competent organs of the United Nations″.[40] In this sense, the phrase ″to take such action (…) as they consider appropriate″ suggests that these

[34] See also *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility Judgment, ICJ Reports, 5 October 2016 (I), para. 34.

[35] The exchanges between the Parties must refer to a subject matter of the treaty with sufficient clarity to enable the State against which the claim is made to identify that there is a dispute. ICJ Reports (2022), *op. cit*., note 23, para. 72. See also ICJ Reports (2011), *op. cit*., note 17, para. 30.

[36] ICJ Reports (2022), *ibid*., paras. 64-76.

[37] *Ibid*., para. 77.

[38] *Ibid*., paras. 80-81.

[39] *Ibid*., para. 81.

[40] The Court applied the rules of customary international law on treaty interpretation, as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. See *The Vienna Convention on the Law of Treaties*, 1969, UNTS, vol. 1155, 1980.

organs exercise discretion in determining the action that should be taken with a view to ″the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III″. The Court continues by stating that the function of the competent organs within the meaning of Article VIII is thus different from that of the Court, whose function is to decide in accordance with the rules of international law pursuant to Article 38 of its statute.[41] The Court concluded that the purpose of Article VIII is to address political questions rather than to determine international responsibility for genocide.[42] Further, the Court explained that, unlike Article IX, the application of Article VIII is not dependent on the existence of a dispute between the parties.[43] Hence, since Article VIII does not govern the seisin of the Court, Myanmar´s reservation to that provision has no relevance in this case.[44] The third preliminary objection of Myanmar was thus rejected.

Crucial issues of the fourth preliminary objection concerned the *jus standi* of The Gambia to bring this case before the Court, the differentiation between injured and non-injured States (not) having the right to present a claim before the Court, and the question of legal interest of the applicant to initiate proceedings under the Genocide Convention against Myanmar.[45] The Gambia, on the other hand, bases its right to bring a claim before the Court and to institute proceedings against Myanmar on the *erga omnes partes* character of the obligations of States under the Convention.[46]

In relation to the question of injured and non-injured States, the Court only recalled the Advisory Opinion on *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide* of 1951, in which it explained: ″In such a convention the contracting States (…) have a common interest, namely, the accomplishment of those high purposes which are the *raison d´être* of the Convention″.[47] Thus, all the States Parties to the Genocide Convention have a common interest to ensure the prevention, suppression, and punishment of genocide by committing themselves to

41 ICJ Reports (2022), *op. cit*., note 23, para. 88.

42 *Ibid*. Similarly, see ICJ Reports (2007), *op. cit*., note 5, para. 159.

43 ICJ Reports (2022), *ibid*., para. 89.

44 *Ibid*., paras. 90-91.

45 *Ibid*., paras. 93-94.

46 *Ibid*., para. 100. The drafting history of the Convention, according to The Gambia, supports the view that the limitation of standing to ″specially injured″ States would undermine the effectiveness of the Convention with respect to acts committed within a State´s territory against a minority population. *Ibid*., para. 103.

47 *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports, 28 May 1951, p. 23.

fulfilling the obligations contained in the Convention.[48] In this sense, these obligations are obligations *erga omnes partes*,[49] which entail the right of every State Party to invoke the responsibility of another State Party for an alleged breach of its obligations under the Convention through the institution of proceedings before the Court.[50] The issue of nationality of claims, in relation to the *erga omnes* character of obligations, is also irrelevant. According to the argumentation of the Court, a State initiating proceedings does not need to demonstrate that victims of an alleged violation of the Genocide Convention are its nationals. This confirms the humanitarian purpose of the Genocide Convention and its objective to safeguard the very existence of certain human groups and to confirm the most elementary principles of morality, as was already emphasised in the Advisory Opinion of 1951.[51]

3. UKRAINE V. RUSSIAN FEDERATION

3.1. Case Overview

On 24 February 2022 on President Putin´s orders, armed forces of the Russian Federation started a military invasion against the territory of Ukraine. The goal of the so-called ″special military operation″ was to ″protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime″.[52] In his address, Putin also invoked Article 51 of the UN Charter, i.e. the right to self-defence, as the legal basis for the military intervention in Ukraine.[53]

Along with the military response to defend its territory and its citizens, Ukraine immediately decided to file an application instituting proceedings before the ICJ on 26 February 2022, as well as a request for the indication of

48 ICJ Reports (2022), *op. cit*., note 23, para. 107.

49 *Ibid*. See also ICJ Reports (2012), *op. cit*., note 17, para. 68. In the case *Barcelona Traction*, the Court explained that obligations *erga omnes* are by their very nature the concern of all States and that all States have a legal interest in their protection. See *Case Concerning the Barcelona Traction, Light and Power Company, Limited,* Judgment, ICJ Reports, 5 February 1970, para. 33.

50 ICJ Reports (2022), *ibid*., para. 108. See also Becker, M. A., The Plight of the Rohingya…, *op. cit*., pp. 438-440.

51 ICJ Reports (2022), *ibid*., paras. 109-113.

52 President of Russia, http://en.kremlin.ru/events/president/transcripts/statements/67843 (accessed 10 June 2023).

53 *Ibid*.

provisional measures.[54] The basis for the application were false claims of genocide committed by the Ukrainian authorities against Russian-speaking citizens, as well as the use of force as the justification for the prevention of and punishment of acts of genocide. To prove that there was a dispute between the parties within the meaning of Article IX of the Genocide Convention, the applicant referred to the claims by Russia that genocidal acts had occurred in the Luhansk and Donetsk oblasts of Ukraine, and that Russia had thus undertaken military and other actions against Ukraine with the purpose of preventing and punishing genocide.[55] Ukraine grounded the jurisdiction of the Court in Article IX of the Convention, which both States are parties to.[56]

In support of its contentions, the applicant listed statements made at the international level by the highest Russian officials, in which the protection of the Russian people from genocide by the Kiev regime was mentioned as the goal of the ″special military operation″.[57] The applicant emphasised that Ukraine and Russia held opposite views on whether genocide had been committed in Ukraine, and whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to prevent and punish genocide.[58] To summarise, Ukraine requested the Court to judge and declare that no acts of genocide, as defined by Article III of the Convention, have been committed in Ukraine; that Russia cannot lawfully take any action under the Convention in Ukraine; that Russia´s recognition of the independence of the so-called ″Donetsk People´s Republic″ and ″Luhansk People´s Republic″, as well as the ″special military operation″ carried out by Russia, has no basis in the Genocide Convention; that Russia provide assurances that it will not take unlawful actions in and against Ukraine, including by the use of force, on the false claim of genocide.[59]

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54 *Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation),* Application Institution Proceedings, ICJ Reports, 26 February 2022.

55 *Ibid*., paras. 2-3.

56 Ukraine ratified the Convention as the Ukrainian Soviet Socialist Republic on 15 November 1954, while the Russian Federation is a State Party to the Convention, continuing the legal personality of the Union of Soviet Socialist Republics, which ratified the Convention on 3 May 1954. A list of all the parties to the Genocide Convention are available at UN Treaty Series, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280027fac&clang=_en (accessed 5 June 2023). While both States Parties made a reservation to Article IX of the Convention, they both withdrew their reservations in 1989.

57 ICJ Reports (2022), *op. cit*., note 54, paras. 7-8.

58 *Ibid*., paras. 9-11. Facts of the case encompassing the period from 2014 until the present day are presented in paragraphs 13-25 of the application.

59 *Ibid*., para. 30.

A couple of days later, Russia submitted a document setting out its position regarding the alleged ″lack of jurisdiction″ of the Court. Russia offered several arguments in favour of its claim. First, even though both States are parties to the Genocide Convention, Russia argued that the Court must first ″ascertain whether the alleged breaches of the Convention are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX″.[60] Russia further noted that the use of force between States, the recognition of States, as well as the provision of the right of self-defence are issues that fall beyond the scope of the Convention.[61] The respondent argued that the legal justification of its military action in Ukraine is based on Article 51 of the UN Charter and customary international law, that such action is aimed at protecting the Russian people, and that the recognition of the Donetsk and Lugansk People´s Republics is a manifestation of a sovereign political act of the Russian Federation and a confirmation of the right of self-determination, as confirmed in the UN Charter.[62] Accordingly, the application and the request for the indication of provisional measures fall beyond the scope of the Genocide Convention and beyond the jurisdiction of the Court.

Since the Court suspended the proceedings on the merits in order to decide on the submitted preliminary objections,[63] we will focus our analysis of the key issues relating to the *prima facie jurisdiction* of the Court established by the order indicating provisional measures. We will also briefly present the content of the provisional measures ordered by the Court.

3.2. Order Indicating Provisional Measures

After convening a public hearing in which only Ukraine participated, but taking into account the views expressed by Russia in its document setting out its position regarding the lack of its jurisdiction, the Court made a decision on

[60] Document from the Russian Federation Setting Out its Position Regarding the Alleged ″Lack of Jurisdiction″ of the Court, ICJ Reports, 7 March 2022, paras. 7-9.

[61] *Ibid*., paras. 10-13.

[62] *Ibid*., paras. 16-19.

[63] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, ICJ Reports, 7 October 2022. In the meantime, the Russian Federation also submitted a document containing the objections with respect to the admissibility of all the declarations of intervention. See International Court of Justice, https://icj-cij.org/case/182/intervention (accessed 18 September 2023).

its *prima facie* jurisdiction in this case and indicated provisional measures of 16 March 2022.[64] In the introduction, the Court emphasised its deep concern of the extent of the human tragedy taking place in Ukraine and the use of force by Russia in Ukraine. The Court also underlined awareness of its responsibility for international peace and security, as well as the peaceful settlement of disputes under the UN Charter and the ICJ Statute.[65]

The Court explained that it may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but that it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.[66] In this case, the Court indicated that it must ascertain whether there exists a dispute between the parties under Article IX of the Genocide Convention relating to the interpretation, application, or fulfilment of obligations under the Convention at the time of the filing of the application.[67] Further, the Court noted that it must be shown that ″the claim of one Party is positively opposed by the other″,[68] for which purpose it took into account in particular statements and documents exchanged between the parties, as well as those made in international organisations. The Court also assessed the author(s), the content, and the other circumstances of these statements.[69]

By reaching a conclusion that there was a dispute between the parties in the case at hand, the Court explained that while it is not necessary for a State to refer expressly to a specific treaty in its exchanges with the other State, the exchanges must refer to the subject matter of the treaty with sufficient clarity to enable the State against which a claim is made to ascertain that there is, or may be, a dispute with regard to that subject matter.[70] The evidence presented, according to the Court, *prima facie* demonstrates that the statements made by the parties refer

[64] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation),* Order Indicating Provisional Measures, ICJ Reports, 16 March 2022.

[65] *Ibid*., paras. 17-18.

[66] See also *Application of the Convention on Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Provisional Measures, Order, ICJ Reports, 23 January 2020, para. 16.

[67] ICJ Reports (2022), *op. cit*., note 64, para. 28.

[68] *Ibid*. See also *South West Africa (Ethiopia v. South Africa),* Preliminary Objections, Judgment, ICJ Reports, 21 December 1962, p. 328.

[69] The Court observed references by several Russian State organs and officials, as well as statements made by Ukrainian State organs. See ICJ Reports (2022), *ibid*., paras. 37-42.

[70] *Ibid*., para. 44. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Jurisdiction and Admissibility, Judgment, ICJ Reports, 26 November 1984, para. 83.

to the subject matter of the Genocide Convention to allow Ukraine to invoke Article IX of the Convention as the basis for the Court´s jurisdiction.[71] Furthermore, the Court found that Russia´s invocation of Article 51 of the UN Charter does not preclude the Court from *prima facie* concluding the existence of its jurisdiction under the Genocide Convention, since certain acts or omissions may give rise to a dispute that falls within the scope of more than one treaty.[72]

In deciding whether there are conditions for the indication of provisional measures, the Court had to decide whether the rights claimed by Ukraine, and for which it is seeking protection, are plausible, and that there must be a link between those rights and the provisional measures being requested.[73] In its decision, the Court explained that every State Party to the Genocide Convention, in accordance with Article I, is obliged to prevent and punish genocide, while the measures to be undertaken to fulfil that obligation are not specified. However, it is self-explanatory that it must be fulfilled in good faith, taking into account other provisions, particularly Articles VIII and IX, and must be undertaken within the limitations set by international law.[74] Although the Court´s task in this preliminary stage of proceedings is not to decide on the merits of the case and on whether genocide in Ukraine has been committed, it considers it doubtful that the Convention, in light of its object and purpose, authorises States Parties to unilaterally use force in the territory of another State Party for the purpose of preventing and punishing acts of genocide.[75]

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71 ICJ Reports (2022), *ibid*., paras. 44-45.

72 *Ibid*., para. 46. See also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports, 3 February 2021, para. 56.

73 ICJ Reports (2022), *ibid*., paras. 50-51. The same argumentation is used in the Order instituting provisional measures against Myanmar. See ICJ Reports (2020), *op. cit*., note 66, paras. 43-44. The development of the plausibility test through the jurisprudence of the ICJ is presented in Lando, M., Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice, *Leiden Journal of International Law*, vol. 31 (2018), no. 3, pp. 641-668; Marchuk, I., 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, *Melbourne Journal of International Law*, vol. 18 (2017), no. 2, pp. 436-459.

74 ICJ Reports (2022), *ibid*., paras. 56-57. See also ICJ Reports (2007), *op. cit*., note 5, para. 430. The Court specifically cites Article I of the UN Charter, which says that the purpose of the United Nations is, *inter alia*, "to maintain international peace and security, and (…) to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". See ICJ Reports (2022), *ibid*., and Article I of the UN Charter, *op. cit*., note 27.

75 ICJ Reports (2022), *ibid*., paras. 59-60.

For the indication of provisional measures, the element of urgency is also required, which means that irreparable prejudice could be caused to rights claimed before the Court or when the alleged disregard of such rights may entail irreparable consequences.[76] In this context, the Court referred, *inter alia*, to the UN General Assembly Resolution of 2 March 2022, in which the Assembly expressed ″grave concern at reports of attacks against civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, children″; it also ″recognised that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war″.[77]

Taking all the above-mentioned facts and circumstances into consideration, the Court concluded that the conditions for the indication of provisional measures were met in this case,[78] thus indicating the following measures: the Russian Federation must immediately suspend military operations in the Ukrainian territory; it must ensure that any military and irregular armed units, any organisations or persons it controls or directs, take no steps in the furtherance of these operations; both parties must refrain from any action which might aggravate or extend the dispute before the Court.[79] The Court declined the Ukrainian request for Russia to provide the Court with a report on measures taken to implement provisional measures one week after the adoption of the Order and further on a regular basis.[80] We find this part of the Court´s decision deficient since, in our opinion, regular reporting on the measures taken would have enhanced public scrutiny, as well as the influence and political pressure of human rights organisations on both parties in regard to their actions on the ground, as well as their observance of their international obligations.[81]

Currently, the case between Ukraine and the Russian Federation is in the preliminary objections phase, and thus the proceedings on the merits are suspended until the decision on the jurisdiction of the Court is reached.[82]

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76 *Ibid*., paras. 65-66.

77 General Assembly Resolution, UN Doc. A/RES/ES-11/1, 2 March 2022, Preamble.

78 ICJ Reports (2022), *op. cit*., note 64, para. 78.

79 *Ibid*., para. 86.

80 *Ibid*., para. 83.

81 Becker criticises in a similar way the content of the provisional measures ordered against Myanmar. See Becker, M. A., The Plight of the Rohingya…, *op. cit*., pp. 446-447.

82 According to the available information, considering the fact that 33 States filed declarations on intervention in the case, the Court first had to decide on the admissibility of

4. ANALYSIS OF CRUCIAL JURISDICTIONAL ISSUES

Although both of the analysed cases are not yet in a phase in which the Court deliberates on all the presented facts and arguments of all the parties, the decisions made so far already have significant value for the consideration of the most relevant issues concerning the determination of the jurisdiction of the ICJ under the Genocide Convention. To some extent, these issues have already been discussed before the Court in previous cases, primarily in the first case ever involving the crime of genocide under the Convention, *Bosnia and Herzegovina v. Serbia and Montenegro* in 2007. However, since the jurisprudence of the Court in relation to the application and interpretation of the Genocide Convention is not abundant, the Court´s legal interpretation of the issues concerning the existence of a dispute, the meaning of the *erga omnes* and *erga omnes partes* obligations under international law, *jus standi* before the Court, the scope of application of Articles VIII and IX of the Convention, as well as the problem of the use of force for the purpose of preventing and punishing genocide, will help us draw conclusions on future cases involving similar legal problems.

4.1. The Gambia v. Myanmar

As far as the case between The Gambia and Myanmar is concerned, one of the important aspects of the judgment on the preliminary objections was the acknowledgment of the Rohingya group as a protected group under the Genocide Convention, regardless of the fact that in Myanmar´s law they are not afforded such status. Myanmar´s policies eventually led to the abolition of certain civil and political rights of the members of the Rohingya and the deterioration of their legal and actual position in Myanmar society.[83] The subsumption of the

these declarations. In its decision of 5 June 2023, the Court rendered the majority of the declarations admissible. See *Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation),* Admissibility of the Declarations of Intervention Order, ICJ Reports, 5 June 2023. For more on the right to intervention in the proceedings before the ICJ, see Palchetti, P., Opening the International Court of Justice to Third States: Intervention and Beyond, *Max Planck Yearbook of United Nations Law,* vol. 6 (2002), pp. 141-145; Alexander, A.; Guha, S. K., Critical Analysis of Third-Party Intervention before the International Court of Justice, *Indonesian Journal of International & Comparative Law,* vol. 8 (2021), no. 4, pp. 441-466.

[83] In this context, the Court afforded significant probative value to the reports submitted by the Fact-Finding Mission on Myanmar of the UN Human Rights Council. The significance of such reports and findings was explained in prior decisions, as well. See ICJ Reports (2015), *op. cit*., note 5, para. 459. For more about the probative value of evidence

Rohingya group under Article II of the Genocide Convention has enabled this vulnerable group to be protected under international law, or at least for their rights and protection to be discussed at the world court.[84]

Furthermore, a unique feature of this case is also the fact that for the first time in history proceedings before the Court under the allegations of genocide were initiated by a State which, at first glance, does not have any connection either to Myanmar as the Respondent State (it is not even a neighbouring State), or to its citizens, and neither are the victims of the alleged crimes nationals of the applicant. So, in our opinion, in order for such serious allegations to be examined and the most vulnerable groups of people protected, it is even more significant that the Court in its judgment of 2022 reaffirmed the *erga omnes* and *jus cogens* character of the prohibition of genocide, as well as the *erga omnes partes* character of the obligations contained in the Genocide Convention.[85] In this sense, it is important that the Court once again emphasised that since the obligations under the Convention are obligations *erga omnes partes*, every State is entitled and has an interest to invoke the responsibility of another State Party for an alleged breach of the Convention through the institution of proceedings before the Court, whether or not there is a special interest of the applicant. This conclusion is also in line with Article 48 of the International Law Commission´s articles on the Responsibility of States for Internationally Wrongful Acts, which is based on the idea that in the case of a breach of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured.[86] By analysing the development of the international legal

presented before the ICJ, see Ukabiala, N.; Pickard, D.; Yamamoto, A., *Erga Omnes Partes* before the International Court of Justice: From Standing to Judgement on the Merits, *ILSA Journal of International and Comparative Law*, vol. 27 (2021), no. 2, pp. 243-248.

[84] Similarly, Hameed, U., The ICJ´s Provisional Measures Order in *Gambia v. Myanmar* and Its Implications for Pakistan´s Kashmir Policy, *Pakistan Law Review*, vol. 11 (2020), p. 185. According to the Human Rights Council´s report from 2016, the Rohingya Muslims ″self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State″. See UN General Assembly, Human Rights Council, Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar, UN Doc. A/HRC/32/18, 29 June 2016, para. 3.

[85] The object of the Genocide Convention, on the one hand, is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principles of morality. ICJ Reports (1951), *op. cit*., note 47, para. 23.

[86] The International Law Commission explains that Article 48 does not distinguish between sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations

rules protecting collective interests, it is explained in theory that the roots and *raison d´être* for their development are, among other things, the ethical value and the special vulnerability of the public good of humankind. Thus, suffering caused by massive violations of human rights and the damage resulting from the loss of lives and cultures have inspired international legal instruments on the protection of human rights and the responsibility for international crimes.[87]

Hence, the problem of directly injured and non-injured States, as well as the requirement of the nationality of claims, are irrelevant for the establishment of *jus standi* before the Court.[88] *Belgium v. Senegal* is the first case deliberated before the ICJ in which the Court ruled that a State has standing before the Court by virtue of the concept of *erga omnes partes* obligations, in this case by interpreting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[89] In this case, the Court emphasised the following: ″The common interest in compliance with the relevant obligations under the

have sometimes been referred to as ″obligations *erga omnes partes*″. See Report of the International Law Commission on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentary, 2001, vol. II, General Assembly Resolution, UN Doc. A/RES/56/10, 12 December 2001, p. 126.

87 A theoretical analysis of the development of *erga omnes* obligations, *jus cogens* rules of international law, and international responsibility towards the international community as a whole is provided in Villalpando, S., The Legal Dimension of the International Community: How Community Interests Are Protected in International Law, *European Journal of International Law*, vol. 21 (2010), no. 2, pp. 387-420. See also the preamble of the Universal Declaration of Human Rights, where it is stated: ″Whereas 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; Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people (…)″. General Assembly Resolution, Universal Declaration on Human Rights, UN Doc. A/RES/217 (III), 10 December 1948, Preamble. The Statute of the International Criminal Court also says: ″Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity; Recognizing that such grave crimes threaten the peace, security and well-being of the world (…)″. Rome Statute of the International Criminal Court, 1998, UNTS, vol. 2187, 2004, Preamble.

88 The opposite argument invoked by Myanmar would render the purpose of the Convention meaningless and the legal protection sought for the abused groups of people almost impossible to realise. Hameed, U., The ICJ´s Provisional Measures…, *op. cit*., p. 185.

89 ICJ Reports (2012), *op. cit*., note 17, para. 68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UNTS, vol. 1465, 1987.

Convention against Torture implies the entitlement of each State Party to the Convention to make a claim concerning the cessation of an alleged breach by another State Party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim".[90] However, *jus standi* before the ICJ is nevertheless conditioned by the requirement that there must be consent to the Courts jurisdiction by both States Parties to a dispute.[91] It can be concluded that the *erga omnes partes* concept of international law has been confirmed as customary international law by virtue of the widespread practice of States and *opinion juris*, and has been reflected in many international conventions and in the jurisprudence of international courts and tribunals.[92]

The relationship between Articles VIII and IX of the Convention remains to some extent vague in spite of the explanation of the Court that these provisions have distinct areas of application. According to the Court´s argumentation, Article VIII refers primarily to political organs, whereas Article IX explicitly refers to the competence of the ICJ as the UN´s judicial organ. Its authority is to decide on the issues of international responsibility.[93] The Court´s reasoning is convincing if one looks at the wording of these articles. Namely, the term "dispute" is mentioned verbatim in Article IX and is related to the competence of the ICJ, whereas the phrases "competent organs of the United Nations" and "to take such action (…) as they consider appropriate (…)" contained in Article VIII indicate that this article covers situations which refer to the engagement of various UN organs competent to use more diverse measures (and not merely legal ones) in order to prevent and suppress acts of genocide. Otherwise, the separation of the two articles in the Convention and differentiating "competent organs of the

[90] ICJ Reports (2012), *ibid*., para. 69. See also Hamid, A. G., The Rohingya Genocide Case (*The Gambia v Myanmar*): Breach of Obligations *Erga Omnes Partes* and Issues of Standing, *IIUM Law Journal*, vol. 29 (2021), no. 1, pp. 42-43.

[91] In the case between the DR Congo and Rwanda, deliberating on the legal effect of the reservation to Article IX of the Genocide Convention by Rwanda, the ICJ recalled that "(…) the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the Parties". *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* Jurisdiction of the Court and the Admissibility of the Application, Judgment, ICJ Reports, 3 February 2006, paras. 64-65.

[92] For the practice of various international courts confirming the existence of and the significance of *erga omnes partes* in international law, see Hamid, A. G., The Rohingya Genocide Case…, *op. cit*., pp. 42-46.

[93] See *supra* in para. 2.2.

United Nations" and the ICJ would serve no meaningful purpose for the States Parties other than affording them the right to turn to different organs of the UN for the purpose of the application of the obligations under the Convention. The argumentation of the Court is in line with its previous decisions, such as the judgment in the case *Bosnia and Herzegovina v. Serbia and Montenegro*, where the Court explained that Article VIII "may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility".[94]

To conclude, the significance of the Court's judgment on the preliminary objections in the case between The Gambia and Myanmar lies, in our opinion, in the effect that the Court's ruling could have on the protection of the most vulnerable minority in Myanmar and in the world, particularly where the Security Council is unable to adopt coercive measures due to the veto right of the five permanent members.[95] Even in this phase of the proceedings when it has not yet been decided on the merits, but provisional measures have been ordered and the jurisdiction established, the role of the ICJ may have a much greater value for the protection of minority groups in general at the time of ethnic conflicts.[96] If the Court finds that Myanmar is directly responsible for genocide, which would be the first such ruling, it would be confirmation of the view that international crimes of such a scale and effect are virtually inconceivable without the involvement of a State.[97] At the same time, it is important to bear in mind that, although the Genocide Convention envisages both individual as well as State responsibility, mechanisms for attributing responsibility for genocide to these two legal subjects are not quite the same. Namely, as previous ICJ decisions show, genocidal intent as one of two elements of the crime can hardly be attributed to a State as an abstract legal entity. By contrast, as a wrongful act of exceptional seriousness, genocide always requires the existence of a genocidal policy and a pattern of a widespread and systematic violence of a certain group.[98] However,

[94] ICJ Reports (2007), *op. cit*., note 5, para. 159.

[95] See, for example, UN Security Council Press Release, UN Doc. SC/8939, 12 January 2007.

[96] Stephenson, C. P. Y., The International Court of Justice and Ethnic Conflicts: Challenges and Opportunities, *Texas International Law Journal*, vol. 56 (2021), no. 1, p. 33.

[97] Schabas, W. A., *Genocide in International Law*, 2nd edn., Cambridge University Press, Cambridge, 2009, p. 512.

[98] Gaeta, P., Genocide, in: Schabas, W. A.; Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Routledge Taylor & Francis Group, London and New York, 2011, pp. 114-117. Some authors point to two different objects of State responsibility and individual criminal responsibility. The first one is primarily invoked to obtain reparation, while the other one is associated with punishment of an individual. See Duff, R. A., State Responsibility: An

intent as part of the primary rule prohibiting genocide is also required to establish the crime of genocide by a State, if the intent by State organs is proven. This indicates that these two levels of responsibility can overlap.[99] It is for the Court to evaluate fairly all the evidence, which will be presented to it by both States in this case, and to deliver its judgment on the merits accordingly.

4.2. Ukraine v. Russian Federation

As for the case between Ukraine and Russia, in its order on provisional measures the ICJ reminded the parties of their international obligations and responsibilities arising from the UN Charter for the maintenance of international peace and security, the peaceful settlement of disputes, and other international legal rules, including the rules of international humanitarian law.[100] The proceedings before the Court initiated by Ukraine are limited in scope by the framework of the Genocide Convention since the jurisprudence of the Court in this case is only *prima facie* established under its provisions, and thus the Court must confine its decision-making to the interpretation of that international instrument.

For these reasons, in order for the Court to indicate provisional measures, it had to appear *prima facie* that the jurisdiction of the Court is based on the Genocide Convention.[101] It is not disputable that both States are parties to the Genocide Convention, but it is somewhat disputable whether there is a dispute between the parties within the meaning of Article IX of the Genocide Convention. In other words, the issue is whether the acts complained of in the application instituting proceedings are capable of falling within the scope of the Convention *ratione materiae* and whether the parties hold opposite views concerning the question of the performance or non-performance of certain

Outsider's View, in: Besson, S. (ed.), *Theories of International Responsibility Law*, Cambridge University Press, Cambridge, 2022, pp. 73-74. For a more detailed analysis, see Wyler, E.; Castellanos-Jankiewicz, L. A., State Responsibility and International Crimes, *op. cit*., pp. 385-405.

[99] Bianchi, A., State Responsibility and Criminal Liability of Individuals, in: Cassese, A. (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 18.

[100] ICJ Reports (2022), *op. cit*., note 64, para. 18. For an analysis of the violations of international law in the Russian-Ukrainian war, see Khater, M., The Legality of the Russian Military Operations against Ukraine from the Perspective of International Law, *Access to Justice in Eastern Europe*, no. 3, 2022, pp. 113-115; Kwiecien, R., The Aggression of the Russian Federation against Ukraine: International Law and Power Politics or "What Happens Now", *Polish Review of International and European Law*, vol. 11 (2022), no. 1, p. 9 *et seq*.

[101] See also ICJ Reports (2020), *op. cit*., note 66, para. 16.

international obligations.[102] The key question is, therefore, whether or not the Court´s argumentation of the existence of a dispute between Ukraine and Russia under the Genocide Convention and the application of Article IX is clear and precise enough for it to be legally convincing.

By referring to various statements made by high-ranking State officials from both parties on a bilateral as well as international level, the Court concluded that the evidence presented supports the conclusion that *prima facie* the dispute at hand refers to the subject matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke Article IX as the basis for the Court´s jurisdiction.[103] The Court relied on its previous jurisprudence, i.e. on previous decisions in which it explained that in order for a compromissory clause of an international treaty to be invoked, it is not necessary for a party to expressly refer to that specific treaty or provision. Cases such as *Nicaragua v. United States of America* or *Georgia v. Russian Federation*[104] confirm this reasoning. In this sense, it can be concluded that the Court´s decision in regard to the existence of a dispute under Article IX in the case between Ukraine and Russia is, at least in this initial phase, well founded in law and in its previous jurisprudence.

However, the Court failed to use another argument to substantiate its decision on having *prima facie* jurisdiction *ratione materiae* in this case. In its judgment of 2007, the Court elucidated that the wording of Article IX ″Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State (…)″ tends to confirm that ″disputes relating to the responsibility of Contracting Parties for genocide (…) are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention″.[105] The dispute between the parties regarding the use of force for the prevention or suppression of genocidal acts, if understood *lato sensu*, could thus be subsumed under Article IX. Even if the Court was deciding merely on its *prima facie* jurisdiction, this argument might have strengthened the Court´s reasoning for the application of Article IX. In any case, the problematic issue of the use of force and the application of the Genocide Convention will have to be elaborated in

[102] ICJ Reports (2022), *op. cit*., note 64, para. 28.

[103] The Court particularly took into account statements made by the representatives of Ukraine and Russia in the UN General Assembly and the Security Council, as well as in the European Union. *Ibid*., para. 44.

[104] ICJ Reports (1984), *op. cit*., note 70, para. 83; ICJ Reports (2011), *op cit*., note 17, para. 30.

[105] ICJ Reports (2007), *op. cit*., note 5, para. 169. See also Plachta, M.; Zagaris, B., Atrocity Crimes in Ukraine, *International Enforcement Law Reporter*, vol. 38 (2022), no. 3, p. 86.

more detail in future decisions of the Court. Still, the Court did, but only briefly, refer to the problem of the use of force for the purpose of preventing and punishing the alleged acts of genocide as a measure for the fulfilment of the obligation contained in Article I of the Convention.[106] The Court merely states that the acts complained of by the applicant appear to be capable of falling under the Genocide Convention.[107] Of course, the standard of conviction for the Court to make certain conclusions and decisions is certainly not and need not be on the same level as in the merits decision phase.[108] However, it might be problematic for the later phase of the proceedings that the Court did not find it necessary, even in the decision on provisional measures, to elaborate in more detail the significance of Russia´s contention that the so-called special military operation was based on the right of self-defence within the meaning of Article 51 UN Charter. The Court only observed that: ″(…) certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty″[109] and that it does not preclude it from deciding on its *prima facie* jurisdiction under the Genocide Convention. The Court remained silent on the issue of the recognition of the independence of the ″Donetsk and Luhansk People´s Republics″ and its significance for the application of the Convention.[110] It is also highly unlikely that the Court will find legal ground for a conclusion that these issues are capable of falling under the scope of the Genocide Convention. However, the Court will eventually have to refer to this matter, at least in brief, in the coming proceedings on jurisdiction.

The analysis of the legal preconditions for the exercise of the right to self-defence under the UN Charter would go beyond the scope of this paper. However, we will only recall that according to well-established case law of the ICJ as well as the opinions of international lawyers, the use of force in the exercise of self-defence within the meaning of the Charter is justified only in an armed attack by another State, and the preconditions of proportionality and necessity should

[106] Article I of the Genocide Convention prescribes: ″The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish″. See the Genocide Convention, *op. cit*., note 1.

[107] ICJ Reports (2022), *op. cit*., note 64, para. 45.

[108] *Ibid*., para. 24.

[109] *Ibid*., para. 46. See also ICJ Reports (2021), *op. cit*., note 72, para. 46.

[110] In its resolution, the UN General Assembly stated that the recognition of the statehood of the Donets and Luhansk People's Republics is a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the UN Charter. See UN General Assembly Resolution, UN Doc. A/RES/ES-11/1, *op. cit*., note 77.

be satisfied.[111] At this point, it seems almost impossible that Russia will be able to substantiate its claim and its military intervention on the territory of Ukraine by reference to Article 51.[112] Moreover, if Russia continues with its contentions that armed force was used as a measure for the prevention and suppression of genocidal acts within the meaning of Article I of the Convention, it is necessary to recall the Court´s opinion in the order on provisional measures that ″(…) it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party´s unilateral use of force in the territory of another State″ for this purpose.[113] Surely, it would not only be contrary to the humanitarian purpose of the Convention, but also to the fundamental principles of international law and international relations established in Article 2, para. 4 of the UN Charter, which prescribes the duty of all States to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, as well as the duty of States to settle their international disputes peacefully (Article 2, para. 3 of the Charter).[114]

It is to be expected from the Court in the continuation of the proceedings to emphasise and remind States Parties to the dispute of Article VIII of the

[111] Article 51 of the UN Charter states: ″Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security (…)″. UN Charter, *op. cit*., note 27. On the right to self-defence in general, see Dinstein, Y., *War, Aggression and Self-Defence*, 5th edn., Cambridge University Press, Cambridge, 2012; Seršić, M., Article 51 of the UN Charter and the ″War″ against Terrorism, in: Becker, S. W.; Derenčinović, D. (eds.), *International Terrorism: The Future Unchained?*, Faculty of Law, University of Zagreb, Zagreb, 2008, pp. 95-113; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, ICJ Reports, 27 June 1986, para. 176; *Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment, ICJ Reports, 6 November 2003, para. 51; Nihreieva, O., Russian Invasion of Ukraine through the Prism of International Law: Critical Overview, *Paix et Sécurité Internationales – Journal of International Law and International Relations*, vol. 10 (2022), pp. 17-18.

[112] Similarly, Nihreieva, O., Russian Invasion of Ukraine…, *ibid*., pp. 21-22. Critical analysis of various interpretations of Russia´s ″special military operation″ under the existing international legal norms is provided by Hoffmann, T., War or Peace? – International Legal Issues Concerning the Use of Force in the Russia-Ukraine Conflict, *Hungarian Journal of Legal Studies*, vol. 63 (2022), no. 3, pp. 209-220. See also Ranjan, P.; Anil, A., Russia-Ukraine War, ICJ, and the Genocide Convention, *Indonesian Journal of International & Comparative Law*, vol. 9 (2022), no. 1, pp. 103-105.

[113] ICJ Reports (2022), *op. cit*., note 64, para. 59. See also Plachta, M.; Zagaris, B., Atrocity Crimes in Ukraine, *op. cit*., p. 89.

[114] UN Charter, *op. cit*., note 27, Article 2, paras. 3 and 4.

Genocide Convention and their right to call upon competent organs of the United Nations to take appropriate measures for the prevention and suppression of acts of genocide if they consider it necessary.[115] If Russia believes that Ukraine is to be held responsible for genocide, it might have used the legal possibility to activate Article IX and initiate proceedings before the ICJ under the Genocide Convention against Ukraine since both of the States are parties to the Convention. Other means of peaceful settlement of disputes are also available for all parties. Unilateral actions by the use of armed force as a measure for the prevention of genocide cannot find justification in any legal norm. What is more, the preamble of the Convention clearly obliges States to achieve international cooperation ″in order to liberate mankind from such an odious scourge″ and not use armed force to that end.[116] Russia´s unilateral use of force as well as the use of the right of veto by the Russian Representative in the UN Security Council[117] clearly point to the conclusion that international cooperation for the purpose of suppressing the alleged acts of genocide in Ukraine is not the path Russia is willing to take, and also that the idea of self-defence is impossible to defend.

5. CONCLUSION

The two cases pending before the ICJ concerning the application, interpretation, and fulfilment of States´ obligations under the Genocide Convention offer interesting jurisdictional issues of international law, some of which have already been dealt with by the Court in its previous cases, and some which pose new challenges both for the ICJ and for international law. The arguments presented by the Court in the judgment on the preliminary objections in *The Gambia v. Myanmar* case in which it confirmed its jurisdiction are grounded in well-established jurisprudence, particularly in regard to questions of the existence of a dispute, the *erga omnes* character of certain international obligations, and the legal position of injured and non-injured States under the Genocide Convention. The greatest value of the judgment lies, in our opinion, in the fact

[115] Ranjan, P.; Anil, A., Russia-Ukraine War…, *op. cit*., p. 111; Kagan, J. M., The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms, and State Responsibility, *San Diego International Law Journal*, vol. 7 (2006), no. 2, p. 468. For an analysis of the means and channels for States to fulfil their obligation to prevent genocide, see De Pooter, H., Obligation to Prevent Genocide: A Large Shell Yet to Be Filled, *African Yearbook of International Law*, vol. 17 (2009), pp. 285-320.

[116] Similarly in ICJ Reports (2007), *op. cit*., note 5, paras. 163-164.

[117] UN News, https://news.un.org/en/story/2022/02/1112802 (accessed 15 June 2023).

that the Court strengthened the scope of protection under the Convention by confirming that the most vulnerable groups of people, even when, and perhaps particularly when, their rights are allegedly being violated by their own government, are protected by international law. In this respect, it is important to reiterate the humanitarian purpose of the Genocide Convention and its growing importance for the protection of humanity.

However, proceedings on the merits will be challenging both for the representatives of States Parties of the dispute to provide the Court with sufficient evidence of the genocidal acts committed, particularly in respect of proving the genocidal intent, as well as for the Court in assessing all the facts and evidence fairly, within the framework of international law. In its previous judgments involving the responsibility of States, the Court set a very high test for the attribution of certain acts to a State, which seems almost impossible to satisfy. Nevertheless, if the ICJ eventually determines that Myanmar as a State is responsible for genocide against its own citizens, it would be the first such ruling which, we dare believe, might truly influence States to refrain from the most serious violations of human rights and implement more decisive and efficient measures for the prevention and suppression of genocide.

On the other hand, the order on provisional measures in the case *Ukraine v. Russian Federation* did not have the desired effect; Russia did not suspend military operations, nor did it ensure that its military or irregular units or persons take no steps in the furtherance of the military actions in Ukraine. There are no procedural execution mechanisms to make the measures ordered efficient. According to Article 94, para. 1 of the UN Charter, both States are under the obligation to act in accordance with the order on provisional measures.[118] Unfortunately, we are witnessing ongoing use of military force in Ukraine by the Russian armed forces, and there is little or no hope that the Security Council will use its enforcement power to implement coercive measures against a State which is violating its international obligations and the UN Charter.[119] It is yet

[118] Article 94, para. 2 of the UN Charter prescribes: ″Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a Party″. See the UN Charter, *op. cit*., note 27. The ICJ confirmed the binding effect of provisional measures in the *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports, 27 June 2001, para. 102. See also in Schabas, W. A., *Genocide in International Law*, *op. cit*., p. 504.

[119] Veto power by permanent members of the Security Council (in this case by Russia and China) prevents the Council from deciding on the implementation of measures envisaged by Chapter VII of the UN Charter. For the possibilities of the International Criminal Court to entertain its competence in regard to individual criminal responsibility for crimes

to be seen how the Court will handle the most challenging question on the use of force and its connection to the obligations of States under the Genocide Convention. It seems to us that the continuation of the proceedings depends mostly on the resolution of this problem. Since one of the parties in this dispute is a permanent member of the Security Council, the role of the ICJ in the context of protecting the international legal order and preserving international peace and security is extremely important. Hopefully, Schwarzenberger´s remark that the Genocide Convention is ″unnecessary when applicable and inapplicable when necessary″[120] will prove to be incorrect.

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Sažetak:

ODGOVORNOST DRŽAVA PREMA KONVENCIJI O GENOCIDU – PITANJA NADLEŽNOSTI U NOVIJOJ PRAKSI MEĐUNARODNOG SUDA

Autorica analizira određena pitanja o utvrđivanju odgovornosti država prema Konvenciji o sprječavanju i kažnjavanju zločina genocida i najnovijim slučajevima koji se razmatraju pred Međunarodnim sudom. Posebna se pažnja posvećuje odlukama Suda u slučajevima Gambija protiv Mijanmara *i* Ukrajina protiv Ruske Federacije *te interpretaciji odredaba Konvencije o genocidu koje se odnose na uspostavljanje nadležnosti Suda. U tom se kontekstu osobito analiziraju pitanja preliminarnog karaktera, poput postojanja spora između stranaka, nadležnosti Suda* ratione personae, erga omnes *obveze koje proizlaze iz Konvencije,* jus standi *stranaka pred Sudom, odnosa između članaka VIII i IX Konvencije, kao i pitanja uporabe sile radi sprječavanja ili kažnjavanja genocida. Po mišljenju autorice, unatoč tomu što u analiziranim slučajevima još nije odlučeno o meritumu, do sada donesene odluke imat će znatan utjecaj na ispravnu i učinkovitu primjenu Konvencije o genocidu u budućnosti, u smislu pojašnjavanja preduvjeta za uspostavu nadležnosti Suda, kao i očuvanja temeljnih načela međunarodnog prava i pravila o odgovornosti država.*

Ključne riječi: *odgovornost država; Konvencija o sprječavanju i kažnjavanju zločina genocida; Međunarodni sud; nadležnost Suda; slučaj* Gambija protiv Mijanmara; *slučaj* Ukrajina protiv Ruske Federacije.

GVINEJSKI ZALJEV – ŽARIŠTE PIRATSKIH NAPADA I NOVA PRIJETNJA MEĐUNARODNOJ SIGURNOSTI PLOVIDBE

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Moderno piratstvo predstavlja jednu od najvećih ugroza sigurnosti pomorske plovidbe. Posljednjih se godina njegovo žarište premjestilo iz Adenskog zaljeva u Gvinejski zaljev koji je danas najrizičnije plovno područje u svijetu. Po uzoru na aktivne i pasivne mjere primijenjene pri suzbijanju piratstva u Adenskom zaljevu, države regije, kao i međunarodna zajednica, donijele su niz propisa i ugovora kojima žele ograničiti i onemogućiti daljnje piratske napade. U tome kontekstu svakako treba spomenuti relevantne rezolucije Ujedinjenih naroda – Pravilnik o postupanju Yaoundé, Afričku povelju o pomorskoj sigurnosti i razvoju u Africi, Zakon o suzbijanju piratstva i drugih pomorskih kaznenih djela Savezne Republike Nigerije te Priručnik BMP WA. Važan doprinos u borbi protiv piratstva u Gvinejskom zaljevu dali su NATO i EU kroz brojne pomorske operacije koje provode i nadziru radi podizanja stupnja pomorske sigurnosti u ovom rizičnom području. Kao nezamjenjiv partner zemalja regije Gvinejskog zaljeva istaknuo se EU koji kroz čitav niz dokumenata i operacija na moru, u kojima aktivno sudjeluje, pokušava onemogućiti daljnje piratske napade i pridonijeti postizanju željene pomorske sigurnosti u ovom dijelu svijeta te tako zaštititi zajedničke interese. U ovom radu, autorica daje pregled najvažnijih međunarodnih dokumenata donesenih radi suzbijanja piratskih napada u Gvinejskom zaljevu, s posebnim naglaskom na ulogu EU-a.

Ključne riječi: *piratstvo; Gvinejski zaljev; Pravilnik o postupanju Yaoundé; Afrička povelja o pomorskoj sigurnosti i razvoju u Africi; Zakon o suzbijanju piratstva i drugih pomorskih kaznenih djela Savezne Republike Nigerije; Priručnik BMP WA; Strategija EU-a za Gvinejski zaljev; Akcijski plan EU-a za Gvinejski zaljev; Strateški kompas EU-a.*

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1. UVOD

Kako bi se osigurala nesmetana međunarodna trgovinska razmjena te održao međunarodni mir i sigurna pomorska plovidba, nužno je stvoriti sigurno pomorsko okruženje. Piratstvo je od pamtivijeka pratilo trgovinu i pomorsku plovidbu. Iako je klasično piratstvo suzbijeno početkom devetnaestog stoljeća, ono nikada nije u potpunosti iskorijenjeno.[1] Moderno se piratstvo pojavilo devedesetih godina prošlog stoljeća, a kulminaciju je doživjelo u prvom desetljeću dvadeset prvog stoljeća u Adenskom zaljevu. Zahvaljujući međunarodnoj zajednici koja je poduzela aktivne i pasivne mjere, posljednjih je godina došlo do suzbijanja piratstva i oružane pljačke u tom području te se žarište piratskih napada premjestilo u Gvinejski zaljev, osobito na područje Nigerije.[2] Prema izvješću Međunarodnog pomorskog ureda (u nastavku: IMB)[3] za 2022. godinu, broj prijavljenih piratskih napada i oružanih pljački u svijetu najniži je od 1992. godine.[4] Međutim, piratstvo i dalje predstavlja jednu od najopasnijih modernih pomorskih ugroza te je prisutno na frekventnim pomorskim putevima, osobito u područjima pod nadležnošću siromašnih i slabije razvijenih obalnih država.

Gvinejski zaljev je strateški važna pomorska regija, ključna za transport nafte, plina i robe u/iz središnje i južne Afrike, poznata po plavoj ekonomiji. Zaljev obuhvaća približno šest tisuća kilometara obale Liberije, Obale Bjelokosti, Gane, Benina, Toga, Nigerije, Kameruna, Svetog Toma i Principa, Ekvatorijalne

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1 Pogledati Rubin, A. P., *The Law of Piracy*, 2. izdanje, Transnational Publishers, Irvington-on-Hudson, New York, 1998., str. 92.

2 Iako je tijekom 2022. godine broj piratskih napada u Gvinejskom zaljevu znatno opao, te je veći broj napada zabilježen u Singapurskom prolazu, navedeni podatak ne umanjuje opasnost koja vlada tijekom plovidbe tim područjem, kao ni ozbiljnost prijetnje za pomorsku sigurnost. IMB smatra kako je realni broj napada za dvije trećine veći od broja prijavljenih napada. Vidi Anyimadu, A., Maritime Security in the Gulf of Guinea: Lessons Learned from the Indian Ocean, Chatham House, Africa 2013/02, str. 10, https://www.chathamhouse.org/sites/default/files/public/Research/Africa/0713pp_maritimesecurity_0.pdf (pristup 2. veljače 2023.).

3 Engl. *International Maritime Bureau*. Međunarodni pomorski ured specijalizirana je podružnica Međunarodne trgovačke komore – ICC (engl. *International Chamber of Commerce),* osnovana 1981. godine radi suzbijanja svih oblika kaznenih djela na moru, a osobito piratstva. Više o tome vidi https://www.icc-ccs.org/ (pristup 15. siječnja 2023.).

4 U prvih devet mjeseci 2022. godine zabilježeno je tek devedeset piratskih napada i slučajeva oružanih pljački. Od ukupno devedeset zabilježenih napada, trinaest ih se dogodilo u Gvinejskom zaljevu. Više o tome vidi https://www.icc-ccs.org/index.php/1321-no-room-for-complacency-says-imb-as-global-piracy-incidents-hit-lowest-levels-in-decades (pristup 15. siječnja 2023.).

Gvineje i Gabona, te je područje u kojem se nalaze najveći afrički naftni resursi.[5] Nalazišta nafte smještena su u dubokom moru Gvinejskog zaljeva i na obalnim područjima delte Nigera, čineći tako Nigeriju osmom državom s najvećim izvozom nafte na svijetu.[6] Unatoč tomu, Nigerija je jedna od najsiromašnijih država svijeta, a upravo zbog nejednake raspodjele velikog bogatstva ostvarenog proizvodnjom i izvozom nafte potiče nestabilnost na tom prostoru. Naime, samo su Vlada, gospodarska elita i naftne kompanije profitirale od proizvodnje i izvoza nafte, dok je ostatak društva marginaliziran i isključen iz dobiti. Osim toga, tijekom godina dogodila su se znatna izlijevanja nafte koja su onečistila deltu Nigera i gotovo uništila tamošnje gospodarstvo, što je dovelo i do rasta broja nezaposlenih. Zbog velikog siromaštva, nezaposlenosti, nefunkcioniranja državnih institucija te nepostojanja regionalne koordinacije, dio lokalnog stanovništva delte Nigera opredijelio se za počinjenje pomorskih kaznenih djela, smatrajući da je takvo ostvarenje ekonomskog profita vrijedno rizika kojem se izlažu.[7] Rast piratskih napada zabilježen je početkom dvadeset prvog stoljeća i usko je povezan s osnivanjem Pokreta za oslobođenje delte Nigera (u nastavku: MEND) 2005. godine. MEND je, naizgled, tražio veći udio u dobiti ostvarenoj

[5] González, Y. S., The Gulf of Guinea: The Future African Persian Gulf?, *Brazilian Journal of African Studies*, god. 1 (2016.), br. 1, str. 86.

[6] Ured Ujedinjenih naroda za droge i kriminal – UNODC (engl. *United Nations Office on Drugs and Crimes*). Tijekom 2011. godine prihodi od naftne industrije iznosili su više od 52 milijarde američkih dolara. Više o tome vidi https://www.unodc.org/documents/toc/Reports/TOCTAWestAfrica/West_Africa_TOC_PIRACY.pdf (pristup 16. siječnja 2023.).

[7] Nigerija je zemlja s velikim brojem stanovništva, otprilike 212.389.018 stanovnika, koji se većinom bave poljoprivredom i ribolovom. Pronalazak nafte na tom području poremetio je osjetljiv ekosustav jer nije postojala odgovarajuća infrastruktura koja je trebala spriječiti ili barem minimalizirati štetne posljedice po okoliš. Stoga, otpad koji je nastao kao nusprodukt proizvodnje i izlijevanja nafte često završi u vodi ili u tlu te se takvim onečišćenjem onemogućuje njihova uporaba za poljoprivredu i ribolov. Vidi Worldometer – Nigeria Population, https://www.worldometers.info/world-population/nigeria-population/ (pristup 11. siječnja 2023.). Više od 60 % mladih je nezaposleno. U potrazi za zaposlenjem oni migriraju iz ruralnih sredina u gradove čime dodatno opterećuju ionako nedovoljno razvijenu gradsku infrastrukturu i povećavaju tenzije među urbanom populacijom. Upravo tako veliki postotak nezaposlenih mladih ljudi potiče ih na kriminalne aktivnosti u kojima vide jedini način osiguranja egzistencije za sebe i svoje obitelji. Vidi Council of the European Union, EU Strategy on the Gulf of Guinea, FOREIGN AFFAIRS Council meeting Brussels, od 17. ožujka 2014., https://www.consilium.europa.eu/media/28734/141582.pdf (pristup 11. siječnja 2023.); Arifin, J. A.; Juned, M., Nigeria´s Compliance with the Yaoundé Code of Conduct in the Cases of Piracy and Armed Piracy of the Nigerian State in the Gulf of Guinea in 2016-2021, *Journal of Social and Political Sciences*, god. 6 (2023.), br. 1, str. 111.

proizvodnjom i izvozom nafte.[8] Međutim, dominacija njegovih kriminalnih aktivnosti brzo je ukazala na stvarne motive djelovanja. U početku su bili usmjereni prema petro-piratstvu koje je, uz piratstvo na moru, najzastupljenije kazneno djelo u ovom području.[9] Cilj je petro-pirata krađa sirove nafte iz tankera ili cjevovoda, koja se zatim obrađuje u ilegalnim rafinerijama i na koncu prodaje na ilegalnom tržištu nafte.[10] Njihove su se aktivnosti vrlo brzo preselile s kopna na more te su zabilježeni česti slučajevi krađe nafte i otmica članova posade na brodovima i naftnim platformama u Gvinejskom zaljevu. Nakon gotovo četiri godine neprestanih pobunjeničkih napada, Federalna vlada Nigerije započela je pregovore s MEND-om koji su okončani tijekom lipnja 2009. godine proglašenjem amnestije pobunjenika. Pobunjenici su se obvezali na predaju oružja u zamjenu za redovita mjesečna primanja i obuku.[11] Amnestija je dovela do demobilizacije pobunjeničkih snaga i organizacijske strukture MEND-a te je, posljedično, došlo do opadanja broja piratskih napada. Međutim, ispostavilo se kako je samo dio pripadnika MEND-a financijski profitirao postignutim sporazumom s Vladom, što je rezultiralo frakcijama unutar pokreta. Odcijepljene su skupine nastavile s napadima, ali zbog nedostatka prijašnjih oružanih resursa i logistike više nisu bile u mogućnosti organizirati veće napade na *offshore* postrojenja i posadu na njima, nego su se usmjerile na manje, ali češće piratske napade. Eskalacija

[8] Engl. *Movement for the Emantipation of the Niger Delta*. Vidi Enemugwem, J. H., The Niger Delta of Nigeria: A World Class Oil Region in Africa, 2000-2006, *Africana Journal*, god. 4 (2010.), br. 1, str. 166.

[9] Krađa nafte ili petro-piratstvo uključuje »pohranjivanje« te otimanje tankera radi krađe goriva. Nedavno je procijenjeno da Nigerija gubi otprilike sto tisuća barela nafte dnevno koji se onda preprodaju na crnom tržištu. Brodovi-tegljači koji prevoze radnike na naftne platforme također su na meti pirata i naoružanih razbojnika. Ove aktivnosti povećaju troškove sigurnosti i obeshrabruju daljnja ulaganja. Izlijevanje nafte, povezano s krađom nafte, često nanosi dodatnu štetu obalnom području, a time i ribolovu i poljoprivrednom načinu života. Vidi Europska komisija i Visoki predstavnik Europske unije za vanjske poslove i sigurnosnu politiku, Zajednička komunikacija Europskom parlamentu, Vijeću, Europskom gospodarskom i socijalnom odboru i Odboru regija – Elementi strateškog odgovora EU-a izazovima u Gvinejskom zaljevu, JOIN(2013) 31 final, Bruxelles, od 18. prosinca 2013., str. 4, https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:52013JC0031 (pristup 13. siječnja 2023.).

[10] Petro-piratstvo se u današnje vrijeme najčešće odvija na kopnu. Vidi Pichon, E.; Pietsch, M., Piracy in the Gulf of Guinea: EU and International Action, Briefing, EPRS | European Parliamentary Research Service, 2020., https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649333/EPRS_BRI(2020)649333_EN.pdf (pristup 15. siječnja 2023.).

[11] Detaljnije o razvoju piratstva u Gvinejskom zaljevu vidi Kamal-Deen, A., The Anatomy of Gulf of Guinea Piracy, *Naval War College Review*, god. 68 (2015.), br. 1, str. 98, https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1183&context=nwc-review&httpsredir=1&referer= (pristup 15. siječnja 2023.)

piratskih napada u ovom području započela je u drugom desetljeću dvadeset prvog stoljeća i danas ozbiljno ugrožava sigurnost plovidbe u zaljevu, kroz koji svakodnevno prolazi više od tisuću petsto ribarskih brodova, tankera i teretnih brodova.[12]

Osobito zabrinjava podatak o premještanju mjesta počinjenja piratskih napada i oružane pljačke izvan obalnog mora Nigerije. Naime, ovaj podatak potvrđuje da tamošnji pirati ponovno raspolažu brzim brodicama i modernom tehnologijom te da čak ni trgovački brodovi koji plove na većoj udaljenosti od obale, kao ni *offshore* postrojenja, nisu sigurni.[13] Unatoč smanjenju broja napada tijekom razdoblja od 2020. do 2022. godine, vjerojatno zbog smanjenja trgovinske razmjene uzrokovane epidemijom koronavirusa, Gvinejski zaljev i dalje se smatra najopasnijim plovnim područjem na svijetu, kad je riječ o ovoj modernoj pomorskoj ugrozi, te se očekuje ponovni porast napada.

2. POJAM PIRATSTVA

Piratstvo je institut međunarodnog prava mora, definiran Konvencijom o pravu mora iz 1982. godine (u nastavku: UNCLOS).[14] Prema članku 101. UNCLOS-a, piratstvom (engl. *piracy,* fr. *piraterie,* šp. *pirateria)* se smatra:

1. Svaki nezakoniti čin nasilja ili zadržavanja ili bilo kakva pljačka, koje za osobne svrhe izvrši posada ili putnici privatnog broda ili privatnog zrakoplova[15] i usmjeren:

[12] European Union External Action Service (EEAS), EU Maritime Security Factsheet: The Gulf of Guinea, https://www.eeas.europa.eu/eeas/eu-maritime-security-factsheet-gulf-guinea_en (pristup 11. siječnja 2023.).

[13] Tijekom 2020. godine, 47 % od ukupno sto šest piratskih napada dogodila su se izvan obalnog mora. Vidi Bell, C.; Huggins, J.; Benson, J.; Joubert, L.; Okafor-Yarwood, I.; Marclint Ebiede, T., Pirates of the Gulf of Guinea: A Cost Analysis for the Coastal States, *Stable Seas Report*, studeni 2021., str. 3.

[14] Opširnije Degan, V. Đ., *Međunarodno pravo mora u miru i oružanim sukobima*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2002., str. 17, 28; Ibler, V., *Međunarodno pravo mora i Hrvatska*, Barbat, Zagreb, 2001., str. 39, 43. Tekst Konvencije na hrvatskom jeziku vidi Rudolf, D., *Konvencija Ujedinjenih naroda o pravu mora (1982)*, Književni krug, Pravni fakultet Split, Split, 1986. Tekst Konvencije na engleskom jeziku vidi https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (pristup 4. travnja 2023.).

[15] Osim privatnog broda ili zrakoplova, piratstvo može počiniti ratni brod ili javni brod ili javni zrakoplov čija se posada pobunila i preuzela kontrolu nad brodom ili zrakoplovom. U tom će se slučaju djela piratstva počinjena ratnim ili javnim brodom ili javnim zrakoplovom izjednačiti s djelima koja je počinio privatni brod ili zrakoplov (čl. 102. Konvencije). Vidi Amižić Jelovčić, P., Mjere suzbijanja piratstva u Adenskom zaljevu, Buklijaš, B. (ur.), *Zbornik radova sa znanstveno-stručnog skupa »In memoriam prof. dr. sc. Vjekoslav Šmid«*, Rab, 2012., str. 137.

a) na otvorenom moru protiv drugog broda ili zrakoplova ili protiv osoba ili imovine na njima;[16]
b) protiv broda ili zrakoplova, osoba ili imovine na mjestu izvan jurisdikcije bilo koje države.[17]

2. Svaki čin dobrovoljnog sudjelovanja u upotrebi broda ili zrakoplova, ako počinitelj zna za činjenice koje tom brodu ili zrakoplovu daju značenje piratskog broda ili zrakoplova.

3. Svaki čin kojemu je svrha poticanje ili namjerno olakšavanje nekog djela opisanog u stavcima 1 ili 2.[18]

Iako je ova konvencijska definicija piratstva i danas najraširenija, sadržava brojne nedostatke zbog kojih se teško može primijeniti na moderno piratstvo. Prema definiciji, piratstvo treba biti motivirano osobnom koristi ili nekom drugom osobnom pobudom,[19] a ne političkim ciljem koji motivira terorizam. Upravo motiv napada predstavlja ključnu razliku između piratstva i pomorskog terorizma.[20] Naime, terorizam, uključujući i pomorski terorizam,[21] vođen je

[16] Piratstvo pretpostavlja postojanje dva broda u suprotstavljenom odnosu – brod čija posada poduzima nezakonite radnje protiv drugog broda. Konvencijskom definicijom nije obuhvaćen slučaj kada se, na primjer, posada ili putnici na brodu pobune i preuzmu vlast nad tim brodom ili kada putnik na brodu opljačka drugog putnika. Jasno je da se sitne krađe koje počine posada ili putnici tijekom plovidbe ne mogu smatrati piratstvom u smislu odredbi Konvencije, ali ako nezakonite radnje poprime veće razmjere i imaju obilježja nasilja, pljačke, zadržanja ili neke druge prijetnje počinjene radi osobne koristi, tada bi se i takvi slučajevi trebali smatrati piratstvom. *Ibid.*, str. 137, 138.

[17] To područje podrazumijeva zračni prostor iznad otvorenog mora te Antarktika sa svojim zračnim prostorom, Degan, V. Đ., *Međunarodno pravo mora…*, *op. cit.*, str. 150.

[18] Dobrovoljno sudjelovanje, poticanje i pomaganje djela piratstva izjednačeno je, dakle, s njegovim počinjenjem. Pri tome nije važno je li sudjelovanje, poticanje ili pomaganje počinjeno na moru ili ne. Naime, jednako je kažnjiva ista radnja počinjena s kopna. Opširnije Amižić Jelovčić, P., Mjere suzbijanja piratstva…, *op. cit.*, str. 135.

[19] Misli se prvenstveno na mržnju ili osvetu, vidi Degan, V. Đ., *Međunarodno pravo mora…*, *op. cit.*, str. 151. Iz konvencijske definicije pojma piratstva proizlazi da nije nužna namjera pljačkanja (lat. *animus furandi*), što znači da se djelo piratstva može počiniti iz mržnje ili osvete, a da pri tome nije cilj ostvariti ekonomsku korist. Međutim, mora postojati namjera nanošenja štete (lat. *animus nocendi*). Opširnije vidi Grabovac, I., Piratstvo – suvremena prijetnja sigurnosti plovidbe i događaj koji utječe na odgovornost pomorskog prijevoznika u prijevozu stvari, *Zbornik radova Pravnog fakulteta u Splitu*, god. 48 (2011.), br. 3, str. 463.

[20] Nilasari, N.; Steele, L., UNCLOS Definition of Piracy: Is it still Relevant for Modern Piracy?, *Mulawarman Law Review*, god. 7 (2022.), br. 2, str. 93.

[21] Opširnije o pomorskom terorizmu vidi Amižić Jelovčić, P.; Bolanča, D., Pravni okvir borbe protiv pomorskog terorizma s posebnim osvrtom na Obalnu stražu Republike Hrvatske, *Poredbeno pomorsko pravo = Comparative Maritime Law*, god. 57 (2018.), br. 172, str. 356.

prvenstveno političkim ciljevima.[22] Međutim, moderni pirati raspolažu naprednom tehnologijom,[23] a njihovi napadi postaju sve okrutniji te se bilježi sve veći broj piratskih napada vođenih političkim motivima ili radi raspodjele ostvarenih otkupnina s pripadnicima korumpiranih vlada država. Stoga je gotovo nemoguće u konkretnom slučaju razlučiti čin piratstva od čina pomorskog terorizma.[24] Zbog svega navedenog, danas je definicija piratstva neodrživa u dijelu u kojem se kao pretpostavka podvođenja nezakonitog čina pod pojam piratstva ističe osobna pobuda počinitelja.

Nadalje, UNCLOS izričito navodi da piratski napad mora biti poduzet ili na otvorenom moru ili na mjestu izvan jurisdikcije bilo koje države. Iz ove odredbe proizlazi kako se na iste nezakonite radnje počinjene u obalnom moru neke države ne primjenjuju odredbe međunarodnog prava, nego isključivo kazneni propisi te obalne države. Spomenute radnje počinjene u obalnom moru države mogu se smatrati piratstvom samo ako ih tako proglasi kazneno zakonodavstvo odnosne države. U suprotnom, bit će podvedene pod pojam oružane pljačke[25]

[22] Nezakonita djela otmice, nasilja i pljačke počinjena zbog političkih ciljeva regulirani su Konvencijom o suzbijanju nedopuštenih akata protiv sigurnosti pomorske plovidbe – SUA (engl. *Convention for the Suppression of the Unlawful Acts against the Safety of Maritime Navigation*). Dopunjena je Protokolom o suzbijanju nedopuštenih akata protiv sigurnosti fiksnih platformi smještenih iznad epikontinentskog pojasa – Protokol SUA (engl. *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*). Konvencija i Protokol usvojeni su 10. ožujka 1988. godine na Konferenciji u Rimu, a stupili su na snagu 1. ožujka 1992. godine. Konvencija i Protokol izmijenjeni su 2005. godine pripadajućim protokolima usvojenim 14. listopada 2005. godine, koji su stupili na snagu 28. srpnja 2010. godine. Tekst Konvencije i Protokola iz 1988. godine na hrvatskom jeziku, vidi *Narodne novine – Međunarodni ugovori*, br. 4/2005.

[23] Opširnije Spicijarić, I., Piraterija: žig srama na modernom pomorstvu, *Hrvatski vojnik*, br. 219-220, 2008., str. 7, https://hrvatski-vojnik.hr/piraterija-zig-srama-na-modernom-pomorstvu/ (pristup 26. siječnja 2023.).

[24] Evidentirani su brojni piratski napadi u kojima su pirati oteli posadu napadnutog broda te im prijetili smrću, a upravo se piratski napadi počinjeni na području delte Nigera navode kao primjer ispripletenosti osobnih i političkih motiva pri poduzimanju piratskih napada. Opširnije Isanga, J. M., Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes, *American University Law Review*, god. 59 (2010.), br. 5, str. 1283, 1285.

[25] Prema međunarodnom pravu, svaki nezakoniti čin nasilja i zadržavanja počinjen unutar obalnog mora države potpada pod pojam oružane pljačke usmjerene protiv brodova. U Priručniku o istrazi kaznenih djela piratstva i oružane pljačke usmjerene protiv brodova (engl. *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*), usvojenom Rezolucijom A.1025(26) IMO-a u prosincu 2009. godine, oružana pljačka protiv brodova definirana je kao »svaki nezakoniti čin nasilja ili zadržanja ili pljačke, ili druge prijetnje, a koji nije piratstvo, usmjeren protiv broda ili osoba ili imovine na tom brodu, počinjen unutar područja unutrašnjih morskih voda, arhipelaškog mora

koja predstavlja nacionalnu inačicu međunarodnog kaznenog djela piratstva. Naime, iako je prema stvarnim značajkama radnji i posljedicama jednaka piratstvu, oružana pljačka ne sadržava sve bitne elemente piratstva kako je predviđeno UNCLOS-om. Slijedom toga, samo je obalna država nadležna suzbijati i kažnjavati akte oružane pljačke u obalnom moru odnosne države. Nažalost, brojne obalne države nisu u mogućnosti nadzirati područje svog obalnog mora ni na njemu učinkovito provoditi nadležnost, što u konačnici rezultira češćim pljačkama i nasiljem u obalnom moru država, nego na otvorenom moru.[26] [27]

Međunarodno pravo ovlašćuje svaku državu da može, na otvorenom moru ili na bilo kojem drugom mjestu koje ne potpada pod vlast nijedne države, uzaptiti[28] piratski brod ili zrakoplov ili brod ili zrakoplov koji su pirati oteli i koji se nalazi u vlasti pirata te uhititi osobe i oduzeti dobra na njima.[29] Pritom, znatnu prepreku predstavljaju odredbe UNCLOS-a koje se odnose na pravo progona, a prema kojima brod mora prestati s progonom kada progonjeni brod uđe u teritorijalno more svoje ili treće države. Time se bitno umanjuje vjerojatnost da će progonjeni piratski brod biti uistinu uzapćen i procesuiran, s obzirom na to da UNCLOS ovlašćuje države na procesuiranje pirata, ali ih na to ne obvezuje. U praksi, države često zbog gospodarskih ili političkih razloga izbjegavaju ili odgađaju pokretanje kaznenog postupka protiv pirata i izricanje primjerenih kazni. Hoće li pokrenuti kazneni postupak protiv pirata ovisi i o domaćem pravu te države. Naime, ako piratstvo nije uređeno kaznenim zakonom odnosne države kao kazneno djelo koje treba procesuirati, izvjesno je da će uhićeni pirati biti pušteni na slobodu. Radi suzbijanja piratstva u svim rizičnim područjima mora, postojeću konvencijsku odredbu trebalo bi izmijeniti i države obvezati na uzapćenje piratskog broda ili zrakoplova te na uhićenje i procesuiranje osoba koje

ili teritorijalnog mora države. Oružanom se pljačkom smatra i svaka radnja poticanja i pomaganja neke od ranije navedenih radnji.«

[26] Amižić Jelovčić, P., Mjere suzbijanja piratstva…, *op. cit.*, str. 139.

[27] Vidi Kimball, J. D., The Prosecution of Pirates under United States Law, *Il diritto marittimo,* Genova, god. 2 (2010.), str. 615-622; Degan, V. Đ.; Pavišić, B., *Međunarodno kazneno pravo*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2005., str. 260.

[28] Rudolf, D., *Konvencija Ujedinjenih naroda*…, *op. cit*., str. 428.

[29] Uhićeni pirati imaju pravo na sudski postupak pred sudovima države zastave ratnog broda koji ih je lišio slobode. Države često predviđaju stroge kazne za počinjenje piratskih djela. Na primjer, Sjedinjene Američke Države intervenirale su nakon što su u travnju 2009. godine četiri pirata zaplijenila američki brod. Trojica su pirata pritom ubijena, a četvrtom se sudilo na sudu u New Yorku. Osuđen je na temelju američkih propisa na trideset tri godine i devet mjeseci zatvora. Opširnije Kimball, J. D., The Prosecution of Pirates…, *op. cit*., str. 618.

su počinile kazneno djelo. Ratni brodovi ili vojni zrakoplovi ili drugi brodovi ili zrakoplovi koji su u vladinoj službi i koji su kao takvi jasno označeni i prepoznatljivi, jedini su ovlašteni izvršiti uzapćenje piratskog broda ili zrakoplova. Stoga, u skladu s odredbama međunarodnog prava, napadnutom trgovačkom brodu nije dozvoljeno u samoobrani uzaptiti piratski brod.[30] Sudovi države koja je brod ili zrakoplov uzaptila mogu odlučiti[31] o kaznama koje treba izreći i o poduzimanju mjera prema brodovima, zrakoplovima ili dobrima, što ne utječe na prava trećih osoba koje postupaju u dobroj vjeri (UNCLOS, čl. 105.).[32] Dakle, ne samo što UNCLOS ne obvezuje države na procesuiranje pirata, nego ostavlja na diskreciju državi koja je uzaptila brodove, način na koji će i u kojoj mjeri kazniti počinitelje piratskog napada.[33]

Može se zaključiti kako, uz nedostatke postojećih odredbi UNCLOS-a koje nemaju obvezujući karakter, i sama definicija piratstva ima nekoliko nedostataka. U prvom redu, problem predstavlja odredba koja iz primjene isključuje nezakonite radnje koje nisu motivirane osobnom pobudom. Nadalje, preduvjet primjene odredbi o piratstvu jest postojanje dva broda u suodnosu te se naposljetku odredba primjenjuje isključivo na nasilje, zadržavanje i pljačku počinjenu u području otvorenog mora. Upravo potonje konvencijsko rješenje, u praksi, predstavlja najveću prepreku u učinkovitoj borbi protiv modernih pirata, s obzirom na to da se nezakonite radnje nasilja, zadržavanja i pljačke danas češće događaju na području obalnog mora, nego na otvorenom moru. Naime, kako je već istaknuto, prema odredbama međunarodnog prava, ratni brodovi i zrakoplovi nemaju pravo uzapćenja, uhićenja i procesuiranja pirata u obalnom moru, nego samo u području otvorenog mora. Stoga, većina spomenutih kaznenih djela i njihovih počinitelja prolazi nekažnjeno. Međunarodna pomorska organizacija pridonijela je ispravljanju dijela navedenih nedostataka donošenjem Konvencije o suzbijanju nezakonitih akata protiv sigurnosti pomorske plovidbe – Konvencije

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30 Isanga, J. M., Countering Persistent Contemporary Sea…, *op. cit*., str. 1291.

31 Na međunarodnoj se razini čak predlaže da se ostvarivanje te obveze osigura osnivanjem UN-ova *ad hoc* suda, koji bi odlučivao o kažnjavanju i naknadi štete. Vidi Hart Dubner, B.; Greene, K., On the Creation of a New Legal Regime to Try Sea Pirates, *Journal of Maritime Law & Commerce*, god. 41 (2010.), br. 3, str. 452.

32 Ako se radi, na primjer, o otetom brodu ili zrakoplovu koji je upotrijebljen u piratske svrhe, njegovo se vlasništvo mora poštovati, kao i vlasništvo robe koju su opljačkali pirati. Vidi Degan, V. Đ., *Međunarodno pravo mora…, op. cit*., str. 151. Zaplijenjeni brod i teret vraćaju se vlasnicima, a ako se ne bi znalo tko je vlasnik, brod i teret dodjeljuju se pljenitelju. Vidi Rudolf, D., *Terminologija međunarodnog prava mora*, Pravni fakultet Sveučilišta u Splitu, Split, 1980., str. 196.

33 Isanga, J. M., Countering Persistent Contemporary Sea…, *op. cit*., str. 1301, 1304.

SUA,[34] koja se primjenjuje na iste nezakonite radnje neovisno o motivu njihova poduzimanja bez obzira na to koliko brodova sudjeluje u njihovu počinjenju. Konvencija SUA je, po svom donošenju, postala bitan međunarodni instrument koji se primjenjuje pri provođenju istrage, uhićenja i procesuiranja počinitelja pomorskih kaznenih djela te, kad je riječ o međunarodnoj suradnji, kod izručenja počinitelja. Međutim, ni SUA nije uspjela utjecati na područje primjene, pa se i njezine odredbe ne primjenjuju na djela poduzeta u području obalnog mora.[35]

3. PRAVNI OKVIR BORBE PROTIV PIRATSTVA U GVINEJSKOM ZALJEVU

U borbi protiv piratskih napada koriste se brojne aktivne i pasivne mjere. Među najučinkovitije aktivne mjere svakako ubrajamo naoružanu pratnju na pomorskim brodovima te razne oblike nadzora koji pomorski brodovi država članica NATO-a i EU-a čine nad rizičnim područjem. Naoružana pratnja pokazala se kao iznimno učinkovita mjera u suzbijanju piratskih napada u Somaliji. Međunarodna pomorska organizacija (engl. *International Maritime Organization*, u nastavku: IMO) donijela je smjernice i preporuke kojima državama prepušta odluku o tome hoće li i pod kojim uvjetima predvidjeti svojim propisima korištenje usluga naoružane pratnje na brodovima koji viju njihovu zastavu te brodarima i posadama brodova odluku o potrebi njihova angažiranja u svakom pojedinom slučaju.[36] Unatoč prednostima koje ovaj oblik zaštite brodova nosi, same aktivnosti privatne naoružane pratnje na trgovačkim brodovima mogu potencijalno dovesti do niza problema, poput preklapanja jurisdikcija. Naime, privatna naoružana pratnja mora poštovati propise države zastave broda, ali i odredbe međunarodnog prava, kao i prava obalne države čijim vodama plovi brod. Shodno tome, prijeko je potrebno stvoriti obvezujući

[34] Nonso Enebeli, V.; Chibuike Njoku, D., A Critical Appraisal of the Anti-piracy Law of Nigeria, *Journal of Law, Policy and Globalization,* god. 113 (2021.), str. 54.

[35] Amižić Jelovčić, P., Mjere suzbijanja piratstva…, *op. cit*., str. 141.

[36] Vidi Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, MSC.1/Circ.1406, od 23. svibnja 2011.; Revised Interim Recommendations, MSC.1/Circ.1406/Rev.1, od 16. rujna 2011.; Interim Guidance to Ship Owners and Ship Operators, Shipmasters and Crews on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, MSC.1/Circ.1405, od 23. svibnja 2011.; Revised Interim Guidance, MSC.1/Circ.1405/Rev.1, od 16. rujna 2011. Opširnije o tome Amižić Jelovčić, P., Naoružana pratnja na hrvatskim pomorskim brodovima, Radić, Ž. (ur.), *Zbornik radova sa znanstveno-stručnog skupa »In memoriam prof. dr. sc. Vjekoslav Šmid«*, Rab, 2013., str. 130.

međunarodni regulatorni okvir koji bi se primjenjivao na privatnu naoružanu pratnju na trgovačkim brodovima.[37]

Pozitivno zakonodavstvo u državama Gvinejskog zaljeva ne predviđa mogućnost ukrcaja privatne naoružane pratnje na brodove trgovačke mornarice tijekom plovidbe njihovim obalnim morima.[38] Međutim, postoji mogućnost korištenja njihovih usluga pod uvjetom da su ukrcani na brodove koji plove u pratnji trgovačkih brodova kojima je potrebna zaštita. Pojedine države iznimno dopuštaju ukrcaj naoružane pratnje na brodove trgovačke mornarice dok se nalaze na sidrištu. Ovakvo je rješenje propisano jer u području Gvinejskog zaljeva nacionalne vojske država i policijski službenici pružaju uslugu pratnje brodovima te je privatnim zaštitarskim tvrtkama onemogućeno korištenje istih usluga.[39] Pridržavanje i primjena zakonskih odredbi koje reguliraju pitanje naoružane pratnje nadzire se redovito, a svako njihovo kršenje kažnjava se rigorozno.

Suzbijanju piratskih napada pridonosi i svakodnevna prisutnost vojnih brodova koji plove žarišnim područjem, u sklopu raznih pomorskih operacija država regije Gvinejskog zaljeva koje pokreću u regionalnoj suradnji ili s državama EU-a.[40] U tom je kontekstu važnu ulogu imala Operacija *Prosperity* koju su 2011. godine pokrenule države Benin i Nigerija, nakon što su se napadi pirata iz delte Nigera proširili i na države regije. Operacijom su se željeli spriječiti budući piratski napadi te zaštititi morski okoliš. Sporazumom se Nigerija obvezala staviti na raspolaganje svoju mornaricu, ljudske resurse i logističku pomoć, dok je Benin pristao otvoriti granice svog teritorijalnog mora kako bi nigerijska mornarica mogla nesmetano provoditi protupiratske akcije. Operacija je postigla željene rezultate te je produžena na daljnjih šest mjeseci. Iskustvo stečeno tijekom trajanja Operacije *Prosperity* ukazalo je na prednosti i nedostatke zajedničke suradnje u ovom području. Zaključeno je da se međudržavna suradnja preporučuje i u budućnosti jer se jedino putem zajedničke akcije i razmjenom podataka mogu

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37 Ahmad, M., Maritime Piracy Operations: Some Legal Issues, *Journal of International Maritime Safety, Environmental Affairs and Shipping*, god. 4 (2020.), br. 3, str. 64.

38 Protection Vessels International West Africa – PVI´s West Africa najpoznatija je privatna zaštitarska kompanija koja nudi uslugu naoružane pratnje u Adenskom i Gvinejskom zaljevu, kao i u drugim rizičnim plovnim područjima. Vidi Compliance in the Gulf Of Guinea: What Does it Mean for Ship Operators Hiring Security Services?, https://www.pviltd.com/compliance-in-the-gulf-of-guinea-what-does-it-mean-for-ship-operators-hiring-security-services/ (pristup 19. siječnja 2023.).

39 Protection Vessels International West Africa – PVI´s West Africa, https://www.pviltd.com/services/west-africa/ (pristup 19. siječnja 2023.).

40 Arifin, J. A.; Juned, M., Nigeria´s Compliance with the Yaoundé Code…, *op. cit*., str. 114.

onemogućiti budući napadi i onečišćenje mora. Međutim, također je utvrđeno kako logistička pomoć ne može biti odgovornost samo jedne ugovorne strane te da je za uspjeh operacija na moru nužna spremnost bolje opremljene mornarice da svoje resurse podijeli s državama s kojima surađuje.[41]

Nigerijska je mornarica 2016. godine pokrenula protupiratsku Operaciju *Tsare Teku* radi otklanjanja opasnosti od oružane pljačke, sabotiranja plinskih i naftnih cjevovoda te zaštite domaćih i međunarodnih trgovačkih brodova od piratskih napada, kao i *offshore* platformi. Operacija se provodila osam mjeseci i odvijala se u tri faze. Iako je u početnim fazama bilježila pozitivne rezultate, potkraj 2016. godine naglo je skočio broj napada.

Gotovo istodobno s Operacijom *Tsare Teku*, u lipnju 2016. godine Zapovjedništvo obrane Nigerije započelo je s Operacijom *Delta Safe* radi povećanja učinkovitosti primjene postojećih odredbi o pomorskoj sigurnosti.[42]

Službene su statistike za 2021. godinu zabilježile opadanje broja piratskih napada za gotovo 60 %, nakon što su na tom području počeli aktivno djelovati Nigerijska mornarica i Nigerijska agencija za pomorsku sigurnost (u nastavku: NIMASA)[43] u sklopu projekta *Deep Blue*[44] u borbi protiv piratstva, ali i zbog pojačane prisutnosti međunarodnih snaga u Gvinejskom zaljevu. Nigerijski projekt *Deep Blue* započeo je u lipnju 2021. godine. Središnje zapovjedništvo i kontrolni centar nalaze se u Lagosu odakle se upravlja brodovima, zrakoplovima, helikopterima, dronovima i drugom imovinom pod okriljem projekta, a koja pridonosi nadzoru regije sedam dana u tjednu i dvadeset četiri sata dnevno. Projekt *Deep Blue* smatra se prvom integriranom nacionalnom pomorskom sigurnosnom strategijom u zapadnoj i središnjoj Africi. Cilj je projekta, kroz strateško partnerstvo NIMASA-e i međunarodnih organizacija, unaprijediti regionalni pristup u suzbijanju pomorskih sigurnosnih ugroza u Gvinejskom zaljevu.

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41 Osei-Tutu, J. A., Lowering the Anchor on Maritime Insecurity along the Gulf of Guinea: Lessons from Operation Prosperity, Kofi Annan International Peacekeeping Training Centre (KAIPTC), Policy Brief 11/2013, Africa Portal, 2013., https://www.africaportal.org/publications/lowering-the-anchor-on-maritime-insecurity-along-the-gulf-of-guinea-lessons-from-operation-prosperity/ (pristup 7. travnja 2023.).

42 Arifin, J. A.; Juned, M., Nigeria´s Compliance with Yaoundé Code…, *op. cit*., str. 114.

43 Engl. *Nigerian Maritime Safety Agency*. Više o tome vidi http://nimasa.gov.ng/about-us/ (pristup 27. siječnja 2023.).

44 Lamai, S., Deep Blue Project to Tackle Insecurity in Gulf of Guinea – FG, Federal Ministry of Information & Culture of Federal Republic of Nigeria, 2021., https://fmic.gov.ng/deep-blue-project-to-tackle-insecurity-in-gulf-of-guinea-fg/ (pristup 18. siječnja 2023.).

Osim spomenutih aktivnih mjera, znatan doprinos u borbi protiv modernih pomorskih ugroza predstavljaju brojne pasivne mjere, poput povećanog motrenja, noćnog tranzita opasnim područjem, uporabe vatrogasnih mlaznica, pare, pjene, povećanja brzine i izvođenja upravljačkih manevara brodom.[45] Posebno učinkovit oblik pasivnih mjera zasigurno su brojni međunarodni i nacionalni dokumenti doneseni radi prevencije i represije piratskih napada na moru. U tom su segmentu ključnu ulogu odigrali IMO i UN.

Vodeći se pozitivnim iskustvima u borbi protiv piratstva u Adenskom zaljevu[46] te njegovom uspješnom suzbijanju proteklih godina, Vijeće sigurnosti UN-a odgovorilo je na piratske napade u Gvinejskom zaljevu donošenjem rezolucija:[47]

1) S/RES/2018 od 31. listopada 2011. godine, kojom je osuđeno djelo piratstva i oružane pljačke u Gvinejskom zaljevu te su pozvani regionalni akteri da poduzmu snažne mjere protiv počinitelja. Također, pozvani su na međusobnu suradnju te na suradnju s državama čiji su državljani žrtve piratskog napada ili oružane pljačke, u progonu počinitelja navedenih kaznenih djela.[48]

2) S/RES/2039 od 29. veljače 2012. godine, kojom je izražena duboka zabrinutost zbog stanja pomorske sigurnosti u regiji te se pozivaju države na sazivanje konferencije radi izrade zajedničke pomorske strategije.[49] Države regije Gvinejskog zaljeva upozoravaju se na hitnost poduzimanja akcija, na nacionalnoj i regionalnoj razini, uz pomoć međunarodne zajednice. Rezolucija, također, ističe potrebu donošenja i implementacije Strategije pomorske sigurnosti, kao i stvaranje

[45] Belamarić, G., *Model zaštite broda od piratskih napada, doktorska disertacija*, Sveučilište u Rijeci, Pomorski fakultet, 2015., str. 62.

[46] Anyimadu, A., Maritime Security in the Gulf of Guinea…, *op. cit.*, str. 5.

[47] Amižić Jelovčić, P., Mjere suzbijanja piratstva…, *op. cit.*, str. 146.

[48] Vijeće sigurnosti u ovoj Rezoluciji pozdravlja intenciju organiziranja sastanka šefova država u ovoj regiji kako bi pronašli zajednički odgovor na ovu sigurnosnu prijetnju te ohrabruje države članice ECOWAS-a, ECCAS-a i GGC-a na razvijanje sveobuhvatne strategije kroz donošenje nacionalnih propisa kojima se kriminaliziraju piratski napadi i oružana pljačka te nacionalnih propisa kojima će se u nacionalno zakonodavstvo implementirati odredbe i rješenja relevantnih međunarodnih propisa o sigurnosti pomorske plovidbe. Ovom se Rezolucijom, također, potiče i razvoj regionalnog okvira u borbi protiv piratstva i oružane pljačke na moru. Tekst Rezolucije 2018 (2011) na engleskom jeziku vidi https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNOWA%20S%20RES%202018.pdf (pristup 21. siječnja 2023.).

[49] Rezolucijom se ohrabruje države regije te ECOWAS, ECCAS i GGC za razvoj i implementaciju transnacionalnih i transregionalnih koordinacijskih centara za sigurnost pomorske plovidbe koji bi pokrivali cijelo područje Gvinejskog zaljeva. Tekst Rezolucije 2039 (2012) na engleskom jeziku vidi https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNOCA%20SRES%202039.pdf (pristup 21. siječnja 2023.).

pravnog okvira za prevenciju i represiju piratstva i oružane pljačke na moru te kazneni progon osoba koje su sudjelovale u počinjenju ovih kaznenih djela.

3) S/RES/2634 od 31. svibnja 2022. godine, kojom se osuđuje piratstvo i oružana pljačka u području Gvinejskog zaljeva te se pozivaju države regije da kriminaliziraju piratstvo i oružanu pljačku na moru u sklopu svog domaćeg zakonodavstva te da u skladu s tim procesuiraju ili, ako je potrebno, izruče počinitelje spomenutih kaznenih djela.[50]

Posljednjom rezolucijom iz svibnja 2022. godine, Vijeće sigurnosti ponovno ističe ozbiljnost prijetnje za sigurnost plovidbe u regiji Gvinejskog zaljeva. Pritom navodi kako je odgovornost za suzbijanje ove sigurnosne ugroze prvenstveno na zemljama regije koje piratstvo mogu ograničiti jedino ako pozitivno djeluju na sam uzrok problema.[51] Također, Rezolucijom se savjetuje države članice UN-a da podijele korisne podatke, s kojima raspolažu s Interpolom, kako bi oni bili dostupni državama regije kroz ugovorom reguliranu razmjenu informacija. Iz navedenog je očito kako podrška međunarodne zajednice u suzbijanju piratstva u Gvinejskom zaljevu ne uključuje vojnu pomoć, nego je aktivna borba prepuštena državama regije. U tom je ključna razlika prema rezolucijama UN-a koje su se odnosile na Adenski zaljev. Naime, te su rezolucije UN-a, iako vremenski ograničeno, proširile područje primjene UNCLOS-ove definicije piratstva i na teritorijalno more Somalije te time dozvolile stranim vojnim brodovima plovidbu i uzapćenje piratskih brodova u somalijskim teritorijalnim vodama. Međutim, ohrabrujući je podatak iz izvješća o provedbi Rezolucije 2634 iz studenoga 2022. godine koji navodi kako nije zabilježena operativna, organizacijska ni ideološka veza između pirata, ekstremista i terorista u Gvinejskom zaljevu.[52] Naime, postojala je bojazan od suradnje tamošnjih pirata i

[50] Rezolucija 2634 donesena je nakon deset godina od posljednje Rezolucije 2039 koja se odnosi na problem piratstva i oružane pljačke u Gvinejskom zaljevu. Tekst Rezolucije 2634 (2022) na engleskom jeziku vidi https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_RES_2634.pdf (pristup 23. siječnja 2023.).

[51] Međunarodna zajednica, međutim, svjesna je da problem siromaštva, nerazvijenog gospodarstva, niskog stupnja obrazovanja i nepostojanja demokracije u zemljama trećeg svijeta, pa tako i u regiji Gvinejskog zaljeva, nije moguće riješiti u potpunosti. Slijedom toga, potiče se suradnja država regije Gvinejskog zaljeva s razvijenim državama, prvenstveno iz EU-a, vjerujući kako će se kroz kontinuiranu i stabilnu suradnju u dogledno vrijeme dogoditi ekonomski i kulturni iskorak nužan za suzbijanje piratstva u Gvinejskom zaljevu.

[52] UN Security Council, Situation of Piracy and Armed Robbery at Sea in the Gulf of Guinea and its Underlying Causes, Report of the Secretary-General, S/2022/818 od 1. studenoga 2022., https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2022_818.pdf (pristup 7. travnja 2023.).

pripadnika terorističke skupine Boko Haram. U izvješću se izričito navodi kako ne postoje nikakvi empirijski dokazi o tome.

Nakon što su godinama zanemarivali pitanje pomorske sigurnosti u svojim obalnim državama, čelnici država u regiji Gvinejskog zaljeva prepoznali su ozbiljnost problema s kojim se suočavaju te su pokazali spremnost u poduzimanju odgovarajućih radnji kako bi suzbili kriminalne aktivnosti u tom području.[53] Potaknuti spomenutim rezolucijama, čelnici Gospodarske zajednice zapadnoafričkih država – ECOWAS (engl. *Economic Community of West African States),* Gospodarske zajednice srednjoafričkih država – ECCAS (engl. *Economic Community of Central African States*) i Komisije Gvinejskog zaljeva – GGC (engl. *Gulf of Guinea Commision)* okupili su se 25. lipnja 2013. godine u Yaoundéu u Kamerunu. Na tom su sastanku postavljeni temelji zajedničke regionalne strategije za sprječavanje i kazneni progon kriminalnih aktivnosti u vodama Gvinejskog zaljeva donošenjem Pravilnika o postupanju radi suzbijanja piratstva, oružane pljačke protiv brodova i nezakonitih pomorskih aktivnosti u zapadnoj i središnjoj Africi, tzv. Pravilnik o postupanju Yaoundé.[54] U izradi Pravilnika sudjelovao je i IMO, koji je tako pokazao svoju odlučnost u pružanju doprinosa u borbi protiv piratstva u području zapadne Afrike.

3.1. Pravilnik o postupanju Yaoundé

Pravilnikom o postupanju Yaoundé, države potpisnice obvezale su se surađivati u suzbijanju međunarodnog organiziranog pomorskog kriminala, uključujući piratstvo, pomorski terorizam i nezakoniti, neprijavljeni i neregularni ribolov, tzv. IUU-ribolov.[55] [56] Dakle, Pravilnik se ne primjenjuje

[53] Pichon, E.; Pietsch, M., Piracy in the Gulf of Guinea…, *op. cit*., str. 2.

[54] Ovaj je Pravilnik rezultat suradnje država regije te je donesen uz pomoć IMO-a, a u skladu s UN Rezolucijama S/RES/2018 (2011) i S/RES/2039 (2012).

[55] Engl. *Illegal, Unreported and Unregulated Fishing*. Nezakoniti, neprijavljeni i neregularni ribolov u Gvinejskom zaljevu košta obalne države otprilike 350 milijuna američkih dolara godišnje i predstavlja ozbiljnu ekološku prijetnju za riblji fond te mogući sveukupni pad ribarske industrije. Smatra se kako su ukupni procijenjeni ulovi na obali Gvinejskog zaljeva do 40 % veći nego što je zabilježeno. Kao rezultat toga, izgubljeni su znatni resursi, prihodi, hrana i sredstva za život. Vidi Europska komisija i Visoki predstavnik Europske unije za vanjske poslove i sigurnosnu politiku…, *op. cit,* str. 4, 5.

[56] Važnu ulogu u unapređenju suradnje država Gvinejskog zaljeva ima i organizacija Prijatelji G7++Gvinejskog zaljeva – G7++FOGG (engl. *G7++Gulf of Guinea Friends*). Organizacija je formirana 2008. godine tijekom summita G8 kako bi se reagiralo na piratske cijene u Gvinejskom zaljevu. Nakon isključenja Rusije, države G7 odlučile su uključiti i druge države i institucije, stvarajući tako G7++FOGG koja okuplja privatne, javne, regionalne i međunarodne institucije. Tvore je Belgija, Danska, Nizozemska, Norveška, Portugal, Španjolska i Švicarska te EU, UNODC i Interpol. Vidi EU Maritime Security Factsheet…, *op. cit*., str. 23.

isključivo na piratske napade i oružanu pljačku, nego i na slučajeve međunarodnog organiziranog pomorskog kriminala. Pravilnik u članku 1., u slučajeve međunarodnog organiziranog pomorskog kriminala izričito ubraja: pranje novca, nezakonito trgovanje oružjem i narkoticima, piratstvo i oružanu pljačku, krađu nafte, trgovanje i krijumčarenje ljudima, nezakoniti, neprijavljeni i neregularni ribolov, onečišćenje morskog okoliša, nezakonito odlaganje otrovnog otpada u more, pomorski terorizam i otmice te vandalizaciju *offshore* postrojenja. Šire područje primjene je ključna razlika u odnosu na Pravilnik Djibouti iz 2009. godine koji je prvenstveno usmjeren na suzbijanje piratstva u Adenskom zaljevu, a koji je poslužio kao predložak za sastavljanje ovog Pravilnika.[57]

U skladu s Pravilnikom, države potpisnice obvezuju se surađivati, u najvećoj mogućoj mjeri, pri uhićenju, istrazi i procesuiranju osoba koje su, ili za koje se opravdano sumnja, počinile djelo piratstva ili neko drugo prethodno navedeno kazneno djelo. Nadalje, obvezuju se na suradnju i pri zapljeni piratskog broda i/ili zrakoplova i imovine na njima te u spašavanju brodova, osoba i imovine pod piratskim napadom. Kako bi se postigla visoka razina informiranosti, države se obvezuju čuvati povjerljivost zaprimljenih podataka te se dogovoriti oko jedinstvenog kriterija prijave napada, sve radi postizanja vjerodostojne procjene rizika od piratskog napada i oružane pljačke u području zapadne i središnje Afrike. Pravilnikom se države obvezuju razviti i implementirati odgovarajuće nacionalne sigurnosne mjere kojima bi zaštitile sigurnost pomorske plovidbe i trgovine od svih oblika nezakonitih akata koje ih mogu ugroziti, kao i razviti i implementirati nacionalno zakonodavstvo, praksu i procedure potrebne za sigurnost brodova i luka te za zaštitu morskog okoliša. Veliki nedostatak Pravilnika jest taj što predviđa samo namjeru, ali ne i obvezu, država potpisnica na procesuiranje počinitelja piratskih napada i svih drugih nezakonitih akata počinjenih protiv pomoraca, brodova, luka i osoba zaposlenih u lukama, pred domaćim sudovima u skladu s njihovim nacionalnim pravom.

Zahvaljujući Pravilniku Yaoundé, utemeljena je hijerarhijska mreža pomorskih operativnih centara, tzv. YAMS[58] čija je glavna zadaća ubrzanje međuregionalne razmjene informacija i koordinacije odgovora u hitnim slučajevima. Radi

[57] Vidi Amižić Jelovčić, P., Mjere suzbijanja piratstva…, *op. cit*., str. 148, 151. Tekst Pravilnika na engleskom jeziku vidi https://www.imo.org/en/OurWork/Security/Pages/Code-of-Conduct-against-illicit-maritime-activity.aspx (pristup 14. siječnja 2023.).

[58] Engl. Y*aoundé Architecture for Maritime Security*. Vidi Bell, C. *et. al*., Pirates of the Gulf of Guinea…, *op. cit*., str. 24. Obalno područje podijeljeno je na pet pomorskih operativnih zona čijim aktivnostima koordiniraju i upravljaju pet pomorskih operativnih centara, tzv. MMCC (engl. *Maritime Multinational Coordination Centres*).

unapređenja suradnje između postojeća dva pomorska sigurnosna centra zapadne i središnje Afrike, 2014. godine uspostavljen je Međuregionalni koordinacijski centar (u nastavku: ICC),[59] kao krovno tijelo zaduženo za jačanje aktivnosti usmjerenih na koordinaciju, suradnju i funkcioniranje uspostavljenog sustava te provedbu regionalne suradnje o sigurnosti unutar područja zajedničkog pomorskog prometa.[60] Iznimnu potporu u obuci pri provođenju istraga i prikupljanju informacija dao je Interpol kroz svoja dva projekta: AGWE West Afrika i WATA. Prvim projektom, koji je započeo 2015. godine i koji bi trebao biti okončan ove godine, nastoji se unaprijediti provedba pomorskih propisa u Beninu, Obali Bjelokosti, Gani, Nigeriji i Togu. Sudionici projekta usvojili su, kroz razne vježbe, nova znanja o provođenju istraga kaznenih djela i koordinaciji između nadležnih agencija.[61] WATA projekt započeo je 2022. godine, a njegovo je trajanje predviđeno do 2026. godine. Nastavlja se na prethodni Interpolov projekt i usmjeren je na iste države regije. Aktivnosti predviđene projektom uključuju unapređenje sposobnosti mornarica pri osiguravanju mjesta zločina, provođenju istraga te jačanje lučke infrastrukture i njezinih kapaciteta, što može pomoći pri ranom prepoznavanju počinitelja kaznenih djela.[62]

Iako promiče regionalnu suradnju, Pravilnik ističe kako se njime, ni u kom smislu, ne osporava suverenitet država potpisnica, kao ni njihova teritorijalna cjelovitost, te se njime ne dopušta intervencija u vezi s nacionalnim pitanjima pojedinih država potpisnica. Štoviše, Pravilnikom se izrijekom navodi kako su sve operacije koje su poduzete u području obalnog mora obalne države, radi suzbijanja međunarodnih kaznenih djela na koja se Pravilnik odnosi, pod isključivom jurisdikcijom te države. Tek izvan teritorijalnog mora obalne države, druge su države ovlaštene zaplijeniti piratski brod i uhititi počinitelje.

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[59] Engl. *Interregional Coordination Centre*. Vidi https://www.icc-gog.org (pristup 13. siječnja 2023.).

[60] Centar je ustanovljen kako bi nadzirao tri regionalne organizacije u implementaciji Pravilnika te je ovlašten usmjeriti sredstva potrebna u borbi protiv pomorskog kriminala, iz jedne regije u drugu. Pod okriljem ICC-a djelovat će posebni regionalni centri: jedan za zapadnu, a drugi za središnju Afriku – CRESMAC (engl. *Regional Centre for Maritime Security in Central Africa*) i CRESMAO (engl. *Regional Maritime Security Centre of West Africa*). *Ibid*.

[61] Project AGWE, West Africa, https://www.interpol.int/Crimes/Maritime-crime/Project-AGWE-West-Africa (pristup 10. travnja 2023.).

[62] Project WATA, https://www.interpol.int/Crimes/Maritime-crime/Project-WATA (pristup 10. travnja 2023.).

Pravilnik prepoznaje važnost i doprinos koji sustavna i sveobuhvatna pravna regulativa pojedine države ima u borbi protiv piratstva i modernih pomorskih prijetnji. Naime, samo ako sve države regije uspostave zadovoljavajući pravni okvir za suzbijanje i represiju međunarodnih kaznenih djela na koja se Pravilnik o postupanju poziva, može se očekivati kako će ova međuregionalna suradnja, u konačnici, biti učinkovita. U članku 4. Pravilnika, ističe se nužnost napretka na razini svake pojedine države kroz donošenje i razvijanje modernih nacionalnih propisa, praksi i procedura radi postizanja sigurnosne zaštite luka, brodova i morskog okoliša. Također, s istim se člankom potiče i na donošenje nacionalnih planova sigurnosti plovidbe kako bi uspješnije uskladili i koordinirali implementaciju sigurnosnih mjera te kako bi se, u konačnici, unaprijedila sigurnost u međunarodnom pomorskom prometu.

Iako je donošenje Pravilnika rezultiralo pozitivnim pomakom u borbi protiv pirata, desetljeće njegove primjene ukazalo je i na njegove nedostatke. Kao ključna prepreka u učinkovitoj primjeni pokazao se nedostatak odgovarajućeg osoblja, opreme i logističke potpore, kao i nepostojanje redovitog financiranja.[63] Tome su, također, pridonijele i nedovoljno jasne odredbe o nadležnosti pojedinih regionalnih tijela te inertnost država regije u donošenju nužnih nacionalnih propisa u skladu s preporukama. Svakako je i neobvezujući karakter Pravilnika pridonio porastu broja piratskih napada i oružanih pljački nakon njegova donošenja. Bez odgovarajućeg pravnog okvira na razini ugroženih država u regiji te njihove čvršće suradnje ne može se očekivati veći napredak u suzbijanju piratskih napada u Gvinejskom zaljevu.

3.2. Afrička povelja o pomorskoj sigurnosti i razvoju u Africi (Povelja Lomé)

Države članice Afričke unije usvojile su 2016. godine Afričku povelju o pomorskoj sigurnosti i razvoju u Africi[64] koja sadržava mjere zaštite mora i obale afričkog kontinenta, potičući pritom održivo gospodarsko iskorištavanje mora i podmorja. Poveljom se svaka država članica obvezuje poduzeti sve potrebne mjere radi unapređenja razine sigurnosti na svom pomorskom dobru. Navedeno je moguće ostvariti jačanjem postojećih kapaciteta, usklađivanjem nacionalnog zakonodavstva te uspostavljanjem nacionalnih agencija za pomorsku koordinaciju.

[63] UN Office on Drugs and Crime, Maritime Piracy…, *op. cit*., str. 50.

[64] Engl. *African Union Charter on Maritime Security and Safety and Development in Africa*. Više o tome vidi https://au.int/sites/default/files/treaties/37286-treaty-african_charter_on_maritime_security.pdf (pristup 6. veljače 2023.).

Povelja definira piratstvo u skladu s odredbama UNCLOS-a, a kao ključan cilj svog donošenja navodi prevenciju i suzbijanje nacionalnih i transnacionalnih kaznenih djela, uključujući terorizam, piratstvo, oružanu pljačku protiv pomorskih brodova, krijumčarenje droge i migranata, trgovanje ljudima te nezakoniti, neprijavljeni i neregularni ribolov (čl. 3. Povelje). U tom smislu, ističe se potreba za osnivanjem nacionalnih, regionalnih i kontinentalnih institucija te implementacijom rješenja kojima se potiče postizanje sigurnosti na moru. Također se ističe važnost međuagencijske i međunarodne suradnje, kao i suradnje među državama članicama Afričke unije. Kako bi spriječila počinjenje kaznenih djela na moru, svaka se država obvezuje aktivno nadzirati i štititi svoje more te pružiti potporu drugim državama članicama, ako je to potrebno. Nadalje, u skladu s odredbom čl. 6. Povelje, svaka je država dužna ojačati provedbu zakona na moru uz pomoć mornarice, obalne straže, agencija nadležnih za pomorsku sigurnost, carinske vlasti i lučkih kapetanija.

Države članice obvezuju se uskladiti svoje nacionalno zakonodavstvo s UNCLOS-om, SOLAS-om te Protokolom iz 2005. godine uz Konvenciju SUA te obučiti osoblje zaduženo za njihovu implementaciju, osobito unutar pravosudnog sustava (čl. 8. Povelje). Prema izvješću UNODC-a, samo je trećina država kriminalizirala piratstvo unutar svojih nacionalnih propisa te uskladila njihove odredbe s definicijom piratstva iz UNCLOS-a. Navedeno je nužno za uspostavljanje univerzalne jurisdikcije. Kako bi se pak otklonio problem trajnog i stabilnog financiranja, koji je identificiran kao ključna prepreka provedbi Pravilnika Yaoundé, Poveljom se države članice obvezuju osigurati potrebna financijska sredstava kroz javne fondove i privatna partnerstva te osnovati Fond za pomorsku sigurnost (čl. 11). Odredbama Povelje nameće se državama članicama obveza donošenja potrebnih pravnih propisa i stvaranja pravnog okvira koji će omogućiti učinkovitu provedbu zadanih ciljeva, kao i obveza suradnje u zaštiti, istragama i procesuiranju počinitelja kaznenih djela na moru (čl. 40. Povelje).

Osobita važnost ove Povelje jest što je obvezujućeg karaktera te je time pravni okvir pomorske sigurnosti u Africi, koji su do tada tvorile odredbe mekog prava, dodatno osnažen.

3.3. Zakon o suzbijanju piratstva i drugih pomorskih kaznenih djela (Zakon SPOMO)

U skladu s člankom 4. Pravilnika Yaoundé, Nigerija je 2019. godine donijela Zakon o suzbijanju piratstva i drugih pomorskih kaznenih djela (u nastavku:

Zakon SPOMO),[65] radi prevencije i suzbijanja piratstva, oružane pljačke i drugih nezakonitih djela počinjenih protiv broda, zrakoplova ili pomorskog objekta, uključujući fiksnu i plutajuću platformu. Zakon SPOMO je prvi specijalizirani propis u području regije koji je usmjeren protiv piratstva, a čije su odredbe usklađene s odredbama UNCLOS-a i Konvencije SUA. Međutim, u učinkovitoj borbi protiv počinitelja kaznenih djela nije dovoljno propisati ta kaznena djela unutar svog nacionalnog zakonodavstva. Nužno je stvoriti i kvalitetan pravni okvir koji jamči procesuiranje njihovih počinitelja. Većina država, uz iznimku Liberije i Toga, nije implementirala odredbe relevantnih međunarodnih konvencija u svoje nacionalno zakonodavstvo, što znatno otežava njihovu borbu protiv počinitelja međunarodnih zločina na moru. Donošenjem Zakona SPOMO, Nigerija je napravila bitan iskorak u tom smjeru. Ne samo da je pravno regulirala piratstvo u skladu s odredbama UNCLOS-a, nego je svojim područjem primjene obuhvatila i počinitelje drugih pomorskih kaznenih djela, kako je propisano Konvencijom SUA, te omogućila njihovo procesuiranje za što je propisana isključiva nadležnost Federalnog visokog suda. Zakonom se ujedno pokušala otkloniti velika prepreka u uspješnoj primjeni Pravilnika Yaoundé, a to je problem stabilnog financiranja. Naime, članak 19. Zakona SPOMO propisuje da će NIMASA osnovati tzv. SPOMO-fond kojim će ujedno i upravljati. Fond bi se koristio za implementaciju Zakona, a trebao bi biti financiran sredstvima koja u tu svrhu odobri Federalna vlada Nigerije i financijskim doprinosima korisnika usluga agencija za pomorsku sigurnost. Također, 35 % dobiti od prodaje imovine zaplijenjene počiniteljima kaznenih djela propisanih Zakonom, kao i druge dobiti ostvarene počinjenjem tih djela, trebalo bi biti uplaćeno u Fond.[66]

Nedostatkom Zakona SPOMO smatraju se nedovoljno jasne formulacije, poput one iz čl. 17. st. 3. koje nameću odgovornost za prikupljanje podataka, nadzor i istragu kaznenih djela agencijama za provedbu zakona i sigurnosti, a da, pritom, izričito ne navodi koje su to agencije. U praksi takve neprecizne formulacije često dovode ili do preklapanja ili pak do izbjegavanja nadležnosti. Nesklad između odredbi Zakona SPOMO i pozitivnog prava Nigerije predstavlja još jedan problem u primjeni. Primjer je takve neusklađenosti odredba Zakona SPOMO koja imenuje Nigerijsku agenciju za pomorsku upravu i sigurnost kao koordinacijsko tijelo nadležno za sve pomorske aktivnosti i sigurnost, uključujući prevenciju piratstva, pomorskih kaznenih djela i drugih nezakonitih čina

[65] Engl. *Suppression of Piracy and Other Maritime Offences Act*. Više o tome vidi https://placbillstrack.org/8th/upload/Suppression%20of%20Piracy%20and%20Other%20Maritime%20Offences%20Act%202019.pdf (pristup 6. travnja 2023.).

[66] Nonso Enebeli, V.; Chibuike Njoku, D., A Critical Appraisal…, *op. cit*., str. 60.

zabranjenih Zakonom. Međutim, navedena je odredba u koliziji s odredbom Zakona o oružanim snagama iz 1993. godine koja za te poslove ovlašćuje Nigerijsku mornaricu.[67]

Donošenjem Zakona željelo se sveobuhvatno pristupiti problemu piratstva i drugim pomorskim kaznenim djelima, tako da Zakon sadržava i odredbe o procesuiranju počinitelja, što je svakako pohvalno. Ipak, Zakon nije pravno regulirao odgovornost za ona kaznena djela koja prethode počinjenju kaznenih djela piratstva, otmica i oružane pljačke, kao ni ona koja uslijede nakon njih. Primjerice, počinjenju piratstva redovito prethodi kazneno djelo krijumčarenja oružjem, dok nakon piratskog napada često dolazi do pranja novca, korupcije i utaje poreza. Nakon donošenja Zakona SPOMO zabilježen je pad broja piratskih napada u tom području. Međutim, pokazalo se kako pad broja piratskih napada nije rezultat učinkovitosti ovog propisa, nego činjenice da njegovim područjem primjene nisu obuhvaćena kaznena djela koja uslijede nakon počinjenja piratskog napada. Naime, nakon donošenja Zakona SPOMO, pirati su se u većoj mjeri opredijelili za počinjenje drugih pomorskih kaznenih djela, poput otmica uz traženje visokih otkupnina, regulirani drugim propisima koji ne predviđaju mogućnost njihova procesuiranja. Istodobno, Zakon SPOMO se ne odnosi ni na kazneno djelo ilegalnog ribarstva koje predstavlja jednako ozbiljan problem za gospodarstvo Nigerije.

Iako donošenje Zakona SPOMO predstavlja važan doprinos u borbi protiv modernih pomorskih ugroza, u području ne samo Nigerije nego i cijele regije, te prvi korak pri stvaranju odgovarajućeg pravnog okvira, nažalost, sam Zakon nije postigao željene rezultate. Neučinkovita implementacija i provedba zakona te činjenica da ne postoje drugi odgovarajući zakonski i podzakonski propisi koji bi omogućili i olakšali primjenu odredbi Zakona SPOMO, kao i neusklađenost Zakona SPOMO s postojećim relevantnim pravnim propisima, negativno su utjecali na njegovu učinkovitost u primjeni. Stoga se preporučuje izmjena Zakona jer se samo sustavnim pristupom problemu piratstva i drugih kaznenih djela u regiji, te usklađivanjem s postojećim propisima, može postići uspjeh u njihovoj prevenciji i suzbijanju.

[67] Ogbonnaya, M., Nigeria´s Anti-piracy Law Misses the Mark, Institute for Security Studies, 2020., https://issafrica.org/iss-today/nigerias-anti-piracy-law-misses-the-mark (pristup 5. travnja 2023.).

3.4. BMP WA

Po uzoru na Priručnik BMP5,[68] koji se pokazao vrlo koristan i učinkovit u borbi protiv pirata u Adenskom zaljevu, 2020. godine donesen je Priručnik BMP WA (u nastavku: Priručnik).[69] Priručnik sadržava gotovo identična rješenja kao i BMP5, osim geografskog područja primjene,[70] te preporuke za javljanje koordinacijskom centru MDAT-GoG-u.[71] Baš kao i BMP5, BMP WA donesen je kao priručnik koji nije obvezujući za kompaniju, ali se preporučuje pridržavanje njegovih uputa tijekom prolaska kroz rizično područje. Priručnik služi isključivo kao smjernica u postupanju te se autori izuzimaju od svake odgovornosti koja bi za njih mogla proizaći zbog pridržavanja uputa iz Priručnika. Štoviše, već u samom uvodu Priručnika ističe se kako smjernice sadržane u njemu ne umanjuju ovlasti niti oslobađaju zapovjednika broda odgovornosti za sigurnost broda te osoba i tereta na njemu. Svrha ovog Priručnika jest pružiti pomoć brodovima pri planiranju putovanja kroz rizična područja, pri otkrivanju, izbjegavanju, onemogućavanju i odgađanju piratskog napada te, naposljetku, o njegovom izvješćivanju. S obzirom na to da su pomorske ugroze, uključujući piratstvo, izuzetno dinamične i nepredvidive, od ključne je važnosti za odbijanje napada na brod razumijevanje same sigurnosne prijetnje i raspolaganje aktualnim informacijama o njoj. Priručnik je usmjeren na pomorska kaznena djela koja predstavljaju izravnu prijetnju članovima posade i teretu koji se prevozi brodom, ističući, prije svega, piratstvo, oružanu pljačku, krađu tereta, otmicu broda i članova posade.

Kako bi se spriječile potencijalne ugroze, ključno je razumijevanje prijetnje, provedba procjene rizika, implementacija mjera sigurnosne zaštite broda,

[68] Posljednja peta verzija Priručnika datira iz lipnja 2018. godine. Tekst na engleskom jeziku vidi https://www.maritimeglobalsecurity.org/media/1037/bmp5-low_res.pdf (pristup 12. siječnja 2023.).

[69] Engl. *Best Management Practices to Deter Piracy and Enhance Maritime Security off the Coast of West Africa including the Gulf of Guinea*. Priručnik su u ožujku 2020. godine priredili u koautorstvu ICS, BIMCO, IGP&I Clubs, INTERCARGO, INTERTANKO i OCIMF. Tekst BMP WA na engleskom jeziku vidi https://www.westpandi.com/getmedia/e913f6ec-61ef-40da-b40f-1adeafee3c6c/BMP-West-Africa.pdf (pristup 20. siječnja 2023.).

[70] Priručnik BMP WA primjenjuje se na područje zapadne Afrike, a osobito na područje Gvinejskog zaljeva.

[71] Engl. *Maritime Domain Awareness Trade – Gulf of Guinea*. MDAT – GoG je koordinacijski centar Pomorske trgovačke operacije Ujedinjenog Kraljevstva (UKMTO) i Francuske mornarice (MICA Center) od lipnja 2016. godine. Centar doprinosi sigurnosti pomorske plovidbe središnje i zapadne Afrike tako što potiče brodare na javljanje i prijavljivanje incidenata ili sumnjivih aktivnosti te osigurava vezu između broda i vojnih snaga u regiji (odjeljak 6. Priručnika). Više o tome vidi https://gog-mdat.org/home (pristup 24. siječnja 2023.).

izvještavanje o tome, kao i suradnja. Kompanije bi trebale provoditi procjenu rizika i odrediti zaštitne mjere za brod, poput ojačavanja fizičke zaštite broda, dodatne obuke posade broda te jačanje straže. Brodovi se tijekom plovidbe rizičnim područjem moraju redovito javljati koordinacijskom centru MDAT-GoG-u kako bi prijavili svaku sumnjivu aktivnost, pokušaj napada ili ostvareni napad te uputili poziv u pomoć u slučaju konkretnog napada na brod. Važnu ulogu u primjeni svih preporučenih preventivnih mjera ima zapovjednik broda koji prije ulaska u rizično područje treba prikupiti sve relevantne informacije te, ako je to uobičajena praksa, angažirati naoružanu pratnju. Također, zapovjednik bi trebao prije ulaska u rizično područje obavijestiti posadu o provedenim radnjama, organizirati vježbe simulacije napada i provjeriti ispravnost pogonskih uređaja na brodu. Po ulasku u rizično područje, zapovjednik broda prijavit će svoj ulazak koordinacijskom centru, ažurirati i pratiti nove informacije, pobrinuti se da su sve pristupne točke na brodu osigurane tako da onemogućuju ukrcaj pirata na brod te minimalizirati uporabu VHF-a i elektroničke pošte tijekom plovidbe tim područjem. U tom smislu, zapovjednik broda treba pripremiti i testirati Komunikacijski plan za hitne slučajeve. BMP WA preporučuje da sustav za automatsku identifikaciju broda, tzv. AIS[72] ostane aktiviran tijekom plovidbe rizičnim područjem kako bi centri za prijavu i vojni brodovi u blizini mogli locirati brod. Pritom, dostupni podaci trebaju biti ograničeni na ime broda, poziciju broda, rutu, brzinu, plovidbeni status te na informacije vezane za sigurnost. Također se preporučuje minimalno zadržavanje na sidrištu kada su brodovi najranjiviji i najizloženiji potencijalnom napadu.

Zapovjednik broda dužan je primijeniti mjere za zaštitu broda. U najučinkovitije mjere zaštite svakako se ubraja stražarenje, zahvaljujući kojem se u ranoj fazi mogu primijetiti sumnjive radnje te pravodobno poduzeti odgovarajuće mjere za odbijanje piratskog napada. Ako brodu prijeti napad, Priručnik

[72] Engl. *Automatic Indentification Ship System*. AIS je primopredajni uređaj koji koristi VHF-frekvenciju (engl. *Very High Frequency*) za izmjenu podataka s brodovima te omogućava identifikaciju brodova koji se nalaze u njihovoj blizini. Primljene i odaslane informacije sadržavaju osnovne navigacijske podatke o tim brodovima. Sustav AIS poboljšava sigurnost ljudskog života na moru, sigurnost u vođenju navigacije te pridonosi zaštiti morskog okoliša. Vidi Baturina, E., Automatski identifikacijski sustav – AIS, *Pomorski zbornik*, god. 40 (2002.), br. 1, str. 79. Sustav automatske identifikacije broda počeo se primjenjivati u Republici Hrvatskoj 2005. godine. Pomoću njega osigurava se identifikacija brodova, praćenje i nadzor odvijanja pomorskog prometa u morskom prostoru pod hrvatskom nadležnošću. Vidi Ćorić, D., *Onečišćenje mora s brodova: međunarodna i nacionalna pravna regulativa*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2009., str. 36; Bolanča, D., *Prometno pravo Republike Hrvatske*, Pravni fakultet Sveučilišta u Splitu, Split, 2017., str. 39.

savjetuje aktivaciju alarma kako bi se članovi posade upozorili na to da je brod napadnut. Tako se istodobno upozoravaju i pirati da je napad prepoznat te da će se brod i članovi posade ponašati u skladu s tim. Manevri za izbjegavanje napada kao i različite fizičke barijere, poput žilet-žice te prepreka pozicioniranih preko najviše oplate trupa broda, dokazano su učinkoviti oblici sprječavanja neželjenog ukrcaja na brod. U iste svrhe, u praksi, koriste se vodeni topovi i pjena. Poseban napor treba uložiti kako bi se onemogućio pristup brodskom mostu, strojarnici i smještajnim prostorijama posade. Na brodu mora postojati mjesto sigurnog okupljanja[73] i/ili *citadela*,[74] o čijoj uporabi odlučuje zapovjednik broda.

BMP WA ne preporučuje ukrcaj naoružane pratnje na brod, nego odluku o tome u potpunosti prepušta kompaniji. U Priručniku se ističe kako pri donošenju te odluke treba uzeti u obzir stupanj prijetnje i analizu rizika, zakonodavstvo obalne države te stupanj zaštite koju pružaju obalna straža, pomorska policija i ratna mornarica u tom području.[75]

Priručnik također sadržava smjernice za postupanje posade broda u slučaju objektivne opasnosti za brod. Prvenstveno bi trebalo oglasiti alarm te putem VHF-kanala 16 uputiti poziv u pomoć. Ako brod ne plovi punom brzinom treba povećati brzinu, koliko je to moguće, pokrenuti postupak za hitne slučajeve te aktivirati Komunikacijski plan za hitne slučajeve. Sustav AIS treba biti uključen, a preporučuje se i aktivacija svih dostupnih oblika fizičke zaštite broda te okupljanje članova posade na mjestu sigurnog okupljanja ili u *citadeli*, odakle bi trebalo ostvariti kontakt s koordinacijskim centrom MDAT-GoG i kompanijom. Priručnik sadržava konkretne upute za posadu u slučaju da pirati preuzmu kontrolu nad brodom, kao i za slučaj otmice.[76] U posljednjem je dijelu Priručnika obrađen postupak istrage i prikupljanja i čuvanja dokaza o kaznenom djelu,[77] kao i obveza kompanije za pružanje svakog oblika pomoći članovima posade koji su pretrpjeli napad.

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[73] Engl. *Safe Muster Point*. Mjesto sigurnog okupljanja je mjesto koje je određeno Planom sigurnosne zaštite broda i s kojim su upoznati svi članovi posade. Radi se o mjestu koje zadovoljava uvjet fizičke zaštite članova posade od napadača. Na navedenom će se mjestu, u slučaju napada, okupiti svi članovi posade čije prisustvo nije neophodno na mostu ili u strojarnici. Vidi BMP WA, Best Management Practices…, *op. cit*., str. 21.

[74] Amižić Jelovčić, P., Mjere suzbijanja piratstva…, *op. cit*., str. 156, 157.

[75] Vidi BMP WA, Best Management Practices..., *op. cit*., str. 27.

[76] *Ibid*., str. 33, 34.

[77] Zapovjednik broda i članovi posade trebali bi se držati IMO-vih Smjernica o čuvanju i prikupljanju dokaza, A 28/Res. 1091 (engl. *IMO Guidelines on Preservation and Collection of Evidence*). Vidi https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.1091(28).pdf (pristup 19. siječnja 2023.).

4. DOPRINOS EUROPSKE UNIJE U BORBI PROTIV PIRATSTVA U GVINEJSKOM ZALJEVU

Zbog svog geostrateškog položaja te blizine sjevernoameričkog i europskog kontinenta, Gvinejski zaljev preuzeo je mjesto među izvoznicama nafte i plina, čak i ispred zemalja Bliskog istoka. Njegova važnost za EU dodatno je porasla početkom rata u Ukrajini kada je Europa, koja je do tada ovisila o uvozu ugljikovodika iz Rusije, upravo u Gvinejskom zaljevu pronašla zamjenskog dobavljača potrebnih energenata. Shodno tome, Gvinejski zaljev i zemlje EU-a imaju zajedničke interese za ekonomskom stabilnošću i pomorskom sigurnošću u ovom dijelu svijeta.[78] Regija ima dugu obalnu liniju i bogata je resursima koji su važni za zapošljavanje lokalnog stanovništva i potrošnju, kao i za trgovinu s Europom. Sigurni plovni putovi preduvjet su za sigurnu trgovinu i održivost svih pomorskih resursa, uključujući ribarstvo, što je od neprocjenjive važnosti za lokalnu zajednicu, ali i za europske korisnike. Međutim, međunarodni zločini na moru,[79] trgovina narkoticima i ostala ilegalna roba koja se krijumčari uzduž obale i diljem kopnenih granica sve više oštećuju lokalne zajednice država regije i potiču probleme u Europi.[80]

EU je podržao ciljeve Pravilnika o postupanju Yaoundé, usvojivši 2014. godine Strategiju EU-a za Gvinejski zaljev[81] u kojoj se definiraju potencijalni

[78] Afričke zemlje i EU surađuju putem višestrukih okvira poput Sporazuma iz Cotonoua te zajedničke strategije Afrike i EU-a. Osim tih okvira, Vijeće je usvojilo i tri regionalne strategije za Afrički rog, Gvinejski zaljev i Sahel. Sporazum iz Cotonoua sveobuhvatan je okvir za odnose EU-a s afričkim, karipskim i pacifičkim (AKP) zemljama. Njime su obuhvaćeni odnosi EU-a sa sedamdeset devet zemalja, uključujući i četrdeset osam zemalja supsaharske Afrike. Zajednička strategija Afrike i EU-a usvojena je 2007. godine kao formalni kanal za odnose EU-a s afričkim zemljama. U ožujku 2020. godine Europska komisija (EC) i Europska služba za vanjsko djelovanje (ESVD) izdale su zajedničku komunikaciju naslovljenu »Put prema sveobuhvatnoj strategiji s Afrikom«. Njome se predlaže suradnja u nekoliko ključnih područja: zelenoj tranziciji i pristupu energiji, digitalnoj transformaciji, održivom rastu i otvaranju novih radnih mjesta, postizanju mira, sigurnosti i upravljanju migracijama i mobilnošću. Vidi Vijeće Europske unije, Odnosi EU i Afrike, https://www.consilium.europa.eu/hr/policies/eu-africa/ (pristup 27. siječnja 2023.).

[79] Bolanča, D., *Odgovornost brodara za izuzete slučajeve*, Pravni fakultet Sveučilišta u Splitu, Split, 1996., str. 78, 83.

[80] Vidi Europska komisija i Visoki predstavnik Europske unije za vanjske poslove i sigurnosnu politiku…, *op. cit*., str. 2.

[81] U Strategiji se kao ključne prijetnje stabilnosti regije i uspješnog gospodarskog razvoja navode: nezakoniti ribolov, nedopušteno odlaganje otpada u more, piratstvo i oružana pljačka, otmice, trgovanje ljudima, narkoticima, oružjem i krivotvorinama, krijumčarenje migrantima, krađa nafte te kriminalne radnje u lukama. Vidi Council of the European Union, EU Strategy…, *op. cit*., str. 2.

potezi koje EU može poduzeti putem sveobuhvatnog pristupa podrške akcijama afričke regije i u suradnji s međunarodnim partnerima. Ovi bi potezi pridonijeli rješavanju problema s kojima se suočavaju zemlje Gvinejskog zaljeva i njihove regionalne organizacije te bi im pomogli u borbi protiv pomorskih prijetnji. Strategijom se žele postići četiri temeljna cilja: razvoj, dobro upravljanje i rješavanje unutarnjih sukoba, politička i diplomatska sigurnost, vladavina prava te, na koncu, suzbijanje nasilnog ekstremizma. Iako je Strategijom jasno iskazana spremnost EU-a za pružanje pomoći zemljama regije, očito je da ta pomoć ne uključuje i prisutnost vojnih snaga, kao što je to bio slučaj u Adenskom zaljevu.

Već sljedeće godine, Vijeće EU-a donijelo je Akcijski plan za Gvinejski zaljev za razdoblje od 2015. do 2020. godine u kojem je razrađen plan podrške EU-a, nastojanjima regije i njezinih obalnih država, u neutraliziranju različitih ugroza sigurnosne zaštite u pomorstvu i organiziranog kriminala. Akcijskim se planom želi ojačati međuregionalna suradnja država središnje i zapadne Afrike te povećati razina koordinacije između EU-a i njezinih država članica te međunarodnih partnera.[82] Cilj je EU-a pružiti pomoć državama regije u postizanju mira, sigurnosti i prosperiteta kroz legitiman razvoj ekonomije i pravnih institucija.[83] Suradnjom između EU-a i država regije štite se njihovi zajednički interesi u području ekonomije, razvoja, trgovine i sigurnosti, jer se većina pomorske trgovinske razmjene Gvinejskog zaljeva odvija upravo s Europom.[84] Dokaz su tome razni projekti u kojima je sudjelovao i EU i koji je financijski

[82] Cilj je Akcijskog plana pružiti podršku i na regionalnoj i na nacionalnoj razini postojećim nastojanjima Gospodarske zajednice zapadnoafričkih država (ECOWAS), Gospodarske zajednice srednjoafričkih država (ECCAS) i Komisije Gvinejskog zaljeva (GGC), kao i državama potpisnicama Pravilnika o postupanju Yaoundé iz 2013. godine.

[83] Osobita je pažnja posvećena održivosti ribljeg fonda i prirodnih resursa u području Gvinejskog zaljeva.

[84] U svakom trenutku u području Gvinejskog zaljeva nalazi se barem trideset brodova koji plove pod zastavama država EU-a ili su u njihovom vlasništvu. EU uvozi gotovo polovinu potrebne mu energije, od čega 10 % nafte i 4 % prirodnog plina potječe iz Gvinejskog zaljeva koji zbog svog geografskog položaja i blizine Europi ima komparativnu prednost u odnosu na Bliski istok. Vidi Council of the European Union, EU Strategy…, *op. cit*. u bilj. 7. EU uvozi 13 % nafte i 6 % plina iz zapadne Afrike. Vidi Vijeće Europske unije, Zaključci Vijeća o Akcijskom planu za Gvinejski zaljev za razdoblje od 2015. do 2020., od 16. ožujka 2015., https://www.consilium.europa.eu/hr/press/press-releases/2015/03/16/council-conclusions-gulf-guinea-action-plan-2015-2020/ (pristup 19. siječnja 2023.).

podržao, poput SEACOP-a,[85] GoGIN-a,[86] PESCAO-a,[87] SWAIMS-a,[88] WeCAPS-a[89] i drugih.

EU je u Africi pokrenuo više vojnih i civilnih misija i operacija kao dio Zajedničke sigurnosne i obrambene politike. Jedna od poznatijih jest svakako Afrički NEMO,[90] koji koordinira francuska ratna mornarica. Afrički NEMO je operacija utemeljena radi unapređenja operabilnosti obalnih država Gvinejskog zaljeva te kao podrška primjeni Pravilnika o postupanju Yaoundé iz 2013. godine. Važan doprinos operaciji NEMO dala je i Europska agencija za pomorsku sigurnost (EMSA)[91] kroz svoj satelitski program *Copernicus*, koji je osmišljen kako bi osigurao dostupnost svih potrebnih operativnih podataka i usluga vezanih za okolišna i sigurnosna pitanja.[92] Osim Francuske, i druge europske države, poput Portugala, Španjolske, Italije, Ujedinjenog Kraljevstva, Belgije i Danske, pružaju pomoć u borbi protiv piratstva u Gvinejskom zaljevu.[93]

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85 Engl. *Seaport Cooperation Project*. Projekt je pokrenut je 2015. godine radi rješavanja problema nezakonitog pomorskog prometa u regiji. Vrijednost projekta iznosi 6 milijuna eura. Vidi The Gulf of Guinea and Maritime Security, *NATO Open Publications*, god. 7 (2022.), br. 1, str. 20, https://issuu.com/spp_plp/docs/the_gulf_of_guinea_gog_and_maritime_security?fr=sOTBhMDQ1MTE0NTU (pristup 27. siječnja 2023.).

86 Engl. *The Gulf of Guinea Inter-Regional Network*. Projekt je započeo s radom 2016. godine radi unapređenja pomorske sigurnosti u devetnaest država regije. Vrijednost projekta iznosi 9.3 milijuna eura. *Ibid.*

87 Engl. *Improved Regional Fisheries Governance in Western Africa*. Projekt je pokrenut 2018. godine kako bi se poboljšao i osigurao održivi ribolov, a onemogućio nezakoniti, neprijavljeni i neregularni ribolov. Vrijednost projekta iznosi 15 milijuna eura. *Ibid.*

88 Engl. *The West Africa Integrated Maritime Security*. Projekt je započeo s radom 2019. godine i posebnu pozornost posvećuje unapređenju pravnog okvira upravljanja, primjene i implementacije pravnih propisa. Vrijednost projekta iznosi 28 milijuna eura. *Ibid.*

89 Engl. *West and Central Africa Port Security*. Projekt je pokrenut 2019. godine kako bi unaprijedio sigurnost luka u regiji zapadne i središnje Afrike. Vrijednost projekta iznosi 8.5 milijuna eura. *Ibid.*

90 Engl. *African Navy´s Exercise for Maritime Operations* – African NEMO. Partner u nizu vježbi koje su održane u sklopu ove operacije je UN-ov Ured za droge i kriminal – UNODC (engl. *The United Nations Office on Drugs and Crimes*). *Ibid.*

91 Engl. *European Maritime Safety Agency*. Vidi Europska agencija za pomorsku sigurnost, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/emsa_hr (pristup 12. siječnja 2023.).

92 Satelitski program *Copernicus* korišten je kroz niz pokaznih vježbi koje su održane pokraj Obale Bjelokosti, Svetog Tome i Principa, Senegala, Toga i Zelenortskih Otoka. Vidi Programme of the European Union »Copernicus«, https://www.copernicus.eu/en/access-data (pristup 12. siječnja 2023.).

93 The Gulf of Guinea and Maritime Security…, *op. cit.*, str. 23.

Potvrđujući važnost suradnje u borbi protiv piratstva, Vijeće Europske unije odobrilo je u siječnju 2021. godine zaključke o pokretanju prvog pilot projekta o konceptu koordinirane pomorske prisutnosti u Gvinejskom zaljevu (CMP), kojom se obvezuje osigurati prisutnost barem jedne države članice EU-a u svakom trenutku.[94] Vijeće njime ističe stratešku važnost Gvinejskog zaljeva, ističući iznova dugogodišnju predanost EU-a u pružanju podrške državama regije, kao i namjeru daljnjeg jačanja kooperacije. Slijedom toga, utvrđuje Gvinejski zaljev kao pomorsko područje od interesa (MAI)[95] i pozdravlja uspostavljanje Jedinice za koordinaciju pomorskog područja od interesa (MAICC).[96] Ono što države regije zamjeraju državama EU-a jest njihova usmjerenost u borbi isključivo protiv piratstva u ovom dijelu svijeta. Naime, druga kaznena djela, poput krijumčarenja i nezakonitog ribolova, imaju čak negativniji utjecaj na lokalno stanovništvo i gospodarstvo regije.

Kako je u međuvremenu cjelokupno sigurnosno okruženje postalo nestabilnije, složenije i rascjepkanije nego ikad, EU je odlučio pripremiti akcijski plan za jačanje svoje sigurnosne i obrambene politike do 2030. godine. Plan je detaljno razrađen unutar Strateškog kompasa EU-a,[97] koji je donesen u ožujku 2022. godine, kako bi EU postao još snažniji i sposobniji pružatelj sigurnosti, s obzirom na aktualne sigurnosne prijetnje u susjedstvu, a osobito zbog rata u Ukrajini. Kompas obuhvaća sve aspekte sigurnosne i obrambene politike te se temelji na četiri stupa, a to su: djelovanje, ulaganje, partnerstvo i sigurnost. Kao jedan od ciljeva, čijoj se realizaciji teži, ističe se i jačanje uloge EU-a kao aktera u području

[94] Engl. *Co-ordinated Maritime Presence*. Vidi Zaključci Vijeća o pokretanju pilot projekta o konceptu koordinirane pomorske prisutnosti u Gvinejskom zaljevu, br. 5387/21, Bruxelles, od 25. siječnja 2021., https://data.consilium.europa.eu/doc/document/ST-5387-2021-INIT/hr/pdf (pristup 20. siječnja 2023.). U siječnju 2022. godine odlučeno je da će navedeni projekt nastaviti s radom i naredne dvije godine, do siječnja 2024. godine.

[95] Engl. *Maritime Area of Interest.*

[96] Engl. *Maritime Area od Interest Coordinartion Cell*. Ono što države regije zamjeraju državama EU-a jest njihova usmjerenost u borbi isključivo na piratstvo u ovom dijelu svijeta. Naime, druga kaznena djela, poput krijumčarenja i nezakonitog ribolova, predstavljaju jednako veliki problem u ovoj regiji i imaju čak veći negativni utjecaj na lokalno stanovništvo i gospodarstvo. EU rješava nezakoniti, neprijavljeni i neregulirani ribolov (IUU-ribolov) provođenjem Uredbe o nezakonitom, neprijavljenom i nereguliranom ribolovu i Sporazumima o partnerstvu u ribarstvu EU-a, pri čemu mnoge obalne zemlje zapadne i središnje Afrike pomažu regulirati ribolov, uključujući brodove EU-a, te tako doprinose razvoju uprave i boljoj kontroli sektora ribarstva. Vidi Europska komisija i Visoki predstavnik Europske unije za vanjske poslove i sigurnosnu politiku…, *op. cit*., str. 6.

[97] Tekst na hrvatskom jeziku vidi https://data.consilium.europa.eu/doc/document/ST-7371-2022-INIT/hr/pdf (pristup 23. siječnja 2023.).

pomorske sigurnosti. S obzirom na to da je pomorsko okruženje sve konfliktnije, EU planira proširiti svoju koordiniranu pomorsku prisutnost na područja od pomorskog interesa, koja utječe na sigurnost EU-a, i prema potrebi nastojati povezati relevantne partnere. Kako bi EU u tome uspio, potrebno je ojačati suradnju sa strateškim partnerima, kao što su NATO, UN i regionalni partneri, te razviti prilagođenija bilateralna partnerstva sa zemljama istomišljenicama i strateškim partnerima, poput SAD-a, Kanade, Norveške, ali i sa zemljama na zapadnom Balkanu, u našem istočnom i južnom susjedstvu, Africi, Aziji i Latinskoj Americi, kroz jačanje dijaloga i suradnje, te osobito promicanjem sudjelovanja u misijama i operacijama iz domene sigurnosti i obrane. Pritom, kao pozitivan primjer dosadašnjih akcija i pomorskih operacija u kojima je sudjelovala ističe se upravo Adenski i Gvinejski zaljev.[98]

5. ZAKLJUČAK

Broj piratskih napada u Gvinejskom zaljevu počeo je rasti početkom dvadeset prvog stoljeća, da bi posljednjih godina navedeno područje postalo njegovim glavnim svjetskim žarištem. Tome su pridonijeli brojni razlozi: dugogodišnja nebriga za zaštitu morskog okoliša koja je postepeno dovela do visokog stupnja nezaposlenosti, nesrazmjerna raspodjela dobiti ostvarene proizvodnjom i izvozom nafte što je izazvalo organiziranje pobunjeničkih skupina, nefunkcioniranje državne uprave, nepostojanje odgovarajućeg pravnog okvira, neučinkovita implementacija propisa i nemogućnost njihove provedbe te, na koncu, sustavno zanemarivanje značenja sigurnosti pomorske plovidbe.

Gvinejski zaljev je zbog svoje geostrateške pozicije i blizine europskog i sjevernoameričkog kontinenta postao jedan od ključnih izvoznika energetskih resursa prema spomenutim kontinentima. Rizici kojima su izloženi trgovački brodovi tijekom plovidbe tim područjem ili boravka u njemu ne ugrožavaju, međutim, samo sigurnost tog broda i njegove posade, kao i tereta koji se njime prevozi. Posljedice su mnogo opsežnije te zadiru i u gospodarski aspekt pomorskog prijevoza. Naime, navedeni rizici dovode do povećanja troškova prijevoza, povećanja vozarine, povišenja premija osiguranja te nužnosti angažiranja usluga privatne naoružane pratnje. Piratstvo negativno utječe na nacionalnu sigurnost

[98] Vijeće Europske unije, Strateški kompas za snažniju sigurnost i obranu EU u sljedećem desetljeću, https://www.consilium.europa.eu/hr/press/press-releases/2022/03/21/a-strategic-compass-for-a-stronger-eu-security-and-defence-in-the-next-decade/ (pristup 22. siječnja 2023.).

Nigerije i dovodi u pitanje sigurnost ulaganja u naftnu industriju te tako ugrožava globalnu energetsku sigurnost i sigurnost plovidbe. Stoga ne iznenađuje činjenica kako čitava međunarodna zajednica, uključujući dionike svjetske pomorske industrije, ima potrebu zaštititi zajedničke interese u navedenoj regiji, sačuvati mir i omogućiti sigurnu pomorsku plovidbu u tom dijelu svijeta.

Po uzoru na pravne instrumente međunarodnih organizacija i institucija EU-a, radi suzbijanja i ograničavanja piratskih napada u Adenskom zaljevu, donesen je čitav niz propisa kako bi se onemogućila ili barem umanjila aktivnost pirata u Gvinejskom zaljevu. Od donesenih instrumenata treba prvenstveno izdvojiti relevantne međunarodne konvencije koje sadržavaju temeljne odredbe u vezi s piratstvom i drugim međunarodnim pomorskim kaznenim djelima, a pri čijem su donošenju ključnu ulogu imali UN i IMO. UN je donio, sada već davne 1982. godine, Konvenciju UNCLOS koja sadržava općeprihvaćenu definiciju piratstva. Sama Konvencija zbog svog neobvezujućeg karaktera otežava suzbijanje piratstva u praksi, dok i definicija piratstva sadržava niz nedostataka od kojih je svakako najveći onaj koji se odnosi na područje primjene. Stoga se preporučuje revizija UNCLOS-a, osobito u dijelu same definicije piratstva i instituta progona brodova. UN je donio i brojne rezolucije u kojima se izražava zabrinutost zbog stanja pomorske sigurnosti u regiji i potiče države Gvinejskog zaljeva na međusobnu suradnju te donošenje i implementaciju propisa kojima bi se doprinijelo suzbijanju piratskih napada i procesuiranju pirata. S druge strane, IMO je donio Konvenciju SUA iz 1988. godine s Protokolom iz 2005. godine. Konvencija SUA se odnosi na druga pomorska kaznena djela i propisuje procesuiranje njihovih počinitelja. IMO je donio i niz protupiratskih mjera te smjernica i preporuka poput onih koje se odnose na ukrcaj privatne naoružane pratnje na trgovačke brodove. Također je pružio pomoć u pripremi i izradi nacionalnih i regionalnih pravnih instrumenata afričkih država te asistirao u obuci njihova osoblja zadužena za implementaciju i provedbu relevantnih propisa. Osim navedenih međunarodnih instrumenata, čije se odredbe primjenjuju i na gvinejsko piratstvo, važan pomak u pravnom reguliranju ovog sigurnosnog problema ostvaren je putem brojnih instrumenata nacionalnog ili regionalnog karaktera koje su donijele države regije Gvinejskog zaljeva. Osobitu važnost ima Pravilnik o postupanju radi suzbijanja piratstva, oružane pljačke protiv brodova i nezakonitih pomorskih aktivnosti u zapadnoj i središnjoj Africi, tzv. Pravilnik o postupanju Yaoundé iz 2013. godine. Pravilnikom su se države regije obvezale surađivati u suzbijanju međunarodnog organiziranog pomorskog kriminala, uključujući piratstvo, pomorski terorizam i nezakoniti, neprijavljeni i neregularni ribolov. Unatoč dobrim rješenjima koje Pravilnik sadržava, nije postigao željene

rezultate u primjeni. Naime, radi se o Pravilniku koji nema obvezujući karakter te za njegovu implementaciju i provedbu nedostaju potrebni pravni i financijski preduvjeti. Ono što je spriječilo kvalitetnu primjenu Pravilnika u praksi, pokušalo se popraviti donošenjem propisa koji su uslijedili. Afrička povelja o pomorskoj sigurnosti i razvoju u Africi ima obvezujući karakter te državama članicama nameće obvezu donošenja potrebnih pravnih propisa i stvaranja pravnog okvira koji će omogućiti učinkovitu provedbu zadanih ciljeva, kao i obvezu suradnje u zaštiti, istragama i procesuiranju počinitelja kaznenih djela na moru. Prvi korak u tom smjeru napravila je upravo Nigerija koja je 2019. godine donijela Zakon o suzbijanju piratstva i drugih pomorskih kaznenih djela, tzv. Zakon SPOMO. Radi se o prvom specijaliziranom propisu za piratstvo među državama regije koji je uskladio svoje odredbe s odredbama UNCLOS-a i Konvencije SUA. Međutim, Zakonu se već sada zamjera neučinkovita implementacija i provedba te neusklađenost s postojećim relevantnim pravnim propisima u Nigeriji. Preporuka je izmijeniti i dopuniti postojeći Zakon kako bi se omogućila njegova primjena i na kaznena djela koja prate kazneno djelo piratstva, poput otmica, pranja novca te utaje poreza.

Sigurnosti plovidbe u Gvinejskom zaljevu pridonosi i BMP WA, poseban priručnik koji sadržava niz korisnih savjeta za brodove tijekom plovidbe visokorizičnim područjem te je u slučaju piratskog napada, a koji je donesen po uzoru na istovjetan Priručnik BMP5, primjenjiv na Adenski zaljev.

EU se također vrlo aktivno uključio u borbu protiv piratstva u Gvinejskom zaljevu, vodeći se interesom za stabilizacijom stanja u Gvinejskom zaljevu i suzbijanjem prijetnji pomorskoj plovidbi, brodovima i posadi u tom području. EU je, u tom smislu, dao golem doprinos pomažući državama u jačanju vladavine prava i učinkovitom upravljanju cijelom regijom kroz razvoj pomorske uprave. Postizanje tog cilja otežano je zbog nemogućnosti kvalitetnog nadzora granica. Budući da pomorske granice još uvijek nisu potpuno određene, od presudne se važnosti pokazala suradnja među obalnim državama te novi mehanizmi regionalne koordinacije kojima se pridonosi smanjenju prijetnji i na moru i na kopnu. Statistika potvrđuje da prisutnost brodova oružanih snaga država EU-a i NATO-a, koji djeluju u suradnji s državama regije, rezultira drastičnim smanjenjem broja piratskih napada u Gvinejskom zaljevu, te bi svakako trebalo nastaviti s tom praksom i u budućnosti.

Preduvjet postizanja željenih rezultata u borbi protiv piratstva je, prije svega, revizija UNCLOS-ove definicije piratstva, osobito u dijelu koji se tiče područja primjene. Neophodno je definicijom obuhvatiti i teritorijalno more

obalnih država. UNCLOS je donesen u vrijeme kada je međunarodna zajednica bila uvjerena da sve države potpisnice imaju sposobnost, resurse i volju štititi svoje obalno more i spriječiti piratske napade u njemu. To se uvjerenje pokazalo pogrešnim, osobito u vezi s nerazvijenim državama koje nemaju potrebna znanja ni mogućnosti suzbiti piratstvo, a upravo se u obalnim morima tih država bilježi najveći broj napada. Iako se proširivanjem područja primjene definicije i na teritorijalno more otvara mogućnost zadiranja drugih država u suverenitet obalne države u kojoj se dogodio napad, proširenje je nužno s obzirom na kontinuirani rast napada u tom području mora. Shodno tome, preporučuje se donošenje Protokola uz UNCLOS ili Smjernica za tumačenje piratstva.

Uz pravnu reformu koja je potrebna, bitan je i daljnji razvoj suradnje među državama regije kroz donošenje novih bilateralnih ugovora ili čak na međunarodnoj razini. Osim suradnje, potrebno je u većoj mjeri financijski poduprijeti države Gvinejskog zaljeva u njihovoj borbi. Koordinirana je suradnja među državama ključna, posebno kod uhićenja i procesuiranja pirata što, također, predstavlja prepreku u borbi protiv ove pomorske ugroze. Naime, uzapćenju piratskog broda redovito prethodi progon koji, u skladu s odredbama UNCLOS-a, mora prestati kada progonjeni brod uđe u svoje teritorijalno more ili teritorijalno more treće države. Međutim, ako jedna od tih država nije sposobna ili voljna uzaptiti piratski brod, izvjesno je da ni pirati neće biti procesuirani. Zbog toga je iznimno važno pravno regulirati suradnju među državama te ih na nju obvezati. Postojeći ugovori na razini preporuke, nažalost, ne mogu postići očekivani uspjeh.

Iako se neke od mjera korištene u borbi protiv piratstva u Adenskom zaljevu gotovo zrcalno mogu primijeniti i u Gvinejskom zaljevu, jasno je da ovo područje ima svoje specifičnosti i da zahtijeva individualni pristup. Za razliku od područja Somalije, delta Nigera je regija koja je izuzetno bogata prirodnim resursima. U tom području postoje druge okolnosti, poput nepravedne raspodjele bogatstva, neučinkovite primjene pravnih propisa i dijela korumpirane vlasti koje su doprinijele porastu tamošnjeg piratstva. Stoga je potrebno, uz uvažavanje pozitivnih iskustava u borbi protiv piratstva u drugim područjima, pri suzbijanju problema piratstva u Gvinejskom zaljevu primijeniti mjere prilagođene specifičnim okolnostima koje tamo vladaju. Nesporna je činjenica da je piratstvo jedno od najvećih problema s kojim se susreću zemlje regije Gvinejskog zaljeva te predstavlja najveću prijetnju međunarodnoj pomorskoj plovidbi u tom području. Međutim, bilo bi pogrešno zanemariti i druge ugroze pomorske sigurnosti koje prijete tim obalnim državama, poput petro-piratstva, krijumčarenja i IUU-ribolova, koji ugrožavaju nacionalna gospodarstva država regije i onemogućuju njihov prosperitet. Za postizanje željenog pozitivnog iskoraka i napretka

u suzbijanju svih pomorskih ugroza u Gvinejskom zaljevu, uključujući i piratstvo na moru, ključno je, prije svega, stvoriti učinkovit pravni okvir s funkcionalnom državnom upravom te poduprijeti daljnji razvitak gospodarstva u regiji, u skladu s postojećim strategijama razvoja. Tako bi se otvorila nova radna mjesta i pružila potpora slabije razvijenim zajednicama da se odupru kriminalnim ili nasilnim aktivnostima.

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Summary:

THE GULF OF GUINEA: A PIRACY HOT SPOT AND A NEW THREAT TO THE INTERNATIONAL SAFETY OF NAVIGATION

Contemporary piracy is one of the most significant threats to the safety of navigation. In recent years, the piracy hot spot has moved from the Gulf of Aden to the Gulf of Guinea, which is nowadays known as the most dangerous navigation area in the world. Based on the experience of active and passive measures applied in the Gulf of Aden, countries from the Gulf of Aden region, in cooperation with the international community, have adopted a series of regulations and agreements with the goal of suppressing piracy in the aforementioned area. The most important among them are UN resolutions on the Gulf of Guinea, the Yaoundé Code of Conduct, the African Union Charter on Maritime Security and Safety and Development in Africa, the Act on the Suppression of Piracy and Other Maritime Offences of the Federal Republic of Nigeria, and the Best Management Practices, West Africa. Furthermore, marine security operations undertaken in this region, under the auspices of NATO and the EU, have made an immeasurable contribution to combating marine piracy. The EU has proven to be an irreplaceable partner to the countries of the region in the fight not only against piracy but also against other international crimes that occur there on a daily basis. Consequently, in order to protect its interests in that part of the world and to contribute to international maritime security, the EU is making great efforts to prevent piracy attacks and armed robbery through the adoption of different legal instruments and through active participation in marine operations. In this article, the author gives an overview of the most relevant international documents adopted for the purpose of suppressing pirate attacks in the Gulf of Guinea, with special regard to the role of the EU.

Keywords: *the Gulf of Guinea; Yaoundé Code of Conduct; African Union Charter on Maritime Security and Safety and Development in Africa; Act on the Suppression of Piracy and Other Maritime Offences of the Federal Republic of Nigeria; BMP WA; EU Strategy on the Gulf of Guinea; EU Action Plan on the Gulf of Guinea; Strategic Compass of the EU.*

POSLJEDICE BREXITA ZA POMORSKO PRAVO EUROPSKE UNIJE

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Pitanje je u kojoj mjeri Brexit utječe na pomorsko pravo i pomorsku industriju Europske unije. Trgovački sud u Londonu stoljećima rješava međunarodne sporove nastale iz prijevoza stvari morem. Približno 80 % svih sporova pred tim sudom, kao i Sudom za pomorske sporove, i danas su pomorski sporovi nastali iz pomorskih osiguranja i brodograđevnih sporova. Oko 70 % takvih sporova međunarodnog su karaktera. Velika većina sudaca engleskog Trgovačkog suda, Žalbenog suda, Vrhovnog suda i Suda za pomorske sporove, kao i veliki broj specijaliziranih odvjetnika i vještaka, imaju iskustva u pomorskim sporovima. Sve to upućuje na zaključak kako je London bio i ostao dominantna jurisdikcija za rješavanje međunarodnih pomorskih sporova. Pragmatičan pristup pitanju odgovornosti i alokaciji rizika pomorskih pothvata, kao i detaljna analiza specifičnih okolnosti svakog slučaja, među ostalim, krase englesku sudsku praksu. Nakon završetka tzv. tranzicijskog razdoblja pregovora o izlasku Velike Britanije iz Europske unije, 31. prosinca 2020. godine, u Velikoj Britaniji prestale su važiti Uredba Europske unije Bruxelles I (preinaka), Luganska konvencija iz 2007. godine i tzv. Uredbe Rim I i Rim II. Navedeni propisi reguliraju pitanja nadležnosti, priznanja i izvršenja sudskih odluka u građanskim i trgovačkim sporovima među državama članicama Europske unije, kao i izbor mjerodavnog prava. Prestankom važenja potonjih propisa prestao je dotadašnji postupak automatskog priznanja i ovrhe presuda engleskih sudova u građanskim i trgovačkim sporovima među državama članicama Europske unije (i obratno). U tim se okolnostima postavlja pitanje, hoće li brodarske kuće, osiguravajuća društva, brodograditelji i drugi dionici pomorske industrije Europske unije i dalje s povjerenjem ugovarati primjenu engleskog prava i nadležnost engleskih sudova. Smatramo kako hoće jer englesko pomorsko pravo i sudska praksa nude jedinstveno visok stupanj izvjesnosti, jasnoće i predvidljivosti, kao i visoku razinu razumijevanja specifičnosti pomorske

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industrije koje London već više od stoljeća pruža pomorskim kompanijama Europske unije i ostatku svijeta.

Ključne riječi: *Brexit; englesko pravo; engleski sudovi; engleska sudska praksa; pomorski sporovi; propisi Europske unije; priznanje i ovrha stranih sudskih odluka.*

1. UVOD

Trgovački sud u Londonu (*The Commercial Court*), koji je dio Suda za poslovne i imovinske sporove (*The Business and Property Courts*) i Visokog suda pravde (*The High Court of Justice*), sastoji se od trinaest specijaliziranih sudaca u različitim područjima trgovačkog prava. Sud je specijaliziran za rješavanje sporova koji proizlaze iz trgovačkih ugovora, pitanja osiguranja i reosiguranja, bankarstva i financijskog poslovanja, prijevoza stvari, pomorstva, priznanja i ovrhe inozemnih sudskih presuda i arbitražnih odluka te drugih sličnih pitanja.

Trgovački sud u Londonu ima tradiciju dulju od sto dvadeset pet godina u rješavanju ne samo sporova nastalih u londonskom Cityju, nego i sporova koji su nastali izvan njegove jurisdikcije. Statistika pokazuje kako je više od 70 % sporova koji se vode pred tim sudom barem jedna strana u postupku inozemna.[1]

Tijekom 2020. godine, osam od trinaest sudaca ovog suda imaju dugogodišnje iskustvo u sudovanju u sporovima iz područja prijevoza stvari morem i primjeni pomorskog prava. Slična je situacija i s tri od pet sudaca na Žalbenom sudu (*The Court of Appeal*), kao i s tri trgovačka suca na Vrhovnom sudu (*The Supreme Court*).[2]

Prvih stotinjak godina (s malom iznimkom tridesetih i dijelom pedesetih godina prošlog stoljeća), najveći dio sporova koji su se vodili pred Trgovačkim sudom u Londonu imali su inozemni element i proizlazili su iz međunarodnog prijevoza stvari morem. U tim sporovima, osim iskusnih sudaca u tom području, bili su uključeni i odvjetnici (*solicitori* i *baristeri*), također s bogatim iskustvom u pomorskim sporovima, kao i sudski vještaci, pomorski agenti, bankari i financijeri, svi iskustveno povezani s pomorskom industrijom.

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[1] Osvrt suca Petera Grossa na članak Courtly Competition objavljen u tjedniku *The Economist*, 2. rujna 2017. godine. Sudac Peter Gross izlagao je taj osvrt na 35th *Annual Donald O´May Maritime Law Lecture* 1. studenoga 2017. godine u Londonu. Vidi Gross, P., A Good Forum to Shop in: London and English Law Post-Brexit, *Lloyd´s Maritime and Commercial Law Quarterly*, Part 2 (2018.), str. 1, i-law.com/ilaw/doc/view.htm?id=388700 (pristup 20. siječnja 2023.).

[2] Foxton, D., Why Shipping Law still Matters, *Lloyd´s Maritime and Commercial Law Quarterly*, Part 3 (2021.), str. 10, i-law.com/ilaw/doc/view.htm?id=421606 (pristup 20. siječnja 2023.).

Sud za pomorske sporove (*The Admiralty Court*), čija tradicija seže u trinaesto stoljeće, od 1981. godine zajedno je s Trgovačkim sudom u Londonu dio tzv. Odjela kraljeva stola (*King's Bench Division*) Visokog suda. Suci toga suda, također, imaju golemo iskustvo u rješavanju pomorskih sporova koji proizlaze iz sudara i spašavanja na moru, prijevoza robe morem, ograničenja odgovornosti u pomorskim sporovima te sporovima koji proizlaze iz hipoteke na brodu. Jedna od njegovih specifičnosti su i sporovi *in rem* koji se vode protiv broda, kao što je, primjerice, donošenje privremenih mjera zaustavljanja broda, odnosno zabrane isplovljenja iz luke.

Londonska arbitraža za pomorske sporove, koja se rukovodi pravilima Londonske udruge pomorskih arbitara (*The London Maritime Arbitrators' Association* – LMAA), također rješava veliki broj pomorskih i brodograđevnih sporova. Na to upućuje i tvrdnja suca Sir Davida Foxtona da postoji više žalbi na arbitražne odluke po pitanju primjene prava u pomorskim sporovima, nego u bilo kojim drugim arbitražama u Londonu. Sama mogućnost žalbe na arbitražne odluke po pitanju primjene prava, koja je u drugim jurisdikcijama inače rijetkost, čini London još atraktivnijim forumom za arbitražno rješavanje sporova.[3]

Također, navedeno iskustvo i tradicija čine London i danas najznačajnijim svjetskim centrom za rješavanje sporova u međunarodnoj pomorskoj industriji. U proteklih nekoliko godina pravne usluge koje pruža tzv. *Legal London* u rješavanju sporova iz područja engleskog pomorskoga prava donijele su britanskom gospodarstvu prihod veći od trideset milijardi funti.[4]

2. VAŽNOST ENGLESKOG POMORSKOG PRAVA ZA POMORSKU INDUSTRIJU EUROPSKE UNIJE

Englesko pomorsko pravo i sudska praksa od iznimne su važnosti za englesko ugovorno pravo. Neka od najvažnijih načela engleskog trgovačkog i ugovornog prava proizašla su iz engleskog pomorskog prava i sudskih sporova koji su nastali iz prijevoza stvari morem.

Isto tako, sudski postupci pred engleskim Trgovačkim sudom i Sudom za pomorske sporove, kao i arbitražni postupci pred Međunarodnim arbitražnim sudom (*The International Arbitration Court* – IAC), odavno su postali međunarodno priznati kao najviši postupovni standardi u mnogim jurisdikcijama diljem svijeta.

[3] *Ibid.*

[4] *Ibid.*, str. 1.

Nadalje, visoki stupanj izvjesnosti, poštovanje načela slobode ugovaranja, jasnoća i predvidljivost engleskog pomorskog prava i sudske prakse prepoznati su u pomorskoj industriji kako u svijetu, tako i u Europskoj uniji. Tomu svakako pridonosi London, sa svojim pomorskopravnim i drugim stručnjacima u području pomorstva, koji je odavno prepoznat kao međunarodni centar za pružanje pravnih usluga i rješavanje pomorskih (i drugih trgovačkih) sporova na najvišoj razini.

Osim visokog stupnja izvjesnosti, jasnoće i predvidljivosti, englesko pomorsko pravo i praksa, poznati kao englesko običajno pravo (*Common Law)*, sve ove godine nudili su pomorskim kompanijama Europske unije visoku razinu razumijevanja specifičnosti pomorske industrije, kao i rizika i odgovornosti koji se u njoj javljaju. Veliki broj riješenih sudskih i arbitražnih sporova uspostavili su jasne kriterije, primjerice, da poslovni subjekti moraju na temelju svoje razumne procjene vjerojatnosti ishoda nekog događaja imati pravo donijeti određenu poslovnu odluku (poput odluke o raskidu ili produljenju ugovora) u određenom trenutku, umjesto da čekaju dok se taj događaj zaista i dogodi. U svakom je sporu, prvenstveno, potrebno utvrditi cilj i namjeru koja se želi postići ugovorom, pri čemu suci ne stvaraju ugovor, nego ga samo tumače (*construction of contract*). Raspodjela je rizika ključna za određivanje prava na naknadu štete zbog raskida ugovora. Englesko pravo i sudska praksa uveli su odredbe o vrstama štete koje se mogu naknaditi primjenom ugovorne kazne u različitim oblicima pomorskih ugovora.

Veliki broj engleskih sudskih i arbitražnih odluka tijekom stoljeća dovele su do savršenstva analizu razloga za raskid ugovora zbog neispunjenja ugovornih obveza: a) obveze čije neispunjenje daje pravo oštećenoj strani na raskid ugovora i naknadu štete (*condition*), b) obveze čije neispunjenje daje oštećenoj strani pravo na naknadu štete, ali ne i na raskid ugovora (*warranty*) i c) obveze čije je neispunjenje toliko ozbiljno da se njime poništava u cijelosti sama svrha ugovora te oštećenoj strani daje pravo na raskid ugovora i naknadu štete (*innominate term*).

Iz svih navedenih razloga, brodari država članica Europske unije, kao i njihove *offshore* podružnice, godinama koriste standardne obrasce brodarskih ugovora (ugovora o zakupu broda, ugovora o tegljenju, ugovora o prijevozu robe, o osiguranju broda i tereta, o upravljanju brodom, o kupoprodaji broda, o gradnji ili popravku broda), bilo da ih nudi međunarodna organizacija brodara i pomorskih agenata, kao što je Baltičko i međunarodno pomorsko vijeće (*The Baltic and International Maritime Council* – BIMCO), ili ih stvara praksa. Najveći broj takvih ugovora sadrži odredbu o primjeni engleskog prava kao mjerodavnog te odredbe o nadležnosti engleskih sudova ili londonske arbitraže za rješavanje

sporova koji mogu proizaći iz takvih ugovora. Isti je slučaj i s različitim oblicima ugovora o financiranju nabave brodova ili plovidbenih pothvata.[5]

Svi navedeni ugovori sadrže odredbe čija su tumačenja u raznim sporovima dali suci Trgovačkog suda, Suda za pomorske sporove, Vrhovnog suda ili Doma lordova ili arbitraže sa sjedištima u Londonu, te su mnoga njihova tumačenja postala englesko pravo.

Važne su presude kojima se uspostavila važnost kauzaliteta kod naknade štete zbog neispunjenja ugovora, koje se posljedice neispunjenja ugovora trebaju uzeti u obzir, a koje ne pri utvrđivanju visine naknade štete, te kako utvrditi koje odredbe ugovora čine već spomenute obveze: *condition*, *warranty* i *innominate term*. Pomorski su prijevozi po svojoj prirodi izloženi općepoznatim opasnostima pa je u svakom pojedinom slučaju iznimno važno odrediti koje opasnosti su sastavni, predvidljivi dio plovidbenog pothvata, a na koje rizike brodar nije pristao ugovorom o prijevozu, te bi zbog njihova nastupa imao pravo na naknadu štete (*Petroleo Brasileiro S.A (Respondent) v. E.N.E. Kos 1 Limited (Appellant*).[6]

Fleksibilnost engleskog običajnog prava koja više naginje praktičnoj realnosti same gospodarske grane kao što je pomorstvo, nego doktrinarnom pristupu, pokazala se od iznimne važnosti upravo u području pomorskog prava. Tome svjedoče mnogobrojne sudske presude i arbitražne odluke, primjerice, *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*.,[7] u kojoj je sud zbog kompleksnosti odgovornosti brodara za mane broda iz brodarskog ugovora morao posegnuti za sasvim novim pristupom utvrđivanja odgovornosti za štetu nastalu naručitelju iz brodarskog ugovora. U potonjem je slučaju, zbog jednostranog neispunjenja ugovora, sud utvrdio da neispunjenje mora biti toliko ozbiljno da: a) u cijelosti uskraćuje nedužnoj strani svrhu koja se ugovorom namjeravala postići i na koju nedužna strana ima pravo prema ugovoru, b) djelomično uskraćuje nedužnoj strani svrhu i c) čini prekršaj temeljne ugovorne obveze, kao što je u slučaju *Federal Commerce and Navigation Ltd. v. Molena Alpha Inc. (The »Nanfri«, »Benfri« and »Lorfri«)*.[8]

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[5] Vidi BIMCO Contracts, https://www.bimco.org/contracts-and-clauses/bimco-contracts (pristup 20. siječnja 2023.).

[6] Vidi *Petroleo Brasileiro S.A (Respondent) v. E.N.E. Kos 1 Limited (Appellant)* [2012] UKSC 17, http://ukscblog.com/case-comment-petroleo-brasileiro-s-a-respondent-v-e-n-e-kos-1-limited-appellant-2012-uksc-17/ (pristup 20. siječnja 2023.).

[7] Vidi *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26, Court of Appeal, https://www.bailii.org/ew/cases/EWCA/Civ/1961/7.html (pristup 31. ožujka 2023.).

[8] Vidi *Federal Commerce and Navigation Ltd. v. Molena Alpha Inc. (The »Nanfri«, »Benfri« and »Lorfri«)* [1978] 1 Lloyd´s Rep. 581, [1979] 2 Lloyd´s Rep. 132, [1978] 1 Lloyd´s Rep. 201,

Pomorskoj industriji koja je po svojoj prirodi dinamična i koja se tehnološki brzo razvija, potreban je pravni sustav poput engleskog običajnog prava koji se mijenja i razvija. Takav pragmatičan pristup pitanju odgovornosti i alokaciji rizika pomorskih pothvata, detaljna analiza specifičnih okolnosti svakog slučaja, analiza prirode ugovorne odredbe, vrsta i razina kršenja ugovora, kao i posljedice prekršaja za oštećenu stranu, od vitalne su važnosti za pomorsku industriju. Sve navedeno proizlazi iz nepreglednog broja engleskih sudskih presuda koje su postale presedani od iznimne važnosti za svjetsku pomorsku industriju, kao i pomorsku industriju Europske unije.

3. IZVORI PRAVA EUROPSKE UNIJE

Osim već spomenutih razloga zbog kojih veliki broj europskih brodara, naručitelja prijevoza u brodarskom ugovoru i zakupoprimatelja brodova, pomorskih agenata, osiguratelja, brodograditelja i drugih tradicionalno ugovaraju primjenu engleskoga prava i nadležnost engleskih sudova ili arbitraže, treba imati na umu kako je Velika Britanija zemlja s velikim brojem međunarodnih i europskih konvencija. Među njima su i one koje se odnose na izbor mjerodavnog prava u ugovornim i izvanugovornim odnosima, izbor suda za rješavanje trgovačkih i građanskih sporova te priznanje i ovrhu inozemnih sudskih odluka u građanskim i trgovačkim sporovima:

- Uredba Rim I br. 593/2008 o pravu koje se primjenjuje na ugovorne obveze (Rim I)[9] i Uredba Rim II br. 864/2007 o pravu koje se primjenjuje na izvanugovorne obveze (Rim II);[10]

- Uredba Bruxelles I (preinaka) (*The Recast Brussels I Regulation*) br. 1215/2012[11]

https://charterpartycases.com/case/112-federal-commerce-and-navigation-ltd-v-molena-alpha-inc-the-%e2%80%9cnanfri%e2%80%9d-%e2%80%9cbenfri%e2%80%9d-and-%e2%80%9clorfri%e2%80%9d-1978-1-lloyd%e2%80%99s-rep-581-1979-2-lloyd (pristup 20. siječnja 2023.).

[9] Uredba (EZ) br. 593/2008 Europskog parlamenta i Vijeća od 17. lipnja 2008. godine o pravu koje se primjenjuje na ugovorne obveze (Rim I), Službeni list Europske unije L 177/6, 4. srpnja 2008.

[10] Uredba (EZ) br. 864/2007 Europskog parlamenta i Vijeća od 11. srpnja 2007. godine o pravu koje se primjenjuje na izvanugovorne obveze (Rim II), Službeni list Europske unije L 199/40, 31. srpnja 2007.

[11] Uredba (EU) br. 1215/2012 Europskog parlamenta i Vijeća od 12. prosinca 2012. o nadležnosti, priznavanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima (preinačena), Službeni list Europske unije L 351/1, 20. prosinca 2012.

koja se primjenjuje od 10. siječnja 2015. godine (njome je zamijenjena Uredba Bruxelles I br. 44/2001, primjenjiva u svim državama članicama Europske unije, kojom se suštinski izmijenila originalna Briselska konvencija o nadležnosti i izvršenju sudskih odluka u građanskim i trgovačkim stvarima iz 1968. godine).[12] Potonjoj je Konvenciji Velika Britanija pristupila 1978. godine. Jedna od ključnih obilježja Uredbe Bruxelles I (preinaka) je da se njome stavljaju izvan snage formalnosti za priznanje i ovrhu inozemnih sudskih odluka u zemljama u kojima se priznanje i ovrha traži, tako da se sudska odluka donesena u jednoj državi članici Europske unije priznaje i izvršava u drugim državama članicama bez potrebe za posebnim postupkom. Sudska odluka donesena u državi članici koja je izvršna u toj državi, izvršna je i u drugim državama članicama bez posebnog postupka pribavljanja potvrde o izvršnosti. U skladu s odredbom 31.2. ove Uredbe, sud čija je isključiva nadležnost izabrana voljom ugovornih strana ima prednost pred sudom u državi tuženika, pa čak i onda ako je pred tim sudom započet neki sudski postupak;[13]

- Luganska konvencija o nadležnosti te priznavanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima iz 2007. godine koja se primjenjuje, osim u zemljama članicama Europske unije, također i u Švicarskoj, Islandu i Norveškoj;[14]

- Haška konvencija o sporazumima o izboru suda iz 2005. godine.[15]

Navedene konvencije i uredbe činile su englesko pravo i jurisdikciju engleskih sudova još atraktivnijim u pomorskoj industriji Europske unije jer su im omogućile, ne samo punopravnost izbora engleskog prava, nego su se odluke engleskih sudova priznavale i izvršavale u državama članicama Europske unije bez ikakvih daljnjih formalnosti.

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[12] Konvencija o nadležnosti i izvršenju sudskih odluka u građanskim i trgovačkim stvarima (potpisana 27. rujna 1968.), (1) (72/454/EEZ), Preambula, Službeni list Europske unije L 299/32, 31. prosinca 1972.

[13] *Ibid*.

[14] Konvencija o nadležnosti te priznavanju i izvršenju sudskih odluka u građanskim i trgovačkim stvarima, Službeni list Europske unije L 339/3, 21. prosinca 2007., https://eur-lex.europa.eu/legal-content/HR/TXT/PDF/?uri=CELEX:22007A1221(03)&from=MT (pristup 20. siječnja 2023.).

[15] Haška konferencija o međunarodnom privatnom pravu, Konvencija od 30. lipnja 2005. o sporazumima o izboru suda, https://assets.hcch.net/docs/e1d80d5a-f320-40ff-892a-156a4b85a266.pdf (pristup 20. siječnja 2023.).

4. BREXIT

Po završetku tzv. tranzicijskog razdoblja pregovora o izlasku Velike Britanije iz Europske unije 31. prosinca 2020. godine (Brexit), navedeni propisi, osim Uredbi Rim I i Rim II, prestali su se primjenjivati u Velikoj Britaniji.

S obzirom na to da su Uredbe Rim I i Rim II već odavno sastavni dio engleskog prava, te se i dalje primjenjuju u državama članicama Europske unije, ugovorne su strane i dalje slobodne izabrati englesko pravo kao mjerodavno za svoje ugovorne i izvanugovorne odnose. Kako primjena Uredbe Rim I ne ovisi o reciprocitetu, slobodan izbor mjerodavnog prava poštovat će se i nadalje u državama članicama Europske unije, bez obzira na Brexit.

Međutim, Uredba Bruxelles I (preinaka) prestala se primjenjivati u Velikoj Britaniji nakon 31. prosinca 2020. godine, osim u slučaju sudskih sporova započetih prije toga datuma.[16] To praktički znači da se odluke engleskih sudova donesene nakon 31. prosinca 2020. godine više neće automatski priznavati i izvršavati u državama članicama Europske unije (i obratno). Svaki takav postupak, ovisno o postupovnim pravilima svake države članice, bit će daleko sporiji, neizvjestan i skuplji, nego što je to bio slučaj prije Brexita. Iznimka od navedenog jest ta da će se, u skladu s odredbama Sporazuma o Brexitu između Velike Britanije i Europske unije, ova Uredba i dalje primjenjivati na sve sudske postupke započete prije 1. siječnja 2021. godine. Ako između Velike Britanije i pojedine države članice Europske unije ne postoji bilateralni sporazum o priznanju i izvršenju sudskih odluka, tužitelj/ovrhovoditelj će cijeli postupak (najvjerojatnije) trebati (ponovo) započeti pred sudom države članice u kojoj traži ovrhu, u skladu s propisima te države članice. Ovrha inozemne odluke u Engleskoj zahtijeva od ovrhovoditelja da započne novi postupak protiv ovršenika pred engleskim sudom za priznanje i izvršenje odluke donesene pred nekim drugim sudom.

Spomenuta Luganska konvencija više se ne primjenjuje u Velikoj Britaniji. Iako je Velika Britanija već 8. travnja 2020. godine zatražila od Europske unije da joj dozvoli ponovni pristup ovoj konvenciji, Europska unija odbila je taj zahtjev s obrazloženjem da nije u mogućnosti dati takvu suglasnost.

U kontekstu sporova koji proizlaze iz prijevoza putnika i robe morem, kao i iz onečišćenja mora, ograničenja odgovornosti za pomorske tražbine, generalne havarije, tegljenja i spašavanja na moru, Hašku konvenciju o sporazumima o iz-

[16] Brexit and Dispute Resolution, https://www.pinsentmasons.com/out-law/analysis/brexit-and-dispute-resolution (pristup 20. siječnja 2023.).

boru suda iz 2005. godine nije vrijedno spominjati s obzirom na to da su upravo takvi sporovi isključeni iz njezine primjene na temelju članka 2.2. točke (f) i (g) ove konvencije.

5. ARBITRAŽA

Velika Britanija i sve države članice Europske unije, članice su Konvencije Ujedinjenih naroda o priznanju i izvršenju stranih arbitražnih odluka (New York, 1958.).[17]

Brexit nema nikakvog utjecaja na valjanost i ovrhu arbitražnih sporazuma sačinjenih prema engleskom pravu, kao ni na priznanje i ovrhu engleskih arbitražnih odluka u državama članicama Europske unije, i obratno.

6. ZAKLJUČAK

Kada bi se postavilo pitanje, je li zbog Brexita primjena engleskog prava i engleske sudske prakse izgubila na važnosti za pomorsku industriju Europske unije ili na europsko pomorsko pravo, odgovor bi trebao biti negativan.

Ako se u nekom plovidbenom pothvatu, po prirodi stvari, ne očekuje da bi se eventualna presuda engleskog suda trebala ovršiti u nekoj od država članica Europske unije, sama činjenica Brexita neće imati nikakvog utjecaja na valjanost izbora engleskog prava kao mjerodavnog, kao ni na valjanost izbora engleske jurisdikcije za rješavanje sporova iz ugovora.

Iako je za očekivati kako će postupak priznanja i ovrhe engleskih sudskih presuda u nekim državama članicama Europske unije (i obratno) nakon Brexita biti sporiji, možda neizvjestan i skuplji, treba imati na umu da između Velike Britanije i nekih država članica Europske unije postoje različiti bilateralni oblici suradnje po pitanju međusobnog priznanja i ovrhe sudskih odluka, uz moguća ograničenja po pitanjima javnog poretka, uredne dostave pismena i ispravne nadležnosti suda za čiju se odluku traži priznanje i ovrha.

Prednosti koje pruža *Legal London* pomorskoj industriji Europske unije superiornije su s obzirom na promjene koje je donio Brexit.

[17] Konvencija o priznanju i izvršenju stranih arbitražnih odluka (Njujorška konvencija iz 1958.), https://www.hgk.hr/documents/newyorskakonvencijaiz1958395772707d266af15c765b4311f89.pdf (pristup 20. siječnja 2023.).

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Summary:

THE CONSEQUENCES OF BREXIT FOR THE MARITIME LAW OF THE EUROPEAN UNION

The question is posed in this paper of what repercussions Brexit will have on maritime law and on the maritime industry of the European Union. This is because the Commercial Court in London has been dealing with disputes arising from the international carriage of goods by sea for centuries. Approximately 80% of all disputes before that Court and the Admiralty Court are maritime, shipping and shipbuilding disputes. Approximately 70% of such disputes are international. The majority of judges of the Commercial Court and of the Admiralty Court, as well as a substantial number of solicitors and barristers and court expert witnesses are specialised or have experience in shipping law. All this means that London has been and remains the dominant jurisdiction for resolving international shipping disputes. The pragmatic approach to the question of liability and allocation of risk in shipping ventures, and the detailed analysis of the specific circumstances of every case, among other things, make English court decisions unique. At the end of the UK exit negotiations on 31 December 2020, the Brussels I Recast, the Lugano Convention 2007, and Rome I and Rome II ceased to apply. These regulations and conventions deal with jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters among EU Member States and the law chosen by the parties. This means that the automatic recognition and enforcement of the English Commercial Court judgments by the courts in the European Union (and vice versa) has ended. In these circumstances, the question is whether shipping companies, marine insurance companies, shipyards and other marine industries in the European Union will continue to choose with confidence English law as the governing law of their contracts and English court jurisdiction for settling their shipping disputes. We believe that they will, especially because of the uniquely high level of certainty, clearness and predictability of English shipping law and English court decisions. Furthermore, because of the high level of understanding of the specifics of the maritime industry which has been provided by London to the maritime industries of the European Union and the world for centuries.

Keywords: *Brexit; English Law; Courts of England and Wales; English Case Law; Maritime Disputes; European Union Legislation; Recognition and Enforcement of Foreign Judgments.*

POSEBNOSTI UGOVARANJA LEASINGA PLOVILA U PRAVNOM PROMETU U REPUBLICI HRVATSKOJ

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U ovom radu autori analiziraju posebnosti ugovaranja u poslu leasinga plovila u Republici Hrvatskoj u usporedbi s drugim pokretninama. Ovo istraživanje usredotočuje se na poslovnu praksu, odnosno opće uvjete poslovanja kao dio ugovora o leasingu plovila u kontekstu trgovačkopravnog procesa. Autori, također, analiziraju različite pristupe leasing društava s obzirom na specifičnosti plovila, kao objekta leasinga, koji putem općih uvjeta poslovanja određuju specifična prava i obveze davatelja i primatelja leasinga. Kritički se razmatraju različita rješenja koja su propisana putem općih uvjeta poslovanja leasing društava u Republici Hrvatskoj. Kako bi se potpuno analizirao doseg ugovornih strana u procesu ugovaranja, prethodno je potrebno općenito analizirati pravni okvir ugovaranja leasinga.

Ključne riječi: *leasing; davatelj leasinga; primatelj leasinga; plovilo; opći uvjeti poslovanja; financijski leasing; operativni leasing; izravni leasing; neizravni leasing.*

1. UVOD

Tržište leasinga u Republici Hrvatskoj počelo se razvijati sredinom devedesetih godina dvadesetog stoljeća.[1] U razdoblju od 1994. do 1997. godine osnivaju

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[1] »U Hrvatskoj se leasing počeo razvijati oko 1970. g. i to bez posebnih zakonskih regulativa,… Tadašnja politička i gospodarska klima nije išla na ruke poduzetnicima… Donošenjem Zakona o trgovačkim društvima 1993. godine, koji se primjenjuje od 1. siječnja 1995 te novim carinskim i poreznim zakonima stvorena je povoljna poduzetnička klima za razvoj leasinga i strana ulaganja.« Vidi Kaleb, Z., Ugovor o leasingu u hrvatskom trgovačkom pravu, *Informator*, br. 5278, 2004., str. 19.

se prva leasing društva koja se bave poslovima leasinga investicijske opreme i potrošačke robe, slično kao i u drugim europskim zemljama. Ekspanzija leasinga u Republici Hrvatskoj dogodila se u razdoblju od 1999. do 2006. godine, isto kao i u drugim tranzicijskim državama srednje i jugoistočne Europe.[2]

Za ilustraciju razvoja tržišta u Republici Hrvatskoj, može se istaknuti kako je 2006. godine na hrvatskom tržištu leasinga poslovalo šezdeset šest leasing društava. Djelatnost leasinga činila je tada 6 % financijskog tržišta, a prema strukturi imovine bila je druga najzastupljenija financijska djelatnost, odmah nakon bankovne djelatnosti. Tijekom 2004. godine, hrvatska su leasing društva sklopila leasing ugovore u vrijednosti od 543,73 milijuna eura, što je oko 30 % više nego prethodne godine. Nakon toga rast tržišta usporava, ali se i dalje bilježi sve do danas.[3]

U radu će autori uspoređivati ugovaranje leasinga plovila s ugovaranjem leasinga kod ostalih pokretnina. Fokus istraživanja bit će poslovna praksa i opći uvjeti poslovanja leasing društava, kao sastavni dio ugovora o leasingu plovila i trgovačkopravnih odnosa. Analizirat će se različiti pristupi leasing društava

[2] Opširnije o tome vidi Haiss, P.; Kichler, E., Leasing, Credit and Economic Growth: Evidence for Central and South Eastern Europe, EI Working Papers, *Europainstitut, WU Vienna University of Economics and Business,* br. 80, 2009., str. 1-45.

[3] Prikazuje se stanje tržišta leasinga u Republici Hrvatskoj u prethodnim godinama, međutim, bez podatka o stanju tijekom godina koronakrize. »Na kraju 2019. u Hrvatskoj je poslovalo 14 leasing društava, što su dva društva manje u odnosu na 2018. godinu. Njihova ukupna imovina na dan 31. prosinca 2019. iznosila je 21,3 mlrd. kuna, odnosno 9,2 % više nego godinu prije. Najznačajnija su stavka imovine potraživanja po osnovi financijskog leasinga u iznosu od 14,4 mlrd. kuna, što predstavlja rast od 15,7 % u odnosu na prethodnu godinu s obzirom na to da se rast gospodarske aktivnosti pozitivno odrazio na leasing vozila posebno povezanih s djelatnosti prijevoza putnika. Svoje poslovanje leasing društva primarno financiraju inozemnim zaduživanjem pa su obveze za kredite i zajmove inozemnih banaka i financijskih institucija u 2019. povećane za 11,0 % te su iznosile 15,5 mlrd. kuna. Višegodišnji pozitivan trend rasta tržišta leasinga u Republici Hrvatskoj nastavljen je i u 2019. pa je vrijednost novozaključenih ugovora porasla za 15,5 % te je iznosila 10,2 mlrd. kuna. Istodobno su nedospjela potraživanja, odnosno ugovorena vrijednost aktivnih ugovora iznosila 17,1 mlrd. kuna, odnosno 14,0 % više nego prethodne godine. Snažniji rast novozaključenih ugovora ostvaren je u segmentu financijskog leasinga (16,7 %) u odnosu na operativni leasing (9,8 %), a što je posljedica povoljnih makroekonomskih kretanja i turističke sezone pa su osobna i gospodarska vozila bila dominantni predmet leasinga. Nastavak je to višegodišnjih trendova, zbog čega vozila prevladavaju i u strukturi vrijednosti svih aktivnih ugovora (12,7 mlrd. kuna, odnosno 74,7 % vrijednosti svih aktivnih ugovora). Poslovni subjekti u najvećoj su mjeri sklapali predmetne ugovore pa unatoč trendu rasta (21,7 % u 2019.) ugovori o leasingu sklopljeni sa stanovništvom čine 11,4 % ukupne vrijednosti aktivnih ugovora.« Vidi Hrvatska agencija za nadzor financijskih usluga (HANFA), Godišnje izvješće 2019., str. 32-33, https://www.hanfa.hr/media/5kmoukz0/godisnje-izvjesce-2019-ver0611.pdf (pristup 25. veljače 2021.).

u vezi s posebnostima plovila kao objektima leasinga. Oni se očituju u općim uvjetima poslovanja kao posebnosti prava i obveza davatelja i primatelja leasinga. Kritički će se razmatrati različita rješenja propisana općim uvjetima poslovanja leasing društava u Republici Hrvatskoj. Za cjelovito istraživanje dosega strana u procesu ugovaranja leasinga plovila, prethodno je potrebno analizirati pravni okvir zadane teme. Osim toga, autori će obraditi i zaštitu potrošača u poslovima leasinga plovila. U radu će se koristiti normativna metoda radi analize rješenja i učinaka koji su predviđeni pozitivnom pravnom normom, kao i metoda analize koja će se primijeniti pri objašnjavanju sadržaja, pravne norme i učinaka ugovora o leasingu plovila, kako bi se utvrdile posebnosti, međusobni odnos i povezanost ugovora o leasingu i poslova leasinga. Metodom sinteze spojit će se silogizmi dobiveni analitičkim promatranjem. U istraživanju će se koristiti i druge opće znanstvene metode, poput metode dedukcije, indukcije, apstrakcije, konkretizacije i specijalizacije, kako bi se kritički promotrila različita rješenja koja propisuju leasing društva putem općih uvjeta poslovanja u Republici Hrvatskoj.

2. RAZVOJ POSLA LEASINGA I ZAKONODAVNI OKVIR U REPUBLICI HRVATSKOJ

U Republici Hrvatskoj prvobitno je usvojen Zakon o leasingu iz 2006. godine (*Narodne novine*, br. 135/2006) koji je bio na snazi od 21. prosinca 2006. do 4. prosinca 2013. godine. Do tada nije postojao poseban zakon koji bi regulirao tu djelatnost te je zamijenjen novim Zakonom o leasingu iz 2013. godine (*Narodne novine*, br. 141/2013).[4]

[4] Uz zakon postoji i niz pravilnika koji detaljnije reguliraju rad leasing društava, a to su: Pravilnik o organizacijskim zahtjevima leasing društva (*Narodne novine*, br. 86/2018), Pravilnik o kriterijima i načinu upravljanja rizicima leasing društva (*Narodne novine*, br. 86/2018 i 150/2022), Pravilnik o sadržaju te načinu i rokovima dostave redovitih izvješća leasing društava i izvješća na zahtjev Hrvatske agencije za nadzor financijskih usluga (*Narodne novine*, br. 57/2016 i 72/2017), Pravilnik o strukturi i sadržaju te načinu i rokovima dostave financijskih i dodatnih izvještaja leasing društava (*Narodne novine*, br. 41/2016, 132/2017 i 142/2022), Pravilnik o obavljanju poslova leasinga leasing društava iz država članica i trećih država na području Republike Hrvatske (*Narodne novine*, br. 68/2014 i 142/2022), Pravilnik o reviziji izvještaja leasing društva (*Narodne novine*, br. 68/2014 i 57/2016), Pravilnik o izdvajanju poslovnih procesa leasing-društva (*Narodne novine*, br. 66/2014 i 142/2022), Pravilnik o sadržaju i obliku ugovora o leasingu te metodologiji izračuna efektivne kamatne stope (*Narodne novine*, br. 66/2014 i 86/2018) i Pravilnik o Registru objekata leasinga – neslužbeni pročišćeni tekst (*Narodne novine*, br. 63/2014, 16/2015 i 142/2022). Iznos, način i rok plaćanja naknade za vođenje Registra određuju sljedeći pravilnici: Pravilnik o vrsti i visini naknada i administrativnih pristojbi Hrvatske agencije za nadzor financijskih

Regulatorno tijelo koje nadzire poslovanje leasinga u Republici Hrvatskoj je Hrvatska agencija za nadzor financijskih usluga (u nastavku: HANFA),[5] nadzorno tijelo koje provodi nadzor nad nebankarskim financijskim sektorom radi promicanja i očuvanja njegove stabilnosti. Nebankarski financijski sektor obuhvaća tržište kapitala, osiguranja, leasinga i faktoringa, investicijske fondove te drugi i treći stup mirovinskog osiguranja. Pravne i fizičke osobe koje na tim tržištima pružaju financijske usluge su subjekti nadzora HANFA-e čija je zadaća osigurati da oni posluju u skladu s propisima u navedenim područjima.[6]

Na hrvatskom tržištu leasinga danas postoji četrnaest društava sa sjedištem u Republici Hrvatskoj. Članovi su Udruženja leasing društava koje djeluje pri Hrvatskoj gospodarskoj komori, a osnovano je 2002. godine.[7] Na hrvatskom je tržištu leasinga zastupljen posao operativnog leasinga i posao financijskog leasinga.[8]

Hrvatsko se tržište leasinga, po uzoru na međunarodno tržište leasinga, počinje specijalizirati prema načinu rada i predmetima koji se financiraju. »Prema tom načinu djelovanja hrvatsko se tržište leasinga dijeli na četiri dijela: nekretnine, opremu, plovila i vozila. Stabilizacijom gospodarskog stanja u Hrvatskoj, djelovanje prema rizicima podijeliti će leasing društva na konzervativnija i slobodnija. Prema predviđanjima financijskih analitičara hrvatska leasing društva bi u budućnosti trebala preuzeti od banaka veći dio financijskih poslova.«[9]

Primjere vodećih gospodarskih zemalja Europe slijedile su i druge države unutar Europske unije. Ostale zemlje koje su u tranziciji pristupile tržišnom gospodarstvu također su prihvatile leasing kao neizostavni dio financijskog

usluga (*Narodne novine*, br. 151/2014), Pravilnik o kontnom planu leasing društva (*Narodne novine*, br. 63/2014, 132/2017 i 142/2022), Pravilnik o kapitalu leasing društva (*Narodne novine*, br. 60/2014 i 142/2022), Pravilnik o primjeni odredaba Zakona o leasingu i drugih propisa na leasing društva u likvidaciji (*Narodne novine*, br. 60/2014 i 57/2016), Pravilnik o uvjetima za članstvo u upravi i nadzornom odboru leasing društva (*Narodne novine*, br. 23/2014 i 72/2017) i Pravilnik o izdavanju suglasnosti za stjecanje kvalificiranog udjela u leasing društvu i drugoj pravnoj osobi (*Narodne novine*, br. 20/2014 i 72/2017).

5 HANFA je regulatorno tijelo za poslove leasinga na temelju Zakona o Hrvatskoj agenciji za nadzor financijskih usluga (*Narodne novine*, br. 140/2005 i 12/2012).

6 Hrvatska agencija za nadzor financijskih usluga (HANFA), Leasing, https://www.hanfa.hr/getfile.ashx/?fileId=42494 (pristup 17. siječnja 2023.).

7 Hrvatska gospodarska komora (HGK), Udruženje leasing društava, https://hgk.hr/udruzenje-leasing-drustava (pristup 23. siječnja 2023.).

8 Hrvatska agencija za nadzor financijskih usluga (HANFA), Godišnje izvješće 2019., *op. cit*. u bilj. 3.

9 Više o tome vidi Gelenčer, G., Muke zbog dva posto, *Banka*, br. 9, rujan 2004., str. 61.

tržišta. To znači da su slijedile iskustva vodećih zemalja Europe. Tijekom devedesetih, u vrijeme socijalističkog društvenog uređenja i gospodarstva, poslovi leasinga nisu se prihvaćali niti razvijali. Međutim, to svakako ne znači da je tada leasing bio nepoznat.[10]

3. LEASING KAO OBLIK FINANCIRANJA

Promatrano s ekonomskog, odnosno poslovnog aspekta, leasing se određuje kao posebna tehnika financiranja[11] koja je postala snažna privredna i ekonomska djelatnost[12] u skladu s potrebama ekonomskog razvoja i viškom neplasiranih

[10] *Ibid.*

[11] Domaća ekonomska literatura definira leasing kao: »…oblik vanjskog financiranja nabavke pokretnih i nepokretnih dobara koja se na temelju posebnog ugovora daje na određeno vrijeme na uporabu korisniku leasinga, uz određenu naknadu…«, Belić, J., *Leasing nekretnina na hrvatskom financijskom tržištu*, magistarski rad, Ekonomski fakultet Sveučilišta u Zagrebu, Zagreb, 2004., str. 28; »…metoda eksternog financiranja koja ima karakter duga jer zakupnina sadrži dio za amortizaciju iznajmljene imovine (otplatna kvota) i dio za naknadu iznajmljivaču (kamate)…«, Orsag, S., *Problematika financiranja poslovanja i razvoja inkorporativnog poduzeća*, Institut za javne financije, Zagreb, 1990., str. 62; »…poseban način financiranja nabave pokretnih i nepokretnih dobara koja se, na temelju posebnog ugovora, daju na korištenje primatelju leasinga uz određenu naknadu i na ugovorom određeno vrijeme…«, Matić, B., *Međunarodno poslovanje*, Sinergija, Zagreb, 2004., str. 208. Slično kao u domaćoj ekonomskoj literaturi, i inozemna ekonomska literatura leasing određuje kao: »…iznajmljivanje dugotrajne imovine putem financijskih institucija i drugih poduzetnika koji se profesionalno bave poslovima iznajmljivanja…«, Gabele, E.; Kroll, M., *Leasingverträge optimal gestalten: Vertragsformen, Vor- und Nachteile, steuerliche Analyse,* 3. izdanje, Gabler Verlag, Wiesbaden, 2001., str. 2; »…metodi financiranja kojom davatelj leasinga prepušta na uporabu leasing dobro primatelju leasinga koji zauzvrat plaća ugovorenu naknadu za leasing…«, Grundmann, W., *Leasing und Factoring: Formen, Rechtsgrundlagen, Verträge*, Springer Gabler, Wiesbaden, 2013., str. 3; »…financijska operacija kod koje zainteresirani privredni subjekti dolazi do određenih stvari a da ih pri tom ne kupuje i ne angažira sopstvena sredstva već pod određenim uvjetima uzima u zakup tu stvar, sa ili bez opcije na kupovinu po isteku ugovorenog perioda zakupa…«, Milošević, D., *Uvoz i izvoz opreme putem zakupa – pasivni i aktivni ´leasing´ poslovi,* Eksportpres, Beograd, 1986., str. 11-12.

[12] Općenito o institutu pridržaja prava vlasništva, kao bliskom institutu u praksi na početku razvoja leasinga kao oblika financiranja, raspravljala je Ljerka Mintas Hodak. Autorica ističe »kako je odredbom čl. 87. st. 3. Zakona o osnovnim vlasničkopravnim odnosima predviđeno da je za prava i obveze stranaka iz vlasničkopravnih odnosa na pokretnoj stvari koja se upisuje u javnu knjigu, od trenutka upisa mjerodavno pravo republike, odnosno autonomne pokrajine na čijem teritoriju se vodi ta javna knjiga (nepotpuno kolizijsko pravilo), a odredbom čl. 996. st.1. ZPUP-a je predviđeno da se prava na brodu u društvenom vlasništvu i stvarna prava na brodu ocjenjuju prema pravu države čiju državnu pripadnost brod ima (potpuno kolizijsko pravilo), to primjena jugoslavenskog prava u pogledu

bankarskih sredstava. S druge strane, pravni aspekt leasinga obuhvaća široko područje ugovora i pravnih oblika u kojima se ta djelatnost javlja.[13] [14]

Danas je djelatnost leasinga globalno rasprostranjena, a posao leasinga javlja se u različitim inačicama, pri čemu se, kao općeprihvaćena osnovna podjela pojavnih oblika posla leasinga, ističe podjela na posao financijskog i na posao operativnog leasinga. Međutim, u poslovnoj praksi, na nacionalnim tržištima leasinga znatno se razlikuje poimanje posla financijskog leasinga i posla operativnog leasinga. Stoga je s posebnim oprezom potrebno pristupiti navodima iz literature o zastupljenosti tih pojavnih oblika posla leasinga na nacionalnim tržištima leasinga.

Poslovanje leasinga u Europi u stalnom je razvoju, a veći se dio poslovanja nalazi u »rukama« najrazvijenijih europskih zemalja. Leasing pomaže tim zemljama ostvariti snažan industrijski razvoj, pogotovo u prodaji kapitalnih dobara. Ulaskom u Europsku uniju dolazi do snažnog razvoja tržišta leasinga i u novim članicama, pri čemu najveći rast leasinga bilježe upravo najrazvijenije zemlje pristupnice. Kao što se očekivalo, najveći interes za leasing u tranzicijskim zemljama pokazao se u području kupnje vozila, a nakon toga u području kupnje nekretnina, strojeva za proizvodnju i slično.[15]

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dopustivosti klauzule, pretpostavki za valjanost, sadržaja prava i stvarnopravnih učinaka klauzule o pridržaju prava vlasništva na pripadak broda može doći do primjene samo u situacijama kad se radi o brodu upisanom u jugoslavenski upisnik brodova, bez obzira da li se kao vlasnik, odnosno nositelj prava raspolaganja brodom pojavljuje domaća ili strana društvena pravna osoba ili fizička osoba.« Opširnije vidi Mintas Hodak, Lj., *Jamstva pri stjecanju broda na kredit,* Zavod za pomorsko pravo, historiju i ekonomiku pomorstva Jugoslavenske akademije znanosti i umjetnosti, Zagreb, 1990., str. 116.

13 Marušić, S., *Ugovor o financijskom leasingu*, doktorska disertacija, Ekonomski fakultet Split, Split, 1982., str. 26.

14 »Aspekt politike financiranja jest strateški kriterij za poduzeće primatelja leasinga kod odlučivanja o uporabljivosti leasinga u konkretnom slučaju. Naime, poduzeća primatelji leasinga više nisu obvezni bilancirati sredstva angažirana za leasing naknadu, te se stvara privid da poduzeća obnavljaju svoju infrastrukturu bez povećanog naprezanja.« Vidi Kaleb, Z., Ugovor o leasingu…, *op. cit.*, str. 21.

15 Više o tome vidi Vizjak, A.; Alkier Radnić, R., Mjesto leasinga u ekonomiji EU, *Tourism and hospitality management*, god. 11 (2005.), br. 2, str. 145.

4. OPĆA OBILJEŽJA UGOVORA O FINANCIJSKOM I OPERATIVNOM LEASINGU ZA PLOVILA – POVIJESNO-PRAVNI KONTEKST RAZVOJA POSLA LEASINGA

U razvoju instituta financijskog leasinga postojale su dvije tendencije koje su se na teorijskoj razini međusobno suprotstavljale. Prva je od njih zastupala stajalište da se ugovor o financijskom leasingu može svrstati u neke od imenovanih ugovora trgovačkog prava. S druge strane, novija je doktrina zastupala stav kako je, s obzirom na specifičnosti tog pravnog posla, logično da se ugovor o financijskom leasingu razvija zasebno ako se razlikuje od nominalnih ugovora. Slijedeći ekonomsku stvarnost odnosa između strana ugovora o financijskom leasingu, taj je ugovor pronašao svoj posebni pravni put.[16] Unutar financijskog leasinga postoje pravne modifikacije od kojih je jedna vezana uz leasing plovila zbog specifičnosti plovila kao objekta leasinga.

Tipične odredbe ugovora o financijskom leasingu koji nastaju kao tipski ugovori,[17][18] pokazuju da na području autonomnog trgovačkog prava nastaje samostalni ugovorni odnos koji podsjeća na najam, zakup ili kupoprodaju, ali se u određenim točkama znatno razlikuje od njih.[19] Na primjer, u trostranom odnosu financijskog leasinga nije uvijek moguće primijeniti pravila iz trgovačkog prava o posljedicama nemogućnosti izvršenja obveza kao u dvostranim ugovornim odnosima.[20]

Dok su zakonodavstvo, doktrina i sudska praksa imali, ponekad, dijametralno suprotna stajališta o pojedinim aspektima financijskog leasinga, poslovna je praksa uspostavila svoja jedinstvena rješenja za reguliranje ugovora o financijskom leasingu u nacionalnim i međunarodnim okvirima. To je bilo nužno kako bi suvremena tehnika financiranja bolje funkcionirala i zadovoljila potrebe rastućeg gospodarstva koje zahtjeva pokretnu investicijsku opremu bez ulaganja vlastitog kapitala, pa je bilo potrebno napustiti postojeća pravila trgovačkog prava i izgraditi samostalni pravni okvir.[21]

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16 Miklaušić, R., Pojam financijskog leasinga, *Pravo u gospodarstvu*, god. 37 (1998.), br. 2, str. 186.

17 Svi ugovori o leasingu plovila u Republici Hrvatskoj su tipski ugovori.

18 Brežanski, J., Ugovor o leasingu – novo zakonsko uređenje, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, god. 29 (2008.), br. 1, str. 626.

19 »…ugovoru koji često nastaje kao adhezijski ili tipski…« Vidi Marušić, S., Sklapanje ugovora o leasingu, *Informator*, br. 4588, 1998., str. 13.

20 Više o tome vidi Buhl, H. U., Finanzierungsleasing und wirtschaftliches Eigentum: Kritische Anmerkung und Ergänzungen zum Beitrag von Körner/Weiken, *Betriebs-Berater*, god. 47 (1992.), br. 15, str. 1033-1042.

21 Primjer kako je sudska praksa tretirala kupoprodajne ugovore (poslove) prije stupanja na snagu prvog Zakona o leasingu kao ugovore o financijskom leasingu: »…18 ugovora o prodaji plovila je sklopljeno prije stupanja na snagu prvog Zakona o leasingu (Narodne novine 135/06),

Danas je financijski leasing samostalna pojava autonomnog trgovačkog prava.[22] Ugovor o financijskom leasingu je standardni, adhezijski i tipski ugovor koji je povezan s najmom, zakupom[23] i kupoprodajom, te kao takav predstavlja osnovu financijskog leasinga kao zasebnog ugovornog oblika.[24]

ZL/06, koji je stupio na snagu 21. prosinca 2006. i bio na snazi do 4. prosinca 2013. kad je stupio na snagu Zakon o leasingu (Narodne novine 141/13), ZL/13, a dva su ugovora o financijskom leasingu sklopljena nakon stupanja na snagu ZL/06-a; da je prema prirodi sklopljenih ugovora, neovisno kako su stranke nazvale te ugovore, u svim slučajevima riječ o financijskom leasingu, čije su osnovne karakteristike slijedeće: najmom se prenosi vlasništvo nad sredstvom najmoprimcu po završetku razdoblja najma; najmoprimac ima opciju kupiti sredstvo po cijeni za koju očekuje da će biti dosta niža od fer vrijednosti na datum kada se opcija može izvršiti tako da je na početku najma dosta izvjesno da će se opcija izvršiti; razdoblje najma je veći dio ekonomskog vijeka sredstva, čak iako vlasništvo nije preneseno; na početku najma sadašnja vrijednost minimalnih plaćanja najma veća je ili jednaka fer vrijednosti iznajmljenog sredstva; iznajmljena imovina je posebne vrste tako da je samo najmoprimac može koristiti bez većih modifikacija; da je i iz cijelog dužničko-vjerovničkog odnosa razvidno da se radi o poslovima financijskog leasinga, neovisno o nazivu ugovora. Naime, financijski leasing ili, kako se još naziva ´najam kapitala´ bitno se razlikuje u strukturi kalkulacije kod davatelja leasinga od kalkulacije proizvođača ili trgovca. Leasing društvo uobičajeno kupuje sredstva radi davanja u najam, a ne zbog daljnje prodaje. Trošak nabave ili knjigovodstvena vrijednost sredstva jednaka je tržišnoj, prodajnoj cijeni na početku najma, a profitna orijentacija najmodavca sadržana je u naplatama najamnine sa ugrađenom stopom povrata, odnosno kamatnom stopom; nadalje, 18 ugovora, koji su bili sklopljeni 2005. i 2006. godine, sklopljeni su prije donošenja ZL/06, tako da je u tim ugovorima ´prodavatelj´ po navedenim pravnim poslovima zapravo leasing društvo, a ne klasični trgovac. Zbog razlike u prirodi pravnog posla između kupoprodajnog ugovora i ugovora o leasingu, za prvih 18 Ugovora sklopljeni su i Sporazumi o zasnivanju založnog prava na pokretnoj imovini, koji čine jedinstvenu dokumentaciju, a sastavni dio su i Opći uvjeti. Na ovaj način su kupoprodajni ugovori (poslovi) prilagođeni uvjetima koji bi bili da su sklopljeni prema propisima koji reguliraju leasing ugovore (poslove). Opći uvjeti su posebno sačinjeni za Ugovore o prodaji uz obročnu otplatu, a posebno za Ugovore o leasingu, ali su svi uvjeti koje propisuju prilagođeni prirodi poslovnog odnosa, a to je prvenstveno financiranje kupnje plovila; da se svi predmetni ugovori mogu tretirati kao ugovori kojima se financira stjecanje poslovne imovine, tako su odnosi između tužitelja i društva T. Y. d.o.o. u prvom redu iz područja financijskih, a ne trgovačkih transakcija pa je za poduzetnika taj odnos najsličniji kreditiranju koje zahtjeva instrumente osiguranja (sporazum o osiguranju tražbine, Opći uvjeti, instrumenti osiguranju) tražbina u visini glavnice i kamate kao naknade za angažirani kapital, stoga je leasing besposjedovni oblik osiguranja tražbina.« Vidi Općinski sud u Splitu, Građanski odjel, Po 9772011-66 od 26. siječnja 2023.

22 »S obzirom na sve specifičnosti pravnih odnosa koji nastaju na temelju ugovora o leasingu u odnosu na bilo koji dosad poznati imenovani obveznopravni ugovor, sve više prevladava shvaćanje da se radi o samostalnom ugovoru autonomnog privrednog prava.« Vidi Mintas Hodak, Lj., *Jamstva pri stjecanju broda*…, *op. cit.*, str. 123.

23 »…očito je da je leasing odnos koji ima mnogo sličnosti sa ugovorom o zakupom…«, *ibid*.

24 Miklaušić, R., Pojam financijskog leasinga, *op. cit*., str. 187.

Za suvremeno određivanje financijskog leasinga treba istaknuti kako su glavne strane: primatelj leasinga, davatelj leasinga kao financijer i isporučitelj objekta leasinga te proizvođač objekta leasinga.[25]

Financijski leasing, u praksi, najčešće se ostvaruje kao trostrani, odnosno indirektni leasing, iako u financijskom leasingu postoje leasing konstrukcije u kojima je odnos dvostran pa se takav odnos naziva direktan financijski leasing. Primjetno je u suvremenom poslovanju, pogotovo u automobilskoj industriji, da proizvođači automobila osnivaju vlastita leasing društva koja kontroliraju te putem financijskog leasinga nude vozila na tržištu.[26]

S obzirom na široku primjenu financijskog leasinga u nabavi različitih pokretnina, uključujući leasing plovila,[27] najčešće se govori o pravnom poslu indirektnog financijskog leasinga. U takvom pravnom poslu gdje je objekt leasinga plovilo, glavni je subjekt leasing društvo kao davatelj objekta leasinga. Davatelj leasinga kupuje plovilo, po nalogu primatelja leasinga, od proizvođača ili dobavljača, a po prethodnom odabiru budućeg primatelja leasinga, te postaje vlasnik plovila. Istodobno, davatelj leasinga daje primatelju plovilo na uporabu i korištenje pod određenim uvjetima i na određeni rok utvrđen ugovorom o financijskom leasingu. Tako se pravni posao sastoji od dva ugovorna odnosa – kupoprodaje i leasinga.[28]

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[25] Marušić, S., Sklapanje ugovora o leasingu, *op. cit*., str. 13.

[26] Oechsler, J., *Schuldrecht Besonderer Teil Vertragsrecht*, Verlag Franz Vahlen, München, 2003., str. 276.

[27] Za potrebe ovog rada koristi se pojam plovilo, bez obzira na to što u hrvatskoj zakonskoj terminologiji taj pojam ne postoji. Pomorski zakonik (*Narodne novine*, br. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015 i 17/2019) u čl. 5. definira pojmove iz zakonika u kojem ne određuje definiciju pojma plovilo. Želja je autora da se pod pojmom plovilo podrazumijevaju svi plovni objekti koji su predmet poslovne prakse leasinga u Republici Hrvatskoj. Hrvatska poslovna praksa, kroz ugovore i opće uvjete poslovanja, takve objekte leasinga naziva »plovilima«.

[28] »Ugovorom o leasingu davatelj leasinga se obvezuje pribaviti (kupiti) objekt leasinga od dobavljača i predati ga korisniku leasinga na korištenje, a korisnik leasinga se obvezuje davatelju leasinga plaćati ugovorenu naknadu. Premda ugovor o leasingu, osim ugovora o zakupu, sadržava u sebi elemente ugovora o prodaji s obročnom otplatom cijene i ugovora o prodaji s pridržajem prava vlasništva, na temelju tog ugovora ne može se steći vlasništvo objekta leasinga. Pravna praksa je usuglašena u ocjeni da je ugovor o leasingu prvenstveno složeni ugovor, trgovački ugovor koji u sebi sadrži elemente ugovora o zakupu, ugovora o prodaji s obročnim otplatama cijene (čl. 550. ZOO) te ugovora o prodaji sa zadržanjem prava raspolaganja (čl. 540. ZOO). Međutim, nedvojbeno je da primatelj leasinga na temelju samog ugovora o leasingu ne može steći pravo vlasništva na predmetu leasinga.« Vidi Visoki trgovački sud Republike Hrvatske, Pž-4622/04 od 22. studenoga 2007.

Plovilo je dodirna točka ovih dvaju odnosa u kojemu se spajaju tri subjekta i dva ugovorna odnosa. Te dodirne točke određuju da je bez ugovora o leasingu kupoprodajni ugovor ništavan jer je za davatelja bez osnovne svrhe i cilja koji su sadržani u samoj konstrukciji leasinga. To je stoga što se kupoprodajni ugovor između proizvođača ili dobavljača plovila i davatelja leasinga sklapa tek nakon što budući primatelj leasinga dogovori sve uvjete i elemente kupoprodaje s proizvođačem ili dobavljačem. Tako je ujedno budući davatelj objekta leasinga u cijelosti isključen iz procesa pregovaranja u poslu kupoprodaje. On sudjeluje u procesu kupoprodaje samo pri sklapanju ugovora o kupoprodaji čime ostvaruje osnovnu gospodarsku svrhu financijskog leasinga, a to je financiranje.

U takvom poslu postoji veliki rizik financiranja, pogotovo u poslu leasinga plovila zbog vrlo velike vrijednosti plovila. Zbog toga davatelj leasinga pri ugovaranju leasinga pažljivo ispituje sve okolnosti urednog poslovanja budućeg primatelja leasinga kako bi osigurao svoje gospodarske i poslovne interese. U poslovnoj praksi, davatelj leasinga obično sklapa i ugovor o refinanciranju koji direktno utječe na prava i obveze iz ugovora o financijskom leasingu.[29]

Proučavajući opće uvjete poslovanja davatelja financijskog leasinga za pokretnine općenito, a pogotovo u Republici Hrvatskoj, pokazuje se kako su sadržaji ugovora o financijskom leasingu ustaljeni u poslovnoj praksi, bez obzira na to što je riječ o promjenljivom i fleksibilnom ugovoru koji je, prije svega, proizašao iz poslovne prakse. Taj se ugovor neprestano razvija i prilagođava potrebama primatelja leasinga i novim tehnološkim dostignućima koja postaju objekti leasinga, kao i neprestanim promjenama na financijskom tržištu. Analiza ugovornih obrazaca i općih uvjeta poslovanja ukazuje na prisutnost oneroznih odredbi što od primatelja leasinga zahtijevaju opreznost.

Za suvremeno određivanje posla financijskog leasinga plovila, važno je, osim općih značajki, utvrditi ključne odrednice koje određuju gospodarske učinke ovog pravnog posla i karaktere prava i obveza strana iz ugovora o financijskom leasingu. Stoga su važne sljedeće odrednice posla financijskog leasinga: leasing naknada koju primatelj leasinga u pravilu mjesečno plaća davatelju leasinga, pravo vlasništva plovila tijekom trajanja ugovora o leasingu, rok uporabe plovila od primatelja leasinga te održavanje plovila tijekom trajanja ugovora s posebnim osvrtom na redovno i izvanredno održavanje. Također, važne odrednice posla financijskog leasinga su prava i obveze strana u vezi s oštećenjem i propasti plovila, pogotovo jer se veliki broj sklopljenih ugovora o financijskom leasingu odnosi na tehnički nova i neprovjerena plovila, što povećava rizik od oštećenja i propasti zbog raznih

[29] Marušić, S., Sklapanje ugovora o leasingu, *op. cit.*, str. 14.

objektivnih okolnosti. Najvažnija je odrednica ovog posla investicijski rizik, koji određuje poslovni, odnosno gospodarski uspjeh leasing posla.[30]

S druge strane, u poslu operativnog leasinga važno je istaknuti kako se radi, u pravilu, o izravnom leasingu, što znači da ne postoji trostrani odnos između proizvođača, odnosno dobavljača te davatelja i primatelja leasinga. To se razlikuje od posla financijskog leasinga. Ovdje proizvođači plasiraju svoje proizvode na tržište putem operativnog leasinga.[31]

U slučaju operativnog leasinga, obično se sklapa ugovor na neodređeno vrijeme, a kada se sklapa ugovor na određeno vrijeme, ono je uvijek kraće od redovnog ekonomskog vijeka trajanja objekta leasinga, te se taj ugovor uvijek može otkazati. Važno je istaknuti kako je, za razliku od financijskog leasinga, investicijski rizik na davatelju leasinga.[32]

Ova obilježja nisu jedina obilježja pravnog posla operativnog leasinga, odnosno ugovora o leasingu. Ugovor o operativnom leasingu sadržava i druge bitne značajke koje određuju ovaj posao u smislu prava i obveza ugovornih strana. Ovdje je bilo bitno istaknuti razlikovna obilježja operativnog leasinga u usporedbi s financijskim leasingom jer su upravo ove značajke znatno različite između ovih dvaju poslova leasinga. Ta obilježja nisu čvrsto propisana te su u poslovnoj praksi i u zakonodavnim okvirima dopuštena različita odstupanja.[33]

Navedena obilježja koja razlikuju operativni i financijski leasing samo su jedan od načina utvrđivanja specifičnosti ovog pravnog posla, uključujući posebnosti ugovora o leasingu, kao i posebnosti koje se odnose na financijski ili operativni leasing plovila.[34]

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[30] O funkciji financijskog leasinga općenito, vidi Miklaušić, R., Funkcija financiranja i financijski leasing, *Hrvatska gospodarska revija*, god. 46 (1997.), br. 3, str. 312-316; Marušić, S., *Ugovor o financijskom leasingu*, *op. cit.* u bilj. 13; Žunić Kovačević, N., *Financijski leasing*, magistarski rad, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2001.; Liu, G., *Finance Leasing in International Trade*, doktorska disertacija, Birmingham Law School, College of Arts and Law, The University of Birmingham, Birmingham, 2010.

[31] Schopper, A.; Skarics, F., Das Leasinggeschäft, Apathy, P.; Iro, G.; Koziol, H. (ur.), *Österreichisches Bankvertragsrecht – Band VII: Leasing, Factoring und Forfaitierung*, Verlag Österreich, Wien, 2015., str. 28, 38.

[32] *Ibid*., str. 28.

[33] Više o tome vidi Cinotti, K., Operativni leasing i neke dvojbe u praksi, *Suvremeno poduzetništvo*, god. 11 (2004.), br. 9, str. 3-8.

[34] »Za razliku od operativnog leasinga, financijski leasing opreme (pa tako i brodova) je po trajanju dugoročan, uz temeljni uvjet (basic term) da je jednostavno neotkaziv kroz određeno fiksno vremensko razdoblje. Trajanje financijskog leasinga opreme odgovara obično vremenskom vijeku trajanja opreme uzete u leasing (ili samo nešto kraće), pa se stoga

Prethodno utvrđena karakteristična obilježja posla operativnog leasinga, kao i različitosti između operativnog leasinga i tipičnih ugovora trgovačkog prava, poput kupoprodaje, najma i zakupa, jasno pokazuju da se posao operativnog leasinga razlikuje od kupoprodaje jer mu svrha nije trajni prijenos vlasništva na objektu leasinga. Svrha je operativnog leasinga privremeni naplatni prijenos radi uporabe objekta leasinga.

Razgraničenje posla financijskog leasinga od posla najma, odnosno zakupa, moguće je te se lako mogu utvrditi razlikovna obilježja. S obzirom na navedene karakteristike posla operativnog leasinga, može se primijetiti njegova velika sličnost s poslom najma i zakupa. Ova važna teorijska odrednica posla operativnog leasinga, koja ga razlikuje od posla financijskog leasinga, općenito je prihvaćena i približava posao operativnog leasinga najmu i zakupu.

Financijski leasing nedvojbeno je najistaknutiji oblik leasinga, što ga čini primarnim fokusom znanstvene i pravne teorije. S druge strane, pojam operativnog leasinga često se zanemaruje jer se posao financijskog leasinga poistovjećuje s poslom leasinga općenito, dok se posao operativnog leasinga izjednačuje s poslom najma. U pravnoj je literaturi izuzetno teško pronaći tekstove o operativnom leasingu jer rasprave o najmu ne uključuju i operativni leasing, dok se rasprave o leasingu uglavnom odnose samo na financijski leasing. Dakle, teoretičari koji se bave trgovačkopravnim ugovorima, a pogotovo ugovorima o najmu, ne navode operativni leasing.[35]

Poslovna praksa na tržištima u Republici Hrvatskoj i referentnim zemljama Europe, prije svega u Njemačkoj i Austriji, prihvaća stav da se posao leasinga uglavnom odnosi na financijski leasing.[36] S druge strane, operativni leasing smatra se pravnom konstrukcijom koja je po svojim karakteristikama, odnosno opcijama u ugovorima, te pravima i obvezama bliža najmu i zakupu. To je stoga što po ugovoru o operativnom leasingu primatelj leasinga nije u mogućnosti steći pravo vlasništva

oprema kroz to razdoblje i amortizira (tzv. ´full pay out leasing´).« Vidi Mintas Hodak, Lj., *Jamstva pri stjecanju broda…*, *op. cit*., str. 123.

35 Von Blank, H.; Börstinghaus, U. P., *Miete: Das gesamte BGB-Mietrecht Kommentar*, Verlag C. H. Beck, München, 2008.

36 Na primjer, o ovim odnosima u Velikoj Britaniji vidi Adams, J. N., *Commercial Hiring and Leasing*, Butterworths Law, London/Edinburgh, 1989., str. 53; Liu, G., *Finance Leasing*…, *op. cit*., str. 18. U Njemačkoj je jednaka situacija kao i u Velikoj Britaniji. Ugledni časopis uglavnom sadržava tekstove o financijskom leasingu. Više o tome vidi *Leasing in Deutschland 2015*, Mudersbach, M. (ur.), Bundesverband Deutscher Leasing-Unternehmen (BDL), Berlin, 2015., https://bdl.leasingverband.de/fileadmin/downloads/broschueren/marktstudien/bdl-marktstudie-2015.pdf (pristup 23. rujna 2021.).

nad objektom leasinga. Ovakav je stav poslovne prakse, prije svega, uvjetovan činjenicom da je financijski leasing kao pravni posao prisutan na tržištu već dulje vrijeme, kao i da međunarodni dokumenti određuju operativni leasing kao zakup.[37]

Pojam operativnog leasinga pojavio se u SAD-u u prvoj polovici dvadesetog stoljeća. Ovaj je pojam nužno povezan s engleskim pojmom *operating lease* uz promjene karakteristične za određeno povijesno razdoblje i razvoj različitih oblika tog posla te različitih oblika najma kao trgovačkopravnog instituta. Stoga je ovdje nužno obuhvatiti najvažnije povijesne točke, a to su, prije svega, važni dokumenti koji se pojavljuju u tom povijesnom kontekstu.

Jedan od relevantnijih znanstvenih radova je *History of Equipment Leasing*, autora Nevitta i Fabozzia,[38] koji se bavi nastankom pojma operativnog leasinga. Autori ističu da su se u prvoj polovici dvadesetog stoljeća gospodarstvenici počeli baviti operativnim »najmom«. Najmodavac bi davao najmoprimcu stvar na temelju ugovora, a ta bi stvar bila upotrijebljena tako da njome upravljaju zaposlenici najmodavca u ime i za račun najmoprimca.[39]

Kada je financijski leasing početkom šezdesetih godina dvadesetog stoljeća percipiran u trgovačkopravnoj i poslovnoj praksi u Europi, taj se posao pojavio kao novoosnovani financijski institut. Na temelju ovog instituta najmodavac ostvaruje potpunu nadoknadu investicijskih sredstava i troškova kroz zakupnine koje se obvezuje plaćati najmoprimac tijekom neotkazivog razdoblja kako je određeno ugovorom[40] Dok se na području Europe ustaljivao novi gospodarsko-pravni institut, u SAD-u nastaje modifikacija tog oblika financijskog leasinga, transformirajući ga iz posla usmjerenog prema potpunoj amortizaciji troškova u posao usmjeren na djelomičnu amortizaciju investicijskih troškova najmodavca.[41]

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[37] Leaseurope, Annual Statistical Enquiry 2021., https://www.leaseurope.org/_flysystem/s3?file=Statistics/Annual%20statistics/Leaseurope%20Annual%20Statistical%20Enquiry%202021_Summary%20Report_V2.pdf (pristup 21. ožujka 2023.)

[38] Nevitt, P. K.; Fabozzi, F., History of Equipment Leasing, *The Journal of Equipment Lease Financing*, god. 3 (1985.), br. 1, str. 48-61.

[39] *Ibid*., str. 51.

[40] U ovom radu možemo također spomenuti i druge pravne poslove koji su, uz leasing, na približno sličan način tražili svoje mjesto u gospodarskom i pravnom prostoru. Na primjer, ugovor o zakupu broda uz opciju kupnje po tipskom ugovoru BARECON »A« ili Hire/Purchase Agreement. Vidi Mintas Hodak, Lj., *Jamstva pri stjecanju broda…, op. cit*., str. 117-120.

[41] Uporabu izraza *operating*, *operating lessee* i *operating lease* u poslovnoj praksi vidi Baker, L. N., Oil and Gas: Power of Lessee to Surrender Lease without Consent of Holder of Overriding Royalty, *California Law Review*, god. 30 (1942.), br. 2, str. 200-204; Davidson, R. D.; Wernimont, K., Tenure Agreements in Oklahoma Oil Fields, *The Journal of Land & Public Utility Economics*, god. 19 (1943.), br. 1, str. 40-58.

U europskoj se literaturi financijskim leasingom naziva leasing u kojem leasing društvo tijekom neotkazivog razdoblja leasinga u cijelosti nadoknađuje troškove nabave i proizvodnje te investicijske troškove kroz mjesečne leasing rate. Operativni leasing utvrdio se kao pravni posao u kojemu se ugovor o leasingu sklapa na otkazivo razdoblje tijekom kojeg se kroz mjesečne leasing rate ne nadoknađuju u cijelosti investicijski troškovi davatelja leasinga. Osim toga, financijski leasing prihvaćen je kao trostrani pravni posao, a operativni leasing kao dvostrani pravni posao između primatelja leasinga i proizvođača objekta leasinga, koji je ujedno i davatelj leasinga. O tome svjedoče radovi prvih autora koji su se bavili poslom leasinga u europskoj literaturi, a čija su stajališta u velikoj mjeri prihvaćena u novijoj europskoj literaturi.[42]

U poslovnoj su se praksi s vremenom počeli javljati ugovori o leasingu koji omogućuju djelomičnu amortizaciju investicijskih troškova davatelja leasinga putem mjesečnih leasing rata. To je rezultat različitih poreznih i računovodstvenih tretmana koje su uvele pojedine države, što je utjecalo na pojavu novih leasing odnosa. U Njemačkoj je 1971. godine donesena Uredba o leasingu pokretnina s punom amortizacijom,[43] kojom su propisani kriteriji prema kojima će se objekt leasinga poreznopravno pripisati primatelju leasinga, čime se učinak leasinga izjednačuje s poslom kupoprodaje kad je riječ o poreznopravnom tretmanu objekta leasinga. Posljedično su se u poslovnoj praksi pojavili ugovori s djelomičnom amortizacijom kao glavnom karakteristikom operativnog leasinga.

Svakako je važno istaknuti da razgraničenje između financijskog i operativnog leasinga nije bilo jednostavno ni na početku njihova nastanka ni danas, s obzirom na sve navedene okolnosti. Općenito postoji vrlo mala zainteresiranost da teorija i praksa odjeljuju ova dva glavna podtipa leasinga. Čak i *Leaseurope*,[44] kao krovno europsko udruženje leasing društava, u svojim godišnjim i sličnim izvješćima ne razdvaja financijski i operativni leasing. Za usporedbe i korištenje tih podataka bilo bi potrebno razlučiti prisutnost financijskog i operativnog leasinga u gospodarstvu, iako treba istaknuti kako *Leaseurope* u svojim izvješćima razdvaja posao leasinga od posla kratkoročnih zakupa.[45]

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42 U njemačkoj literaturi, na primjer, Hans-Friedrich von Ploetz u djelu iz 1968. godine utvrđuje dvije vrste leasinga, financijski i operativni, koji se razlikuju prema trajanju ugovora i njegovoj otkazivosti. Opširnije vidi Von Ploetz, H.-F., *Der Leasing-Vertrag*, Gabler Verlag, Wiesbaden, 1968., str. 16, 17.

43 BFH, IV R 144/66 od 26. siječnja 1970.

44 Leaseurope, http://www.leaseurope.org/index.php?page=about-us (pristup 23. siječnja 2023.).

45 Leaseurope, Preliminary 2021 Survey Results for the Leasing Sector, https://www.leaseurope.org/preliminary-2021-survey-results-leasing-sector (pristup 23. siječnja 2023.).

Od važnijih promatranih zemalja svakako treba uzeti u obzir primjer Njemačke. Njihovo udruženje leasing društava (BDL)[46] koje broji oko sto pedeset članica, prema statističkim podacima za 2019. godinu[47] iskazuje kako su ugovori o financijskom leasingu prevladavali s 47 % udjela, dok su ugovori o najamkupnji činili 15 %, a ugovori o operativnom leasingu 38 % udjela. Ugovori o operativnom leasingu, prema izvješćima BDL-a, odnose se na ugovore koji se ne temelje na načelu pune amortizacije, što znači da davatelj leasinga mora poduzeti više poslova kako bi nadoknadio svoje investicijske troškove.[48] Stavovi ovog udruženja su takvi da je operativni leasing ugovor o leasingu s djelomičnom amortizacijom investicijskih troškova davatelja leasinga u kojemu davatelju ostaje neamortizirani ostatak vrijednosti.[49]

Jednako tako je i poimanje posla operativnog leasinga u austrijskoj poslovnoj praksi u kojoj se poslom operativnog leasinga, također, smatra posao u kojemu protekom jednog sklopljenog ugovora nije moguće amortizirati sve troškove davatelja leasinga. Protekom jednog sklopljenog ugovora o operativnom leasingu ostaje neamortizirani ostatak vrijednosti koji se nadoknađuje od istog primatelja leasinga. Austrijsko udruženje za leasing ne razdvaja operativni i financijski leasing,[50] ali zbog slične dinamike u gospodarstvu, austrijsko i njemačko tržište je usporedivo.

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[46] Bundesverband Deutscher Leasing-Unternehmen (BDL), Leasingverband, https://bdl.leasingverband.de/der-bdl/ueber-uns/ (pristup 25. veljače 2023.).

[47] U izvješću za 2019. godinu se navodi: »Članovi BDL-a zaključuju ugovore o financijskom leasingu, kao i ugovore o leasingu s preostalim vrijednostima i ugovore o otkupu najma. Financijski leasing temeljem uredbe o leasingu (ugovori o punoj amortizaciji i djelomičnoj amortizaciji) činio je udio od 47% u ukupnom novom poslovanju u 2019. godini. To uključuje ugovore srednjoročnog ili dugoročnog trajanja čiji je osnovni period najma kraći od uobičajenog vijeka upotrebe predmeta i koji su najmoprimci usmjereni na potpunu amortizaciju najamnog predmeta. Novo poslovanje poraslo je za 20% u odnosu na prethodnu godinu. Ugovori o operativnom leasingu (ugovori s otvorenom rezidualnom vrijednošću) imali su udio od 38% u 2019. godini. Prema financijskom razumijevanju, ovaj pojam označava ugovore o leasingu u kojima najmodavac snosi investicijski rizik. Potpuna amortizacija nastaje samo kada se novi ugovor o leasingu zaključi s istim ili drugim primateljem leasinga ili kada se imovina proda na vlastitu odgovornost leasing društva. Te su se varijante ugovora već učvrstile u IT-u i leasingu automobila (ugovori za kilometar) – posebno u vezi sa servisnim komponentama. Novo poslovanje poraslo je za 7% u 2019.« Vidi Bundesverband Deutscher Leasing-Unternehmen (BDL), Leasing in Deutschland, https://bdl.leasingverband.de/leasing/marktzahlen/leasing-markt/ (pristup 23. rujna 2021.).

[48] *Ibid.*

[49] *Ibid.*

[50] U izvješću za 2020. godinu, navodi se samo broj ugovora (770.000) i vrijednost (26 milijarde eura). Vidi Verband Österreichischer Leasing-Gesellschaften (VÖL), https://www.leasingverband.at/verband/ (pristup 23. rujna 2021.).

Izvor za navedena istraživanja austrijske i njemačke poslovne prakse su brošure i druga slična izdanja te mrežne stranice austrijskog udruženja leasing društava (*Verband Österreichischer Leasing-Gesellschaften* (VÖL))[51] i njemačkog udruženja leasing društava (*Bundesverband Deutscher Leasing-Unternehmen* (BDL)).[52] Iz tih je izvora vidljivo da nove inačice leasinga zauzimaju važno mjesto na tržištu te da postoji trajni trend u promjeni karakteristika poslova leasinga, a time i njihova ugovaranja.

Svakako se može zaključiti da se prema svojim obilježjima, a pogotovo prema praksi njemačkih i austrijskih leasing društava, danas pod poslom operativnog leasinga podrazumijeva oblik neizravnog leasinga u kojemu se primatelj leasinga, na temelju ugovora o leasingu, obvezuje davatelju leasinga isplaćivati mjesečne obroke kojim se samo djelomično nadoknađuju investicijski troškovi.

Unatoč tomu što je posao operativnog leasinga s opisanim obilježjima danas u znatnom opsegu prisutan i na austrijskom i na njemačkom tržištu leasinga, novija austrijska i njemačka literatura, uključujući i izdanja standardnih djela o poslovima leasinga objavljena 2018. godine, i dalje u žarištu svog interesa ima samo posao financijskog leasinga kao »pravi« financijski leasing, odnosno ugovore o financijskom leasingu kao zakonom uređene ugovore o leasingu. Ipak, bez obzira na prividnu zamršenost u raščlanjivanju i nastanku novih oblika leasinga uz financijski leasing, u razvoju ovih podtipova poslova leasinga u teoriji je prisutan pojam leasinga »prve« i »druge« generacije. Za posao financijskog leasinga, odnosno općenito za prve poslove leasinga,[53] u literaturi se ističe kako je riječ o »ugovorima prve generacije«.[54]

Analiza povijesno-pravnog konteksta financijskog i operativnog leasinga, kao i općih značajki posla i ugovaranja s posebnim osvrtom na plovila, predstavlja utvrđivanje okvira u kojem svaka poslovna, odnosno pravna akvizicija u

[51] Za austrijsko udruženje vidi Verband Österrreichischer Leasing-Gesellschaften (VÖL), Leasing in Österreich, Wien, 2014., https://www.leasingverband.at/wp-content/uploads/2017/03/V%C3%96L_Brosch%C3%BCre-aktuelle-Version-Auflage-2014.pdf (pristup 23. rujna 2021.).

[52] Za njemačko udruženje vidi *Leasing in Deutschland 2007*, Gödel, R. (ur.), Bundesverband Deutscher Leasing-Unternehmen (BDL), Berlin, 2007., https://bdl.leasingverband.de/fileadmin/downloads/broschueren/marktstudien/marktstudie-2007.pdf (pristup 23. rujna 2021.); *Leasing in Deutschland 2015*, *op. cit*. u bilj. 36.

[53] Pojedini njemački autori pod »leasingom prve generacije« podrazumijevaju najmove kojima su se potkraj devetnaestog stoljeća bavili *Bell Telephone Company* i drugi proizvođači. Vidi Berghammer, H., *Leasing als Finanzierungsalternative und die Entwicklung des Leasing in Österreich*, magistarski rad, Johannes Kepler Universität Linz, Linz, 2008., str. 4.

[54] Marek, M., Geschichte des Leasing – Abriss einer beeindruckenden Entwicklung, Arbeitspapiere, Fakultät für Wirtschaftswissenschaften an der Universität Paderborn, Neuen Folge br. 73, 2001., str. 7.

nabavi plovila mora započeti leasingom. Utvrđivanje dosega osnovnih značajki ovog pravnog posla nabave plovila nužan je kako bi se sagledali svi oni ekonomski i pravni rizici i posljedice koje može donijeti ovakav pravni posao. Bez toga je nemoguće razumjeti posebnosti koje poslovna i pravna praksa leasinga plovila nosi u procesu ugovaranja i provedbe ugovora o leasingu.

5. POSEBNOSTI UGOVARANJA LEASINGA PLOVILA

5.1. Općenito o glavnim pravima i obvezama ugovora o financijskom i operativnom leasingu u poslu neizravnog i izravnog leasinga plovila

Za raspravu o pitanju radi li se o poslu izravnog ili neizravnog leasinga odlučan je karakterističan sadržaj[55] ugovora o leasingu plovila koji se odnosi na prava i obveze ugovornih strana.[56] Posao neizravnog leasinga plovila u svojoj suštini je takav posao u kojemu uz davatelja i primatelja leasinga sudjeluje i dobavljač ili proizvođač plovila. U odnosu na izravni leasing, neizravni leasing češći je oblik leasinga u poslovnoj praksi u Republici Hrvatskoj.[57]

Kada se raspravlja o karakterističnom sadržaju i suštini ugovora o leasingu plovila, važno je istaknuti i tumačenje ugovora u cjelini i njegovih pojedinih odredbi. Zakonodavac uvijek podrazumijeva tumačenje ugovora tako da mu pristupa posebno u svakom pojedinom slučaju, uvažavajući posebnosti konkretnog ugovora, odnosno pravnog posla. To vrijedi i za ugovore o leasingu plovila. Primjenitelji norme određuju njezinu svrhu koju ugovor ima među stranama u svakom slučaju posebno.[58]

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[55] »Ugovor o leasingu je ugovor kojeg sklapaju davatelj i primatelj (korisnik) leasinga. Tim se ugovorom davatelj leasinga obvezuje financirati objekt ugovora ili tako da ga sam izradi, odnosno kupi ili dade izraditi kod treće osobe (dobavljača objekta leasinga), sve po narudžbi primatelja i predati ga primatelju na korištenje, a primatelj (korisnik) se obvezuje da će preuzeti objekt leasinga i koristiti ga na uobičajeni način, da će davatelju plaćati ugovorenu naknadu kroz određeno vremensko razdoblje trajanja tog ugovora te da će nakon prestanka važenja tog ugovora (1) otkupiti objekt leasinga (opcija kupnje) ili (2) ga vratiti davatelju leasinga odnosno (3) nastaviti s njegovim korištenjem.« Vidi Visoki trgovački sud Republike Hrvatske, XXVIII Pž-4882/04-3 od 11. rujna 2007.

[56] Općenito o podjeli posla leasinga vidi Brežanski, J., Ugovor o leasingu…, *op. cit*., str. 6-9.

[57] Iz sadržaja općih uvjeta poslovanja leasing društava jasno proizlazi da su svi opći uvjeti takvi da pretpostavljaju prisutnost dobavljača, odnosno proizvođača objekta leasinga kao treće strane u poslu leasinga.

[58] Ugovaranje leasinga plovila, kao i kod ugovaranja kada su druge pokretnine objekti leasinga, uvijek se odvija putem prihvaćanja općih uvjeta poslovanja. Time se budućem primatelju leasinga onemogućuje pregovaranje u konkretnom poslu leasinga.

Poslovna se uloga davatelja leasinga u poslu neizravnog leasinga plovila sastoji u financiranju nabave ili proizvodnje plovila koje je odabrao primatelj leasinga te omogućavanju uporabe i korištenja plovila tijekom trajanja ugovora o leasingu. Stoga, posebnosti tog pravnog posla, odnosno ugovora o leasingu, ovise o podjeli leasinga na izravni i neizravni leasing.[59]

Drugi spektar promatranja ugovora o leasingu odnosi se na podjelu posla financijskog i operativnog leasinga. Ta se podjela temelji na različitoj podjeli investicijskog rizika u tim poslovima, što je posebno osjetljivo u poslovima leasinga koji uključuju leasing plovila i utječu na karakteristični sadržaj ugovora o leasingu koji sklapaju davatelj i primatelj leasinga, bez utjecaja na glavne obveze ugovornih strana ugovora o leasingu.

Različit broj sudionika u poslovima izravnog i neizravnog leasinga, kao i njihova različita prava i obveze, čine određujuće posebnosti tih posebnih ugovora o leasingu. Upravo radi toga, za raspravu o posebnostima ugovora o leasingu plovila važna je podjela na neizravni i izravni leasing jer se te posebnosti upravo odražavaju u toj podjeli. S druge strane, kod podjele na financijski i operativni leasing, kao što smo više puta ponovili, ključna razlika jest u raspodjeli investicijskih troškova odnosno rizika.

U poslu neizravnog leasinga koji obuhvaća niz međusobno povezanih postupaka i radnji sudionika posla leasinga, uz davatelja i primatelja leasinga, pojavljuje se i dobavljač ili proizvođač plovila kao treća strana posla.[60]

Poslovna uloga davatelja leasinga u tom međusobno povezanom procesu sastoji se u financiranju nabave ili proizvodnje plovila. Primatelj leasinga prethodno je odabrao plovilo, a ugovor o leasingu omogućuje mu uporabu tog objekta leasinga tijekom određenog razdoblja. U svakom poslu neizravnog leasinga, primatelj leasinga plaća davatelju leasinga, u pravilu u mjesečnim obrocima, unaprijed utvrđenu novčanu naknadu za leasing koja služi kao nadoknada investicijskih, odnosno nabavnih troškova.

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[59] Važno je istaknuti kako je podjela leasinga na izravni i neizravni leasing zapravo najvažnija u klasifikaciji leasinga jer najviše utječe na tumačenje i doseg pravnih normi. Ostale podjele su više ili manje vezane uz fiskalne i ostale pogodnosti u poslu leasinga, što je manje važno promatrajući posao leasinga s pravnog stajališta.

[60] Predmet istraživanja i radova u hrvatskoj literaturi su: obvezni odnos između davatelja leasinga i dobavljača objekta leasinga, obvezni odnos između primatelja leasinga i dobavljača objekta leasinga, kao i obvezni odnos između davatelja leasinga i primatelja leasinga u financijskom leasingu. Vidi Marušić, S., Leasing brodova – suvremeni način financiranja obnove flote: komentar općih uvjeta poslovanja iz strane prakse, *Privreda i pravo*, god. 32 (1993.), br. 7-8, str. 455-479; Žunić Kovačević, N., *Financijski leasing, op. cit*. u bilj. 30.

U poslu izravnog leasinga, dobavljač ili proizvođač plovila ne sudjeluje kao treća osoba ili sudionik u procesu. Stoga se i sadržaj glavnih obveza davatelja i primatelja leasinga u ugovoru zaključenom u sklopu posla izravnog leasinga nužno razlikuje od sadržaja glavnih obveza ugovornih strana ugovora o leasingu zaključenog u sklopu posla neizravnog leasinga.

Budući da je davatelj leasinga u poslu izravnog leasinga već vlasnik plovila koje odgovara potrebama primatelja leasinga, jer je on proizvođač objekta leasinga, davatelj leasinga nije obvezan kupiti plovilo za primatelja leasinga, odnosno nema obvezu financiranja.

5.2. Općenito o sporednim obvezama u ugovoru o leasingu u kontekstu specifičnosti ugovaranja leasinga plovila

Bez obzira na to radi li se o izravnom ili neizravnom financijskom leasingu, sporedne obveze su jednake.[61] Ovdje je važno napomenuti kako su pojedine sporedne obveze ugovornih strana ugovora o leasingu karakteristične za svaki pojedini ugovor o leasingu, neovisno o tome u sklopu kojeg oblika posla leasinga se sklapa ugovor o leasingu.[62] Međutim, neki autori pravne literature ističu kako su sporedna obilježja financijskog ugovora o leasingu takva da ne predstavljaju svakodnevnu praksu ugovaranja. Na primjer, Miklaušić spominje pravo opcije kupnje kao sporednu obvezu u ugovoru o financijskom leasingu. S druge pak strane, Žunić Kovačević također ističe da je opcija kupnje sporedno obilježje ugovora o financijskom leasingu.[63] Autorica navodi da su nebitne oznake financijskog leasinga takve da »temeljem njih ne možemo razlikovati ugovor o financijskom leasingu od drugih vrsta leasing ugovora«, što nije slučaj kod prakse operativnog leasinga jer se kod operativnog leasinga u pravilu ne ugovara opcija kupnje.[64]

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[61] »Riječ je o takvim oznakama koje jesu svojstvene ugovoru o financijskom leasingu, ali ne označavaju njegov ustaljeni sadržaj i temeljem njih ne možemo razlikovati ugovor o financijskom leasingu od drugih vrsta leasing ugovora.« Vidi Žunić Kovačević, N., *Financijski leasing*, *op. cit*., str. 59.

[62] Miklaušić navodi da »…sporedne obveze i prava u financijskom leasingu su: amortizacija opreme, pravo opcije kupnje, servisne usluge leasing društva, odabir, proizvodnja i isporuka opreme.« Više o tome vidi Miklaušić, R., Pojam financijskog leasinga, *op. cit*., str. 189-191.

[63] Žunić Kovačević, N., *Financijski leasing*, *op. cit.*, str. 60.

[64] Ovdje autorica objašnjava da opcija kupnje zapravo predstavlja novi pravni posao koji nije povezan s osnovnim ugovorom o leasingu, pa stoga opcija kupnje nije bitno obilježje ugovora o financijskom leasingu. Žunić Kovačević navodi: »Ako uzmemo da je bitna oznaka

Zakonske tekstove koji se odnose na leasing, odnosno na financijski leasing, a navode klauzulu opcije kupnje, mogli bismo podijeliti u dvije grupe. Prva grupa obuhvaća zakonske tekstove koji klauzuli o pravu opcije kupnje daju kvalifikacijsku važnost jer smatraju da je to bitni element ugovora koji je odlučujući za pravnu kvalifikaciju. Drugu grupu čine zakonski tekstovi koji, doduše, navode klauzulu o pravu opcije kupnje, ali ona nema važnost kvalifikacijskog elementa ugovora.[65] U navedenim pravnim sustavima, ako strane žele da se njihova transakcija kvalificira kao financijski leasing, moraju ugovoriti klauzulu o pravu opcije kupnje u korist primatelja leasinga jer je riječ o bitnom elementu ugovora. Klauzula ne smije biti stipulirana tako da se opcija može iskoristiti na početku ili tijekom trajanja ugovora o leasingu, a ni tako da isplatom posljednjeg obroka naknade leasinga vlasništvo opreme automatski prelazi na primatelja. Dakle, samo pravilno stipulirana klauzula o pravu opcije kupnje, koja omogućuje ostvarivanje tog prava tek po isteku ugovora o leasingu, u određenim pravnim sustavima predstavlja kvalifikacijski element i bitnu oznaku financijskog leasinga.[66]

Zaštita od evikcije predstavlja obvezu davatelja leasinga koja je prisutna u svakom ugovoru o leasingu, bez obzira na to u kojem je pojavnom obliku posla leasinga ugovor sklopljen.[67] Dok davatelj leasinga redovito odgovara primatelju leasinga za pravne nedostatke objekta leasinga, pa tako i plovila, odgovornost davatelja leasinga za materijalne nedostatke plovila redovito je isključena ugovorom o leasingu u svakom pojavnom obliku posla leasinga.[68]

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financijskog leasinga pravo vlasništva leasing društva na opremi koja je predmet transakcije, tada je odgovor na pitanje može li davatelj leasinga izvršiti prijenos prava vlasništva za vrijeme trajanja ugovora koji je zaključio s primateljem leasinga i temeljom kojega primatelj leasinga ostvaruje pravo na korištenje opreme, negativan. To ne priječi ugovornim strankama da one ugovore klauzulu opcije kupnje, ali čija bi realizacija bila moguća tek po isteku ugovora o leasingu. Ugovorne stranke moraju znati da do isteka ugovora leasing društvo ne može izvršiti prijenos vlasništva na primatelja leasinga. Prilikom stipulacije klauzule kojom se reguliraju uvjeti pod kojima će davatelj leasinga prenijeti vlasništvo na opremi na primatelja leasinga (´purchase option´) valja biti jako obazriv, jer o tome zavisi rješenje brojnih pitanja koja se ovdje javljaju.« Vidi Žunić Kovačević, N., *Financijski leasing, op. cit*., str. 2.

65 Slakoper, Z.; Štajfer, J., Temeljna obilježja opcijskih ugovora i opcija, *Zbornik Pravnog fakulteta u Zagrebu*, god. 57 (2007.), br. 1, str. 61-95.

66 *Ibid.*

67 Vidi čl. 55. Zakona o leasingu.

68 Vidi odredbu 11.1. PBZ Leasing, Opći uvjeti PBZL-a za ugovor o operativnom leasingu, str. 3, https://www.pbz-leasing.hr/media/mmwa3g4w/opci-uvjeti-pbzl-a-za-ugovor-o-operativnom-leasingu-v-2301-vozilo-plovilo-oprema-sijecanj-2023.pdf (pristup 20. ožujka 2023.) i odredbu 4.13. OTP Leasing, Opći uvjeti ugovora o financijskom leasingu FL-PLV-08, str. 2/9, https://www.otpleasing.hr/UserDocsImages/OP%C4%86I%20UVJETI/2022/Op%C4%87i%20uvjeti%20

U poslu neizravnog leasinga specifično je da davatelj leasinga ustupa primatelju leasinga svoja prava koja na temelju odgovornosti za nedostatke ima prema dobavljaču plovila, kao i prodavatelju plovila.[69] To znači da je primatelj leasinga ovlašten, na temelju ugovora o leasingu, odnosno sklapanjem pravnog posla leasinga, pozvati dobavljača ili proizvođača plovila da ukloni nedostatke koje je primijetio na plovilu, odnosno nedostatke vezane uz plovilo.[70]

Za svaki ugovor o leasingu, bez obzira na to u sklopu koje vrste posla leasinga je ugovor o leasingu zaključen, posebnost je da obveza održavanja plovila u ispravnom stanju tijekom trajanja ugovora o leasingu i obveza obavljanja potrebnih popravaka na plovilu nisu obveze davatelja leasinga, nego obveze primatelja leasinga. U poslu bruto leasinga često su obveze održavanja i popravka objekta leasinga na davatelju leasinga,[71] dok se primatelj leasinga obvezuje platiti posebnu naknadu davatelju leasinga za te usluge. Stoga, ove obveze davatelja leasinga iz ugovora o leasingu, zaključenog u sklopu posla bruto leasinga, predstavljaju elemente karakteristične za ugovor o djelu.[72] Karakteristično je i za svaki ugovor o leasingu da je obveza snošenja javnih tereta u vezi s objektom leasinga, pa tako i s plovilom, također sporedna obveza primatelja leasinga, a ne davatelja leasinga. U ugovoru o leasingu sklopljenom u poslu bruto leasinga, obveza snošenja javnih tereta često je obveza davatelja leasinga za koju se primatelj leasinga obvezuje davatelju leasinga platiti posebnu naknadu. Stoga, i u vezi s tom obvezom davatelja leasinga u poslu bruto leasinga, obvezni odnos između davatelja leasinga i primatelja leasinga treba promatrati kao odnos izvođača i naručitelja iz ugovora o djelu. Ugovorom o leasingu, primatelj leasinga redovito se obvezuje sklopiti ugovor o osiguranju objekta leasinga s osiguratelјem u korist davatelja leasinga kao osiguranika. Primatelj leasinga obvezuje se kako će kao ugovaratelj osiguranja ispuniti sklopljeni ugovor o osiguranju, odnosno plaćati premije osiguranja.[73] Tako je i kod ugovora o leasingu plovila.

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ugovora%20o%20financijskom%20leasingu_FL-PLV-08.pdf?vel=210126 (pristup 20. ožujka 2023.).

69 Tako primjerice vidi odredbu 11.3. PBZ Leasing, Opći uvjeti PBZL-a za ugovor o operativnom leasingu, *op. cit.*, str. 3.

70 Ovdje se radi o specifičnoj situaciji u kojoj su pravila vezana uz ugovore logično nametnuta u korist treće osobe.

71 Ova specifična obveza za ovaj tip leasinga proizlazi iz različitih novih poslovnih aranžmana i ponuda kojim leasing društva pokušavaju privući nove klijente.

72 Vidi Miklaušić, R., Financijski leasing i pravo vlasništva, *Pravo u gospodarstvu*, god. 39 (2000.), br. 1, str. 77-91; Miklaušić, R., Funkcija financiranja…, *op. cit.* u bilj. 30.

73 Feinen, K., Die Finanzdienstleistung Leasing – eine innovative Investitionsalternative, Bierbaum, D.; Feinen, K. (ur.), *Bank- und Finanzwirtschaft*, Gabler Verlag, Wiesbaden, 1997., str. 163-192.

Sklapanje ugovora o osiguranju plovila i plaćanje premije osiguranja[74] sporedne su obveze primatelja leasinga iz ugovora o leasingu. Za ispunjenje tih obveza, primatelj leasinga nema pravo na posebnu naknadu kao protučinidbu, kao ni pravo na naknadu troškova koji je imao pri ispunjenju tih obveza. Ugovaranjem ovih sporednih obveza primatelja leasinga u ugovor o leasingu unose se pojedini elementi ugovora o nalogu, a obvezni odnos između davatelja i primatelja leasinga, u vezi s tim sporednim obvezama primatelja leasinga, trebalo bi promatrati kao atipičan ugovor o nalogu. U ugovoru o leasingu sklopljenom u poslu bruto leasinga, davatelj leasinga ponekad se obvezuje primatelju leasinga da će, kao ugovaratelj osiguranja, sklopiti ugovor o osiguranju objekta leasinga i plaćati premije osiguranja. Primatelj leasinga obvezuje se davatelju leasinga platiti posebnu naknadu za ispunjenje navedenih obveza. Mjesečni obroci naknade za leasing uključuju i iznose premija osiguranja koje davatelj leasinga plaća osiguratelju. Unošenje elemenata ugovora o djelu i ugovora o nalogu u ugovor o leasingu u pojedinim varijantama posla leasinga ne utječe znatno na pravnu prirodu ugovora o leasingu jer glavne obveze ugovornih strana i većina njihovih sporednih obveza ostaju istovjetne, kao i u ugovorima o leasingu sklopljenim u drugim varijantama posla leasinga.[75]

U domaćoj se praksi postavlja posebno pitanje osigurljivog interesa leasing društva koje je financiralo nabavu plovila. Postalo je uobičajeno da se polica osiguranja plovila izdaje u korist leasing društva kao formalnog vlasnika plovila i kao jedinog osiguranika, dok korisnik leasinga djeluje kao ugovaratelj osiguranja.[76] Takva praksa, koja se potvrđuje i sudskim odlukama,[77] rezultira određenim anomalijama u odnosima između osiguravatelja i osiguranika.[78] Važno je prepoznati da osoba koja zakonski i ugovorno snosi odgovornost za štetu, također, ima osigurljiv interes i trebala bi biti uključena u krug osiguranika na policu AO.[79]

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74 *Ibid*.

75 Opširnije o tome vidi Baran, M.; Baran, K.; Zagrajski, S., Pravni aspekti leasinga, *Hrvatska pravna revija,* god. 8 (2008.), br. 7-8, str. 21-34.

76 Padovan, A. V., Osiguranje brodica i jahti, *Svijet osiguranja*, god. XVI (2013.), br. 6, str. 31.

77 »Budući da štetu nastalu na vozilu uslijed naleta psa lutalice koju tužitelj potražuje u ovom sporu nije nastala njemu već trgovačkom društvu P. L. d.o.o., to je sud prvog stupnja zbog nedostatka tužiteljeve aktivne građansko pravne legitimacije pravilno u cijelosti odbio tužbeni zahtjev tužitelja.« Vidi Presuda Visokog trgovačkog suda Republike Hrvatske, 28 Pž-4179/2021-2 od 13. prosinca 2021.

78 Padovan, A. V., Osiguranje brodica i jahti, *op. cit.*, str. 31.

79 Radionov, N.; Padovan, A. V., Sudar vozila u vlasništvu istog leasing društva i problem treće osobe iz AO osiguranja, *Zbornik Pravnog fakulteta u Zagrebu*, god. 62 (2012.), br. 4, str. 1067.

5.3. Posebnosti u općim uvjetima ugovora o leasingu plovila

Iz prethodno navedenog, vidljivo je da je kroz analizu domaće i inozemne pravne literature i prakse oblikovan proces sklapanja ugovora o leasingu plovila te kao takav predstavlja pravnu praksu koja ovisi o poslovnim politikama leasing društava, određenoj općoj ekonomskoj situaciji i stanju na tržištu plovila.

Iz analize općih uvjeta poslovanja leasing društava,[80] koji čine većinu tržišta leasinga plovila u Republici Hrvatskoj,[81] primjećuje se različiti pristup u ugovaranju specifičnih prava i obveza u ugovorima o leasingu plovila u usporedbi s drugim pokretninama koje su obuhvaćene tim općim uvjetima poslovanja leasing društava.[82] Ta specifična prava i obveze u ugovorima o leasingu plovila zapravo su ugovorne posebnosti koje, s obzirom na karakter objekta leasinga, imaju primatelji leasinga. Važno je istaknuti da samo jedno leasing društvo ima posebne uvjete poslovanja za plovila, dok primjenjuje posebne uvjete poslovanja za ostale pokretnine.[83]

Upravo zbog te neujednačenosti autori ukazuju na različitost poslovne prakse ugovaranja plovila u Republici Hrvatskoj. Stoga će biti navedeni specifični elementi ugovaranja leasinga plovila koji na određeni način odvajaju ugovaranje posla leasinga plovila od ostalih pokretnina koje leasing društvo prepušta primatelju leasinga.

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[80] »Prema članku 142. stavku 1. ZOO-a, Opći uvjeti koji odredi jedan ugovaratelj, bilo da su sadržani u formalnom ugovoru, bilo da se na njih ugovor poziva, dopunjuju posebne pogodbe utvrđene među ugovarateljima u istom ugovoru, i u pravilu obvezuju kao i ove. Prema tome, Opći uvjeti ugovora čine popis ugovornih klauzula formuliranih u pisanom obliku kojima se ugovorne strane mogu koristiti tako da sve te klauzule ili neke od njih uključe u ugovor, da se u ugovoru pozovu na njih ili samo na neke.« Vidi Visoki trgovački sud Republike Hrvatske, 9 Pž-120/2018-3 od 10. lipnja 2020.

[81] U ovom znanstvenom istraživanju proučavaju se poslovne prakse društava PBZ Leasing, OTP Leasing, Raiffeisen Leasing i Erste & Steiermärkische S-Leasing koja čine većinski udio na tržištu leasinga plovila u Republici Hrvatskoj.

[82] Ovdje je važno istaknuti kako su ugovori o leasingu plovila u Republici Hrvatskoj tako strukturirani da se većina prava i obveza strana ovog ugovornog odnosa nalazi u općim uvjetima poslovanja, a prava i obveze ugovornih strana u poslu leasinga plovila, koja su predmet ovog znanstvenog istraživanja, u cijelosti su sadržani u općim uvjetima poslovanja leasing društava i čine sastavni dio pojedinog ugovora u formi priloga.

[83] To je leasing društvo OTP Leasing, a više o tome vidi OTP Leasing, Opći uvjeti ugovora o operativnom leasingu OL-PLV-08, https://www.otpleasing.hr/UserDocsImages/OP%C4%86I%20UVJETI/2022/Op%C4%87i%20uvjeti%20ugovora%20o%20operativnom%20leasingu_OL-PLV-08.pdf?vel=205097 (pristup 20 ožujka 2023.) i OTP Leasing, Opći uvjeti ugovora o financijskom leasingu FL-PLV-08, *op. cit*. u bilj. 68.

5.3.1. Obveza ugovaranja specifičnog osiguranja plovila

Plovilo mora biti osigurano od raznih rizika zbog načina korištenja i svojih tehničkih karakteristika.[84] U istraživanju poslovne prakse primjećuje se da se osiguranje plovila posebno ističe kao bitna odrednica ugovornog odnosa. Uz leasing društva koja posebno ugovaraju opće uvjete poslovanja za plovila, odvajajući ih posebnim uvjetima poslovanja od ostalih pokretnina, i druga leasing društva koja imaju jedinstvene uvjete poslovanja za plovila, vozila i ostale pokretnine, također u svojim odredbama općih uvjeta posebno ističu obvezu osiguranja specifičnih rizika. Plovilo je u redovitoj uporabi izloženo drugačijim rizicima za osobe na njemu ili izvan njega, za stvari na njemu ili izvan njega, kao i za okolinu u cjelini, pa je stoga logično i potrebno ugovarati osiguranje.[85]

5.3.2. Određivanje matičnog mjesta plovila

Pojam matičnog mjesta u poslovnoj praksi leasinga plovila predstavlja objekte[86] koji su prikladni za smještaj plovila na teritoriju Republike Hrvatske.[87]

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[84] Bez obzira na veličinu plovila i njegove karakteristike, ova je specifična obveza dio tradicije ugovaranja. Vidi Marušić, S., Leasing brodova…, *op. cit*., str. 473.

[85] Na primjer, »9.2. Kada je objekt leasinga plovilo, primatelj leasinga je dužan na svoj trošak u ime PBZL-a kao vlasnika objekta leasinga zaključiti za objekt leasinga propisano obvezno osiguranje od odgovornosti s dopunskim osiguranjem posade i putnika od posljedica nesretnog slučaja na punu vrijednost objekta leasinga. Primatelj leasinga obvezan je prije isporuke plovila uplatiti u cijelosti policu obveznog osiguranja za prvu godinu a za svaku narednu godinu (uplata u cijelosti) osam dana prije isteka osiguranja za prethodnu godinu i o tome obavijestiti PBZL i dostaviti presliku polica osiguranja.«, vidi PBZ Leasing, Opći uvjeti PBZL-a za ugovor o financijskom leasingu s fizičkim osobama, str. 3, https://www.pbz-leasing.hr/media/sylch2w3/opci-uvjeti-pbzl-a-za-ugovor-o-financijskom-leasingu-fizicke-osobe-v2301-vozilo-plovilo-oprema-sijecanj-2023.pdf (pristup 20. ožujka 2023.); »8.1.1. Primatelj leasinga se obvezuje za cijelo vrijeme trajanja Ugovora pravovremeno i redovito, u ime i za račun osiguranika – društva Erste & Steiermärkische S-Leasing d.o.o., a o svom trošku, ugovarati police osiguranja (obvezno osiguranje s dopunskim osiguranjem vozača i putnika (za vozila) odnosno policu osiguranja od odgovornosti (za plovila), te kasko osiguranje (za vozila, plovila)…«, vidi Erste & Steiermärkische S-Leasing, Opći uvjeti uz ugovor o operativnom leasingu, str. 3, https://www.ersteleasing.hr/hr/dokumentacija/opci-uvjeti-i-naknade (pristup 20. ožujka 2023.).

[86] Na primjer, »16.1. Matično mjesto Objekta leasinga je mjesto sjedišta/prebivališta Primatelja leasinga odnosno mjesto na čijem području je Objekt leasinga registriran, osim u slučaju plovila kada se Matičnim mjestom Objekta leasinga smatra registrirana marina, luka nautičkog turizma ili privezište na teritoriju Republike Hrvatske.« Vidi Erste & Steiermärkische S-Leasing, Opći uvjeti uz ugovor o operativnom leasingu, *op. cit*., str. 9.

[87] O vrstama objekata pogodnih za smještaj plovila na teritoriju Republike Hrvatske vidi Pravilnik o kategorizaciji luke nautičkog turizma i razvrstavanju drugih objekata za pružanje usluga veza i smještaja plovnih objekata, *Narodne novine*, br. 130/2017 i 25/2019.

S obzirom na namjenu plovila, logično je da takav objekt leasinga izlazi iz matičnog mjesta, odnosno iz teritorijalnih voda Republike Hrvatske. Pojedina leasing društva u svojim općim uvjetima poslovanja propisuju obvezu davanja prethodne suglasnosti davatelja leasinga, odnosno leasing društva za isplovljavanje plovila izvan teritorijalnih voda Republike Hrvatske.[88] Sveukupnost nautičkih, pravnih i gospodarskih rizika koje takvo isplovljavanje nosi, kao i druge poslovne okolnosti primatelja leasinga tijekom trajanja ugovora, a koje mogu utjecati na uredno ispunjenje prava i obveza ugovornih strana u poslu leasinga, nužno zahtijevaju propisivanje ovakvih ugovornih odredbi koje su sadržane u općim uvjetima poslovanja.

5.3.3. Mjesto primopredaje plovila

Primopredaja plovila kao objekta leasinga,[89] u kontekstu prava i obveza ugovornih strana,[90] ima svoju specifičnost u usporedbi s vozilima i drugim pokretninama upravo zbog složenosti postupka. U poslovnoj praksi leasinga plovila često se događa da davatelj leasinga i primatelj ne mogu postići dogovor o mjestu preuzimanja plovila.[91] Nabava plovila i manipulativne sposobnosti lučkih postrojenja, koja ponekad zbog svojih karakteristika nisu u mogućnosti pripremiti plovilo za preuzimanje ili pak zahtijevaju dodatne troškove koje davatelj leasinga ne želi preuzeti na sebe, uvjetuju ugovaranje odredbi koje uz opće uvjete poslovanja stavljaju davatelja leasinga u povoljniji položaj. Naime, u ugovaranju leasing posla pojedini davatelji leasinga, u uvjetima poslovanja, određuju dogovor o mjestu primopredaje kao prvotnu opciju. Ako se dogovor ne može postići, smatra se da je mjesto isporuke ono koje je odredio davatelj leasinga. Ovdje se za razliku od ostalih objekata leasinga, poput vozila ili drugih pokretnina, gdje mjesto primopredaje određuje davatelj leasinga, ugovara

[88] Na primjer, »16.2. …ukoliko je Objekt leasinga plovilo, isto može napustiti teritorijalno more Republike Hrvatske sukladno registriranom području plovidbe u plovnim dokumentima i Certifikatima koje je Primatelj leasinga, temeljem prethodne punomoći Davatelja leasinga, ishodio u tu svrhu.« Vidi Erste & Steiermärkische S-Leasing, *op. cit*., str. 9.

[89] Marušić, S., Leasing brodova…, *op. cit*., str. 466-467.

[90] O prijelazu rizika gubitka ili oštećenja stvari, pa tako i plovila, od trenutka isporuke u poslu leasinga vidi Josipović, T., Financial Leasing in Croatia, *Uniform Law Review*, god. 16 (2011.), br. 1-2, str. 282.

[91] Takve situacije propisane su općim uvjetima, na primjer, »7.2. Mjesto primopredaje objekta leasinga davatelju leasinga bit će utvrđeno dogovorom ugovornih strana. Ukoliko o mjestu i terminu primopredaje ugovorne strane ne uspiju postići dogovor, mjesto primopredaje je ACI marina Split…« Vidi PBZ Leasing, Opći uvjeti PBZL-a za ugovor o financijskom leasingu s fizičkim osobama, *op. cit*., str. 2.

mogućnost dogovora između primatelja i davatelja leasinga koji u skladu s životnim okolnostima i tehničkim mogućnostima mogu dogovoriti različita mjesta isporuke za svaki novi ugovor o leasingu plovila.

5.3.4. Držanje plovidbenih isprava

Plovidbene isprave te druga dokumentacija koja »prati« plovilo moraju biti sigurno pohranjena kod primatelja leasinga.[92] To je uobičajena ugovorna odredba iz općih uvjeta davatelja leasinga koja je propisana u svim općim uvjetima promatranih leasing društava. Pojedina leasing društva ugovaraju i čuvanje kopije ključeva izvan plovila.

Ta ugovorna odredba proizlazi iz zaštite davatelja leasinga od nemogućnosti ostvarivanja naknade iz osiguranja ako ono ne pokriva pojedine štetne događaje kada se plovidbene isprave te druga dokumentacija, kao i ključevi, nalaze na plovilu u trenutku štetnog događaja. U tom slučaju, opći uvjeti određuju da je primatelj leasinga odgovoran za štetu. Također, zbog prirode plovila i mjesta veza, primatelji leasinga ugrađuju različite sigurnosne i zaštitne sustave za koje davatelji leasinga također traže pristupe.[93]

5.3.5. Obveza obavještavanja o prometnoj nezgodi

Ova obveza primatelja leasinga plovila korespondira s obvezom obavještavanja primatelja leasinga vozila kada dođe do prometne nezgode. Često se događa da uporabom plovila dolazi do štetnih događaja, slično kao i kod vozila. Postoje određene razlike u takvim situacijama na koje ovdje treba ukazati. Prirodna okolina u kojoj se redovito upotrebljavaju plovila znatno se razlikuje od okoline u kojoj se upotrebljavaju vozila. Ceste na kojima se voze vozila napravljene su

[92] U skladu s čl. 94. Pomorskog zakonika, brodske isprave, zapisi i knjige koje brod mora imati služe kao dokaz o identitetu, sposobnosti za plovidbu i ostalim svojstvima broda.

[93] Na primjer, »10.10. Ako je objekt leasinga vozilo, odnosno plovilo, primatelj leasinga se obvezuje dokumentaciju vezanu za korištenje objekta leasinga prometnu dozvolu kao i ostale dokumente) držati isključivo kod sebe, a ne u objektu leasinga. Primatelj leasinga se obvezuje predati PBZL-u i sredstva za deblokadu pogona, alarma i ostalih uređaja koje naknadno ugrađuje u objekt leasinga.«, vidi PBZ Leasing, Opći uvjeti PBZL-a za ugovor o financijskom leasingu s fizičkim osobama, *op. cit.*, str. 3; »5.2. Ukoliko je objekt leasinga vozilo, odnosno plovilo, Primatelj leasinga se obvezuje dokumentaciju vezanu za korištenje Objekta leasinga (prometnu dozvolu kao i ostale dokumente) držati isključivo kod sebe, a ne u Objektu leasinga.«, vidi Raiffeisen Leasing, Opći uvjeti ugovora o operativnom leasingu 01_23, str. 2, https://www.raiffeisen-leasing.hr/documents/435416/2781871/Op%C4%87i+uvjeti+-+operativni+leasing/e3c71442-f3f0-e2c2-2a8a-b9e2db08ca1d?version=1.0 (pristup 20. ožujka 2023.).

ljudskom rukom uz sve prilagodbe koje su potrebne za sigurnu vožnju, odnosno korištenje. S druge pak strane, vodena površina nije takva. Ona je osjetljiva na hidrometeorološke uvjete čije promjene uzrokuju nestabilnost za redovnu uporabu plovila i kao takva je u znatno većem riziku, nego što je to slučaj kod vozila. Postupci utvrđivanja okolnosti nastanka štete razlikuju se kod vozila i plovila, a granice odgovornosti i realizacije osiguranja ovise o tim postupcima.[94]

5.3.6. Definiranje posla leasinga plovila, odnosno ugovora o leasingu plovila

U određivanju posla leasinga plovila i ugovora o leasingu plovila, pojedina leasing društva pristupaju jednoznačno. Postoji jasna distinkcija između posla leasinga i ugovora o leasingu. To su dva pojma koji sadržajno ne mogu biti sinonimi, ali koje poslovna praksa ponekad poistovjećuje, uređujući ih putem općih uvjeta poslovanja leasing društava. Svakako, posao leasinga plovila obuhvaća skup radnji i postupaka koje poduzimaju sudionici u poslu leasinga plovila, a osim glavnih radnji koje se odnose na sklapanje ugovora o leasingu plovila, uključuje i sklapanje drugih imenovanih ugovora autonomnog trgovačkog prava, prije svega, kupoprodaje plovila. U vezi s tim, posao leasinga plovila posebno je izražajan u poslu neizravnog leasinga. Osim ugovaranja, posao leasinga plovila pretpostavlja i različite pregovore, informiranja i sve one postupke koji se zaključuju sklapanjem ugovora o leasingu plovila. S druge strane, ugovor o leasingu završni je akt posla leasinga koji je pojmovno uži u odnosu na posao leasinga. On predstavlja ukupnost svih postupaka u poslu leasinga u kojem strane uređuju međusobna prava i obveze.[95]

Ne ulazeći u pravnu korektnost pojmova koji su naznačeni u općim uvjetima poslovanja, u uvodnom dijelu i u poglavljima,[96] treba istaknuti da postoji prilična neujednačenost pri određivanju ključnih odrednica, odnosno pojmova

[94] Na primjer, ova je obveza sadržana ovdje »12.1. …Kada je objekt leasinga plovilo, primatelj leasinga je dužan u slučaju prometne nezgode u kojoj je sudjelovao objekt leasinga odmah prijavom o prometnoj nezgodi obavijestiti nadležnu Lučku kapetaniju, te po potrebi i nadležnu policijsku postaju«. Vidi PBZ Leasing, Opći uvjeti PBZL-a za ugovor o operativnom leasingu, *op. cit*., str. 3.

[95] O razlikovanju tih pojmova vidi Baće, M., *Posebnosti ugovora o leasingu u pravnom prometu*, doktorska disertacija, Pravni fakultet Sveučilišta u Mostaru, Mostar, 2022., str. 253.

[96] Tako se, na primjer, ugovor o leasingu plovila definira ovdje »2.2. Ugovorom o leasingu Davatelj i Primatelj leasinga uređuju davanje na korištenje (leasing) objekta leasinga (plovila i drugih plovnih objekata) za određeno vrijeme i plaćanje naknade za korištenje (leasing) objekta leasinga, pravo na stjecanje vlasništva, te sve druge odnose u vezi s korištenjem (leasingom) i pravom stjecanja vlasništva na objektu leasinga.« Vidi OTP Leasing, Opći uvjeti ugovora o financijskom leasingu FL-PLV-08, *op. cit.,* str. 1/9.

leasinga plovila. Na primjer, može se uočiti kako opcija kupnje plovila nakon isteka ugovora o leasingu nije jasno naznačena.[97]

5.3.7. Obveza smještaja plovila u sigurnoj luci

Ovakva je sporedna obveza kod leasinga plovila zapravo vrlo važna. U nastavku na prethodno raspravljanje o obvezi utvrđivanja matičnog mjesta plovila, za ovu je obvezu specifično da predstavlja vez u luci[98] koja posjeduje sve relevantne dozvole za prihvat plovila, odnosno da je maritimno sigurna u uobičajenim hidrometeorološkim uvjetima. Utvrđivanje pravno i maritimno sigurnog veza u lukama, prije svega u lukama nautičkog turizma, logična je poslovna i pravna obveza koju propisuju leasing društva. Naime, osigurani rizici pretpostavljaju da se za vrijeme štetnog događaja i šteta koje su nastale dok je plovilo na vezu, taj vez nalazi u luci osposobljenoj za prihvat plovila. Ta je dvojba dodatno umanjena činjenicom da takva luka mora imati sve relevantne dozvole nadležnih tijela, kao što su, na primjer, koncesije.[99]

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[97] Na primjer, tako nije naznačeno ovdje »1.1. Ugovor – Ugovor predstavlja ugovor o financijskom leasingu, Opće uvjete PBZL-a za ugovor o financijskom leasingu, plan otplate, kao i sve kasnije izmjene i dopune istih, koji svi čine njegove sastavne dijelove.«, vidi PBZ Leasing, Opći uvjeti PBZL-a za ugovor o financijskom leasingu s fizičkim osobama, *op. cit*., str. 1; »1.1. Ugovor – Ugovor predstavlja ugovor o operativnom leasingu, Opće uvjete PBZL-a za ugovor o operativnom leasingu, plan dospijeća obroka, dokument ´Kriteriji za utvrđivanje prihvatljivog stanja vozila po završetku ugovora´ (samo kada je objekt leasinga vozilo) kao i sve kasnije izmjene i dopune istih, koji svi čine njegove sastavne dijelove«, vidi PBZ Leasing, Opći uvjeti PBZL-a za ugovor o operativnom leasingu, *op. cit*., str. 1.

[98] Prema čl. 13. Općih uvjeta za korištenje veza Adriatic Croatia International Club, za djelatnost marina d.d. (ACI d.d.) obvezuje se »…nadzirati stanje Plovila i priveza te o uočenim nedostacima obavijestiti Korisnika; …pribaviti, održavati i po potrebi mijenjati dvije pramčane privezaljke (*mooring*) i vezice (spoj privezaljke i obale-tirele); …omogućiti Plovilu opskrbu električnom energijom prema mogućnostima mreže te ispravnost utičnice na energetskom ormariću; …nadzirati i održavati energetske ormariće; …omogućiti Plovilu opskrbu vodom te se pobrinuti za ispravnost slavine na energetskom ormariću; …u slučaju vidljivog prodora mora i/ili požara intervenirati i poduzeti radnje u cilju spašavanja Plovila i imovine ACI Marine o trošku Korisnika; u slučaju da dođe do štete nastale uslijed rada djelatnika ACI Marine, nadoknaditi trošak u skladu sa važećom policom, a u vrijednosti priznatoj od strane osiguravajućeg društva; …kod šteta na Plovilu uzrokovanih od strane drugih Plovila i/ili trećih osoba izvijestiti nadležna tijela (Lučku kapetaniju i Pomorsku policiju).« Opširnije o tome vidi Adriatic Croatia International Club, za djelatnost marina d.d. (ACI d.d.), Opći uvjeti za korištenje veza u Adriatic Croatia International Club d.d., https://aci-marinas.com/hr/aci-uvjeti/ (pristup 20. svibnja 2023.).

[99] Tako je OTP Leasing jedino leasing društvo u Republici Hrvatskoj koje je propisalo posebne opće uvjete za plovila u poslu financijskog i operativnog leasinga: »14.6. Primatelj leasinga se obvezuje plovilu kao objektu leasinga osigurati stalni sigurni vez u zaštićenoj

6. ZAŠTITA POTROŠAČA U POSLU LEASINGA PLOVILA

Ugovori o leasingu plovila u praksi mogu biti i trgovačkopravni, kao i potrošački ugovori.[100] U skladu s čl. 2. st. 1. Zakona o potrošačkom kreditiranju (u nastavku: ZPK), potrošač je fizička osoba koja u transakcijama obuhvaćenim ZPK-om djeluje izvan poslovne djelatnosti ili slobodnog zanimanja.[101] Člankom 3. ZPK-a određene su iznimke, odnosno ugovori na koje se ne primjenjuje taj

luci predviđenoj za smještaj plovila na svoj trošak, kao i snositi ostale troškove plovidbe, sidrenja i sl., ukoliko ugovorne strane nisu ugovorile što drugo.« Jednako tako i ostale obveze koje se odnose na sigurnost plovila; »14.14. Primatelj leasinga ne smije bez posebne pisane suglasnosti Davatelja leasinga: …s plovilom, kao objektom leasinga, sudjelovati na natjecanjima i utrkama.« Ove posljednje naznačene odredbe izuzete su u poslu operativnog leasinga kod ovog leasing društva. Više o tome vidi OTP Leasing, Opći uvjeti ugovora o financijskom leasingu FL-PLV-08, *op. cit*., str. 5/9.

100 »Podredno, ovaj sud napominje da čak i u slučaju kada bi tužbeni zahtjev bio osnovan, tužitelj neosnovano potražuje zatezne kamate koje na iznos od 9.345,12 kn teku od 12. veljače 2020. po stopi koja je propisana za potraživanja proizašla iz trgovačkih ugovora i ugovora sklopljenim između trgovca i osobe javnog prava. Naime, neovisno od toga što su obje parnične stranke osobe javnog prava u smislu članka 26. stavka 6. Zakona o obveznim odnosima, eventualno tužiteljevo potraživanje ne proizlazi iz ugovora kojeg su te stranke međusobno sklopile, već se u ovom sporu radi o potraživanju po osnovi naknade izvanugovorne štete. Slijedom navedenog, čak i kada bi tužbeni zahtjev tužitelja bio (u potpunosti ili djelomično) osnovan u dijelu glavnog potraživanja, tužitelj ne može osnovano potraživati zatezne kamate prema stopi tih kamata koja je propisana za potraživanja iz trgovačkih ugovora i ugovora između trgovca i osobe javnog prava, već po stopi koja je propisana za ostale odnose.« Vidi Visoki trgovački sud Republike Hrvatske, 28 Pž-4179/2021-2 od 13. prosinca 2021., *op. cit*. u bilj. 77.

101 Više o tome vidi: Zakon o potrošačkom kreditiranju, *Narodne novine*, br. 75/2009, 112/2012, 143/2013, 147/2013, 09/2015, 78/2015, 102/2015, 52/2016 i 128/2022; »Izmjenama i dopunama Zakona o potrošačkom kreditiranju u zakonodavstvo RH transponira se preostali dio Direktive 2008/48/EZ čime se omogućuje potrošaču traženje ispunjenja ugovornih obveza od strane vjerovnika (kreditora-banke) ukoliko iste obveze ne ispuni dobavljač.«, Ministarstvo financija Republike Hrvatske, Prijedlog Zakona o izmjenama i dopunama zakona o potrošačkom kreditiranju, s konačnim prijedlogom zakona, str. 1, https://mfin.gov.hr/UserDocsImages//dokumenti/fin-sustav//potrosacko.pdf (pristup 20. ožujka 2023.); »Svrha Direktive 2008/48 u njezinu je članku 1. opisana kao ´usklađivanje određenih aspekata zakona i drugih propisa država članica o ugovorima koji obuhvaćaju potrošačke kredite´. Direktiva 2008/48 primjenjuje se, kako je predviđeno u njezinu članku 2. stavku 1., na ugovore u kreditu. U njezinu se članku 2. stavku 2. točki (d) pak navodi da se ona ne primjenjuje na ´ugovore o najmu ili leasingu u kojima se samim ugovorom ili zasebnim ugovorom ne propisuje obveza kupnje predmeta ugovora; smatra se da takva obveza postoji ako to jednostrano odluči vjerovnik´.«, Mišljenje nezavisnog odvjetnika Collinsa od 16. veljače 2023., spojeni predmeti, *VK protiv BMW Bank GmbH* (C-38/21), *F. F. protiv C. Bank AG* (C-47/21), *CR, AY, ML, BQ protiv Volkswagen Bank GmbH, Audi Bank* (C-232/21), ECLI:EU:C:2023:107, t. 7.

zakon. Među ostalim, st. 1. t. b) određuje kao iznimku ugovore o operativnom leasingu kada u glavnom ili posebnom ugovoru nije propisana obveza kupnje predmeta ugovora. Takva obveza postoji samo ako to jednostrano odluči vjerovnik.[102] Prema Zakonu o leasingu, čl. 110. određuje da se u smislu toga zakona pod pojmom potrošača podrazumijeva svaka fizička osoba koja kao primatelj leasinga sudjeluje u poslovima leasinga u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju zanimanja. U skladu s čl. 111. Zakona o leasingu, potrošač ima pravo podnijeti pisani prigovor leasing društvu s kojim je sklopio ugovor o leasingu, ako se leasing društvo ne pridržava ugovornih uvjeta. Leasing društvo dužno je odgovoriti potrošaču na pisani prigovor u roku od petnaest dana od dana zaprimanja pisanog prigovora. Potrošač ima pravo podnijeti zahtjev za rješavanje spora na pisani odgovor leasing društva. Na izvansudsko rješavanje sporova primjenjuju se odredbe posebnih zakona kojima se uređuje zaštita potrošača.[103] Zakon o zaštiti potrošača (u nastavku: ZZP)[104] u čl. 4. st. 21. određuje da je potrošač svaka fizička osoba koja sklapa pravni posao ili djeluje na tržištu izvan svoje trgovačke, poslovne, obrtničke ili profesionalne djelatnosti.

Ovisno o tome radi li se o trgovačkom ili o potrošačkom ugovoru, razlikuje se i trajanje prekluzivnih rokova za pregled stvari i obavijesti o materijalnom nedostatku.[105] [106] U trgovačkom ugovoru, kupac bi trebao obavijestiti prodavatelja o vidljivim nedostatcima odmah nakon pregleda stvari, odnosno nakon što je pregled bio moguć, dok bi ga o skrivenim nedostatcima trebao obavijestiti odmah nakon što se nedostatak pokazao, a najkasnije u roku od šest mjeseci.[107]

[102] »Iz sudske prakse Suda proizlazi da ugovor o operativnom leasingu treba razlikovati od financijskog leasinga, s obzirom na to da potonjeg karakterizira prijenos većine koristi i rizika svojstvenih pravnom vlasništvu na primatelja leasinga. Činjenica da se prijenos vlasništva izvršava po isteku valjanosti ugovora ili da je diskontirani iznos obroka praktički istovjetan tržišnoj vrijednosti robe predstavlja, svaka za sebe ili sve zajedno, kriterije na temelju kojih je moguće utvrditi može li se određeni ugovor okvalificirati kao ugovor o financijskom leasingu (vidjeti, u tom smislu, presudu Eon Aset Menidjmunt, C-118/11, EU:C:2012:97, t. 38.).« Vidi Presuda Suda (drugo vijeće) od 2. srpnja 2015., *NLB Leasing d.o.o. protiv Republike Slovenije*, C-209/14, ECLI:EU:C:2015:440, t. 28.

[103] Osim na temelju odredaba članaka 110. i 111. Zakona o leasingu, zaštita potrošača provodi se na temelju posebnih zakona kojima se uređuje zaštita potrošača.

[104] *Narodne novine*, br. 19/2022.

[105] Članak 403. i 404. Zakona o obveznim odnosima, *Narodne novine*, br. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021, 114/2022 i 156/2022.

[106] Bilić, A., Trgovac, poduzetnik i trgovački ugovori, *Zbornik Pravnog fakulteta u Zagrebu*, god. 72 (2022.), br. 1-2, str. 643.

[107] Članak 403. st. 1. Zakona o obveznim odnosima.

U potrošačkom ugovoru, potrošač kao kupac nije obvezan pregledati stvar, ali mora obavijestiti prodavatelja o postojanju vidljivih nedostataka u roku od dva mjeseca od dana kada je otkrio nedostatak, a najkasnije u roku od dvije godine od prijelaza rizika na potrošača.[108] Tradicionalno određenje trgovca ovisi o općem položaju trgovca u pravnom prometu, dok definicija trgovca koja dolazi iz europskog potrošačkog prava ovisi o trgovčevu položaju u konkretnom ugovoru, odnosno djeluje li on u sklopu svoje djelatnosti. Kako bi ugovor bio trgovački, dostatno je da jedan trgovac djeluje u sklopu svoje djelatnosti, dok je za potrošačke ugovore potrebno da trgovac djeluje, a potrošač ne djeluje u sklopu svoje djelatnosti.[109] Članak 14. st. 2. Zakona o obveznim odnosima (u nastavku: ZOO) određuje da je trgovački ugovor samo ako su obje ugovorne strane trgovci.

Kako bi doprinijela povećanju transparentnosti na tržištu leasinga i dodatnoj zaštiti primatelja leasinga koji imaju status potrošača, HANFA je izradila usporedni prikaz naknada svih leasing društava na jednom mjestu za ugovore o financijskom leasingu sklopljene s potrošačima. Time je omogućen jasniji uvid u vrste i visinu naknada koje društva zaračunavaju, što potrošačima može olakšati odluku pri odabiru leasing društva. Usporedbom je utvrđeno da se društva međusobno razlikuju prema broju, vrsti i visini naknada koje obračunavaju potrošačima. Tako se broj naknada, ovisno o leasing društvu, kreće od četiri do čak četrnaest naknada. Pritom je važno istaknuti kako samo neka društva, točnije njih četiri, obračunavaju naknadu za sklapanje ugovora ili, na primjer, naknadu za prijevremenu otplatu.[110]

Pravilnik o sadržaju i obliku ugovora o leasingu te metodologiji izračuna efektivne kamatne stope,[111] u čl. 3. određuje da ugovor mora biti sklopljen u pisanom obliku te se na njega primjenjuju odredbe ZOO-a, ako drugačije nije određeno Zakonom o leasingu (ZL) i Pravilnikom. Ugovor mora biti napisan na pregledan i razumljiv način tako da primatelju leasinga omogući raspolaganje

[108] Članak 403. st. 4. Zakona o obveznim odnosima.

[109] Bilić, A., Trgovac, poduzetnik i trgovački ugovori, *op. cit*., str. 644.

[110] U ovom usporednom prikazu naknade su grupirane prema vrsti, a neki su nazivi ujednačeni radi lakše usporedivosti i pregleda tržišta. Prikazane su naknade za dvanaest leasing društava koja sklapaju ugovore o financijskom leasingu s potrošačima (ti se uvjeti ne odnose na pravne ni na fizičke osobe primatelje leasinga po ugovorima o operativnom leasingu). Vidi Hrvatska agencija za nadzor financijskih usluga (HANFA), Usporedba naknada leasing društava za potrošače, https://www.hanfa.hr/vijesti/usporedba-naknada-leasing-dru%C5%A1tava-za-potro%C5%A1a%C4%8De/# (pristup 28. svibnja 2023.).

[111] *Narodne novine*, br. 66/2014 i 86/2018, *op. cit*. u bilj. 4.

sa svim bitnim informacijama o uvjetima ugovora iz kojih će biti vidljiva prava i obveze ugovornih strana. Pri sklapanju ugovora s potrošačem kao primateljem leasinga, davatelj leasinga dužan je primjenjivati odredbe Zakona o zaštiti potrošača, kao i druge zakonske i podzakonske propise koji reguliraju i štite prava i interese potrošača, a kod ugovora o financijskom leasingu i odredbe Zakona o potrošačkom kreditiranju i njegovih podzakonskih propisa. Davatelj leasinga obvezan je važeće opće uvjete ugovora o leasingu učiniti javno dostupnim objavom na internetskoj stranici davatelja leasinga.[112]

Djelotvorna procesna zaštita materijalnih prava potrošača koja proizlazi iz brojnih direktiva potrošačkog prava Europske unije,[113] s kojima domaće pravo država članica mora biti usklađeno, od presudne je važnosti za ispunjenje načela zaštite materijalnih prava potrošača koje predstavlja *meritum*.[114] Operativni i financijski leasing pojmovi su koji potječu iz nacionalnog građanskog prava. Kao takvi, sve do danas, u Europskoj uniji nisu bili predmet usklađivanja, što znači da nisu pozitivno definirani na samoj razini Europske unije.[115]

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[112] Osim toga, čl. 14. Pravilnika određuje da ugovor o financijskom leasingu mora sadržavati efektivnu kamatnu stopu. Iznimno, ugovor o financijskom leasingu koji se sklapa s primateljem leasinga, a koji nije potrošač, ne mora sadržavati odredbe o efektivnoj kamatnoj stopi. Efektivnu kamatnu stopu za ugovor o financijskom leasingu koji se sklapa s potrošačem, davatelj leasinga dužan je izračunavati po metodologiji propisanoj zakonom kojim je regulirano potrošačko kreditiranje.

[113] Kada je riječ o načelu djelotvornosti, važno je napomenuti da treba pažljivo razmotriti svaki slučaj u kojem se postavi pitanje – onemogućuje li pojedina nacionalna procesnopravna odredba ili pretjerano otežava primjenu prava Europske unije. Pri tome treba uzeti u obzir položaj te odredbe unutar cjelokupnog postupka, tijeka postupka i njegove posebnosti, kao i, prema potrebi, načela na kojima se temelji nacionalni pravni sustav kao što su zaštita prava obrane, načelo pravne sigurnosti i pravilno odvijanje postupka. Vidi Presuda Suda (prvo vijeće) od 22. travnja 2021., *LH protiv Profi Credit Slovakia s.r.o.*, C-485/19, EU:C:2021:313, t. 53. Međutim, posebnost postupaka nije čimbenik koji može utjecati na pravnu zaštitu koju potrošači imaju na temelju odredaba Direktive 93/13. Vidi Presuda Suda (treće vijeće) od 21. travnja 2016., *Ernst Georg Radlinger i Helena Radlingerová protiv Finway a.s.*, C-377/14, EU:C:2016:283, t. 50. i navedena sudska praksa. Također, vidi Presuda Suda (veliko vijeće) od 17. svibnja 2022., *IO protiv Impuls Leasing România IFN SA*, Predmet C-725/19., ECLI:EU:C:2022:396, t. 45.

[114] Toth, I., Razvoj zaštite potrošača i alternativno rješavanje potrošačkih sporova u Republici Hrvatskoj (III. dio), https://www.iusinfo.hr/strucni-clanci/razvoj-zastite-potrosaca-i-alternativno-rjesavanje-potrosackih-sporova-u-republici-hrvatskoj-iii-dio (23. siječnja 2023.).

[115] Mišljenje nezavisnog odvjetnika M. Szpunara od 11. svibnja 2023.(1), *AUTOTECHNICA FLEET SERVICES d.o.o., prije ANTERRA d.o.o. protiv Hrvatske agencije za nadzor financijskih usluga*, C-278/22, ECLI:EU:C:2023:401, t. 24.

7. ZAKLJUČAK

Ugovor o leasingu općenito je noviji tip ugovora koji ima vlastitu fizionomiju i obično je glavni, a ponekad i jedini ugovor u pravnom poslu leasinga. Unutar te skupine leasing ugovora jest i ugovor o leasingu plovila koji također ima svoje posebnosti.

Ugovor o leasingu plovila u hrvatskom pravu je standardni, adhezijski i tipski ugovor koji je povezan s najmom, zakupom i kupoprodajom. Kao takav čini okosnicu leasinga kao zasebnog ugovornog oblika, određenog specifičnim sadržajem. Riječ je o zakonom uređenom tipu ugovora, kojemu je poslovna praksa dala poseban karakterističan sadržaj koji se razlikuje od drugih leasing ugovora, posebno po općim uvjetima poslovanja leasing društva. Ugovaranje leasinga plovila, kao i kod ugovaranja kada su druge pokretnine objekti leasinga, uvijek se odvija putem prihvaćanja općih uvjeta poslovanja. Time se budućem primatelju leasinga onemogućuje pregovaranje u konkretnom poslu leasinga.

Ugovorom o leasingu plovila davatelj se obvezuje kako će, nakon što je primatelj leasinga prethodno odabrao plovilo prema svojim potrebama, pribaviti plovilo od dobavljača ili proizvođača u svoje vlasništvo te ga predati primatelju leasinga na uporabu i korištenje na određeno vrijeme. Primatelj se obvezuje plaćati davatelju naknadu za leasing, obično u mjesečnim obrocima.

Ugovaranje leasinga plovila u hrvatskoj poslovnoj praksi temelji se na općim uvjetima poslovanja koji uređuju prava i obveza strana ugovora o leasingu plovila. Kroz te opće uvjete poslovanja daju se cjelovite smjernice za ugovorni odnos, ali istodobno onemogućuju dispozicije ugovornih strana u pregovaranju o sadržaju prava i obveza konkretnog ugovornog odnosa.

Leasing društva putem općih uvjeta poslovanja različito uređuju dva ugovora – ugovor o financijskom leasingu i ugovor o operativnom leasingu.

U vezi s ugovorima koji prate pravni posao leasinga plovila, treba istaknuti da oni ovise o broju sudionika te se u teoriji dijele na izravni i neizravni leasing, iako je poslovna praksa u Republici Hrvatskoj takva da su ugovori o leasingu plovila neizravni.

Posebnosti ugovaranja leasinga plovila očituju se u specifičnim uvjetima koji prate ovaj objekt leasinga. Zbog toga je ugovaranje leasinga plovila različito od ostalih pokretnina.

Ugovor o leasingu plovila u hrvatskom pravu rezultat je reakcije poslovne prakse koja traži usklađivanje u određivanju prava i obveza sudionika u pravnom poslu leasinga, odnosno strana u ugovoru o leasingu.

Pri sklapanju ugovora s potrošačem kao primateljem leasinga, davatelj leasinga dužan je primjenjivati odredbe ZZP-a, kao i druge zakonske i podzakonske propise koji reguliraju i štite prava i interese potrošača. Kod ugovora o financijskom leasingu primjenjuju se i odredbe ZPK-a i njegovih podzakonskih propisa.

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Summary:

SPECIAL FEATURES OF VESSEL LEASING CONTRACTS IN LEGAL TRANSACTIONS IN THE REPUBLIC OF CROATIA

The authors analyse the peculiarities of contracting in the business of vessel leasing in the Republic of Croatia and its relation to other movable properties. General business conditions as part of the vessel leasing contract are the focus of this research. In the paper, the authors examine different approaches of leasing companies in relation to the specifics of the vessel, as an object of leasing, which, through the general conditions of business, determine the specific rights and obligations of the leasing provider and receiver. A critical review is given of the various solutions that are prescribed by leasing companies in the Republic of Croatia through the general terms of business. For a complete analysis of the scope of the parties in the contracting process, the legal framework of the leasing contract is analysed beforehand.

Keywords: *leasing; leasing provider; lessee, vessel; general business conditions; financial leasing; operational leasing; direct leasing; indirect leasing.*

ODLUKE DOMAĆIH SUDOVA
DECISIONS OF DOMESTIC COURTS

ODGOVORNOST ZA ŠTETU ZBOG OŠTEĆENJA BRODICE NA VEZU – TERET DOKAZIVANJA

VISOKI TRGOVAČKI SUD REPUBLIKE HRVATSKE
Presuda br. Pž-6300/2017-4 od 9. ožujka 2020.
Sudac: mr. sc. Srđan Šimac

Korisnik veza, kao tužitelj u sporu, potraživao je naknadu štete zbog oštećenja svoje brodice. U trenutku štetnog događaja brodica se nalazila na vezu u moru u tuženikovoj marini, na temelju ugovora o godišnjem vezu sklopljenog između stranaka u sporu. U ovoj pravnoj stvari, na tužitelju (korisniku veza) nije bio teret dokazivanja o tome tko je odgovoran za nastalu štetu na njegovoj brodici. Pretpostavljala se tuženikova odgovornosti za štetu, pa je na njemu bio teret dokazivanja kako on ne odgovara za štetu. Tuženik (marina) trebala je dokazati da je šteta na tužiteljevoj brodici nastala bez njegove krivnje, odnosno dokazati postojanje okolnosti koje isključuju njegovu odgovornost.

Tužitelj je vlasnik brodice, a tuženik je marina M. u kojoj se tužiteljeva brodica nalazila na vezu, na temelju ugovora o godišnjem vezu. Tužbeni zahtjev odnosi se na naknadu štete zbog oštećenja brodice na vezu.

U prvostupanjskom je postupku utvrđeno da su stranke, 30. kolovoza 2005. godine, sklopile ugovor o korištenju godišnjeg veza u marini M. za tužiteljevu brodicu za razdoblje od 7. rujna 2005. do 6. rujna 2006. godine, u iznosu od 21.491,70 kuna za godišnji vez. Tijekom boravka u marini M., 17. lipnja 2006. godine, tužitelj je primijetio oštećenja na brodici te ih je odmah prijavio tuženiku i Lučkoj kapetaniji M. Tužitelj je od tuženika zatražio naknadu štete jer je oštećenje njegove brodice nastalo za vrijeme trajanja ugovora i boravka brodice u marini.

Tuženik je osporio osnovu i visinu tužbenog zahtjeva. Istaknuo je kako tužitelj u tužbi neosnovano navodi da je njegova brodica oštećena tijekom čuvanja na suhom vezu. U prijavi nezgode Lučkoj kapetaniji M., od 17. lipnja 2006. godine, navedeno je da je brodica bila privezana uz obalu i usidrena, a pod vrstom nezgode sudar s drugim brodom i površinska ogrebotina (skinuta boja) dužine otprilike jedan metar. Tuženik je istaknuo kako iz navedenog proizlazi da se tužiteljeva brodica sudarila s drugim brodom, a u skladu s odredbom čl. 750. Pomorskog zakonika, u slučaju sudara brodova, za štetu koja nastane na brodu odgovara drugi brod. Zbog toga je tuženik istaknuo prigovor promašene pasivne legitimacije. Tuženik je naveo kako je odredbom čl. 12. ugovora propisano da

on ne snosi odgovornost za štetu nastalu zbog krivnje trećih osoba. Smatrao je kako tužitelj nije dokazao da su ispunjene pretpostavke za njegovu odgovornost za ovu štetu pa je predložio da se odbije tužbeni zahtjev kao neosnovan.

Na temelju rezultata provedenog dokaznog postupka, prvostupanjski je sud utvrdio, u skladu s odredbom 4. ugovora, da se tuženik, među ostalim, obvezao čuvati i paziti plovilo u marini. Prema odredbi čl. 10. ugovora, tuženik se obvezao nadoknaditi štetu zbog oštećenja na plovilu koja nastanu za vrijeme čuvanja plovila u marini i za koja bi prema Zakonu tuženik bio odgovoran. Odredbom čl. 12.e) ugovora, utvrđeno je da tuženik ne snosi odgovornost za naknadu štete nastalu na plovilu zbog krivnje trećih osoba.

Prema odredbi čl. 342. st. 2. Zakona o obveznim odnosima (*Narodne novine*, br. 35/2005 i 41/2008; u nastavku: ZOO) propisano je da u slučaju ako tuženik ne ispuni svoju obvezu, vjerovnik ima pravo zahtijevati popravljanje štete koju je zbog toga pretrpio. Pretpostavka za ostvarenje prava na naknadu štete po osnovi ugovorne odgovornosti je povreda ugovorne obveze. Odredbom čl. 342. ZOO-a propisane su pretpostavke odgovornosti za ugovornu štetu: a) postojanje ugovora, b) neispunjenje ili zakašnjenje u ispunjenju dužnikove obveze, c) šteta nanesena vjerovniku, d) postojanje uzročne veze te e) postojanje protupravnosti, odnosno nepostojanje neke od okolnosti koja dopušta oslobođenje dužnika od odgovornosti. Sve navedene pretpostavke moraju biti ispunjenje kumulativno.

Za štetu iz odredbe čl. 342. st. 2. ZOO-a, dužnik odgovara na temelju pretpostavljene krivnje i može se osloboditi od odgovornosti ako dokaže da je šteta nastupila bez njegove krivnje. Na temelju provedenog dokaznog postupka, a posebno iskaza saslušanih svjedoka, prvostupanjski je sud utvrdio da je šteta nastala dok se tužiteljeva brodica nalazila na vezu u moru u tuženikovoj marini. Stoga je prvostupanjski sud utvrdio kako je tuženik prekršio svoju ugovornu obvezu, odnosno nije ispunio svoju obvezu čuvanja plovila u marini (čl. 4. ugovora) te da je zbog toga tužitelj pretrpio štetu koju mu je tuženik dužan nadoknaditi.

Prvostupanjski je sud smatrao da tuženik u ovoj pravnoj stvari odgovara na temelju pretpostavljene krivnje. Stoga je tijekom postupka bio dužan dokazati postojanje okolnosti koje isključuju njegovu odgovornost kao čuvara za nastalu štetu, odnosno bio je dužan dokazati da je stvar koja je objekt činidbe slučajno propala te da je pravodobno ispunio svoju obvezu (čl. 342. st. 5. ZOO-a). On je bio dužan dokazati da nije mogao ispuniti svoju obvezu, odnosno da je zakasnio s ispunjenjem obveze zbog vanjskih, izvanrednih i nepredvidivih okolnosti koje su nastale prije sklapanja ugovora, a koje nije mogao spriječiti, otkloniti ili izbjeći (čl. 343. ZOO-a).

Tuženik je tijekom postupka pred prvostupanjskim sudom tvrdio da ne snosi odgovornosti za štetu jer je šteta na tužiteljevoj brodici nastala zbog krivnje trećih osoba (čl. 12. st. 1.e Ugovora), i to zbog sudara s drugim brodom. Prema ocjeni prvostupanjskog suda, tuženik nije uspio dokazati navedeno (čl. 219. st. 1. čl. 7. st. 1. ZPP-a). Ako sud ne može utvrditi odlučne činjenice na temelju provedenih dokaza, primijenit će se pravilo o teretu dokazivanja (čl. 221.a ZPP-a).

S obzirom na tuženikov prigovor da je u prijavi nezgode brodice navedeno kako su oštećenja nastala zbog sudara s drugim brodom, prvostupanjski je sud utvrdio da je u toj prijavi, također, navedeno kako je u trenutku nezgode brod bio privezan uz obalu i usidren. Lučki kapetan, svjedok N. B. koji je ispunio prijavu nezgode je na pitanje zašto je kao vrstu nezgode naveo sudar s drugim brod, iskazao da je to bila njegova pretpostavka s obzirom na mjesto gdje se nalazio brod koji je bio privezan uz obalu i oštećenja koja su na brodu nastala. Slijedom navedenog, prvostupanjski je sud zaključio da tuženik nije dokazao postojanje okolnosti koje bi isključile njegovu odgovornost kao čuvara za štetu koju je pretrpio tužitelj.

Radi utvrđivanja visine nastale štete, prvostupanjski je sud izveo dokaz vještačenja putem vještaka pomorske struke. Stalni sudski vještak za pomorski promet i brodogradnju R. G. utvrdio je visinu štete na brodici u iznosu od 10.850,00 eura, odnosno 81.375,00 kuna. Tužitelj nije imao primjedbe na nalaz i mišljenje vještaka, dok se vještak na tuženikove primjedbe detaljno očitovao pisanim putem, te usmenim očitovanjem na ročištu.

Tužiteljeve navode o tome da se iznosu utvrđene štete treba dodati i PDV-e, prvostupanjski je sud ocijenio neosnovanim jer se ovdje radi o tražbini s osnove naknade za štetu, a ne o tražbini proizašloj iz prometa roba ili usluga između stranaka. Porez na dodatnu vrijednost je prihod državnog proračuna (čl. 1. st. 2. Zakona o porezu na dodanu vrijednost, *Narodne novine*, br. 47/1995, 106/1996, 164/1998, 105/1999, 54/2000, 73/2000, 48/2004, 82/2004, 90/2005, 76/2007, 87/2009, 94/2009 i 22/2012; u nastavku: ZOPDV) te se plaća na isporuke svih vrsta dobara i sve obavljene usluge u tuzemstvu uz naknadu (čl. 2. st. 1. ZOPDV-a). Pored navedenog, tužitelj temelji visinu tužbenog zahtjeva na predračunu brodogradilišta C. Republike Italije, od 2. srpnja 2007. godine, u kojem stoji kako troškovi popravka brodice iznose 12.800,00 eura bez PDV-a.

Slijedom navedenog, prvostupanjski je sud ocijenio tužbeni zahtjev osnovanim u iznosu od 10.850,00 eura zajedno s pripadajućim zakonskim zateznim kamatama (čl. 22. st. 4. i čl. 29. i čl. 1086. ZOO-a). Što se tiče preostalog dijela tužbenog zahtjeva u iznosu od 1.950,00 eura, prvostupanjski je sud odbio tužbeni zahtjev kao neosnovan.

Tužitelj je podnio žalbu protiv presude navodeći kako je prvostupanjski sud pogrešno primijenio materijalno pravo, odbijajući tužbeni zahtjev kao neosnovan za iznos od 1.950,00 eura koji predstavlja iznos PDV-a na utvrđeni iznos štete. Smatrao je kako ima pravo na naknadu pune štete, uključujući i isplatu iznosa PDV-a na tu štetu (čl. 1085. i 1090. ZOO-a). Stoga je tužitelj predložio drugostupanjskom sudu da preinači pobijanu presudu u njegovu korist.

U odgovoru na žalbu tuženik je osporio žalbene navode tužitelja i istaknuo da je prvostupanjski sud dosudio tužitelju utvrđeni iznos štete od 12.800,00 eura. Iz predračuna koji je tužitelj predočio u spisu, nalazio se samo iznos od 12.800,00 eura. Osim toga, tužitelj u tužbenom zahtjevu nije zatražio iznos PDV-a. U nastavku odgovora na žalbu, tuženik je ponovio, odnosno dodatno obrazložio navode iz svoje žalbe.

Tuženik je protiv presude u točki I. i II. njezine izreke podnio žalbu, navodeći u njoj da prvostupanjski sud nije obrazložio zašto je odbio njegov prijedlog za izvođenje dokaza očevidom na mjesta događaja radi dokazivanja uzroka štete na tužiteljevoj brodici. Prema mišljenju tuženika, tužitelj je morao dokazati da je šteta nastala za vrijeme boravka njegove brodice u marini. Osim toga, tužitelj nije dokazao pretpostavke tuženikove odgovornosti za štetu koje se moraju ispuniti kumulativno. Tuženik je, također, smatrao kako je prvostupanjski sud, pri donošenju pobijane presude, pogrešno primijenio materijalno pravo i donio pogrešnu odluku o troškovima postupka. Slijedom navedenog, tuženik je predložio drugostupanjskom sudu da ukine pobijanu presudu i ili da je preinači i odbije tužbeni zahtjev.

VTS je odlučio da tužiteljeva i tuženikova žalba nisu osnovane.

Nakon što je pobijana presuda ispitana na temelju odredbe čl. 365. st. 2. Zakona o parničnom postupku (*Narodne novine*, br. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 123/2008, 57/2011, 148/2011 – pročišćeni tekst, 25/2013, 89/2014 i 70/2019; u nastavku: ZPP) u granicama dopuštenih žalbenih razloga i pazeći pritom, po službenoj dužnosti, na bitne povrede odredaba parničnog postupka iz odredbe čl. 354. st. 2., 4., 8., 9, 11, 13 i 14 ZPP-a, kao i na pravilnu primjenu materijalnog prava, VTS je utvrdio da je presuda pravilna i zakonita.

VTS je smatrao kako je prvostupanjski sud dao valjane i detaljne razloge za svoju odluku te da je donio pobijanu presudu na temelju pravilno utvrđenog činjeničnog stanja, pravilno ocijenjenih rezultata dokaznog postupka i uz pravilnu primjenu materijalnog prava. Stoga se VTS poziva na njezino obrazloženje.

U obrazloženju presude VTS ističe da se tuženik bavi različitim djelatnostima, među kojima je i pružanje usluge vezivanja brodova i brodica na morskim

vezovima te njihovo čuvanje. Djelatnost upravljanja marinom je složena i nosi sa sobom prava, dužnosti i odgovornosti, kao i brojne rizike.

VTS je istaknuo kako je svaka stranka dužna iznijeti činjenice i predložiti dokaze na kojima temelji svoj zahtjev ili s kojima pobija navode i dokaze protivnika (čl. 219. ZPP-a). Ako sud na temelju izvedenih dokaza (čl. 8. ZPP-a) ne može sa sigurnošću utvrditi neku činjenicu, o postojanju te činjenice zaključit će primjenjujući pravila o teretu dokazivanja (čl. 221.a ZPP-a).

Prvostupanjski je sud ocijenio tuženikove prigovore na nalaz i mišljenje vještaka kao neosnovane. VTS je smatrao kako je prvostupanjski sud ispravno utvrdio da se PDV-e obračunava na promet roba i usluga, ali u pravilu ne i na iznos naknade za štetu. Ako oštećenik preda brod brodopopravljaču na popravak te mu brodopopravljač nakon popravka izda račun s PDV-om koji oštećenik mora platiti, oštećenik bi imao pravo na puni iznos obeštećenja od štetnika za koji je njegova imovina umanjena zbog štete (čl. 1085. st. 1. i čl. 1090. ZOO-a). U ovom postupku, do zaključenja glavne rasprave, tužitelj nije dokazao da je pri popravku oštećenja na brodici platio PDV-e. U tom slučaju, VTS je smatrao kako je prvostupanjski sud pravilno odbio ovaj dio tužbenog zahtjeva kao neosnovan (čl. 219. st. 1. ZPP-a).

VTS je tumačio ugovor o vezu i zaključio kako se tuženik tijekom važenja ugovora obvezao čuvati i paziti brodicu u marini te nadoknaditi štetu nastalu na brodu za vrijeme njegova čuvanja, za koju bi on bio odgovoran prema zakonu. Odredbom ugovora utvrđeni su određeni razlozi za koje tuženik ne bi bio odgovoran za štetu, uključujući i radnje trećih osoba. VTS je smatrao da tuženik nije ispunio svoju ugovornu obvezu čuvanja tužiteljeve brodice jer je oštećena za vrijeme trajanja ugovora. Odgovornost tuženika za štetu koju je tužitelj pretrpio pretpostavlja se u ovoj pravnoj stvari. Prema mišljenju VTS-a, rezultati cjelokupnog dokaznog postupka pred prvostupanjskim sudom upućuju, kao što je utvrdio i prvostupanjski sud, na činjenicu da tuženik do zaključenja glavne rasprave nije dokazao kako bi ta šteta nastala bez njegove krivnje, odnosno nije dokazao postojanje okolnosti koje bi isključile njegovu odgovornost kao čuvara za nastalu štetu (čl. 342. st. 5. i čl. 343. ZOO-a i čl. 12. ugovora).

VTS se pozivao na odredbe ZOO-a kojima je propisano da je sudionik u obveznom odnosu dužan ispuniti svoju obvezu i odgovoran je za njezino ispunjenje (čl. 9. ZOO-a). Kada dužnik ne ispuni svoju obvezu ili zakasni s njezinim ispunjenjem, vjerovnik ima pravo zahtijevati nadoknadu štete koju je zbog toga pretrpio (čl. 342. st. 2. ZOO-a). Za štetu iz odredbe čl. 342. st. 2. ZOO-a, dužnik odgovara na temelju pretpostavljene krivnje i može se osloboditi od odgovornosti za štetu ako dokaže da je ona nastala bez njegove krivnje.

U ovoj pravnoj stvari nije na tužitelju teret dokazivanja o tome tko je odgovoran za nastalu štetu na njegovoj brodici. Pretpostavlja se tuženikova ugovorna odgovornost za štetu (čl. 342. st. 2. u vezi s čl. 9. ZOO-a). Zato je na njemu teret dokaza da on ne odgovara za ovu štetu (čl. 219. i st. 221.a ZPP-a). Tuženik, po ocjeni VTS-a, u tome nije uspio do zaključenja glavne rasprave.

Izvođenje dokaza očevidom na mjestu događaja te vještačenjem po sudskom vještaku pomorske struke o utvrđivanju uzroka štete i isključenju tuženikove odgovornosti je, prema ocjeni VTS-a, nakon deset godina od nastanka predmetne štete, bespredmetno i samo bi doprinijelo odugovlačenju postupka. VTS je istaknuo kako je tuženik od dana nastanka štete imao na raspolaganju brojne mogućnosti pravodobnog utvrđivanja uzroka štete za koje tvrdi da ga ekskulpira od odgovornosti u ovoj pravnoj stvari.

O tuženikovoj žalbi VTS je odlučio na temelju čl. 368. st. 1. ZPP-a. Zahtjevi stranaka za naknadu troškova odbijeni su kao neosnovani jer su ocijenjeni kao radnje koje nisu potrebne za vođenje ovog postupka, a to je odlučivanje o žalbi.

Prema ocjeni VTS-a, prvostupanjski je sud donio pravilnu i zakonitu presudu, pa su odbijene kao neosnovane tuženikova i tužiteljeva žalba te je potvrđena prvostupanjska presuda.

Bilješka:

U ovom sporu sud je tumačenjem ugovora o vezu zaključio kako se tuženik tijekom važenja ugovora obvezao čuvati brodicu u marini te nadoknaditi štetu nastalu na brodici za vrijeme njezina čuvanja. Treba istaknuti da je u ovom predmetu primijenjeno materijalno pravo koje je važilo prije novele Pomorskog zakonika iz 2019. godine, kojom je ugovor o nautičkom vezu postao novi imenovani ugovor hrvatskog prava (Pomorski zakonik, čl. 673.j do 673.v, *Narodne novine*, br. 17/2019). Zakonodavac je vjerno prenio i implementirao specifičnosti ugovora o vezu koje su se izgradile i ustalile u poslovnoj praksi hrvatskih marina. Rezultati poslovne prakse hrvatskih marina pokazuju da prema aktualnoj praksi i ponudi, većina hrvatskih marina ne preuzima punu odgovornost za plovila na vezu u smislu odgovornosti za njihovo čuvanje, nego se primjenjuje model najma veza ili najma veza i nadzora plovila na vezu.[1] Prema pozitivno-pravnom uređenju

[1] Vidi radove, Skorupan Wolff, V.; Padovan, A. V., Postoje li elementi ostave u ugovorima o vezu u lukama nautičkog turizma?, Ćorić, D.; Radionov, N.; Čar, A. (ur.), *Conference Book of Proceedings of the 2nd International Conference on Transport and Insurance Law, INTRANSLAW Zagreb 2017*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2017, str. 313-353; Skorupan Wolff, V.; Padovan, A. V., Zašto se na ugovor o vezu ne bi trebale primjenjivati zakonske odredbe o ugovoru o uskladištenju?, Amižić Jelovčić, P.; Klarić, M.; Bolanča, D.; Skorupan

ugovora o vezu tužitelj treba dokazati štetu, činjenicu da je šteta nastala dok je plovio bilo u marini na vezu, te da na plovilu, u trenutku štetnog događaja, nisu boravili korisnik veza ili osobe koje je ovlastio korisnik. Tada se krivnja marine (pružatelja usluge veza) pretpostavlja, što znači da ona treba dokazati da je šteta nastala bez njezine krivnje. Važno je napomenuti kako u praksi postoje razlozi koji mogu dovesti do oštećenja ili uništenja plovila na vezu, za koje marina (pružatelj usluge veza) nije odgovorna. Primjerice, uzrok nastanka štete može biti sudar plovila na vezu s drugim plovilom ili udar plovila na vezu u obalu, oštećenje ili uništenje plovila zbog zapuštenosti ili neodržavanosti, štetna radnja treće osobe, poput vlasnika susjednog plovila koji pravilno i sigurno ne veže svoje plovilo pa, primjerice, zbog nevremena dođe do popuštanja konopa i direktnog kontakta trupova plovila, poprečnog udaranja ili uzdužnog struganja i sl. Brižljivom ocjenom dokaza uz poštivanje pravila o teretu dokazivanja, sud u svakom konkretnom slučaju treba pažljivo ocijeniti sve činjenice i dokaze kako bi pravilno primijenio materijalno pravo u konkretnom slučaju.

Dr. sc. Vesna Skorupan Wolff, znanstvena savjetnica u trajnom zvanju
Jadranski zavod Hrvatske akademije znanosti i umjetnosti

Wolff, V.; Padovan, A. V.; Bulum, B.; Grbec, M.; Musi, M. (ur.), *Zbornik radova 3. međunarodne znanstvene konferencije pomorskog prava – Suvremeni izazovi pomorske plovidbe*, Pravni fakultet Sveučilišta u Splitu, Split, 2021, str. 263-294. Popis ostale literature koja se odnosi na iscrpna doktrinarna tumačenja koncepcijskih i pravno-teorijskih pitanja te sudske prakse u vezi s ugovorima o vezu, dostupan je na poveznici http://www.delicromar.hazu.hr/en/publications/.

Summary:

LIABILITY FOR DAMAGE INCURRED BY A VESSEL AT BERTH IN A MARINA: BURDEN OF PROOF

High Commercial Court of the Republic of Croatia
Pž-6300/2017-4, 9 March 2020

A berth user as the plaintiff in a dispute sues for indemnity for damage to his boat. At the time of the damage, the boat was at berth at sea in the respondent´s marina on the basis of an annual berth contract concluded between the parties to the dispute. In this legal matter, it is not the plaintiff´s burden of proof as to who is responsible for the damage caused to his boat. The respondent´s contractual liability for damages is presumed, so he bears the burden of proving that he is not liable for damages. The respondent must either prove that the damage to the plaintiff´s boat did not occur as a result of his own fault or prove the existence of circumstances that exclude his liability.

PLOVILO NA VEZU NIJE OPASNA STVAR

VISOKI TRGOVAČKI SUD REPUBLIKE HRVATSKE
Presuda br. Pž-4747/2019-3 od 11. veljače 2022.
Vijeće: Marina Veljak, predsjednica vijeća, Kristina Saganić, sutkinja izvjestiteljica i Lenka Ćorić, članica vijeća

> *Brodovi ili brodice dok plove same po sebi, u pravilu, ne predstavljaju opasnost. Opasnost mogu predstavljati određene djelatnosti na brodu ili brodici ili u vezi s njima. Brodovi i brodice na morskom vezu, u usporedbi s onima u plovidbi, predstavljaju još manju opasnost za okoliš, a plovila smještena na suhom vezu praktički ne predstavljaju nikakvu opasnost za okoliš.*

U prvostupanjskom je postupku Trgovački sud u Rijeci, presudom poslovni broj P-2590/14-113 od 19. travnja 2019. godine, odlučio o tužbenom zahtjevu za naknadu štete koju je tužitelj, kao oštećenik i vlasnik plovila K., potraživao za totalnu štetu nastalu na njegovu plovilu zbog požara koji se dogodio u marini P. Prvotuženik i drugotuženik su u sporu vlasnici brodice M. iz koje je buknuo požar i doveo do uništenja tužiteljeva plovila, trećetuženik je njihov osiguratelj, četvrtotuženik je marina s kojom je tužitelj u ugovornom odnosu iz ugovora o vezu, a petotuženik je osiguratelj četvrtotuženikove odgovornosti.

Nakon opsežnog dokaznog postupka, prvostupanjski je sud zaključio da prvotuženik, drugotuženik i trećetuženik nisu odgovorni za štetu pa je, u odnosu na njih, odbio tužbeni zahtjev za isplatu iznosa od 183.958,40 eura s kamatama. Što se tiče četvrtotuženika (marine) i petotuženika (osiguratelja odgovornosti marine), tužbeni je zahtjev u pretežnom dijelu prihvaćen pa im je naloženo plaćanje iznosa od 155.043,75 eura s kamatama, te četvrtotuženiku i iznos od 995,73 eura s kamatama. Tužbeni je zahtjev protiv navedenih tuženika djelomično odbijen, u odnosu na četvrtotuženika za iznos od 27.918,92 eura s kamatama i na petotuženika za iznos od 28.914,65 eura s kamatama. Što se tiče parničnih troškova, odlučeno je da su četvrtotuženik i petotuženik solidarno obvezni platiti tužitelju iznos od 359.142,96 kuna te je odbijen tužiteljev zahtjev za iznos od 35.000,00 kuna. Tužitelj je, također, obvezan naknaditi prvotuženiku, drugotuženiku i trećetuženiku iznos od 307.555,00 kuna, a njihov je zahtjev za trošak od 60.925,00 kuna odbijen.

U provostupanjskom je postupku utvrđeno kako je u marini P. izbio požar na brodici M. koja je u vlasništvu prvotuženika i drugotuženika, zbog kvara na

električnoj instalaciji dvanaestvoltne mreže iznad akumulatorskih baterija, odnosno oštećenja plastične izolacije vodiča. Uzrok kvara nije bilo nedostatno održavanje plovila niti je kvar bilo moguće uočiti i spriječiti. Požar se zbog vjetra i lako zapaljivih materijala proširio s te brodice na još devetnaest brodica na doku D3, pri čemu je tužiteljeva brodica K. potpuno uništena. Prvostupanjski je sud zaključio da prvotuženik, drugotuženik i trećetuženik nisu odgovorni za nastalu štetu jer do požara nije došlo zbog njihovih radnji ili propusta. Sud je zauzeo stajalište kako su plovila na suhom vezu opasne stvari zbog svojih karakteristika, položaja u marini i činjenice da nisu pod potpunom kontrolom onog tko ih je dužan nadzirati. Prema mišljenju suda, do požara nije došlo zbog skrivene mane ili skrivenog svojstva brodice s koje je buknuo požar (čl. 1066. Zakona o obveznim odnosima, *Narodne novine*, br. 35/2005, 41/2008, 125/2011, 78/2015, 29/2018, 126/2021; u nastavku: ZOO) pa je zbog toga isključena odgovornost njezina vlasnika (prvotuženika i drugotuženika), a time i njihova osiguratelja.

Na rješavanje spora prvostupanjski je sud primijenio odredbe Ugovora o vezu, Opće uvjete poslovanja četvrtotuženika (marine) i odredbe ZOO-a o ostavi i uskladištenju te je zaključio da je za štetu odgovoran četvrtotuženik (marina). Sud je, također, zaključio kako četvrtotuženik i petotuženik nisu dokazali razloge za oslobođenje od odgovornosti te da odgovaraju za štetu (čl. 964. i 965. ZOO-a). O visini štete, prvostupanjski je sud odlučio na temelju izvođenja dokaza vještačenja, a o parničnim troškovima primjenom čl. 154. i 155. Zakona o parničnom postupku (*Narodne novine*, br. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014 i 70/2019; u nastavku: ZPP).

Protiv prvostupanjske presude žalbu su izjavili tužitelj, četvrtotuženik i petotuženik. Stranke su se u žalbama protivile brojnim utvrđenjima prvostupanjskog suda, osobito zaključku o uzroku štete i odgovornosti za tu štetu. Tužitelj je pobijao presudu žalbom ističući sve žalbene razloge te je predložio da Visoki trgovački sud (u nastavku: VTS) preinači presudu prihvaćanjem tužiteljeva zahtjeva u cijelosti, podredno ukine presudu i vrati predmet prvostupanjskom sudu na ponovno suđenje. Tužitelj se, također, protivio zaključku prvostupanjskog suda o neodgovornosti prvotuženika, drugotuženika i trećetuženika te odbijanju dijela tužbenog zahtjeva i odluci o parničnim troškovima. Tvrdio je kako je pogrešan zaključak prvostupanjskog suda o nepostojanju skrivene mane brodice M., što je presudno za odgovornosti vlasnika opasne stvari (čl. 1066. ZOO-a). Smatrao je kako plovilo M. nije bilo pripremljeno za zimovanje jer je u tanku bilo goriva, pa su vlasnici bili dužni otpojiti akumulator ili obavijestiti marinu (četvrtotuženika) da to nisu

učinili. Uzrok požara bio je kratki spoj na dijelu električne instalacije iznad akumulatorskih baterija, koji se ne bi dogodio da je baterija bila fizički otpojena. Stoga je tužitelj tvrdio kako je uzrok požara bio skriveni nedostatak plovila. Istaknuo je da je prvostupanjski sud utvrdio visinu štete na temelju vještačenja vještaka brodograđevne struke I. Š. koji je kao osnovu uzeo podatke iz kataloga *Schwacke Marine Liste*. To je najrelevantniji izvor podataka za procjenu, ali je vještak drukčije obračunao deprecijaciju od vrijednosti iz kataloga. Po katalogu, vrijednost plovila nakon petnaest godina starosti stagnira između 48 % i 62 % od početne vrijednosti, što znači da je vrijednost tužiteljeva plovila, ako se računa srednja vrijednost, 139.700,00 eura, odnosno 167.640,00 eura s PDV-om. Ako se tomu pribroje još dvije godine starosti tužiteljeva plovila, uvećano za vrijednost opreme i uz primjenu koeficijenata, šteta iznosi približno 181.744,00 eura.

Četvrtotuženik (marina P.) je žalbom pobijao presudu u dijelu u kojem je usvojen tužbeni zahtjev te je istaknuo sve žalbene razloge i predlagao VTS-u da presudu u pobijanom dijelu preinači ili ukine te predmet vrati prvostupanjskom sudu na ponovno suđenje. U žalbi je istaknuo da je upitna tužiteljeva legitimacija jer on kao suvlasnik nije ovlašten samostalno tražiti naknadu štete, a potvrda carinskog tijela nije dokaz o vlasništvu niti su pribavljeni podaci o isplati osiguranja. Četvrtotuženik je u žalbi istaknuo da je prvostupanjski sud propustio utvrditi sve činjenice relevantne za odluku o odgovornosti za štetu te je pogrešno zaključio da je plovilo opasna stvar, a djelatnost marine opasna djelatnost. Marina nije imala u posjedu plovilo, nije bila ovlaštena koristiti plovila na vezu i nije mogla ulaziti u tuđa plovila i ispitivati je li vlasnik pravilno instalirao određene instalacije u pojedino plovilo. Nadalje, u žalbi je istaknuo da ne postoji doprinos marine šteti jer su plovila bila pravilno smještena, a djelatnost marine u pružanju usluge veza nije opasna djelatnost. Zbog toga je četvrtotuženik smatrao kako je prvostupanjski sud nepravilno zaključio o njegovoj ugovornoj odgovornosti. Pored toga, četvrtotuženik je u žalbi istaknuo da je sud nepravilno primijenio materijalno pravo kada je primijenio odredbe ZOO-a o uskladištenju. Napominjao je kako su vještaci potvrdili da je marina propisno opremljena protupožarnom opremom, da su djelatnici obučeni za postupanje u slučaju požara te da su uočili požar u nastajanju i poduzeli odgovarajuće mjere, ali, bez obzira na njihovo brzo djelovanje, požar se brzo širio zbog lako zapaljivih materijala i vjetra, te se može zaključiti kako nije bila riječ o četvrtotuženikovoj običnoj nepažnji. U žalbi se, također, ističe: da odluka o troškovima postupka nije pravilna jer je prvostupanjski sud neosnovano povećao naknadu za zastupanje odvjetniku za 100 %; nije utvrdio koji su to obrazloženi podnesci s pravom na puni iznos naknade; neosnovano je tužitelju dosudio trošak za sastav zahtjeva za suđenje u

razumnom roku; na svim ročištima nije se raspravljalo o glavnoj stvari i trošak pristupa ročištu za objavu presude nije bio potreban niti opravdan.

Petotuženik je žalbom pobijao presudu isticanjem svih žalbenih razloga, s prijedlogom da VTS u cijelosti odbije tužbeni zahtjev. U žalbi je ponavljao tvrdnje koje je iznosio i tijekom postupka, osporavajući tužiteljevu aktivnu legitimaciju. Tvrdio je, jednako kao i njegov osiguranik (četvrtotuženik), kako je do požara došlo zbog unutrašnjeg svojstva plovila na koje marina nije mogla utjecati, a sud je propustio primijeniti odredbe ugovora o vezu i Opće uvjete poslovanja marine (četvrtotuženika). Ugovor o vezu je prvostupanjski sud nepravilno tumačio kao ugovor o ostavi, odnosno ugovor o uskladištenju. Petotuženik je smatrao kako marina nije bila odgovorna za štetu koja je nastala zbog kvara na plovilu M. jer marina nije prouzročila niti mogla spriječiti kvar. Plovilo u marini koje ima pun spremnik goriva nije opasna stvar, a vlasnik plovila M. treba odgovarati za štetu.

Petotuženik je tvrdio da tužitelj nema pravo na direktnu tužbu te da ugovor s četvrtotuženikom ne pokriva odgovornost za cjelokupno poslovanje, nego samo onu štetu koja proizlazi iz izvršenja ugovora o vezu i servisne djelatnosti marine. Petotuženik se protivio i visini iznosa štete, kao i odluci o trošku jer je smatrao kako je pogrešno utvrđen uspjeh u parnici te da tužitelj nije imao pravo na naknadu troška za sastav zahtjeva za zaštitu prava za suđenje u razumnom roku, kao ni na povećanje naknade od 100 %. Četvrtotuženik je odgovorio na tužiteljevu žalbu osporavajući osnovanost žalbenih navoda, a prvotuženik, drugotuženik i trećetuženik su, također, dostavili odgovore na žalbe tuženika u kojima osporavaju u cijelosti sve žalbene navode iz obje žalbe.

VTS je odlučio da žalbe nisu osnovane, osim u dijelu odluke o parničnim troškovima. Odbio je žalbe tužitelja, četvrtotuženika i petotuženika kao neosnovane te potvrdio presudu prvostupanjskog suda. Prvostupanjska je presuda preinačena te je odlučeno da se odbije tužiteljev zahtjev da mu četvrtotuženik i petotuženik naknade troškove parničnog postupka u iznosu od 180.290,20 kuna. Zahtjevi stranaka za naknadu troškova žalbenog postupka odbijeni su kao neosnovani, i to: tužiteljev zahtjev za sastav žalbe u iznosu od 43.750,00 kuna, kao i zahtjev četvrtotuženika za sastav žalbe u iznosu od 31.875,00 kuna te za sastav odgovora na žalbu u iznosu od 27.500,00 kuna.

VTS je pobijanu presudu ispitao na temelju odredbe čl. 365. ZPP-a, u granicama dopuštenih žalbenih razloga, pazeći po službenoj dužnosti na bitne povrede odredaba parničnog postupka iz čl. 354. st. 2. t. 2., 4., 8., 9., 11., 13. i 14. ZPP-a, kao i na pravilnu primjenu materijalnog prava.

VTS je zaključio da u ovom postupku nije sporno da je 22. prosinca 2012. godine došlo do požara u marini P., na suhom doku D3, u kojoj je izgorjelo ukupno dvadeset plovila, među kojima i tužiteljeva jahta K. Pritom je u požaru izgorjela i motorna jahta M. u vlasništvu prvotuženika i drugotuženika. Petotuženik je osiguratelj djelatnosti četvrtotuženika, a trećetuženik osiguratelj prvotuženika i drugotuženika. Tužitelj je bio u ugovornom odnosu s četvrtotuženikom, s osnove ugovora o vezu, jednako kao prvotuženik i drugotuženik.

Tužitelj, prvotuženik i drugotuženik bili su u ugovornom odnosu s četvrtotuženikom na temelju ugovora o vezu.

Suprotno žalbenim navodima, VTS je zaključio da je prvostupanjski sud, nakon opsežnog dokaznog postupka, pravilno i potpuno utvrdio činjenično stanje te je u obrazloženju pobijane presude odgovorio na sve brojne prigovore stranaka, a u konačnici, na osnovi pravilnog zaključka o odlučnim činjenicama, prvostupanjski je sud donio pravilnu i zakonitu odluku o tužbenom zahtjevu. VTS je posebno istaknuo kako ne prihvaća zaključak prvostupanjskog suda u dijelu u kojem je zaključeno da je brodica na vezu opasna stvar, a djelatnost marine opasna djelatnost. VTS je smatrao kako se u konkretnom slučaju ne radi o brodici kao opasnoj stvari, u smislu odredaba Zakona o obveznim odnosima.

U odnosu na uzrok štete, VTS je zaključio da je prvostupanjski sud pravilnom ocjenom izvedenih dokaza utvrdio kako je do požara, koji je prouzročio predmetnu štetu, došlo zbog kvara na električnoj instalaciji dvanaestvoltne mreže, iznad akumulatorskih baterija, odnosno oštećenja plastične izolacije vodiča na plus (+) i minus (–) vodičima, na motornoj jahti M. u vlasništvu prvotuženika i drugotuženika. Sudski su se vještaci suglasili oko toga da su strujni krugovi kaljužne pumpe, solarnog panela s regulatorom punjenja baterija te eventualno upravljanje mostom koji se nalaze između glavne sklopke i akumulatorskih baterija, ostali pod naponom nakon isključenja glavne sklopke na plovilu M. Prema utvrđenju vještaka, nesporno je kako je uzrok požara bio kratki spoj na dijelu električne instalacije iznad akumulatorskih baterija koja se nalazila pod njihovim naponom, odnosno kvar na tom dijelu električne instalacije. Vještaci su u nalazu i mišljenju istaknuli da se kvar električne instalacije, odnosno oštećenje izolacije vodiča električnih instalacija ne može utvrditi vremenski prije požara, a pogotovo nakon požara. Navedeni nedostatak nije moguće sa sigurnošću uočiti i spriječiti ni pregledima ni ispitivanjima, osobito ne vizualnim pregledom električne instalacije. Suglasan je zaključak sudskih vještaka da se radilo o nedostatku koji nije vezan za tehničke karakteristike plovila. Zbog oštećenja izolacije došlo je do kratkog spoja na plus vodiču (+) i na minus vodiču (–), odnosno iskrenja s visokim temperaturama (iznad 1080 °C, kasnije i više od 3500 °C), što je

izazvalo zapaljenje plastične izolacije vodiča, odnosno zapaljenje gorivih materijala od užarenih iskri i širenje požara na zapaljivi materijal u okolini. Od tog se mjesta požar dalje širio te ga je primijetio djelatnik marine. Vještaci su smatrali kako nije bio utvrđen nijedan drugi mogući uzrok požara, kao što su samozapaljenje, mehaničke iskre, prirodne pojave poput groma ili munje, statički elektricitet, ionizacijsko zračenje ili namjerno izazivanje paljenja, koji bi ukazivali na mogući uzrok požara na tim plovilima. Prema nalazu vještaka, nije se radilo o tehničkom nedostatku brodice te ga nije bilo moguće uočiti i spriječiti periodičkim propisanim pregledima i ispitivanjima, kao ni vizualnim pregledima.

VTS je smatrao kako je prvostupanjski sud, oslanjajući se na rezultate kombiniranog vještačenja te uvažavajući i rezultate svih ostalih dokaza (iskazi svjedoka i stranaka), pravilno ocijenio sve okolnosti kada je odlučio prihvatiti rezultate vještačenja o uzroku požara. Dakle, do kvara na električnoj instalaciji nije došlo kao posljedica lošeg održavanja brodice ili opreme, odnosno kao posljedica neodržavanja, zapuštenosti ili dotrajalosti. Vlasnici brodice M. uredno su i redovito održavali svoje plovilo te ne postoji dokaz o njihovoj skrivljenoj radnji koja bi doprinijela štetnom događaju. Nema dokaza o skrivenom nedostatku plovila koji je mogao uzrokovati požar, posebice kako je to tužitelj tvrdio u žalbi. Stoga je VTS smatrao kako je prvostupanjski sud ispravno odbio tužbeni zahtjev protiv vlasnika plovila iz kojeg je požar krenuo, kao i protiv njihova osiguratelja. Pritom je VTS istaknuo kako su vlasnici motorne jahte M., jednako kao i tužitelj, ostavili svoja plovila kod četvrtotuženika, vjerujući da su sigurni na suhom vezu, te su postupali u skladu s uputama četvrtotuženika koji je brodice smjestio onako kako je smatrao prikladnim. U vrijeme nastanka požara, oni, kao i tužitelj nisu bili na mjestu događaja, za razliku od četvrtotuženika, pa ni na koji način nisu mogli doprinijeti nastanku štete ili njezinom eventualnom smanjenju.

VTS je smatrao kako je za predmetni štetni događaj, kao što je i prvostupanjski sud zaključio, odgovoran četvrtotuženik. Prema mišljenju suda, uporište za takav zaključak nalazi se u rezultatima cjelokupnog dokaznog postupka, iako je prvostupanjski sud pogrešno zaključio da se radi o šteti od opasne stvari, odnosno opasne djelatnosti (čl. 1045. st. 3., čl. 1063. ZOO-a). Opasnost stvari ocjenjuje se u odnosu na njezinu opasnost za okolinu. Brodovi ili brodice dok plove na širokim prostranstvima same po sebi, u pravilu, ne predstavljaju opasnost. Opasnost mogu predstavljati određene djelatnosti na brodu ili u vezi s brodom. Plovilo na morskom vezu predstavlja još manju opasnost za okoliš, a prema mišljenju VTS-a, od plovila na suhom vezu praktički ne prijeti nikakva opasnost za okoliš. Nadalje, VTS je smatrao kako rezultati dokaznog postupka upućuju na to da su prvi i drugi tuženik, jednako kao i tužitelj, povjerili svoja plovila

četvrtotuženiku na čuvanje i nadzor te su mu za to plaćali naknadu na temelju ugovora o korištenju veza. Unatoč tomu, četvrtotuženik je tvrdio kako nema ovlasti nad brodicama dok se nalaze na suhom vezu. Međutim, prema mišljenju VTS-a, četvrtotuženik nije ispunio ugovorne obveze svojim postupanjem i propuštanjem, a njegove tvrdnje kako nema ovlasti nad brodicama na suhom vezu, demantirao je sadržaj odredaba njegovih Općih uvjeta pod kojima je zaključen i ugovor o vezu s tužiteljem:

- člankom 8. st. 3. Općih uvjeta Ugovora o korištenju stalnog veza, propisano je da uz potpisani Ugovor o korištenju stalnog veza, korisnik veza je dužan marini predati kopiju dokumenta kojim dokazuje vlasništvo, ključeve plovila te uredno popunjenu listu inventara (popis opreme plovila),

- člankom 8. st. 3. Općih uvjeta Ugovora o korištenju stalnog veza, propisano je da je plovilo pod nadzorom kad je plovilo privezano na vez i kad je korisnik veza predao marini dokumentaciju navedenu u prethodnom stavku ovog članka i ključeve plovila,

- članak 9. st. 3. Općih uvjeta koji govori o obvezama marine propisuje da se marina obvezuje da će se pažnjom dobrog gospodarstvenika, u skladu s pravilima struke, brinuti o tome da vez koji se daje na korištenje bude ispravan i siguran u tehničkom i nautičkom smislu te odgovarajući za određeno plovilo, i kao takav održavan za svo vrijeme trajanja Ugovora. Posebno, ovo uključuje obvezu marine da u skladu s pravilima struke i pažnjom dobrog gospodarstvenika brine o ispravnosti opreme veza te da ima zaposlen dovoljan broj kvalificiranih djelatnika osposobljenih za poslove vezane za održavanje, nadzor i brigu o tehničkoj sigurnosti i ispravnosti vezova,

- članak 9. st. 5. Općih uvjeta koji govori o obvezama marine propisuje da se marina obvezuje čuvati od korisnika veza preuzetu dokumentaciju i ključeve plovila,

- članak. 11. st. 1. Općih uvjeta koji govori o odgovornosti za štetu na plovilu i opremi, propisuje da marina, u okviru svojih obveza utvrđenih Općim uvjetima, odgovara za štetu nastalu na plovilu i opremi za koje postoji Ugovor o korištenju veza, pod uvjetom da je šteta nastala u vrijeme dok je marina imala nadzor nad plovilom u smislu čl. 8. Općih uvjeta, samo ako je šteta nastala kao posljedica propuštanja dužne pažnje marine, odnosno njezinih djelatnika.

VTS je u obrazloženju presude istaknuo da se obveze četvrtotuženika (marine P.) i korisnika veza izjednačavaju, neovisno o tome radi li se o ugovoru o morskom ili suhom vezu. Prema mišljenju drugostupanjskog suda, a to je i mišljenje prvostupanjskog suda, ugovor o vezu poistovjećuje se s ugovorom o

ostavi pa je potrebno primijeniti odgovarajuće odredbe propisane općim odredbama obveznog prava. Ugovor o nautičkom vezu postao je imenovani ugovor tek posljednjim izmjenama Pomorskog zakonika (*Narodne novine*, br. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015 i 17/2019; u nastavku: PZ), pa se u konkretnom slučaju te odredbe ne mogu primijeniti. Odredbom čl. 725. st. 1. ZOO-a, propisano je da se ostavoprimac obvezuje primiti stvar od ostavodavca te je čuvati i vratiti kad je ovaj bude zatražio. Ostavoprimac je dužan čuvati stvar kao svoju vlastitu, ako je ostava uz naknadu kao dobar gospodarstvenik, odnosno kao dobar domaćin (čl. 727. st. 1. u vezi s čl. 10. st. 1. ZOO-a), dakle, pojačanom pozornošću. Prema mišljenju VTS-a, čuvanje je stvari temeljna četvrtotuženikova obveza jer se s njom ostvaruje osnovni cilj tog ugovora. Četvrtotuženik je preuzeo tužiteljevu brodicu na čuvanje, pritom se obvezao ispuniti ugovor kako glasi, uključujući povećanu pažnju pravnog subjekta čija je to gospodarska djelatnost. Njegova je obveza bila vratiti tužitelju njegovu stvar kad on to zatraži, ali s obzirom na to da je stvar u potpunosti uništena zbog požara u konkretnom štetnom događaju, on to više nije mogao učiniti, pa je tužitelju bio dužan naknaditi štetu koju je on zbog toga pretrpio (čl. 342. ZOO-a).

VTS je istaknuo da su tuženici u žalbi bezuspješno ukazivali na pogrešnu primjenu materijalnog prava jer je prvostupanjski sud pravilno primijenio odgovarajuće odredbe ZOO-a i sadržaj ugovornog odnosa među strankama. Povrh svega, prvostupanjski je sud osnovano uzeo u obzir i činjenicu da je četvrtotuženik ovlaštenik koncesije luke nautičkog turizma (čl. 40., 42. i 80. Zakona o pomorskom dobru i morskim lukama, *Narodne novine*, br. 158/2003, 100/2004, 141/2006, 38/2009, 123/2011 i 56/2016). Četvrtotuženik upravlja lukom nautičkog turizma te je odgovoran za održavanje reda u luci, pružanje turističkih usluga u nautičkom turizmu, kao i drugih usluga u turističkoj potrošnji, u skladu sa Zakonom o pružanju usluga u turizmu (*Narodne novine*, br. 68/2007 i 88/2010).

Usluge nautičkog turizma koje pružaju luke nautičkog turizma su, među ostalim, prihvat, čuvanje i održavanje plovnih objekata na vezu u moru i suhom vezu (čl. 45. Zakona o pružanju usluga u turizmu). Obveza je luke nautičkog turizma, odnosno subjekta koji s njom upravlja, pružiti korisniku veza uslugu veza i smještaj plovila, a korisnik veza obvezan je platiti naknadu za tu uslugu. Četvrtotuženik se obvezao, pažnjom dobrog gospodarstvenika, brinuti o tehničkoj i nautičkoj ispravnosti veza te je odgovoran za štetu nastalu na plovilu i opremi za koje postoji ugovor o korištenju veza, a koja je nastala dok je imao nadzor nad plovilom. Tužitelj je povjerio svoje plovilo četvrtotuženiku (marini P.), s njim ugovorio smještaj plovila, uredno mu platio naknadu i očekivao kako će njegovo plovilo biti zaštićeno i sigurno.

VTS je zaključio da petotuženik odgovara kao četvrtotuženikov osiguratelj, a zakonom je propisano tužiteljevo pravo na izravnu tužbu protiv osiguratelja (čl. 964. i 965. ZOO-a), na što se petotuženik neosnovano protivio u žalbi.

Vezano uz tužiteljevo pravo vlasništva i aktivnu legitimaciju, VTS je smatrao kako je prvostupanjski sud detaljno razmotrio te prigovore. Iz ugovora o prodaji broda, od 4. siječnja 2002. godine i Dokumenta o registraciji plovila broj 13911/3100, proizlazi da je tužitelj bio suvlasnik u dijelu od 34,38 %, zajedno s gospodinom i gospođom E. koji su u trenutku kupnje plovila bili suvlasnici u dijelu od 65,62 %. Tužitelj je kupio brodicu, zajedno s ostala dva tadašnja suvlasnika, od prodavatelja M. M. Dokumentacija u spisu svjedoči kako je tužitelj u vrijeme nastanka štetnog događaja bio isključivi vlasnik plovila K. Iz odredaba francuskog nacionalnog zakonodavstva čiju je zastavu vijorilo tužiteljevo plovilo K. (arg. iz čl. 969. st. 2. t. 2. PZ-a), proizlazi da je za plovilo duljine od 5 do 20 metara upis obvezan, da se vlasnički list izdaje nakon kupnje, a bilo koji akt, kojim se stvara, prenosi ili gasi pravo vlasništva ili bilo koje drugo imovinsko pravo nad plovilom upisanim u francuski upisnik plovila, treba biti pismeno potvrđen (L5114-1 Zakonika o prometu). Takvu pisanu potvrdu o vlasništvu nad plovilom ili upisni list u francuski upisnik plovila, tužitelj nije mogao pribaviti jer nakon gubitka plovila nije moguće izdati upisni list. To je potvrđeno Potvrdom regionalne uprave Korzike za carinu i neizravne pristojbe koju je izdao načelnik regionalne uprave za Korziku, a ovjerio javni bilježnik Kneževine Andore.

Iz te Potvrde proizlazi: da je jedrilici K. dozvoljeno vijoriti francusku zastavu na temelju upisnog lista broj 13911/3100 izdanog 22. veljače 2002. godine od načelnika regionalne uprave za carinu u Nici; da je tužitelj bio upisan kao isključivi vlasnik plovila K. od 30. rujna 2004. do 3. svibnja 2013. godine, kao dana brisanja plovila iz francuskog upisnika; da je tužitelj obavijestio carinsku upravu da je plovilo izgorjelo 22. prosinca 2012. godine u požaru u Hrvatskoj, ali da nakon gubitka plovila više nije pravno moguće vlasniku izdati duplikat upisnog lista jer se taj list mora vratiti carinskoj upravi kod postupka brisanja iz upisnika; da je na dan 22. prosinca 2012. godine, tužitelj bio isključivi i posljednji vlasnik plovila K.; te da je tužitelj bio nositelj prava vlasništva na dan odjave plovila. Zato je, prema mišljenju VTS-a, prvostupanjski sud pravilno utvrdio da je tužitelj aktivno legitimiran u ovoj parnici tražiti naknadu štete. Uz navedenu Potvrdu, u spisu se nalazi i druga dokumentacija koja potvrđuje tu činjenicu, a koju je prvostupanjski sud detaljno naveo u obrazloženju odluke. Pritom, u parnici nije dokazano da je tužitelj od osiguratelja namiren za štetu.

VTS je prihvatio odluku prvostupanjskog suda o visini tužbenog zahtjeva. S jedne strane, iako tužitelj nije sporio da je vještačenje provedeno uz primjenu

najrelevantnijih izvora podataka za procjenu plovila, smatrao je kako sudski vještak nije pravilno izračunao deprecijaciju tužiteljeva plovila te da je trebalo prihvatiti tužbeni zahtjev u cijelosti. S druge strane, tuženici su, također, u žalbi pokušavali dovesti u pitanje rezultate vještačenja. Prvostupanjski je sud jasno i detaljno obrazložio rezultate vještačenja i razloge zašto prihvaća nalaz i mišljenje sudskog vještaka, a tome se pridružuje i VTS. Sudski je vještak brodograđevne struke I. Š. izradio pisani nalaz i mišljenje te je tijekom saslušanja na ročištu odgovorio na sve primjedbe i upite. Zaključio je da se radi o totalnoj šteti te je procijenio vrijednost jedrilice K. u vrijeme štetnog događaja kao nabavnu cijenu jedrilice i opreme umanjenu za deprecijaciju (umanjenje vrijednosti), s korekcijom za utjecajne koeficijente tržišta i s analizom svakog pojedinog koeficijenta. Vještak je koristio godišnju stopu gubitka vrijednosti plovila od 5 % i opreme od 5 % do 100 %, s obrazloženjem da je to uobičajeno za takvu vrstu plovila i opremu. Vještak je cjelokupnu tržišnu vrijednost plovila i opreme sa svim pripadajućim koeficijentima i stanjem na tržištu na dan štetnog događaja, uzimajući u obzir umanjenje vrijednosti plovila od 5 % godišnje i umanjenje vrijednosti opreme, utvrdio u iznosu od 156.039,48 eura. Za sve pripadajuće koeficijente i stanje na tržištu na dan štetnog događaja, uzimajući u obzir umanjene vrijednosti plovila od 5 % godišnje i umanjene vrijednosti opreme, vještak je utvrdio cjelokupnu tržišnu vrijednost plovila i opreme u iznosu od 156.039,48 eura.

Računajući vrijednost opreme, vještak je posebno vodio računa da ne uračunava troškove bojanja, održavanja, tečajeva, servisa, testiranja ronilačkih boca (troškove koje je tražio tužitelj). Ti troškovi ne predstavljaju štetu koju je tužitelj pretrpio zbog požara i za koju bi mu tuženici mogli odgovarati, stoga vještak nije uključio ove stavke u ukupnu vrijednost plovila s opremom. Prvostupanjski je sud, uzimajući u obzir sve okolnosti (vrijednost stvari koju je utvrdio vještak, račune koje je dostavio u spis tužitelj, činjenicu da je i u tom dijelu nalaza vještak vodio računa o gubitku vrijednosti tih stvari protekom godina, prihvaćajući vrijednost plovila s dodatnom opremom koju je obračunao vještak), utvrdio da tužitelju pripada pravo na naknadu štete na plovilu i stvarima koje su se na njemu nalazile u trenutku nastanka štetnog događaja u iznosu od 156.039,48 eura.

VTS je smatrao kako je šteta nastala zbog četvrtotuženikove djelatnosti za vrijeme smještaja plovila K. na suhom vezu u zimskim mjesecima dok je vlasnik bio odsutan, a plovilo nije bilo korišteno u skladu s namjenom. Solidarno s četvrtotuženikom za njegovu obvezu odgovara i osiguratelj na temelju ugovora o osiguranju odgovornosti Marine Punat d.o.o. za štete počinjene trećim osobama čl. 965. st. 1. ZOO-a, s korekcijom za odbitnu franšizu od 7.500,00 kuna po objektu i događaju odnosno za 995,73 eura. Zato je tužbeni zahtjev prema petotuženiku

prihvaćen za iznos od 155.043,75 eura, a razliku od 995,73 eura snosi četvrtotuženik. Slijedom navedenog, pobijanu presudu u odluci o glavnoj stvari, VTS je potvrdio u cijelosti (čl. 368. st. 1. i 2. ZPP-a). Zbog toga je tužbeni zahtjev protiv petotuženika prihvaćen za iznos od 155.043,75 eura, dok četvrtotuženik snosi razliku od 995,73 eura. Slijedom navedenog, VTS je potvrdio pobijanu presudu u odluci o glavnoj stvari u skladu s člankom 368. st. 1. i 2. ZPP-a.

Dr. sc. Vesna Skorupan Wolff, znanstvena savjetnica u trajnom zvanju
Jadranski zavod Hrvatske akademije znanosti i umjetnosti

Summary:

A BERTHED BOAT IS NOT AN INHERENTLY DANGEROUS OBJECT

High Commercial Court of the Republic of Croatia
Pž-4747/2019-3, 11 February 2022

As a rule, a ship or boat is not an inherently dangerous object while it is navigating. Certain activities on or in connection with the ship can be a danger. Berthed ships and boats, compared to those in navigation, represent an even smaller danger to the environment. There is practically no danger to the environment from vessels in dry berths.

OPASNOST KAO PRETPOSTAVKA ZA ODREĐIVANJE PRIVREMENE MJERE

VISOKI TRGOVAČKI SUD REPUBLIKE HRVATSKE
Rješenje br. Pž-5433/10-3 od 18. listopada 2010.
Sutkinja: Branka Ćiraković

Iz upisnika brodova proizlazi da je predlagatelj osiguranja suvlasnik u jednoj polovini dijela broda O. Predlagatelj osiguranja predložio je da se privremenom mjerom osigura njegova nenovčana tražbina koja glasi na predaju broda u suposjed i na korištenje. Kako bi se odredilo zatraženo osiguranje, među ostalim potrebnim uvjetima, treba postojati opasnost od onemogućenja ostvarenja tražbine. Opasnost mora biti subjektivne prirode, što znači da predlagatelj osiguranja mora ukazati na konkretne dužnikove radnje (propuštanja) svjesno poduzete radi ugrožavanja namirenja predlagateljeve tražbine. One moraju stvarno ugrožavati buduće ostvarenje predlagateljeve tražbine, a sud mora utvrditi postojanje takvih dužnikovih radnji (propuštanja) i subjektivni odnos dužnika prema njima. To znači da se ne može smatrati kako je opasnost učinjena vjerojatnom, zbog same objektivno postojeće činjenice da protivnik osiguranja nije ispunio određenu tražbinu koja je među strankama sporna, ili nije vratio stvar ili samostalno koristi stvar čiji je suvlasnik ili slično. Činjenica kako protivnik osiguranja, kao jedan od suvlasnika broda koristi brod, ne mora sama za sebe značiti da će upravo zbog toga otežati ostvarivanje nenovčane tražbine drugih suvlasnika koja glasi na predaju te stvari. Ako protivnik osiguranja onemogućuje predlagatelju ostvarenje njegova prava iz suvlasništva nad brodom i poduzima konkretne subjektivne radnje usmjerene na ugrožavanje namirenja predlagateljeve nenovčane tražbine predaje broda u suposjed, tek tada su ispunjeni uvjeti za određivanje predloženog osiguranja.

Predlagatelj osiguranja podnio je prijedlog za osiguranje određivanjem privremene mjere zaustavljanja broda O. i njegove predaje u suposjed. To znači da je predlagatelj osiguranja predložio da se privremenom mjerom osigura njegova nenovčana tražbina koja glasi na predaju broda u suposjed i na korištenje.

Iz upisnika brodova za brod O. proizlazi kako je predlagatelj osiguranja njegov suvlasnik u jednoj polovini dijela, a protivnik osiguranja i D. K. suvlasnici svaki u jednoj četvrtini dijela. Predlagatelj osiguranja smatrao je kako iz navedenog nedvojbeno proizlazi da on ima sva prava na predmetnom brodu koja mu kao suvlasniku pripadaju, dakle i pravo na suposjed i pravo na sukorištenje broda.

Predlagatelj osiguranja tvrdio je kako protivnik osiguranja sam koristi brod za prijevoz putnika (turista), unatoč njegovoj zabrani, i da protivnik osiguranja koristi brod na nezakonit način. Tvrdio je kako je protivnik osiguranja, kao zapovjednik broda, koristio ulje za loženje za brodski pogon, stoga je predlagatelj osiguranja solidarno obvezan platiti posebni porez na naftne derivate.

Rješenjem Trgovačkog suda u Splitu, poslovni broj P-1361/10 od 9. srpnja 2010. godine, odbijen je prijedlog za osiguranje određivanjem privremene mjere zaustavljanja broda O. i njegove predaje u suposjed protivniku osiguranja.

To je rješenje prvostupanjski sud donio primjenom odredaba čl. 298. Ovršnog zakona (*Narodne novine*, br. 57/1996, 29/1999, 42/2000, 173/2005, 194/2003, 151/2004, 88/2005 i 67/2008; u nastavku: OZ) i čl. 951. st. 2. Pomorskog zakonika (*Narodne novine*, br. 181/2004, 76/2007 i 146/2008; u nastavku: PZ). Sud je ocijenio da predlagatelj osiguranja nije učinio vjerojatnim postojanje opasnosti da bi se bez tog osiguranja spriječilo ili znatno otežalo ostvarenje tražbine koju on predlaže osigurati, a to je pravo na njegov suposjed broda kao suvlasnika.

Prvostupanjski je sud zaključio kako predlagatelj ne tvrdi da protivnik osiguranja poduzima konkretne radnje u tom pravcu, a samom dostavom upravnog rješenja kojom se strankama, kao poreznim obveznicima, nalaže solidarna isplata poreza na naftne derivate, nije učinjeno vjerojatnim da je mjera osiguranja potrebna kako bi se time spriječila nenadoknadiva šteta. Predlagatelju osiguranja, kao suvlasniku broda, nastala bi još veća šteta kada brod uopće ne bi radio.

Protiv navedenog rješenja predlagatelj osiguranja podnio je žalbu iz svih žalbenih razloga, s prijedlogom da ga Visoki trgovački sud Republike Hrvatske (u nastavku: VTS) preinači ili ukine i vrati na ponovan postupak.

U obrazloženju žalbe predlagatelj osiguranja naveo je kako je prvostupanjski sud propustio ocijeniti sve okolnosti iz kojih jasno proizlazi neophodnost određivanja predloženog osiguranja. Naime, tvrdio je da unatoč zabrani predlagatelja osiguranja, protivnik osiguranja neovlašteno koristi brod i time neosnovano isključuje predlagatelja iz suposjeda i korištenja broda. Time za predlagatelja osiguranja nastaje teško naknadiva šteta zbog izostanka dobiti od korištenja broda jer protivnik osiguranja na nezakoniti način koristi brod, a predlagatelj osiguranja treba plaćati i posebne poreze na naftne derivate.

Odgovor na žalbu nije podnesen. VTS je zaključio kako žalba nije osnovana.

Ispitavši pobijano rješenje na temelju odredbi čl. 365. st. 2. i čl. 381. Zakona o parničnom postupku (*Narodne novine*, br. 53/1991, 91/1992, 112/1999, 88/2001, 117/2003, 88/2005, 84/2008 i 123/2008; u nastavku: ZPP), u granicama žalbenih razloga, pazeći pritom po službenoj dužnosti na bitne povrede odredaba

parničnog postupka iz čl. 354. st. 2. t. 2., 4., 8., 9. i 11. ZPP-a i na pravilnu primjenu materijalnog prava, VTS je odlučio kako je pobijano rješenje pravilno i zakonito.

U obrazloženju svoje odluke VTS je istaknuo kako su zakonske pretpostavke za prihvaćanje prijedloga za osiguranje nenovčane tražbine privremenom mjerom propisane odredbom čl. 298. st. 1. OZ-a, a to su: a) vjerojatnost postojanja tražbine čije se osiguranje traži i b) vjerojatnost opasnosti da će bez takve mjere protivnik osiguranja spriječiti ili znatno otežati ostvarenje tražbine čije se osiguranje traži, osobito time što bi promijenio postojeće stanje stvari, ili ako učini vjerojatnim da je mjera potrebna da bi se spriječilo nasilje ili nastanak nenadoknadive štete koja prijeti.

Opasnost, kao jedna od alternativnih dopunskih pretpostavki, u određenim slučajevima ne mora se dokazivati ako predlagatelj osiguranja učini vjerojatnim da bi predloženom mjerom protivnik osiguranja pretrpio samo neznatnu štetu (čl. 298. st. 2. OZ-a).[1] VTS je ocijenio da je prvostupanjski sud pravilno zaključio kako nije učinjeno vjerojatnim da bi tom mjerom protivnik osiguranja pretrpio samo neznatnu štetu, što znači da je bio dužan učiniti vjerojatnim postojanje navedene opasnosti.

VTS je u svojoj odluci posebno istaknuo kako je pri odlučivanju o postojanju zakonskih pretpostavki za prihvaćanje prijedloga za osiguranje sucima, pri izvođenju dokaza dano ovlaštenje da reduciraju svoja uvjerenja sa stupnja izvjesnosti na stupanj vjerojatnosti. Vjerojatnost je slabiji stupanj uvjerenja o postojanju određene činjenice koja dopušta i samo utvrđivanje mogućnosti da se takvo uvjerenje poklapa sa stvarnošću.

VTS je smatrao kako za određivanje zatraženog osiguranja privremenom mjerom, predlagatelj osiguranja mora učiniti vjerojatnim postojanje svoje tražbine koju predlaže osigurati, kao i postojanje opasnosti da bi se bez tog osiguranja onemogućilo ili znatno otežalo ostvarenje tražbine. O postojanju takve opasnosti ocjenu donosi sud na temelju dokaza i okolnosti koje predlagatelj osiguranja mora navesti u svom prijedlogu. Ta opasnost mora biti subjektivne prirode, što znači da predlagatelj osiguranja mora ukazati na konkretne dužnikove radnje, odnosno propuštanja svjesno poduzete radi ugrožavanja namirenja njegove tražbine. One moraju stvarno ugrožavati buduće ostvarenje predlagateljeve tražbine, a sud mora utvrditi postojanje takvih dužnikovih radnji, odnosno propuštanja, kao i subjektivni odnos dužnika prema njima. To znači da se ne može smatrati kako je opasnost učinjena vjerojatnom, zbog same objektivno postojeće činjenice da protivnik osiguranja nije platio određenu tražbinu koja je među strankama sporna, da nije vratio stvar te da samostalno koristi stvar čiji je suvlasnik ili slično.

[1] U odluci je vjerojatno greškom naveden čl. 298. st. 2. OZ-a umjesto čl. 296. st. 2. OZ-a.

Protivno žalbenim navodima VTS je prihvatio zaključak prvostupanjskog suda da predlagatelj osiguranja nije učinio vjerojatnim postojanje opasnosti od otežanog namirenja, odnosno nije ukazao na konkretne dužnikove radnje poduzete radi ugrožavanja namirenja njegove tražbine. Činjenica da protivnik osiguranja, kao jedan od suvlasnika broda, koristi brod, ne znači nužno da će upravo zbog toga on otežati ostvarenje nenovčane tražbine drugih suvlasnika koja glasi na predaju te stvari.

VTS je istaknuo da na temelju utvrđenih činjenica nije moguće zaključiti kako je protivnik osiguranja neovlašteno koristio brod. Iz dopisa predlagatelja osiguranja, od 30. lipnja 2010. godine (prijedlog za osiguranje podnesen je 2. srpnja 2010. godine), proizlazi da je protivnik osiguranja izjavom predlagatelja osiguranja, od 25. studenoga 1985. godine, bio ovlašten rukovoditi radovima i poslovanjem broda. Navedenim dopisom od 30. lipnja 2010. godine, predlagatelj osiguranja opoziva protivniku osiguranja takvu punomoć. U spisu nema traga da je protivniku osiguranja taj dopis dostavljen prije početka ovog postupka, kako je predlagatelj osiguranja tvrdio. To znači da je sam predlagatelj osiguranja zapravo priznao ovlast protivnika osiguranja na korištenje broda, ali ograničeno, odnosno do opoziva predmetne punomoći koja ga ovlašćuje na samostalno poslovanje tim brodom. Protivnik je osiguranja primio dopis predlagatelja osiguranja o opozivu ovlasti za korištenje broda 16. srpnja 2010. godine, dakle nakon donošenja pobijanog rješenja.

U obrazloženju svoje presude VTS je zaključio kako bi uspješno ostvario svoje pravo na suposjed i to pravo zaštitio, predlagatelj osiguranja je trebao učiniti vjerojatnom tražbinu na predaju broda u suposjed što mu kao suvlasniku pripada, osim ako je protivnika osiguranja ovlastio na poslovanje tim brodom (kao u ovom slučaju). Tek kada bi protivnik osiguranja, unatoč prestanku takve ovlasti, nastavio samostalno koristiti brod i time onemogućavao predlagatelja u ostvarenju njegova prava iz suvlasništva nad tim brodom, te kada bi poduzimao konkretne subjektivne radnje usmjerene na ugrožavanje namirenja predlagateljeve nenovčane tražbine predaje broda u suposjed, tada bi bili ispunjeni uvjeti za određivanje predložena osiguranja.

Slijedom navedenog, VTS je potvrdio pobijano rješenje kojim je odbijen prijedlog za određivanje privremene mjere u skladu s čl. 380. t. 2. ZPP-a.

Dr. sc. Vesna Skorupan Wolff, znanstvena savjetnica u trajnom zvanju
Jadranski zavod Hrvatske akademije znanosti i umjetnosti

Summary:

PERICULUM IN MORA ***AS A PREREQUISITE FOR A SHIP ARREST***

High Commercial Court of the Republic of Croatia
Pž-5433/10-3, 18 October 2010

The applicant is a co-owner of 1/2 part of the ship. The applicant applies for a ship arrest to secure his non-monetary claim for the transfer of possession and use of the ship based on co-ownership. In order to succeed with the ship arrest, among other necessary conditions, there must be a periculum in mora. *It must be of a subjective nature, which means that the person applying for a ship arrest as a provisional conservatory measure must point to the debtor´s specific actions (omissions), consciously undertaken to jeopardise the settlement of the applicant´s claim. If the respondent prevents or obstructs the applicant from realising his right arising from co-ownership over the ship, and if the respondent also undertakes specific subjective actions aimed at jeopardising the settlement of the applicant´s non-monetary claim for the handover of the vessel to co-possession, only then are the conditions for ordering the proposed security fulfilled.*

NE POSTOJI OBVEZA PLAĆANJA LUČKIH PRISTOJBI ZA LUKU KOJA NIJE PROGLAŠENA LUKOM OTVORENOM ZA JAVNI PROMET

VISOKI TRGOVAČKI SUD REPUBLIKE HRVATSKE
Presuda br. Pž-4338/04-4 od 4. srpnja 2007.
Vijeće: Viktorija Lovrić, predsjednica vijeća, mr. sc. Srđan Šimac i Branka Ćirak-ović, članovi vijeća

Predmet spora je zahtjev za plaćanje lučkih pristojbi za upotrebu obale luke radi ukrcaja i iskrcaja tereta u međunarodnom prometu. Tužitelj je Lučka uprava, a tuženik pravna osoba koja koristi luku za ukrcaj i iskrcaj tereta na svoje brodove. Tuženik osporava tužiteljevu procesnu legitimaciju i tvrdi kako je riječ o luci posebne namjene. U sporno je vrijeme predmetna luka bila proglašena lukom otvorenom za javni promet, no sve pravne posljedice takve odluke poništene su presudom Upravnog suda Republike Hrvatske. Kada sud poništi akt protiv kojeg je bio pokrenut upravni spor, predmet se vraća u stanje u kojem se nalazio prije nego što je poništeni akt donesen (čl. 62. Zakona o sudskim sporovima). Dakle, pravomoćnom je sudskom odlukom tužitelju oduzeto pravo na naplatu lučkih pristojbi koje mu zapravo nikad nije niti pripadalo. U lukama koje nisu otvorene za javni promet lučka uprava nije ovlaštena naplaćivati lučke pristojbe, a to znači da ne postoji obveza plaćanja lučkih pristojbi za korištenje luke koja nije proglašena lukom otvorenom za javni promet.

Plaćanje lučkih pristojbi za upotrebu obale u luci N., pristanište A., predmet je tužbenog zahtjeva. Lučka uprava je tužitelj u sporu, a tuženik je pravna osoba koja koristi luku za vez svojih brodova radi ukrcaja kamena za međunarodni prijevoz. Nakon što je ta luka proglašena lukom otvorenom za javni promet, tužitelj je tuženiku ispostavio račune koji su utuženi u tom sporu. Tuženik je prigovarao tužbenom zahtjevu i tvrdio kako je riječ o luci posebne namjene koja služi za potrebe društva A. d.o.o., osporavajući tužiteljevu procesnu legitimaciju u sporu.

U ovom je predmetu sporna tužiteljeva aktivna legitimacija, odnosno njegovo ovlaštenje za naplaćivanje lučke pristojbe za upotrebu obale u luci A. po osnovi utuženih računa.

Prvostupanjski je sud odbio tužiteljev zahtjev da mu tuženik plati iznos od 114.390,00 eura s pripadajućim kamatama, kao i da mu naknadi trošak postupka.

Nakon provedenog dokaznog postupka, prvostupanjski je sud utvrdio da je tužitelj osnovan Odlukom Županijskog poglavarstva I. županije, u skladu s odredbom čl. 31. st. 1. i 2. Zakona o morskim lukama (*Narodne novine*, br. 108/1995, 6/1996, 97/2000; u nastavku: ZML). Odlukom o dopuni Odluke o osnivanju Lučke uprave U. N., tužiteljeva nadležnost protegla se i na pristanište A., ali u tim se odlukama ne spominje prenamjena luke. Sud je utvrdio kako je 1. rujna 2000. godine tužiteljevo Upravno vijeće dodijelilo koncesiju za obavljanje lučkih djelatnosti trgovačkom društvu K. d.d. U kontekstu te odluke i sadržaja odredbe čl. 65. st. 7. ZML-a, sud je utvrdio da odluka o dodjeli koncesije nije donesena od nadležnog tijela (čl. 28. ZML-a) niti se u njoj spominje da je koncesija dodijeljena za luku posebne namjene. S obzirom na to, sud je zaključio kako se prenamjeni luke pristupilo donošenjem Odluke Vlade Republike Hrvatske o prenamjeni luke posebne namjene – industrijske luke A. u luku otvorenu za javni promet (odluka, klasa: 343-21/02/03, ur. br. 5030116-02-1 od 9. svibnja 2002. godine). Ta je odluka poništena presudom Upravnog suda Republike Hrvatske, poslovni broj Us-5042/2002-7 od 4. rujna 2003. godine.

Radi razjašnjenja pravnog režima i statusa morskih luka, prvostupanjski sud polazi od (tada važećeg) ZML-a kao *lex specialis*, analizirajući i relevantne upravne akte. Činjenica je kako je Vlada Republike Hrvatske, 9. svibnja 2002. godine, donijela Odluku o prenamjeni luke posebne namjene – industrijske luke A. u luku otvorenu za javni promet. Međutim, isto je tako nesporno da je ta Odluka poništena presudom Upravnog suda Republike Hrvatske, poslovni broj Us-5042/2002-7 od 4. rujna 2003. godine.

U svojoj odluci prvostupanjski je sud posebno uzeo u obzir kako u konkretnom slučaju još uvijek postoji niz spornih činjenica i pravnih pitanja koja nisu u nadležnosti suda, nego upravnog tijela, i to: je li A. d.o.o. tražio dodjelu koncesije na pomorskom dobru na kojem se nalazi luka A.; je li I. županija obavijestila to društvo da će uzeti u razmatranje njegov zahtjev nakon što nadležno ministarstvo donese propise za provedbu postupka za dodjelu koncesija; je li bilo drugog ili trećeg poziva u natječajnom postupku za dodjelu koncesije; je li nadležno ministarstvo pri provođenju upravnog nadzora utvrdilo da je luka A. luka posebne namjene; je li A. d.o.o. izgradilo mol i lučka postrojenja; je li dovršen postupak izvlaštenja. Budući da je Upravni sud Republike Hrvatske, presudom poslovni broj Us-5042/2002-7 od 4. rujna 2003. godine, poništio odluku Vlade Republike Hrvatske od 9. svibnja 2002. godine o prenamjeni luke posebne namjene – industrijske luke A. u luku otvorenu za javni promet, prvostupanjski je sud zaključio kako to nije luka otvorena za javni promet. Kako bi potkrijepio svoj zaključak, sud se pozvao i na pravno stajalište iz presude Upravnog suda Republike Hrvatske, poslovni broj Us-2690/2001-8 od 17. siječnja 2002. godine.

S obzirom na to da luka A. u spornom razdoblju nije bila luka otvorena za javni promet, prvostupanjski je sud utvrdio da tužitelj nije bio ovlašten upravljati tom lukom pa je tužbeni zahtjev odbio, a o trošku postupka sud je odlučio na temelju odredbe čl. 154. st. 1. i čl. 155. Zakona o parničnom postupku (*Narodne novine*, br. 53/1991, 91/1992, 112/1999, 88/2001 i 117/2003; u nastavku: ZPP).

Protiv navedene presude žalbu je podnio tužitelj iz svih zakonskih razloga. Tužitelj je tvrdio kako luka A. nikada nije bila luka posebne namjene jer o tome ne postoji odluka Vlade Republike Hrvatske, što znači da je to luka otvorena za javni promet. Žalitelj je prigovorio na pravilnosti utvrđenja prvostupanjskog suda jer je smatrao kako tužitelj nije bio ovlašten upravljati lukom A. u spornom razdoblju, pozivajući se na to da je tužitelj osnovan 1997. godine i da su tuženikovi brodovi koristili luku. U svojoj je žalbi tužitelj ukazao na zakonske propise kojima je regulirano upravljanje pomorskim dobrom, djelatnost lučke uprave, njezini prihodi i plaćanje, a uporište za osnovanost svog zahtjeva nalazi u odredbama čl. 28., 30., 33., 45. – 48. ZML-a. Žalitelj tvrdi i to kako tuženik bespravno koristi pomorsko dobro radi ostvarenja dobiti, nema koncesiju i za njegovo korištenje ne plaća naknadu.

Visoki trgovački sud (u nastavku: VTS) odlučio je da tužiteljeva žalba nije osnovana.

U obrazloženju pobijane presude naveo je da na osnovi utvrđenih i detaljno obrazloženih pravno relevantnih činjenica slijedi zakonit zaključak prvostupanjskog suda o nedostatku tužiteljeva ovlaštenja za ubiranje lučkih pristojbi. Prema mišljenju VTS-a, iako su tuženikovi brodovi u spornom razdoblju upotrebljavali obalu luke radi ukrcaja tereta, tužitelju ne pripada pravo koje ovom tužbom želi ostvariti jer luka A. nije luka otvorena za javni promet (čl. 45. – 48. ZML-a). Ta je luka u sporno vrijeme bila proglašena lukom otvorenom za javni promet, no sve su pravne posljedice takve odluke poništene presudom Upravnog suda Republike Hrvatske. Kada sud poništi akt protiv kojeg je bio pokrenut upravni spor, predmet se vraća u stanje u kojemu se nalazio prije nego što je poništeni akt donesen (čl. 62. Zakona o sudskim sporovima, *Narodne novine*, br. 53/1991, 9/1992 i 77/1992). Dakle, obvezujućim sudskim aktom tužitelju je oduzeto pravo na naplatu lučkih pristojbi koje mu zapravo nije niti pripadalo.

Prvostupanjski je sud u obrazloženju pobijane odluke iznio niz činjeničnih problema i pravnih pitanja, čije rješenje treba pronaći u postupku pred upravnim tijelima. Pritom, on opravdano zaključuje kako luka A., s obzirom na poništenje Odluke o njezinoj prenamjeni, nema status luke otvorene za javni promet. U nedostatku tog svojstva, na osnovi kojeg je Zakonom propisano pravo lučkih uprava na ubiranje lučkih pristojbi, VTS je smatrao kako tužitelju ne pripada zatraženo pravo.

VTS je prihvatio zaključak prvostupanjskog suda o nedostatku tužiteljeva ovlaštenja za upravljanje lukom A. u spornom razdoblju te istaknuo kako iz dokumentacije i obrazloženja pobijane presude proizlazi da je tužitelj i prije donošenja poništene Odluke Vlade Republike Hrvatske o prenamjeni, pokušavao sebe dovesti u status aktivno legitimiranog subjekta kroz prenamjenu luke posebne namjene u luku otvorenu za javni promet. Tužitelj je osnovan Odlukom poglavarstva I. županije 25. studenoga 1997. godine (čl. 31. st. 2. i 3. ZML-a) kao lučka uprava za luku od županijske važnosti. Županijsko poglavarstvo donijelo je 16. lipnja 1998. godine Odluku o dopuni navedene odluke kojom se tužiteljeva nadležnost proteže i na pristanište A. Nakon toga, rješenjem Ministarstva, pomorstva, prometa i veza, poslovni broj UP/I 342-01/00/01-1441 od 22. siječnja 2001.godine, deklarirana je činjenica da je to luka otvorena za javni promet. Iz obrazloženja tog rješenja proizlazi da korisnik luke nije u zakonskom roku prijavio korištenje luke posebne namjene pa je izgubio pravo na dodjelu koncesije, a Županijsko poglavarstvo nije donijelo formalnu odluku o prenamjeni luke. To je rješenje poništeno presudom Upravnog suda Republike Hrvatske, poslovni broj Us-2690/2001 od 12. siječnja 2002. godine, jer je utvrđeno kako je riječ o luci posebne namjene koja služi isključivo za posebne potrebe trgovačkog društva koje je i tada koristi, pa je za donošenje rješenja o prenamjeni statusa luke nadležna Vlada Republike Hrvatske. Dakle, ni s tim aktima nije izvršena prenamjena luke.

Na osnovi tako utvrđenih i u pobijanoj presudi detaljno obrazloženih pravno relevantnih činjenica, VTS smatra kako slijedi zakonit zaključak prvostupanjskog suda o nedostatku tužiteljeva ovlaštenja za ubiranje lučkih pristojbi. Iako su tuženikovi brodovi u spornom razdoblju upotrebljavali obalu te luke radi ukrcaja i iskrcaja tereta, tužitelju ne pripada pravo koje ovom tužbom želi ostvariti jer luka A. nije luka otvorena za javni promet (čl. 45. – 48. ZML-a). Ta je luka u sporno vrijeme bila proglašena lukom otvorenom za javni promet, no sve pravne posljedice takve odluke poništene su presudom Upravnog suda Republike Hrvatske. Kada sud poništi akt protiv kojeg je bio pokrenut upravni spor, predmet se vraća u stanje u kojemu se nalazio prije nego što je donesen poništeni akt (čl. 62. Zakona o sudskim sporovima, *Narodne novine*, br. 53/1991, 9/1992 i 77/1992). Dakle, obvezujućim sudskim aktom tužitelju je oduzeto pravo na naplatu lučkih pristojbi koje mu zapravo nikada nije niti pripadalo.

VTS ističe kako je zakonita i odluka o troškovima postupka, kako po osnovi (čl. 154. st. 1. ZPP-a), tako i po visini (čl. 155. ZPP-a). Prvostupanjski je sud pravilno obvezao tužitelja da tuženiku naknaditi parnični trošak u iznosu od 80.970,00 kuna, koji je obračunao u skladu sa Zakonom o sudskim pristojbama (*Narodne novine*, br. 74/1995 i 57/1996) i Tarifnim brojevima 7. i 8. Tarife o

nagradama i naknadi troškova za rad odvjetnika (*Narodne novine*, br. 66/1993, 87/1993, 16/1994 i 11/1996). Takvu svoju odluku valjano je obrazložio i ujedno naveo sve parnične radnje za koje je tuženiku priznat trošak, kao i pravnu osnovu i visinu dosuđenog troška.

VTS zaključuje kako luka A., s obzirom na to da se poništila Odluka o njezinoj prenamjeni, nema status luke otvorene za javni promet. U nedostatku tog svojstva, na osnovi kojeg je zakonom propisano pravo lučkih uprava na ubiranje lučkih pristojbi, tužitelju ne pripada zatraženo pravo.

Slijedom navedenog, tužiteljeva je žalba odbijena kao neosnovana, a pobijana je presuda potvrđena na temelju odredbe čl. 368. ZPP-a.

Dr. sc. Vesna Skorupan Wolff, znanstvena savjetnica u trajnom zvanju
Jadranski zavod Hrvatske akademije znanosti i umjetnosti

Summary:

THERE IS NO OBLIGATION TO PAY PORT DUES FOR A PORT THAT HAS NOT BEEN OPEN FOR PUBLIC TRAFFIC

High Commercial Court of the Republic of Croatia
Pž-4338/0, 4 July 2007

The subject of the dispute is the payment of port dues for the use of the port shore for the loading and unloading of cargo in international traffic. The plaintiff is the Port Authority, and the respondent is a legal entity that uses the port to load and unload cargo onto its ships. The respondent contests the plaintiff's right of action and asserts that it is a special purpose port. At the time in question, the port was declared a port open to public traffic, but all legal consequences of that decision were set aside by the judgment of the Administrative Court of the Republic of Croatia. When a court sets aside an administrative act against which an administrative dispute was initiated, the case returns to the state it was in before the annulled administrative act was passed (Art. 62 of the Judicial Disputes Act). Thus, by a final court judgment, the plaintiff was deprived of the right to charge port dues, which, in fact, never belonged to him. In ports that are not open to public traffic, the port authority is not authorised to charge port dues, which means that there is no obligation to pay port dues for the use of a port that has not been declared a port open to public traffic.

PRIKAZI KNJIGA / BOOK REVIEWS

POMORSKO PRAVO

Dragan Bolanča; Petra Amižić Jelovčić
Pravni fakultet Sveučilišta u Splitu, Split, travanj 2023., XVI + 645 str.

Knjiga pod naslovom Pomorsko pravo, autora prof. dr. sc. Dragana Bolanče i prof. dr. sc. Petre Amižić Jelovčić, objavljena je u travnju 2023. godine u izdanju Pravnog fakulteta Sveučilišta u Splitu. Autori su svoje znanje i iskustvo, stečeno višedesetljetnim znanstvenim i nastavnim radom na Katedri za pomorsko i općeprometno pravo Pravnog fakulteta u Splitu, pretočili u ovo najnovije djelo koje je odlukom Senata Sveučilišta u Splitu prihvaćeno kao sveučilišni udžbenik pomorskog prava.

Knjiga je podijeljena u deset poglavlja.

U prvom poglavlju (Pojam, značajke i podjela pomorskog prava) autori definiraju pomorsko pravo u njegovom dvojakom značenju. Prvo se značenje odnosi na pomorsko pravo kao sustav normi kojima su uređeni pravni odnosi u vezi s pomorskom plovidbom, pomorskim djelatnostima i drugim djelatnostima povezanim s morem. Drugo se značenje odnosi na pomorsko pravo kao znanost koja razmatra i tumači spomenute pravne norme. Autori elaboriraju cjeline na koje je pomorsko pravo podijeljeno te razmatraju odnos pomorskog prava prema prometnom, prijevoznom i plovidbenom pravu.

Drugo poglavlje (Povijesni razvoj pomorskog prava) sadržava vrlo pregledan prikaz povijesnog razvoja pomorskog prava u svijetu i kod nas, s posebnim naglaskom na metode ujednačavanja te grane prava na svjetskoj razini, kao i na razini EU-a.

Potom slijede poglavlja u kojima autori analiziraju norme pojedinih cjelina pomorskog prava.

U trećem najopsežnijem poglavlju (Pomorsko upravno pravo) autori, među ostalim, obrađuju sva relevantna pitanja vezana uz sigurnost plovidbe, obalnu stražu, definicije i karakteristike različitih pomorskih objekata s detaljnim osvrtom na upisnik brodova. Analiziraju se i upravni aspekti zaštite morskog okoliša i materija inspekcijskog nadzora.

Četvrto poglavlje (Pomorsko imovinsko pravo) započinje analizom imovinskopravnih obilježja broda (stvarna prava na brodu). Nakon toga, definira se pojam brodara i objašnjava njegov pravni položaj s posebnim naglaskom na opće (globalno) ograničenje brodarove odgovornosti. Potom se proučava ugovor o

gradnji, preinaci ili popravku broda. Slijedi detaljan prikaz svih ugovora o iskorištavanju brodova. Analiza pomorskog ugovornog prava završava prikazom osnovnih obilježja ugovora o najmu jahte i brodice, ugovora o nautičkom vezu i ugovora o pomorskoj agenciji. Potom autori prikazuju pravno uređenje sudara brodova, spašavanje na moru i zajedničke havarije. Poglavlje završava analizom uređenja slučajeva izvanugovorne odgovornosti vlasnika broda i brodara.

Peto poglavlje (Pomorsko radno pravo) iscrpno prikazuje radnopravni status zapovjednika i članova posade broda i drugih pomorskih objekata. Detaljno se opisuju sva njihova prava i obveze (odgovornosti).

Šesto poglavlje (Pomorsko pravo osiguranja) započinje prikazom osnovnih obilježja ugovora o pomorskom osiguranju, a potom se zasebno analiziraju podvrste pomorskog osiguranja – osiguranje broda, robe, vozarine i odgovornosti.

U sedmom se poglavlju (Pomorsko međunarodno javno pravo (međunarodno pravo mora)) najprije iznosi povijesni, a potom i pozitivno-pravni prikaz pravnog uređenja morskih i podmorskih prostora Republike Hrvatske (unutarnje morske vode, teritorijalno more, gospodarski pojas i epikontinentalni pojas).

Poglavlja osam, devet i deset (Literatura, Korišteni propisi, Kazalo pojmova) mogli bi se naizgled pogrešno smatrati »pomoćnim« dijelovima ovog udžbenika. Zapravo, njihova je ogromna važnost u kontekstu lakšeg snalaženja u knjizi i upućivanja na druga znanstvena i stručna djela u kojima su neka specifična pitanja pomorskog prava dublje elaborirana, nego što je to bilo moguće učiniti u ovom udžbeniku. Fascinira činjenica da bibliografski popis sadržava tisuću sto četrdeset djela inozemne i domaće pomorskopravne literature. Od velike je pomoći iscrpan popis relevantnih hrvatskih i međunarodnih citiranih propisa. O opsežnosti i preciznosti kazala pojmova dovoljno govori činjenica da se proteže na čak sedamnaest stranica.

Autori su uspješno ostvarili cilj koji su sami sebi postavili. Vrlo opsežnu i složenu materiju pomorskog prava sustavno su prikazali u vrlo zahtjevnoj formi udžbenika. U predgovoru, autori ističu da je ova knjiga prvenstveno namijenjena studentima pravnih i pomorskih fakulteta, ali da može biti korisno štivo u rukama svih osoba koje se žele upoznati sa zanimljivim svijetom pomorskog prava. S tom se tvrdnjom svakako možemo složiti. Ovo djelo, u vrlo značajnoj mjeri, može pomoći sveučilišnim nastavnicima pri izvođenju različitih oblika nastave iz pomorskopravnih kolegija na svim vrstama i razinama studija. Autorima i nakladniku odajemo priznanje i čestitamo na objavljivanju ovako važnog i u našoj pomorskopravnoj literaturi jedinstvenog djela. Istodobno, unaprijed se radujemo i s nestrpljenjem iščekujemo drugo izdanje ovog udžbenika, kako je već

najavljeno u predgovoru, u kojem autori planiraju obraditi i one teme koje nisu mogle biti obuhvaćene u ovom izdanju (pomorsko kazneno pravo, pomorsko prekršajno pravo, pomorsko procesno pravo i pomorsko međunarodno privatno pravo), imajući u vidu njegov unaprijed zadani opseg.

Prof. dr. sc. Jasenko Marin, redoviti profesor u trajnom zvanju
Pravni fakultet Sveučilišta u Zagrebu, Katedra za pomorsko i općeprometno pravo

Summary:

MARITIME LAW

Dragan Bolanča; Petra Amižić Jelovčić
University of Split, Faculty of Law, Split, April 2023, XVI + 645 pages

In April 2023, the University of Split, Faculty of Law, published a book entitled Maritime Law, written by Professors Dragan Bolanča and Petra Amižić Jelovčić. The authors have transferred their knowledge and experience, gained through decades of scientific and teaching work at the Department of Maritime and General Transport Law of the Faculty of Law in Split, into this comprehensive work. The Senate of the University of Split has accepted this book as a university textbook on maritime law.

The book is divided into ten chapters.

In the first chapter (Notion, Features and Division of Maritime Law), the authors define maritime law in its dual meaning. The first meaning refers to maritime law as a system of norms regulating legal relations in connection with marine navigation, marine activities, and other sea-related activities. The second meaning refers to maritime law as a science that considers and interprets the aforementioned legal norms. The authors elaborate the specific areas into which maritime law is divided and consider the relationship of maritime law to traffic, transport, and navigation law.

The second chapter (Historical Development of Maritime Law) contains a comprehensive overview of the historical development of maritime law in the world as well as in Croatia, with special emphasis on the methods of harmonising this branch of law at the world and EU level.

In the third, most comprehensive chapter (Maritime Administrative Law), the authors, among other topics, deal with all relevant issues related to the safety of navigation, the coast guard, the definitions and characteristics of various marine objects, with a detailed review of the ship registry regulation. The administrative aspect of the protection of the marine environment and the matter of inspection supervision are also analysed.

The fourth chapter (Maritime Property Law) begins with an analysis of the property rights over the ship (ownership, mortgage, maritime liens). Then, the importance of the ship operator is described, as well as his legal position, with special emphasis on the global limitation of the ship operator´s liability. The chapter continues with an elaboration of shipbuilding contracts. Further, the authors elaborate on all contracts for the employment of ships. The analysis of maritime contract law ends with a presentation of the basic features of yacht and boat rental contracts, nautical berth contracts, and marine agency contracts. Subsequently, the authors present an analytic overview of the legal regulation of ship collisions, marine salvage, and general average. The chapter ends with an analysis

of the extra-contractual liability of ship owners and ship operators.

The fifth chapter (Maritime Labour Law) provides a comprehensive overview of the status of the ship master and crew members. All their rights and obligations (responsibilities) are described in detail.

The sixth chapter (Maritime Insurance Law) begins with a description of the basic features of the marine insurance contract, and then the subtypes of marine insurance are analysed separately: hull insurance, cargo insurance, freight insurance, and liability insurance.

In the seventh chapter (Public Maritime Law (International Law of the Sea)), the authors elaborate on the regulation of specific sea areas of the Republic of Croatia (internal waters, territorial sea, the economic zone, the continental shelf).

The eighth, ninth and tenth chapters contain the Literature, Cited Regulations and the Index.

This textbook is a very useful tool to help university professors and students in the process of teaching and learning maritime law. It could also be very useful for those engaged in a practical way with maritime law.

We acknowledge and congratulate the authors on the publication of such an important and unique work in Croatian maritime law literature.

THE CARRIAGE OF GOODS IN SWISS LAW: A COMPREHENSIVE OVERVIEW OF THE SWISS LEGAL SYSTEM, THE LIABILITY OF CARRIERS AND FREIGHT FORWARDERS AND THE MARINE AND LIABILITY INSURANCE

Vesna Polić Foglar
Stämpfli Publishers Ltd. (Stämpfli Verlag AG), Bern, 2022., 548 str.

U nakladi ugledne izdavačke kuće Stämpfli, vodećeg švicarskog nakladnika pravne literature, 2022. godine objavljena je znanstvena monografija pod naslovom *The Carriage of Goods in Swiss Law: A Comprehensive Overview of the Swiss Legal System, the Liability of Carriers and Freight Forwarders and the Marine and Liability Insurance (Prijevoz stvari po švicarskom pravu – sveobuhvatan pregled švicarskog pravnog sustava, odgovornosti prijevoznika i špeditera te pomorskog osiguranja i osiguranja odgovornosti)*. Autorica monografije je dr. sc. Vesna Polić Foglar, stručnjakinja u području pomorskog i općeprometnog prava i prava pomorskog i transportnog osiguranja s dugogodišnjom karijerom na poslovima transportnih osiguranja i pravnog savjetovanja u Švicarskoj, te nekadašnja znanstvena djelatnica Jadranskog zavoda Hrvatske akademije znanosti i umjetnosti.

Djelo je napisano na engleskom jeziku i sastoji se od šesnaest poglavlja. Sadrži sveobuhvatan ažurirani pregled i analizu pravnog uređenja prijevoza stvari u svim transportnim granama po švicarskom pravu, uključujući sustav odgovornosti prijevoznika i špeditera, te pomorsko osiguranje i druga transportna osiguranja, posebno osiguranje odgovornosti u transportu.

U prvom poglavlju autorica iznosi važne informacije o Švicarskoj, osobito o njezinom gospodarstvu, kretanjima robe u prijevozu, švicarskoj osiguranjeljnoj i reosiguranjeljnoj industriji i transportnoj infrastrukturi, uključujući željeznicu, ceste, pomorstvo (podaci o švicarskoj floti trgovačke mornarice), zračni promet, poštanske usluge, cjevovode i špediciju. S obzirom na snažnu gospodarsku ulogu Švicarske i njezin geografski položaj, kao važne tranzitne zemlje, visoko razvijeno tržište prijevozničkih, brodarskih i logističkih usluga te pratećih usluga pomorskog i transportnog osiguranja i reosiguranja, švicarsko transportno pravo može biti itekako zanimljivo i važno svim dionicima u međunarodnoj trgovini i transportu. Snagom zakona, međunarodnih konvencija i ugovornih klauzula iz ugovora o prijevozu ili ugovora o osiguranju, može proizaći primjena švicarskog prava i nadležnost švicarskih sudova u potencijalnim sporovima

vezanim uz prijevoz stvari i osiguranje transportnih rizika. Stoga je uvodno poglavlje knjige veoma korisno i informativno, posebno za čitatelje koji se po prvi put susreću sa švicarskim pravnim sustavom. U ovom poglavlju, čitatelji mogu pronaći sažeti pregled švicarskog političkog i pravnog sustava, ustrojstva zakonodavne, izvršne i sudbene vlasti u toj državi, načela neutralnosti, konfederalnog ustavnog uređenja te zemlje i druge relevantne informacije.

U drugom poglavlju autorica obrađuje švicarski Zakonik o obveznim odnosima kao glavni zakonski izvor obveznog prava koji ujedno predstavlja temelj za švicarsko opće pravno uređenje prijevoza stvari. U ovom poglavlju čitatelji se upoznaju s osnovama švicarskog ugovornog prava (sklapanje ugovora, sloboda ugovaranja, ništetnost i pobojnost ugovora, tumačenje ugovora i slično), građanskopravne odgovornosti za štetu i drugih izvanugovornih odgovornosti, učincima obveza, njihovom prestanku, zastari, solidarnim obvezama, ugovornim kaznama, prijenosu tražbina i drugo.

U trećem se poglavlju iznosi sveobuhvatan pregled posebnih odredbi švicarskog Zakonika o obveznim odnosima koje uređuju ugovor o prijevozu stvari (Glava XVI Zakonika o obveznim odnosima). Ove se zakonske odredbe primjenjuju na ugovore o prijevozu robe u svim transportnim granama, u mjeri u kojoj ugovor o prijevozu u pojedinoj transportnoj grani nije uređen posebnim nacionalnim propisima ili međunarodnim konvencijama. Odredbe se odnose na prijevoze unutar Švicarske Konfederacije. U ovom se poglavlju analizira i podredna primjena odredbi švicarskog Zakonika o obveznim odnosima o nalogu (Glava XIII Zakonika o obveznim odnosima) na ugovor o prijevozu. Do podredne primjene odredbi švicarskog Zakonika o obveznim odnosima na ugovore o prijevozu u raznim transportnim granama dolazi i u slučajevima kada posebni nacionalni propis ili međunarodna konvencija, koja uređuje ugovor o prijevozu stvari u pojedinoj transportnoj grani, ne regulira pojedina pravna pitanja. Tako se odredbe švicarskog nacionalnog prava o ugovoru o prijevozu mogu podredno primijeniti i na međunarodne transporte ako relevantna međunarodna konvencija ne govori o pojedinim pravnim pitanjima. Na primjer, međunarodne konvencije o ugovorima o prijevozu stvari u pravilu ne sadrže odredbe o načinu sklapanja ugovora, prijevoznikovu pravu retencije ili njegovu pravu na ugovorenu naknadu i drugo, pa se na ta pitanja primjenjuju odredbe švicarskog Zakonika o obveznim odnosima. Autorica u ovom poglavlju obrađuje elemente ugovora o prijevozu, ugovorne strane i pravni položaj primatelja, ugovorne obveze pošiljatelja i prijevoznika, ulogu teretnog lista, ovlaštenje raspolaganja pošiljkom tijekom prijevoza, sustav odgovornosti prijevoznika za štetu na stvarima (posebno opseg i vrste štete za

koje prijevoznik odgovara), isključenja i ograničenja odgovornosti prijevoznika, odgovornost prijevoznika za osobe koje rade za njega i za podugovaratelje, način isporuke, prijevoznikovo pravo na retenciju i založno pravo na robi u prijevozu, način i rokove obavještavanja prijevoznika o šteti na robi te ostvarivanja prava na naknadu štete, postupanje s robom u slučaju spora, pitanja u vezi sa zastarom potraživanja prema prijevozniku, aktivnom i pasivnom legitimacijom u sporovima iz ugovora o prijevozu i ostalo.

U četvrtom se poglavlju autorica bavi posebnim izvorima prava za prijevoz stvari u cestovnom prometu. Obrađuje relevantno autonomno pravo, poglavito pravnu problematiku općih uvjeta ugovora cestovnih prijevoznika. Prikazuje najčešće korištene standardne prijevozničke opće uvjete u Švicarskoj, kao što su: Opće odredbe za prijevoz unutar Švicarske – Odredbe o odgovornosti prijevoznika (FFHB) Švicarskog udruženja cestovnog prometa (ASTAG); ASTAG-ovi Opći uvjeti za selidbu namještaja; Opći uvjeti ugovora o prijevozu (2005.) Švicarske udruge za špediciju i logistiku – SPEDLOGSWISS. U sklopu istog poglavlja, posebna se pozornost posvećuje Konvenciji o ugovoru za međunarodni prijevoz robe cestom (CMR) koja obvezuje Švicarsku Konfederaciju kao državu članicu te se pojašnjava odnos između Konvencije CMR i švicarskog Zakonika o obveznim odnosima. Analizira se pravna priroda i način sklapanja ugovora o prijevozu robe cestom i uloga teretnog lista, pravo na raspolaganje pošiljkom u cestovnom prijevozu, sustav odgovornosti cestovnog prijevoznika za štetu na robi i za zakašnjenje (temelj odgovornosti, oslobođenje i isključenje odgovornosti, posebne opasnosti, ograničenje odgovornosti) te pitanja u vezi s ostvarivanjem prava na naknadu štete (primateljevi prigovori i reklamacije, zastara, sudska nadležnost).

Peto se poglavlje bavi prijevozom stvari željeznicom. Autorica tumači kako Savezni Zakon o prijevozu robe željeznicom i brodarskim kompanijama iz 2015. godine uređuje prijevoz robe željeznicom te izgradnju i rad prekrcajnih objekata za kombinirani prijevoz i sporednih kolosijeka, a na odgovarajući se način primjenjuje na prijevoz robe žičarama i unutarnjim vodenim putovima. Taj propis, međutim, sadrži samo jedan članak koji se odnosi na ugovor o prijevozu robe željeznicom. On je detaljno uređen Uniformnim pravilima o ugovoru o međunarodnom prijevozu robe željeznicom (CIM) koja čine dodatak Konvenciji o međunarodnom željezničkom prijevozu (COTIF). Radi veće ujednačenosti nacionalnog i međunarodnog pravnog uređenja ove materije, CIM se primjenjuje kao švicarski nacionalni propis na domaće i na međunarodne prijevoze robe željeznicom. Stoga se u petom poglavlju knjige autorica usredotočuje na pravno uređenje ugovora o prijevozu robe željeznicom po CIM-u te na Opće uvjete

ugovora o međunarodnom prijevozu robe u željezničkom prometu (GTC-CIM) koje donosi Međunarodni odbor za željeznički prijevoz (CIT). Ovi opći uvjeti obvezuju samo članove navedenog međunarodnog udruženja željezničkih prijevoznika u onoj mjeri u kojoj su ih pojedini članovi usvojili. Sročeni su kao preporuka za članove, a usklađeni su s CIM-om. Primjenjuju se na sve ugovore o prijevozu robe željeznicom koji podliježu CIM-u ili kada pošiljatelj i prijevoznik izričito ugovore njihovu primjenu. Autorica ukazuje i na mogućnost ugovaranja Općih uvjeta Međunarodnog udruženja za kombinirani prijevoz željeznicom i cestom (UIRR) kada se pošiljke prevoze na cestovnim teretnim vozilima ukrcanim na željezničke vagone, što je čest oblik prijevoza robe kroz Alpe. Konačno, obrađeni su i Opći uvjeti ugovora o prijevozu Švicarske savezne željeznice SBB Cargo AG koji se primjenjuju na sve domaće i međunarodne prijevoze koje obavljaju SBB Cargo AG i njegove podružnice.

Šesto je poglavlje posvećeno prijevozu stvari u zračnom prometu. Prikazan je švicarski nacionalni pravni okvir, uključujući Savezni Zakon o zrakoplovstvu, kao pretežno javnopravni propis, na temelju kojega je donesen Pravilnik o zračnom prijevozu. Pravilnik je usklađen s međunarodnim pravilima koja obvezuju Švicarsku, a uređuje sve ugovore o prijevozu putnika i robe u zračnom prometu na koje se ne primjenjuje Montrealska konvencija iz 1999. godine. On se smatra posebnim propisom za ugovore o prijevozu robe u zračnom prometu u odnosu na švicarski Zakon o obveznim odnosima koji je *lex generalis*. Međutim, s obzirom na to da je Švicarska članica Montrealske konvencije, u većini se slučajeva upravo ta konvencija primjenjuje na prijevoz robe u zračnom prometu. Autorica u ovom poglavlju iznosi sveobuhvatan pregled pravnog uređenja ugovora o prijevozu robe u zračnom prometu po Montrealskoj konvenciji kako je implementirana u švicarski pravni sustav. Na kraju ovog poglavlja, posebna je pozornost posvećena najčešće korištenim općim uvjetima ugovora o prijevozu robe u zračnom prometu (npr. opći uvjeti prijevoza koje donosi IATA ili Swiss WorldCargo).

Sedmo poglavlje obrađuje prijevoz stvari morem. Autorica iznosi opsežan pregled švicarskog pomorskog prava koje uređuje ugovore o pomorskom prijevozu stvari. Analiza uključuje usporedbu relevantnog nacionalnog zakonodavstva i Haško-Vizbijskih pravila, s obzirom na to da je Švicarska članica ove međunarodne pomorske konvencije. Analizirajući različite aspekte ugovora o pomorskom prijevozu prema švicarskom pravu, autorica razmatra odnos između Saveznog zakona o pomorskoj plovidbi pod švicarskom zastavom iz 1953. godine kao *lex specialis* i relevantnih odredbi Zakonika o obveznim odnosima i Građanskog zakonika kao *legi generali*. U svom se istraživanju poziva na relevantnu švicarsku sudsku praksu. Analiza obuhvaća aspekte

međunarodnog privatnog prava ugovora o pomorskom prijevozu, uključujući Savezni kodeks međunarodnog privatnog prava, Lugansku konvenciju iz 2007. godine i Njujoršku konvenciju iz 1958. godine. Istražuje se važnost trgovačke mornarice za Švicarsku kao državu bez izlaza na more te se razmatra budući razvoj švicarskog pomorskog prava. Ovaj pristup pomaže čitateljima da shvate globalnu važnost švicarskog nacionalnog pomorskog prava.

U osmom poglavlju autorica obrađuje ugovor o prijevozu stvari u unutarnjoj plovidbi. Unutarnja je plovidba u Švicarskoj uređena posebnim zakonom, odnosno Saveznim zakonom o unutarnjoj plovidbi iz 1975. godine te Pravilnikom o plovidbi švicarskim vodama iz 1978. godine. Kad je riječ o odnosima iz ugovora o prijevozu stvari u unutarnjoj plovidbi i odgovornosti prijevoznika za robu, mjerodavne su i odredbe Saveznog zakona o pomorskoj plovidbi pod švicarskom zastavom iz 1953. godine. Taj se zakon primjenjuje na plovidbu na Rajni, njezinim pritocima i kanalima te na svim unutarnjim vodama koje Švicarsku povezuju s morem. S obzirom na to da je Švicarska članica Budimpeštanske konvencije o ugovoru o prijevozu robe unutarnjim plovnim putevima (CMNI) iz 2000. godine, njezine odredbe imaju veću pravnu snagu od odredbi švicarskih nacionalnih propisa. Za prijevoz robe unutarnjim vodama unutar granica Švicarske mogu biti mjerodavne odredbe spomenutog Saveznog zakona o prijevozu robe željeznicom i brodarskim kompanijama iz 2015. godine. Kad je riječ o ugovoru o prijevozu robe na unutarnjim plovnim putovima koji ne vode prema moru, primjenjuju se odgovarajuće odredbe švicarskog Zakona o obveznim odnosima o ugovoru o prijevozu stvari. U sklopu ovog poglavlja, posebna je pozornost posvećena i Švicarskim općim uvjetima prijevoza Rajnom (SRTB) koje često koriste švicarski brodari unutarnje plovidbe.

Deveto se poglavlje odnosi na prijevoz stvari koji obavljaju pružatelji poštanskih usluga. Ovdje je mjerodavan Zakon o pošti iz 2012. godine, Pravilnik o pošti iz 2012. godine, Savezni zakon o organizaciji švicarske pošte iz 2012. godine i Svjetska poštanska konvencija iz 2019. godine. Autorica obrađuje Opće uvjete Švicarske pošte, kao i drugih pružatelja poštanskih usluga u Švicarskoj (CEP, DHL, FedEx), te ukazuje na podrednu primjenu odredbi Zakona o obveznim odnosima o ugovorima o prijevozu stvari. Posebna se pozornost posvećuje načinu sklapanja ugovora o prijevozu poštanskih pošiljki, obvezama ugovornih strana, odgovornosti pružatelja poštanskih usluga za štetu na stvarima u prijevozu, odnosno na poštanskim pošiljkama, pitanjima u vezi s ostvarivanjem prava na naknadu štete i drugo.

Deseto poglavlje obrađuje multimodalni prijevoz. Autorica analizira problematiku primjene mjerodavnog materijalnog prava na ugovor o multimodalnom

prijevozu. Bavi se pravnim specifičnostima u vezi s prijevozom kontejnerima i nedostatkom uniformnog međunarodnog pravnog uređenja za ovu vrstu prijevoza stvari. Ovu tematiku razmatra u okviru švicarskog transportnog prava i odgovarajuće primjene odredbi švicarskog Zakona o obveznim odnosima o ugovorima o prijevozu stvari.

U jedanaestom poglavlju autorica iznosi sveobuhvatan pregled švicarskog pravnog uređenja ugovora o otpremi (špediciji). Ova je vrsta ugovora u Švicarskoj regulirana Zakonom o obveznim odnosima, ali samo u najopćenitijim crtama. Autorica objašnjava osnovne razlike između ugovora o prijevozu stvari i ugovora o špediciji po švicarskom pravu. Analizira pravnu narav i glavne značajke ugovora o špediciji, prava i obveze ugovornih strana, sustav odgovornosti špeditera i specifičnosti njegova pravnog položaja kao organizatora prijevoza koji radi za račun nalogodavca, ali može nastupati i u ulozi prijevoznika. Posebno obrađuje široko primjenjive Opće uvjete SPEDLOGSWISS-a koje u pravilu primjenjuju svi švicarski špediteri i članovi te švicarske udruge za špediciju i logistiku.

Dvanaesto je poglavlje posvećeno osiguranju u transportu. Autorica izlaže pravni okvir za transportno osiguranje u švicarskom pravnom sustavu. Analizira švicarski Zakon o ugovoru o osiguranju kao glavni propis koji uređuje privatnopravne aspekte osiguranja, uključujući posebno i ugovore o pomorskom i transportnom osiguranju. Obrađuje se uloga posrednika u transportnim osiguranjima, a posebna se pozornost posvećuje postupku obrade šteta u transportnom osiguranju. Slijedi sveobuhvatan pregled osiguranja robe u prijevozu po standardnim široko prihvaćenim općim uvjetima pomorskog osiguranja robe švicarskih osiguratelja (GCMI 2006, edicija 01.2021). Analiza obuhvaća i niz stvarnih primjera šteta iz ove vrste osiguranja što je osobito korisno za razumijevanje pravno složenih pitanja u vezi s provedbom ugovora o osiguranju robe u prijevozu u praksi švicarskih osiguratelja. Autorica ukazuje i na specifičnosti posebnih uvjeta osiguranja robe u prijevozu koji su u primjeni na švicarskom tržištu osiguranja, uključujući Opće uvjete za osiguranje robe Švicarske udruge za osiguranje, Opće uvjete za osiguranje skupocjene robe (GCIS 2006, edicija 01.2021) te primjere općih uvjeta osiguranja robe u prijevozu koje sastavljaju brokeri u osiguranju ili pojedina švicarska društva za osiguranje. U sklopu ovog poglavlja obrađuje se i osiguranje kaska raznih vrsta prijevoznih sredstava koja se koriste u kopnenom prijevozu i unutarnjoj plovidbi te osiguranje odgovornosti u transportu u raznim granama prijevoza. Analiziraju se standardni uvjeti osiguranja Švicarske udruge za osiguranje, uključujući Opće uvjete osiguranja odgovornosti u transportu (BP-GCIL 2006,

edicija 01.2021), Opće uvjete osiguranja prijevozničke odgovornosti (GCCL Carrier 2008, edicija 01.2008) i Opće uvjete osiguranja odgovornosti špeditera (GCIL Freight Forwarders 2008, edicija 01.2008), s posebnim osvrtom na pravo na izravnu tužbu protiv osiguratelja odgovornosti prema švicarskom pravu.

Trinaesto se poglavlje bavi subrogacijom u transportnom osiguranju i regresnim zahtjevima osiguratelja po švicarskom pravu. Autorica iznosi mjerodavne zakonske odredbe Zakona o ugovoru o osiguranju i Zakona o obveznim odnosima, s osvrtom na povijesni razvoj relevantnih zakonskih odredbi i njihovu interpretaciju u sudskoj praksi.

U četrnaestom se poglavlju, na primjerima iz prakse švicarskih sudova, obrađuju pojedini aspekti parničnog postupovnog prava, pitanje aktivne i pasivne legitimacije te specifičnog položaja Lloydovih osiguratelja (eng. *underwriters*), rokovi i pravne posljedice zastare i gubitka prava na naknadu štete, osiguranje tražbina i ovrha, alternativni načini rješavanja sporova, nadležnost švicarskih sudova te raspodjela tereta dokazivanja, osobito u sporovima iz prijevoza stvari i pomorskog osiguranja.

Petnaesto se poglavlje bavi pitanjima međunarodnog privatnog prava. Autorica iznosi pregled mjerodavnih švicarskih propisa, uključujući Savezni Zakonik o međunarodnom privatnom pravu iz 1989. godine. Analizira zakonske odredbe o primjeni mjerodavnog prava i sudske nadležnosti te njihovu interpretaciju u praksi švicarskih sudova.

U šesnaestom poglavlju autorica raspravlja o prednostima i nedostacima švicarskog pravnog uređenja prijevoza stvari te iznosi ideje o mogućim poboljšanjima u budućem razvoju ove pravne grane u Švicarskoj. Autorica donosi osvrt na aktualne inicijative za reviziju švicarskog Zakonika o obveznim odnosima, na pitanje ograničenja odgovornosti prijevoznika, odgovornosti prijevoznika za krajnju nepažnju, ograničenja odgovornosti prijevoznikovih zaposlenika, na unifikaciju prava preuzimanjem odredbi konvencije CMR u nacionalne propise, na pitanje slobode ugovaranja u transportu te na posebne pravne aspekte odgovornosti i osiguranja u vezi s automatizacijom i primjenom umjetne inteligencije u tehnologiji prijevoza.

U knjizi se nalaze vrlo vrijedni i korisni prilozi, kao što su trojezično tablično kazalo citiranih propisa i međunarodnih konvencija na engleskom, njemačkom i francuskom jeziku, kazalo sudske prakse koje uključuje i sažete prikaze odluka švicarskih sudova, abecedno stvarno kazalo te sveobuhvatan popis relevantne literature, i to posebno grupirana djela pisana na engleskom, njemačkom i francuskom jeziku.

Knjiga predstavlja vrijednu zbirku znanja o svim važnim pravnim aspektima prijevoza stvari i poslova pomorskih i transportnih osiguranja u švicarskom pravnom sustavu, a sadrži i autoričin osvrt na određene prednosti i nedostatke u švicarskim propisima iz područja pomorskog i transportnog prava, kao i preporuke za moguća poboljšanja u budućem razvoju ove pravne grane u Švicarskoj. Djelo je rezultat autoričina dugogodišnjeg poslovnog iskustva u švicarskom osiguranjeljnom sektoru i njezina pravno-znanstvenog istraživanja. Riječ je o znatnom znanstvenom doprinosu i vrlo vrijednom izvoru stručne literature za praktičare i znanstvenike koji se bave pomorskim i transportnim pravom, za svu stručnu čitalačku publiku profesionalno vezanu uz pomorstvo, brodarstvo, prijevozništvo i logističku industriju i za studente prava, pomorstva, logistike i prometa, ne samo u Švicarskoj, nego i u inozemstvu, osobito diljem Europe. Upoznavanje sa švicarskim pravnim sustavom u području transporta i osiguranja može imati vrlo važnu praktičnu vrijednost za pružatelje, ali i korisnike usluga u transportu, posebno za one koji trguju sa švicarskim uvoznicima i izvoznicima.

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Summary:

THE CARRIAGE OF GOODS IN SWISS LAW: A COMPREHENSIVE OVERVIEW OF THE SWISS LEGAL SYSTEM, THE LIABILITY OF CARRIERS AND FREIGHT FORWARDERS AND THE MARINE AND LIABILITY INSURANCE

Vesna Polić Foglar
Stämpfli Publishers Ltd. (Stämpfli Verlag AG), Bern, 2022, 548 pages

In 2022, Stämpfli Publishers, a renowned Swiss leader in legal publishing, brought out a book entitled The Carriage of Goods in Swiss Law: A Comprehensive Overview of the Swiss Legal System, the Liability of Carriers and Freight Forwarders and the Marine and Liability Insurance authored by Dr. Vesna Polić Foglar, who is a counsel in Zürich with over 20 years of professional experience. She is an expert in shipping and transport law, carriage of goods, marine and transport insurance, and in transport claims handling. Before her successful career in Switzerland she had pursued an academic career in the field of maritime and transport law at the Adriatic Institute of the Croatian Academy of Sciences and Arts.

The book is written in English and contains a comprehensive up-to-date review and analysis of the legal regulation of carriage of goods in all transport branches under Swiss law, including the carriers´ and freight forwarders´ liability systems, as well as marine and transport insurance, and especially liability insurance in the transport industries.

The book represents a valuable collection of knowledge on all relevant legal aspects of carriage of goods and marine and transport insurance, and also contains the author's reflections on certain advantages and disadvantages of Swiss regulations in the field of maritime and transport law, as well as recommendations for possible improvements in the future development of this legal branch in Switzerland. The book draws on the author´s many years of business experience in the Swiss insurance industry and on her legal and academic research. It is a significant academic contribution and a very valuable source of professional literature for practitioners and scholars dealing with maritime and transport law and for all readers with a professional interest in shipping, the transport and logistics industry, as well as for students of law, economics, maritime studies, logistics, and traffic engineering, not only in Switzerland but also abroad, especially throughout Europe. Getting to know the Swiss legal system in the field of transport and insurance can be of significant practical value for providers as well as users of transport and insurance services, especially for those who trade with Swiss importers and exporters.

A MODERN LEX MERCATORIA FOR CARRIAGE OF GOODS BY SEA

Petar Kragić; Diana Jerolimov
Hrvatsko društvo za pomorsko pravo, Rijeka, 2022., 75 str.

Monografija pod nazivom *A Modern Lex Mercatoria for Carriage of Goods by Sea*, autora dr. sc. Petra Kragića i Diane Jerolimov, dipl. iur., objavljena je 2022. godine na engleskom jeziku u izdanju Hrvatskog društva za pomorsko pravo. Knjiga ima dvije inačice – tiskanu i elektronsku koja je dostupna na mrežnoj stranici Hrvatskog društva za pomorsko pravo (https://hdpp.hr/publikacije/). Ovo djelo predstavlja rad naših velikih autoriteta u pomorskopravnoj struci. Oboje autora proveli su svoju profesionalnu karijeru radeći kao pravnici u najvećoj hrvatskoj brodarskoj kompaniji te imaju bogato dugogodišnje radno iskustvo u području brodarstva i međunarodne pomorske trgovine. Sudjelovali su u izradi Nacrta konvencije Ujedinjenih naroda o ugovorima o međunarodnom prijevozu robe u cijelosti ili djelomično morem (Roterdamska pravila) kao članovi CMI-jeva pododbora i delegati UNCITRAL-ove radne grupe. Tijekom svoje karijere, dr. sc. Petar Kragić obavljao je brojne važne dužnosti. Bio je predsjednik Hrvatskog društva za pomorsko pravo i Hrvatske udruge brodara te direktor međunarodnog osiguruteljnog kluba UK P&I Club i SIGCo (međunarodni pružatelj usluga financijskih jamstava za odgovornost za onečišćenje mora uljem). Monografija je iznimno važna i vrijedna zbog nekoliko razloga. Kao prvo, za struku je uvijek neprocjenjiv doprinos čitati djelo nastalo iz pera vrsnih pomorskopravnih praktičara, a posebno osoba koje su sudjelovale u pripremnim radovima, raspravama i procesima u kojima se izgrađivala određena specifična materija, u ovom slučaju Konvencija Ujedinjenih naroda o ugovorima o međunarodnom prijevozu robe u cijelosti ili djelomično morem (u nastavku: Roterdamska pravila). Drugi je važan doprinos ove knjige što sažeto, pregledno, uz naglašen kritički osvrt autora te njihove vrlo originalne stavove obrađuje kompleksnu materiju odgovornosti pomorskog prijevoznika za prijevoz stvari morem. Osim toga, knjiga sadrži elaborat autora o tome što bi trebalo učiniti kako bi se unaprijedila pojedina konvencijska rješenja, što knjizi daje elemente originalnosti.

Monografija obrađuje tri središnja pitanja. Prvo je pitanje tko je odgovorna osoba na strani broda u ugovorima o prijevozu stvari morem. Drugo važno pitanje kojem autori posvećuju pažnju je obvezno osiguranje odgovornosti za teret, točnije treba li po uzoru na neke druge međunarodne konvencije uvesti obvezno

osiguranje tereta. Treća velika cjelina knjige posvećena je sudskoj nadležnosti i arbitraži s posebnim naglaskom na uređenje tog pitanja u Roterdamskim pravilima.

Knjiga započinje briljantnim kratkim prikazom i analizom povijesnog razvoja odgovornosti pomorskog prijevoznika za prijevoz stvari morem, od rimskog prava preko srednjeg vijek pa do novog doba. Ovaj je dio iznimno koristan za one koji se tek upoznaju s materijom, ali jednako tako i za svakog čitatelja koji dobro poznaje ovu temu jer autori sažimaju povijesne lekcije i tumače važne činjenica iz povijesti u vezi odgovornosti za prijevoz stvari morem.

U drugom poglavlju monografija sadrži sveobuhvatnu kritičku i poredbenopravnu analizu pitanja tko su odgovorne osobe na strani broda u pomorskom prijevozu stvari, a najvažnija je analiza pitanja tko je prijevoznik u suvremenom kontekstu brodarske djelatnosti i pomorskih prijevozničkih ugovora. Ovdje posebno dolazi do izražaja sjajna analitika autora i njihova vrlo precizna sinteza. Autori precizno razlučuju tko je odgovorna osoba prema Haškim, Haško-Visbijskim te Hamburškim pravilima. Posebno važan dio ovog poglavlja jest dubinska pravna analiza koja sadrži precizna objašnjenja atributa prijevoznika prema Roterdamskim pravilima. Naročito vrijedan doprinos ovog djela studije je razrada koncepta pomorskog izvršitelja i kritički osvrt na koncept odgovornosti pomorskog izvršitelja. Autori briljantno elaboriraju sve složene odnose između osoba na strani broda. Ovaj dio knjige sadrži vrlo recentne podatke te važne informacije s preparatornih radova kojima su autori osobno svjedočili kao članovi CMI-jeva pododbora i delegati u UNCITRAL-ovoj radnoj skupini za izradu nacrta Roterdamskih pravila. Neprocjenjive vrijednosti ovog dijela knjige su dokumentirana shvaćanja i tumačenja o pojedinim pitanjima tvoraca konvencije, kao i prijedlozi pojedinih nacionalnih delegacija. Prezentacija materije često uključuje vrlo slikovite i plastične ilustracije i crteže, što je vrlo korisno imajući u vidu kompleksnost ugovora koji se sklapaju u pomorskom prijevozu i kompleksnost odnosa osoba na strani broda.

Treće je poglavlje posvećeno obveznom osiguranju tereta. Autori ističu kako se stvarnost brodarstva bitno promijenila od donošenja Haških pravila, navodeći da su sve izmjene Haških pravila, pa čak i novije konvencije, slijedile isti koncept. Oni ukazuju da su konvencije koje uređuju prijevoz stvari morem zanemarile razvoj događaja u području osiguranja, za razliku od konvencija koje uređuju prijevoz putnika, odgovornost za onečišćenje mora te uklanjanje podrtina. Čitatelju nastoje na duhovit način približiti svoju tezu, sugerirajući da se treba prisjetiti priče o Kolumbovom jajetu, odnosno da i ovdje postoji jednostavno rješenje za tešku zagonetku. To jednostavno rješenje autori vide u analogiji

prema drugim obveznim osiguranjima u pomorstvu te predlažu uvođenje tog koncepta i u prijevoz stvari. Dakle, zalažu se za obvezno osiguranje odgovornosti brodovlasnika za teret kao zamjenu za institut izvršitelja. Spomenuti institut omogućuje ovlaštenicima na teretu tužiti bilo koju osobu koja obavlja ili se obveže obaviti bilo koju prijevoznikovu obvezu iz ugovora o prijevozu, a koja je vezana za preuzimanje, ukrcaj, rukovanje, slaganje, prijevoz, držanje, čuvanje, iskrcaj i isporuku tereta. Ovo stajalište zadire u načelo da ugovor stvara obveze i prava samo između ugovornih strana. Umjesto mogućnosti utuženja svih tih osoba u svrhu lakše naplate, autori predlažu usmjeravanje zahtjeva prema prijevozniku uz obvezno osiguranje njegove odgovornosti za teret. Smatraju da je takvo pokriće obvezno već sada *de iure* i *de facto*. *De iure* Direktiva 2009/20/EC Europskog parlamenta i Vijeća Europske unije nalaže obvezno osiguranje odgovornosti brodara za pomorske tražbine prema odredbama LLMC-a iz 1976. i njegova protokola iz 1996. godine. Ova obveza također postoji *de facto* jer u pomorskoj praksi naručitelji prijevoza redovito zahtijevaju od brodara – kao uvjet zaključenja ugovora o iskorištavanju brodova – potvrdu da je brod učlanjen u P&I klub. Autori predlažu da se prema Roterdamskim pravilima izravna tužba omogući samo za naplatu nagodbe ili presude, odnosno arbitražne odluke koju je ovlaštenik na teretu ishodio na nadležnom sudu protiv prijevoznika. Time bi se P&I klubovi našli u istoj situaciji kao kad izdaju LOU. Osiguratelji bi samo jamčili isplatu iznosa odštete određenog u nagodbi ili presudi ili arbitražnoj odluci.

Osiguravatelji odgovornosti bili bi u istoj poziciji kao danas, osim što tužitelj ne bi morao arestirati brod kako bi dobio jamstvo (jamstveno pismo ili bankovnu garanciju), ali kao što je opisano, imao bi pravo tužiti osiguravatelja na ispunjenje pravomoćne presude protiv prijevoznika u slučaju ako ona ne bude izvršena dobrovoljno.

Autori objašnjavaju da u slučaju postojanja obveznog osiguranja, ako se utvrdi odgovornost prijevoznika, osiguratelj postaje jamac i nestaje potreba za privremenim zaustavljanjem broda radi osiguranja tražbine. Prema njihovom mišljenju, obvezno osiguranje naročito bi pomoglo u slučaju ako ugovorni prijevoznik postane insolventan ili njegov jedini brod postane potpuni gubitak ili zbog područja plovidbe nedostupan za arest. Autori se zalažu za koncept da se u Roterdamskim pravilima odgovornost kanalizira na prijevoznika. Naime, ako prijevoznik nije identificiran u ugovoru ili prijevoznoj ispravi, ili ako nije ispravna polica koja pokriva njegovu odgovornost za teret, predlažu da se upisani vlasnik smatra prijevoznikom. To bi omogućilo usmjeravanje odgovornosti za teret prema prijevozniku, a svi drugi pružatelji usluga ne bi bili izloženi zahtjevima u odnosu na taj

teret. Sigurnost za učinkovitu naknadu štete ostvarila bi se tako da tužitelj najprije ishodi pravomoćnu presudu nadležnog suda ili arbitražnu odluku ili nagodbu, a nakon toga dobio bi pravo tužiti osiguravatelja od odgovornosti samo ako pravomoćna presuda protiv prijevoznika ne bi bila naplaćena unutar roka za njezino dobrovoljno izvršenje.

Ovakvi stavovi o obveznom osiguranju brodovlasnika za tražbine na teretu nisu za sada prihvaćeni u brodarskim i osiguruteljnim krugovima, kao ni na diplomatskoj razini, pa će biti zanimljivo pratiti hoće li oni zadobiti širu potporu u budućnosti. Naime, uvjeti osiguranja tereta predmet su ugovorne slobode strana što znači da je u podlozi dobrovoljno osiguranje odgovornosti brodara, obično u obliku P&I osiguranja. Opće pravo na izravnu tužbu nije ugrađeno u Direktivu 2009/20/EC, kao ni u IMO-ovu rezoluciju A.898(21) iz 1999. godine o odgovornosti brodara za pomorske tražbine čije preporuke Direktiva 2009/20/EC ujedno implementira u europsko pravo. Stoga, korist od Direktive imaju samo tužitelji koji uspiju arestirati brod.

Zahvaljujući činjenici da su autori vrhunski pravni praktičari s dugogodišnjim iskustvom u pomorskoj industriji, oni besprijekorno uočavaju sve probleme u praksi u primjeni aktualnih pomorskopravnih konvencija i njihovih protokola koji se odnose na sudsku nadležnost i arbitražu. Pored toga, poznaju sve detalje i autentična tumačenja Roterdamskih pravila jer su kao delegati sudjelovali u pripremnim radovima. U tom smislu uočavaju koja rješenja Roterdamskih pravila potencijalno mogu biti sporna u praksi.

U četvrtom poglavlju knjige autori čitatelje uvode u relevantne probleme koji se odnose na sudsku nadležnosti i arbitražu. Oni objašnjavaju doktrinu forum *non conveniens* uz prikaz i komentar sudskih oduka u kojima su sudovi odlučivali o primjeni ovog načela, odnosno o pitanju postoji li u pojedinom slučaju prikladniji sud za vođenje postupka s obzirom na interese svih strana u sporu i ostvarivanje pravde. U nastavku ovog poglavlja govore o Europskoj regulaciji nadležnosti i arbitraži, odredbama Hamburških pravila o tom pitanju te o odredbama Roterdamskih pravila o jurisdikciji i arbitraži. Objašnjavaju zašto je izbor nadležnog suda bitan i koje su posljedice. Kad je riječ o tom pitanju, najvećom sadržajnom manjkavošću Roterdamskih pravila smatraju bitno ograničenje u vezi s mogućnostima i učincima sporazuma strana o isključivo nadležnom sudu koji će rješavati spor protiv prijevoznika. Zalažu se za to da forum koji je ugovoren u brodarskom ugovoru obvezuje i imatelja teretnice jer su to u pravilu forumi u koje gospodarstvenici imaju povjerenja zbog nepristranosti i stručnosti (npr. arbitraža u Londonu), što je u samom temelju povijesne *legis mercatoriae*. Hamburška i Roterdamska pravila daju strani tereta mogućnost izbora foruma

(npr. domaćeg suda luke iskrcaja) koji će im biti naklonjen i, prema mišljenju autora, nestandardnim tumačenjem dokaza te im može pogodovati i na drugi način. Kod pojedinačnih ugovora u linijskom prijevozu treba zaštiti korisnika prijevoza kao »malog potrošača« koji nema pregovaračku snagu. To se pogotovo odnosi na ugovaranje nadležnosti suda sjedišta prijevoznika.

S obzirom na to da Roterdamska pravila nisu uspjela izazvati dovoljno entuzijazma diljem svijeta za ratifikaciju, posebnu vrijednost knjizi daju originalna razmatranja autora o tome što bi se moglo učiniti da ona postanu privlačnija industriji i državama za ratifikaciju. Prema autorima, čini se kako Roterdamska pravila nisu doživjela uspjeh zbog njihove složenosti i kompliciranosti strukture, kao i straha da bi njihova primjena mogla izazvati više nejasnoća i sporova, nego što bi doprinijela njihovom rješavanju. Nadalje, glavni su uzroci oklijevanja država s ratifikacijom složenost Roterdamskih pravila, i činjenica što je dopušteno osobama na strani tereta, pored prijevoznika, tužiti i pomorske izvršitelje, što znači da tuženici mogu biti razni subjekti uključeni u prijevoz.

Autori u knjizi iznose konkretne prijedloge za unaprjeđenje Roterdamskih pravila. Novi konceptualni pristup koji autori sugeriraju jest pojednostavljivanje mehanizama naknade štete tako da se usmjeri odgovornost na prijevoznika, a tražbine osiguraju obveznim osiguranjem odgovornosti brodovlasnika za teret. Drugi važan prijedlog za koji se zalažu autori odnosi se na izmjene odredbi o nadležnosti i arbitraži u Roterdamskim pravilima, konkretno izmjene odredbi o prorogaciji nadležnosti te uvođenje institucionalne konvencijske arbitraže koja će koristiti etablirane arbitre iz postojećih arbitražnih centara.

Autori zaključuju kako je stupanje na snagu Roterdamskih pravila poželjno te da bi njihova primjena olakšala transakcije vezane za međunarodni prijevoz stvari morem. Drugim riječima, moderni *lex mercaroria* potreban je za uređenje modernih ugovornih trgovačkih odnosa u vezi s prijevozom stvari morem i za rješavanje sporova koji proizlaze iz toga.

Može se zaključiti da su autori vrlo uspješno ispunili težak zadatak, što podrazumijeva obradu i analizu jedne vrlo kompleksne materije te njezino uspješno približavanje čitateljima. Autori su u tome pokazali visoku razinu pravničkog umijeća. Knjiga sažeto i koncizno obrađuje složena pitanja. Sadrži vrlo slojevitu analizu svih konvencija u ovom području, njihovu poredbenu analizu te kritički osvrt na njih. Ono što je posebno vrijedno i važno jest da se u obradi teme autori kontinuirano osvrću na relevantnu sudsku praksu. Primjeri sudskog tumačenja uključuju i njihov komentar sudskih odluka, što monografiji daje posebnu vrijednost. Vrlo je važan i povijesni osvrt na tijek reguliranja ove materije. Najveću vrijednost imaju originalni stavovi autora o tome kako

oni vide moderno pravno uređenje prijevoza stvari morem. Svoje stavove i zaključke o pojedinim rješenjima te prijedloge za njihovo unaprjeđenje, jasnim stilom prenose čitatelju.

Zbog svojih kvaliteta, ova monografija bit će važno i vrijedno štivo za praktičare i znanstvenike koji se bave pomorskim prijevozničkim ugovorima, a iznimno je važna i za struku osiguranja koja u ovoj knjizi može naći zanimljive ideje i koncepte.

Knjiga je napisana na engleskom jeziku, što jamči da će imati vrlo širok krug čitatelja na međunarodnoj razini, a takvu pozornost svakako i zaslužuje.

Dr. sc. Vesna Skorupan Wolff, znanstvena savjetnica u trajnom zvanju
Jadranski zavod Hrvatske akademije znanosti i umjetnosti

Summary:

A MODERN LEX MERCATORIA FOR CARRIAGE OF GOODS BY SEA

Petar Kragić; Diana Jerolimov
Croatian Maritime Law Association, Rijeka, 2022, 73 pages

A Modern Lex Mercatoria for Carriage of Goods by Sea is a book that is exceptionally important and valuable for a number of reasons. Firstly, it represents an essential contribution to shipping law because it is written by two experienced practitioners who participated in the preparatory works, discussions, and processes of developing the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Secondly, the major significance of this book lies in the fact that it elaborates concisely, transparently, and critically the complex matter of liability of the carrier of goods by sea by offering original views on the issue. In addition, the book contains the authors´ proposals of what should be done to improve some of the Convention´s solutions, which gives the book elements of innovation.

The book begins with a short review and analysis of the historical development of liability of the carrier of goods by sea from the Roman period through the Middle Ages to contemporary times. In the second chapter, the book makes a comprehensive critical and comparative analysis of the question: ˝Who are liable persons on the part of the ship in the carriage of goods by sea?˝ Most important is the analysis of who the carrier is in the context of modern shipping and contemporary contracts of carriage of goods by sea. The authors precisely distinguish who the liable person is under The Hague Rules, The Hague – Visby Rules, and The Hamburg Rules. A particularly important part of this chapter is the in-depth analysis of the elements of the carrier under the Rotterdam Rules and a valuable explanation of the concept of the maritime performing party together with a critical review of its liability.

The third chapter is devoted to compulsory insurance for cargo liability, which the authors see as a replacement for the concept of maritime performing party that violates the principle of privity of contracts. The authors state that the conventions on carriage of goods by sea have ignored developments in insurance, unlike the conventions that govern carriage of passengers by sea, liability for oil pollution, and removal of wrecks. They attempt to develop this argument in a witty way by referring to the story of Columbus´s egg, claiming that there is also a simple solution to this complex puzzle. The authors see this solution in analogy with other compulsory insurance cases in shipping, and propose the introduction of such a concept for the carriage of goods. This means that they advocate compulsory insurance of the carrier´s liability for cargo and direct action by claiming that such insurance cover is already de iure *and* de facto *in place.* De iure*, Directive 2009/20/*

EC of the European Parliament and EU Commission requires compulsory insurance for the shipowner´s liabilities for maritime claims listed in LLMC 1976 and its 1996 Protocol, and, de facto*, in shipping commercial practice where the charterers regularly require proof of P&I cover of the ship. If direct action were introduced, then the need to arrest the ship as security for the claim would diminish or even disappear. According to the authors, compulsory insurance would be particularly useful if the carrier becomes insolvent. For the Rotterdam Rules, they advocate channelling liability towards the carrier.*

In the fourth chapter of the book, the authors introduce readers to the relevant problems concerning jurisdiction and arbitration. They explain the doctrine of forum non conveniens accompanied by a presentation of and comments on court cases where courts have decided on the implementation of such a principle, actually on the question of whether in a particular case there was another jurisdiction to try the case more conveniently, bearing in mind the interests of all parties involved in the dispute and achieving justice. In the continuation of this chapter, the authors write about the European regulation on jurisdiction and arbitration, and the articles of the Hamburg Rules and the Rotterdam Rules on jurisdiction and arbitration. They explain why the choice of court agreement is important and what the consequences are of restricting the choice of court agreements for resolving disputes against carriers, which they consider to be the main flaw of the Rotterdam Rules. The point is that the parties to the charterparties chose independent, impartial and expert forums (that is the core of legis mercatoriae), but that forum included in the bill of lading does not bind the consignee, which under the Rotterdam Rules has the right to sue the carrier in a court of its choice. In practice that will be usually domestic court, which would by biased interpretation of evidence or otherwise favour the claimant´s interest. The point is that the parties to the charterparties chose independent, impartial and expert forums (that is the core of legis mercatoriae), but that forum included in the bill of lading does not bind the consignee, which under the Rotterdam Rules has the right to sue the carrier in a court of its choice. In practice that will be usually domestic court, which would by biased interpretation of evidence or otherwise favour the claimant´s interest. The authors suggest that the Rules have not succeeded in getting a sufficient number of ratifications due to their complexity, and they fear that their implementation would cause more uncertainty and litigation rather than contribute to resolving disputes. Further, the main reason why States are reluctant to ratify the Rotterdam Rules, apart from their complexity, is the fact that the Rotterdam Rules allow cargo interests to sue, in addition to the carrier, maritime performing parties.

In the book, the authors give specific proposals for improving the Rotterdam Rules. The new conceptual attitude suggested by the authors is a simplification of the damage recovery mechanism by way of channelling liability towards the carrier and by introducing the compulsory insurance of the ship owner´s liability for cargo. The second important change advocated by the authors is related to the Rotterdam Rules on jurisdiction and arbitration, specifically changes of the articles on prorogation of jurisdiction and

the introduction of institutionalised convention arbitration that would use established arbitrators from the existing arbitrational centres. The authors conclude that with the entry into force of the amended Rotterdam Rules, transactions related to the international carriage of goods by sea would be facilitated simply and easily. In other words, a modern lex mercatoria *is required to regulate modern contractual merchant relations regarding the carriage of goods by sea and for resolving disputes resulting therefrom.*

TEMATSKA BIBLIOGRAFIJA
SELECTIVE BIBLIOGRAPHY

Tematska bibliografija / Selective Bibliography

PROMETNO PRAVO / TRANSPORT LAW

ALEKSANDRA ČAR, mag. spec., viša knjižničarka*

Bibliografija u području prometnog prava obuhvaća reference odabranih članaka i radova objavljenih u domaćim i inozemnim znanstvenim i stručnim časopisima, te knjiga i poglavlja u knjigama u izdanju hrvatskih i inozemnih (uglavnom europskih) izdavača.

Bibliografija nije sveobuhvatna, a uključuje odabrane radove i publikacije objavljene od 2010. do 2023. godine na hrvatskom i engleskom, te u manjoj mjeri na francuskom i njemačkom jeziku.

Cilj je ove bibliografije dati pregled domaće i inozemne građe koja se odnosi na transportno pravo, kao i na pojedine njegove grane i područja (cestovni i željeznički promet; osiguranje transportnih rizika; tržišno natjecanje u području transporta; multimodalni prijevoz; te turizam i prava putnika) te time olakšati stručni i znanstveni rad istraživača u području transportnog prava. S obzirom na važnost pomorskog prava kao grane prometnog prava kojom se bavi Jadranski zavod, za idući broj časopisa Pomorsko poredbeno pravo (izdanje 2024.) u pripremi je zasebna opsežna bibliografija posvećena isključivo toj grani prometnog prava.

Unutar tematskih područja reference su razvrstane abecednim redom prema imenu autora, a pri navođenju korištena su pravila za citiranje pravnih izvora OSCOLA (Oxford University Standard for the Citation of Legal Authorities).

This is a list of bibliographic references to selected articles, papers, books and chapters in books in the field of transport law, published in scientific and research journals and other publications by Croatian and foreign (mainly European) publishers from 2010 to 2023. Included are works published in English and Croatian and to a lesser extent in French and German.

The purpose of this bibliography is to facilitate the work of researchers in the field of transport law or within one of its narrower areas such as: road transport; rail transport; insurance of transport risks; competition in the transport sector; multimodal transport; and tourism and passenger rights. Given that maritime law is the main subject of research and scientific interest of the Adriatic Institute, a separate bibliography dedicated exclusively to that

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branch of transport law is being prepared for the next issue of the Maritime Comparative Law Journal (to be published in 2024).

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IN MEMORIAM

PROF. DR. SC. DRAGO PAVIĆ
(1933. – 2023.)

Jedan od velikana hrvatskog pomorskog prava i vodeći stručnjak iz područja pomorskog osiguranja, prof. dr. sc. Drago Pavić, preminuo je 4. lipnja 2023. godine u devedesetoj godini života. Smrt uvijek dolazi neočekivano i iznenada, čak i kad smo svjesni njezine blizine. Zbog toga smo njegov odlazak doživjeli nespremno i iznenada.

Profesor Pavić rođen je 27. studenoga 1933. godine u Hvaru, gdje je završio osnovnu školu. Učiteljsku školu završio je 1952. godine u Zadru, a Višu pedagošku školu 1956. godine u Splitu. Diplomirao je 1964. godine na Pravnom fakultetu u Splitu. Poslijediplomski studij iz trgovačkog prava završio je 1975. godine na Pravnom fakultetu u Zagrebu, stekavši zvanje magistra pravnih znanosti. Doktorat društvenih znanosti iz područja pravnih znanosti stekao je 1978. godine na Pravnom fakultetu u Zagrebu. U znanstveno-istraživačko zvanje znanstvenog savjetnika izabran je 1989. godine kada je stekao i znanstveno-nastavno zvanje redovitog profesora. Odlukom Senata Sveučilišta u Splitu, 1998. godine trajno je izabran u znanstveno-nastavno zvanje redovitog profesora.

Titularni član (*titulary member*) Međunarodnog pomorskog odbora postao je 1994. godine. Bio je glavni urednik časopisa *Svijet osiguranja* (1998. – 2001.), a od 2001. godine redoviti član Akademije pravnih znanosti Hrvatske. Dobitnik je Nagrade grada Splita za znanost 1987. godine i godišnje Nagrade za doprinos u znanosti Splitsko-dalmatinske županije 1999. godine.

Tijekom svog radnog vijeka ostvario je zavidnu gospodarsku, nastavnu i znanstvenu karijeru. Nakon što je završio Pravni fakultet, 1965. godine započela je njegova gospodarska karijera. U narednom je razdoblju obnašao rukovodeće poslove u Jadranskom osiguravajućem zavodu u Splitu i Croatia osiguranju. Tamo je punih sedamnaest godina obavljao dužnost direktora Filijale za osiguranje transporta i kredita u Splitu, a dvije je godine bio savjetnik generalnog direktora u Zagrebu. Osim što je djelovao u gospodarstvu, sustavno se bavio znanstveno-istraživačkim radom na području pomorskog prava, posebice pomorskog osiguranja, što je potvrdio brojnim publiciranim radovima.

Nastavnu karijeru na visokoškolskim učilištima započeo je 1971. godine na Višoj ekonomskoj školi u Splitu. Od školske godine 1986./1987., predavao je na

Pomorskom fakultetu u Splitu kolegije Pomorski prijevozi, Pomorske havarije i osiguranje te Trgovačko pravo. Od 1997. do 2004. godine bio je dekan Pomorskog fakulteta u Splitu. Bio je stalni suradnik na poslijediplomskom studiju Pravo mora Pravnog fakulteta u Splitu za disciplinu pravo osiguranja. Sudjelovao je u izvođenju nastave na više poslijediplomskih studija (Pomorski fakultet u Rijeci, Pravni fakultet u Rijeci i Ekonomski fakultet u Zagrebu) iz pomorskopravnih kolegija i kolegija iz prava osiguranja.

Aktivno je sudjelovao na brojnim savjetovanjima i seminarima u organizaciji Hrvatske akademije znanosti i umjetnosti, Hrvatskog društva za pomorsko pravo, Udruge pravnika u gospodarstvu Split, hrvatskih i inozemnih osiguratelja te odvjetničkih kuća s temama iz pomorskog prava, osiguranja i trgovačkog prava. Bio je stalni suradnik *Pomorske enciklopedije* te urednik struke Pravo osiguranja i autor u projektu *Pravnog leksikona* u izdanju Leksikografskog zavoda Miroslav Krleža. Aktivno je sudjelovao u radu na reviziji Zakona o obveznim odnosima i Pomorskog zakonika. Bio je redoviti suradnik Znanstvenog savjeta Hrvatske akademije znanosti i umjetnosti. Kao glavni istraživač vodio je znanstveno-istraživački projekt »Hrvatsko pravo osiguranja u uvjetima europske integracije«. Bio je prvi glavni urednik novopokrenutog časopisa *Svijet osiguranja* 1998. godine u Zagrebu.

Profesor Pavić bio je naš vodeći stručnjak i najplodniji pisac iz područja pomorskog osiguranja. U sklopu svoje znanstvene karijere objavio je sljedeće knjige: *Prijevoz kontejnerima*, Zagreb, 1983.; *Pomorsko osiguranje*, knjiga prva, Zagreb, 1986.; *Institutske klauzule pomorskog osiguranja*, Zagreb, 1991.; *Pomorsko osiguranje*, knjiga druga, Zagreb, 1994.; *Pravo pomorskog osiguranja*, Zagreb, 1997.; *Saobraćajno pravo* (koautor), Novi Sad, 1990.; *Rječnik osiguranja* (koautor), Zagreb, 1997.; *Trgovačko pravo I* (udžbenik), Split, 1998.; *Pomorsko pravo,* knjiga treća, *Pomorske havarije i osiguranje* (udžbenik), Split, 2000.; *Pomorsko pravo,* knjiga druga, *Pravo pomorskih prijevoza* (udžbenik), Split, 2002.; *Pomorske havarije i osiguranje* (udžbenik), Split, 2003.; *Komentar Zakona o obveznim odnosima* (koautor), Zagreb, 2005. Nakon umirovljenja objavljuje svoja najznačajnija djela: *Pomorsko imovinsko pravo* (udžbenik), Split, 2006.; *Ugovorno pravo osiguranja – komentar zakonskih odredbi*, Zagreb, 2009.; i, konačno, *Pomorsko osiguranje – pravo i praksa* u izdanju Književnog kruga Split, 2012. godine. Također je autor više priručnika, a objavio je više od četiristo znanstvenih i stručnih radova, rasprava, stručnih prikaza, enciklopedijskih članaka i izlaganja iz područja pomorskog i trgovačkog prava.

Njegov znanstveni doprinos, kao autora i pisca, pokazuju nam već njegova ranija djela, kao što su knjige *Pomorsko osiguranje I*. i *II.*, koje i danas predstavljaju rijetkost u svjetskoj stručnoj publicistici jer su stručno i cjelovito obrađena

pomorska osiguranja. S tim se radovima profesor Pavić predstavio kao osoba s velikim teoretskim i praktičnim znanjem iz prava osiguranja. Knjiga *Prijevoz kontejnerima* je jedinstvena jer na sveobuhvatan način prikazuje pravne učinke prijevoza stvari u kontejnerima. U nastavku se posebno izdvajaju i prikazuju tri njegova posljednja djela, jedan udžbenik i dvije knjige koje su ujedno i kruna njegova znanstvenog rada.

Pomorsko imovinsko pravo je udžbenik u izdanju Književnog kruga Split, 2006. godine. Sadrži šesto dvadeset i jednu stranicu. U njemu su cjelovito i sistematski prikazani i objašnjeni najvažniji klasični instituti pomorskog imovinskog prava, njegovo suvremeno pravno stanje i fenomeni praktične primjene. Okosnicu tog udžbenika čini Pomorski zakonik iz 2004. godine, kao i drugi međunarodni i nacionalni propisi. Podijeljen je u pet glava (Uvod u pomorsko imovinsko pravo, Odgovornost vlasnika broda (brodara), Ugovori o iskorištavanju brodova, Pomorske havarije i Pomorsko osiguranje) u kojima je autor složene institute pomorskog imovinskog prava obradio jasnim i pitkim stilom uz zadržavanje vrlo visokog stupnja pravne preciznosti. Posebna je kvaliteta ovog udžbenika što je jednaka pažnja posvećena teoretskoj obradi instituta pomorskog imovinskog prava i njihovoj praktičnoj primjeni u plovidbenoj, gospodarskoj, sudskoj i nastavnoj praksi. Takvo metodološko i sadržajno opredjeljenje pisca u obradi ove složene materije vidljivo je na svakoj stranici ovog iznimnog djela. Prikazujući i analizirajući institute pomorskog imovinskog prava, autor je odgovorio na brojna pitanja na koja pomorski poduzetnici, ali i zapovjednici brodova i članovi posade nailaze u svakodnevnoj praksi. U udžbeniku je prikazan i pojašnjen poseban položaj zapovjednika broda, s obzirom na njegove obveze i odgovornosti povezanih s različitim aspektima pomorskih prijevoza robe i putnika morem, pomorskih nesreća i pomorskog osiguranja. Iza svake tematske cjeline nalazi se osvrt na zapovjednikove dužnosti u važnim i složenim pomorskopravnim odnosima tijekom obavljanja plovidbenih aktivnosti i u uvjetima opasnosti za brod, osobe i stvari na brodu te za morski okoliš. Autor je uz knjigu priložio i niz iznimno korisnih i relevantnih prijevoda pomorsko-pravnih izvora, uključujući York-Antwerpenska pravila iz 1994. i 2004., Lloyd´sov standardni obrazac ugovora za spašavanje, Institutske klauzule za osiguranje robe (A, B i C), Institutske klauzule za osiguranje brodova na vrijeme (ITC 1995.) te Institutske klauzule za osiguranje brodova od ratnih rizika i rizika štrajka (1995.). Knjiga *Pomorsko imovinsko pravo* prvenstveno služi kao udžbenik namjenjen studentima prijediplomskih, diplomskih i poslijediplomskih studija pravnih i pomorskih fakulteta, kao obvezna literatura na visokoškolskim institucijama. Međutim, ona nije samo neizostavna znanstveno-stručna literatura za studente i nastavnike

visokih učilišta na kojima se proučava pomorsko pravo, nego je i dragocjeno štivo svim onima koji su profesionalno vezani uz pomorsku djelatnost.

Sljedeća knjiga, *Ugovorno pravo osiguranja – komentar zakonskih odredbi* objavljena je 2009. godine u izdanju nakladnika Tectus d.o.o., Zagreb. Napisana je na šesto osamdeset i četiri stranice i predstavlja prvi pokušaj da se u Republici Hrvatskoj cjelovito na jednom mjestu analiziraju i znanstveno-stručno objasne zakonske odredbe o ugovoru u osiguranju i to u svim vrstama osiguranja (imovinsko, pomorsko i životno). U tu su svrhu u knjizi analizirani svi relevantni domaći propisi: Zakon o obveznim odnosima (2005.), Pomorski zakonik (2004.), Zakon o obveznim i stvarnopravnim odnosima u zračnom prometu (2008.), Zakon o osiguranju (2008.), Zakon o obveznim osiguranjima u prometu (2005.), kao i europska legislativa, judikatura i doktrina (EU Council Insurance Directives, ZOS – 2008., njemački VVG – 2007., Uredbe Vijeća EU Rim I. – 2008. i Rim II. – 2007. i dr.). Izniman je doprinos ove knjige što se u njoj uspoređuju zakonska rješenja našeg prava s relevantnim rješenjima drugih pravnih sustava. Komentar pojedinih zakonskih odredbi je opširan, cjelovit, sustavno povezan s odgovarajućom materijom iz drugih zakona, usporeden i ilustriran s poredbenopravnim rješenjima. U komentaru su, gdje god je to bilo potrebno, prikazane domaće i inozemne sudske prakse, posebno u tumačenju odredbi pomorskog osiguranja. Dok je dotadašnju literaturu krasio fragmentalni prikaz ugovora o osiguranju u pojedinim vrstama osiguranja ili pak obrada specifičnih problema iz materije ugovora o osiguranju prikazana u znanstvenim i stručnim radovima objavljenim u pojedinim časopisima i zbornicima s raznih savjetovanja, u ovoj su knjizi s teoretskog i praktičnog stajališta na jednom mjestu obrađeni svi specifični pravni instituti prava osiguranja. Takav pristup čini ovu knjigu nezaobilaznim štivom za svakog tko želi cjelovito upoznati tu važnu pravnu materiju. U uvodnom dijelu knjige temeljito su obrađeni pravno-teoretski pravni izvori ugovornog prava osiguranja, povijest njihova nastajanja, pojam i pravna obilježja ugovora o osiguranju te njegova pravna narav. Autor ističe praktičnu primjenu zakonskih odredaba i svakodnevnu praksu osiguravajućih društava, koju također navodi, te tako svestrano osvjetljava same zakonske odredbe o pojedinim institutima prava osiguranja. Knjiga predstavlja iscrpan i pouzdan vodič za sve one koji su praktično, stručno ili samo teoretski zainteresirani za područje osiguranja, posebice osiguratelje i reosiguratelje, zastupnike osiguranja i posrednike, pravosudne institucije, visokoškolske ustanove, studente, odvjetnike, bilježnike, trgovačka društva i dr. Može se reći kako je ova knjiga doista jedinstvena, ne samo u Republici Hrvatskoj, nego i izvan njezina područja. Ona je enciklopedijski priručnik, kombinacija teorije i prakse ugovornog prava osiguranja, knjiga za svakog koga interesira osiguranje ili se susreće s nekim problemima osiguranja.

Posljednja knjiga, *Pomorsko osiguranje – pravo i praksa s osnovama kopnenoga i zračnog transportnog osiguranja* u izdanju Književnog kruga Split, 2012. godine, napisana je na petsto šezdeset i dvije stranice. U njoj se cjelovito prikazuje i objašnjava sustav pravnih normi pomorskog osiguranja, specifični instituti toga prava, kao i odgovarajuća poslovna praksa. Radi cjelovitosti obrade sustava transportnih osiguranja, knjiga sadrži i prikaz osnova kopnenog i zračnog transportnog osiguranja. Podijeljena je u dva dijela, na opći i na posebni dio. U uvodu općeg dijela analizira se pomorsko osiguranje iz povijesnog aspekta i uloge osiguranja u gospodarstvu te pitanje organizacije pravnih izvora osiguranja. Pritom se institut pomorskog osiguranja promatra zasebno, ali i kao dio transportnog osiguranja općenito. U drugoj glavi općeg dijela, autor detaljno i iscrpno razlaže materiju ugovora o pomorskom osiguranju poštujući logičan redoslijed relevantnih elemenata ugovora o pomorskom osiguranju. Razrada navedene materije temelji se na tumačenju relevantnih odredaba Pomorskog zakonika, standardnih uvjeta pomorskog osiguranja, te, što je poseban doprinos ovog djela, najnovijih redakcija institutskih klauzula i ostalih izvora autonomnog karaktera (Institutske klauzule za osiguranje robe iz 2009. godine, Incoterms 2010. i dr.). U posebnom dijelu knjige, kao samostalne cjeline, proučava se osiguranje robe u prijevozu, osiguranje plovnih objekata, osiguranje vozarine, osiguranje od odgovornosti (P&I osiguranje) te uloga zapovjednika u slučaju ostvarenja osiguranog slučaja. Nakon toga, autor analizira opće odredbe kopnenog transportnog osiguranja, dok se na kraju ovog dijela izlaže materija općih odredbi zračnog transportnog osiguranja. Uvažavajući nezamjenjivu ulogu instituta osiguranja u pravno-ekonomskim odnosima te imajući na umu potrebu da se pravo osiguranja sustavno izučava i podučava na visokoškolskim ustanovama, prvenstvena namjena ove knjige jest poslužiti kao udžbenik za prijediplomske, diplomske i poslijediplomske studije. Međutim, knjiga također pronalazi svoju neizostavnu primjenu pri usavršavanju zaposlenika u osigurateljskoj industriji, odvjetnika i svih onih koji su u sklopu svoje profesionalne djelatnosti vezani uz institut osiguranja. Važno je istaknuti kako autor kroz čitavu knjigu ukazuje na bogatu relevantnu domaću i inozemnu sudsku i arbitražnu praksu te tako dodatno pojašnjava ovu kompleksnu materiju. To je od osobite važnosti za svakog tko se susreće s institutom osiguranja, te nailazi na brojne probleme koji iziskuju poznavanje i uvid u praksu koju stvaraju sudovi i relevantna arbitražna sudišta.

Navedene su knjige nastale kao logična posljedica dugogodišnje bogate znanstvene, nastavne i gospodarske karijere profesora Pavića. Osim svoje znanstvene vrijednosti, one imaju i neprocjenjivu stručnu i praktičnu vrijednost. Krasi ih jasnoća izričaja, preglednost i sustavnost izlaganja, pa se može reći da se izrazito komplicirana i zahtjevna materija pomorskog imovinskog prava

i prava osiguranja izlaže na lako razumljiv i koncizan način. Stil pisanja u navedenim djelima obilježava jasna i logična rečenica koja je, unatoč složenoj materiji, prikazana razumljivo i pregledno uz istodobno zadržavanje vrlo visokog stupnja znanstvene razine. Ukupno gledajući, sav opus profesora Pavića napisan je jednim osebujnim i izvanrednim stilom, bitno drugačijim od stila ostalih kvalitetnih autora i stručnjaka koji su se na različite načine bavili ili se općenito bave materijom pomorskog, trgovačkog i građanskog prava. Taj bismo način pisanja mogli jednostavno nazvati »Pavićev stil«, koji bi mogao poslužiti kao uzor mlađim generacijama i pomoći im da postanu poznati i priznati stručnjaci iz područja pomorskog prava te sposobni napisati vrhunski vrijednu knjigu. Nabrojene knjige trajno će predstavljati nezaobilaznu literaturu za svakog pomorskog pravnika, ali i za ostale čitatelje koji su profesionalno vezani uz pomorstvo ili transport.

Kao dugogodišnji profesor i dekan Pomorskog fakulteta u Splitu, svojim je prvorazrednim znanstvenim opusom pokazao kako je bio ne samo najbolji poznavatelj problematike prava pomorskog (i općeg) osiguranja, nego i jedan od vodećih hrvatskih pravnika uopće. Visoka znanstvena i praktična razina njegovih djela čine ga nezaobilaznim autorom u svakodnevnom radu. Stoga je taj promicatelj hrvatske pomorske misli ujedno i odgajatelj brojnih generacija studenata, znanstvenika i praktičara. Svojim je radom snažno utjecao na razvitak hrvatskog pomorskog i trgovačkog prava. Njegov izniman doprinos rezultirao je velikim zaslugama i za hrvatsku znanost uopće, a posebno je zaslužan u promicanju znanosti grada Splita, za što je i nagrađen.

Osim toga, osobito je zaslužan i za razvoj visokog pomorskog školstva u Splitu. Tijekom njegova dekanskog mandata, splitsko pomorsko visoko učilište ispunilo je sve zahtjeve strogih međunarodnih standarda za školovanje pomoraca i postalo ravnopravnim članom svjetskog sustava pomorskog školstva, čije su diplome priznate svugdje u svijetu. Odlukom Senata splitskog Sveučilišta i Ministarstva znanosti i tehnologije Republike Hrvatske, 2003. godine vraćena je gradu Splitu institucija Pomorskog fakulteta, a nesumnjivo je za to najzaslužniji upravo profesor Pavić.

Kao vrstan pedagog, stručnjak i znanstvenik, bio je strpljiv i poticajan mentor diplomandima, magistrandima i doktorandima, pod čijim su mentorskim vodstvom izrađeni znanstveno vrijedni i priznati radovi. Nesebično je prenosio svoje golemo znanje studentima i mlađim kolegama, uvijek dostupan i na raspolaganju, ponašajući se ljudski i pedagoški odgovorno. Generacije studenata pamtit će ga kao vrsnog pedagoga i profesora, a njegovi znanstveni radovi biti će poticaj i budućim generacijama.

Iako se povukao s Pomorskog fakulteta, davne 2004. godine, odlaskom u mirovinu ostao je aktivan u mentorskom radu, pisanju knjiga i znanstvenih članaka. Slobodno je vrijeme provodio na svom rodnom otoku Hvaru i na malenom otoku u skupini Paklenjaka, gdje je vrijeme ispunjavao plovidbom i ribolovom. More mu je oduvijek bila ljubav i trajna inspiracija u stvaralaštvu.

Osobno poznanstvo s profesorom Pavićem, bilo da je riječ o mentorstvu na mojem magisteriju i doktoratu ili kroz poslovnu suradnju tijekom više od dvadeset godina, izravno je utjecalo, na najbolji mogući način, na moju profesionalnu karijeru te sam počašćena jer sam imala sreću učiti od najboljeg. Profesor Pavić trajno je obilježio moj znanstveni put i bio snažna podrška, uzor i primjer sveučilišnog nastavnika, znanstvenika i člana akademske zajednice, kakvih je danas, nažalost, sve manje. Na nama, koji smo ga poznavali i surađivali s njime, ostaje zadaća sačuvati sjećanje na njegovo znanstveno djelo te pokušati slijediti njegov pristup i predanost radu.

Zadržimo ga u trajnom sjećanju i zahvalimo mu na sve spomenute i nespomenute uspjehe, rezultate i odlike, bilo da je riječ o profesionalnoj i znanstvenoj karijeri ili o ljudskim osobinama koje su krasile ovog iznimno cijenjenog profesora.

Prof. dr. sc. Ranka Petrinović, redovita profesorica u trajnom zvanju
Pomorski fakultet Sveučilišta u Splitu

IN MEMORIAM

PROF. DR. SC. HRVOJE KAČIĆ
(1932. – 2023.)

U nizu velikana hrvatskog pomorskog prava, profesor Kačić bio je poseban jer je na jedinstven način povezao pravnu i brodarsko-poslovnu praksu, rad u domaćim i međunarodnim organizacijama i udruženjima te znanstveni rad na razvoju pomorskog prava, uz brigu za poticanje i promoviranje mladih kolega. Uz te značajke, treba dodati i njegovo mjesto u nastavljanju bogate dubrovačke pomorskopravne tradicije, što je posebno istaknuo akademik Vladislav Brajković. On je u predgovoru knjige *Naknada štete u slučaju sudara pomorskih brodova*, koja je proizašla iz doktorata profesora Kačića i tiskana 1968. godine, napisao sljedeće:

»…davne stanovnike naših obala more [je] dovelo već od najstarijih dana poznate nam historije u najširi kontakt s ostalim svijetom… koji je našem pomorstvu, kroz stoljetni razvitak naših primorskih autonomnih gradova i napose našeg Dubrovnika, pribavio neprolaznu slavu i današnji ponos. … Dubrovniku je uspjelo da… po mnogim spomenicima pomorskih znanosti i pomorskog prava pribavi historijski primat. … Posve je onda shvatljivo što moreplovstvo… nalazi na nepresušnom vrelu pomorskih tradicija nadahnuća za novi preporod… u izučavanju pomorske norme na žarištu pomorskopravne baštine, kao što je baš tretiranje aktuelnog problema naknade štete u slučaju sudara pomorskih brodova iz pera jednog mladog naučnog radnika u Dubrovniku dra Hrvoja Kačića.«

Profesor Kačić rođen je u Dubrovniku 1932. godine. Diplomirao je 1956. godine na Pravnom fakultetu Sveučilišta u Zagrebu. Nakon vježbeničkog staža na Općinskom sudu u Dubrovniku i Visokom trgovačkom sudu u Zagrebu te nakon položenog pravosudnog ispita (1960.), zaposlio se u brodarskoj tvrtki Atlantska plovidba u Dubrovniku (1961.). Doktorirao je 1964. godine na Pravnom fakultetu u Zagrebu. Odvjetnički je ured otvorio 1989. godine u Zagrebu.

Kao pravnik praktičar, radio je za Atlantsku plovidbu i druge brodare i brodogradilišta, za banke na nizu transakcija kod kupoprodaje brodova i naručivanja novogradnji, kao i njihovu financiranju, te u nagodbama, parnicama i arbitražama vezanim za komercijalne sporove iz iskorištavanja brodova i pomorske nezgode. Neke su od njih privukle veliku pažnju javnosti. Na primjer, potonuće broda *Cavtat* u talijanskim vodama 1974. godine i talijanskog broda *Brigitta Montanari* pokraj Šibenika 1984. godine, oba su bila natovarena teretima

opasnim po okoliš čije je zbrinjavanje zahtijevalo vrlo složene tehničke postupke i otvorilo niz pravnih pitanja vezanih za naknadu štete; sudar tegljenog broda *Sealady*, u vlasništvu Brodospasa, i američke nuklearne podmornice *USS Von Steuben* pokraj Gibraltara 1968. godine gdje je potonja morala nužno izroniti, a u konačnici je rezultiralo pobjedom Brodosplita u sporu pred sudom u New Yorku; masovne eksplozije dvaju tankera *Petrogen* i *Camponovia* 1985. godine u Algesirasu koja je ubila šesnaest osoba, ozlijedila četrdeset, dok ih je devetnaest proglašeno nestalim, a šteta na postojanjima rafinerije i gubitak zarade zbog prekida proizvodnje bila je ogromna.

Za profesora Kačić može se reći kako je svojim autoritetom i angažmanom bio poput svjetionika i vodilje pomorsko-privredne zajednice. Kroz rad u komisiji brodara pri Croatia osiguranju, seminare i savjetovanja, stručne i znanstvene članke te spremnost da svakome pomogne savjetom ili informacijom, upoznavao je kolege s novostima i trendovima u svjetskom brodarstvu i osiguranju te predlagao načine kako im se prilagoditi. Bio je uključen u rad na pomorskom zakonodavstvu i zalagao se za uvođenje rješenja koja bi olakšala poslovanje privrede. Tako je, na primjer, na njegov prijedlog u Pomorski zakonik uvedeno pravo hipotekarnog vjerovnika da osim sudske prodaje može preuzeti posjed nad brodom u slučaju propusta hipotekarnog dužnika u ispunjenju njegovih obveza. Time se vjerovniku omogućavalo preuzeti nadzor nad brodom i dovesti ga u luku povoljnu za sudsku prodaju, što je afirmiralo hrvatski upisnik kod inozemnih zajmodavaca. Uz navedeno, sudjelovao je u raspravama o organizaciji osiguranja u Republici Hrvatskoj, pa je tako i 1970. godine inicirao vraćanje imena Croatia pripadajućem osiguravajućem zavodu koje je bilo promijenjeno nakon Drugog svjetskog rata. Veliku je pažnju posvećivao usavršavanju i napredovanju mladih kolega, u što je ulagao sav svoj utjecaj, jer je upravo tako brinuo o unapređenju struke.

Bio je aktivan u mnogim organizacijama. Osim što je bio član Hrvatskog društva za pomorsko pravo te član Upravnog odbora, bio je i titularni član Međunarodnog pomorskog odbora (Comité Maritime International – CMI), te je u njegovu radu sudjelovao kroz razne odbore. Sudjelovao na konferencijama CMI-ja u Ateni (1962.), New Yorku (1965.), Tokiju (1969.), Hamburgu (1974.), Rio de Janeiru (1977.), Montrealu (1981.), Lisabonu (1985.), Parizu (1990.), Vancouveru (2004.), Dubrovniku (2007.) i Ateni (2009.). Kao član nacionalnog izaslanstva, prisustvovao je nizu sastanaka UNCTAD-a i na brojnim zasjedanjima raznih diplomatskih konferencija na kojima su razmatrana pitanja pomorskog osiguranja i prijevoza robe morem, sudjelujući, također, u radnim skupinama i odborima za izradu nacrta akata tijekom pripremnih aktivnosti za različite međunarodne pomorske konvencije. Od 1970. do 1974. godine bio je predsjednik Stalnog

pravnog odbora Međunarodne udruge brodovlasnika (International Shipowners´ Association – INSA) u Gdyniji. Od 1981. do 1985. godine bio je član Izvršnog odbora Međunarodne udruge havarijskih likvidatora (International Association of Average Adjusters) u Antwerpenu, dok je od 1980. do 1994. godine bio direktor UK P&I Cluba i član Izvršnog odbora Međunarodnog udruženja supervizora osiguranja (International Association of Insurance Supervisors – IAIS).

Kao sveučilišni profesor, bio je i pročelnik Pomorskog odjela Sveučilišta u Dubrovniku i nositelj nekoliko kolegija na poslijediplomskim studijima na Pravnom fakultetu Sveučilišta u Splitu i na Interuniverzitetskom centru u Dubrovniku. Bio je pozvani predavač na brojnim sveučilištima u Italiji, Velikoj Britaniji, Belgiji, Nizozemskoj, Norveškoj, Španjolskoj, SAD-u, Kini, Nigeriji, Austriji, Njemačkoj, Rusiji, Japanu, Singapuru i Novom Zelandu. Objavio je nekoliko monografija i niz članaka koji pokrivaju razne aspekte pomorskog prava.

Uz pravničku karijeru, ostavio je i dubok trag svojim angažmanom u procesu stjecanja hrvatske neovisnosti, međunarodnog priznanja i višestranačke demokracije. Na prvim demokratskim izborima 1990. godine, izabran je u Hrvatski sabor kao nezavisni kandidat, a zatim za predsjednika saborskog Odbora za vanjsku politiku.

U rujnu i listopadu 1991. godine predstavljao je Republiku Hrvatsku na Konferenciji o bivšoj Jugoslaviji u Haagu kao član izaslanstva Hrvatskog sabora pri Vijeću Europe, parlamentarne skupine u Srednjoeuropskoj inicijativi. Od 1994. do 2001. godine bio je predsjednik Državne komisije za granice Republike Hrvatske. Putem svojih poslovnih veza dolazio je do utjecajnih ličnosti svjetske politike kod kojih je zagovarao hrvatsku neovisnost i slobodu. O tim je vremenima napisao knjigu *U službi domovine* koja je doživjela tri izdanja i bila prevedena na nekoliko svjetskih jezika. Također je napisao i knjigu *Dubrovačke žrtve – jugokomunistički teror na hrvatskom jugu 1944. i poratnim godinama (početak Bleiburga)* koja govori o dugo prešućivanim žrtvama totalitarizma.

Profesor Kačić bio je i svjetski poznati vaterpolist. Kao državni reprezentativac, od 1950. do 1961. godine, nastupio je na Europskom prvenstvu u Beču (1950. godine, brončana medalja), Olimpijskim igrama u Melbourneu (1956. godine, srebrna medalja), Europskom prvenstvu u Budimpešti (1958. godine, srebrna medalja), Mediteranskim igrama u Bejrutu (1959. godine, zlatna medalja) i Olimpijskim igrama u Rimu (1960. godine, četvrto mjesto). Tri je puta biran u najbolju vaterpolsku momčad svijeta (1956., 1957. i 1960. godine). Sa svojim je klubom, dubrovačkim Jugom, osvojio 1950. i 1951. godine državno prvenstvo.

U sebi je nosio duh dubrovačkog renesansnog čovjeka s interesima i aktivnostima u mnogim područjima, pri čemu je dostigao svjetske razine, bilo da je

riječ o sportu, politici i diplomaciji, pravničkoj struci ili znanosti. Kroz život su ga vodile vrijednosti slobode i pridonošenja boljitku zajednici, koje su kao *libertas* zapisane na zastavi Dubrovačke Republike i *publica curate* uklesane na navratku Vijećnice Kneževa dvora. Zbog svojih nacionalnih i političkih uvjerenja imao je poteškoća u životu, ali usprkos nevoljama uspio je sačuvati svoj ljudski integritet.

Njegovi prijatelji i kolege pamtit će ga kao dobrog, otvorenog i velikodušnog čovjeka, koji je živio po svojim načelima slobode, otvorenosti, marljivosti i predanog rada, uvijek spremnog za razgovor, suradnju i pomoć kako bi svijet učinio boljim mjestom za život.

Dr. sc. Petar Kragić

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