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CUPRINS

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In the section *Events of Relevance in the Romanian Practice of Implementing International Law*, we continue to present such events unfolded during during the first semester of 2018, with focus on the official positions of the Romanian authorities.

Further on, on the section *Commentaries regarding the Activities of International Bodies in the Field of International Law* brings to the attention of the reader the article of Ion Gâlea, A Brief Commentary on the Resolution on the Activation of the ICC Jurisdiction over the Crime of Aggression.

The section *PhD and Master Candidate's Contribution* hosts one contribution of Cătălin-Nicușor Ghinea, on the automated effect and margin of appreciation in the context of UN targeted sanctions implementation process and the Challenges brought within.

I hope this new on-line issue of the RJIL will be found attractive by our constant readers, and all those interested in international law will enjoy these new contributions[1] of the Romanian and foreign scholars and experts in this field.

Professor dr. Bogdan Aurescu

[1] The opinions expressed in the papers and comments published in this issue belong to the authors only and do not engage the institutions where they act, the RJIL or the Romanian Branch of the International Law Association.

Abrevieri / Abbreviations

ADIRI – Asociaţia de Drept Internaţional şi Relaţii Internaţionale / Association for International Law and International Relations

AIEA / IAEA – Agenţia Internaţională pentru Energie Atomică / International Atomic Energy Agency

CAHD – Comitetul ad-hoc al experţilor în drept internaţional public / Committee of Legal Advisers on Public International Law

CDI / ILC – Comisia de Drept Internaţional / International Law Commission

CE / EC – Comunitatea Europeană / European Community

CEDO / ECHR – Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights

CIJ / ICJ – Curtea Internaţională de Justiţie / International Court of Justice

CJCE / CJEC – Curtea de Justiţie a Comunităţilor Europene / Court of Justice of the European Communities

CJUE / CJEU – Curtea de Justiţie a Uniunii Europene / Court of Justice of the European Union

COJUR – Grupul de lucru Drept Internaţional Public al Consiului UE / EU Council Working Group on Public International Law

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

CPJI / PCIJ – Curtea Permanentă de Justiţie Internaţională / Permanent Court of International Justice

NATO – Organizaţia Tratatului Nord-Atlantic / North Atlantic Treaty Organization

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

TUE / TEU – Tratatul privind Uniunea Europeană / Treaty on European Union

UE / EU – Uniunea Europeană / European Union

UNSC – Consiliul de Securitate al Organizaţiei Naţiunilor Unite / United Nations Security Council

Articole / Articles

Cross-border Insolvency and Public International Law

Dr. Aniruddha RAJPUT[1]

Abstract
The legal issues arising from cross-border insolvency primarily belong to the domain of private international law. However, in recent times, cross-border insolvency is arising under and giving rise to issues of public international law. The problems posed by cross-border insolvency are complicated, since the legal system in different States is diverse and there is no unified framework. Equally important are issues of efficiency and effectiveness of proceedings. We will be addressing all these issues and provide potential solutions in the present paper.

I. Introduction

Globalisation has enhanced the involvement of companies in international business and cross-border transactions. With greater integration of the world economy, instances of cross-border insolvency have risen.[2] Modern day insolvency entangles legal regimes of more than one jurisdiction. Cross-border insolvency involves shareholders, corporations and national courts of different States in various forms. First, the entity under insolvency proceedings may be a multinational corporation operating in different States, with management, presence and assets in different States. Second, the shareholders and other creditors may be located in different jurisdictions. Third, more than one court may have jurisdiction, due to the first two situations, thereby giving rise to multiple judicial proceedings in different States.

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[2] Andrew T. Guzman, "International Bankruptcy: In Defense of Universalism", *98 MICH. L. REV.* 2177, 2178 (1999); L.M. LoPucki, "Cooperation in International Bankruptcy: A Post-Universalist Approach", *84 CORNELL. L. REV.* 696, 699, 703 (1999); P. J. Omar, *European Insolvency Law* 15 (2006).

As such, insolvency law has been termed as a type of meta-law that '...swoops in and trumps baseline legal relationships in unusual circumstance of general default.[1] The internationalisation of insolvency law thus multiplies these complexities. The very nature of insolvency, it has been argued, influences nations to legislate for it in a manner that takes into account and reflects the nations' historical, social, political and cultural needs.[2] Cross-border insolvencies cause complex problems for not only debtors and creditors, but also jurisdictions involved. The more a country's economy is integrated into the world economy, the more susceptible to cross-border insolvency it is. Problems arise when an insolvent company has assets or interests in a property and creditors are located in multiple jurisdictions. The diversified state of the insolvent entity's activities may be such that conditions for opening insolvency proceedings are simultaneously met with regard to more than one country, giving rise to the possibility of multiple proceedings in different jurisdictions. A jurisdiction in which one of the multiple proceedings is initiated may lay claim to universal recognition and enforcement of the ensuing judgement, although in practice, the proceeding may be confined to the local estate of the insolvent debtor on which effective control can be exercised. [3]

The legal issues arising from cross-border insolvency primarily belong to the domain of private international law. [4] However, in recent times, cross-border insolvency is arising under and giving rise to issues of public international law. Yet, the consequences of cross-border insolvency for public international law are unexplored. One of the reasons for the relative neglect of public international law towards matters of cross-border insolvency is the status of legal persons in public international law. In public international law, corporations are not treated as 'subjects' of international law, rather only 'objects, since they are neither created nor possess any obligations directly under public international law.[5] A'subject' of

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[1] John A. E. Pottow, "Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to Local Interests", 104 *MICH. L .REV.* 1899, 1902 (2006) [hereinafter Pottow]; Manfred Balz, "The European Union Convention on Insolvency Proceedings", 70 *AM. BANKR. L. J.* 485, 486 (1996).

[2] Nathalie Martin, "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation", 28 *BOSTON COLLEGE INT'L. & COMP. L. REV.* 1, 4 (2005); Frederick Tung, "Fear of Commitment in International Bankruptcy", 33 *GEO. WASH. INT'L. L. REV.* 555, 561 (2001); Pottow, *supra* note 3.

[3] Ian F. Fletcher, "The European Convention on Insolvency Proceedings: Choice of Law Provisions", 33 *Tex. Int'l. L. J.* 119,124 (1998).

[4] Ian F. Fletcher, *Insolvency in Private International Law* 1.11 (2nd ed. 2005).

[5] Anthony Aust, *Handbook of International Law* 12 (2nd ed. 2010); James Crawford, *Brownlie's Principles of Public International Law* 121-2 (8th ed. 2012).

international law has direct rights and obligations under such law, whereas an 'object' has derivative rights and obligations that originate from and depend upon States.[1] In situations where they are granted direct rights and obligations under international law, the mechanisms for their enforcement, at the level of international law, are limited to those provided for by States.[2] In view of the recent developments in the field of public international law, this Article aims at the situations in which cross-border insolvency would raise issues of public international law.

Insolvency, despite its cross-border nature, may be an outcome of the measures adopted by the State or the decision of the courts of a State in insolvency proceedings. In ordinary scenario, the decision of the State would be final without challenge in private international law. Traditionally, public international law had no serious occasions to consider the possibility of stakeholders based in different jurisdictions seeking to enforce their claims. The situation has drastically changed due to the transformation brought about by investment treaty arbitration. Insolvency may not be a topic covered by public international law but it could amount to breach of other international law obligations, which may give rise to an international claim.

This article is divided in four sections. The introduction is followed by section two where the treatment of cross-border insolvency in the past in public international law is discussed. The third section discusses the transformation of dispute resolution through investment treaty arbitration. The last section is comprised of conclusions.

II. Cross-border insolvency in Public International Law

In the past, in public international, the stakeholders i.e. shareholders, creditors and the company that suffered injury had no avenue for enforcement of their rights. Since they are private entities, they did not possess substantive rights or standing for initiating proceedings against the State whose actions have resulted into insolvency, either through a governmental measure or through the decisions of its Courts. Meager

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[1] Fleur Johns, "The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory", 19 *MELBOURNE UNIVERSITY L. REV.* 893, 897 (1994) (citing Bin Cheng, "Introduction to Subjects of International Law", in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 23 (Mohammed Bedjaoui ed., 1991).

[2] For example, the human rights obligations could be enforced at the international level only through the procedure and fora mentioned by international law. This is without prejudice to their enforcement under domestic laws.

discussion has taken place in international law in relation to indirect injuries to creditors.[1] In international law, a State would not have attracted international responsibility for causing losses to a debtor, which resulted in injury to a foreign creditor. These issues were resolved primarily based on equity rather than law.[2] Thus, a host State did not incur responsibility for indirect losses caused to the creditors of another State. However, insolvency proceedings may result into direct or indirect losses.

Even at present, public international law does not contain provisions relating to cross-border insolvency, but cross-border insolvency may result into a violation of rules of international law. Thus, States have brought cases arising out of insolvency proceedings before international tribunals, alleging that cross-border insolvency has resulted into violation of some rules of international law. Two cases were brought before the International Court of Justice based on the Friendship Commerce and Navigation Treaties.

In the *Barcelona Traction* case, the claim was brought before the ICJ by Belgium against Spain for wrongfully conducting insolvency proceedings against the company, Barcelona Traction. Barcelona Traction was incorporated in Canada. After the First World War, Belgian nationals obtained majority of shares of the company.[3] The Company had issued bonds. However, it failed to pay dividends on the bonds and the bondholders initiated bankruptcy proceedings in Spain. These were decreed and the Company was declared bankrupt.[4] This case presents complex challenges to international law, summarised by the Court in the following words:

> 31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is

[1] Lucius Caflish, "Indirect Injuries to Foreign Creditors in International Law", 2 *REVUE BELGE DE DROIT INTERNATIONAL* 404 (1967).

[2] *Id.* at 408 – 410. (See cases cited there).

[3] *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgement*, 1970 I.C.J. Rep. 3, para. 9 (Feb. 5) [hereinafter Barcelona Traction Judgement].

[4] *Id.* at para. 13.

> incorporated, and in whose territory it has its registered office."[1]

The Court rejected Belgium's claim on the technical ground that there is a distinction between damage caused to a company and to its shareholders. In the instant case, the damage may have been caused to the company, but no damage to the shareholders had been shown.[2]

In the *ELSI* case, a company called Elettronica Sicula S.p.A. was incorporated in Italy and was controlled by two American companies, who were major shareholders in the company. The company had a plant for the production of electronic components. The Company was unable to repay its debts and its liabilities had exceeded one third of its revenues. Therefore, according to Italian laws, its equity had to be reduced and capital stock was devalued. This process had to take place one more time.[3] There were efforts made by the American controlling companies to negotiate with the Italian Government to introduce an Italian buyer, so that the Company could do well. The negotiations failed, and the two American companies decided to liquidate the assets so that after repaying the debts, the Company would remain a going concern and attract an international buyer.[4] Since the Company decided to dismiss employees, the Mayor of the town requisitioned the plant on the ground that dismissal of employees would have terrible economic consequences. He entrusted the management to the Managing Director of the Company with a directive to preserve the machinery.[5] The requisition order did not take away the control of the American companies.[6]

After analysing the facts, the International Court of Justice concluded that liquidation was not realistic and the Company could not have repaid its debts.[7] The Court upheld the requisition order and the bankruptcy proceedings in Italian Courts on the ground that there were matters of domestic law and its application in which the Court could not intervene. Also, the United States had failed to prove otherwise.[8] Insolvency

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[1] *Id.* at para. 31.
[2] *Id.* at paras. 46-49.
[3] *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgement, 1989 I.C.J. Rep. 15*, paras. 12-14 (Jul. 20) [hereinafter ELSI Judgement].
[4] *Id.* at paras. 17-22.
[5] *Id.* at paras. 30-31.
[6] *Id.* at para. 70.
[7] *Id.* at para. 92.
[8] *Id.* at para. 99.

proceedings were a matter of domestic law. It is difficult for an international tribunal to interfere with the findings of the domestic courts unless there are situations of denial of justice. Since the workforce had occupied the plant, the United States argued that this amount to violation of Full Protection and Security provision in the FCN treaty. The Court rejected the argument because every act of occupation or disruption of possession could not amount to violation of the Full Protection and Security clause.[1] The American argument that the proceedings amounted to taking or indirect expropriation was rejected, because the Company was not in a position to repay its debts and its bankruptcy was not a consequence of the actions of the Italian Government.[2] The argument of arbitrary actions was rejected on the ground that similar proceedings were initiated against various similarly placed Italian companies. It was not established that ELSI was singled out for the purpose of these proceedings.[3] Since there was nothing in the bankruptcy order that could shock the conscience of the Court, it could not be argued that the actions of the Italian authorities were arbitrary and therefore contrary to the rule of law.[4]

Several cases brought before the Iran-US Claims Tribunal involved an element of insolvency. Particularly after the Iranian revolution, American directors of companies in Iran had fled, leaving the companies unattended. This resulted in insolvency. Insolvency was an indirect consequence of the upheaval in Iran. The discussion in most of these cases was in relation to who was in 'control' after insolvency proceedings, in order to decide

[1] *Id.* at para. 108.
[2] *Id.* at para. 119.
[3] *Id.* at paras. 122-123.
[4] *Id.* at para. 128.

whether the Iran-US Claims Tribunal had jurisdiction.[1] It was in *Eastman Kodak Co v Iran* case, that the Iran-US Claims Tribunal found that the claimant was forced into liquidation as a consequence of the actions of Iranian Government. Hence, the Iranian Government was responsible for the insolvency.[2]

III. Transformation of dispute resolution through investment arbitration

As a result of investment treaty arbitration, all persons associated with the insolvency can bring arbitration proceedings against the host State for taking actions that have resulted into insolvency, and the actions of the judiciary of the host State where judicial proceedings have resulted into insolvency.

a. Standing:

Investment treaty arbitration has revolutionised the standing requirements for initiating investment disputes. A claim could be brought before the

[1] Behring International, Inc. v. Islamic Republic of Iranian Air Force, Iran Aircraft Industries and The Government of Iran, 8 Iran-U.S. Cl. Trib. Rep. 276 (1985); Behring International, Inc. v. Islamic Republic of Iranian Air Force, Iran Aircraft Industries and The Government of Iran, 3 Iran-U.S. Cl. Trib. Rep. 36 (1991); Itel Corporation v. The Government of The Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 5 (1992); Eastman Kodak Company v. The Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 153 (1987); CBS Incorporated v. The Government of the Islamic Republic of Iran, 25 Iran-U.S. Cl. Trib. Rep. 131 (1990); RayGo Wagner Equipment Company v. Iran Express Terminal Corporation, 2 Iran-U.S. Cl. Trib. Rep. 141 (1988); International Technical Products Corporation and ITP Export Corporation v. Government of Islamic Republic of Iran, The Islamic Republic Iranian Air Force, Ministry of National Defense, Civil Aviation Organization, 12 Iran-U.S. Cl. Trib. Rep. 341 (1987); Phelps Dodge and Overseas Pvt. Investment Corp. v. The Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 121 (1986); Schlegel Corporation v. National Iranian Copper Industries Company, 14 Iran-U.S. Cl. Trib. Rep. 176 (1987); International Systems & Controls Corporation v. Industrial Development and Renovation Organization of Iran, Iran Wood and Paper Industries, Mazandaran Wood and Paper Industries and The Islamic Republic of Iran, 12 Iran-U.S. Cl. Trib. Rep. 239 (1986); Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. The Government of The Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mella, 10 Iran-U.S. Cl. Trib. Rep. 110 (1986); Rexnord Inc. v. The Islamic Republic of Iran, Tchacosh Company, Iran Siporex Industrial and Manufacturing Works, 2 Iran-U.S. Cl. Trib. Rep. 5 (1988).

[2] Eastman Kodak Company v. The Government of The Islamic Republic of Iran, 17 Iran-U.S. Cl. Trib. Rep. 153, 168 (1987).

International Court of Justice only by the home State, provided the home State was willing to grant diplomatic protection to its national. Diplomatic protection would be granted based on various considerations that were not necessarily legal. The home State would weight its relations with the host State, see the stakes involved and the overall political implications of bringing such an action.[1] Before granting diplomatic protection, the foreign investor would have to exhaust local remedies available in the host state's jurisdiction.[2] The rule of exhaustion of local remedies would not create many problems in cases where the cause of action is based on the insolvency proceedings pending or decided by the courts of the host State. The foreign investor would have approached the municipal courts and exhausted judicial remedies upto the highest level. In situations where it has not, the foreign investor could always argue that the remedies in the host State were futile. If the foreign investor is forced into liquidation due to the actions of other branches of the government, the legislature or the executive, then the foreign investor would have to go through the judicial process. There would be no option of challenging the governmental action directly.

Investment arbitration has liberated this standing requirement. There is no need of diplomatic protection on behalf of the home State, and thus, no need of exhaustion of local remedies. The definition of 'investment' in investment treaties is broad and includes shareholders and creditors. For example, NAFTA defines 'investment' in the following manner:[3]

> investment means:
>
> (a) an enterprise;
>
> (b) an equity security of an enterprise;
>
> (c) a debt security of an enterprise
>
> (i) where the enterprise is an affiliate of the investor, or

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[1] Barcelona Traction Judgement, *supra*, at paras. 77-78; Hersch Lauterpacht & L. Oppenheim, *International Law: A Treatise* 686, 687 (1955); Jan Paulsson, "Arbitration Without Privity", 10 *ICSID Review* 232 (1995); Zachary Douglas et. al., *The Foundations of International Investment Law: Bringing Theory into Practice* 38 (2014); Joost Pauwelyn, "At the Edge of Chaos: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed", 29 *ICSID Review* 372, 404 (2014); Krista Schefer, *International Investment Law: Text, Cases and Materials* (2nd ed. 2016).

[2] Andrew P. Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 6 (2009); *Draft Articles on Diplomatic Protection* [2006] 2 Y.B. Int'l L. Comm'n 24 U.N. Doc. A/CN.4/SER.A/2006/Add.l (Part 2) art. 14, cmt. 1 -6; Interhandel (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, 27 (Mar. 21).

[3] North American Free Trade Agreement art. 1139, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M 289 [hereinafter NAFTA].

(ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;[1]

The consequence of the *Barcelona Traction case* was distinguishing the injury to the company from that of the shareholder. Irrespective of the

[1] NAFTA, *supra*, at art. 1193.

harm of the company, the shareholder can maintain proceedings once the company is subject to insolvency proceedings.[1]

If the investor satisfies one of these requirements, the jurisdictional requirement of *ratione materiae* is satisfied. The *ratione personae* requirement expects that the foreign investor shall be an 'investor' as defined under the Treaty. The definition of 'investor' is liberal in investment treaties. For example, NAFTA defines 'investor' as follows:

> investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;[2]

The fundamental requirement is that the investor shall be foreigner and be a national of the other party to the BIT. In cross-border insolvency proceedings, the parties involved are from different States. What is necessary is that the parties should belong to one of the parties to the BIT and should be suing another party. In most cases, the test of nationality of the investor is the place of incorporation. This allows corporations to use the nationality of the place where they are incorporated – through restructuring

[1] See Patrick Dumberry, "The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?" 18 *Michigan State Journal of International Law* 354 (2010); Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, para. 214 - 18 (Jul 27, 2006); CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, para. 48 (Jul. 17, 2003); Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, para. 37-38, 46, (Jan. 14, 2004); Ronald S Lauder v. The Czech Republic, Award, 9 ICSID Reports 66, (Sept. 3, 2001); Camuzzi International S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2, Decision on Jurisdiction, para. 63-64, 76-77, (May 11, 2005); Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, para. 73-74, (Dec. 8, 2003); Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, para. 79, (Feb. 22, 2006); Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova, SCC Award, para. 5.1, (Sept. 22, 2005).

[2] Id.

– and initiate arbitration accordingly.[1] However, the restructuring should be bona fide and not solely for the purpose of gaining access to arbitration.[2] Therefore, each of the parties having stakes in cross-border insolvency, whether caused due to the governmental action of the host State or actions of the judiciary, could initiate arbitration proceedings.

b. Denial of justice:

Denial of justice is a standard associated with the working of the judiciary and inviolable in situations where the courts do not conduct insolvency proceedings fairly. In situations of denial of justice, the action of judiciary constitutes the cause of action for an international claim. It is a rule of customary international law that the State would attract state responsibility for actions of the judiciary of the host State. Denial of justice came into prominence with investment arbitration, particularly due to the liberal standing requirements and the possibility of corporations filing international claims without the need of diplomatic protection from their home State. An investment tribunal is responsible for applying the BIT as well as other rules of international law, as enshrined in Article 31 (3) (c) of the Vienna

[1] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections, para. 2.45 (Jun. 1, 2012); Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, para. 330(d) (Oct. 21, 2005); Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay, ICSID Case No ARB/07/9, Further Decision on Objections to Jurisdiction para. 93 (Oct. 9, 2012); Mark Feldman, "Setting Limits on Corporate Nationality Planning in Investment Treaty Arbitration", 27 *ICSID REV–FILJ* 281 (2012); Emmanuel Gaillard, "Abuse of Process in International Arbitration", 32 *ICSID Review* 17, 19 (2017).

[2] Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, para. 205 (Jun. 10, 2010); Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No ARB/09/12, Decision on the Respondent's Jurisdictional Objections, para. 2.17 (Jun. 1, 2012); Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, para. 570, 586 (Dec. 17 2015); Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, paras. 142 - 44 (Apr. 15, 2009).

Convention on the Law of Treaties.[1] Since denial of justice is customary international law rule, it continues to apply whether it is present in the BIT or not. Some tribunals have indicated that denial of justice is one of the aspects of the fair and equitable treatment, thereby applying the jurisprudence and the contents of the rule of denial of justice through the fair and equitable treatment standard.[2]

Article 9 of the Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners (1929 Harvard Draft) has defined denial of justice as follows:

> A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice. [3]

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[1] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, para. 38 – 42 (Jun. 27, 1990); Tokios Tokelés v. Ukraine, ICSID Case. No. ARB/02/18, Decision on Jurisdiction, para. 27 (Apr. 29, 2004); MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, para. 112 (May 25, 2004) [hereinafter MTD v. Chile]; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), para. 32 (Aug. 2, 2004); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, para. 80 (Aug. 3, 2004); Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, para. 75 (Nov. 29, 2004); Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, para. 117, 147-65 (Feb. 8, 2005); Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on Jurisdiction, para. 141 (May 11 2005).

[2] Metaclad Corporation v. The United Mexican States, ICSID Case No. ARB (AF)/97/1, Award, para. 91 (Aug. 30, 2000) [hereinafter Metaclad v. Mexico]; Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB (AF)/98/3, Award, para. 54 (Jun. 26, 2003) [hereinafter Loewen v. U.S.]; Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, para. 451-5 (Jun. 1, 2009).

[3] The Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners, 23 AJIL SPEC SUPP 133, 134 (1929).

Municipal courts should entertain cross-border insolvency proceedings carefully. If they have jurisdiction and they do not exercise it, then it would amount to denial of justice. [1] On the other hand, if they entertain proceedings without having jurisdiction, then an illegitimate assertion of jurisdiction would also result into denial of justice. [2] The municipal courts would have to carefully look at the transition and conflict of laws before entertaining a cross-border insolvency proceeding. The judicial proceedings would have to be conducted fairly. If there is bias in favour of or against any of the parties to insolvency proceedings such as the promoters, shareholders, the company or the debtors, it would constitute denial of justice. In *Loewen v United States*, the proceedings in the Mississippi state courts against a Canadian investor were conducted in such a manner that the trial exhibited a gross absence of due process and protection of the investor from prejudice on account of his nationality. The Tribunal found that the conduct of the trial was so flawed, that it constituted a miscarriage of justice.[3] Judicial decisions based on discrimination of prejudice[4], arbitrariness[5] or gross incompetence[6] constitute denial of justice.

The rationale of the rule of denial of justice is that all States are obliged to provide a judicial system that adheres to certain standards of fairness, particularly while treating foreigners within their jurisdiction.[7] Cross-border insolvency proceedings take place before domestic courts. Domestic courts are under an obligation to act fairly in all proceedings including cross-border insolvency proceedings. Under the standard of denial of justice, the merits of the decision cannot be reviewed.[8] The assessment is limited to whether the judiciary acted fairly. Thus, all that is to be seen is whether the domestic courts have applied the insolvency laws in good faith. If there is a manifestly unjust and unfair application of insolvency laws, that would amount to denial of justice. Denial of justice entails procedural fairness. Procedural unfairness would include judgments tainted by fraud, bias, dishonesty or malice.[9]

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[1] Jan Paulsson, *Denial of Justice in International Law* 176-7 (2005) [hereinafter Jan Paulsson].

[2] Jan Paulsson, *supra*, at 178-9.

[3] Loewen v. U.S., *supra*, at para. 54.

[4] Jan Paulsson, *supra*, at 192-5.

[5] Jan Paulsson, *supra*, at 196-8.

[6] Jan Paulsson, *supra*, at 200-2.

[7] Jan Paulsson, *supra*, at 1-2.

[8] Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award, para. 99 (Nov. 1, 1999).

[9] Jan Paulsson, *supra* note 37, at 88-89.

If the proceedings in the domestic court go on for too long, it has a severe financial impact on the corporation concerned. The delay in judicial proceedings may exacerbate the situation and put a corporation that would have otherwise recovered into an irreversible situation. If the courts in the host States intentionally or unintentionally cause delays in the proceedings, that would amount to denial of justice. A delay could be seen as a defect in the judicial system, which could also be treated to amount to denial of justice.[1] However, if the party alleging denial of justice has contributed towards the delay or the judicial system of the host State is under severe backlog of cases, an investment tribunal would be hesitant to hold the host State responsible for denial of justice.[2] This would be the situation even if the subject matter of the dispute were cross-border insolvency.

c. Fair and equitable treatment (FET):

The fair and equitable treatment is a prominent standard for protection of foreign investment. The contents of the fair and equitable treatment standard cannot be determined in abstract and depend on facts of each case.[3] It could capture both the situations in which the host State may be responsible: namely, actions of the host State that forced a foreign investor into insolvency and actions of its judiciary contributing towards insolvency. If the host state interferes with the insolvency proceedings, that host state

[1] El Oro Mining and Railway Company Ltd. (Great Britain) v United Mexican States, 5 R.I.A.A. 191, 198 (Great Britain - Mexico Claims Commission 1931). The Tribunal found a nine years delay to amount to denial of justice. The tribunal held that: "the amount of work incumbent on the Court and the multitude of law suits which they are confronted, may explain, but not excuse, the delay. If this number is so enormous as too occasion an arrear of nine years, the conclusion cannot be other than the judicial machinery is defective".

[2] Antoine Fabiani (Fr. v Venez.), 10 R.I.A.A 83, 110-13 (French – Venezuelan Commission 1902); White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, para. 10.4.12 (Nov. 30, 2011).

[3] Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", 269 *RECUEIL DES COURS* 251, 346 (1997); UNITED NATIONS CONFERENCE ON INT'L TRADE AND DEVT. FAIR AND EQUITABLE TREATMENT at 22, U.N. Sales No. E.99.II.D.11 (1999); Mondev International Ltd. v. United States of America, ICSID Case No. ARB (AF)/99/2, Award, para. 118 (Oct. 11, 2002); Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/00/3, Award, para. 99 (Apr. 30, 2004) [hereinafter Waste Management v. Mexico]; Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award, para. 292 (Sept. 3, 2001); CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, para. 273 (May 12, 2005); Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, para. 181 (Oct. 12, 2005).

would be responsible for the breach of the fair and equitable treatment standard.[1] The fair and equitable treatment was defined in *Genin v Estonia* in the following words:

> would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.[2]

Discrimination against foreigners is an important indication of breach of fair and equitable treatment standard.[3] Likewise, unreasonable conduct on the part of the host State represents breach of fair and equitable treatment standard.[4] The failure of due process may take the form of "manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process".[5]

The actions of the government and the conduct of the judiciary regarding insolvency proceedings should be conducted in good faith. Tribunals have confirmed that good faith is one of the elements of fair and equitable treatment.[6] Good faith enshrines the requirement of not inflicting any damage upon the foreign investor purposefully. An unfair motive to defeat the rights of foreign investor, if proved, is the basis for breach of the fair and equitable treatment standard.[7] Bad faith involves use of instrumentalities of the State for the purpose other than for which they were

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[1] Petrobart Limited v. Kyrgyz Republic, SCC Case No. 126/2003, Arbitral Award, para. 82 (Mar. 29, 2005).

[2] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, para. 367 (Jun. 25, 2001) [hereinafter Genin v. Estonia].

[3] Loewen v. U.S., *supra*, at para. 135; Waste Management v. Mexico, *supra* note 48, at para. 98; MTD v. Chile, *supra*, at para. 109; *But see* Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, para. 209 (Jan. 12, 2011).

[4] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, para. 309 (Mar. 17, 2006) [hereinafter Saluka v. Czech Republic].

[5] Waste Management v. Mexico, *supra*, at para. 98.

[6] Genin v. Estonia, Award, *supra*; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, para. 297–99 (Sept. 28, 2007) [hereinafter Sempra v. Argentina]; Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, para. 153 (May 29, 2003) [hereinafter Tecmed v. Mexico].

[7] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 250 (Nov. 14, 2005) [hereinafter Bayindir v. Pakistan].

created. It includes conspiracy by State organs to inflict damage and defeat the investment for reasons other than those presented by the government.[1] The insolvency proceedings would have to be conducted in good faith by the judicial authority, the trustee and the government (if involved). The compliance with the domestic law on insolvency will have to be done in good faith. During insolvency proceedings, settlements cannot be forced on the foreign investor. Doing so would amount to coercion and harassment, a basis to claim breach of the fair and equitable treatment standard.[2]

In *Plama v Bulgaria*, the Claimant alleged that the bankruptcy trustee was in connivance with the court and hence, Bulgaria was responsible for the breach of this standard. The tribunal found that the trustees were not an instrumentality of the state and the courts could not be held responsible for the actions of the bankruptcy trustees.[3] Thus, if insolvency proceedings are forced or conducted as a part of a State's conspiracy to defeat rights of foreign investors, then that would be a breach of the fair and equitable treatment standard.

'Legitimate expectations' is an important element of fair and equitable treatment.[4] They are based on the time at which investments are made.[5]A foreign investor would be justified in expecting that the insolvency proceedings would be appropriately conducted, and not in a manner to defeat the rights of the company. The Government cannot frustrate the expectations of a foreign investor by arbitrarily changing the legal

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[1] Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award, para. 300 (Nov. 12, 2010) [hereinafter Frontier Petroleum v. Czech Republic].

[2] Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award in Respect of Damages, paras. 67-9 (May 31, 2002); Tecmed v. Mexico, *supra*, at para. 163; Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, para. 338 (Dec. 27, 2010); Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, para. 179 (Feb. 6, 2008).

[3] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, paras. 251-55 (Aug. 27, 2008).

[4] Metaclad v. Mexico, *supra*, at para. 89; MTD v. Chile, *supra*, at para. 113, 163.

[5] Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, para. 82, 83 (May 20, 1992); Saluka v. Czech Republic, *supra*, at para. 329; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, para. 372 (Jul. 14, 2006) [hereinafter Azurix v. Argentina]; PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, para. 255 (Jan. 19, 2007) [hereinafter PSEG v. Turkey]; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, para. 299 (Jan. 17, 2007); Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, para. 265 (Nov. 6, 2008); EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award para. 219 (Oct. 8, 2009).

framework under which the investment was made.[1] If the host State changes regulations in a manner that would diminish the value of the assets of the foreign investor and forces the investor to go into insolvency, the measure that resulted into insolvency would be a breach of the fair and equitable treatment.

FET may be relevant at several stages of insolvency proceedings. For example, towards the conclusion of insolvency proceedings, if the court decided to windup the company and the assets of the company are to be auctioned to fetch maximum price, adequate notice and intimation is necessary. In *Middle East Cement Co. v Egypt*, the claimant's ship was seized and auctioned without any proper notice to the owner. This was found to violate the fair and treatment standard.[2]

d. Full protection and security (FPS):

Traditionally, full protection and security is understood to cover physical protection of the investment by making adequate provision for police protection.[3] Arbitral tribunals have interpreted the standard liberally to

[1] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award, para. 611 (Sept. 13, 2011); Bayindir v. Pakistan, *supra*, at paras. 231–2; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, para. 131 (Oct. 3, 2006); PSEG v. Turkey, *supra*, at paras. 240-56; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, paras. 260-2 (May 22, 2007); Sempra v. Argentina, *supra*, at para. 300, 303; National Grid plc v. The Argentine Republic, UNCITRAL, Award, paras. 178–9 (Nov. 3, 2008) [hereinafter National Grid v. Argentina]; Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, para. 420 (Nov. 8, 2010); Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 267 (Jan. 14, 2010); Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, paras. 68-73 (Mar. 28, 2011).

[2] Middle East Cement Shipping and Handling Co. S. A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002).

[3] Aniruddha Rajput, "India's Shifting Treaty Practice: Comparison of 2003 and 2015 Model BIT", 7 *JINDAL GLOBAL L. REV.* 201 (2016); Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award paras. 45-56, 78-83 (Jun. 27, 1990); Saluka v. Czech Republic, *supra*, at paras. 483-4; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, para. 668 (Jul. 29, 2008); ELSI Judgement, *supra*, at paras. 105-108; Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, para. 84 (Dec. 8, 2000); Tecmed v. Mexico, *supra*, at para. 154; Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award, paras. 164-166 (Oct. 12, 2005); Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No.

include not only physical security, but also certainly that the legal framework of the host state would remain stable. The obligation of full protection and security is said to expect a host state to maintain a regulatory and commercial framework. It is said to extend beyond physical protection.[1] In *Parkerings v Lithuania*, the tribunal took the view that full protection and security also expects that the host state keep its judiciary available for an investor seeking appropriate relief.[2]

It is difficult to convincingly establish which approach may be taken by a tribunal. In both situations, insolvency proceedings would be relevant. Execution of insolvency proceedings would involve forceful use of police power to take over physical possession of assets. If a tribunal takes a more liberal view that full protection and security extends beyond physical protection, then any decision of the judiciary regarding insolvency proceedings and action undertaken by the authorities of the host state in enforcement of those actions could arguably amount to violation of full protection and security. It is not only the conduct of insolvency proceedings, but the also the manner of administration of these proceedings would be relevant.

e. Expropriation:

Responsibility for violation of the expropriation standard would arise when the host State adopts a regulation that would result into insolvency of a foreign investor. Expropriation is the oldest standard for treatment for foreign investors.[3] The expropriation clause was a regular phenomenon in Friendship Commence and Navigation (FCN) Treaties, which preceded the

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ARB/07/21, Award, paras. 71- 84 (Jul. 30, 2009); American Manufacturing & Trading, Inc. **v**. Republic of Zaire, ICSID Case No. ARB/93/1*,* Award paras. 6.02-6.11 (Feb. 21, 1997); Eureko B.V. v. Poland, Partial Award*, para.* 236, 237 (Aug. 19, 2005); PSEG v. Turkey, *supra*, at, paras. 257-259; Saluka v. Czech Republic, *supra*, at paras. 483-4.

[1] T. W. Wälde, "Energy Charter Treaty-based Investment Arbitration", 5(3) *JOURNAL OF WORLD INVESTMENT* 373, 390-391 (2004); Ceskoslovenská Obchodní Banka A.S. v. The Slovak Republic*,* ICSID Case No. ARB/97/4, Award, para. 170 (Dec. 29, 2004); Azurix v. Argentina, *supra*, at para. 406, 408; National Grid v. Argentina*, supra*, at para. 189; Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*,* ICSID Case No. ARB/97/3, Award, paras. 7.4.13-7.4.17 (Aug. 20, 2007).

[2] Parkerings - Compagiet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, paras. 360, 361 (Sept. 11, 2007); Frontier Petroleum v. Czech Republic, *supra*, at para. 273.

[3] Campbell McLachlan et. al., *International Investment Arbitration: Substantive Principles* 266-7 (1st ed. 2007).

present-day investment treaties.[1] Expropriation connotes forceful taking over of private property by the Government, either directly or indirectly.[2] Direct expropriation is relatively easy to identify since in case of direct expropriation, the ownership of the property is transferred to the State or any other entity in favour of which the transfer is directed by the State to take place.[3]

It is inconceivable that direct expropriation would be relevant in situations cross-border insolvency. If the properties of a company are expropriated, then there is a breach of the treatment standard of expropriation directly. The fact existence of cross-border insolvency becomes irrelevant. In situations of indirect expropriation, the title of the foreign investor is left untouched, but the foreign investor is deprived of utilizing the property in a meaningful way.[4] In *RFCC v Morocco*, the Tribunal held that an indirect expropriation exists where the measures have "substantial effects of an intensity that reduces and/or removes the legitimate benefits related with the use of the rights targeted by the measure

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[1] Treaty of Friendship Commerce and Navigation between The United States of America and The Italian Republic art V.2, Feb. 2, 1948, 63 Stat. 2255, 79 U.N.T.S 171. ("The property of nationals, corporations and associations of either High Contracting Party shall not be taken within the territories of the other High Contracting Party without due process of law and without the prompt payment of just and effective compensation. The recipient of such compensation shall, in conformity with such applicable laws and regulations as are -not inconsistent with paragraph 3 of Article XVII of this Treaty, be permitted without interference to withdraw the compensation by obtaining foreign exchange, in the currency of the High Contracting Party of which such recipient is a national, corporation or association, upon the most favorable terms applicable to such currency at the time of the taking of the property, and exempt from any transfer or remittance tax, provided application for such exchange is made within one year after receipt of the compensation to which it relates"); Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany art V.4, Dec. 8 1923, 52 L.N.T.S. 133.

[2] G Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", 269 *RECUEIL DES COURS* 261, 379 (1997) ("By expropriation is meant the coercive appropriation by the State of private property, usually by means of individual administrative measures. Nationalizations do not differ in substance from expropriation except that they are directly statutorily based and have a wide coverage."); Also see Ian Brownlie, *Principles of Public International Law* 537 (7th ed. 2008).

[3] INSTITUTE DE DROIT INTERNATIONAL, ANNUAIRE, 44 II 238 (1952) ("La nationalization est le transferet à l'Etat, par measure législative et dans un intérèt public, de biens ou droits privés d'une certaine catégorie, en vue de leur exploitation ou controle par l'Etat, ou d'une nouvelle destination qui leur serat donnée par celui-ci.").

[4] Dolzer and Schreuer, *Principles of International Investment Law* 100-2 (2012) [hereinafter Dolzer and Schreuer].

to an extent that they render their further possession useless".[1] The determinative factors in deciding existence of indirect expropriation are "intensity and duration of the economic deprivation suffered by the investor as the result of them."[2]

In the *ELSI* case, the United States alleged that the insolvency proceedings amounted to indirect expropriation. The claims of the United States were based on the allegation that the requisition by an Italian local authority of the plant and related assets of ELSI had frustrated the right of its investors to 'organize, control and manage' their investment, ELSI, and prevented its orderly liquidation.[3] The Court declined to rule on this contention, given the lack of a causal link between the requisition and the economic loss suffered by the United States investors.[4] However, Judge Schwebel's Dissenting Opinion recognized that the commercial value of the shareholder's property, that is Raytheon's interests in ELSI, was substantially reduced upon the Italian requisition, thereby amounting to expropriation.[5]

In the *Barcelona Traction* case, Belgium stated that Barcelona Traction's share-capital belonged largely to Belgian nationals and claimed that the acts of organs of the Spanish State, whereby the company had been declared bankrupt and liquidated, were contrary to international law. It contended that this led to "deprivation of enjoyment of rights"[6] of Belgian nationals and "total spoliation of the Barcelona Traction Group."[7] While the claims were rejected due Belgium's lack of *jus standi,* Judge Fitzmaurice in his Separate Opinion characterized the acts of the Spanish Government as "disguised expropriation".[8] Additionally, Judge Gros alluded to the act of

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[1] Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Award, para. 69 (Dec. 22, 2003) (original in French: 'avoir des effets substantiels d'une intensité certaine qui réduisent et/ou font disparaître les bénéfices légitimement attendus de l'exploitation des droits objets de ladite mesure à un point tel qu'ils rendent la détention de ces droits inutile'); Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award, para. 132 (Nov. 12, 2008); Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, para. 459 (Aug. 27, 2009).

[2] Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award, para. 70 (Sept. 13, 2006).

[3] ELSI Judgement, *supra*, at para. 114.

[4] *Ibid.* at para. 119.

[5] Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Dissenting Opinio of Judge Schwebel, 1989 I.C.J. Rep. 95, 118 (Jul. 20) [hereinafter ELSI Dissenting Opinion].

[6] Barcelona Traction Judgement, *supra*, at para. 25.

[7] *Ibid.* at para. 25.

[8] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Separate Opinion of Judge Sir Gerald Fitzmaurice, 1970 I.C.J. Rep. 64, para. 71 (Feb. 5).

incorporation of Barcelona Traction into Spain's economy as "a sort of nationalization" which, if affected by misuse of procedure, would amount to a breach of international law.[1]

In the *Diallo* case, Guinea alleged that since its national, on whose behalf they had brought the case, had lost the control and effective use of property, different actions of Democratic Republic of Congo that resulted into loss of control and effective use of property amounted to indirect expropriation.[2] The ICJ, however, held that there was nothing to establish that the Guinean national was deprived of his right to receive dividends in the share or that the company under question was in a state of 'undeclared bankruptcy'; hence there was no violation of property rights.[3]

In case of insolvency of a foreign investor, the assets lose value. The loss of value may go down to such an extent that the ratio of the value of the assets held in relation to the debts may go very low, and the foreign investor may be forced into insolvency. If the loss of value and the consequential insolvency of a foreign investor is due to a measure of the host state, then that measure may amount to indirect expropriation. The host State may take various measures that would deprive the foreign investor of the value of its property. The host state may arbitrarily revoke the investor's requisite license through regulatory interference.[4] The host State may impose heavy tax on a certain industry to which the foreign investor belongs. As a consequence of the regulation, the foreign investor loses its profits substantially and is forced into insolvency. This would be a ground for indirect expropriation. In the *Yukos case*, the Tribunal found that: "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets."[5] The Tribunal found Russia responsible for indirect expropriation, for having forced the investor into liquidation through its tax legislation, in the following words:

> In the view of the Tribunal, the expectations of Claimants may have been, and certainly should have been, that Yukos' tax avoidance

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[1] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Separate Opinion of Judge Gros, 1970 I.C.J. Rep. 267, para. 12 (Feb. 5).

[2] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgement, 2010 I.C.J Rep. 639, para. 149-50 (Nov. 30).

[3] *Ibid.* at para. 157-59.

[4] Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award, para. 124 (Feb. 10, 1999); Tecmed v. Mexico, *supra*, at paras. 150-1.

[5] Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, para. 756 (Jul. 18, 2014).

> operations risked adverse reaction from Russian authorities. It is common ground between the Parties that Yukos and its competitors viewed.[1]

Some tribunals have developed the concept of 'judicial expropriation'.[2] In *Saipem v. Bangladesh*, the domestic courts of Bangladesh revoked the ICC Tribunal's authority and thereafter, declared the ICC Award non-existent to prevent the enforcement of the Award in Bangladesh. The Tribunal treated "residual contractual rights under the investment as crystallised" as property rights.[3] The Tribunal found that the judicial decision had the effect of depriving the foreign investor of the value of the property in the following words:

> Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is "a nullity". Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.[4]

Likewise in *Muhendislik Sanayi Ve Ticaret A.S. v. Kyrgyz Republic*, the Tribunal held that the decisions of domestic courts took away the contractual rights of the foreign investor. Therefore, the judicial decision resulted into judicial expropriation. The Tribunal observed as follows:

> 119. That abrogation of the Claimant's property rights amounts to a breach of the Article III of the Turkey-Kyrgyz BIT, which forbids the expropriation of property unless it is done for a public purpose, in a non-discriminatory manner, and upon payment of prompt, adequate and effective compensation. Those conditions are not satisfied in this case: in particular, no compensation has been paid.

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[1] *Ibid.* at para. 1578.

[2] Mavluda Sattorova, "Judicial Expropriation or Denial of Justice? A Note on Saipem v. Bangladesh", (13(2) *INT'L ARBITRATION L. R.* 35 (2010).

[3] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Final Award, para. 128 (Jun. 30, 2009).

[4] *Ibid.* at para. 129.

> The Respondent is accordingly obliged to make reparation for that breach of the BIT.

As a consequence of these judgments, once there is loss of property of property as an outcome of a judicial decision, it may fall under 'judicial expropriation'. Insolvency proceedings may be initiated voluntarily by the entity concerned or by the creditors, which would be a forced insolvency. In the first situation, even if the proceedings may have been voluntary, it may be due to circumstances created due to the regulations adopted by the host State. In the second situation, insolvency proceedings would be against the wishes of entity put under insolvency proceedings. In either case, if the insolvency proceedings are successful in a court, the entity is not a running concern anymore.

Although some tribunals have devised the concept of judicial expropriation, there are doubts about its validity. Every judicial decision would be expropriatory for the losing party. That is a harsh standard. State responsibility for judicial actions is best captured by denial of justice: a well-established standard in customary international law.

The difficult task is of distinguishing between a regulation aimed at diminishing the value of the assets of a corporation and legitimate regulations undertaken in public interest.

f. Most Favoured Nation /National Treatment:

MFN and NT treatment are relative standards. They aim at providing level playing field between the foreign investors of different States, and foreign investors and domestic (national) investors, respectively.[1] Three elements are involved in determination of violation of national treatment standard: a) whether the foreign investor and the domestic investor are in a comparable situation - i.e. like circumstances; b) whether the treatment accorded to the foreign investor is less favourable that that accorded to the domestic investor; and c) if differentiation exists, then whether there are grounds to justify the differentiation.[2] In the context of insolvency, they would have a limited role but nevertheless, an important role. If the shareholders, creditors

[1] Dolzer and Schreuer, *supra*, at 198.

[2] Ibid. at 199; United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1, Award on the Merits, para. 83 (May 24, 2007).

or the company under liquidation is treated in a discriminatory manner as compared to the others similarly placed, then the State and the courts of that State which discriminate would be responsible for the violation of MFN and NT.

However, discriminatory treatment could be justified if there are adequate grounds. [1] In *GAMI v Mexico*, the Tribunal found that the objective of protecting solvency of an important local industry (sugar, in that case) was a legitimate regulation, not aimed at discriminating against foreign investors.[2] In *ADF v USA*, the Tribunal did not find violation of national treatment standard, even when the US required locally produced steel to be used for government projects - because it applied equally to national and foreign contractors.[3] If there are genuine reasons for applying laws distinctly to investors, then the host State would not be responsible for violation of the national treatment or MFN standards, even if the regulations have resulted into liquidation of the foreign investor. For example, if there is an economic crisis in the host State and banks are under strain, the host State may grant economic support only to government or public owned banks and not to private owned banks, thereby resulting into insolvency of the private banks. Such a discriminatory measure could be defensible.

IV. Conclusions

In recent years, with investment treaty arbitration, the situation has drastically changed and entities are able to bring investment claims against host States, without the need of intervention of the home State. These developments have created the possibility of a cause of action arising out of cross-border insolvency to be decided based on rules of public international law. This does not mean that cross-border insolvency, by itself, has become a topic covered by public international law. Proceedings under public international law are possible as a derivative of rights and obligations arising under cross-border insolvency. Insolvency proceedings may constitute a basis of the cause of action, but they must result into violation of some rule of international law.

The constant question is the appropriate standard for judging the actions of the concerned State and its courts. Their decision cannot be

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[1] Dolzer and Schreuer, *supra*, at 203.

[2] Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Final Award, paras. 114-5 (Nov. 15, 2004).

[3] ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, paras. 156-8 (Jan. 9, 2003).

judged on merit, but the manner in which those decisions are arrived at is important. The problems posed by cross-border insolvency are complicated, since the legal system in different States is diverse and there is no unified framework.[1] Equally important are issues of efficiency and effectiveness of proceedings. The problems become more complicated when the insolvency laws of the jurisdictions involved are outdated, rigid, formalistic, and above all, have a strong bias in favour of particular categories of locally interested parties.[2] It is equally so where there is no law in place, non-enforcement of the law or a lack of practical experience in administering the law. The additional complexities surrounding cross-border insolvencies necessarily lead to uncertainty, risk, injustice, and ultimately, high costs to businesses.[3]

With the stakeholders having the right to initiate international arbitration, State responsibility may be attracted for failure to maintain a certain standard of proceedings and transparency in insolvency matters. The UNCITRAL has proposed the Model Law on Cross-border Insolvency. The overall purpose of the Model Law is to provide constructive lucid mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

- Cooperation between the courts and other competent authorities of states involved in cases of cross-border insolvency;
- Greater legal certainty for trade and investment;
- Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties, including the debtor;
- Protection and maximization of the value of the debtor's assets; and
- Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[4]

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[1] D McKenzie, "International Solutions to International Insolvency: An Insoluble Problem?" 26 *U. BALT. L. REV.* 15, 23 (1997); Ian F. Fletcher, "International Insolvency: A Case for Study and Treatment", 27 *THE INT'L. LAWYER* 429, 430 (1993).

[2] Malcolm Rowat, "Reforming Insolvency Systems in Latin America", *WORLD BANK: VIEWPOINT* (Jun. 1999), http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/187rowat.pdf

[3] JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum", 65 *AM. BANKR. L. J.* 457, 460, 558 (1991).

[4] UNITED NATIONS COMMISSION ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON CROSS – BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, U.N. Sales No. E.14.V.2 (2014).

The structure of the Model Law is such that in States where it is followed, there could be presumption of adherence to a unified standard and it would be difficult to hold the host State responsible in such situations.

Comentarii privind activitatea organizaţiilor internaţionale în domeniul dreptului internațional/ Commentaries regarding the Activities of International Bodies in the Field of International Law

A Brief Commentary on the Resolution on the Activation of the ICC Jurisdiction over the Crime of Aggression

Ion GÂLEA[1]

Abstract:

On 14 December 2017, the Assembly of States Parties to the Statute of the International Criminal Court adopted by consensus a Resolution on the activation of the Jurisdiction of the Court over the crime of aggression. However, this Resolution contains an element of interpretation which seems to have given an answer to an important debate that preceded the activation of the jurisdiction over the crime of aggression. This article is a continuation of a previous study that attempted to explain the problem and the options for interpreting the Kampala Amendment. Thus, the present study proposes a brief analysis over the interpretative solution that has been suggested in the text of the Resolution and appears to be confirmed by the reactions of the States, following the adoption of the Resolution

Key Words*:* International Criminal Court, crime of aggression, activation of jurisdiction, Kampala Amendment

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Introduction

The date of 14 December 2017 will be remembered as one of the cornerstones in the evolution of the international criminal law: the jurisdiction of the International Criminal Court over the crime of aggression was activated, as of 17 July 2018[1]. Even if the moment does not enjoy the magnitude of the adoption of the Rome Statute in 1998[2] or of the Kampala Amendment in 2017[3], from the legal point of view it represented the necessary condition for the functioning of the International Criminal Court with respect to the crime of aggression. The moment 2017 was anticipated even from the Kampala Conference, as the Amendment itself provided that"*The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute*"[4].

Following the difficulties in negotiating the Kampala Amendment, it would have been essential that the activation of the jurisdiction should have been made by consensus: which, indeed, was the case. However, it should not be neglected that the adoption of the Resolution of the Assembly of States Parties on 14 December 2017 was preceded by an important divergence of views between States and scholars, with respect to the interpretation of certain provisions of the Rome Statute and of the Kampala Amendment. This divergence of interpretation concerned the answer to the question whether *in a case referred to the prosecutor by a State or in a proprio motu investigation, would the ICC have jurisdiction over an alleged crime of aggression related to an act of aggression committed by State A, which is a Party to the Rome Statute, but has not accepted or ratified the Kampala Amendment, against the territory of State B, which is a Party to the Rome Statute and has ratified or accepted the Kampala Amendment*. In two previous studies published in 2017, before the activation of the jurisdiction over the crime of aggression, we have named this issue "the question" and attempted to analyse the possible arguments in favour of the two divergent opinions[5].

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[1] Resolution ICC-ASP/16/Res.5, adopted at the 13th Plenary meeting, on 14 December 2017.

[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

[3] International Criminal Court, Assembly of States Parties, ReviewConference, The Crime of Aggression, ICC Doc. RC/Res.6 (June 11, 2010) (hereinafter"Kampala Amendment") .

[4] Kampala Amendment, articles 15 bis, para. 3 and 15 ter, para. 3.

[5] Ion Gâlea, *Activating ICC Jurisdiction over the Crime of Aggression: How Should the Statute and the Kampala Amendment Be Interpreted?,* Romanian Journal of International

The present study will remind only in a brief manner the arguments presented in the debate over „the question". Nevertheless, the main purpose of the study would be to comment upon the text of the Resolution ICC-ASP/16/Res.5, adopted on 14 December 2017, in order to ascertain whether it has an impact over the interpretation of the relevant provisions which relate to the above-mentioned"question". From this perspective, it would be very important to follow the reactions of States following the adoption of the Resolution. At the same time, it might be appropriate to examine the legal value that the Resolution might have for interpretative purposes.

Beyond the questions related to the technicalities of the legal interpretation, "the question" is linked to some of the core issues of international relations: discouragement of use of force in inter-State relations and state consent for jurisdiction. The crime of aggression is: "the only crime under international law that requires the commission of certain internationally wrongful conduct by a state."[1] On one hand, the establishment of the largest possible scope for the jurisdiction of the International Criminal Court over the crime of aggression would have, without any doubt, a discouraging effect over possible actions of States involving the use of force, which might come under the scope of the ICC jurisdiction. However, on the other hand, jurisdiction over the crime of aggression does touch not only the "crime of a person", but also the "act of the State", which triggers the application of the principle of international jurisdiction according to which an international court could not rule without the consent of the State concerned. All would agree that the discouragement of any manifest violation of the Charter with respect to the use of force is a fundamental problem. Nevertheless, as Dapo Akande underlines, during the negotiations for the Kampala Amendment and after the adoption of it, scholars and States failed "to appreciate that the consent problem raises a more fundamental question of deeper significance than the textual or perhaps technical issues concerning the way in which the amendment concerning aggression might come into force"[2].

Law, no. 17 (January-June 2017), p. 40-73; Ion Gâlea, *Interpretation of the Kampala Amendments – One of the Key Issues for Activating the Jurisdiction of the ICC over the Crime of Aggression,* Journal of Law and Administrative Sciences, No.7/2017, p. 175-191.

[1] Claus Kress, 'The State Conduct Element', in Claus Kress, Stefan Barriga (ed.), *The Crime of Aggression: A Commentary,* Cambridge University Press, 2017, p. 412; Dapo Akande, Antonios Tsakanopoulos, *The Crime of Aggression in the ICC and State Resposnibility,* Harvard Internatioanl Law Journal, vol. 58, Spring 2017, p. 34; Ion Gâlea, *Interpretation of the Kampala Amendments – One of the Key Issues for Activating the Jurisdiction of the ICC over the Crime of Aggression,* loc. cit., p. 176.

[2] Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, WORKING PAPER, OXFORD INSTITUTE FOR ETHICS, LAW AND

I. The interpretation dilemma and its background

Even from the early stages of the negotiations related to the creation of the International Criminal Court, the introduction of the crime of aggression in the jurisdiction of the Court generated polarized opinions. Following difficult negotiations, the crime of aggression was included in the jurisdiction of the Court in 1998 only following a last-minute proposal of the Non-Aligned Movement[1], but, nevertheless, article 5 (2) of the Statute had provided that the Court will exercise the jurisdiction only"*once a provision is adopted [...] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime*". The negotiations preceding the Kampala Amendment have outlined two opposite positions: i) the so-called „Option 1", supported mainly by France and the UK – State Parties which are permanent members of the Security Council – advocated the Security Council to be the only body to determine whether an „act of aggression" took place; thus, the International Criminal Court would have assessed only the link between the individual and the act of aggression (act of a State)[2]; ii) the so-called „Option 2" argued that if the Security Council would not determine the existence of an act of aggression, the ICC itself might rule, on a preliminary basis, that an act of aggression took place[3]. In such a case, the ICC would have to determine, *inter alia,* whether the use of force is a „manifest" violation of the Charter.

The final moments of the negotiations in Kampala witnessed a move towards "Option 2": the permanent members of the Security Council accepted (maybe at the very last moment) the possibility of the Pre-Trial Division of the Court to authorize the formal opening of the investigation, should the Security Council not make a determination of an act of aggression within six months, on the expense of the very complex nature of the Kampala Amendment itself: different articles related to Security Council

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ARMED CONFLICT (2010), available at http://www.elac.ox.ac.uk/downloads/dapo akande working paper may 2010.pdf (accessed 7 August 2018), p. 7.

[1] Stefan Barriga, Claus Kress, *The Travaux Préparatoires of the Crime of Aggression,* Cambridge University Press, 2012, p. 315.

[2] Stefan Barriga, 'Introduction to Negotiation History', in Stefan Barriga, Claus Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression,* Cambridge University Press, 2012, p. 1-99, 34-35; Ion Gâlea, *Activating ICC Jurisdiction over the Crime of Aggression: How Should the Statute and the Kampala Amendment Be Interpreted?*, loc. cit., p. 42.

[3] Stefan Barriga, 'Introduction to Negotiation History', *loc. cit.*, p. 36; Ion Gâlea, *Activating ICC Jurisdiction over the Crime of Aggression: How Should the Statute and the Kampala Amendment Be Interpreted?*, loc. cit., p. 43.

referrals, respectively State referrals or *proprio-motu* investigations, the possibility of ”opt-out”, the special provisions of article 15 bis para. (5) of the Amendment[1].

It is this very complex nature of the Kampala Amendment that generated”the question”, the dilemma of interpretation related to the situation when an alleged act of aggression is committed by a State, which is a Party to the Rome Statute, but has not accepted or ratified the Kampala Amendment, against the territory of another State, which is a Party to the Rome Statute and has ratified or accepted the Kampala Amendment. The provisions to be interpreted resided both in the Amendment and in the Rome Statute: i) first, article 15 bis para (5) of the Amendment represents an exception from the solution provided by articles 13 a) and c) and 12 (2) of the Statute, but refers only to the case when a State is not a party to the Statute (”at all”); ii) the ”key provision” subject to interpretation is article 121 (5), which has been used for the adoption of the Kampala Amendment, and which states that “Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. *In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory*” (emphasis added)[2].

The above quoted provision of article 121 (5) generated two conflicting views that marked the debate before the activation of the ICC jurisdiction of the crime of aggression. The first position (”consent-based position” or”restrictive position”) supported the idea that indeed article 121 (5) does apply to the crime of aggression and, therefore, in case of an alleged act of aggression committed by a State Party to the Statute, but not to the Amendment, on the territory of a State Party to the Statute and to the

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[1] Article 15 bis para (5) provides that ”In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory”.

[2] Before and during the Kampala Conference, there was a dilemma whether the Amendment should be adopted in accordance with article 121 (4) of the Statute or with 121 (5). Finally, as stipulated in Resolution RC/Res 6 provided that the Amendment ”are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5” - C.N.651.2010.TREATIES-8 (Depositary Notification), 29 November 2010; Paragraph (4) provided for a different procedure for entry into force: „*Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them*”.

Amendment, the ICC would not have jurisdiction[1]. The second position (”the protective position”) argues that only the States which are not parties to the Statute (”at all”) are exempted from article 12 (2) of the Statute, by virtue of article 15 bis (5) of the Kampala Amendment. Moreover, the”protective position” argues that article 121 (5) of the Statute does not apply to the crime of aggression, mainly because the crime of aggression was already placed under the jurisdiction of the Court, according to article 5 (1) of the Statute and all State Parties to the Statute accepted the jurisdiction over the crime of aggression, by virtue of article 12 (1)[2].

The following arguments have been raised in favour of the ”consent-based position”, mainly by Harold Koh and Todd Buchwald[3] (former chief legal advisor and deputy legal advisor of the Department of State: i) the principle according to which an international could not adjudicate upon acts attributable to a State without the consent of that respective State[4]; ii) the *travaux préparatoires* of the Rome Statute lead to the conclusion that article 121 (5) would apply in the same way for any new crime as well as for a modification of articles 5, 6, 7 or 8, which represented, in an initial draft of the Statute, a single provision[5]; iii) the scholars argue that the theory according to which consent of the State to the jurisdiction of the ICC on the crime of aggression would have been expressed by the article 5 (2) of the Statute would mean that the State Parties had agreed, in advance, to „“whatever definition and whatever conditions for exercising jurisdiction a two thirds majority would agree”[6].

The „protective position” was advocated mainly by the writings of Stefan Barriga, deputy head of Deputy Permanent Representative of Liechtenstein

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[1] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* Journal of International Criminal Justice, no. 16 (2018), p. 1-17, 8.

[2] Ibid.

[3] Harold Koh, Todd Buchwald, The Crime of Aggression: The United States Prespective, American Journal of International Law, Vol. 109, No. 2 (April 2015), p. 257-295, 270.

[4] Ibid., p. 276; see also Dapo Akande, Antonios Tsakanopoulos, *The Crime of Aggression in the ICC and State Responsibility,* Harvard International Law Journal, vol. 58, Spring 2017, p. 36.

[5] Harold Koh, Todd Buchwald, *loc. cit.,* p. 279.

[6] Ibid., p. 285; see also Sean D. Murphy, ‘The Crime of Aggression at the ICC’, in Marc Weller, (ed.), Oxford Handbook on the Use of Force, Oxford University Press, 2013, p. 23-24.

to the United Nations[1]. His arguments could be summarized as follows: i) the negotiating history of the Kampala Amendment demonstrates that the final dilemma was not necessarily related to the role of the Security Council in determining whether a crime of aggression took place, but referred to a mutual concessions between States that supported the so called ”consent model” (the consent of the ”alleged aggressor State would be required, mainly through, but not limited to, ratification of the Amendment) and those States supporting the ”protective model” (supporting the idea that the consent of the aggressor State would not be required); Barriga argues that between those two ”extreme” positions, two intermediate ones were proposed: a) requiring only the consent of non-State Parties to the Statute and b) the variant a) above plus the „opt-out” system. This latter solution was finally adopted and, according to Barriga, it was a concession of the States supporting the”protective model” towards the ones supporting the „content model” [2]. Therefore, not accepting the interpretation supported by Barriga would mean that ”*Camp Protection first came all the way over to Camp Consent, and then went even beyond!*”[3]; ii) article 12 (1) of the Statute represents *lex specialis* in relation to the general rule of article 121 (5), with respect to amendments regarding the crime of aggression; according to Stefan Barriga, the second phrase of article 121 (5) would apply only in case of ”new” crimes, such as terrorism, that might be introduced in the future, or in cases of amendments brought to the existing crimes[4]; iii) the ”consent” is ensured by the possibility of the ”potential aggressor” to opt-out, as the opt-out declaration may be submitted also

[1] Stefan Barriga, Leena Goover, *A Historic Breakthrough on the Crime of Aggression,* American Journal of International Law, 2011, vol. 105, issue 477, p. 517-533; Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force of the Amendments on the Crime of Aggression,* Belgian Interministerial Commission for Humanitarian Law: Colloquium “From Rome to Kampala”, Brussels, 5 June 2012, available at: http://www.regierung.li/media/medienarchiv/icc/2012-6-5_Stefan_Barriga_-_CoA_Exercise_of_Jurisdiction_and_EIF_-_Brussels_Colloquium_-_paginated_02.pdf?t=636294503019761306 (1 August 2018), p. 1-12; Stefan Barriga, *Introduction to Negotiation History,* in Stefan Barriga, Claus Kress (ed.), *The Travaux Préparatoires of the Crime of Aggression,* Cambridge University Press, 2012, p. 1-99; also quoted by Ion Gâlea, *Activating ICC Jurisdiction over the Crime of Aggression: How Should the Statute and the Kampala Amendment Be Interpreted?,* Romanian Journal of International Law, no. 17 (January-June 2017), p. 40-42; see also *Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC,* published by the Liechenstein Institute of Self-Determination, Woodrow Wilson School of Public and International Affairs, November 2012, p. 9-10.

[2] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 12; Stefan Barriga, *Introduction to Negotiation History*, loc. cit., p. 43.

[3] Stefan Barriga, *Exercise of Jurisdiction and Entry into Force…,* loc. cit p. 17.

[4] *Ibid.* p. 22-23.

before a State Party accepts or ratifies the Kampala Amendment[1]. It would be useful to emphasize, in the perspective of the analysis of the Resolution adopted on 14 December 2017, that one of the most important arguments of Liechtenstein, Stefan Barriga and other States or scholars supporting the „protective view" was represented by the possibility of a State Party that did not ratify or accept the Kampala Amendment to formulate the"opt-out" declaration on the basis of article 15 bis (4) of this Amendment.

II. The way towards the activation of ICC jurisdiction over the crime of aggression: the Assembly of State Parties of December 2017

In December 2016, the Assembly of State parties decided to establish facilitation, in order to discuss the activation of the Court jurisdiction over the crime of aggression[2]. The facilitator (Ms. Nadia Kalb from Austria) was appointed on 20 February 2017 by the Bureau of the Assembly of State Parties. During the process of facilitation, seven meetings were held in New York[3].

During the facilitation process, even if delegations showed general support for the activation of the jurisdiction, but, however, opposite views were expressed with respect to the scope of the jurisdiction of the ICC over the crime of aggression[4]. The"opposition" stood exactly between the „consent-based position" and the"protective position". The arguments presented above were re-iterated. Moreover, the supporters of the „protective position" argued that"the compromise reached in the Review Conference was clear, and jurisdiction could extend to nationals of those State Parties which had not ratified the amendments, unless they opted out. […] The option of lodging an opt-out prior to ratification only makes sense if the Court can

[1] *Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC*, loc. cit., p. 10; see also Claus Kress, Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, Journal of International Criminal Justice, vol. 8 (2010), p. 1213-1214.

[2] Official Records of the Assembly of State Parties to the Statute of the ICC, Fifteenth Session, The Hague, 16-24 November 2016, ICC-ASP/15/20, vol. I, part. III, ICC-ASP/15/Res.5, annex I, para 18 (b); also quoted by *Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression,* ICC-ASP/16/24, 27 November 2017 (hereinafter "Report on the facilitation"), para. 4.

[3] Report on the facilitation, loc. cit., para. 5-6.

[4] Ibid., para. 16-18.

indeed exercise jurisdiction with respect to a State Party that has not ratified the amendments"[1].

Three position papers were submitted during the facilitation process. Canada, Colombia, France, Japan, Norway and the United Kingdom submitted in March 2017 a position paper. The first point that these countries required to be clarified was related to the case of State Parties that have not ratified the aggression amendments: "they deserve to know whether the aggression amendments will apply to them following activation"[2]. This position paper supported clearly the "consent-based position", invoking, inter alia, articles 34 and 40 (4) of the Vienna Convention on the Law of Treaties of 1969. Essentially, these articles establish the principle of the relative legal effect of treaties: the Kampala Amendment may not create any legal effects for States which are not parties to it[3]. The States that submitted this position paper rejected the argument according to which article 121 paragraph 5 of the Statute would not apply to aggression amendments, for the following reasons: a) textual interpretation of the text; b) the Amendment could not apply to those States that have not ratified it, as it results merely from article 121 (5); c) articles 5 paragraph 1 and 12 of the Statute do not govern the entry into force of the amendments and these texts could not be interpreted as „binding State Parties to any future amendment with regard to crimes listed in article 5, whether in relation to the crime of aggression, or any other crimes"; d) "the fact that Resolution RC/Res.6 stipulates that any State Party may lodge an "opt-out" declaration prior to ratification does not imply that a State is bound by an amendment that it refuses to ratify"[4].

A position paper bringing strong arguments in favour of the "protective position" was submitted by Liechtenstein[5]. It argued that the negotiation history of the Kampala Amendment proves that the solution achieved is a "middle ground between the "opt-in" and "no-consent" regime": "*Roughly one half of the delegations ("camp consent") wanted an opt-in regime: Only nationals of ICC State parties that ratified the amendments should be subject to jurisdiction (and nationals of non-State Parties excluded altogether). The other half of the delegations ("camp protection") wanted a no-consent regime: The consent of the State of nationality should not be required – in other words, the jurisdiction should simply be the same as for*

[1] Ibid., para. 19.
[2] Ibid., annex II. A., para. 2 a).
[3] Ibid., annex II.A., para. 5-6.
[4] Ibid, annex II.A., para. 12.
[5] Ibid, annex II.B.

the other three Rome Statute crimes. […] a middle ground had to be found. The only logical middle ground between the opt-in and no-consent was the opt-out regime"[1]. Liechtenstein also argued that the legal basis for the opt-out regime could be found in article 5 (2) of the Rome Statute[2]. It also argues that article 121 (5) did not apply for the aggression amendments, based on the contextual interpretation: if the second sentence would apply to the crime of aggression, it would stand in conflict with other provisions of the Statute, namely article 5 (2) and 12 (1): "*these conflicts can be resolved when articles 12 (1) and 5 (2) are seen as the more specific provisions applying to the crime of aggression, i.e. the lex specialis prevailing over the more generic provision of article 121 (5)*"[3].

A third paper was submitted in August 2017 by Argentina, Botswana, Samoa, Slovenia and Switzerland. Besides providing arguments in favour of activation of jurisdiction, the paper supported the "protective view". Even if the paper generally affirms that „bot aggressor and victim States need to have given their consent", it argues that „crucially, *only one has to have ratified* the crime of aggression. For the other State Party involved, it is sufficient if that State Party *refrained from declaring an opt-out"* (emphasis in the original)[4].

Having in mind the two opposite views expressed during the facilitation process, which coincided to the opinions expressed before, different approaches to the activation process were shaped. One option has been the "simple activation" – a resolution with only one paragraph that would decide upon the activation of the jurisdiction. Such option would have left "the question", the interpretative dilemma exposed above, to be decided by the Court if such a case would appear[5]. Such option was somehow favoured

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[1] Ibid. annex II.B, para. 2-3. In our opinion, the main element of disagreement within the Kampala Conference was not merely the issue of consent, but the role of the Security Council - see Ion Gâlea, *Interpretation of the Kampala Amendments…,* loc. cit., p. 180-181; see also Harold Koh, Todd Buchwald, *loc. cit.*, p. 274, arguing that: " "As described above, the United States' view had been that the ICC should be able to exercise jurisdiction only if the Security Council has made a prior determination that aggression had ,in fact, occurred. The United States was therefore less focused upon whether the consent of the "aggressor state" should be required for the Court to proceed than were many of the other states that attended the meetings in Kampala".

[2] Report on the facilitation, loc. cit., annex II.B, para. 4.

[3] Ibid., annex II.B., para. 8.

[4] Ibid. annex II.C., para. 2 a).

[5] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* loc. cit., p. 9; Nikolas Sturchler, *The Activation of the Crime of Aggression in Perspective,* EJIL: Talk!, 26 January 2018, https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/ (accessed 9 August 2018).

by the States supporting the „protective position"[1]. However, States that favoured the "consent-based position" were not willing to assume the risk of not knowing at the moment of the activation what the solution to the interpretative dilemma will be. Thus, these States"sought to have their position confirmed by all State Parties as part of the resolution accompanying the activation decision"[2]. This is confirmed also by the proposals forwarded during the facilitation process. Thus, France and the United Kingdom have put forward an "element of a possible activation decision", explaining that it would clarify the exercise of jurisdiction of the Court over the crime of aggression, in the sense that jurisdiction could not be extended over national of States Parties which had not ratified the amendments in accordance with article 121 (5)[3]. At the same time, France and the United Kingdom affirmed that this element was"indispensable for the activation decision, and they would be able to support activation by consensus only if this clarification were included"[4]. The delegations supporting the"protective position" rejected the paragraph proposed by France and the UK, on the argument that it"sought to recreate and reopen negotiations in Kampala"[5].

The two opposite positions (respectively, the"simple activation" and the"paragraph proposed by UK and France") triggered an attempt to"build a final bridge between them"[6]. As Claus Kress emphasizes, such bridge would have "allowed both camps to maintain their respective legal positions", while offering the States supporting the „consent-based position" a legal tool to be protected in case that the Court would adopt the "protective view"[7]. These "legal tools" comprised: i) to consider that the communication of a State Party of its "restrictive position" to the Registrar should be treated by the Court as an "opt-out" declaration under article 15 bis paragraph (4) of the Statute, as amended by the Kampala Amendment[8]; ii) to allow State Parties to "be place on a list established by the President of the ASP and to be transferred to the registrar, and to have the ASP decide

[1] Claus Kress, *loc. cit.,* p. 9-10.
[2] Ibid., p. 10.
[3] Report on the facilitation, loc. cit., para. 23 and annex III.
[4] Report on the facilitation, loc. cit., para. 23.
[5] Ibid., para. 24.
[6] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* loc. cit., p. 10.
[7] Ibid.
[8] Ibid.

that the Court shall not exercise jurisdiction over the crime of aggression 'over nationals or on the territory' of such a State Party[1].

Notwithstanding these attempts to bridge the two positions, the views of France and the UK remained unchanged. The options of the Assembly of State Parties were: to outvote France and the UK and to adopt the "protective view"; to postpone the activation, for further negotiations and, thirdly, to activate by consensus accepting the French and British request. As Nikolas Sturchler outlines, "any State Parties willing to take the issue to a vote were in a very strong position to hold the activation decision hostage to an agreement on their view of jurisdiction"[2].

The final proposal submitted to the possibility of consensus, in the afternoon of 14 December 2017 was based on the attempt by the Austrian facilitator to "build a bridge" between the two extreme position[3]. The operative paragraphs of the Resolution, following the "activation clause", would have provided that:

> *"a) The Assembly acknowledges the positions expressed by States Parties, individually or collectively, as reflected in the Report on the facilitation, or upon adoption of this resolution to be reflected in the Official Records of this session of the Assembly or communicated in writing to the President of the Assembly by 31 December 2018 that, for whatever reason, including based on paragraph 5 of article 121 of the Rome Statute, they do not accept the Court's exercise of jurisdiction over the crime of aggression unless they ratify or accept the amendments regarding the crime of aggression,*
>
> *(b) The Assembly unanimously confirms that, in accordance with the Rome Statute, in case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction in respect of the crime of aggression when committed by nationals or on the territory of the States Parties referred to in subparagraph (a), unless they ratify or accept the amendments regarding the crime of aggression*"[4].

However, this text did not pass. The Austrian facilitation invited the Vice-Presidents of the Assembly to lead the negotiations and, after long consultations to "what became ICC-ASP/16/Res.5 as a final take-it-or-

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[1] Ibid, p. 11.

[2] Nikolas Sturchler, *loc. cit.*

[3] Documents ICC-ASP/16/L.9, 13 December 2017 and ICC-ASP/16/L.9/Rev.1, 14 December 2017.

[4] ICC-ASP/16/L.9/Rev.1, 14 December 2017, aslo quoted by Nikolas Sturchler, *loc. cit.*

leave-it text"[1], which incorporated, practically, the position of France and the UK. The spirit of compromise, "with a view to softening the unconditional surrender to France and the UK"[2], was represented by the addition of what became now paragraph 3 (the reaffirmation of paragraph 1 of article 40 and paragraph 1 of article 119 in relation to the judicial independence of the Court). Negotiations were prolonged for some more hours by the proposal of France, supported with the UK, to move this paragraph to the preamble - proposal opposed by Switzerland[3]. In the final dramatic moment, as it would have seemed unreasonable to block such an important decision for the reason of placing the present paragraph 3, the resolution was submitted to consensus and adopted[4].

III. Significance of the text of Resolution ICC-ASP/16/Res.5

The previous section attempted to present the brief history of negotiating Resolution ICC-ASP/16/Res.5. It would be useful to present, below, a brief outline of its main provisions.

It is obvious, operative paragraph 2[5], which is the most important text of the Resolution, has the meaning of "confirming" the view of the States supporting the "consent-based position". It is similar to the paragraph proposed during the facilitation by France and the UK. Indeed, paragraph 2 is the strongest possible advocate of the "consensus-based position", as opposed to the "protective position"[6].

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[1] Nikolas Sturchler, *loc. cit.*

[2] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* loc. cit., p. 12.

[3] Ibid. p. 12-13.

[4] Ibid. p. 13; Nikolas Sturchler, *loc. cit.*

[5] The wording of Preambular paragraph 2 is the following: "Confirms that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or propio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments".

[6] See Dapo Akande, *The International Criminal Court Gets Jurisdiction over the Crime of Aggression,* EJIL: Talk!, 15 December 2017, available at https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/ (accessed 9 August 2018).

Operative paragraph 3, as noted above, "reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court". This paragraph was meant to represent an "argument" or a "point" in favour of the "protective position", as one of the assumption of the States supporting the protective position was that the Court itself will decide whether to embrace the "narrow view" (the consent-based view) or the "larger view" (the protective view). Nevertheless, a simple reiteration of the judicial independence of the Court does not mean that it could influence in any way the future approach of the Court related to the text of the Resolution. As Claus Kress, who supports the "protective position", emphasizes, paragraph 3 "is no more than a statement of the obvious fact that the ASP cannot replace the Court as the judicial body charged with applying the law" and it is nothing more than a "symbolic concession to those asked to give in"[1].

As regards the preambular paragraphs, it is not our purpose to comment upon the "solemnity" of the moment, reflected in the language of the first three paragraphs of the preamble. Nevertheless, a number of preambular paragraphs may be read as representing small "arguments" or "points" for each of the "consensus-based position" or "protective position". Thus, preambular paragraph 5 recalled "paragraph 4 of article 15 bis and paragraph 5 of article 121". In our view, paragraph 4 of article 15 bis (the opt-out clause) may be read as indirectly supporting the protective view, while paragraph 5 of article 121 supports the consensus-based view. At the same time, preambular paragraph 6 of Resolution ICC-ASP/16/Res.5 recalls the first paragraph of Resolution RC/Res.6 of the Review Conference (the Resolution that adopted the crime of aggression amendment), which, on its turn, refers to: a) the fact that the amendment enters into force in accordance with article 121 paragraph 5 of the Statute - an argument in favour of the "consent-based position" and b) "noted that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance of the amendments" – which is, in our view, an argument in favour of the "protective view"[2].

Even if the short analysis above shows arguments both in favour of the "consensus-based position" and of the "protective position", one thing is

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[1] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* loc. cit., p. 16; See also Kevin John Heller, *The Draft Resolution's curious Paragraph 3,* Opinio Juris, 15 December 2017, http://opiniojuris.org/2017/12/15/the-curious-paragraph-3/ (accessed 9 August 2018).

[2] We may recall that it was the view of Liechtenstein that "*The option of lodging an opt-out prior to ratification only makes sense if the Court can indeed exercise jurisdiction with respect to a State Party that has not ratified the amendments*" – supra, note 27.

clear: paragraph 2 is a firm affirmation of the narrower "consensus-based position"[1]. There is almost no balance in Resolution ICC-ASP/16/Res.5 – the position of France and the UK was embraced and the "concessions" in favour of the "protective view" are minor.

It seems that the decision of the Assembly of State Parties was in the sense that it would be better to activate the jurisdiction with consensus, accepting the narrower "consensus-based view", than to risk fragmentation (and even to risk withdrawal of France and UK). In the words of Claus Kress, "better to bend than to break"[2]. In our view, the decision of the Assembly of State Parties was wise[3]: the State Parties had to choose between: i) an ambitious step, which would have left certain States with the feeling, that their consent for accepting the jurisdiction of the Court to adjudge whether those States committed a crime of aggression was "too largely interpreted" or even "indirectly derived" from the initial text of the Statute and ii) a less ambitious step, with a narrower scope of jurisdiction, but which leaves no doubt about the issue of consent with respect to jurisdiction. In a previous study, we have put the following questions: "*what is more important – to dissuade aggression on the „cost" of a flexible consent? or to secure the certainty of inter-State legal relations on the „cost" of a less ambitious disuasion of aggression?* […] *what is preferred: a solid, ambitious „step forward", with a shaky foundation or a less ambitious „step forward" (but still a step forward), with a solid foundation?".* Resolution ICC/ASP/Res.5 is a smaller step forward, but with a solid foundation. That is why we consider the decision to be a wise one.

The importance of the decision took on 14 December 2017 also resides in the fact that if consensus were not reached in this "symbolic" moment, if a decision would have been postponed to further ASPs, it is very likely that it might have been postponed for a long time. As the Swiss delegate Nikolas Sturchler emphasizes, "*Although the Assembly would have, technically speaking, been free to activate the Court's jurisdiction at any subsequent session, given the realities of multilateral negotiations, the outcome would very likely have been eternal postponement*"[4]. Therefore, the activation of

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[1] See aslo Jennifer Trahan, *One Step Forward for International Criminal Law; One Step Back for Jurisdiction*, Opinio Juris, 16 December 2018, available at http://opiniojuris.org/2017/12/16/one-step-forward-for-international-criminal-law-one-step-backwards-for-jurisdiction-the-perspective-of-someone-present-at-the-un-during-negotiations/ (accessed 9 August 2018).

[2] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* loc. cit., p. 13.

[3] See also Jennifer Trahan, *loc. cit.*

[4] Nikolas Sturchler, *loc. cit.*

the jurisdiction over the crime of aggression on 17 July 2018 (a symbolic date – the Day of International Criminal Justice and 20 years since the adoption of the Rome Statute) is timely[1] and represents and undoubted contribution to the strengthening of the international prohibition of the use of force[2].

Even if the decision to favour the "consensus-based opinion" seems firm, we think that there is still an open question, which could be articulated as follows: is the Court bound by operative paragraph 2 of the Resolution?

IV. Legal value of paragraph 2 – an interpretative agreement?

The question that remains open to debate is the following: *is operative paragraph 2 of Resolution ICC-ASP/16/Res.5 an "interpretative agreement", in the sense of article 31 (3) a)* of the Vienna Convention on the Law of Treaties? From a first glance, the opinions seem to be divided and the "seed" for division is operative paragraph 3 of the Resolution that suggests that the Court might have "its own interpretation".

Thus, on 15 December 2017, one day after the adoption of the Resolution (or even in the same day), Dapo Akande affirmed: "it seems to me that this paragraph at least amounts to a subsequent agreement of the parties to the Rome Statute (under Art. 31(3)a of the Vienna Convention on the Law of Treaties) regarding the interpretation of the relevant provision of the Rome Statute (Art. 121(5)) and how it should be applied. Thus, it would seem that the Court is bound to take it into account in interpreting the Rome Statute and consequently the Kampala Amendments"[3]. Other scholars, without pronouncing themselves on the nature of the paragraph as an interpretative agreement, reach the conclusion that the jurisdiction will have, without doubt, "extremely limited reach"[4], or that the likelihood of contesting the solution offered by paragraph 2 "is essentially zero", as "the text and drafting history are too clear"[5].

A radically opposite view was expressed by the Swiss representative Nikolas Sturchler, in January 2018: "it is difficult to label the resolution as a

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[1] Claus Kress, *On the Activation of ICC Jurisdiction over the Crime of Aggression,* loc. cit., p. 17.

[2] Nikolas Sturchler, *loc. cit.*

[3] Dapo Akande, *International Criminal Court Gets Jurisdiction over the Crime of Aggression, loc. cit.*

[4] Jennifer Trahan, *loc. cit.*

[5] Kevin John Heller, *loc. cit.*

case of subsequent agreement or practice under article 31(3) of the Vienna Convention of the Law of Treaties"[1]. He further argued that, indeed, paragraph 2 confirmed one of the two opposite legal positions, but, nevertheless, this confirmation does not reflect the views of all parties. Sturchler argues that a paradox exists – "the formal resolution adopted by the Assembly and the "actual" *opinio iuris* of States Parties underlying the resolution" are different and both seem to matter[2]. Sturchler further details that the Assembly of State Parties did not agree on a legal basis for operative paragraph 2 of the Resolution (as opposed to the final "Austrian" draft proposed during the negotiations). Therefore, the result would be "an operative paragraph 2 that, like the second sentence of paragraph 5 of article 121 of the Rome Statute which it seeks to leverage, stands in contradiction to paragraph 4 of article 15*bis* of the Rome Statute"[3] (according to paragraph 4 of article 15bis, the Court will have jurisdiction over a crime an aggression committed by a *State Party,* unless it had lodged an opt-out declaration). Sturchler further argues that the operative paragraph 2 of the resolution might be a revision of paragraph 4 of article 15*bis*, which, indeed, did not pass through the formal revision procedure[4]. In any case, it is argued that the controversy remains and it will be for the Court to finally decide: "is for this reason that the reference to the independence of the judges in operative paragraph 3 is so important"[5].

The opinions of States, enshrined in their statements delivered after the adoption of the resolution, reflected, within a certain measure, this controversy.

Nevertheless, we have remarked that only four State Parties have maintained clearly their position in support of the "protective view", despite

[1] Nikolas Sturchler, *loc. cit.*
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.

paragraph 2 of Resolution ICC-ASP/16/Res.5. These were Argentina[1], Liechtenstein[2], Palestine[3] and Switzerland[4].

Certain States that have supported the "protective view" have reflected on the official records only the fact that they have favored a "simple activation of jurisdiction" (which would have contained no understanding, leaving exclusively to the Court to decide in the future). Such positions no not affect in any way the legal qualification to be given to paragraph 2. Such States were Belgium, Costa Rica, the Czech Republic, Finland and Slovenia[5]. Totally neutral positions were adopted by Austria, Chile, Samoa, the

[1] Assembly of State Parties to the Statute of the ICC, Sixteenth Session, 4-14 December 2017, New York, Official Records, vol I, Document ICC-ASP/16/20, Statements concerning the adoption of the resolution on activation of the jurisdiction of the Court over the crime of aggression to the Assembly at its 13th plenary meeting, on 14 December 2017 (hereinafter "Official Records, ICC-ASP/16/20"), Annex VII, p. 80; Argentina declared that: "I would like to state for the record that our joining in the consensus today is without prejudice to my country's interpretation of the jurisdictional reach of the Kampala amendment, as reflected in the facilitator's report".

[2] Official Records, ICC-ASP/16/20, Annex VII, p. 85. Liechtenstein maintained its position on the interpretation of the Kampala Amendment, declaring that: "First, we are of the firm view that the Court, in exercising its jurisdiction over the crime of aggression, must and will apply the law contained in the Kampala amendments. […]The Court's jurisdiction is determined by the Rome Statute and we, as States Parties, are committed to the independence of the Court and it is telling that the last discussion we had on this decision had to do with the independence of the judges. We have an obligation not to infringe upon its mandate. We have expressed repeatedly our view that the Court's jurisdiction relating to the crime of aggression is founded in articles 15 bis and 15 ter, which were adopted by consensus in Kampala. Article 15 bis, paragraph 4, in particular is itself based on article 12 of the Rome Statute in which is enshrined the cardinal principle of the Court's territorial jurisdiction".

[3] Official Records, ICC-ASP/16/20, Annex VII, p. 88. Palestine declared that: "This resolution does not affect, and is without prejudice to, our legal interpretation, as presented in the report of the facilitation, and throughout this process, on the applicable jurisdictional regime, but in accordance with article 15 bis, paragraph 4, and articles 5 and 12, of the Rome Statute. But we adhere to the principle that the Court has its own competence and we are respectful of that reality. We did all we could to reach a compromise and we are happy that our extensive flexibility also helped this result".

[4] Official Records, ICC-ASP/16/20, Annex VII, p. 89; Switzerland declared: "To be clear: Switzerland does not share the legal view expressed in this resolution regarding the Court's jurisdiction over the crime of aggression. In our view, the Court does have jurisdiction over a crime of aggression committed by nationals or on the territory of non-ratifying States Parties. We highlight in this context the judicial independence of the judges and the Court as enshrined in the Rome Statute, and as confirmed by the resolution".

[5] Official Records, ICC-ASP/16/20, Annex VII, p. 80-87. For example, Slovenia outlined that "But having agreed to working towards a consensual solution, we also accepted in advance that we would not be truly satisfied with the final text, so we can live with it".

Netherlands and Uganda[1]. One State (Mexico) expressed preference for a simple activation, "recognized" that the resolution "departs from the agreement we have reached in Kampala", underlining that the "main driver for the position was that the Court needs a unified Assembly and not a divided one"[2].

We found it a little surprising, but a rather important number of States that took the floor supported, by their statements after the adoption of the Resolution, the "consent-based position". Generally, these States reiterated their position that, without ratification or acceptance of the Kampala Amendment, the Court will not exercise jurisdiction with respect to an alleged act of aggression committed on the territory or by nationals of such States, in accordance with article 121 (5): Australia, Bangladesh, Brazil, Colombia, Guatemala, Madagascar, New Zealand, Nigeria, Republic of Korea, Serbia, Tunisia and Venezuela[3].

Certain delegations that supported the "consent-based view" provided more detailed legal arguments. Thus, Canada invoked expressly article 34 of the Vienna Convention on the Law of Treaties and underlined that "as a matter of treaty law", the Court cannot exercise jurisdiction over nationals or on the territory of a State, unless it accepts or ratifies the Amendments based on article 121 (5) of the Statute[4]. France made it clear that it was able to join the consensus "only because of the clarification provided in paragraph 2" and underlined that, indeed, a difference of view between States had appeared as to the interpretation of article 121, paragraph 5, and the disagreement has been settled by virtue of paragraph 2 of the resolution[5]. The United Kingdom qualified paragraph 2 as an "authoritative, unqualified and clear interpretation of the amendment to the Rome Statute on the crime of aggression, in accordance with article 121 paragraph 5 of the Rome Statute"[6].

Even if it is expected that States like Liechtenstein and Switzerland would maintain their position, a brief analysis might lead to the conclusion that, indeed, paragraph 2 of Resolution ICC-ASP/16/Res.5 may represent an "interpretative agreement" in the sense of article 31 (3) a) of the Vienna Convention on the Law of Treaties. In this respect, the following might be argued:

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[1] Official Records, ICC-ASP/16/20, Annex VII, p. 80-89.
[2] Official Records, ICC-ASP/16/20, Annex VII, p. 86.
[3] Official Records, ICC-ASP/16/20, Annex VII, p. 80-90.
[4] Official Records, ICC-ASP/16/20, Annex VII, p. 81.
[5] Official Records, ICC-ASP/16/20, Annex VII, p. 83.
[6] Official Records, ICC-ASP/16/20, Annex VII, p. 90.

a) First of all, paragraph 2 was adopted by consensus, as a result of a compromise. As long as, at the final appeal, no delegation has opposed to it, it can be said that "the State Parties have agreed upon it". It may be true that an important number of parties may not have been pleased with the result of the compromise, but, as it resulted from the declaration of France, agreeing on paragraph 2 was the price to pay for achieving activation of jurisdiction by consensus. Therefore, it would not be correct to say that paragraph 2 does not represent the "agreed views" of the Parties.

b) An interpretative agreement may take any form[1]. Georg Nolte, Special Rapporteur of the International Law Commission on the topic of Subsequent agreements and subsequent practice in relation to the interpretation of treaties defined the subsequent agreements as "acts, in various forms, by which the parties to a treaty express their agreement concerning the interpretation or application of the obligations that result from a treaty"[2]. Therefore, it is not the form, but the encapsulation of an agreement that is important: as the International Court of Justice emphasized in the case concerning *Pulp Mills on the River Uruguay:* "*Whatever its specific designation and in whatever instrument it may have been recorded […], this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith"*[3].

c) The issue of the value of resolutions adopted by international bodies, as subsequent agreements relevant for interpretation, has been examined by the International Court of Justice in the *Whaling in the Antarctic Case*[4]. The Court underlined that only when a resolution (in that case of the International Whaling Commission) is adopted by consensus or unanimity, it could be regarded as subsequent agreement or subsequent practice in the sense of letters a) or b) of article 31 paragraph 3 of the Vienna Convention on the Law of Treaties[5].

Moreover, the issue of the decisions adopted by consensus of a Conference of the State Parties has been addressed by the Draft Conclusions on subsequent agreements and subsequent practice in relation to interpretation

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[1] Richard Gardiner, *Treaty Interpretation,* Oxford University Press, 2008, p. 216.

[2] Georg Nolte, 'Subsequent Agreements and Subsequent Practice', in G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, 2013, p. 309.

[3] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, 63, para. 131; also quoted by the *Second Report of Special Rapporteur Georg Nolte on subsequent agreements and subsequent practice in relation to treaties,* Doc. A/CN.4/671/ 26 March 2014, p. 61, para. 144.

[4] *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening),* ICJ Reports, 2014, p. 226.

[5] *Ibid.* p. 257, para. 83.

of treaties, adopted by the Drafting Committee of the International Law Commission on the second reading, in 2018:

> "*1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.*
>
> *2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a nonexclusive range of practical options for implementing the treaty.*
>
> *3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus"*[1].

In our view, the essential element that results from the third paragraph of conclusion 11 is the expression of an agreement in substance regarding the interpretation of a treaty. It is clear that paragraph 2 of, by the wording "confirms that" and by its adoption by consensus, reflects an agreement upon the meaning to be given to article 121 (5) and to the relevant provisions of the Kampala Amendment.

d) One final point would be useful in relation to what has been argued by Nikolas Sturchler, the Swiss representative. As mentioned above, he supported the idea that paragraph 2 of Resolution Resolution ICC-ASP/16/Res.5, as the second sentence of paragraph 5 of article 121 of the Statute, "stands in contradiction to paragraph 4 of article 15bis of the Rome Statute". He further argues that "In this sense, it is somewhat difficult to argue that operative paragraph 2 is simply a case of interpreting or clarifying the crime of aggression amendments. If the intended point of operative

[1] International Law Commission, Seventieth session New York, 30 April–1 June and Geneva, 2 July–10 August 2018, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, Text of the draft conclusions adopted by the Drafting Committee on second reading, doc. A/CN.4/L.907, draft conclusion 11.

paragraph 2 is to revise paragraph 4 of article 15*bis*, the problem is that it was not passed pursuant to the Statute's amendment provisions"[1].

The very thin line between interpretation and modification is one of the most important features of international law. For example, in case of subsequent practice as an interpretation tool, Special Rapporteur Georg Nolte underlines that "it appears that the International Court of Justice has not explicitly recognized that a particular subsequent practice has had the effect of modifying a treaty. Some cases have, however, been read as implying that, in substance, this was the case". Indeed, the International Court of Justice recognized in the case concerning *Dispute regarding Navigational and Related Rights* that subsequent practice might lead to a departure from the text of the treaty[2]. The same is valid for the famous *Namibia Advisory Opinion,* which recognized that abstention of a permanent member of the Security Council cannot bar the adoption of a resolution, despite the words "concurring votes" in the text of the Charter[3]. The European Court of Human Rights, on its turn, recognized that "an established practice within the member States could give rise to an amendment of the Convention"[4].

Based on this very thin line, Special Rapporteur underlines that when there is doubt whether the purported effect of a practice is modification or interpretation, the interpretative effect must be presumed: "while there are indications in international jurisprudence tha t, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, States and courts should make every effort to conceive an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way"[5].

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[1] Nikolas Sturchler, *loc. cit.*

[2] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009,* p. 213, p. 242, para. 64.

[3] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, p. 22, para. 22; see also *Second Report of Special Rapporteur Georg Nolte on subsequent agreements and subsequent practice in relation to treaties,* Doc. A/CN.4/671/ 26 March 2014, p. 54, para.124.

[4] *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010, Application No. 61498/08, ECHR 2010, para. 119.

[5] *Second Report of Special Rapporteur Georg Nolte on subsequent agreements and subsequent practice in relation to treaties,* Doc. A/CN.4/671/ 26 March 2014, p. 60, para. 142.

The same construction is valid also for interpretative agreements, not only for interpretative practice: when there is doubt about the effect – modification or interpretation – interpretation is to be presumed. In the words of Georg Nolte, "it is often very difficult to draw a distinction between agreements of the parties under a specific treaty provision which attributes binding force to subsequent agreements, simple subsequent agreements under article 31 (3) (a) which are not binding as such, and, finally, agreements on the modification of a treaty under article 39. […] *It is clear, however, that States and international courts are generally prepared to accord States parties a wide scope for the interpretation of a treaty by way of a subsequent agreement. This scope may stretch and even go beyond the ordinary meaning of the terms of the treaty. The recognition of this broad scope for the interpretation of a treaty goes hand in hand with reluctance by States and courts to recognize that an agreement actually has the effect of modifying a treaty* " (emphasis added)[1].

This is also the case for Resolution ICC-ASP/16/Res.5: even if it would be argued that the understanding departs from the original meaning of the Kampala Amendment and Rome Statute, this is the purpose of a subsequent agreement – to make the interpretation evolve. As Georg Nolte emphasizes, State Parties enjoy a wide scope for interpretation by way of a subsequent agreement.

However, our opinion is that this is not the case for the Rome Statute and the Kampala Amendment to be subject to an interpretation that "is very close to modification". The text of article 121 (5) is very clear and the Resolution ICC-ASP/16/Res.5 only confirms that it applies to the Kampala Amendment. With respect to the Kampala Amendment itself, it is a principle of international law – the relative effect of treaties, enshrined by article 34 of the Vienna Convention – that it cannot create effects for States who are not parties to it.

Conclusion

The activation of the jurisdiction of the International Criminal Court over the crime of aggression has been indeed a historic moment. It is the first time in history when an international jurisdiction enjoys specific competence over the crime of aggression. The higher the number of

[1] Ibid., p. 67, para. 163.

ratifications in the future, the greater the dissuasive effect of the ICC will be against illegal use of force in international relations.

The activation decision was not a "simple job", merely because the difficult negotiations in Kampala have left things unclear. After the Revision Conference, delegations were split upon how to interpret the Kampala Amendment as well as article 121 (5) of the Statute. The disagreement concerned the scope of the jurisdiction, more exactly whether the Court could exercise the jurisdiction over an act of aggression committed by nationals of a State Party that did not ratify or accept the Amendment, against the territory of a State Party that has ratified the amendment. The opinions of States were split between the "consent-based position" and the "protective position". Following difficult negotiations, the "consent-based position" was confirmed by the text of paragraph 2 of the Resolution that activated the jurisdiction over the crime of aggression. Accepting this position was "the price to be paid" for France and the United to accept the activation of the jurisdiction (to join consensus for the activation).

It may seem for certain delegations and certain scholars that France and the United Kingdom were too inflexible, because they did not accept "any bridge" between the two opposed position. Nevertheless, we think that their position is somehow understandable: it should not be forgotten that, in Kampala, France and the United Kingdom made an important concession with respect to the crucial element for them, which was the request for an exclusive role of the Security Council in determining whether an act of aggression took place. For France and the UK, the "game" in Kampala was not whether to accept the opt-in, opt-out or other two "milder" positions between these two, as enshrined by Stefan Barriga[1], but whether to accept the non-exclusive role of the Security Council. And this game took place until the very end, in Kampala. Thus, it seems that France and the United Kingdom appeared to see themselves caught in a debate they paid little attention to, before the adoption of the Amendment (as they concentrated on the Security Council). Therefore, it would have been "a second concession in a row", that the two permanent members of the Security Council were not ready to make.

Overall, the solution to confirm the "consent-based position" seems correct, from our point of view. First, it gives expression to one of the most important principles of international jurisdiction, according to which a State must express its consent for its conduct to be assessed by an international

[1] Stefan Barriga, *Exercise of Jurisdiction and Entry Into Force…,* loc. cit., p. 12; Stefan Barriga, *Introduction to Negotiation History*, loc. cit., p. 43.

Court in an undoubted manner. Consent through ratification is the only undoubted one. Consent through the effect of articles 5 (2), 12 of the Rome Statute and 15bis (4) of the Kampala Amendment would have been "extensively interpreted". Therefore, we reiterate our view that a smaller step, with a solid foundation (undoubted consent, through ratification), is a wiser decision than a more ambitious step, with a feeble foundation (consent derived from the effect of article 12, 5 (2) of the Statute and 15bis of the Kampala Amendment). Thus, the decision of the Assembly of State Parties to step back, to confirm the consent-based approach and to achieve consensus through a "less ambitious step" is the correct one. Second, the "consent-based position" reflects the general principle of law of the "relative effect of the treaties", also enshrined in article 34 of the Vienna Convention on the Law of Treaties. According to this principle, the Kampala Amendment may not have any legal effect over States that are not a party through it, by means of ratification or acceptance.

The two principles of law – the need to express undoubted consent for jurisdiction and the relative effect of treaties – need to be regarded altogether. Thus, we appreciate that the legal construction according to which the Rome Statute, through its articles 5 (2) and 12, would have given a "free mandate" to the State Parties that ratify the Amendment to establish jurisdiction for the crime of aggression over all State Parties, notwithstanding what the definition and the condition for exercising jurisdiction might be, may be regarded as "far too ambitious".

Last but not least, let us remember that international law evolves slowly. International consensus is very difficult to be reached. This is another argument to say that the solution embraced by the Assembly of State Parties was wise.

Nevertheless, a reduced number of States still maintained their "protective position" and sustained that paragraph 3 of Resolution ICC-ASP/16/Res.5 opens the door for the Court to decide itself what the interpretative choice between the "protective position" and the "consent-based position" should be. Scholars have argued whether the second paragraph of Resolution ICC-ASP/16/Res.5 represents (or not) an interpretative agreement, in the sense of article 121 (5) of the Vienna Convention on the Law of Treaties. In our view, even if the compromise was hard and many delegations were not pleased with the compromise, the fact that the Resolution was adopted by consensus makes a strong argument in favour of considering it an "interpretative agreement". Even if the debate will continue, the whole picture of Resolution ICC-ASP/16/Res.5 – its text and the negotiation history – gives strength to considering that the parties agreed, indeed, on the

less ambitious interpretation, for the sake of unity and consensus. And unity and consensus represent an important achievement on such an important topic for the international community, as the crime of aggression.

Evenimente relevante din practica românească a aplicării dreptului internaţional
Events of Relevance in the Romanian Practice of Implementing International Law

Events in the Romanian Practice of Implementing International Law (January-June 2018)

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Abstract: *This brief presentation of the Romanian practice during the first semester of 2018*[2] *in implementing international law tries to give an overview of what can be termed as a very rich activity of the Romanian authorities in this field. The paper describes the legal positions expressed on various occasions regarding events with relevance to international law, legal procedures regarding important agreements signed by Romania, Romania's participation to the most important international organizations etc.*

Key-words: *legal status of Jerusalem, Middle East Peace Process, arbitration, settlement of disputes, diplomatic relations*, *illegal annexation of Crimea, weapons of mass destruction, the dispute related to the name of*

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[2] Parts of this presentation were already published, in Romanian, in the *Judicial Courier* review issues of the first semester of 2018 by the same author, in the section "*International Actuality*".

Macedonia, privileges and immunities, JCPOA, Romanian-German Joint Commission on Germans from Romania, persons belonging to national minorities, minority languages.

1. Romania's position regarding the status of Jerusalem

On **5 January 2018**, Romania expressed its position regarding the status of Jerusalem through a Presidential Administration press release on a conversation between the President of Romania and the Prime Minister of Israel.

According to the cited source, the Israeli Prime Minister thanked for Romania's abstention on the occasion of adopting the UN General Assembly Resolution of 21 December 2018 regarding the status of Jerusalem. Among others, the Resolution recommends UN Member States to refrain from establishing diplomatic missions in Jerusalem and intensify international efforts for a comprehensive and just peace in the Middle East.

On 21 December 2017, following the adoption of the mentioned resolution, the Romanian MFA issued a press release in which Romania reaffirmed its known position on the implementation of the 'two-State solution', Israel and Palestine, which should co-exist in peace and security, and on the necessity of ending this conflict, re-expressing Romania's continuous commitment on the efforts of the international community of contributing to a just and lasting settlement of the Israeli-Palestinian conflict, according to the interests of both sides, and ensuring peace and stability in the Middle East. Furthermore, the MFA press release appreciated the promotion of the draft resolution on the status of Jerusalem comes at a time when caution should be exercised, as the MFA considers it would be necessary to re-launch direct dialogue in order to unlock the peace process. Consequently, Romania has chosen to abstain within the UN General Assembly.

Regarding recent evolutions on the status of Jerusalem, according to the 5 January 2018 press release of the Presidential Administration, the President of Romania reiterated the main elements of Romania's position, expressed on the occasion of the vote and the 'explanation of vote' session following the UN General Assembly Resolution of 21 December 2017.

According to this position, approved by the President of Romania prior to voting, based on the reasoned written proposal of the Romanian Ministry of Foreign Affairs, Jerusalem represents a central topic within the peace negotiations and its status should be established following a direct agreement between the parties. According to the mentioned source,

Romania also underlined within the explanation of vote the necessity of a just and lasting settlement of the Israeli-Palestinian conflict by implementing the 'two-State solution', Israel and Palestine, which should co-exist in peace and security, as the only option able to guarantee the fulfillment of both parties' aspirations.

Furthermore, according to the same source, the explanation of vote should that our country's position on the status of Jerusalem remains the one established through the relevant UN Security Council and General Assembly resolutions. At the same time, Romania called for calm, encouraged parties to re-establish direct dialogue for unlocking the peace process and showed that, at present time, there is a need for renewing international efforts for re-launching it. Within this context, our country viewed with reticence the promotion of the Resolution of 21 December 2017, which motivated the decision to abstain.

Consequently, according to Romania's position mentioned in the press release of the Presidential Administration, an eventual decision of moving the Embassy of Romania from Tel Aviv to Jerusalem may only be taken based on the mentioned parameters, by considering future evolutions regarding the Peace Process in the Middle East and, within it, the matter of the status of Jerusalem.

2. Romania has become Chairman of the UN Peacebuilding Commission

On **31 January 2018**, Romania took over, according to an MFA press release, for one year, the presidency of the UN Peacebuilding Commission. The Commission's leadership will be ensured, according to the rules of procedure, by Romania's Permanent Representative to the UN. Romania was elected in 2017 to serve as member of the Peacebuilding Commission, and its mandate effectively began on 1 January 2018.

According to the cited MFA press release, Romania's participation in the Peacebuilding Commission, its decision to run for, as well as obtaining the presidency reflects the national objective of diversifying our country's contribution to UN efforts related to international peace and security, this being the first time since the founding of the Commission (in 2005) that our country has this important task.

According to the same source, the assumption of the position of Chairman highlights, on the one hand, Romania's long and significant contribution to UN peacekeeping operations and, on the other hand, confidence in our

country's capacity of managing the activities of the Commission in the fields of peacekeeping, reconstruction and development of States in their post-conflict periods.

The MFA press release mentions that the *Peacebuilding Commission* is a UN body that provides recommendations to the Security Council, the General Assembly and ECOSOC in peacekeeping situations of major importance. It was created in 2005, starting from the idea that States in post-conflict situations need the assistance of the international community through the UN, to return to normality and economic, social and institutional recovery. The Commission undertakes its activities both at the UN headquarters in New York, through debates between elected members (in fields such as analysis, planning, evaluation regarding UN peacekeeping architecture, financial and administrative aspects) and on the ground (by undertaking projects and operational activities). The Chairmanship of the Commission is annual, being ensured by respecting the principle of geographical rotation. The projects undertaken in the countries where the Commission is present are funded by the Peacebuilding Fund, which draws its resources from volunteer contributions by UN Members.

3. The award of the commercial arbitration between Romania and Chevron

On **3 February 2018**, a press release of the Government of Romania announced that the International Court of Arbitration of the International Chamber of Commerce in Paris (ICC Paris) handed down the award in the dispute between the oil company Chevron and Romania.

According to the mentioned source, Chevron will pay the National Agency for Mineral Resources (ANRM) 73.450.000 USD, following the dissolution of three oil concession agreements without complying with the financial obligations provided by the Petroleum Law. This sum is completed by the legal interest rate set according to the Romanian National Bank reference rate of +8%, calculated from 23 October 2014 until the date of full payment, as well as the arbitration expenses paid by ANRM.

According to the Governmental press release, ANRM and Chevron Romania Holdings concluded on 3 March 2011 three concession agreements for the exploitation-development-exploration in the EX-17 Costineşti, EX-18 Vama Veche and EX-19 Adamclisi perimetres, approved by Governmental Decisions, which provided minimum exploration obligations assumed by Chevron. In November 2014, Chevron informed ANRM that it was denouncing the mentioned concession agreements. ANRM, however,

refused to issue the decision of terminate the concession, as the oil company had not respected Article 40 of the Petroleum Law. More specifically, Chevron did not provide the relevant authority 'the sum representing the value of the works provided in the minimum exploration program established through the oil agreement and those for development and exploitation, due by the date the denunciation was notified and not performed due to reasons attributable to the holder of the oil agreement.'

According to the cited source, the American company went to the Court of Arbitration in June 2015, asking it to note that it had performed its duties provided by the ANRM oil agreements for the termination of the contracts. By the end of 2015, ANRM submitted to the Paris Court of Arbitration both its Answer to the Request for Arbitration, and a counter-claim seeking financial damages for the concession agreements. The final hearings were held in Paris on 19-23 June 2017.

4. Romania and Palau have agreed to establish diplomatic relations

On **16 February 2018**, according to a press release of the Romanian MFA, the signing ceremony of the joint communiqué on the establishment of diplomatic relations between Romania and the State of Palau took place at the headquarters of the Permanent Mission of Romania to the UN in New York.

The document was signed by the Permanent Representatives to the UN of the two States.

According to the MFA press release, the event comes to complement the actions of Romanian diplomacy seeking to strengthen bilateral political relations with the States of the Caribbean and Oceania. By establishing diplomatic relations with Palau, Romania now has diplomatic relations with 189 States, 186 of which are UN Members.

5. Romania's position regarding the Russian presidential elections in Crimea

On **20 March 2018**, the Romanian MFA reminded, through a press release, that Romania does not recognize the Russian Federation's illegal annexation of the Autonomous Republic of Crimea and the city of Sevastopol and, consequently, does not recognize the organization of elections in this territory, a position shared by the EU and its Member States. The MFA also reaffirms, according to the cited press release, its support for Ukraine's

sovereignty and territorial integrity, within its internationally-recognized borders.

6. Romania's position regarding the Great Britain neurotoxin attack

On **26 March 2018**, a press release of the Romanian MFA shows that, following the conclusions of the European Council of 23-24 March 2018, Romania considers that the attack in Salisbury represents a threat to collective security and international law. The press release also shows that, according to the conclusions, the European Council agrees with the United Kingdom Government's evaluation that it is highly probable the Russian Federation is responsible for the attack and there is no other plausible explanation.

The press release continues by announcing the measure of notifying the Embassy of the Russian Federation in Bucharest that one of its diplomats will be declared *persona non grata*, being obliged to leave the territory of Romania. The cited source mentions as the basis for this decision the solidarity with the United Kingdom and the provisions of the Vienna Conventions on Diplomatic Relations.

7. The establishment of diplomatic relations between Romania and Antigua and Barbuda

On **5 April 2018**, according to a press release of the Romanian MFA, a joint communiqué was signed on the establishment of diplomatic relations between Romania and Antigua and Barbuda, at the headquarters of the Permanent Mission of Antigua and Barbuda to the UN in New York. The document was signed by the permanent representatives of the two States to the UN.

According to the cited source, the event comes to complement the actions of Romanian diplomacy seeking to strengthen bilateral political relations with the States of the Caribbean and Oceania, Romania now having diplomatic relations with all the island States of the Caribbean.

According to the MFA press release, by signing the agreement on establishing diplomatic relations between Romania and Antigua and Barbuda, Romania now has diplomatic relations with 189 States, out of which 185 are UN Members.

8. Romania welcomed the OPCW report on the Skripal case

On **13 April 2018**, according to a press release of the Romanian MFA, Romania welcomed the conclusion on 12 April 2018 of the report drawn up by Organization for the Prohibition of Chemical Weapons (OPCW), written at the United Kingdom's request for technical assistance following the Salisbury incident of 4 March 2018 regarding the poisoning of Sergei Skripal and his daughter.

According to the mentioned press release, the report highlights the identity between the results of the tests conducted by the laboratories designated by the OPCW and the results of the investigations undertaken by the United Kingdom on the identity of the chemical agent used to poison Sergei Skripal and his daughter. The MFA welcomed the British authorities' decision to send the report to all OPCW members and publish its executive summary, considering the OPCW confirms the initial assessments regarding the gravity of the Salisbury incident. Furthermore, it advocated for firm measures designed to prevent the repetition of such actions threatening collective security and representing grave breaches of international law.

9. Romania's position on the use of chemical weapons in Syria and the reactions of the United States, the United Kingdom and France

On **14 April 2018**, the Romanian MFA reiterated through a press release 'the firm condemnation of the use of chemical weapons under any circumstances, without any justification existing for such acts'.

The mentioned press release shows that the worrying reports regarding a chemical weapons attack on 7 April 2018 against the population of Douma in Syria must be investigated as soon as possible, in an independent and impartial manner, as the Romanian MFA pleads for the inquiry and prosecution of the individuals responsible for such acts.

Furthermore, the MFA press release also shows that 'the action taken by the United States, the United Kingdom and Franc eon 14 April is a firm response to the atrocities that have resulted in numerous casualties among the civil population of Douma, confronted with the devastating consequences of a war that must cease as soon as possible. Romania stays with its allies and strategic partners'.

At the same time, the MFA reaffirms in the press release the need of resolving the conflict in Syria, which has caused suffering to the Syrian population and considers it essential that all parties involved must continue to actively support the UN efforts designed to end this crisis, based on the

relevant resolutions of the UN Security Council, especially Resolution 2254/2015 and the Geneva Communiqué (2012).

President Klaus Iohannis also stated that 'Romania re-expresses its condemnation of the use of chemical weapons in Syria, which is beyond any justification. We are in solidarity with the actions of our strategic partners'.

10. The entry into force of the Agreement between the Government of Romania and OPCW regarding the OPCW privileges and immunities

On **2 May 2018**, the Romanian MFA announced through a press release that it welcomes the entry into force on that date of the Agreement between the Government of Romania and the Organization for the Prohibition of Chemical Weapons (OPCW) on the OPCW privileges and immunities, signed at The Hague on 6 September 2017. The agreement was ratified by the Parliament of Romania through Law no. 93 of 19 April 2018.

According to the cited source, the conclusion of the Agreement materializes the obligation undertaken by Romania to ratify the Convention on the prohibition of chemical weapons, seeking to establish the regime of privileges and immunities awarded to OPCW personnel undertaking other activities within the national territory besides international inspections. Consequently, according to the mentioned MFA press release, the Agreement's entry into force offers the legal basis needed to develop specific joint projects to increase the level of training of the relevant Romanian authorities and OPCW staff, by using the training centers existing in Romania.

11. The Romanian MFA's position on the United States' withdrawal from the Iran nuclear deal (JCPOA)

On **9 May 2018**, a press release of the Romanian MFA shows that 'as regards the decision of the United States of America to withdraw from the Iran nuclear deal, on the background of negative assessment of the US Administration regarding policies promoted by Iran and the lack of real guarantees concerning its regional policy and the development of its ballistic missile program, the Ministry of Foreign Affairs expresses its confidence in the continuation of diplomatic efforts, so that a real progress may be made and a final, comprehensive and lasting solution may be reached on the Iranian nuclear case'.

At the same time, according to the cited source, 'Romania shall continue to cooperate with the representatives of the entire international community and with the US, its most important strategic partner, in order to identify the best methods for improving regional and international security including in the managing of the nuclear cases according to the Non-Proliferation Treaty, by fully respecting the resolutions of the UN Security Council and the IAEA Board of Governors.'

12. The Romanian MFA's position regarding the conclusions of the Joint Investigation Team on the downing of flight MH17

On **25 May 2018**, the Romanian MFA expressed through a press release special concern regarding the conclusions of the Joint Investigation Team (JIT) on the downing of flight MH17, which includes experts from the Netherlands, Ukraine, Malaysia, Australia and Belgium, found in the interim report of 24 May 2018.

In the application of UN Security Council Resolution 2166/2014, the MFA considers it essential for the Russian Federation to be involved in bringing those responsible for this tragedy to justice. Moreover, the cited document mentions that Romania, together with the other EU Member States, supported the adoption on 25 May 2018 of the Statement by the EU High Representative / Vice-president of the European Commission on behalf of the EU concerning the results of the JIT inquiry on the downing of MH17.

The cited press release reminds that, on 17 July 2014, flight MH17 belonging to Malaysia Airlines was downed in Eastern Ukraine while operating a flight from Amsterdam to Kuala Lumpur. 298 people on board (283 passengers and 15 crew members) died, including a person who was also a Romanian citizen. According to the MFA press release, the criminal inquiry is coordinated by a joint investigation team comprised of representatives of judicial and police authorities from the Netherlands, Ukraine, Australia, Belgium and Malaysia.

13. The MFA welcomes the agreement for the renaming of the Republic of Macedonia to the Republic of North Macedonia

On **13 June 2018**, the Romanian MFA welcomes through a press release the announcement made on 12 June 2018 by the Greek and Macedonian Prime-Ministers regarding the bilateral agreement on the Republic of Macedonia's constitutional name, that of the Republic of North Macedonia.

According to the cited source, the MFA considers this evolution is 'an exceptional event, a decisive step in the current international context of South-Eastern Europe.' Furthermore, it shows that this bilateral agreement places in particular the Republic of Macedonia's European and Euro-Atlantic progress under new and utterly positive auspices. The MFA underlines, in the cited press release, that Romania has constantly supported at political and technical levels the efforts of the Skopje authorities to make progress in the reforms necessary to reach the objectives of joining the European Union and NATO. The press release mentions that 'these are strategic targets of all European partners and Euro-Atlantic allies for the strengthening of regional stability and European security.'

At the same time, the cited source shows that, in perspective of the evolutions that will consolidate the solution announced on 12 June 2018 in the near future, the Romanian MFA reiterates its availability of continuing to contribute to our Macedonian partners' European and Euro-Atlantic development, including within the context of exercising the Presidency of the EU Council in the first semester of 2019 and good bilateral relations.

The press release also reminds that Romania and the Republic of Macedonia have diplomatic relations since 1992, one year after Macedonia's creation as an independent State, that a Consular and Trade Office was opened in 1993 in Skopje, that the mission became an Embassy on 11 January 1995 and that on 30 April 2001, in Bucharest, Romania and the Republic of Macedonia signed the Base Political Agreement. Furthermore, it mentions that during the NATO Summit in Bucharest of 3 April 2008, the heads of the allied States decided to invite the Macedonian partners to join the Alliance as soon as a mutually acceptable solution is reached in the case of the constitutional name.

14. The 21st session of the Romanian-German Joint Governmental Commission on the Problems of German Ethnics in Romania (Berlin, 12-13 June 2018)

According to a press release of the Romanian MFA, on **12-13 June 2018**, the 21st session of the Romanian-German Governmental Commission on the Problems of German Ethnics in Romania took place in Berlin.

According to the cited source, the session reunited representatives of the leadership of the Democratic Forum of Germans in Romania, of the associations of Saxons and Swabians, of the prefectures of counties with relevant German communities and of the relevant Romanian and German ministries.

The Commission appreciated the measures taken by Romania since its establishment (1992), which have contributed to maintaining the traditions and identity of the German minority and, since this session took place in the year of the Hundredth Anniversary of the Great Union, it highlighted the role of German ethnics in realizing this event.

The source informs that the representatives of both parties showed the German minority's positive influence in developing Romanian society and bilateral relations and the session also evaluated the status of undertaking the projects provided in the Protocol concluded at the Joint Commission's previous session (Bucharest, 10-11 April 2017), also agreeing on initiating new projects in fields relevant for the German ethnics in Romania.

The two co-presidents of the Commission welcomed, according to the Romanian MFA press release, the role of a true bridge between the German community in Romania and the Romanian one in Germany, the German side repeatedly appreciating that Romania's policy in the field of protecting the rights of individuals belonging to national minorities represents a model system of approaching minority issues. The Commission showed that it disapproves any allegation regarding German ethnics in Romania.

The representatives of the competent Romanian authorities, the Ministry of Labor and Social Justice, the Ministry of Culture and National identity, the Department for Inter-Ethnical Relations, as well as the Prefectures of the Braşov, Sibiu, Bistriţa-Năsăud, Caraş-Severin and Timiş counties presented reports on the most recent activities of supporting citizens belonging to the German minority.

Finally, according to the mentioned press release, the parties adopted the Protocol of the 21st session of the Joint Commission, establishing the two Governments' main cooperation objectives in this area and the framework for the subsequent development of projects addressed to German ethnics in Romania.

15. The 'National Minorities and Minority Languages in a Changing Europe' Conference

On **18-19 June 2018**, the Anniversary Conference 'National Minorities and Minority Languages in a Changing Europe' took place in Strasbourg under the Croatian Chairmanship of the Council of Europe, within the context of the 20th anniversary of the entry into force of the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

The conference sought to answer a number of questions regarding the protection of rights of people belonging to national minorities and minority languages within the context of political, social and technological developments and socialization, as well as regarding educational and linguistic policies and their role in the official language – minority languages equation. The conclusions of the conference will be the basis for a reflection process at the level of the Committee of Ministers of the Council of Europe for the strengthening of conventional mechanisms in the field of protecting the rights of people belonging to national minorities.

The Romanian intervention at the conference highlighted the idea of acceptance as the basis for the just balance needed to create and consolidate a harmonious society, based on mutual respect, showing that from the majority's point of view, acceptance involves recognizing that an extra set of fundamental rights are awarded to individuals belonging to a minority for the purpose of preserving their identity, while from the minority's point of view acceptance involves the wish of living in the same society as the majority and integrating in that society as a whole, this fundamental collective acceptance defining a civic nation.

Furthermore, the Romanian side showed that specific individual rights awarded to people belonging to national minorities seek to preserve their ethnical, linguistic, cultural and religious identity, without gaining, however, an increased importance related to the rest of fundamental rights and freedoms recognized by international instruments and these rights may not be exercised by sacrificing the objective of integrating those individuals into their societies.

The Romanian delegation's position also included the thesis according to which the protection of the rights of individuals belonging to national minorities involves, firstly, cooperation and dialogue between States in order to identify lasting solutions, and not resorting to unilateral measures by the kin-State, capable of affecting the social balance in the State where the minority lives. At the same time, it highlighted the role of conventional mechanisms in the correct evaluation of the real social situation, as well as supporting the State in identifying the best solutions to properly answer the necessity of promoting and protecting the cultural, linguistic, religious, ethnic identity of people belonging to national minorities.

At the same time, the Romanian delegates at the conference also referred Romania's experience and model developed in order to properly answer both the necessity of protecting at the highest standards the identity rights of all 20 national minorities living in Romania, and to ensure peaceful co-existence, invoking the responsibility entrusted to national minorities

including from the perspective of ensuring a good governance and the development of Romanian society as a whole. Furthermore, the Romanian delegation highlighted the mutual acceptance of the majority and minority as a basis of just social balance, reflecting all of the citizens' interests.

Studii și comentarii de jurisprudență și legislație
Studies and Comments on Case Law and Legislation

L'arrêt *Al Nashiri c. Roumanie* – le Retour des *Black Sites* devant le Juge de Strasbourg

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Résumé: *Dans l'affaire Al Nashiri c. Roumanie*[2] *la Cour EDH a du analyser des aspects extrêmement délicats relatifs à l'applicabilité de la Convention en cas de violation des droits garantis commises sur le territoire d'un Etat partie à la Convention par les agents d'un Etat tiers. Notre analyse ne portera pas sur les nombreuses violations substantielles de la Convention constatées dans l'affaire, mais sur la question de l'imputabilité des faits, ainsi que sur la preuve des omissions coupables de la Roumanie, qui ont engagé sa responsabilité sur le terrain de la CEDH.*

Mots-clés : *CEDH, détention secrète, remise extrajudiciaire, obligations positives*

L'arrêt *Al Nashiri c. Roumanie* rendu par la Cour EDH le 31 mai 2018 s'inscrit dans la série des affaires relatives aux violations des droits de l'homme pendant la capture, la détention et la remise extrajudiciaire des suspects de terrorisme, opérées par la CIA en Europe[3]. La Cour a établi, à l'unanimité, que la Roumanie avait violé la Convention européenne des droits de l'homme en permettant aux agents CIA de placer Monsieur Al Nashiri dans un centre de détention secret sur son territoire, dans des conditions abusives. En plus, la Roumanie avait permis la remise extrajudiciaire du requérant, en secret, vers une destination ou il y avait des

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[2] Cour EDH, *Al Nashiri c. Roumanie* (requête no 33234/12), 31 mai 2018

[3] Fiche thématique, https://www.echr.coe.int/Documents/FS_Secret_detention_FRA.PDF

risques évidents de détention abusive, déni de justice, mauvais traitements et application de la peine de mort[1]. Comme pour les autres affaires similaires, l'Etat a été obligé de dérouler une enquête effective afin d'identifier et de punir les responsables, ainsi qu'a dédommager le requérant du montant de 100.000 euros.

Cet arrêt est en grande partie similaire à celui rendu le 24 juillet 2014 dans les affaires *Al Nashiri et Zubaydah (Husayn) c. Pologne*[2], pays où les deux requérants avaient également été détenus et soumis à des mauvais traitements par des agents CIA, avant d'être renvoyés vers la Roumanie, respectivement la Lituanie. Les arrêts de condamnation de la Roumanie et de la Lituanie ont été rendus le même jour, le 31 mai 2018. Comme la Pologne, la Roumanie et la Lituanie ont formulé des demandes de renvoi devant la Grande Chambre, qui ont été rejetées[3].

Il a été donc prouvé *au-delà de toute doute raisonnable* que les autorités roumaines avaient créé des facilites de détention pour la CIA (dénommés *Black Sites* dans un Rapport de 2014 du Senat des Etats Unis), et que M. Al Nashiri y avait été détenu dans des conditions abusives. L'implication de certains Etat parties à la CEDH (dont la Roumanie) dans les programmes dites de restitution des suspects de terrorisme conduit par les Etats-Unis a été établie par la Cour, malgré leur négation de toute contribution, passive ou active. La difficulté majeure pour établir les faits (I) et pour engager la responsabilité de ces Etats (II) a résulté du caractère secret des pratiques dénoncées, qui en rendait la preuve extrêmement difficile lorsque les Gouvernements défendeurs niaient les faits.

I. La preuve des faits

La première affaire de cette série, jugée par la Cour EDH en 2013, a été l'affaire *El Masri c. Macédoine*[4]. Cette affaire a donnée à la Cour

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[1] Ainsi, la Roumanie a violé les articles 3 CEDH (interdiction de la torture), parce que les autorités ont permis à la CIA d'appliquer des mauvais traitements au requérant sur le territoire roumain et n'ont pas procédé à une enquête effective des allégations de ce dernier; 5 CEDH (droit à la liberté et à la sécurité), 8 CEDH (droit au respect de la vie privée); 13 CEDH (droit à un remède effectif) combiné avec les articles 3, 5 et 8; 6 § 1CEDH (droit à un procès équitable), ainsi que les articles 2 (droit à la vie) et 3, combinés avec l'article 1 du Protocole 6 (abolition de la peine de mort).

[2] *Al Nashiri c. Pologne* (requête no 28761/11) et *Husayn (Abu Zubaydah) c. Pologne* (requête no 7511/13)

[3] Communique de presse ECHR 331 (2018) du 9 octobre 2018

[4] Cour EDH, Grande Chambre, *El Masri c. Macédoine* (requête no 39630/09), 13 décembre 2012

l'occasion de se prononcer sur la responsabilité d'un Etat partie dont les agents accomplissent les démarches préliminaires consistant en la privation de liberté et la remise des suspects de terrorisme visés par la justice répressive d'un Etat tiers. Dans l'affaire *El Masri*, il s'agissait de l'enlèvement du requérant, ressortissant allemand, en Macédoine, afin d'être secrètement remis aux agents américains et ensuite amené en Afghanistan. Le requérant prétendait avoir été enlevé par des officiers macédoniens alors qu'il passait la frontière le 31 décembre 2003. Etant accusé d'être un membre d'Al-Qaida il aurait été enfermé pendant plus de 20 jours dans un hôtel à Skopje et ensuite remis à des agents de la CIA américaine à l'aéroport de Skopje. Après avoir été maltraité et drogué, il aurait été transporté à Kaboul enchaîné sur le sol d'un avion. En Afghanistan, il aurait été détenu pendant quatre mois et ensuite renvoyé en Europe et abandonné au bord de la route en Albanie. Le requérant demandait à la Cour d'obliger le gouvernement de Macédoine à mener une enquête sur l'affaire et de payer des dommages-intérêts pour avoir participé à sa privation de liberté illégale et pour l'avoir soumis à de mauvais traitements.

La Macédoine a nié les faits concernant la détention du requérant sur son territoire, malgré le témoignage de la victime et de nombreux rapports internationaux concernant l'implication de ce pays dans la détention et le transport de prisonniers de la CIA suspects de terrorisme[1]. Dans ce contexte, il convient de rappeler la position de la juridiction suprême américaine par rapport aux arrestations illégales opérées par des agents américains à l'étranger : elle a considéré que cette pratique n'était pas illicite en soi, d'autant plus s'il s'agissait de la coopération des autorités locales, comme dans l'affaire *El Masri*[2]. En tout cas, la Cour EDH n'a pas eu à s'interroger

[1] *La participation des Etats européens à la détention illégale et au transport des prisonniers de la CIA*, Rapport présenté à l'Assemblée parlementaire du Conseil de l'Europe dit « Marty », D/10957, juin 2007 ; *La participation des Etats européens à la détention illégale et au transport des prisonniers de la CIA*, Rapport présenté au Parlement européen dit « Fava », P6_TA (2006)0316

[2] Philippe Berenz, *"La notion de juridiction de l'Etat dans le contentieux européen des droits de l'homme",* thèse de doctorat soutenue en 2011 a l'Université de Paris 1, consultée a la bibliothèque CUJAS *; affaire Alvarez-Machain*, Supreme Court of United States of America, arrêt du 15.06.1992, disponible sur http://www.law.cornell.edu/supremecourt/text/504/655

sur la responsabilité des Etats-Unis, puisque cet Etat n'est pas partie à la Convention[1].

Finalement, la Cour a conclu que l'exposé détaillé des faits rendu par le requérant sous serment, ainsi que les enquêtes internationales et les dépositions des experts constituaient des preuves *au-delà de toute doute raisonnable* de la véridicité des faits[2]. La Cour EDH faisait ainsi écho à la pratique des juridictions internationales, qui ne se considèrent pas liés par des règles aussi strictes que celles des tribunaux nationaux[3]. Ainsi, le standard de la preuve *au-delà de toute doute raisonnable* a pu été atteint par le cumul des preuves indirectes avec la déposition sous serment du requérant.

Les affaires similaires qui ont suivi, *Al Nashiri et Husayn c. Pologne*, ont eu la particularité de l'absence des victimes pendant la procédure devant la Cour. A la différence de l'affaire *El Masri*, où le requérant a participé activement à la procédure, les requérants Al Nashiri et Zubaydah (Husayn) ont accompli tous les actes de procédure par l'intermédiaire des représentants. Transférés par la CIA dans la prison américaine Guantanamo Bay, située à Cuba, ils y sont toujours détenus. Cependant, peu de temps après l'arrêt rendu contre la Pologne en juillet 2014, un rapport du Senat des Etats Unis publié en décembre 2014 confirmait l'existence des programmes secrets de détention des suspects de

[1] S'il s'agissait d'un Etat partie, la solution serait-elle la responsabilité partagée entre l'Etat territorial et l'Etat qui exerçait le contrôle effectif sur le détenu ? Il est de jurisprudence constante de la Cour EDH que le contrôle sur un centre de détention par un Etat partie à la CEDH suffit pour lui attribuer des violations des droits de l'homme subis par les détenus dans ces locaux, même s'ils sont situés à l'extérieur du territoire national (voir l'arrêt rendu par la Grande Chambre de la Cour EDH le 7 juillet 2011*, Al Jedda c. Royaume-Uni,* requête 27021/08) ; en plus, un Etat partie qui, par ses agents, a une emprise effective sur une personne qui se trouve sur le territoire d'un autre Etats peut également voire sa responsabilité engagé pour les faits de ses agents (voir l'arrêt *Ocalan c. Turquie* rendu par la Cour EDH 12 mars 2003, requête 46221/99) .

[2]Les Etats-Unis ont également gardé le silence. Les tribunaux américains avaient rejeté la demande de procès séparé déposée per El-Masri, qui avait recherché l'obtention d'indemnités auprès des membres de l'administration américaine de l'époque des faits. Le requérant a ensuite demandé un même procès contre les Etats-Unis à la Commission Interaméricaine des Droits de l'Homme, mais les Etats-Unis n'ont pas répondu à la demande de la Commission. A l'époque, le probatoire n'était pas encore aussi consistant qu'au moment du jugement des affaires *Al Nashiri* et *Husayn*.

[3] Voir l'affaire du *Detroit de Corfou*, arrêt du 9 avril 1949, CIJ, Rec. 1949, p. 4, voir également l'opinion individuelle de Sir Gerald Fitzmaurice dans l'affaire du *Sud-Ouest africain*, arrêt du 18 juillet 1966, CIJ, Rec. 1966, p. 6

terrorisme[1]. Le rapport confirmait également le fait qu'en route vers Guantanamo, les requérants ont transité la Roumanie (Al Nashiri), respectivement la Lituanie (Zubaydah, dit Husayn). Ce rapport a eu pour conséquence le renforcement des conclusions tirées par la Cour de Strasbourg en 2014, en validant en quelque sorte la valeur de la preuve indirecte ou circonstancielle.

Dans l'affaire *Al Nashiri c. Roumanie* la question de la preuve est analysée sur une cinquantaine de pages, alors que beaucoup d'éléments du probatoire étaient communes à l'arrêt rendu contre la Pologne quatre ans avant. Le requérant a évoqué l'arrêt précédent, tout en soulignant le fait que les opérations de la CIA n'auraient pas été possibles en absence de la coopération, assistance et implication active des Etats partenaires, dont la Roumanie, par la mise à la disposition de la CIA de leur espace aérien, aéroports et des locaux ou les détenus pouvaient être interrogés, ainsi que par la création des conditions nécessaires au bon déroulement de ces opérations. Il a demandé à la Cour de raisonner par analogie et de constater que la charge de la preuve était renversée, surtout que la Roumanie avait l'accès exclusif aux informations classifiées et aux témoins qui pouvaient éclairer la situation du requérant[2].

La Cour a rappelé la nature subsidiaire de son rôle, en soulignant qu'elle n'entendait pas se substituer aux tribunaux nationaux en ce qui concerne l'établissement des faits[3]. Cependant, la Cour a constaté que de nombreux éléments concordants avaient soutenus la véridicité *prima facie* des allégations du requérant et que, par la suite, le Gouvernement n'avait pas fourni à la Cour des documents de nature à offrit une explication différente du déroulement des évènements. En plus, la Cour rappelle que certaines dispositions de la Convention ne peuvent pas se réconcilier avec une interprétation stricte du principe *affirmanti incumbit probation*, dont les articles 2 et 3, notamment dans le cas des personnes détenues, lorsque certains évènements ne sont connus que par les autorités étatiques. La charge de la prévue dans ces situations pèse sur les autorités, qui ont l'obligation d'offrir une explication satisfaisante et convaincante[4].

Par conséquent, l'établissement des faits a été principalement basé sur des preuves circonstancielles, incluant des rapports internationaux, des documents rendus publics par la CIA le rapport du Senat des Etats Unis de

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[1] https://web.archive.org/web/20141209165504/http://www.intelligence.senate.gov/study2014/sscistudy1.pdf

[2] *Al Nashiri c. Roumanie*, *supra*, para. 460.

[3] *Al Nashiri c. Roumanie*, *supra*, para. 490.

[4] *Al Nashiri c. Roumanie*, *supra*, paras. 492-493.

2014, ainsi que d'autres sources publiques et des témoignages. Le Gouvernement a échoué a prouver que les autorités roumaines n'avaient pas connu ou qu'ils ne pouvaient pas connaitre la situation du requérant.

II. La responsabilité

Une fois prouvés les faits, une seconde difficulté se posait - vu que l'Etat territorial ne peut pas être tenu responsable pour les actions des agents étrangers qui ne sont ni à sa disposition, ni sous son contrôle, la seule piste accessible au requérant restait celle de la responsabilité de l'État pour ses propres actions et omissions qui ont permis la perpétration des violations graves de la Convention sur son territoire. Pourtant, l'article 1 de la CEDH ne parle pas de la compétence territoriale des Etats, mais de *« personnes relevant de leur juridiction »*. Il faut ainsi, pour affirmer qu'une personne relève de la « juridiction » d'un Etat, envisager concrètement le lien qui existe entre les deux dans une situation déterminée.

Dans son ouvrage *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, le professeur italien Pasquale de Sena liait l'interprétation de l'article 1 de la CEDH à la question plus générale de l'imputation des actes internationalement illicites[1]. Ainsi, du point de vue du contenu, la « juridiction » d'un Etat partie, au sens de la CEDH, se superposerait à sa capacité d'influencer la jouissance des droits garantis par l'exercice des pouvoirs de gouvernement, soit de manière globale sur un territoire - avec tous les biens et toutes les personnes qui s'y trouvent, soit de manière ponctuelle sur une personne déterminée. Alors que la Cour a initialement affirmé la distinction entre l'exercice de la « juridiction » et l'imputation des violations alléguées[2,] sa jurisprudence reflète néanmoins l'application des mêmes critères pour analyser les deux concepts. Ainsi, l'analyse de la « juridiction » se confonde partiellement avec la question de l'imputabilité

[1] Pasquale de Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, p 145 ; au même sens voir Carmen Puşcaşu, *La notion de juridiction au sens de l'article 1 de la CEDH,* thèse de doctorat soutenue en 2013 a l'Université de Montpellier, disponible aux Bibliothèques Universitaires de Montpellier et de Bucarest

[2] *Loizidou, supra.*

des actes et omissions contraires à la Convention, dans une démarche dont les étapes ne sont pas strictement délimitées[1].

L'affaire *Al Nashiri c. Roumanie* ne fait pas exception. Nous pouvons observer que la responsabilité de la Roumanie est à la fois attachée à la juridiction territoriale, ainsi qu'à la théorie des obligations positives « générales » inhérentes à l'article 1 de la CEDH. Traditionnellement, la compétence territoriale *« doit s'entendre comme l'aptitude de l'Etat à exercer son autorité conformément au droit international, aussi bien sur les biens que sur les situations, les personnes et les activités placées ou exercées à l'intérieur de son territoire »*[2]. Dans cet esprit, la Cour EDH a précisé que les engagements d'une Partie contractante *« comportent (...) des obligations positives de prendre les mesures appropriées pour assurer le respect de ces droits et libertés sur son territoire »* qui *« subsistent même dans le cas d'une limitation de l'exercice de son autorité sur une partie de son territoire, de sorte qu'il incombe à l'Etat de prendre toutes les mesures appropriées qui restent en son pouvoir »*[3].

Si les autorités d'un Etat partie effectuent des démarches préalables sur son territoire afin de faciliter certaines opérations d'un Etat tiers, l'Etat territorial doit-il s'assurer que les opérations qu'ils facilitent se déroulent conformément à la CEDH? La réponse de la Cour de Strasbourg a été oui, sans doute et peu importe si les autorités nationales ont ou n'ont pas un contacte directe avec la victime. Dans les affaires *Al Nashiri* et *Hussayn* le contacte des autorités nationales avec le requérant est beaucoup plus limité que dans l'affaire *El Masri* ; pourtant, la Cour n'explique pas ou s'arrête la

[1] Le contentieux de la Cour EDH relatif au Chypre de Nord, à la zone transnistrienne de la Moldavie, la jurisprudence liée aux interventions de l'ONU en territoire ex-yougoslave et de celles britanniques en Irak, ainsi que les manifestations ponctuelles (occasionnelles) de la juridiction extraterritoriale – voir les affaires *Issa, Öcalan, Medvedyev*, *Hirsi Jamaa*.

[2] Affaire *« Ile de Palmas »* (Etats-Unis c. Pays-Bas), décision rendue par la Cour permanente d'arbitrage le 4 avril 1928. L'arbitre Max Huber attirait l'attention sur le lien existant entre la souveraineté et les caractères de la compétence territoriale : *« la souveraineté dans les relations entre Etats signifie l'indépendance. L'indépendance relativement à une partie du globe est le droit d'y exercer a l'exclusion de tout autre Etat les fonctions étatiques. Le développement de l'organisation nationale des Etats durant les derniers siècles et, comme corollaire, le développement du droit international a établi le principe de la compétence exclusive de l'Etat en ce qui concerne son propre territoire, de manière à en faire le point de départ du règlement de la plupart des questions qui touchent aux rapports internationaux ».*

[3] *Ilaşcu*, *supra*, para. 313

responsabilité de l'Etat pour le fait de ses organes et ou commence sa responsabilité pour manque de diligence[1].

Dans ce contexte, il est utile de rappeler les opinions qui soulignent le fait que la théorie des obligations positives est apparue et s'est développée dans un contexte totalement différent et que, sous peine *« d'élargir la notion de juridiction jusqu'à l'absurde »*, comme le signale le juge Loucaides dans son opinion partiellement dissidente vis-à-vis de l'arrêt *Ilaşcu*, il faudrait faire application de ladite théorie uniquement lorsque l'État a réellement la possibilité d'exercer sa juridiction sur la prétendue victime. Dans le même temps, comme le juge Bonello le précisait dans son opinion séparée en marge des arrêts *Al Skeini* et *Al Jedda*, *« veiller au respect des droits de l'homme relève toujours de la juridiction de l'Etat »,* donc sa responsabilité ne peut être limitée ou exclue *« qu'en ce qui concerne les droits précis qu'il n'est pas en mesure de reconnaître »* dans des circonstances qui ne lui sont pas imputables.

Conclusion

Les possibilités d'engager la responsabilité des Etats sur le terrain de la CEDH sont devenues de plus en plus nombreuse, grâce à la théorie des obligations positives. A l'aide de cette technique d'interprétation, la Cour de Strasbourg peut éviter, si elle le souhaite, des questions délicates relatives à l'imputabilité des faits et à la preuve, puisque ladite théorie fait naitre à la fois des obligations substantielles et procédurales à la charge des autorités nationales. L'application de la théorie des obligations positives dans les affaires relatives aux centres secrètes de détention des suspects de terrorisme est sans doute justifiée, mais son dosage semble déséquilibré. Le volet procédural (qui a pour but de renverser la charge de la preuve) est longuement analysé, alors que la question de séparer les faits et les omissions imputables ne semble pas intéresser la Cour.

[1] Dans l'hypothèse de l'affaire *El Masri* concernant la privation illégale de liberté d'une personne confondue avec un suspect de terrorisme par les autorités macédoines, suivie par la remise aux autorités des Etats-Unis, la Cour n'a eu aucune tentative d'expliquer où s'arrêtait la responsabilité de la Macédoine pour les faits de ces agents et où commençait sa responsabilité pour manque de diligence, alors que cette distinction pouvait être facilement opérée.

Recent Developments regarding Compensation before the International Court of Justice: *The Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua*

(Part II)

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Abstract: *This article studies the manner in which compensation is interpreted and how it currently applies before the International Court of Justice through the perspective of the Case Concerning Certain Activities Carried out by Nicaragua in the Border Area.*

Key-words: *State Responsibility, Remedies, Compensation, Environmental Law.*

1. Introduction

The first part of this Article referred to the remedy of compensation, as interpreted before the International Court of Justice by the parties involved in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua. This second part of the Article will address the same remedy through the perspective of the Judgment of the International Court of Justice. The Court referred to several concepts which are related to the interpretation of reparation in general and to compensation for environmental damage in particular. This Article shall describe and critically assess these notions.

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2. The Judgment of the International Court of Justice

2.1. The primacy of restitution in kind

The judgment of the International Court of Justice contains a chapter dedicated to the *"Legal Principles Applicable to the Compensation Due to Costa Rica"*. It is within this chapter that the Court addressed the issue of the primacy of restitution in kind in international law. As such, the Court concluded as follows:

> *"The Court has held that compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome"*[1]

The prevalent view with respect to restitution in kind as a remedy of international law is indeed that the finding of the Court in the Chorzow Factory Case confirms the circumstance that restitution in kind is the primary remedy in international law and that it should be given a preference when deciding upon reparation. In this view, compensation would be a secondary remedy, in the sense that it should be granted only if restitution in kind is impossible.

Authors argue that the framework of remedies before the International Court of Justice *"presupposes a hierarchy of remedies, one being higher in the scale than another. It is possible to establish such a hierarchy on the basis of the importance of a remedy"* [2]. Thus, *restitutio in integrum* would be at the top of the hierarchy, followed by specific performance, and then damages (which includes the lesser concept of compensation) which are followed by satisfaction and, finally, the declaratory judgment.

The fact that restitution in kind is considered the primary remedy in international law is further confirmed by its inclusion in the ILC Articles on Responsibility of States for Internationally Wrongful Acts,[3] which mirror the approach of the Permanent Court in the Chorzow Factory Case, and, subsequently the manner in which the International Court approached the issue in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua. As such, Article 35[4]

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665, 12.*

[2] Chittharanjan Felix Amerasinghe, *Jurisdiction of Specific International Tribunals* (Martinus Nijhoff 2009)178.

[3] Hereinafter referred to as the "ILC Articles".

[4] Article 35: *"Restitution A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed*

and Article 36[1] of the ILC Articles on Responsibility of States for Internationally Wrongful Acts confirm the view that the International Court undertook.

Even if various views which favour the primacy of restitution in kind exist, the main issue regarding the primacy of restitution in kind is that authors also generally agree that this primacy is not necessarily reflected in practice, as states rarely request restitution in kind. Certain cases that the International Court of Justice has resolved *"highlight dramatically the uncertainties as to the availability of restitution in international law"*[2].

Referring to the *obiter dictum* of the Chorzow Factory Case[3], authors have argued that restitution in kind is available before the International Court of Justice. Some go even further to argue that *"the Permanent Court of International Justice implied that restitution is the normal form of reparation and that indemnity could only take its place if restitution is not available"*[4]. Restitution in kind has been referred to as being *"the ideal form of reparation"*[5], being the sole manner in which the *status quo ante* could be fully restored.

The two above-mentioned perspectives relating to the availability and scope of restitution in kind as a remedy before the International Court of Justice represent an interesting compromise between theory and practice: in theory, nothing appears to prohibit restitution in kind, while in practice several hurdles appear. A strict interpretation of the Chorzow Factory Case dictum might lead to infringing the right of a state to elect the manner in which reparation should be granted.

Even if the judgment in the Chorzow Factory Case established that restitution in kind is the primary remedy in international law, the

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before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

[1] Article 36(1): *"The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."*

[2] Christine Gray, 'The Choice between Restitution and Compensation' (1999) 10:2 EJIL 413.

[3] *Case Concerning the Factory at Chorzow* (*Germany v Poland*) (Merits) [1928] PCIJ Rep Series A No 17.) pp. 27-28.

[4] Eduardo Jiménez de Aréchaga and Attila Massimiliano Tanzi, 'International State Responsibility' in Mohammed Bedjaoui (Ed), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 369.

[5] René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (Kluwer Law International 1996), 133.

restoration of *the status quo ante,* as such, is in most cases impossible,[1] and *"one of the problems in establishing the primacy of restitution is the large gap between practice and theory"*[2]. Thus, the principles stated in the Chorzow Factory Case appear at times abandoned[3] in practice.

As such, the conclusion of the International Court of Justice in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua that compensation should be awarded *"particularly"* in the cases in which restitution in kind is materially impossible to award or is too burdensome, is not necessarily accurate. As such, compensation should be viewed independently, on a case by case basis, without the limitations suggested by the ILC with respect to the primacy of restitution. The conclusion of Judge Bhandari that *"the Court did not elaborate any further"*[4] on this issue has merit, as the Court could have further clarified the manner in which restitution in kind and compensation.

2.2. The burden of proof and valuation related to compensation

Within the same chapter related to the *"Legal Principles applicable to Compensation"*, the Court had two main conclusions related to the issue of the burden of proof. As such, the International Court of Justice firstly concluded as follows:

> *"The Court recalls that, "as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact". Nevertheless, the Court has recognized that this general rule may be applied flexibly in certain circumstances, where, for example, the respondent may be in a better position to establish certain facts"*[5]

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[1] René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (Kluwer Law International 1996), 133.

[2] Christine Gray, 'The Choice between Restitution and Compensation' (1999) 10:2 EJIL 416.

[3] James Crawford, *State Responsibility: The General Part* (CUP 2013), 506-536, 518.

[4] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Separate Opinion of Judge Bhandari, 1.*

[5] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665, 12.*

Indeed, it is generally established that the burden of proof rests with the entity that submits a positive assertion, as the maxim *actori incumbit probatio* provides. However, it is interesting to note that the International Court of Justice expressly mentioned within the Diallo Case that it has the possibility to determine the amount of compensation by analysing the arguments of the responding state as well, accepting that the applicant might have material difficulties in assessing certain situations. Therefore, even if the applicant had the burden of proof with respect to the amounts of compensation, the Court considered that this burden is not absolute and that it has the power to determine the amounts. Thus, the Court recognized that *"the abruptness of Mr. Diallo's expulsion may have diminished the ability of Mr. Diallo and Guinea to locate certain documents, calling for some flexibility by the Court in considering the record before it".*[1]

Further referring to the Ahmadou Sadio Diallo Case, the Court also concluded as follows with respect to the valuation of compensation:

> *"In respect of the valuation of damage, the Court recalls that the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage. For example, in the Ahmadou Sadio Diallo case, the Court determined the amount of compensation due on the basis of equitable considerations."*[2]

This finding of the Court partially represents the finding from the Diallo Case with respect to granting compensation through the application of equity. In the Diallo Case the Court indeed determined that the amount of compensation can be valuated as such, but restricted its reasoning to valuating moral damages and not compensation in general.

As such, the judgment of the International Court in the Diallo Case is relevant for the interpretation and clarification of compensation due to the fact that it made a clear distinction between material and non-material damage. The Diallo case is one of the very few cases in which the International Court has granted compensation both with respect to material and to non-material damage. The judgment of the Court in the Diallo Case is further relevant, not only because it considered the availability of non-material damages but also through the perspective of its approach towards their quantification. In this respect, the Court concluded as follows:

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[1] *Amahdou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) Compensation, Judgment, I.C.J. Reports 2012, p. 324, 12.*

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665, 12.*

> *"Arbitral tribunals and regional human rights courts have been more specific, given the power to assess compensation granted by their respective constitutive instruments. Equitable considerations have guided their quantification of compensation for non-material harm. For instance, in Al-Jedda v. United Kingdom, the Grand Chamber of the European Court of Human Rights stated that, for determining damage,*
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> *"[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred" (application No. 27021/08, judgment of 7 July 2011, ECHR Reports 2011, para. 114)."*[1]

Due to the above-mentioned arguments, the Court awarded the amount of USD 85,000 to Guinea, based on equity and reasonableness. The reasoning for which the Court concluded that the said amount is equitable took into consideration the number of days that Mr. Diallo was detained[2], the fact that Mr. Diallo was detained without being provided with the reasons for the incarceration[3], the fact that he was not allowed to seek remedies for the incarceration[4], that he was detained for an unjustifiably long period pending expulsion, that he was made the object of accusations that were not substantiated and that he was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities.[5]

Authors have argued that the above-mentioned analysis of the Court was not necessarily sufficient for the determination of the said quantum of compensation for moral damages and considered this circumstance regrettable.[6] It can be considered that the Court performed a thorough analysis of the practice of international courts and tribunals to determine the amount that was due to Guinea.[7] Thus, even if non-material damages are

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[1] *Amahdou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Compensation, Judgment, I.C.J. Reports 2012, p. 324*, 15.

[2] ibid. p. 11.

[3] ibid.

[4] ibid.

[5] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* ICJ Pleadings, Application Instituting Proceedings, 7.

[6] James Crawford, *State Responsibility: The General Part* (CUP 2013), 506-536, 521.

[7] *Amahdou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Compensation, Judgment, I.C.J. Reports 2012, p. 324*, 15.

difficult to assess *"international courts and tribunals recognize that such damages are very real".*[1] The International Court of Justice confirmed this view through the Diallo Case.

The International Court of Justice in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua seems to take a step forward from its finding in the Diallo Case and to confirm that equity can be used as a method for the determination of material damages as well.

2.3. Compensation for environmental damages

It should be firstly noted that both parties agreed upon the circumstance that environmental damage is compensable under international law. As such Costa Rica argued that *"it is "settled" that environmental damage is compensable under international law"*[2] and Nicaragua did *"not contest Costa Rica's contention that damage to the environment is compensable."*[3]

Analysing the arguments of both parties with respect to environmental damage being compensation the International Court of Justice concluded as follows in this respect:

> *"The Court is therefore of the view that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment."*

However, even if both parties, and the Court as well, agreed and respectively concluded that compensation is applicable for environmental harm, the methodology used to valuate such compensation differed. As

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[1] Rutsel Silvestre J Martha, *The Financial Obligation in International Law* (OUP 2015) 98.

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665, 12.*

[3] Ibid.

such, the parties had different views regarding the manner in which the Court should appreciate the interpretation of compensation in this respect.

On one hand, Costa Rica concluded that the *"ecosystem services approach"* method should be used by the Court when analysing compensation for environmental harm. As such, Costa explained its arguments as follows:

> *"the value of an environment is comprised of goods and services that may or may not be traded on the market. Goods and services that are traded on the market (such as timber) have a "direct use value" whereas those that are not (such as flood prevention or gas regulation) have an "indirect use value". In Costa Rica's view, the valuation of environmental damage must take into account both the direct and indirect use values of environmental goods and services in order to provide an accurate reflection of the value of the environment. In order to ascribe a monetary value to the environmental goods and services that Nicaragua purportedly damaged, Costa Rica uses a value transfer approach for most of the goods and services affected. Under the value transfer approach, the damage caused is assigned a monetary value by reference to a value drawn from studies of ecosystems considered to have similar conditions to the ecosystem concerned."*[1]

On the other hand, Nicaragua submitted that a *"replacement value"* method should be used by the International Court of Justice when assessing compensation for environmental damage. As such Nicaragua submitted the following argument in this respect:

> *"Nicaragua considers that Costa Rica is entitled to compensation "to replace the environmental services that either have been or may be lost prior to recovery of the impacted area", which it terms the "ecosystem service replacement cost" or "replacement costs". According to Nicaragua, the proper method for calculating this value is by reference to the price that would have to be paid to preserve*

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665,* 15.

an equivalent area until the services provided by the impacted area have recovered."[1]

The international Court of Justice did not choose between the two methods that were suggested by the parties and rather decided to reach a compromise between the two arguments. As such, the Court concluded that *"the valuation methods proposed by the Parties are sometimes used for environmental damage valuation in the practice of national and international bodies, and are not therefore devoid of relevance to the task at hand. However, they are not the only methods used by such bodies for that purpose"*[2] Even if the Court decided to take a different path that the ones suggested by the parties, it decided to *"take into account the specific circumstances and characteristics of each case"*[3].

After rejecting both above mentioned methods of both parties, the Court decided to accept the modified version of a third method submitted by Nicaragua, the *"corrected analysis"* method, The Court, however, made its own further adjustments to this manner of valuating compensation..

Firstly, the Court rejected the arguments that were submitted by Costa Rica through which it requested that an appropriate calculation of the loss would have to consider a period of 50 years of recovery of the ecosystem. The Court considered as follows in this respect:

> *"In respect of the valuation proposed by Costa Rica, the Court has doubts regarding the reliability of certain aspects of its methodology, particularly in light of the criticism raised by Nicaragua and its experts in the written pleadings. Costa Rica assumes, for instance, that a 50-year period represents the time necessary for recovery of the ecosystem to the state prior to the damage caused. However, in the first instance, there is no clear evidence before the Court of the baseline condition of*

[1] Ibid. p. 16.
[2] Ibid. p. 17.
[3] Ibid.

> *the totality of the environmental goods and services that existed in the area concerned prior to Nicaragua's activities"*[1]

As such, the Court concluded that *"different components of the ecosystem require different periods of recovery and that it would be incorrect to assign a single recovery time to the various categories of goods and services identified by Costa Rica."*[2] As such, the Court considered that fifty years cannot be considered as a relevant period for each claim submitted by Costa Rica.

Furthermore, the Court also concluded that Nicaragua's submission was incorrect as well, as such:

> *"In the view of the Court, Nicaragua's valuation of US$309 per hectare per year must also be rejected. This valuation is based on the amount of money that Costa Rica pays landowners and communities as an incentive to protect habitat under its domestic environmental conservation scheme. Compensation for environmental damage in an internationally protected wetland, however, cannot be based on the general incentives paid to particular individuals or groups to manage a habitat."*[3]

Given this argumentation the Court concluded that it will undertake a different approach, by combining, to a certain degree the two methods suggested by the parties. Thus, the Court concluded that:

> *"The Court considers, for the reasons specified below, that it is appropriate to approach the valuation of environmental damage from the perspective of the ecosystem as a whole, by adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than attributing values to specific categories of environmental*

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665,* 22.

[2] Ibid.

[3] Ibid.

goods and services and estimating recovery periods for each of them."[1]

3. Conclusion

The impact that the judgment of the International Court of Justice in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua should not be underestimated. It is indeed the first case in which the Court concluded, as a matter of principle that environmental damage is compensable. As such, the Court's finding could be established in the future as a veritable *obiter dictum:*

> *"However, it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage."*[2]

The Judgment of the Court has been criticized, to a certain degree, through the Separate Opinions of the Judges participating in the process of deliberation. First, Judge Cançado Trindade mentioned that *"The Court's reasoning is, to my mind, far too strict, this being the first case ever in which it is called upon to pronounce on reparations for environmental damages. Its outlook should have been much wider, encompassing also the consideration of restoration measures, and distinct forms of reparation, complementary to compensation"*[3]. Second, Judge Bhandari submitted relevant clarifications regarding the interaction between restitution in kind and compensation and, further, the reasons for the latter was preferred as a remedy[4]. However, even if the Judgment of the Court could have indeed

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[1] Ibid.

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015,* 12.

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Separate Opinion of Judge Cançado Trindade*, 1.

[4] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Separate Opinion of Judge Bhandari,* 1.

been more substantiated, as this case is indeed the *"cas d'espèce on reparations for environmental damages"*[1], as Judge Trindade correctly observed, it will produce a positive impact on the interpretation and clarification of reparation in general and compensation in particular.

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Separate Opinion of Judge Cançado Trindade, 1.*

Contribuţia doctorandului şi masterandului / PhD and Master Candidate's Contribution

The Problematic of an Automated Effect and Margin of Appreciation in the Context of UN Targeted Sanctions Implementation Challenges[1]

Cătălin-Nicușor GHINEA[2]

Abstract: The establishment of the Sanctions Regimes at the UN level with direct effects on individuals and entities has created a global jurisdiction, without also assuring at the outset a proper implementation control, an aspect viewed as a substantial imbalance.[3] Though considered "smart" or "targeted", the UN Sanctions being assimilated with preventive measures, their effectiveness and mandatory nature depend on the supranational action[4] of the Security Council, which extend to the actual implementing manner adopted by the Member States. Yet, the burden of objectives' accomplishments relies almost solely on the proper enforcement decisions at domestic level. As the States, on one hand, are obliged by the UN Charter of engaging in a specific conduct in order to ensure an exact application of the respective UN Resolutions instituting sanctions and, on the other hand, the availability of a real margin of appreciation is called into question, the national and European authorities (EU level), in particular,

[1] The present paper represents an abridged version of Chapter 1 of the author's dissertation for his LLM program at University of Bucharest.

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[3] Philip Moser, apud Rebecca Lowe, *Sanctions: Guilty until proven innocent*, IBA-International Bar Association, 10 November 2014, web page source: https://www.ibanet.org/Article/NewDetail.aspx? ArticleUid=014a5091-c1bd-49db-9507-a2f559d85199, last visited on 15/06/2018.

[4] Lisa Ginsborg, Martin Scheinin, *You can't always get what you want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime*, European University Institute, 2011, p. 9, web page source: http://cadmus.eui.eu/bitstream/handle/1814/20882/Scheinin_Ginsborg.pdf? sequence=2&isAllowed=y, last visited on 15/06/2018.

were confronted with the never-ending dilemma of the exact effects set under the international law of the UN membership status and of Articles 25 and 103 of the UN Charter, when dealing with specific UN Targeted Sanctions.

Key-words: UN Targeted Sanctions, automated effect, margin of appreciation

1. Introduction

The present paper examines, in part, some of the implementing challenges of the UN Targeted Sanctions from the point of view of their provisions' application at national and European Community (EU) level.

Firstly, the review outlines the existence of an automated effect of the SC Resolutions, adopted under Chapter VII of the UN Charter, in the light of the international legal order hierarchy, with the consequence of inducing a seemingly non-derogable States' compliance when adopting domestic enforcement measures.

Following such a rather stringent context, in particular the Member States' obligation for an exact performance, the paper explores, secondly, the existence or not of a margin of appreciation of States.

Thirdly, possible alternatives are reaffirmed and questioned as whether the States may benefit or not from considering a different approach in interpreting the primacy and priority of obligations under the UN Charter, based on a number of decisions of national and EU courts.

2. The Automated Effect

Pursuant to the UN Charter all the Member States have the express general obligation to comply with the imposition of the targeted sanctions measures, in line with the SC Resolutions issued under Chapter VII, as States "agree to accept and execute the Security Council's decisions in accordance with it" (Article 25), prior to any other obligations arising from any other international agreement (Article 103).

At the same time, States cannot rely on nonperformance, as a rule, nor invoke other international obligations, or in the context of national law,[1] the internal procedure required for the incorporation or transposition of such resolutions into the national law or, in particular, at the Community (EU) level.

Since the SC Resolutions are internal acts of the organization, as secondary legislation, positioned outside the new consent requisite set under the Article 2 of VCLT[2] of 1969, the UN Member States are faced with a direct implicit effect instituting rights and obligations, according to the organization's special rules. As an example, the wording of the SC Resolution 1267/1999, at point 3, is thus conclusive as the Security Council "decides that all States shall impose the measures provided for in paragraph 4" (freezing of funds, etc.), and at point 7, "requires all States to act in strict accordance with the provisions of this Resolution, irrespective of .. [other] international agreements." Therefore, under the mandate's effect conferred by Article 24 and by accepting the enforcement under Article 25 of the UN Charter, the UN Member States are bound by the fulfillment of such unconditional obligations, with an automatic or binding effect in the context of Article 103.

Yet, a differentiation must be kept in mind as, by contrast, at the EU level operate the principles of a particular legal order, such as the prior application[3] of Community (EU) law in relation to the Member States' domestic normative system, and a different direct, peculiar effect, namely the capacity to create rights and obligations incumbent on private individuals, according to its own normative order.[4] Similarly, the obligations deriving from the provisions of the ECHR[5] Convention benefit from the recognition of a priority character and a direct undeniable effect, according to Article 1, with the particularity that they do not induce a substitution of the national law, but condition its interpretation upon a specific margin of appreciation.[6]

From a substantial perspective, the automatic effect is maximal, as the compliance with the obligations under Chapter VII is not discretionary

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[1] According to Article 27 of *Vienna Convention on the Law of Treaties 1969* (VCLT).

[2] *Vienna Convention on the Law of Treaties 1969*.

[3] Mihaela Augustina Dumitraşcu, *Dreptul Uniunii Europene şi specificitatea acestuia*, Edition 2, Ed. Universul Juridic, Bucureşti, 2015, pp. 104-106.

[4] Idem, pp. 84-85.

[5] European Court of Human Rights

[6] Jean-François Renucci, *Tratat de drept european al drepturilor omului*, Ed. Hamangiu, 2009, pp. 772-775.

and does not usually leave any scope for challenging or reviewing the content, implementation or legal basis of those UN Resolutions.[1] Moreover, the implementation of UN Sanctions at the level of the UN Member States, part of the EU, reveal a dual institutional conditioning, in a triangular relation.

To the extent that a number of competences are exclusive to the European Union, such as the functioning of the single market, the freedom of movement of persons or capital, the Member States are no longer empowered, under the constitutive treaties, to directly implement the sanctions imposed by the Security Council.[2]

However, the priority of European Community (EU) law has no practical relevance at international level, since the States cannot invoke noncompliance[3] and at the same time they are susceptible to a potential conflict of obligations in the case of the annulment of a regulation implementing the targeted sanctions, although at domestic level the implementation of restrictive measures in the framework of a Union and CFSP[4] action is in line with the institutional and modifying Treaties.[5]

Following the above mentioned aspects, there are notable five different approaches adopted by the States (in/or outside the European Union) in view of the automated effect of SC Resolutions, between rule and exception, of how national or Community courts have in fact addressed their consequences or tried to challenge them (the unconditioned and conditioned primacy, a mediated priority, dualism and the constitutional exception).

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[1] Bardo Fassbender, *Targeted Sanctions and Due Process- The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter*, Institute of International and European Law Humboldt University Berlin, 20 March 2006, p. 22, web page source: http://www.un.org/law/counsel/ Fassbender_study.pdf, last visited on 15/06/2018.

[2] Adrian Năstase, Bogdan Aurescu, *Drept internaţional public. Sinteze*, Edition 8, Ed. C.H. Beck, Bucureşti, 2015, p. 436.

[3] Michael Wood, apud Chatham House, Discussion Group Summary, *UN and EU Sanctions: Human rights and the fight against Terrorism- The Kadi case*, 2009, p. 4, web page source: https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/il220109.pdf , last visited on 15/06/2018.

[4] Common Foreign and Security Policy of EU.

[5] Joined Cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, CJEU, Grand Chamber, C-402/05 P and C-415/05 P, judgment of 3 September 2008, ECLI:EU:C:2008:461, p. 229.

The unconditioned primacy imposes the prevalence of obligations under the UN Charter irrespective of any other international obligations. In *Kadi I,*[1] the Court of First Instance held the prior character of the obligations imposed by the UN Charter to the European Union and the Member States in respect to any other obligations, including those arising from membership of the Council of Europe and the application of the Convention (p. 177, 181), the Community being directly required to accept and enforce the decisions of the SC pursuant to Article 25, TEC (TFEU) (pp. 192-193) and Article 48 paragraph 2 of the UN Charter (p. 199).

Conditioned primacy differs from unconditional primacy by considering a presumption of compliance (the condition). In *Nada,*[2] the UN Member States committed themselves, according to Article 25, to observe and enforce the decisions of the Security Council, and according to Article 103, they recognize their primacy (p. 42), but to ensure the effectiveness of Article 103 there is further considered a presumption of non-derogation of States regarding the preexisting obligations in relation to new international obligations, so that in the event of a potential conflict it is necessary to harmonize the effects and to avoid contradiction (*Nada,* p.170, similar in *Al-Saadoon and Mufdhi,*[3] p. 126). The conditionality stems from a possible conflict of obligations which could not be neutralized by applying the principle of systemic integration, inasmuch as the presumption of non-derogation would be overturned.

The mediated priority is a partial priority, resulting from the differentiation of the obligations arising from the SC Resolutions between procedural and substantial obligations. In *Al-Dulimi,*[4] although there are reiterated the presumption of non-derogation, the systemic interpretation and the avoidance of any conflicts set out in *Nada* (p. 138) a difference of circumstances is revealed. The SC Resolution 1483/2003 on Iraq (p. 23) imposed, in fact, only the State's obligation to freeze immediately the financial assets of the former government and the transfer to the Development Fund, which have the potential only to engage procedural obligations as it authorize the State to exercise only a sufficient scrutiny in

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[1] Case *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, CJEC, Court of First Instance, T-315/01, judgment of 21 September 2005, ECLI:EU:T:2005:332.

[2] Case *Nada v. Switzerland*, ECHR, Grand Chamber, no. 10593/08, judgment of 12 September 2012.

[3] Case *Al-Saadoon and Mufdhi v. The United Kingdom*, ECHR, Chamber, no. 61498/08, judgment of 2 March 2010.

[4] Case *Al-Dulimi and Montana Management* v. *Switzerland*, ECHR, Grand Chamber, no. 5809/08, judgment of 21 June 2016.

order to eliminate arbitrariness regarding the implementing measures (*Al-Dulimi*, Grand Chamber, p. 146). Instead, substantial rights are invoked in *Nada* and *Al-Jedda*[1] (*Al-Dulimi*, p. 143), corollary of substantial State's obligations in imposing the respective measures, i.e. the person's right of free movement.

Dualism stems from the virtual rejection of the automated effect by invoking constitutional provisions and obligations burdening the domestic authorities, under the appearance of recognizing the primacy of the SC Resolutions. In *Abdelrazik,*[2] Article 25 of the UN Charter is actually reviewed from the perspective of the national law, indirectly, by considering implementing measures as "actions that are not lawful" (p. 6). Although Canada had adopted specific internal provisions, the 1985 United Nations Act, which empowered the Governor in the Council to issue orders and regulations in order to comply and give effect to the SC Resolutions (p. 46), the Federal Court acknowledged at the same time a "tension" between Canada's obligations as a UN Member and the requirement to respect the rights and freedoms guaranteed to its citizens (p. 4-5). A similar approach is revealed in *Kadi II*, according to the Community legal order considered autonomous.

The constitutional exception derives from certain constitutional provisions that have the potential to cancel out the automatic effect from the point of view of the applicability of the UN Resolutions at domestic level, for example, by invoking a necessitated act of the Parliament, therefore in view of some particular consequences. In *Ahmed*[3] in 2010, a parliamentary supremacy[4] is stated, since the implementing measures are subject to a judicial review of their validity with the fundamental human rights, being exempted only if the Parliament would have decided otherwise. The Parliament was therefore obliged to adopt an act exempting implementing measures under a conditional compliance.[5] The reverse of such situation is that the State would violate its international obligations if implementing

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[1] Case *Al-Jedda v. The United Kingdom*, ECHR, Grand Chamber, no. 27021/08, judgment of 7 July 2011.

[2] Case *Abousfian Abdelrazik v. Canada* (Minister of Foreign Affairs), Federal Court of Canada, T-727-08, judgment of 4 June 2009, FC 580, [2010] 1 F.C.R. 267.

[3] Case *HM Treasury v. Mohammed Jabar Ahmed and others*, UK Supreme Court, Hilary Term, judgment of 27 January 2010, [2010] UKSC 2.

[4] Marianne Madden, *Kadi II: Judicial Review of Counter Terrorism Sanctions, the "Russian Doll" of Legal Conflicts?*, Journal of Comparative Law, University of Warsaw, Volume 1- Issue 1, January 2014, p. 91, web page source: http://www.uwjcl.wpia.uw.edu.pl/upload/UWJCL-Volume1Issue1January2014-3.pdf, last visited on 15/06/2018.

[5] Idem, p. 92 .

measures were subject to the approval of Parliament under a contrary decision,[1] thus operating like a constitutional exception.

In conclusion, although States tended to position themselves within a specific approach regarding the automated effect, even so, such assertions of interpretation from the perspective of the primacy of the SC Resolutions are only conceptual points of view, as their international relevance is rather reduced or non-existent, and, ultimately and by default, do not rule out the States' responsibility regarding the enforcement and the primacy of obligations set under the UN Charter, according to Articles 25 and 103.

3. The Margin of Appreciation

Following the aspects presented in the previous section and due to the fact that the States are inevitably subject to the automated effect, it comes into question if whether or not they benefit from a domestic margin of appreciation regarding the implementation of the UN Targeted Sanctions. Due to the cumulative effect of Articles 25 and 103 States are apparently deprived of any discretion in the implementation of sanctions, of general or individual application. However, the limits are not precise as general normative acts may include individual enforcement measures such as specific lists attached to a particular act.

The margin of appreciation of States could also be divided into three categories according to the internal competencies of the authorities (legislative, executive and judicial), respectively when States adopt implementing measures, they enforce them or exercise judicial control, moreover the latter being confirmed by the case law of the relevant courts.

As pointed out, the European Union implements the UN Sanctions in the Community internal order, without any possibility of assessing the obligations established as such,[2] but in *Kala Naft,*[1] it recognizes the

[1] Antonios Tzanakopoulos, *The UK Supreme Court Quashes Domestic Measures Implementing UN Sanctions*, EJIL: Talk!, 2010, web page source: https://www.ejiltalk.org/the-uk-supreme-court-quashes-domestic-measures-implementing -un-sanctions/, last visited on 15/06/2018.

[2] Aleksi Pursiainen, *Targeted EU Sanctions and Fundamental Rights*, Solid Plan Consulting, Ministry for Foreign Affairs of Finland, 2017, p. 5, web page source: http://formin.finland.fi/public/download.aspx? ID=168358&GUID= {E6D6883D-9A63-45AB-828A-59E1D6BBD61C}, last visited on 15/06/2018.

Council's wide margin of appreciation in defining the general criteria for the purpose of applying restrictive measures (p. 120). At the same time, indirectly, the Treaties of the EU provide for the jurisdiction of the Community courts to examine the legality of the decisions imposing measures,[2] with the valency of representing a margin of appreciation through an *ex-post* judicial control. Moreover, the EU's case law requires the fulfillment of specific basic conditions when enforcing sanctions (relevance of the designation criterion, motivation and evidence of support).[3] By default, it establishes a margin of appreciation in implementation.

From a substantial perspective, the dilemma of the existence of certain limits or a margin of appreciation of the States in the implementation of SC Resolutions reveal different approaches, according to the content, context and effects of the concerned measures. As a rule, where the wording of the Resolutions excludes any assessment of the existence of a margin, the States do not enjoy any real limit of appreciation, such as within Regime 1267/1989/2253. Instead, Regime 1373 leaves the UN Member States the task of identifying the individuals concerned, to list and to delist them, with an implicit margin of discretion in form of the internal judicial review.[4]

Also, it should be noted that the UN Charter does not impose to the Member States a specific model of the UN Resolutions' implementation, leaving the free choice on the modalities of implementation in the internal legal order, as an obligation of result (*Kadi I*, p. 298, *Nada*, p. 176). This appraisal, although convenient, does not confer the right or exclude any margin of appreciation, and at the same time, it is criticizable due to the fact that the EU has no decision-making power in the listing or delisting of a person, since such an obligation implies the achieving of the result.[5] However, to the extent that resolutions establish obligations of result and states are under a tacit coercion to achieve them, a certain margin of appreciation in implementation, by choosing the relevant means (methods,

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[1] Case *Council of the European Union v. Manufacturing Support & Procurement Kala Naft Co.*, CJEU, Fifth Chamber, C-348/12 P, judgment of 28 November 2013, ECLI:EU:C:2013:776.

[2] *Treaty on the European Union*, Article 24 para. 2 and *Treaty on the Functioning of the European Union*, Article 275 para. 2.

[3] Aleksi Pursiainen, op. cit., p. 6.

[4] Antonios Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ*, EJIL: Talk!, 2013, web page source: https://www.ejiltalk.org/kadi-showdown/, last visited on 15/06/2018.

[5] Antonios Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ*, EJIL: Talk!, 2013.

modalities and procedures)[1] in the context of obligations of means is redundant due to the fact that the obligations of means benefit anyway from a certain margin of appreciation. On the other hand, the limitation of the rights of individuals cannot be discretionary and must observe a reasonable proportionality between the means used and the aim pursued, a principle also acknowledged by the ECHR, which implies the recognition of the legislature's wide discretion in choosing the ways of implementation and the justification of the consequences towards the envisaged objective (*Kadi I*, Court, p. 360). Consequently, the margin of appreciation may exist in relation to the way in which it is carried out a specific obligation and not in relation with the achieved final result, which admits no derogation.

At the same time, according to the relevant case law, a number of examples can be identified in which the existence of a margin of appreciation has been disputed, in form of its absence (*Kadi I*, Court of First Instance), the existence of a certain margin (*Kadi I*, Court), the explicit margin (*Kadi II*[2]), an incidental margin (*Al-Jedda*, *Abdelrazik*), the absolute margin (*Al-Dulimi,*[3] the Chamber), a limited margin (*Al-Dulimi*, Grand Chamber) and culminating with a legal margin, determined by normative derogatory exceptions.

Thus, in *Kadi I*, the Court of First Instance considered that the Community (EU) institutions did not enjoy any margin of appreciation regarding the content of the measures and the review mechanisms, under the exclusive competence of the Security Council (p. 258), implicitly ascertaining the lack of margin, as they acted under circumspect powers, so that they had no possibility of acting either directly or indirectly (p. 214). The SC Resolutions are placed outside the jurisdiction of the Court of Justice which is not competent to question, even indirectly, their legality in the light of Community (EU) law (p. 225), aside from the *jus cogens* norms (p. 226).

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[1] Sue Eckert, Thomas Biersteker, *Due Process and Targeted Sanctions-An Update of the "Watson Report"*, Watson Institute for International Studies, Brown University, 2012, p. 27, web page source: http://repository.graduateinstitute.ch/record/285127/files/Biersteker_Watson%20Report%20Update%2012_12.pdf, last visited on 15/06/2018.

[2] Joined Cases *European Commission and Others v. Yassin Abdullah Kadi*, CJEU, Grand Chamber, C-584/10 P, C-593/10 P and C-595/10 P, judgment of 18 July 2013, ECLI:EU:C:2013:518.

[3] Case *Al-Dulimi and Montana Management v. Switzerland*, ECHR, Chamber, no. 5809/08, judgment of 26 November 2013, transmitted to Grand Chamber as of 14 April 2014.

In contrast, in appeal, the Court has considered the existence of a certain margin of appreciation on the implementation modalities, thus bypassing the apparent conflict between the mandatory UN Resolutions and the right of a fair trial,[1] but without challenging the relationship between the international legal order and the Community legal order (p. 327). As the UN founding act neither imposes a certain model to enforce resolutions, their implementation will be subject to the relevant modalities set under the domestic legal order of each UN Member,[2] but a Community implementing act remains subject of general implied limits imposed by the international law under Article 24 of the UN Charter, and in accordance with the subsequent obligations of the Member States (p. 291, p. 296).

Instead, in *Kadi II*, the Court of First Instance[3] and the Court[4] recognized an explicit margin of appreciation by rejecting the immunity of jurisdiction of the EU acts within the given context, against any judicial review (p. 126; p. 65, 67), while affirming that their review and annulment do not call into question the SC Resolutions priority at international level.[5] The assessment is formalistic, because indirectly this is equivalent to a genuine legal challenge of the UN Resolutions. As a consequence, the margin of appreciation is more than just a review, described as excessively interventionist,[6] through the indirect reinterpretation[7] of the SC decision-making process, a scrutiny, mostly complete, of the legality of all acts of the European Union in the light of fundamental rights. Also to be noted, the

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[1] Jack Garvey, *Targeted Sanctions: Resolving the International Due Process Dilemma*, TILJ- Texas International Law Journal, The University of Texas School of Law, Volume 50, Issue 4, 2016, p. 574, web page source: http://www.tilj.org/journal/Targeted-Sanctions-Resolving-the-International-Due-Process-Dilemma_Jack-I-Garvey.pdf, last visited on 15/06/2018.

[2] Joined Cases *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, CJEU, Grand Chamber, C 402/05 P and C 415/05 P, judgment of 3 September 2008, ECLI:EU:C:2008:461, p.298.

[3] Case *Yassin Abdullah Kadi v. European Commission*, CJEU, General Court, T-85/09, judgment of 30 September 2010, ECLI:EU:T:2010:418.

[4] Joined Cases European Commission and Others v. Yassin Abdullah Kadi, CJEU, Grand Chamber, C 584/10 P, C 593/10 P and C 595/10 P, judgment of 18 July 2013, ECLI:EU:C:2013:518.

[5] Antonios Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ*, EJIL: Talk!.

[6] Devika Hovell, *Kadi: King-slayer or King-maker? The shifting allocation of decision-making power between the UN Security Council and Courts*, LSE Research Online, 2016, p. 14, web page source: http://eprints.lse.ac.uk/65195/1/King%20slayer%20or%20king%20maker.pdf, last visited on 15/06/2018.

[7] Ibidem.

procedural stated elements constitute, in substance, the concrete manifestation of a margin of appreciation at Community (EU) level. Such control was also previously stated in *Bank Melli*[1] (p. 105).

In *Abdelrazik*, the margin of appreciation results from the incidental interpretation of the SC Resolution subordinated to the human rights guaranteed at domestic level. The Federal Court of Canada finally rejects the viability of the travel restriction interpretation as the exercise of such a right in the given situation actually led to hilarious effects (p. 127).[2] By interpretation, airspace is not included in the notion of "territory" of Resolution 1822/2008 nor according to Article 1 of the Chicago Convention on International Civil Aviation of 1944, the prohibition not being applicable within the given context (the person returning to the state of citizenship), also according to the explanatory notes developed by the Committee 1267 (pp. 123, 124, 128). Moreover, the Court interpreted its judicial order of repatriation falling within the category of exceptions applicable within the sanctioning measures in the case of an ongoing judicial procedure or process, thus permitted by the UN Resolution itself (pp. 162-165, 168).[3]

Also, setting an incident margin of appreciation depends on the context of the resolution in question, according to its purpose and the subject matter. If, in *Al-Jedda*, the legal issue concerned the interpretation of a SC Resolution that provided a certain margin of appreciation in implementation without specifying certain acts, however, the measure of internment of the person, in this case, indefinitely without a trial, cannot constitute a valid margin. In *Nada* such a margin is apparently excluded, as the UN Resolution 1390/2002 imposed a ban on the entry and transit of persons listed in the UN list (p.172), but the final conclusion of the Court is in favor of a certain real and limited margin of appreciation of Switzerland (p. 180). Yet, it must be bared in mind that certain derogations may be admitted for medical, humanitarian or religious purposes with the consent of the Sanctions Committee (p.1 (b) of Resolution 1735/2006), but the derogatory regime is only allowed in cases strictly prescribed and not

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[1] Case *Bank Melli Iran v. Council of the European Union*, CJEU, Court of First Instance, T 390/08, judgment of 14 October 2009, ECLI:EU:T:2009:401.

[2] Matthew Happold, *Targeted Sanctions and Human Rights*, in Matthew Happold, Paul Eden, (eds), "Economic Sanctions and International Law", Hart Publishing, 2016, p. 14, web page source: https://papers.ssrn.com/ abstract=2837810, last visited on 15/06/2018.

[3] UN Resolution 2253/2015 adopted these exceptional interpretations, in paragraph 2 b) not to forbid the entry or to request the departure of their own citizens, respectively the transit situation subsequent to a judicial procedure, as mentioned in paragraph 12 a) of the *Guidelines of the Committee for the Conduct of Its Work* of Committee 1267, 23 December 2016.

according to states own competence. Although the domestic authority, the Federal Office for Migration, did not enjoy a margin of appreciation, under paragraph 8 of Resolution 1390/2002 a certain degree of flexibility could be deduced by qualifying certain implementing measures as "where appropriate" (*Nada* p. 50, 178).

In *Al-Dulimi*, unlike in *Nada*, although a UN Member State had no discretion in implementing the Sanctions Regime against Iraq imposed by the SC Resolution 1483/2003 (p. 118), the lack of equivalent protection standard, a presumption of compliance invoked in *Bosphorus,*[1] did not affect the rights of the party conferred by Article 6 of the ECHR, according to the Swiss Federal Court's reasoning to reject the examination of the merits of the complaint.[2] Switzerland disposed in 2004 the seizure of assets belonging to *Al-Dulimi and Montana Management*, citing a mandatory UN Resolution that would have required the State to strictly observe the measures and decisions of the Sanctions Committee 1518. In this respect, it was said that the role recognized of the Court is not to decide on the legality of UN Security Council's acts, similar to the approach in *Kadi,* but it is further considered an apparent exception that requires the Court to examine the wording and the circumstances of the UN Resolutions in order to verify the compliance of the internal acts within the Convention's provisions compliance (p. 139). Such examination and verification thus imply a margin of appreciation.

In its decision of 2013, the Chamber reiterated the requirement to reconcile any apparent conflict between the obligations set under the UN Charter and those deriving from the Convention, regardless of whether the act or omission in question is a consequence of the domestic law or the obligation to comply with international norms, in particular, the international protection of human rights (p. 111-112) precisely by applying the principle of equivalent protection, with the potential to claim an absolute margin of appreciation (p. 117), so that after the 2016 appeal, the Grand Chamber to exclude such a possibility, to the alternative, of more convenient harmonized interpretation, a limited margin of appreciation (p. 140). The UN Resolution 2161/2004, which allowed the confiscation of assets held by persons, former senior officials of the Saddam Hussein

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[1] Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, ECHR, Grand Chamber, no. 45036/98, judgment of 30 June 2005.

[2] Anne Peters, *Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is there a way out of the Catch-22 for UN members?*, EJIL: Talk!, Ejil Analysis, 2013, web page source: https://www.ejiltalk.org/targeted-sanctions-after-affaire-al-dulimi-et-montana-management-inc-c-suisse-is-there-a-way-out-of-the-catch-22-for-un-members/, last visited on 15/06/2018.

regime, did not directly implied an interference with the exercise of any substantial property rights. Therefore, the procedure itself did not imply the necessity of any specific judicial protection of any substantive right, implicitly no real limit in implementation was required, but only the individual's opportunity to challenge the State's decision in court as a procedural matter.[1]

The last, but not the least, a legal margin could be considered in the context of specific derogations permitted in the sanctions' implementation. For example, Resolution 1267/1999 provides at point 4.b an exception from the application of the funds' freezing measure subsequent the authorization of the Sanctions Committee and "granted on an individual basis for reasons of humanitarian nature". Such derogatory measures may be interpreted as imposing certain margin in implementation, but because they have an individual and exceptional nature, they cannot be effectively considered real limits at the discretion of the States, moreover as they are subject, on a case by case basis, of the Committee's authorization. Also, the SC Resolution 1452/2002[2] (paragraph 1) provides for a number of exemptions and derogations and, at the request of the given subjects and unless the Sanctions Committee decides otherwise, the national authorities may exempt from the application of the freeze of funds a series of basic expenses (food, rent, medical expenses, etc.), and by express authorization of the Committee, even some extraordinary expenses (*Kadi I,* Court, p. 364).

In conclusion, on a case-by-case basis, the States benefit from a margin of appreciation in the implementation of the UN Targeted Sanctions, but exceptions may also be incidental going almost to the total denial of such limits, as the States in fact remain captive under specific obligations of result.

4. Possible Alternatives

As we have seen in the previous section, the States benefit more or less from a margin of appreciation in the implementation of the UN Targeted Sanctions. Yet, some questions were raised as of the exact reliability towards posible alternatives, either in form of an existing previous

[1] Matthew Happold, op. cit., p. 12.

[2] UN Resolution 1735/2006, and reiterated by paragraphs 75 and 76 of UN Resolution 2253/2015.

solution or of the unsecured path of adopting a newer, a more adaptative one.

In particular, since the UN review process in imposing targeted sanctions has been and is being questioned (more or less) and disregarding the recent very encouraging improvements over the last 2 or 3 years, the most contested issue being the observance of fundamental human rights, impose the States to always keep a free option of possible alternatives of interpretation in respect of a necessary margin of appreciation. The solutions considered so far are as many possible variants that could be legally exploited in view of invoking or recognizing a margin of appreciation of the States in the context of the automated effect of the SC Resolutions, but yet every of them may reflect hidden, less obvious inconveniences, as we will further recall and point out.

On the other hand, a free-will hypothesis, which implies the freedom to decide the implementation methods, could relieve the judicial review from the substantial limitations of Articles 25 and 103 of the UN Charter.[1] However, in reality, such option remains limited by the very constraints of the notion of obligation, as we have seen.

The differences of approach reflected by the variability of the positions adopted by the national and Community (EU) courts and by the way that the States have agreed to handle the fulfillment of obligations under the UN Charter arise from a cumulative set of factors. Moreover, a legitimate question is whether and under what conditions there might be other alternatives to exclude the margin itself, towards the States' complete freedom of appreciation. In the extreme, the last solution could be to challenge the hierarchy of norms and the priority of obligations arising from the UN Charter, through licit non-enforcement or declaring ineffectiveness of Article 103, consequently placing the whole issue outside the existing regulatory framework and risking engaging the international States' responsibility.

The alternative solutions, in reality, vary from case to case. The *Kadi* series highlighted three different successive positions across the European Court of Justice's judgments regarding the relationship between the SC Resolutions and implementation measures at Community level, in terms of legal order and institutional relationship between the UN, the European Union and Member States. In *Kadi I*, the Court of First Instance recognized the primacy of international law against the domestic law (an approach that might be considered monistic), extending it over the provisions of the SC

[1] Sue Eckert, Thomas Biersteker, op. cit., p. 27.

Resolutions, prior to any other international agreements, including the EC Treaty (p. 184). The examination of the compatibility of resolutions within the international law[1] only regarding the rules of *jus cogens* (p. 226), by exception, shows the obvious inadvertence of extending the scope of the *jus cogens* context to all human rights,[2] by including the right to appear in front of a court, the protection of property and the right of effective remedy. The margin of appreciation thus becomes ineffective, being merely theoretical and illusory.

In 2008, the European Court of Justice in the appeal of *Kadi I*, reversed the decision of the Court of First Instance, by excluding the priority deference, the *jus cogens* approach,[3] and thus annulling the implementing regulation on the basis of the infringement of fundamental rights enshrined in the autonomous legal order of the European Community. By amputating the international sources[4] of the regulation, the Court establishes an autonomous legal system (p. 316), in which the Court had the power to review the validity of Community acts within the Community's internal legal order in the light of fundamental rights.[5] Through this legal it is remarkable the self-imposed hermetization[6] of the Community legal order in order to be able to perform valid assertions, outside the scope of Articles 25 and 103 of the UN Charter.

In 2013, in *Kadi II*, the Court of Justice of the European Union opts out for invoking the prevalence of the Community (EU) constitutional values over international ones, moving the center of gravity, similar to the principle of subsidiarity, to the primacy of the Community (EU) legal order.[7] Thus, while the SC Resolutions prevail at international level, they are subject to the priority of Community (EU) constitutional safeguards. At that time, as the review procedures at the Committee level did not provide the guarantees of an effective judicial protection, the review by the EU judicature was considered appropriate only if it concerned indirectly the substantive assessments of determinations (p. 38), stating in fact the theory of equivalent protection.[8]

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[1] Devika Hovell, op. cit., p. 5.
[2] Idem, p. 6.
[3] Devika Hovell, op. cit., p. 11.
[4] Idem, p. 8.
[5] *Kadi I* 2008, p. 317.
[6] Devika Hovell, op. cit., p. 9.
[7] Idem, p. 15.
[8] Specific notion, in fact, pertaining to the ECHR's jurisprudence, which implies the existence of a comparable system of protection with that established by the Convention, *mutatis mutandis*, at the European Union level, in relation with UN's specific mechanics.

An innovative interpretation, the solution of judicial remedy in *Abdelrazik*, to recognize the possibility of a travel ban exception in the course of a judicial process (p. 162), may constitute a partial and temporary solution in such cases, the expression of a domestic margin of appreciation in relation to constitutional provisions and Canada's Charter of Fundamental Rights and Freedoms, but also a potential genuine breach in the implementation of the SC Resolutions in the event of an abuse of law.

Even so, it could be argued that in reality, by reverting to the triangular context of the States' relations in the European Union, the judicial review does not substitute nor *de facto* create any margin of appreciation because at international level the States are deprived of any practical purpose, while they remain directly bound by the same UN Resolutions enforcement, irrespective of EU's acts and decisions, and the Union is at the same time under the pressure of avoiding adverse decisions which would bring the States into a potential conflict breach of Article 103 of the UN Charter.[1] *Kadi*'s judicial periplus perfectly explains this assertion because the annulled regulation has been replaced by another, in *Kadi I*, or the final decision in *Kadi II*, was pronounced after the delisting at the UN level. Also, the solution offered in *Kadi II* reveals an autonomous approach non-invocable at international level as it operates only according to the distinct legal order of Community (EU) law.

Two alternative solutions can be seen in *Nada* and *Al-Dulimi*. The first resume and consecrate the principle of harmonized interpretation (pp. 169-170) and the second identifies, where systemic interpretation is not reasonable, the State's obligation to act in order to avoid any arbitrariness in the application of the Convention (pp. 145-146). By default, in both cases, the States seem to benefit from a certain margin of appreciation in relation to the implementing measures. The strength point of the systemic approach consists in the viable but not perfect solution, from the perspective of the SC Resolutions prevalence and the States' potential ensemble conflict of obligations at international level.[2] However, these two approaches do not provide a substantial solution regarding the real boundaries dilemma of allowing the States to undertake any action in the context of international law, as the very application of the Convention is subordinated *ratione personae* and *ratione materiae*, in Article 1, under the state's jurisdiction

[1] Adrian Năstase, Bogdan Aurescu, op. cit., p. 436.

[2] Erika De Wet, *From Kadi to Nada: Judicial techniques favoring Human Rights over United Nations Security Council Sanctions*, Chinese Journal of International Law Volume12, 2013, p. 18, web page source: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348010, last visited on 15/06/2018.

domain, intrinsically of domestic nature, regardless of whether it is territorial or extraterritorial.[1] Consequently, it is envisaged the compliance with the provisions of the Convention and not with international obligations set under the UN Charter (*Al-Dulimi*, p. 176), the Court having no jurisdiction to rule on their legality (*Nada*, p. 139). Consequently, the expected margin of appreciation, by systemic interpretation or in order to avoid arbitrariness, same as in *Kadi*, does not arise in the context of the international law, but in the area of the domestic law.

Therefore, what ultimately is affirmed is the pragmatic theory of States' responsibility,[2] since the international legal order cannot be contested, either procedurally or substantially, but at the same time the States remain bound by the Convention's provisions, irrespective of the source of the obligations (*Nada*, p. 168; *Al-Dulimi*, p. 95).

In conclusion, although different possible alternatives of interpretation reside in assessing a margin of appreciation, the States apparently seem to face anyhow the risk of accountability, therefore any reasonable margin of appreciation may be a viable alternative to the inevitable damnation of inaction. In this regard, the consideration of a different, seemingly arbitrary, margin of appreciation might be allowed, for example, to the extent that the SC Resolutions, by interpretation, although valid, would rest outside the requirement of compliance imposed by Article 25 of the UN Charter to the UN Member States.

5. Conclusions

Far from exhausting the problematic of targeted sanctions at the UN level, however, some questions remain open as how States should integrate into their own legal order the implementation of the SC Resolutions and the real availability of a margin of appreciation in order to mitigate the "up tight" conditions set under the UN Charter.

Yet, as pointed out above, States benefit from a margin of appreciation, despite the automated effect of the SC Resolutions within the hierarchy of the international law, although its exact content and scale of application may differ substantially on case by case basis.

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[1] Jean-François Renucci, op. cit., p. 780-781.
[2] Adrian Năstase, Bogdan Aurescu, op. cit., p. 45.

Although desirable, an immediate consequence of greater implementation flexibility by ensuring priority of national or Community (EU) competencies would held anyhow States of a more responsible conduct.

On the other hand, we must bear in mind that the existence of a margin of appreciation resilient to human rights observance should be considered irrespective of the existence of some implementation limits within the SC Resolutions objective's premises and also, should not be made tributary to the automated effect of Articles 25 and 103 of the UN Charter.