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

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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

[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

[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

[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

[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

[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.

[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.