OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 16 January 2008 [1]

1. The appellant in the present proceedings has been designated by the Sanctions Committee of the United Nations Security Council as a person suspected of supporting terrorism, whose funds and other financial resources are to be frozen. Before the Court of First Instance, the appellant challenged the lawfulness of the regulation by which the Council has implemented the freezing order in the Community. He argued — unsuccessfully — that the Community lacked competence to adopt that regulation, and, moreover, that the regulation breached a number of his fundamental rights. On what are essentially the same grounds, he now asks the Court of Justice to set aside the judgment of the Court of First Instance. The Council and the Commission disagree with the appellant on both counts. Most importantly, however, they contend that the regulation is necessary for the implementation of binding Security Council resolutions, and, accordingly, that the Community Courts should not assess its conformity with fundamental rights. Essentially they argue that, when the Security Council has spoken, the Court must remain silent.

I — Background to the appeal

2. Mr Kadi ('the appellant') is resident in Saudi Arabia. On 19 October 2001, he was included in the list in Annex I to Regulation No 467/2001 as a person suspected of supporting terrorism. [2] As a consequence, all his funds and other financial resources in the Community were to be frozen. On 27 May 2002, that regulation was repealed and replaced by Council Regulation (EC) No 881/2002 ('the contested regulation'). [3] However, the appellant continued to be listed — in Annex I to the contested regulation — as a person suspected of supporting terrorism whose funds were to be frozen.

1 — Original language: English.

2 — Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 67, p. 1). The appellant's name was added by Commission Regulation (EC) No 2062/2001 of 19 October 2001, amending, for the third time, Regulation (EC) No 467/2001 (OJ 2001 L 277, p. 25).

3 — Imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9).

3. The contested regulation was adopted on the basis of Articles 60 EC, 301 EC and 308 EC in order to give effect, within the Community, to Council Common Position 2002/402/CFSP.[4] That Common Position, in turn, reflected Resolutions 1267(1999),[5] 1333(2000)[6] and 1390(2002)[7] of the United Nations Security Council. Considering that the suppression of international terrorism is essential for the maintenance of international peace and security, the Security Council adopted those resolutions under Chapter VII of the UN Charter.

4. The resolutions provide, inter alia, that all States are to take measures to freeze the funds and other financial assets of individuals and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, as designated by a committee of the Security Council composed of all its members ('the Sanctions Committee'). On 8 March 2001, the Sanctions Committee published a first consolidated list of the persons and entities that were to be subjected to the freezing of funds. That list has since been amended and supplemented several times. The name of the appellant was added to the list by the Sanctions Committee on 19 October 2001.

5. On 20 December 2002, the Security Council adopted Resolution 1452(2002), intended to facilitate the implementation of counter-terrorism measures. That resolution provides for a number of exceptions to the freezing of funds imposed by Resolutions 1267(1999), 1333(2000) and 1390(2002) that may be granted by the States on humanitarian grounds, on condition that the Sanctions Committee has been notified and has not objected or, in some cases, has given its consent. In addition, on 17 January 2003, the Security Council adopted Resolution 1455(2003), intended to improve the implementation of the measures for the freezing of funds.

6. In the light of those resolutions, the Council adopted Common Position 2003/140/CFSP[8] in order to provide for the exceptions permitted by the Security Council. In addition, on 27 March 2003, the

4 — Concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002 L 139, p. 4). See, in particular, Article 3 and the ninth recital in the Preamble.

5 — S/RES/1267(1999) of 15 October 1999.

6 — S/RES/1333(2000) of 19 December 2000.

7 — S/RES/1390(2002) of 16 January 2002.

8 — Concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62).

Council amended the contested regulation as regards exceptions to the freezing of funds and economic resources. [9]

7. The contested regulation, as amended, provides in Article 2 that 'all funds and other financial resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen'. Article 2a provides for certain exceptions, for instance as regards food, medical expenses and reasonable legal fees, on condition that the Sanctions Committee has been notified and has not objected.

8. By application lodged on 18 December 2001, the appellant brought an action before the Court of First Instance against the Council and the Commission, claiming that that Court should annul Regulations Nos 2062/2001 and 467/2001, in so far as they related to him. The United Kingdom was given leave to intervene in support of the defendants. Following the repeal of Regulation No 467/2001, the Court of First Instance decided to treat the case as an action for annulment of the contested regulation directed against the Council alone, supported by the Commission and the United Kingdom.

9. Before the Court of First Instance, the appellant argued that the Council had lacked competence to adopt the contested regulation. Most importantly, the appellant asserted that that regulation breached a number of his fundamental rights, in particular the right to property and the right to a fair hearing. By judgment of 21 September 2005 in Case T-315/01 *Kadi* v *Council and Commission* ('the judgment under appeal'), [10] the Court of First Instance upheld the contested regulation and rejected all of the appellant's pleas. On 17 November 2005, the appellant brought the present appeal against the judgment of the Court of First Instance. Apart from the appellant, the parties to the present appeal proceedings are the Council, the Commission and the United Kingdom, as well as Spain, France and the Netherlands, as interveners in the appeal. For the sake of brevity I shall refer, on occasion, to the Council, the Commission and the United Kingdom as 'the respondents'.

9 — Council Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1).

10 — [2005] ECR II-3649.

10. My analysis of the appeal will proceed as follows. First, I shall discuss the pleas concerning the legal basis of the contested regulation. Subsequently, I shall address the pleas concerning the jurisdiction of the Community Courts to review whether the contested regulation breaches fundamental rights. Finally, I shall discuss the question of the appropriate standard of review and I shall assess whether or not the contested regulation infringes the fundamental rights invoked by the appellant.

II — The legal basis of the contested regulation

11. The appellant's first plea relates to the legal basis of the contested regulation. The judgment under appeal devotes considerable attention to this issue. Upon consideration of various alternatives, the Court of First Instance concluded that the combined effect of Articles 60 EC, 301 EC and 308 EC gave the Community power to adopt the contested regulation.[11] The appellant argues that this finding is mistaken in law and maintains that the Community lacked competence altogether to adopt the contested regulation. Though relying on slightly different justifications, both the Council and the United Kingdom agree with the Court of First Instance that the contested regulation finds its legal basis in Articles 60 EC, 301 EC and 308 EC. The Commission, however, takes a different view and concludes that Articles 60 EC and 301 EC alone would have provided a sufficient legal basis.

12. I agree with that argument. The Court of First Instance considered that the powers to impose economic and financial sanctions provided for by Articles 60 EC and 301 EC, namely, the interruption or reduction of economic relations with one or more third countries, do not cover the interruption or reduction of economic relations with individuals within those countries, but only with their governing regimes. That view is difficult to reconcile with the wording and the purpose of those provisions. Article 301 EC authorises the Council to 'interrupt or to reduce … economic relations with one or more third countries' through unspecified 'urgent measures' that are necessary to carry out the Union's Common Foreign and Security Policy ('CFSP'). As such, Article 301 EC is fundamentally concerned with the objectives of these measures, namely the objectives of the CFSP, to be achieved by affecting the Community's economic relations with third countries. Article 60(1) EC authorises the Council to take such measures with respect to the 'movement of capital and on payments as regards the third countries concerned'. It therefore indicates the means for carrying out the objectives stated earlier; those means involve restricting the flow of funds into and

11 — Paragraphs 87 to 135 of the judgment under appeal.

out of the Community. Beyond these two provisions, the EC Treaty does not regulate what shape the measures should take, or who should be the target or bear the burden of the measures. Rather, the only requirement is that the measures 'interrupt or reduce' economic relations with third countries, in the area of movement of capital or payments.

13. The financial sanctions in the contested regulation meet that requirement: they are targeted predominantly at individuals and groups within third countries. By affecting economic relations with entities within a given country, the sanctions necessarily affect the overall state of economic relations between the Community and that country. Economic relations with individuals and groups from within a third country are part of economic relations with that country; targeting the former necessarily affects the latter. To exclude economic relations with individuals or groups from the ambit of 'economic relations with … third countries' would be to ignore a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders.

14. Moreover, the Court of First Instance's restrictive reading of Article 301 EC deprives this provision of much of its practical use. Within the framework of the CFSP, the Union may decide, for reasons relating to the maintenance of international peace and security, to impose economic and financial sanctions against non-State actors who are situated in third countries. I fail to see why Article 301 EC should be interpreted more narrowly. As the Court of First Instance itself recognised, 'the Union and its Community pillar are not to be prevented from adapting to [threats to international peace and security] by imposing economic and financial sanctions not only on third countries, but also on associated persons, groups, undertakings or entities engaged in international terrorist activity or in any other way constituting a threat to international peace and security'. [12]

15. The Court of First Instance found that Article 308 EC had to be brought into play in order to impose financial sanctions on individuals who do not exercise government control. However, the reliance on the notion of government control as a distinguishing factor highlights an underlying tension in the reasoning of the Court of First Instance. The Court of First Instance construed Article 308 EC as a 'bridge' between the CFSP and the Community pillar. However, while Article 301 EC might be seen as a cross-pillar bridge, Article 308 EC surely cannot fulfil that function. Article 308 EC, like Article 60(1) EC, is strictly an enabling

12 — Paragraph 133 of the judgment under appeal.

provision: it provides the means, but not the objective. Even though it refers to 'objectives of the Community', these objectives are exogenous to Article 308 EC; they cannot be introduced by Article 308 EC itself. Hence, if one excludes the interruption of economic relations with non-State actors from the realm of acceptable means to achieve the objectives permitted by Article 301 EC, one cannot use Article 308 EC to bring those means back in. Either a measure directed against non-State actors fits the objectives of the CFSP which the Community can pursue by virtue of Article 301 EC, or, if it does not, then Article 308 EC is of no help.

16. My conclusion, therefore, is that the judgment of the Court of First Instance is vitiated by an error in law. If the Court were to follow my analysis concerning the legal basis it would have enough ground to set aside the judgment under appeal. I none the less believe that, where pleas are raised concerning alleged breaches of fundamental rights, it is preferable for the Court to make use of the possibility of reviewing those pleas as well, both for reasons of legal certainty and in order to prevent a possible breach of fundamental rights from subsisting in the Community legal order, albeit by virtue of a measure that merely has a different form or legal basis. I shall accordingly proceed to assess the appellant's remaining pleas in law.

III — The jurisdiction of the Community Courts to determine whether the contested regulation breaches fundamental rights

17. In the proceedings before the Court of First Instance, the appellant claimed that the contested regulation breached the right to a fair hearing, the right to respect for property and the principle of proportionality, and the right to effective judicial review. [13] However, before assessing the substance of these claims, the Court of First Instance examined the scope of its own jurisdiction to assess the conformity of the contested regulation with fundamental rights. [14] In order to ascertain the appropriate scope of judicial review, the Court of First Instance considered the relationship between the Community legal order and the legal order established under the UN Charter. The reasoning of the Court of First Instance is extensive and sophisticated, but may be summarised as follows.

18. First, the Court of First Instance identified what essentially amounts to a rule of primacy, flowing from the EC Treaty, according to which Security Council resolutions adopted under Chapter VII of the UN Charter prevail over rules of Community law. The Court of First Instance essentially found that Community law recognises and accepts that, in keeping with Article 103 of the UN Charter, Security Council resolutions take

13 — Paragraph 59 of the judgment under appeal.
14 — In paragraphs 181 to 232 of the judgment under appeal.

precedence over the Treaty. [15] Secondly, the Court of First Instance held that, in consequence, it had no authority to review, even indirectly, Security Council resolutions in order to assess their conformity with fundamental rights as protected by the Community legal order. It observed that the Security Council resolutions at issue left no margin of discretion and, therefore, that it could not assess the contested regulation without engaging in such indirect review. None the less, the Court of First Instance considered, thirdly, that it was empowered to review the Security Council resolutions at issue in order to assess their conformity with the protection of fundamental rights, in so far as those rights formed part of the principle of *jus cogens*.

19. The appellant challenges this part of the judgment under appeal with a combination of arguments derived from international law and Community law. In his statement of appeal, he argues, inter alia, that the reasoning of the Court of First Instance in respect of the binding effect and the interpretation of the relevant Security Council resolutions is flawed from the perspective of international law. The appellant claims that neither Article 103 of the UN Charter nor those resolutions could have the effect of precluding the courts from reviewing domestic implementing measures in order to assess their conformity with fundamental rights. In his rejoinder and at the hearing, the appellant refined his arguments and tailored them to fit more closely with Community law and the case-law of this Court. The appellant maintains that, so long as the United Nations do not provide a mechanism of independent judicial review that guarantees compliance with fundamental rights of decisions taken by the Security Council and the Sanctions Committee, the Community Courts should review measures adopted by the Community institutions with a view to implementing those decisions for their conformity with fundamental rights as recognised in the Community legal order. The appellant cites the ruling of this Court in *Bosphorus* [16] as a precedent.

20. The United Kingdom has raised a plea of inadmissibility as regards the line of argument based expressly on Community law on the ground that it would amount to a new plea in law. I do not take the same view. The reasoning of the Court of First Instance gives rise to legitimate confusion as to how the primacy of Security Council resolutions can be grounded in Community law by virtue of a requirement that is an import from international law. In that respect, the arguments derived from international law and those derived from Community law are,

15 — Article 103 of the UN Charter provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' It is generally recognised that this obligation extends to binding Security Council decisions. See the Order of 14 April 1992 of the International Court of Justice in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, at paragraph 39.

16 — Case C-84/95 [1996] ECR I-3953.

fundamentally, two sides of the same coin. Admittedly, the appellant would have been better advised to support his plea, from the outset, with both lines of argument. Yet, even though he initially directed most of his arrows from the angle of international law, there was never a misunderstanding among the parties about the thrust of his claim, namely, that the Court of First Instance wrongly portrayed the nature of the Community's obligations under international law and the relationship of those obligations with the duties of the Community Courts under the Treaty. Indeed, in each of their written and oral submissions to this Court, the Council and the Commission, as well as the United Kingdom, have given ample consideration to the key issue raised by the appellant: the relationship between the international legal order and the Community legal order. I fail to see, therefore, why the Court should characterise part of the appellant's arguments as an additional plea in law. Instead, I believe the Court should consider his plea to be admissible in its entirety.

21. This brings us to the question of how the relationship between the international legal order and the Community legal order must be described. The logical starting point of our discussion should, of course, be the landmark ruling in *Van Gend en Loos*, in which the Court affirmed the autonomy of the Community legal order. [17] The Court held that the Treaty is not merely an agreement between States, but an agreement between the *peoples* of Europe. It considered that the Treaty had established a 'new legal order', beholden to, but distinct from the existing legal order of public international law. In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the 'basic constitutional charter'. [18]

22. This does not mean, however, that the Community's municipal legal order and the international legal order pass by each other like ships in the night. On the contrary, the Community has traditionally played an active and constructive part on the international stage. The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments. [19] The Community Courts therefore carefully examine the obligations by which

17 — Case 26/62 *Van Gend en Loos* [1963] ECR 1, at p. 12.

18 — Case 294/83 *Les Verts* [1986] ECR 1339, paragraph 23.

19 — See, for instance, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 22, and Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 9 to 11.

the Community is bound on the international stage and take judicial notice of those obligations. [20]

23. Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law. The case-law provides a number of examples. There are cases in which the Court has barred an international agreement from having effect within the Community legal order on the ground that the agreement was concluded on the wrong legal basis. The Court did so, recently, in *Parliament* v *Council and Commission*. [21] The Court's approach is easy to understand once one realises that it would have 'fundamental institutional implications for the Community and for the Member States' [22] if an agreement that was adopted without a proper legal basis — or according to the wrong decision-making procedure — were to produce effects within the Community legal order. A similar concern underpins cases in which the Court has held that, when entering into commitments on the international stage, Member States and Community institutions are under a duty of loyal cooperation. [23] If an international agreement is concluded in breach of that duty, it can be denied effect in the Community legal order. Even more apposite, in the context of the present case, is the fact that the Court has verified, on occasion, whether acts adopted by the Community for the purpose of giving municipal effect to international commitments were in compliance with general principles of Community law. For instance, in *Germany* v *Council* the Court annulled the Council decision concerning the conclusion of the WTO Agreement to the extent that it approved the Framework Agreement on Bananas. [24] The Court considered that provisions of that Framework Agreement infringed a general principle of Community law: the principle of non-discrimination.

24. All these cases have in common that, although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve

20 — See, for instance, Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos* [2007] ECR I-7001; Case C-300/98 *Dior and Others* [2000] ECR I-11307, paragraph 33; Case C-162/96 *Racke* [1998] I-3655; Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219; and *Poulsen and Diva Navigation*, cited in footnote 19.

21 — Joined Cases C-317/04 and C-318/04 [2006] ECR I-4721. See also Case C-327/91 *France* v *Commission* [1994] ECR-3641.

22 — Opinion 2/94 [1996] ECR I-1759, paragraph 35.

23 — See, for instance, Ruling 1/78 of 14 November 1978 [1978] ECR 2151, paragraph 33; Opinion 2/91 [1993] ECR I-1061, paragraphs 36 to 38; and Case C-25/94 *Commission* v *Council* [1996] ECR I-1469, paragraphs 40 to 51.

24 — Case C-122/95 [1998] ECR I-973.

the constitutional framework created by the Treaty. [25] Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.

25. It follows that the present appeal turns fundamentally on the following question: is there any basis in the Treaty for holding that the contested regulation is exempt from the constitutional constraints normally imposed by Community law, since it implements a sanctions regime imposed by Security Council resolutions? Or, to put it differently: does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council?

26. The appellant argues that the answer to that question can be inferred from the ruling of this Court in *Bosphorus*. [26] In that ruling, the Court assessed whether a regulation that was adopted to implement a Security Council resolution which imposed a trade embargo on the Federal Republic of Yugoslavia infringed fundamental rights and the principle of proportionality. The Court held that the interest of 'putting an end to the state of war in the region and to the massive violations of human rights and humanitarian law in the Republic of Bosnia-Herzegovina' outweighed the interest of a wholly innocent party to be able to pursue its economic activities using assets it had leased from a company based in the Federal Republic of Yugoslavia. [27] The Court made no suggestion whatsoever that it might not have powers of review because the regulation was necessary in order to implement a sanctions regime that was drawn up by the Security Council. [28]

27. Nevertheless, the Council, the Commission and the United Kingdom claim that the judgment in *Bosphorus* does not provide the authority the appellant seeks to ascribe to it. They argue that the judgment is silent on the matter of the scope of the Court's jurisdiction, because, at any rate, the regulation did not infringe fundamental rights. I do not consider this argument very persuasive. True, while the Advocate General dismissed the idea in passing, the Court did not explicitly address whether the fact that the

25 — See, for instance, Opinion 2/94, cited in footnote 22, paragraphs 30, 34 and 35.

26 — Cited in footnote 16.

27 — *Bosphorus*, cited in footnote 16, paragraph 26.

28 — The impounding of the aircraft of Bosphorus Airways took place in accordance with Security Council Resolution 820(1993). The UN Sanctions Committee had decided that a failure on the part of the authorities to impound the aircraft would amount to a breach of the resolution.

regulation implemented a Security Council resolution could preclude it from exercising judicial review. None the less, I would suppose that, instead of deliberately leaving the matter undecided, the Court accepted as self-evident what the Advocate General had felt useful to spell out, namely that 'respect for fundamental rights is … a condition of the lawfulness of Community acts'. [29]

28. In any event, even if one were to accept the suggestion that the Court sidestepped the problem of its jurisdiction in *Bosphorus*, the fact remains that the Council, the Commission and the United Kingdom fail to identify any basis in the Treaty from which it could logically follow that measures taken for the implementation of Security Council resolutions have supra-constitutional status and are hence accorded immunity from judicial review.

29. The United Kingdom suggests that such immunity from review can be derived from Article 307 EC. The first paragraph of that article provides: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.' In the view of the United Kingdom, that provision, read in conjunction with Article 10 EC, would impose on the Community an obligation not to impair Member State compliance with Security Council resolutions. In consequence, the Court should abstain from judicial review of the contested regulation. I shall state at the outset that I am not convinced by that argument, but it is nevertheless worth looking into the matter in some detail, particularly since Article 307 EC figured prominently in the reasoning of the Court of First Instance. [30]

30. At first sight, it may not be entirely clear how Member States would be prevented from fulfilling their obligations under the United Nations Charter if the Court were to annul the contested regulation. Indeed, in the absence of a Community measure, it would in principle be open to the Member States to take their own implementing measures, since they are allowed, under the Treaty, to adopt measures which, though affecting the functioning of the common market, may be necessary for the maintenance of inter-

29 — Opinion of Advocate General Jacobs in *Bosphorus*, cited in footnote 16, paragraph 53. See also paragraph 34 of Opinion 2/94, cited in footnote 22.

30 — Paragraphs 185 to 191 and 196 of the judgment under appeal.

national peace and security. [31] None the less, the powers retained by the Member States in the field of security policy must be exercised in a manner consistent with Community law. [32] In the light of the Court's ruling in *ERT*, [33] it may be assumed that, to the extent that their actions come within the scope of Community law, Member States are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves. On that assumption, if the Court were to annul the contested regulation on the ground that it infringed Community rules for the protection of fundamental rights, then, by implication, Member States could not possibly adopt the same measures without — in so far as those measures came within the scope of Community law — acting in breach of fundamental rights as protected by the Court. Thus, the argument based on Article 307 EC is of indirect relevance only.

31. The crucial problem with the argument raised by the United Kingdom, however, is that it presents Article 307 EC as the source of a possible derogation from Article 6(1) EU, according to which 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. I see no basis for such an interpretation of Article 307 EC. Moreover, it would be irreconcilable with Article 49 EU, which renders accession to the Union conditional on respect for the principles set out in Article 6(1) EU. Furthermore, it would potentially enable national authorities to use the Community to circumvent fundamental rights which are guaranteed in their national legal orders even in respect of acts implementing international obligations. [34] This would plainly run counter to firmly established case-law of this Court, according to which the Community guarantees a complete system of judicial protection in which fundamental rights are safeguarded in consonance with the constitutional traditions of the Member States. As the Court stated in *Les Verts*, 'the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic

31 — Articles 297 EC and 60(2) EC. See also: Case C-70/94 *Werner* [1995] ECR I-3189; Case C-83/94 *Leifer and Others* [1995] ECR I-3231; and the Opinion of Advocate General Jacobs in Case C-120/94 *Commission* v *Greece* [1996] ECR I-1513.

32 — Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 25.

33 — Case C-260/89 [1991] ECR I-2925. See also Case C-368/95 *Familiapress* [1997] ECR I-3689 and Case C-60/00 *Carpenter* [2002] ECR I-6279.

34 — In certain legal systems, it seems very unlikely that national measures for the implementation of Security Council resolutions would enjoy immunity from judicial review (which incidentally shows that a decision by this Court to exclude measures such as the contested regulation from judicial review might create difficulties for the reception of Community law in some national legal orders). See, for instance, the following sources. Germany: Bundesverfassungsgericht, Order of 14 October 2004 (Görgülü) 2 BvR 1481/04, reported in NJW 2004, p. 3407-3412. The Czech Republic: Ústavní soud, 15 April 2003 (I. ÚS 752/02); Ústavní soud, 21 February 2007 (I. ÚS 604/04). Italy: Corte Costituzionale, 19 March 2001, No 73. Hungary: 4/1997 (I. 22.) AB határozat. Poland: Orzecznictwo Trybunału Konstytucyjnego (zbiór urzędowy), 27 April 2005, P 1/05, pkt 5.5, Seria A, 2005 Nr 4, poz. 42; and Orzecznictwo Trybunału Konstytucyjnego (zbiór urzędowy), 2 July 2007, K 41/05, Seria A, 2007 Nr 7, poz. 72.

constitutional charter, the Treaty'.[35] More straightforwardly, in *Schmidberger*, the Court reaffirmed that 'measures which are incompatible with the observance of human rights … are not acceptable in the Community'.[36] In short, the United Kingdom's reading of Article 307 EC would break away from the very principles on which the Union is founded, while there is nothing in the Treaty to suggest that Article 307 EC has a special status — let alone a special status of that magnitude — in the constitutional framework of the Community.

32. Besides, the obligations under Article 307 EC and the related duty of loyal cooperation flow in both directions: they apply to the Community as well as to the Member States.[37] The second paragraph of Article 307 EC provides that 'the Member State or States concerned shall take all appropriate steps to eliminate … incompatibilities' between their prior treaty obligations and their obligations under Community law. To this end, Member States shall 'assist each other … and shall, where appropriate adopt a common attitude'. That duty requires Member States to exercise their powers and responsibilities in an international organisation such as the United Nations in a manner that is compatible with the conditions set by the primary rules and the general principles of Community law.[38] As Members of the United Nations, the Member States, and particularly — in the context of the present case — those belonging to the Security Council, have to act in such a way as to prevent, as far as possible, the adoption of decisions by organs of the United Nations that are liable to enter into conflict with the core principles of the Community legal order. The Member States themselves, therefore, carry a responsibility to minimise the risk of conflicts between the Community legal order and international law.

33. If Article 307 EC cannot render the contested regulation exempt from judicial review, are there perhaps any other rules of Community law that can? The Council, the Commission and the United Kingdom argue that, as a matter of general principle, it is not for the Court to cast doubt on Community measures that implement resolutions which the Security Council has considered necessary for the maintenance of international peace and security. In this connection, the

35 — *Les Verts*, cited in footnote 18, paragraph 23.

36 — Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 73.

37 — For a recent example of a case concerning the obligations of Member States under Article 307 EC, see Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 59.

38 — See, in a similar vein, on the requirement of unity in the international representation of the Community, Opinion 1/94 [1994] ECR I-5267, paragraphs 106 to 109, and *Commission* v *Council*, cited in footnote 23, paragraphs 40 to 51.

Commission evokes the notion of 'political questions'. [39] In brief, one could say that the Commission, the Council and the United Kingdom contend that the specific subject-matter at issue in the present case does not lend itself to judicial review. They claim that the European Court of Human Rights takes a similar position.

34. The implication that the present case concerns a 'political question', in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted. As Justice Murphy rightly stated in his dissenting opinion in the *Korematsu* case of the United States Supreme Court: 'Like other claims conflicting with the asserted constitutional rights of the individual, [that] claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. What are the allowable limits of [discretion], and whether or not they have been overstepped in a particular case, are judicial questions.' [40]

35. Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that should not induce us to say that 'there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods'. [41] Nor does it mean, as the United Kingdom submits, that judicial review in those cases should be only 'of the most marginal kind'. On the contrary, when the risks to public security are believed to be

39 — The term 'political question' was coined by United States Supreme Court Chief Justice Taney in *Luther* v. *Borden*, 48 U.S. 1 (1849), 46-47. The precise meaning of this notion within the Community context is far from clear. The Commission did not dwell upon the argument, which it raised at the hearing, but the suggestion appears to be that the Court should abstain from exercising judicial review, since there are no judicial criteria by which the matters presently under consideration may be measured.

40 — United States Supreme Court, *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting) (internal quotation marks omitted).

41 — Montesquieu, *De l'Esprit des Lois*, Book XII ('Il y a des cas où il faut mettre, pour un moment, un voile sur la liberté, comme l'on cache les statues des dieux').

extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary. As I shall discuss below, the Court must verify whether the claim that extraordinarily high security risks exist is substantiated and it must ensure that the measures adopted strike a proper balance between the nature of the security risk and the extent to which these measures encroach upon the fundamental rights of individuals.

36. According to the Council, the Commission and the United Kingdom, the European Court of Human Rights relinquishes its powers of review when a contested measure is necessary in order to implement a Security Council resolution. Yet, I seriously doubt that the European Court of Human Rights limits its own jurisdiction in that way. [42] Moreover, even if it were to do so, I do not think that

42 — The European Court of Human Rights has held that 'the Contracting States may not, in the name of the struggle against … terrorism, adopt whatever measures they deem appropriate' (*Klass and Others*, judgment of 6 September 1978, Series A no. 28, § 49). Moreover, in its judgment in *Bosphorus Airways*, the same Court discussed the issue of its jurisdiction at length, without even hinting at the possibility that it might not be able to exercise review because the impugned measures implemented a resolution of the Security Council (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* [GC], no. 45036/98). Therefore, the judgment in *Bosphorus Airways* seems to bolster the argument in favour of judicial review. Still, according to the Council, the Commission and the United Kingdom, it would follow from the admissibility decision in *Behrami* that measures that are necessary for the implementation of Security Council resolutions automatically fall outside the ambit of the Convention (*Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01 ECtHR, 2 May 2007); see also the admissibility decisions of 5 July 2007 in *Kasumaj v. Greece* (dec.), no. 6974/05, and of 28 August 2007 in *Gajic v. Germany* (dec.), no. 31446/02). However, that seems to be an overly expansive reading of the Court's decision. The *Behrami* case concerned an alleged infringement of fundamental rights by a security force deployed in Kosovo which operated under the auspices of the United Nations. The respondent States had contributed troops to this security force. Yet, the European Court of Human Rights declined jurisdiction *ratione personae* mainly because the ultimate authority and control over the security mission remained with the Security Council and, therefore, the impugned actions and inactions were attributable to the United Nations and not to the respondent States (see §§ 121 and 133 to 135 of the decision). Indeed, in this respect the Court carefully distinguished the case from *Bosphorus Airways* (see, in particular, § 151 of the decision). Thus, the position of the European Court of Human Rights seems to be that, where, pursuant to the rules of public international law, the impugned acts are attributable to the United Nations, the court has no jurisdiction *ratione personae*, since the United Nations are not a contracting party to the Convention. By contrast, when the authorities of a contracting State have taken procedural steps to implement a Security Council resolution in the domestic legal order, the measures thus taken are attributable to that State and therefore amenable to judicial review under the Convention (see also §§ 27 to 29 of the admissibility decision of 16 October 2007 in Beric and Others v. Bosnia and Herzegovina).

that would be of consequence in the present case.

37. It is certainly correct to say that, in ensuring the observance of fundamental rights within the Community, the Court of Justice draws inspiration from the case-law of the European Court of Human Rights. [43] None the less, there remain important differences between the two courts. The task of the European Court of Human Rights is to ensure the observance of the commitments entered into by the Contracting States under the Convention. Although the purpose of the Convention is the maintenance and further realisation of human rights and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level. [44] This is illustrated by the Convention's intergovernmental enforcement mechanism. [45] The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community. The European Court of Human Rights and the Court of Justice are therefore unique as regards their jurisdiction *ratione personae* and as regards the relationship of their legal system with public international law. Thus, the Council, the Commission and the United Kingdom attempt to draw a parallel precisely where the analogy between the two Courts ends.

38. The Council asserted at the hearing that, by exercising its judicial task in respect of acts of Community institutions which have their source in Security Council resolutions, the Court would exceed its proper function and 'speak on behalf of the international community'. However, that assertion clearly goes too far. Of course, if the Court were to find that the contested resolution cannot be applied in the Community legal order, this is likely to have certain repercussions on the international stage. It should be noted, however, that these repercussions need not necessarily be negative. They are the immediate consequence of the fact that, as the system governing the functioning of the United Nations now stands, the only option available to individuals who wish to have access to an independent tribunal in order to obtain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court. [46] Indeed, the possibility of a successful

43 — See, for instance, Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609, paragraph 33.

44 — See the Preamble to the European Convention on Human Rights and Fundamental Freedoms, as well as Article 19 ECHR and Article 46(1) ECHR.

45 — See Article 46(2) ECHR.

46 — See paragraph 39 of the Report of 16 August 2006 of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/61/267): 'Given that the effect of inclusion [on the list] is the freezing of assets, the right to contest inclusion is a necessity. At the international level, these procedures do not at present exist. They are present, in some instances, at the national level. The Special Rapporteur is of the view that if there is no proper or adequate international review available, national review procedures — even for international lists — are necessary. These should be available in the States that apply the sanctions'.

challenge cannot be entirely unexpected on the Security Council's part, given that it was expressly contemplated by the Analytical Support and Sanctions Monitoring Team of the Sanctions Committee. [47]

39. Moreover, the legal effects of a ruling by this Court remain confined to the municipal legal order of the Community. To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law. While it is true that the restrictions which the general principles of Community law impose on the actions of the institutions may inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter. The Council's contention that, by reviewing the contested regulation, the Court would assume jurisdiction beyond the perimeters of the Community legal order is therefore misconceived.

40. I accordingly conclude that the Court of First Instance erred in law in holding that it had no jurisdiction to review the contested regulation in the light of fundamental rights that are part of the general principles of Community law. In consequence, the Court should consider the appellant's second plea well founded and set aside the judgment under appeal.

IV — The alleged breaches of fundamental rights

41. Instead of referring the matter back to the Court of First Instance, I suggest that the Court make use of the possibility of giving final judgment in this case. [48] For reasons of expediency, I think it would be appropriate, in this regard, to concentrate on the principal aspect of the case, namely the issue whether the contested regulation infringes the appellant's fundamental rights.

47 — See, in particular, the Second Report of the Analytical Support and Sanctions Monitoring Team (S/2005/83), in which it is noted, in paragraph 54, that 'the way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental rights, norms and conventions' and, in paragraph 58, that 'revisions to the process could help to reduce the possibility of one or more potentially negative court decisions'. In that connection, the Report specifically mentions the European Court of Justice. See also Annex I to the Sixth Report of the Analytical Support and Sanctions Monitoring Team (S/2007/132) for an overview of legal challenges to aspects of the sanctions programme.

48 — In accordance with Article 61 of the Statute of the Court.

42. The appellant alleges several breaches of his fundamental rights and, on those grounds, seeks the annulment of the contested regulation in so far as it concerns him. The respondents — in particular the Commission and the United Kingdom — argue that, to the extent that the contested regulation may interfere with the appellant's fundamental rights, this is justified for reasons relating to the suppression of international terrorism. In this connection, they also argue that the Court should not apply normal standards of review, but instead should — in the light of the international security interests at stake — apply less stringent criteria for the protection of fundamental rights.

43. I disagree with the respondents. They advocate a type of judicial review that at heart is very similar to the approach taken by the Court of First Instance under the heading of *jus cogens*. In a sense, their argument is yet another expression of the belief that the present case concerns a 'political question' and that the Court, unlike the political institutions, is not in a position to deal adequately with such questions. The reason would be that the matters at issue are of international significance and any intervention of the Court might upset globally-coordinated efforts to combat terrorism. The argument is also closely connected with the view that courts are ill equipped to determine which measures are appropriate to prevent international terrorism. The Security Council, in contrast, presumably has the expertise to make that determination. For these reasons, the respondents conclude that the Court should treat assessments made by the Security Council with the utmost deference and, if it does anything at all, should exercise a minimal review in respect of Community acts based on those assessments.

44. It is true that courts ought not to be institutionally blind. Thus, the Court should be mindful of the international context in which it operates and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community. In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them. Consequently, in situations

where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council.

45. The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions. This is never an easy task, and, indeed, it is a great challenge for a court to apply wisdom in matters relating to the threat of terrorism. Yet, the same holds true for the political institutions. Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper. In the words of Aharon Barak, the former President on the Supreme Court of Israel:

'It is when the cannons roar that we especially need the laws … Every struggle of the state — against terrorism or any other enemy — is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes". … The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.' [49]

46. There is no reason, therefore, for the Court to depart, in the present case, from its usual interpretation of the fundamental rights that have been invoked by the appellant. The only novel question is whether the concrete needs raised by the prevention of international terrorism justify restrictions on the fundamental rights of the appellant that would otherwise not be acceptable. This does not entail a different conception of those fundamental rights and the applicable standard of review. It simply means that the weight to be given to the different interests

49 — Supreme Court of Israel, HCJ 769/02 [2006] *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, paragraphs 61 and 62 (internal quotation marks omitted).

which are always to be balanced in the application of the fundamental rights at issue may be different as a consequence of the specific needs arising from the prevention of international terrorism. But this is to be assessed in a normal exercise of judicial review by this Court. The present circumstances may result in a different balance being struck among the values involved in the protection of fundamental rights but the standard of protection afforded by them ought not to change.

47. The problem facing the appellant is that all of his financial interests within the Community have been frozen for several years, without limit of time and in conditions where there appear to be no adequate means for him to challenge the assertion that he is guilty of wrongdoing. He has invoked the right to property, the right to be heard, and the right to effective judicial review. In the context of this case, these rights are closely connected. Clearly, the indefinite freezing of someone's assets constitutes a far-reaching interference with the peaceful enjoyment of property. The consequences for the person concerned are potentially devastating, even where arrangements are made for basic needs and expenses. Of course, this explains why the measure has such a strong coercive effect and why 'smart sanctions' of this type might be considered a suitable or even necessary means to prevent terrorist acts. However, it also underscores the need for procedural safeguards which require the authorities to justify such measures and demonstrate their proportionality, not merely in the abstract, but in the concrete circumstances of the given case. The Commission rightly points out that the prevention of international terrorism may justify restrictions on the right to property. However, that does not *ipso facto* relieve the authorities of the requirement to demonstrate that those restrictions are justified in respect of the person concerned. Procedural safeguards are necessary precisely to ensure that that is indeed the case. In the absence of those safeguards, the freezing of someone's assets for an indefinite period of time infringes the right to property.

48. The appellant contends that, regarding the sanctions taken against him, no such safeguards are in place. He maintains that he has not been given any opportunity of being heard on the facts and circumstances alleged and on the evidence adduced against him. He claims that he would have been in a better position if criminal charges had been brought against him, since then at least he would have enjoyed the protection afforded by a criminal trial. In this context, he seeks to rely on the right to be heard by the administrative authorities, as well as on the right to effective judicial review by an independent tribunal.

49. Both the right to be heard and the right to effective judicial review constitute fundamental rights that form part of the general principles of Community law. According to settled case-law, 'observance of the right

to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question … That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views'. [50] As to the right to effective judicial review, the Court has held: 'The European Community is … a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. … Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States'. [51]

50. The respondents argue, however, that in so far as there have been restrictions on the right to be heard and the right to effective judicial review, these restrictions are justified. They maintain that any effort on the part of the Community or its Member States to provide administrative or judicial procedures for challenging the lawfulness of the sanctions imposed by the contested regulation would contravene the underlying Security Council resolutions and therefore jeopardise the fight against international terrorism. In consonance with that view, they have not made any submissions that would enable this Court to exercise review in respect of the specific situation of the appellant.

51. I shall not dwell too much upon the alleged breach of the right to be heard. Suffice it to say that, although certain restrictions on that right may be envisaged for public security reasons, in the present case the Community institutions have not afforded any opportunity to the appellant to make known his views on whether the sanctions against him are justified and whether they should be kept in force. The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee

50 — Case C-32/95 P *Lisrestal and Others* [1996] ECR I-5373, paragraph 21. See also Article 41(2) of the Charter on Fundamental Rights of the European Union.

51 — Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraphs 38 and 39. See also Article 47 of the Charter on Fundamental Rights and Articles 6 and 13 ECHR.

or to their government for removal from the list. [52] Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality. One of the crucial reasons for which the right to be heard must be respected is to enable the parties concerned to defend their rights effectively, particularly in legal proceedings which might be brought after the administrative control procedure has come to a close. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affects on the appellant's right to effective judicial protection.

52. The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right. As the European Court of Human Right held in *Klass and Others*, 'the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure'. [53]

53. The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant him an opportunity to dispute the grounds for his continued inclusion on the list. They have, in effect, levelled extremely serious allegations against him and have, on that basis, subjected him to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless remain in place indefinitely. The Court has no way

52 — The de-listing procedure has undergone several changes since the original adoption of the measures against the appellant. Under the initial regime, the person concerned could only submit requests for de-listing to their State of citizenship or of residence. Under the current procedure, petitioners seeking to submit a request for de-listing can do so either through a United Nations 'focal point or through their State of residence or citizenship. However, the fundamentally intergovernmental nature of the de-listing process has not changed. See Security Council Resolution 1730(2006) of 19 December 2006 and the Sanction Committee's Guidelines for the Conduct of its Work, available at http://www.un.org/sc/committees/1267/index.shtml.

53 — ECtHR, *Klass and Others*, cited in footnote 42, § 55.

of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.

54. Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee — a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.

55. It follows that the appellant's claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant.

V — Conclusion

56. I propose that the Court should:

(1) set aside the judgment of the Court of First Instance of 21 September 2005 in Case T-315/01 *Kadi* v *Council and Commission*;

(2) annul, in so far as it concerns the appellant, Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.