

INTERNATIONAL SANCTIONS FROM A HUMAN  
RIGHTS LAW PERSPECTIVE:  
SOME OBSERVATIONS ON THE *KADI* JUDGMENT  
OF THE EUROPEAN COURT OF JUSTICE

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*I. The General Problem*

In international law, sanctions may be imposed by States or, if they have the power to do so, by international organizations.<sup>1</sup> In this context the question to consider is whether – and if so, to what extent – respect for human rights must be considered to be a major, perhaps even essential element in the decision-making process.<sup>2</sup>

The question turned up because it was noticed that general economic sanctions like those imposed by the United Nations Security Council on Iraq after the Second Gulf War (when Kuwait was liberated)<sup>3</sup> had a very negative impact on the population resulting in a serious decrease of supply for food and medicine. Consequently, there was an increase of infant mortality and a general deterioration of the state of health of the people concerned.<sup>4</sup> Of course one has to add that these unwelcome consequences were partly due to the irresponsible behaviour of the then ruler *Saddam*

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<sup>1</sup> See generally Eckart Klein, *Sanctions by International Organizations and Economic Communities*, 30 ARCHIV DES VÖLKERRECHTS 101-13 (1992).

<sup>2</sup> William Michael Reisman & Douglas L Stevick, *The Applicability of International Law Standards to United Nations Sanctions Programmes*, 9 EUR. J. INT'L L. 86-141 (1998).

<sup>3</sup> See PAUL CONLON, UNITED NATIONS SANCTIONS MANAGEMENT: A CASE STUDY OF THE IRAQ SANCTIONS COMMITTEE, 1990-1994 (2000); see also S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991) (addressing Iraq's invasion of Kuwait).

<sup>4</sup> Cf. August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851-72 (2001); see also Paul Conlon, *The Humanitarian Mitigation of U.N. Sanctions*, 39 GERMAN Y.B. INT'L L. 249-84 (1996).

*Hussein*, but the United Nations recognized that this outcome to a great extent also depended on the mechanism of the imposed sanctions. As such, the Security Council amended the sanctions regime several times over the years. A famous example for this development became the “Oil-for-food Programme.”<sup>5</sup>

One lesson learnt from these unfortunate results was the development of a new generation of sanctions that became known as smart or targeted sanctions.<sup>6</sup> Instead of affecting a whole population that probably, in most cases, is not at all or only in part responsible for the acts of their rulers, the new-generation sanctions of the Security Council are targeted against the responsible politicians or military chiefs themselves, restricting their opportunities to leave their country, freezing their assets abroad, etc. This strategy was expanded to non-State actors like the Taliban in Afghanistan<sup>7</sup> who were never recognized as the legal government of this country, and, when the fight against international terrorism escalated, also to individuals like *Usama Bin Laden* and others suspected of supporting Al-Qaida or other terrorist groups.<sup>8</sup> The practice is that a Sanctions Committee established by the Security Council is running a list in which the individuals are included. The persons concerned are not officially informed, neither before nor after the listing. To get de-listed is a very cumbersome process and will be achieved only with the unanimous consent of the Committee.<sup>9</sup>

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<sup>5</sup> S.C. Res. 986, U.N. Doc. S/RES/986 (Apr. 14, 1995).

<sup>6</sup> Amy Howlett, *Getting “Smart”: Crafting Economic Sanctions that Respect Human Rights*, 73 *FORDHAM L. REV.* 1199-1237 (2004).

<sup>7</sup> S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

<sup>8</sup> See S.C. Res. 1333, U.N. Doc. S/RES/1333 (Aug. 4, 2000); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

<sup>9</sup> S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006); see also U.N. Security Council, Comm. Established Pursuant to Resol. 1267 (1999), *Guidelines of the Committee for the Conduct of its Work* (November 7, 2002), available at [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf); see also *Improving the Implementation of Sanctions Regimes Through Ensuring “fair and clear procedures”*: discussion paper, U.N. Doc. S/2008/428 and A/62/891 (2008) (discussing a procedural improvement that is envisaged by the joint proposal of Germany, Sweden and Switzerland, supported by Denmark, the Netherlands and

Although Security Council resolutions adopted on the basis of Chapter VII of the United Nations Charter do not have an immediate effect on individuals, they do hit them quickly, since the member States of the organization are obliged to carry out the binding resolutions of the Security Council under Chapter VII of the United Nations Charter.<sup>10</sup> It is because of this reason that the human rights issue comes into play.

Many learned books and articles have been published during the last decade to tackle the question whether the United Nations may violate human rights. The precondition for this being of course that the Organization is bound by human rights to begin with. It would be totally unsound to deny this completely. In fact, there are several doctrinal avenues that are used to establish the human rights obligations of the United Nations:<sup>11</sup> (1) the external concept, according to which the United Nations as a subject of public international law is bound only by customary human rights law, having not ratified itself a human rights treaty; (2) the internal concept, meaning that the obligations ensue from the Charter alone, putting the main accent on the interpretation of Art. 24, para. 2, of the Charter; and (3) the hybrid concept, saying that the United Nations cannot be allowed to escape the obligations of its members. This, however, leaves us with the problem that the human rights obligations of the members differ widely on the basis of different ratifications as well as reservations and derogations which they may have declared. Recently, a fourth hypothesis has been put forward according to which the “United Nations is bound to respect human rights because it has unilaterally declared that it expects its personnel to act in accordance with the Universal Declaration of Human Rights as if it were itself bound.”<sup>12</sup> However, this opinion does not take into

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<sup>10</sup> See U.N. Charter arts. 25 & 48; see also Jost Delbrück, *Article 25 Rn. 8-19*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (Bruno Simma et al. eds., 2d ed. 2002).

<sup>11</sup> Frederic Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 *HUM. RTS. Q.* 314, 314-42 (2003).

<sup>12</sup> ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 127 (2006).

account the fact that the Declaration contains only a very general restriction clause (Art. 29, para. 2) and does not provide for derogation in times of emergency, as do other international conventions.

I shall not deepen the discussion on this point here, but only add that, as is well known, there does not exist any direct judicial remedy neither for a State nor an individual to keep a check on whether the Security Council has violated its human rights obligations whatever, they may be. Perhaps this question could be dealt with on rather indirect paths, by an inter-State dispute before the International Court of Justice (as a prejudicial issue) or through an advisory opinion of the Court requested, e.g., by the General Assembly.<sup>13</sup>

## *II. The Kadi Judgment*

In this situation the judgment of the Grand Chamber of the European Court of Justice in Luxemburg, handed down on 3 September 2008, deserves attention.<sup>14</sup> Mr. Kadi, residing in Saudi Arabia, together with others, was listed by the Security Council's Sanction Committee in 2001 as an individual associated with Usama Bin Laden and the Al-Qaida organization.<sup>15</sup> As a result, the relevant Security Council Resolution held that his funds and other financial assets will be frozen and funds and other financial resources will not be made available to him as well as to the other listed individuals.<sup>16</sup> Another Security Council Resolution of 2002 provided for a number

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<sup>13</sup> Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. U.K.) 1999 I.C.J. 975, at 9 (June 29). The *Lockerbie* case may present an example of such an inter-State dispute. Until today, the General Assembly has never requested the International Court of Justice for an Advisory Opinion arguing the unlawfulness of a Security Council Resolution.

<sup>14</sup> Joined Cases C-402/05P & C-415/05P, Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of Eur. Union & Comm'n of Eur. Cmtys., 2008 E.C.R. II-3533 [hereinafter *Kadi*].

<sup>15</sup> *Id.* at ¶ 31.

<sup>16</sup> See S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); see also S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

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of derogations from and exceptions to the freezing of funds and economic resources for humanitarian reasons if the Sanctions Committee consents to it.<sup>17</sup>

According to the law of the European Community, the Community has the competence to carry out the binding Security Council resolutions on behalf of its member States.<sup>18</sup> It did so by enacting a regulation which is, according to European Community law, directly applicable within member States.<sup>19</sup> The regulation provides for the freezing of funds and assets and the prohibition on making economic resources available for persons listed in the annex to the regulation as well as for exceptions to this prohibition for humanitarian reasons. Mr. Kadi figured on the list. He instituted proceedings against the Council and Commission of the European Union before the Court of First Instance in Luxemburg, but his claim was dismissed.<sup>20</sup> However, on appeal, he was successful before the European Court of Justice which annulled the contested regulation.

*A. The Issue of Jurisdiction*

The main hurdle that had to be taken by the Court was the argument, strongly supported by the EU Council of Ministers, that it had no jurisdiction because the regulation attacked is based on a Security Council resolution binding on the member States - an obligation that had to be honored by the Community. The Court of First Instance had denied its jurisdiction just for this reason, relying heavily also on Article 103 U.N. Charter according to which in the event of a conflict between the obligations of U.N. member states under the Charter and under any other international agreement the obligations under the Charter shall prevail.<sup>21</sup> Article 103 also encompasses obligations deriving from acts taken by organs of the United Nations (secondary legal acts).

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<sup>17</sup> S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002).

<sup>18</sup> *Kadi*, *supra* note 14, at ¶ 236 (The Court decided that Articles 60, 301 and 308 EC Treaty, taken together, constitute the legal basis for the Court's action).

<sup>19</sup> Council Regulation 2002/881, 2002 O.J. (L 139) 9 (EC).

<sup>20</sup> *Kadi*, *supra* note 14, at ¶ 292.

<sup>21</sup> *Id.* at ¶¶ 181, 184, 192, 193, 204, 213, 221-223.

Notwithstanding this general denial of jurisdiction, the Court of First Instance assumed jurisdiction so far as a violation of *jus cogens* (peremptory norms of international law) could be argued.<sup>22</sup> This assessment does not contradict the general statement, because a Security Council resolution conflicting with a peremptory norm of public international law would be devoid of any legal effect, neither obligating the member States nor, consequently, bringing Art. 103 U.N. Charter into operation. One cannot take the stance that the Security Council could order acts of genocide, torture, ethnic cleansing or extrajudicial killings, destroying its own legitimacy.<sup>23</sup> Despite the fact that there is no direct judicial control of Security Council resolutions, all subjects of international law are empowered and even obliged to check whether they themselves would act in violation of *jus cogens*. Therefore, the Court of First Instance rightly examined whether a norm of such a nature was at stake here. The plaintiff had argued violations of his rights to property, a fair hearing, and judicial review, but, according to the Court, no infringement of *jus cogens* rules could be found.<sup>24</sup>

The European Court of Justice acting as an appellate court, took a completely different view. Mr. Kadi had maintained that, as long as the law of the United Nations does not offer adequate protection for those who claim that their fundamental rights have been infringed by United Nations organs, a review of the measures adopted by the European Community in order to give effect to resolutions of the Security Council should take place.<sup>25</sup>

The Court did not rely on this deliberation. Instead, it based its findings on two more fundamental lines of argument, viewing the issue from the perspective of international law and Community law. Concerning international law, the Court does not deny “that the European Community must respect international law in the exercise

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<sup>22</sup> *Id.* at ¶ 231.

<sup>23</sup> See Christian Tomuschat, *Court of Justice: Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission*, 43 COMMON MKT. L. REV. 537, 545-46 (2006).

<sup>24</sup> *Kadi*, *supra* note 14, at ¶¶ 242, 243, 251, 286, 288.

<sup>25</sup> *Id.* at ¶ 256.

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of its powers”<sup>26</sup> and that for the purposes of the interpretation of the contested regulation, the wording and object of the underlying Security Council resolution must be taken into account.<sup>27</sup> On the other side, the Court finds that the U.N. Charter does not impose the choice of a particular model for the implementation of Security Council resolutions adopted under its Chapter VII, since they are to be given effect only in accordance with the procedure applicable in the domestic legal order of each member of the United Nations, or in the legal order of an organization that is empowered to act for its members.<sup>28</sup> Of course, from the perspective of international law in general and the United Nations Charter in particular, it must be maintained that the leeway given with regard to the transformation of Chapter VII obligations into national legal norms cannot under any circumstances mean that, at the end of the day, these obligations do not have to be met. At any rate, the Court draws the conclusion that U.N. law does not exclude any judicial review of the internal (European) lawfulness of the contested regulation.<sup>29</sup>

Evidently still more important for the Court was its finding that the EC Treaty does not grant immunity from jurisdiction for Community measures, even if they intend to give effect to binding resolutions of the Security Council. Provisions of the EC Treaty, as Articles 297 and 307, that try to protect international treaties (e.g., the U.N. Charter) concluded by States before they became members of the EU against the effects of the Community law were set aside by the Court as far as they might be understood to derogate from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6, para. 1, EU Treaty “as a foundation of the Union.”<sup>30</sup> According to the Court, obligations under the U.N. Charter do not occupy a higher rank in the

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<sup>26</sup> *Id.* at ¶ 291.

<sup>27</sup> *Id.* at ¶ 297.

<sup>28</sup> *Id.* at ¶ 298.

<sup>29</sup> *Id.* at ¶ 299.

<sup>30</sup> *Id.* at ¶ 303 (Art. 6, para. 1, EU Treaty reads: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”).

Community's legal order than its primary law of which the general principles of law including fundamental rights form part.<sup>31</sup> Thus, as the Community is based on the rule of law, neither its member States nor its own institutions can avoid review of the conformity of their acts with the EC Treaty "as the basic constitutional charter".<sup>32</sup>

The Court puts some emphasis on the distinction that can be made between the case at hand and the *Behrami* and *Saramati* cases which had recently been decided by the European Court of Human Rights.<sup>33</sup> In these cases the applicants complained of alleged violations of rights guaranteed under the European Convention on Human Rights (right to life and liberty) by the Kosovo Forces (KFOR) to which the respondent States had assigned military units at the disposal of the United Nations. The Strasbourg Court held that the actions involved were directly attributable to the United Nations and not the respondent States because those actions did not result from any decisions of the defendant States' authorities.<sup>34</sup> By contrast, the *Kadi* case before the European Court of Justice is characterized by the fact that the contested EC regulation could not be considered being an act attributable to the United Nations;<sup>35</sup> the regulation is clearly a legal act issued by an organ of the European Community and therefore attributable to the Community itself.

From all these findings, the Court draws the conclusion that it has to complete a full review of the lawfulness of the regulation in light of fundamental rights forming an integral part of the general principles of Community law, regardless of the fact that the contested regulation was designed to give effect to a Security Council resolution adopted under Chapter VII of the U.N. Charter.<sup>36</sup>

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<sup>31</sup> *Id.* at ¶ 308.

<sup>32</sup> *Id.* at ¶ 281.

<sup>33</sup> App. Nos 71412/01 and 78166/01 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Eur. Ct. H.R. (2007) available at <http://cmiskp.echr.coe.int>.

<sup>34</sup> It is rather doubtful whether the European Court of Human Rights correctly interpreted the existing line of orders in these cases, but by doing so it managed to avoid coming across with the U.N. mandate.

<sup>35</sup> *Kadi*, *supra* note 14, at ¶ 314.

<sup>36</sup> *Id.* at ¶ 326.

### *B. Human Rights Violations*

Having thus established its authority to review the regulation at hand, the Court rather quickly finds that fundamental rights claimed by Mr. Kadi had “patently” not been respected by the Community’s organs.<sup>37</sup> Though the Court agrees that the right of the appellant to be heard before his name was entered in the list for the first time had not been violated, it found an infringement of this right because he was never informed of the reasons that had led to his inclusion.<sup>38</sup> The appellant was also unable to defend his rights because evidence against him was withheld before the Community judicature, and the Court further held that his right to an effective remedy had also been infringed.<sup>39</sup> Lastly, the Court likewise found a violation of Mr. Kadi’s right to respect for property. The violation was not seen by the freezing of his assets as such, but the Court held that the right to respect for property contains a procedural requirement requesting a reasonable opportunity for the individual concerned of putting his case for review to the competent authorities that was not granted in the case at hand.<sup>40</sup> In view of this, the Court annulled the regulation as far as Mr. Kadi is concerned.

### *III. Evaluation*

This judgment is quite remarkable in as much as it may undermine the legal and political relevance of Security Council resolutions, particularly in combating international terrorism. Of course, the European Court of Justice hurries to say that it is not competent to review the Security Council resolutions as such, not even by measuring them against the yardstick of *jus cogens* as the Court of First Instance had done.<sup>41</sup> However, by annulling the EC regulation that imposed the sanctions on Mr. Kadi according to the

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<sup>37</sup> *Id.* at ¶ 334.

<sup>38</sup> *Id.* at ¶¶ 338 et seq.

<sup>39</sup> *Id.* at ¶¶ 348 et seq.

<sup>40</sup> *Id.* at ¶¶ 354 et seq.

<sup>41</sup> *Id.* at ¶ 287.

resolution, it punched a severe hit to the resolution's effect upon implementation. At least theoretically, this could upset the whole U.N. mechanism for the maintenance or restoration of international peace and security, with very grave consequences for world order.

Apart from these certainly unwelcome consequences, the legal reasoning of the Court is not convincing. The Court plainly emphasizes the autonomy of the legal order of the Community<sup>42</sup>, an argument that has until now been used to defend Community law against tendencies existing within member States to gain inadequate influence on the interpretation and application of the legal rules of the Community. Now the argument becomes likewise directed against international law, offering a basis for shielding the Community against influences from other international bodies, even the United Nations.

However, the autonomy argument must not be exaggerated in either direction. Regarding the domestic law of EU member States, one has to take into account that the constitutional traditions and principles recognized in the national legal orders also form part of the sources of law of the EC;<sup>43</sup> thus, there is, at least partly, space for an osmotic legal interaction. Concerning international law, the autonomy argument is much more disturbing. The outspoken dualistic approach that the Court has now adopted, does not only contradict its former jurisprudence,<sup>44</sup> but also does not really fit a legal order that is entirely based on international treaties. The EC, as a specific (supranational) international organization, has neither obtained, within the international arena, the status of a self-contained regime,<sup>45</sup> nor already evolved into a State losing its international fundament. The Court, by overdoing the autonomy argument, is pushing aside the treaty provisions that exactly intend to preserve the

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<sup>42</sup> *Id.* at ¶¶ 282, 316, 317.

<sup>43</sup> *See, e.g.*, Treaty Establishing European Union, Jul. 29 1992, 1992 O.J. (C 191) 1, 6; Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3, 288.

<sup>44</sup> *Cf.* Tomuschat, *supra* note 23, at 545.

<sup>45</sup> Eckart Klein, *Self-contained Regime*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Rüdiger Wolfrum ed., 2008), available at [www.mpepil.com](http://www.mpepil.com).

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umbilical cord that keeps the Community's legal order a part of international law. By the same token, Article 103 U.N. Charter is completely neglected. It reads: "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."<sup>46</sup> Both treaties, the EU and EC Treaty, are international agreements in this sense. The EU/EC member States, by concluding these treaties, had to honor Article 103 U.N. Charter, and it cannot be presumed that they intended not to do so. Actually, Article 103 U.N. Charter must be considered an implicit element of the EC and EU treaties themselves.<sup>47</sup> This provision therefore cannot be ruled out by stressing the autonomy of the legal order of the Community. It is up to the Community, acting for its members, to honor their obligations under the U.N. Charter. After all, the approach taken by the Court of First Instance is legally more convincing.

It is true, however, that seen from a more political perspective, things boil down a bit. The ability of the Security Council to perform its primary function to maintain or restore international peace and security would probably not seriously suffer if the Council would inaugurate procedural mechanisms allowing the U.N. members and their organizations to conclude that the inclusion of individuals in the disputed list does not disregard due process requirements. The follow-up listing by States or their organizations, implementing the orders of the Security Council, then would probably not meet major legal obstacles either.

It should further be noted that the Court's blow to the Security Council's resolution has been moderated by its finding that the effect of the annulled regulation may be maintained for a period of time that must not exceed three months running from the date of delivery of the judgment. This grants the Community time to repair.<sup>48</sup>

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<sup>46</sup> U.N. Charter art.103.

<sup>47</sup> See Tomuschat, *supra* note 23, at 541, 543, 545.

<sup>48</sup> On November 28, 2008 the Commission adopted EC Regulation No. 1190/2008 (2008 O.J. (L 322) 25), again including Mr. Kadi in the list annexed to the Regulation. The Commission had communicated the narrative summaries of

Finally, one may add that by handing down the *Kadi* judgment, the European Court of Justice might have been driven by the fear that the (constitutional) courts of member States themselves would consider the EC regulation against the background of their own constitutional human rights guarantees,<sup>49</sup> with the possible consequence that the regulation would lose its applicability in some member States of the European Union and, because of that, endanger the unity of the EC law. Quite apparently and understandably, the Court tried to avoid this threat.

Summing up, the judgment of the Court of First Instance appears to me much more in line with international law and even European law requirements than the judgment of the European Court of Justice. On the other hand, the latter decision bespeaks judicial wisdom by clearly raising attention for the evident weaknesses of the Security Council's procedure imposing sanctions on individuals affiliated with international terrorism. By pointing to these deficiencies the Court invites the Security Council to reconsider its procedural mechanisms. It might well be that this impulse will have a stronger impact on the Security Council's practice than the many relevant complaints raised from academics since long.

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reasons provided by the U.N. Al-Qaida and Taliban Sanctions Committee to Mr. Kadi and given him the opportunity to comment on these grounds in order to make his point of view known. After having carefully considered the comments received, the Commission decided that the listing of Mr. Kadi was justified.

<sup>49</sup> It is true that judicial review of legal acts of the Community by member States would violate Community Law, but some constitutional courts, among them the German Federal Constitutional Court, have maintained that they have to act if the European judicature is not adequately defending human rights. It is further true that States under these circumstances could come also in conflict with their U.N. Charter obligations.