Editorial

The difference

On 13 December 2007, after a remarkable acceleration of the process under the German and Portuguese presidencies, representatives of the member states put pen to paper and signed the Treaty of Lisbon. Much of the ensuing debate, both in legal circles and among the general public, has centred on its abandonment of the 'constitutional concept'. Indeed, the June 2007 European Council decided to relinquish the idea of a single text repealing the existing treaties and to delete all terminological references to the C-word, and concepts reminiscent thereof, such as the denominations 'Minister of Foreign Affairs', 'laws' and 'framework laws'. Likewise, there was to be no mention of the symbols of the EU such as the flag, the anthem or the motto. The primacy of EU law would be down-ranked to the status of a declaration recalling the existing case-law of the EU Court of Justice. And thus it was formalised in Lisbon.

Now what of the 'constitutional concept'? For this Review the matter has some urgency. If Lisbon's so-called 'abandonment of the constitutional concept' would indeed affect the constitutional reality of the Union, this could in turn affect the constitutional analysis in which this Review is versed. This is our question: are constitutional discourse and analysis of the Union's evolution as good methods as they were at the time of the conclusion of the Constitutional Treaty in 2004?

To answer this question it is best to consider the whole of the difference between Rome and Lisbon, not just the claimed abandonment of the constitutional concept. And to acknowledge that this difference, even if hard to capture, is real and significant. We shall demonstrate that constitutional analysis of the Union is indeed as good as it was, by using it to pinpoint and qualify the difference between Rome and Lisbon in constitutional terms.

In a purely legal reading, the difference between the two Treaties is lost or made a matter of cosmetics. The House of Commons Foreign Affairs Select Committee indeed concluded that

> there is no material difference between the provisions on foreign affairs in the Constitutional Treaty which the Government made subject to approval in a referendum and those in the Lisbon Treaty on which a referendum is being denied.[1]

[1] Third Report on Foreign Policy Aspects of the Lisbon Treaty, HC 120-I, 20 Jan. 2008

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Likewise, the House of Commons European Scrutiny Committee stated that it did

> *not* consider that references to abandoning a 'constitutional concept' or 'constitutional characteristics' are helpful and consider that they are even likely to be misleading in so far as they might suggest the Reform Treaty is of lesser significance than the Constitutional Treaty. We believe that the Government must offer evidence if it is to assert that the processes are significantly different.[2]

It is true that most of the pieces of the Constitutional Treaty were picked up to find a place in the Lisbon Treaty. But to say that there is no change at all is like saying that the pieces of a smashed vase when glued together make one as good as the original. The difference, however, is not only between the two vases. It is also in the fact that the vase was first smashed and that, glued together, it recalls and records the drama.

The Dutch Council of State gave a wider and at the same time more subtle reading to the difference, claiming that

> the proposed Reform Treaty will be a treaty whose content, methodology and goals are in keeping with the EU's constitutional development [so far]. Taken individually, many of the differences between the proposed Reform Treaty and the Treaty establishing a Constitution for Europe amount in strictly legal terms to shifts in emphasis, changes of form and abolition of symbols; the same was true, but in reverse, of the Treaty establishing a Constitution for Europe in relation to earlier treaties. Taken together, more far-reaching significance should be attached to changes such as the abandonment of the idea of a single written constitution, the decision not to include the Charter of Fundamental Rights, the sharper delimitation of the Union's competences (including those in the protocol on services of general interest and of general economic interest) and the decision not to include the symbols of European unification.
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> The purpose of all these changes is to rid the proposed Reform Treaty as far as possible of the elements from the Treaty establishing a Constitution for Europe which could have laid a basis for the development of the EU into a more explicit state or federation. This means that the proposed Reform Treaty is substantially different from the Treaty establishing a Constitution for Europe.

This reading finds that the difference lies in the future perspectives of the two treaties. While the first could have ushered in a European state or federation, the second purports to block such an evolution. It is a good attempt at seizing the

[2] HC 1014, 9 Oct. 2007.

difference, but on both sides of the equation it overstates its case. There was no purpose in the Constitutional Treaty to usher in a state. No such development is, conversely, forestalled by the Lisbon Treaty.

Let us attempt to break down the difference between the two treaties into distinct aspects, abstracting from the strictly legal ones.

The one aspect most easily overlooked in a legal reading is the crude historical aspect. Think back to the vase. In terms of history a difference is simply made by that which has happened in between two events. The difference between the two treaties, finding expression in the latter, is the two no-votes in France and the Netherlands and the admission of modesty they spurred in the governments.

Secondly, there is a difference of tone, of spirit. While the Constitutional Treaty breathed a spirit of confidence, Lisbon is infused with a spirit of fear, fear of member state peoples. This shows up in a remarkable textual change. Article I-1 of the Constitutional Treaty invoked '… the will of the citizens and the states of Europe …'. This was a far cry from a European 'We the People', but could nevertheless be seen as attempt to bolster the Union's 'own' constituency, its citizens, at the expense of the member states' peoples. It was, certainly, the upbeat for the shift from the Parliament's representing member states' peoples to the Union's citizens in Article 1-20(2).

While the innovation of the Parliament's representative basis has been maintained (in Article 14(2) of the TEU new), the new foundation for the Union has been dropped, and the preambles refer, as of old, to the peoples of the member states. This should not be seen as a minor and symbolic restoration. In normative terms it amounts to the restatement of a taboo. It is the taboo on scrapping the rule of unanimity for ratification of Treaty amendments. This rule of unanimity, after all, is the final security for domestic popular and representative involvement in the Union's evolution.

Then there is a difference of form. The Constitutional Treaty meant to make a break for the Union to become a polity. Its constitutional dress and language, the symbols and symbolism contained in it, the Convention process and the referendums, rightly or wrongly, were intended to provide the Union with a constitutional moment. We shall never know if the Constitutional Treaty could have been successful in creating such a moment, or whether that intention would have overstated the power of constitutions and charters, of the law itself. But it is clear that the member states have instead opted for obscurity, disguised as continuity. Seen through the lens of the intentions of the Laeken Declaration, the Treaty of Lisbon is a disaster.

Expressed in normative terms, this experience has created a taboo on using the C-word in the future and on trying to force a constitutional moment on the Union's evolution.

All this would add up to a rather discouraging picture if considered outside of the evolutionary nature of the Union. This, the heart of its constitutional condition, often makes sense of what at first seems to be a setback. The Union would crumble if its development were to halt. What news, then, is the Lisbon Treaty in affirmative terms?

In positive terms the Lisbon Treaty is the rediscovery of national parliaments and peoples as firm foundations of the Union's existence and action. A perspective has been soundly established: nowhere soon in the course of its gradual evolution will the Union take the full step and pull up its roots from the member states. It will remain and need to remain anchored in each of their polities.

This reorientation is only relatively new; the trend was there. Member state governments have been reasserting themselves inside the Union governmental structure for a long time, beyond anything known in a federal system. The national judiciaries have followed suit, led by the German Constitutional Court, seeking recognition as autonomous participants in the Union's development. Then the national parliaments have started to find better involvement in the Union's life. This is also vindicated in the Lisbon Treaty second protocol. And now it is the national peoples separately which refuse to be phased out in favour of the Union's common citizenry. Their refusal has been given acknowledgement in the Lisbon Treaty.

This reorientation is what Lisbon expresses. It is not just a harking back to the old song. It is an unmistakable strengthening of the Union's domestic roots, at least as a signal. The actual workings of these structural inputs need to be figured out by the national parliaments and peoples. Their new or rediscovered powers presently lie mostly in the negative, in the power to block. These powers need to evolve into affirmative, structural contributions to the Union's development. Veto powers have often evolved thus; witness, for one, the US president's legislative veto.

All this is not in conflict with the further institutional articulation of the Union as conceived in the Constitutional Treaty and firmly upheld in Lisbon. There is a greatly enhanced division of powers and of functions. The reinforced domestic rooting of the Union is no regression to intergovernmentalism.

It is really a matter of strengthening the foundation of the EU's authority and of its functional articulation. Foundation and articulation; these are the stock of the Western constitutional tradition.

One key element has been left aside, so far, of prime constitutional substance: the matter of rights and the rule of law. Rights and the rule of law form the undercurrent without which no serious constitutional evolution is conceivable; they are the true tests of constitutional life. A month after the signature of the Lisbon Treaty, Advocate-General Poiares Maduro gave his Opinion in Kadi and

made short shrift of the Court's pusillanimity in terrorism cases. In it he drew the full consequences of the Court's own youthful audacity in proclaiming an autonomous legal order, forty-five years ago, in which the rule of law is vindicated.

His straightforward, powerfully phrased and worded opinion was:

> ...
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> 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. 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'.
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> …
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> 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. (…) 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.

We do not know if the Court has the courage to follow him. If so or not, the opinion raises the standard to which, in the great words of George Washington when presiding over the American constitutional convention, the wise and honest may repair.

We have decided to annex an excerpt of the Opinion to this editorial.

MC/WTE

Opinion of Advocate-General Poiares Maduro
delivered on 16 January 2008
Case C-402/05 P

Yassin Abdullah Kadi
v.
Council of the European Union
and Commission of the European Communities

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.[1] As a consequence, all his funds and other finan-

[1] 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 Oct. 2001, amending, for the third time, Regulation (EC) No. 467/2001 (*OJ* 2001 L 277, p. 25).

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cial 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').[2] 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.
[…]

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.[…] 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. […]

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.

[2] 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).

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.[…] 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. […] […]

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 precedence over the Treaty.[3] 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*.
[…]

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. [4] The Court held that the Treaty is not merely an agreement between States,

[3] Art. 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, ICJ Reports 1992, p. 3, at para. 39.

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

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'.[5]

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.[6] The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.[7]

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. […]

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 the constitutional framework created by the Treaty.[8] 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

[5] Case 294/83 *Les Verts* [1986] *ECR* 1339, para. 23.

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

[7] *See*, for instance, Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos* [2007] *ECR* I-0000; Case C-300/98 *Dior and Others* [2000] *ECR* I-11307, para. 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 [Note: footnote numbering varies from the original footnote numbering – *EuConst*].

[8] *See*, for instance, Opinion 2/94, [[1996] ECR I-1759 – *EuConst*], paras. 30, 34 and 35.

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?
[…]

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. […]

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.[9] 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

[9] 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 Oct. 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 Feb. 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.

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 constitutional charter, the Treaty'.[10] More straightforwardly, in *Schmidberger*, the Court reaffirmed that 'measures which are incompatible with the observance of human rights … are not acceptable in the Community'.[11] 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.

[…]

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 Commission evokes the notion of 'political questions'.[12] […]

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

[10] *Les Verts* […] para. 23

[11] Case C-112/00 *Schmidberger* [2003] *ECR* I-5659, para. 73.

[12] 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.

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.[13]

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'.[14] 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 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.[15] Moreover, even if it were to do so, I do not think that that would be of consequence in the present case.

[13] United States Supreme Court, *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting) (internal quotation marks omitted). [In this decision, the Supreme Court accepted the internment of Japanese citizens and American citizens of Japanese descent during the Second World War. — *EuConst Editors*]

[14] 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').

[15] 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

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.[16] 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.[17] This is illustrated by the Convention's intergovernmental enforcement mechanism.[18] 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

and Others, judgment of 6 Sept. 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 Aug. 2007 in *Gajic* v. *Germany* (dec.), No. 31446/02). However, that seems to be an overly expansive reading of the Court's decision. (…)

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

[17] *See* the Preamble to the European Convention on Human Rights and Fundamental Freedoms, as well as Art. 19 ECHR and Art. 46(1) ECHR.

[18] *See* Art. 46(2) ECHR.

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.[19] […]

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. […]

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

[…]

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.

[19] *See* para. 39 of the Report of 16 Aug. 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'.

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.[20]

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 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

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

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. […] 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.

[…]

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 or to their government for removal from the list.[21] 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

[21] 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 Dec. 2006 and the Sanction Committee's Guidelines for the Conduct of its Work, available at <http://www.un.org/sc/committees/1267/index.shtml>.

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. […]

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 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. […] 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.