

What happened after Kadi: The protection of the fundamental rights within the European Union of individuals and entities included in the European black list.

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## Introduction

The continuing violation of human rights in Afghanistan, especially the rights of woman and girls, the apprehension of the Consulate-General of Iran, the murder of Iranian diplomats, the fact that the Taliban provides a safe haven to Usama Bin Laden, the bombings of the United States embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania), the conspiring of killing American citizens outside the United States, the terrorist attacks in New York, Washington and Pennsylvania on 11 September 2001 and the terrorist attack in Madrid on 11 March 2004 are all examples of the permanent threat of the international terrorism, which menace the international peace and security. The threat of terrorism directed against the international community made the United Nations Security Council decides to introduce and retain a sanctions regime. The sanction regime contains mainly restrictive measures, also known as smart sanctions directed against persons and entities, which are suspected of supporting the acts of Usama Bin Laden, Al-Qaida and the Taliban. When designated as an 'associate of Usama Bin Laden, Al-Qaida or the Taliban', persons and entities will be included in the United Nations sanctions list.

In the light of the international co-operation to suppress the international terrorism, the European Union followed the approach of the Security Council and also established a sanctions regime. The European Union is not a member of the United Nations, even though the Council of the European Union decided to implement the resolutions of the Security Council, which constitute the United Nations sanctions regime. The purpose of this action was to keep enhancing with the United Nations and to strengthening the voice of the European Union within the United Nations.

Both sanctions regimes received many critics by judicial authors, as well as the persons and entities included in the sanctions lists of the United Nations and the European Union. One of them was Yassin Abdullah Kadi. He brought his case to the European Court of Justice and claimed the annulment of Regulation 881/2002, which is the legitimation of the European sanctions regime, on the grounds that this regulation violated his fundamental rights. The European Court of Justice agreed with the statements of mister Kadi and ordered the Council of the European Union to create a sanctions regime which would suit with the fundamental rights.

The case of *Kadi* is very complicated. This case contains many issues, not only the alleged breach of fundamental rights, but also the relationship between the European Union and the United Nations, the primacy of international law and agreements, the competence of the European Court of Justice to review resolutions of the Security Council and the competence of the Council of the European Union to implement resolutions and its

competence to implement measures directed against individuals and entities, where normally only measures can be taken against third states.

This thesis is mainly focused on the breach of fundamental rights, caused by the inclusion on the European sanctions list. The purpose of this thesis is to examine how the European sanctions regime has changed with regard to the fundamental rights, after the judgement of the European Court of Justice in the *Kadi* case. The research question of this thesis is as followed:

**What happened after *Kadi*: Does Regulation 1286/2009 provide for more legal security for persons and entities which funds and financial resources are frozen or does their still exist an infringement of the right of the defence and the right of property?**

Regulation 1286/2009 of the Council of the European Union was adopted on 22 December 2009 and repeals Regulation 881/2002. To conclude whether or not Regulation 1286/2009 has improved regarding the protection of the rights of the defence and the right of ownership, this thesis provides a framework about the right to a fair hearing, the right to an effective judicial review and the right to property. The purpose of this action is to compare the modifications of Regulation 1286/2009 with the standards of the right to a fair hearing, the right to an effective judicial review and the right to property. This comparison will lead to an answer to the research question and shall indicate if there has been an improvement of the sanctions regime with regard to the fundamental rights, or not.

This research starts with a description of the content of the sanctions regime of the United Nations and the European Union, to understand the background of the *Kadi* case. Further, the issue of the competence of the Council of the European Union, with regard to the implementations of sanctions directed against individuals and entities will be discussed. Although this thesis is focussed on the alleged breach of the fundamental rights of persons and entities included in the European sanctions list, this matter must be discussed and explained, because if there was no competence of the Council of the European Union to implement such measures, there would be no legitimation for the execution of the restrictive measures which means that there would no longer exist a sanctions regime. The purpose of this thesis is to examine the European sanctions regime after *Kadi*: If there exist no legitimate European sanctions regime, this thesis would be irrelevant.

# 1 United Nations Sanctions Regime

## 1.1 Introduction

This chapter contains a description of the United Nations (hereafter UN) sanctions regime. The main objective of this sanctions regime is to suppress the international terrorism by imposing measures which will restrict the financing of terrorism. First, the applicable resolutions will be discussed and afterwards the specific sanctions of the sanctions regime will get a deeper view.

## 1.2 UN Sanctions regime

To suppress the international terrorism, the UN Security Council adopted many resolutions which contain measures that must be undertaken by the Member States. In 1999 the UN adopted two different kind of resolutions, namely Resolution 1267 and Resolutioin 1269. The UN designed two different sanctions regimes: one regime is directed to all terrorists and terrorist groups (Resolution 1269) and the other one is directed against specifically mentioned terrorists and terrorist groups and supporting individuals or entities (Resolution 1267). Resolution 1269 evokes Member States to execute all anti-terrorist treaties and to suppress the preparation and financing of terrorist attacks. Resolution 1269 was followed by Resolution 1373<sup>1</sup>. Resolution 1373 was adopted after a heinous act against the international community, and particular against the people of the United States, namely the terrorist attacks in New York, Washington and Pennsylvania on 11 September 2001. Resolution 1373 contains more specific measures which must be executed by the Member States. For instance, under this resolution, States must prevent and suppress the international financing of terrorist acts and criminalize the provision or collection of funds by their nationals or in their territories with the intention that the funds should be used in order to carry out terrorist acts. Further, States must freeze the funds, financial assets and economic resources of persons and entities who commit terrorist acts or facilitate or participate in the commission of terrorist acts and prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available for the benefit of persons who commit, or attempt to commit or facilitate or participate in the commission of terrorist acts<sup>2</sup>.

Resolution 1267 is directed against persons and entities associated with Usama Bin Laden, Al-Qaida and the Taliban. The inducement for Resolution 1267 was the continuing violation of human rights, especially the rights of woman and girls, the abnormal rise of the

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<sup>1</sup> UNSC Res 1269 (19 Octobre 1999) UN Doc S/Res 1269 , UNSC Res 1373 (28 September 2001) UN Doc S/Res 1373.

<sup>2</sup> UNSC Res 1373 (28 September 2001) UN Doc S/Res/1373 paragraph 1. Paragraph 2 contains more requirements for the Member States.

production of opium, the apprehension of the Consulate-General of Iran, the murder of Iranian diplomats, the fact that the Taliban provides a safe haven to Usama Bin Laden, the bombings of the United States embassies in Nairobi (Kenya) and Dar es Salaam (Tanzania) and for the conspiring of killing American citizens outside the United States<sup>3</sup>.

To suppress international terrorism and to safeguard the international peace and security, the UN imposed several measures in Resolution 1267, that must be implemented by all States, regarding article 25 of Chapter VII of the Charter of the UN: "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter". The regime of sanctions is not only based on Resolution 1267 but has been modified and strengthened by subsequent resolutions<sup>4</sup>: Resolution 1333, 1390, 1455, 1526, 1617, 1735 and 1822<sup>5</sup>. There are three fundamental sanction measures, namely the assets freeze, the travel ban and the arms embargo. The process of effective implementation of these measures by States will be monitored by the United Nations Sanctions Committee (hereafter the Committee).

### **1.2.1 UN sanctions committee**

The Security Council established a sanctions Committee pursuant to resolution 1267<sup>6</sup> on 15 October 1999. The Committee is also known as "the Al-Qaida and Taliban Sanctions Committee"<sup>7</sup> or the 1267 Committee<sup>8</sup> and consists of all the members of the Security Council. The Security Council gave the Committee the assignment to undertake the following tasks<sup>9</sup>:

- To seek from all Member States further information regarding the action they take to implement the measures mentioned in paragraph 4 of Resolution 1267 (the travel ban, the arms embargo and the freezing of assets) and examine this information.
- Make periodic reports to the Security Council about the impact of the measures mentioned in paragraph 4 of Resolution 1267 and about the identification of persons and entities who are financially involved with Usama Bin Laden, Al-Qaida and the Taliban.

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<sup>3</sup> UNSC Res 1267 (15 Octobre 1999) UN Doc S/Res/1267.

<sup>4</sup> Comparative Table Regarding the Security Council 1267 Committee, Counter-Terrorism Committee and 1540 Committee, < <http://www.un.org/sc/committees/1267/pdf/Comparative%20table.2009.06.22.%20-%20English.pdf> > .

<sup>5</sup> UNSC Res 1333 (19 December 2000) UN Doc S/Res/1333, UNSC Res 1390 ( 28 January 2002) UN Doc S/Res/1390, UNSC Res 1455 ( 17 January 2003) UN Doc S/Res/1455, UNSC Res 1526 ( 30 January 2004) UN Doc S/Res/1526, UNSC Res 1617 ( 29 July 2005) UN Doc S/Res/1617, UNSC Res 1735 ( 22 December 2006) UN Doc S/Res/1735, UNSC Res 1822 ( 30 June 2008) UN Doc S/Res/1822.

<sup>6</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

<sup>7</sup> Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated Individuals and Entities, < [http:// www.un.org/sc/committees](http://www.un.org/sc/committees) > .

<sup>8</sup> Named after Resolution 1267.

<sup>9</sup> UNSC Res 1267 (15 October 1999) UN Doc S/Res/1267, paragraph 6.

- Designate the aircrafts and funds or other financial resources which financially support Usama Bin Laden, Al-Qaida and the Taliban.
- Consider requests for exemptions from the measures imposed by paragraph 4 of Resolution 1267.
- Establish and maintain updated lists, based on information provided by States, regional and international organizations of all points of entry and landing areas for aircraft within the territory of Afghanistan under control by the Taliban and of individuals and entities designated as being associated with Usama Bin Laden<sup>10</sup>.

### **1.2.2 Travel ban and arms embargo**

The first measure to suppress the international terrorism, is mentioned in paragraph 4(a) of Resolution 1267 and is a combination of the travel ban and the arms embargo. The Security Council decided, that all States are obligated to deny permission for any airplane to take off or land in their territories, and to prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories of arms or related material of all types, spare parts, technical advice, assistance, or training related to military activities of persons and entities who are designated as 'associated with Usama Bin Laden, Al-Qaida or the Taliban'<sup>11</sup>. This is also known as the arms embargo. The only exception to this measure is when the Committee gives their approval to the specific flight on the ground of humanitarian need, which also includes the religious obligation, for example the Hajj.

The travel ban is the obligation for all UN Member States to prevent the entry into, or transit through their territories by individuals who are regarded as 'associated with Usama Bin Laden, Al-Qaida and the Taliban.

### **1.2.3 The freezing of funds and financial resources**

The second measure mentioned in paragraph 4(b) is the assets freeze. The Security Council decided that all States have the obligation to freeze the funds and financial resources of nationals or other persons within the territory of the States, to ensure that these funds and other financial resources will not be used for the benefit of the Taliban, unless the transaction is authorized by the Committee on the grounds of humanitarian need. The purpose of this measure is to deny listed individuals and entities the means to support terrorism<sup>12</sup>.

The last 10 years was a period of development of Resolution 1267. After Resolution 1267 was adopted, there were many comments about the vagueness of the terms and definitions

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<sup>10</sup> UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333, paragraph 16(a) and 16(b).

<sup>11</sup> Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated Individuals and Entities, < [http:// www.un.org/sc/committees](http://www.un.org/sc/committees) > .

<sup>12</sup> Assets Freeze: Explanation of terms paper on the assets freeze measure, < <http://www.un.org/sc/committees/1267/usefulpapers.shtml> > .

used in this resolution<sup>13</sup>. For example the comment on the sentence in paragraph 4 about the freezing of funds and financial resources of Usama Bin Laden, Al-Qaida, the Taliban and all persons or entities associated with them. The question was ‘when are persons or entities associated with Usama Bin Laden, Al-Qaida and the Taliban’?

Resolution 1617, paragraph 2 gives an answer to that question and specifies this sentence. An individual, group or entity is associated with Usama Bin Laden, Al-Qaida or the Taliban when:

- *They are participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;*
- *They supplying, selling or transferring arms and related material to;*
- *They recruiting for;*
- *They otherwise supporting acts or activities of;*

*Al-Qaida, Usama Bin Laden, the Taliban or any cell, affiliate, splinter group or derivative thereof.*

An individual, group or entity who undertakes one of these acts or activities will be designated as ‘associated with Usama Bin Laden, Al-Qaida or the Taliban and will be placed on the UN sanctions list, which will be discussed in the next paragraph.

### **1.3 UN sanctions list**

After being designated by the Committee as an associate of Usama Bin Laden, Al-Qaida or the Taliban, individuals and entities will be placed on the UN sanctions list. This list was first included in Resolution 1333 (2000) and has been developed in the subsequent resolutions. Paragraph 8(c) of Resolution 1333 first mention the obligation for States to freeze the funds and other financial assets of Usama Bin Laden and then the request to the Committee to maintain an updated list of the individuals and entities designated as being associated with Usama Bin Laden and Al-Qaida. This list consists of four sections; Individuals associated with the Taliban, individuals associated with the Al-Qaida network, entities and other groups and undertakings associated with the Taliban and entities and other groups and undertakings associated with the Al-Qaida network. Important to understand is that when an individual, entity, or other group is designated as ‘associated with’ and listed on the UN sanctions list, their funds and other financial resources will be frozen.

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<sup>13</sup> Bulterman 2006 p. 755.

The list is based on the information provided by States and international organizations. After the UN sanctions list is communicated to the Member States, the States are encouraged to circulate the list to banks and other financial institutions, border points, airports, seaports, consulates, custom agents, intelligence agencies, alternative remittance systems and charities<sup>14</sup>. The Committee Guidelines advise the Member States to submit names to the Committee as soon as they gather evidence of an association or supporting act of the Taliban, Usama Bin Laden or Al-Qaida<sup>15</sup>. To be included in the UN sanctions list it is not necessary that an individual or entity is convicted; inclusion in the sanctions list is a preventive measure just as the following measures, the assets freeze, the travel ban and the arms embargo. The basis for listing is the term 'associated with'. A person or group must be associated with Usama Bin Laden, Al-Qaida or the Taliban. If a State proposes a name of an individual or entity, this designating State must provide evidence which proves the association of an individual or entity with Usama Bin Laden, Al-Qaida or the Taliban. An individual or entity does not have to be a resident of the State which submits her, his or its name to the Committee. Further, States must provide a detailed statement of the case. In paragraph d, section 6 of the Committee Guidelines is stated that "the statement of case should provide as much detail as possible on the basis(es) for listing, including:

- (1) Specific findings demonstrating the association or activities alleged;
- (2) The nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.) and;
- (3) Supporting evidence or documents that can be supplied. States should include details of any connection with a currently listed individual or entity. States shall identify those parts of the statement of case that may be publicly released".

All the collected information by the Committee is coming from the Member States just as the proposals for listing an individual or entity, which makes the Committee an executive organization.

The procedure of listing is also laid down in the Committee Guidelines<sup>16</sup> and the specific resolutions. The Committee Guidelines contains the whole procedure of listing, requirements for the Member States and the tasks and mandate of the Committee. Briefly, Member States can submit names of individuals and entities to the Committee and for that they can use the coversheet of Resolution 1735(2006), which contains a standard form for listing submissions. Thereafter, the Committee will consider this information and decides if a person or group will

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<sup>14</sup> UNSC, 'guidelines of the Al-Qaida and Taliban Sanctions Committee: Guidelines of the Committee for the conduct of its work, section 5, paragraph c.

<sup>15</sup> UNSC, 'guidelines of the Al-Qaida and Taliban Sanctions Committee: Guidelines of the Committee for the conduct of its work, section 6, paragraph c.

<sup>16</sup> UNSC, 'guidelines of the Al-Qaida and Taliban Sanctions Committee: Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002, last update on 9 December 2008.

be placed on the sanctions list, or not. The Committee will be assisted by a Monitoring Team, which scrutinize the information submitted by States, about a nominated individual or entity and will advise the Committee in their decision. The nominated individual or entity will not be informed before their placement on the sanctions list. When the listing of a name on the sanctions list is confirmed to remain appropriate, the State of residence of the designated group or individual will be informed and encouraged to notify or inform the listed individual or group<sup>17</sup>. After the placement of the name and identity of an individual or entity, the updated list will be made promptly available on the website of the Committee and any modification of the list will be immediately communicated to the Member States through Notes Verbales and the United Nations Press Releases<sup>18</sup>.

Individuals, groups, entities and undertakings may submit a petition to request a review of their case. Such a de-listing request can be submitted directly to the Focal Point<sup>19</sup>. This procedure is described in section 7, paragraph g. During this procedure, the designating State and the State of residence or nationality of the petitioner are urged to review the request of de-listing. After this review both States must indicate whether they support or oppose the request of de-listing. After these consultations the Committee decides whether a name will be removed from the UN sanctions list. An individual, entity, undertaking or group can also submit a request for de-listing through her, his or their State of residence or nationality. This procedure is described in section 7, paragraph h. The State that receives the request for de-listing should review all relevant information and subsequently approach the designating State to seek additional information. Also the designating State may request additional information from the State of residence or nationality of the petitioner. The State of residence or nationality of the petitioner as well as the designating State can submit a request of de-listing to the Committee.

#### **1.4 Criticism on the UN sanctions regime**

The listing of individuals and entities on the UN sanctions list is a subject of the academic debate. Judicial author's criticize the UN sanctions regime with regard to the listing on the UN sanctions list and the freezing of financial assets of individuals and entities who are designated as 'associated with'. Bulterman<sup>20</sup> has doubts about the clarification of the term 'associated with' in Resolution 1617(2005). In this clarification the Security Council stated

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<sup>17</sup> UNSC, 'guidelines of the Al-Qaida and Taliban Sanctions Committee: Guidelines of the Committee for the conduct of its work, section 9, paragraph a, sub v.

<sup>18</sup> UNSC, 'guidelines of the Al-Qaida and Taliban Sanctions Committee: Guidelines of the Committee for the conduct of its work, section 5, paragraph b.

<sup>19</sup> To ensure a fair and clear procedure for placing and removing individuals and entities on/from the sanctions list, the Security Council established a Focal Point to receive de-listing requests. This Focal Point for De-listing is located in New York, as a part of the Security Council Subsidiary Organs Branch.

< <http://www.un.org/sc/committees/dfp/shtml> >

<sup>20</sup> Bulterman 2006, p. 755.

that 'associated with' also includes 'otherwise supporting acts or activities of Al-Qaida, Usama Bin Laden or the Taliban'. Bulterman is criticizing this vague criterion. As an example she is wondering if someone, wearing a t-shirt with the image of Usama Bin Laden, already can be designated as 'supporting the acts and activities of Usama Bin Laden, Al-Qaida and the Taliban'. Further, Bulterman is also criticizing the transparency of the sanction regime. The grounds for adding a person or group to the list are not public information<sup>21</sup>. There might be good reasons for this approach, but what about the legal certainty?

Also Dick Marty, member of the Parliamentary Assembly of the Council of Europe, is shocked by the execution of the UN sanctions regime. In his introductory memorandum<sup>22</sup> on UN Security Council black lists he is showing his astonishment by saying that "its frankly shocking that an international organisation whose purpose it is to affirm the principles of peace, tolerance and justice uses itself means that do not respect the fundamental principles at the base of any restriction of individual freedom in any civilised country: the right to be heard, the right to appeal to an independent tribunal, that to a fair trial and the principle of proportionality". This statement of Marty is the key point of the problem; while all means are allowed to suppress the international terrorism, fundamental rights are being violated. Or as Nettesheim<sup>23</sup> says in his paper, the debate is focused on the weighing of conflicting aims of protecting the individual rights versus the fight against international terrorism. However, the question is, which of those two international aims, weighs more.

Designated as an associate of Usama Bin Laden, Al-Qaida or the Taliban gives States the opportunity and obligation to freeze the funds of individuals and entities. Their quality of life becomes uncertain because they have no longer disposition over their financial resources. The main argument for depriving their financial assets is the ultimate aim of the international community, namely the suppressing of the international terrorism. However, does this sanctify the means? The following chapters will give an answer to that question.

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<sup>21</sup> Bulterman 2006, p. 756.

<sup>22</sup> Marty 2007, p. 2.

<sup>23</sup> Nettesheim 2007, p. 570.

## 2 European sanctions regime

### 2.1 Introduction

In May 2002 the Council of the European Union (hereafter: the Council) approved Regulation 881/2002<sup>24</sup>, which impose certain specific restricted measures directed against individuals and entities associated with Usama Bin Laden, Al-Qaida or the Taliban. The UN Security Council resolutions are its basis and the measures mentioned in Resolution 1267 and the subsequent resolutions are implemented in this regulation.

In this chapter, the regulations which form the framework of the European sanctions regime will be discussed and compared with the UN Security Council resolutions. Besides that, the complex relationship between the UN and the EU will be described and examined to find out if there are differences and similarities in their approach to suppress the international terrorism.

### 2.2 European sanctions regime: Regulation 2580/2001

The sanctions regime of the UN was followed in Europe. Also within the European Community there are two types of regimes. One is directed against terrorists and their supporters in general and the second one is directed against persons and entities who are financially supporting the acts of Usama Bin Laden, Al-Qaida or the Taliban. The basis for the regime of restrictive measures directed against terrorists in general, is Regulation 2580/2001<sup>25</sup>. This regulation has a broad scope, whereas the restrictive measures are directed against certain persons and entities who commit or attempt to commit terrorist acts, or who participate in or facilitate the commission of such acts. To create a sanctions regime against terrorists and the financing and supporting of terrorism the codecision procedure of Article 251 EC applies. The codecision procedure must be followed when reference is made in the EC Treaty to Article 251 EC for the adoption of an act. This procedure applies because the Council uses Article 301 EC as the basis for Regulation 2580/2001 and Article 301 EC contains in its last sentence, the obligation for the Council to use the codecision procedure, whereas there is stated that "The Council shall act by a qualified majority on a proposal from the Commission". This is typical for the codecision procedure of Article 251 EC.

As a result of the adoption of Resolution 1373 by the Security Council, the Council formulated common position 2001/930 en 2001/931<sup>26</sup> which stated that financial measures

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<sup>24</sup> Council Regulation (EC) 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 [2002] OJ L139.

<sup>25</sup> Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344.

<sup>26</sup> Council Common Position 2001/930/CFSP and Council Common Position 931/2001/CFSP. The Common Position is a component of the codecision procedure, article 251 of the EC Treaty. In article 15 of the EU Treaty is declared that common positions define the approach of the European Union to a particular matter of a

need to be taken against persons and entities who are (financially) involved with terrorism. Common positions 930 and 931 were followed by Regulation 2580/2001, which contains restrictive measures against certain persons and entities, to combat terrorism and includes a black list<sup>27</sup>. A common position of the Council is one of the steps, that can be taken in the codecision procedure. The formulation of a common position is the beginning of a process that may end with a regulation. In this matter, common position 930 and 931 ended with Regulation 2580/2001.

### 2.2.1 European sanctions regime: Regulation 881/2002

The regime of sanctions directed against individuals and entities which financially support the activities of Usama Bin Laden, Al-Qaida or the Taliban started with the adoption of Regulation 467/2001 and is more specific than Regulation 2580/2001. In the beginning, the restrictive measures mentioned in this regulation, were only directed against supporters of the Taliban and Afghanistan. Regulation 467/2001 was repealed by Regulation 881/2002 and this regulation, regulates the restrictive measures against certain persons and individuals who are associated with Usama Bin Laden, Al-Qaida and the Taliban<sup>28</sup> and includes also a black list.

The adoption of Regulation 881/2002 was a direct consequence of the adoption of Resolution 1390 of the UN Security Council. The Security Council decided to adjust the scope of the restrictive measures and expanded former resolutions 1267 and 1333 by directing the sanctions against not only the Taliban, but also against Usama Bin Laden and the Al-Qaida network. The Council did exactly the same with Regulation 467/2001 and created Regulation 881/2002 which imposes restrictive measures against certain persons and entities associated with Usama Bin Laden, Al-Qaida and the Taliban and repealed

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geographical or thematic nature. Member States must ensure that their national policies conform to the common position.

<sup>27</sup> This thesis is focussed on the sanctions regime of Regulation 881/2002 and its shortcomings. However, the sanctions regime of Regulation 2580/2001 is also not undisputed. The case of *Mujahedin-e Kalq v the Council of the European Union* is the first case about the legitimacy of the European sanctions regime directed against terrorists. See about this ruling of the Court of First Instance A.A.H. van Hoek and C.R.J.J. Rijken, 'Rechtsbescherming en het recht van verdediging bij plaatsing op de Europese terrorismelijst', 'De zaak Mujahedin-e Kalq v. De Raad', NTER-2007-12, p. 284-292.

<sup>28</sup> At first **Regulation 2580/2001** was adopted by the Council in order to impose restrictive measures against all terrorists and terrorist groups (Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344). Secondly, the Council adopted **Regulation 467/2001** which contains restrictive measures against persons and entities who are supporting the Taliban or Afghanistan (Council Regulation (EC) 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds or other financial resources, in respect of the Taliban or Afghanistan [2001] OJ L067). Regulation 467/2001 was repealed by **Regulation 881/2002** which imposes restrictive measures against persons and entities associated with Usama Bin Laden, Al-Qaida or the Taliban (Council Regulation (EC) 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 [2002] OJ L139).

former Regulation 467/2001. Preceding the adoption of Regulation 881/2002, the Council formulated a common position: Common position 402<sup>29</sup> applies to Usama Bin Laden, members of the Al-Qaida network, members of the Taliban or every other individual, group, undertaking or entity, associated with them according to the UN black list. This common position declares that there is an arms embargo (*article 2, sub 1*) for everyone who is associated with Usama Bin Laden, Al-Qaida or the Taliban, there is a travel ban (*article 2, sub 2*) for everyone who is listed on the UN sanctions list and there is an obligation for the European Community to freeze the funds and financial resources (*article 3*) of these individuals and entities. Regulation 881/2002 contains these three restrictive measures, directed against individuals and entities associated with Usama Bin Laden, the Al-Qaida network or the Taliban.

There are several reasons why the Council thinks these measures imposed by the UN, must be implemented on European level and not by every Member State itself. First, the Council believes that the execution of these measures fall under the scope of the Treaty of the European Community, namely Article 60, 301 and 308 EC<sup>30</sup>. Further, the Council believes that Community legislation is necessary to avoid distortion of competition<sup>31</sup>. According to the Council there is in this matter no place for subsidiarity<sup>32</sup>.

### **2.3 The European sanctions list**

The sanctions Committee of the UN established a list of persons and entities associated with Usama Bin Laden, Al Qaida and the Taliban, and so did the European Community. Regulation 881/2002 includes a list of persons and entities which funds and financial resources must be frozen. This list is exactly the same as the black list of the UN. To execute this list, Regulation 881/2002 stresses that every Member State needs to establish sanctions in case of infringement of the provisions of this regulation. The sanctions must be effective, proportionate and dissuasive. Thus, alongside the legislation on European level, national authorities also have to implement legislation which ensures that the provisions mentioned in Regulation 881/2002, like the freezing of assets, can be immediately executed. For that, Annex II provides a list of national authorities who are entitled to freeze the assets of persons and entities, which names are, listed in Annex I of Regulation 881/2002. Regulation 881/2002 delegates the competence of executing and controlling the sanctions list to the

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<sup>29</sup> Council Common Position 2002/402/CFSP.

<sup>30</sup> The explanation of these articles can be found in Chapter 3, paragraph 2.1 and 2.2.

<sup>31</sup> Paragraph 4 of Council Regulation (EC) 881/2002 of 27 May 2002.

<sup>32</sup> Paragraph 4 of Council Regulation (EC) 881/2002 of 27 May 2002. The principle of subsidiarity guarantees that decisions are made at the lowest possible level. Decision-making at European level is only allowed when this is more efficient than decision-making at domestic level.

European Commission<sup>33</sup>. To start with, the European Commission is authorized to amend or supplement Annex 1, based on the decisions of the Security Council or the Committee and to amend Annex II, when information, given by the Member States, requires that. Paragraph 5 of Regulation 881/2002 gives natural and legal persons, entities and bodies the obligation to cooperate with competent authorities mentioned in Annex II and to provide any information which would facilitate compliance with Regulation 881/2002 to the competent authorities of the Member States, in particular information about funds, financial assets or economic resources owned or controlled by persons designated by the Committee and listed in Annex 1 of Regulation 881/2002. Thus, Regulation 881/2002 emphasizes a smooth cooperation between the European Commission and the Member States. The regulation requires an interaction between these two, because they have to notify each other about relevant information at their disposal, especially information referred to paragraph 5 of Regulation 881/2002. Further, the European Commission cooperate with the competent authorities when information will be verified, and the directly received information by the Commission will be made available to the competent authorities of Annex II. So, paragraph 5 of Regulation 881/2002 shows a triangle of interaction between the European Commission, the competent authorities of the member states and the natural and legal persons, entities and bodies of the Member States. This interaction aims to facilitate the execution of the provisions of Regulation 881/2002, such as the freezing of all funds and financial resources belonging to, or owned or held by persons or entities designated by the Committee and listed in Annex I, and the prohibition not to make funds available for the benefit of persons and entities designated as associated with Usama Bin Laden, Al-Qaida or the Taliban<sup>34</sup>. Further, the European Commission have the task to maintain all necessary contacts with the Committee, without prejudice to the rights and obligations all Member States have under the Charter of the UN<sup>35</sup>. Thus, the European sanctions list is designed by the Council in their regulations, but is controlled and modified by the European Commission.

The European sanctions list is not undisputed. On the contrary, many individuals and entities disagree with the inclusion of their names on the black list and the followed procedures. This disagreement has led to several cases brought before the European Court of Justice (hereafter ECJ). One of these cases is the *Kadi* case; brought before the Court of First Instance (hereafter CFI) on 18 December 2001. The case of Kadi is special, because for the first time in the history of the European sanction regime, the ECJ came to the conclusion that the procedures, or rather the absence of procedures, followed by the European Commission and the Council, infringed the fundamental rights of the applicants.

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<sup>33</sup> Paragraph 8 and article 7(1) of Council Regulation (EC) 881/2002 of 27 May 2002.

<sup>34</sup> Article 2 of Council Regulation (EC) 881/2002 of 27 May 2002.

<sup>35</sup> Article 7(2) of Council Regulation (EC) 881/2002 of 27 May 2002.

## 3 Kadi

### 3.1 Introduction

On 18 December 2001 Yassin Abdullah Kadi from Saudi Arabia and Al Barakaat International Foundation established in Sweden, brought an action against the Council of European Union and the European Commission at the CFI. After the attacks of 9/11, both were being designated as “associated with Usama Bin Laden, Al-Qaida or the Taliban” by the Committee. The consequence was an inclusion of their names in the UN sanctions list. Because of the maintenance of the UN sanctions list by the Council, *Kadi* and *Al Barakaat* were also listed at the European sanctions list. They extended their original claim<sup>36</sup> on 28 June 2002 by requesting the annulment of Regulation 881/2002 on the following grounds: Violation of the right to a fair hearing, violation of the right to respect for property and of the principle of proportionality, and the violation of the right to effective judicial review<sup>37</sup>.

### 3.2 Kadi

On 19 October 2001 the Committee added the name of Yassin Abdullah Kadi to the UN sanctions list after designated by the Committee as being associated with Usama Bin Laden, Al-Qaida or the Taliban. Subsequently, by Commission Regulation 2062/2001 of 19 October 2001, amending Regulation 467/2001, Kadi's name was included in the European sanctions list. Regulation 2062/2001 amended Regulation 467/2001 for the third time. Everytime when the Committee designated individuals and entities as being associated with Usama Bin Laden, Al-Qaida or the Taliban, the European Commission is obligated by article 10 of Regulation 467/2001<sup>38</sup> to amend Annex 1, the so-called sanctions list. By doing that, the names of the individuals and entities designated by the Committee will be added to the EU sanctions list.

On 18 December 2001, *Kadi* brought an action against the Council and the Commission under Article 230 EC<sup>39</sup>, while he claimed that the Court should annul Council Regulations 2062/2001 and 467/2001 as so far as they were related to the applicant and he ordered that the Council and/or the Commission should pay the costs. After the adoption of Regulation

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<sup>36</sup> The original claim can be found in paragraph 37 of Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-03649.

<sup>37</sup> Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-03649, paragraph 59.

<sup>38</sup> The obligation for the Commission to amend the sanctions list, can now be found in article 8 of Regulation 881/2002, which repealed Regulation 467/2001.

<sup>39</sup> Article 230 EC gives any natural or legal person the right to institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former. The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

881/2002, *Kadi* extended his original claims and pleas in law to Regulation 881/2002 as the contested regulation, in so far as it concerned him.

Further, *Kadi* has put forward in his application three grounds of annulment alleging breaches of his fundamental rights. First the breach of the right to a fair hearing, secondly a breach of the right to respect for property and of the principle of proportionality and third, a breach of the right to an effective judicial review<sup>40</sup>. Hereafter, *Kadi* added a fourth ground to his application, namely the lack of competence of the Council to adopt the contested regulation and its sanctions. Later on, he withdrew this new ground of annulment. Yet, the CFI decided to consider of its own motion whether the Council was competent, or not.

### 3.2.1 Competence part I

The Council used Article 60 and Article 301 of the EC Treaty as the legal basis for the adoption of Regulation 881/2002 and the special sanctions used against individuals and entities designated as an associate of Usama Bin Laden, Al-Qaida or the Taliban, including *Kadi*, like the freezing of assets, the travel ban and the arms embargo. Article 60 provides in necessary situations, the possibility for the Council to take urgent measures on the movement of capital and on payments as regards third countries concerned. Necessary situations are described in Article 301. This article provides the opportunity for the Council to, when action by the Community is needed to interrupt or to reduce, in part or completely, economic relations with one or more third countries, take the necessary urgent measures. This is only possible in case of a common position or in a joint action adopted according to the provisions of the Treaty of European Union relating to the common foreign and security policy. In the *Kadi* case, legal questions arose, regarding the competence of the Community to adopt and implement sanctions directed against individuals and entities designated as associated with Usama Bin Laden, Al-Qaida or the Taliban, in other words, suspected terrorists<sup>41</sup>. In her case-note on the joined cases of *Kadi* and *Al Barakaat International Foundation*<sup>42</sup>, Maria Tzanou divided these questions in two categories. The first one is, can Article 60 EC and Article 301 EC serve as the legal basis for the adoption of measures that effect individuals, when these articles suggests that they authorise the Council to take measures against third countries only? In other words, is the Council really authorized to take measures against individuals, on the basis of Articles 60 and 301 EC, whereas these articles only provide action against thrid countries?

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<sup>40</sup> Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-03649, paragraph 59.

<sup>41</sup> Tzanou 2009, p. 128

<sup>42</sup> Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR II-03533.

Secondly, can the combination of Articles 60, 301 and 308<sup>43</sup> of the EC Treaty be a sufficient legal basis for the adoption of measures, like the freezing of financial assets of individuals and entities, when no link exists between them and the territory or the governing regime of a third country<sup>44</sup>?

The CFI decided regarding the issue whether the Council was competent to adopt the provisions in the contested regulation on the legal basis of Articles 60 EC, 301 EC and 308 EC, that the ground of annulment based on the alleged incompetence of the author of the contested regulation, is a matter of public policy and may therefore be considered by the Community judicature of its own motion<sup>45</sup>. After a long way of considerations regarding the legal basis of Regulation 467/2001 and later on Regulation 881/2002, the CFI decided that Articles 60 EC, 301 EC and 308 EC can be used as a legal basis for the contested regulation and their restrictive measures. They also decided that the Council was competent to adopt the restrictive measures directly affecting individuals or organisations, in so far these measures actually seek to reduce economic relations with one or more third countries<sup>46</sup>.

The Council observed that the measures provided for Regulation 467/2001, are conventionally known as 'smart sanctions'. After the attacks of 11 September 2001, the concept of terrorism got a new dimension. The Security Council invoked Chapter VII of the Charter of the United Nations, to adopt resolutions against terrorist organizations in order to freeze their assets and other measures. Normally, trade embargos are directed against a whole State. These kinds of sanctions give the Security Council the opportunity to not disadvantage the rest of the innocent population of a State, while they do not lose their effectiveness. Shortly, smart sanctions are more selective and targeted than the classic trade embargos against States<sup>47</sup>. Further, the Council noticed that Articles 60 EC and 301 EC allows the Council "to take restrictive measures against entities which or persons who physically controlled part of the territory of a third country and against entities which or persons who effectively controlled the government apparatus of a third country and also

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<sup>43</sup> Article 308 EC provides the possibility for the Council, to take appropriate measures, in operation of the Common market, one of the objectives of the Community, even when the EC Treaty has not provided the necessary powers. The procedure is as follows: After a proposal of the Commission, the Council unanimously take the appropriate measures, after consulting the European Parliament.

<sup>44</sup> Tzanou 2009, p.128.

<sup>45</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 61. This view comes from the Opinion of Advocate General Lagrange in Case 66/63 *Netherlands v High Authority* [1964] ECR 533 and the fact that the Community judicature can consider the competence of the Council on its own motion is decided in Case 14/59 *Société des fonderies de Pont-à-Mousson v High Authority* [1959] ECR 215, at p. 229; Case 19/58 *Germany v High Authority* [1960] ECR 225, at p. 233; Case 108/81 *Amylum v Council* [1982] ECR 3107, paragraph 28; Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraph 56; Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others v Commission* [1992] ECR II-315, paragraph 31, and Case T-182/94 *Marx Esser and Del Amo Martinez v Parliament* [1996] ECR- SC I-A-411 and II-1197, paragraph 44.

<sup>46</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 89.

<sup>47</sup> Janssens 2009, p. 1411-1412.

against persons and entities associated with them and who or which provided them with financial support”<sup>48</sup>. The CFI accepted this interpretation of the Council, because it is not in contrary with the object of Articles 60 EC and 301 EC. According to the CFI, this interpretation of Articles 60 EC and 301 EC, justifies both by effectiveness and by humanitarian concerns<sup>49</sup>. The CFI accepted this explanation of the Council regarding its interpretation of Articles 60 and 301 EC, and its use as a legal basis for the restrictive measures against individuals and entities associated with Usama Bin Laden, Al-Qaida or the Taliban. The CFI founded this explanation legitimate, although these specific Articles are primary directed against third countries. By this acceptance, the first question of competence was answered: According to the CFI, the Council is allowed to take restrictive measures against individuals and entities as well, based on Articles 60 EC and 301 EC.

The second question that arose, regarding the competence of the Council to adopt measures directed against individuals and entities during the *Kadi* case, about the connection between the suspected person or entity and the territory or governing regime of a third country, was answered by the Council and Commission as well as the CFI. The Council and the Commission declared that in the absence of a link between the taken sanctions with the territory or governing regime of a third country, Articles 60 EC and 301 EC did not constitute a sufficient legal basis for the adoption of the contested regulation<sup>50</sup>. Although those Articles provides that the Council may take the necessary urgent measures on the movement of capital and payments, and the fact that those provisions authorise the adoption of smart sanctions not only against a third country but also against the rulers of such country and the individuals associated with them<sup>51</sup>, the CFI ruled in this specific matter, that Articles 60 EC and 301 EC did not constitute a sufficient legal basis for the contested regulation. The CFI argued that when the governing regime of the third country in question has disappeared, the designated individuals and entities may still be targeted, and in these circumstances there would be no connection between those individuals or entities and a third country<sup>52</sup>.

However, in the end, the CFI concluded that the combination of the Articles 60 EC, 301 EC and 308 EC was legitimate, because of the interpretation of Article 308 EC by the Council. The Council argued that Article 308 EC, in conjunction with Articles 60 EC and 301 EC, gives them the power to adopt a Community regulation which is related to the battle against the financing of international terrorism conducted by the EU and its Member States, under the Common Foreign and Security Policy and imposing economic and financial sanctions against individuals, without ascertain any link with the territory or governing regime of a third

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<sup>48</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 90.

<sup>49</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 91.

<sup>50</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 94.

<sup>51</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 95-96.

<sup>52</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 96-97.

country<sup>53</sup>. According to the CFI this view must be accepted, whereas the Treaty of Maastricht explicitly mention the connection between the Community actions imposing economic sanctions under Articles 60 EC and 301 EC and the purposes of the Treaty of the European Union<sup>54</sup>. The legal basis of Article 308 EC is focused on the accomplishment of objectives of the EC, while the battle against terrorism is a purpose of the EU, which is mentioned in Article 2 of the EU Treaty, and is not mentioned in the list of objectives and activities of the EC Treaty<sup>55</sup>. However, Articles 60 EC and 301 EC are very special foundations, because of its ability to fill the gap between the first and the second pillar of the Treaty of Maastricht, namely the European Communities and the Common Foreign and Security Policy. In combination with Article 308, as an additional legal basis, the CFI decided that this construction to adopt economic and financial sanctions against individuals is legitimate, in case Articles 2 EC and 3 EC gives not enough necessary legal capacity to the Community regarding establishing economic and financial sanctions, and when the Community act for the purpose of attaining the objective pursued by the EU and its Member States under the Common Foreign and Security Policy<sup>56</sup>. Thus, in an situation where the Community has not enough legal powers, Articles 60 EC, 301 EC and 308 EC makes it possible to impose economic and financial sanctions against individuals or entities with no clear connection to a given third country, when its based on a objective pursued under the Common Foreign and Security Policy by the EU and its Member States<sup>57</sup>. Further, the CFI stated that the Community must be empowered to take such measures against individuals or entities, because of the fact that states can no longer be regarded as the only source of threats to international peace and security, but also associated persons, groups, undertakings or entities engaged in international terrorist activities<sup>58</sup>. Therefore, the CFI concluded that the Council did not widen the scope of Community powers and decided that Regulation 881/2002 should not be declared void.

### 3.2.2 Competence part II

By his appeal, Kadi claimed that the ECJ should declare the contested Regulation null and void. The ECJ considered that the CFI was correct in its vision that a bridge has been constructed between the actions of the Community involving economic measures under Articles 60 EC and 301 EC and the objectives of the EU. However, the provisions of the EC

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<sup>53</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 122.

<sup>54</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 123. The Treaty of Maastricht was established on 1 November 1993 and created the European Union, based on three pillars, namely, the European communities, the Common Foreign and Security Policy and the Police and Judicial Co-operation in Criminal Matters. At the same time the European Economic Community transformed into the current European Community.

<sup>55</sup> Van Ooik 2006, p. 233.

<sup>56</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 128.

<sup>57</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 129-130.

<sup>58</sup> Case T-315/01 *Yassin Abdullah Kadi* paragraph 133.

Treaty, nor the structure of this Treaty, provides support to the view that also other provisions, in particular Article 308 EC, fill this gap<sup>59</sup>. Further, the ECJ argued that Article 308 EC should relate to the “operation of the common market” and be intended attain one of the “objectives of the Community”<sup>60</sup>. The ECJ founded the interpretation of the CFI incorrect, because Article 308 EC does not make it possible for the Community to pursue an objective of the Common Foreign and Security Policy, when this construction would undermine the ‘constitutional architecture of the pillars, as intended by the framers of the Treaties’<sup>61</sup>. The ECJ stresses that the EU and the Community are integrated, but still separate legal orders and that widening the scope of Community powers ‘beyond the general framework created by the provisions of the EC Treaty’, would go against the principle of conferred powers<sup>62</sup>.

Regarding Articles 60 EC and 301 EC, the ECJ agreed with the conclusion of the CFI that the Council was allowed to include Article 308 EC in the legal basis of the contested regulation. To be applicable, Article 308 EC contains two conditions. Actions by the Community must be in the course of the operation of the common market and has to achieve one of the objectives of the Community. The ECJ concluded that both conditions were satisfied by stating that the common market might be damaged when every Member State had to take measures on their own and all these domestic legislation could create distortion of competitions, because any difference between the measures taken by the Member States could lead to the advantage or disadvantage of the competitive position of economic undertakings<sup>63</sup>. The second condition was fulfilled because, according to the ECJ ‘Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument’<sup>64</sup>, and that can be seen as ‘constituting an objective of the Community, for the purpose of Article 308 EC’<sup>65</sup>. Finally, the ECJ came to the conclusion that the joint basis of Articles 60 EC, 301 EC and 308 EC authorized the Council to adopt Regulation 881/2002, though on other legal grounds than the CFI. The ECJ believes that Article 308 EC can be used in combination with Articles 60 and 301 EC in order to impose restrictive measures, but only to achieve Community objectives.

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<sup>59</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 197.

<sup>60</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 200.

<sup>61</sup> Tzanou 2009, p. 130-131 and see also Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 201-202.

<sup>62</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 203. The principle of conferred powers implies that the EU can only act under the granted powers by the EU Member States. The EU has these powers to establish the objectives of the EC Treaty and the EU Treaty. The principle of conferred powers is included in Article 5 of the EC Treaty.

<sup>63</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* paragraph 230.

<sup>64</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 226.

<sup>65</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 227.

According to the ECJ in *Kadi*, the requirement of ‘achieving a Community objective’ is fulfilled: “Regulation 881/2002 could legitimately be regarded as designed to attain an objective of the Community and as, furthermore, linked to the operation of the common market within the meaning of Article 308 EC. Moreover, adding Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 EC and 301 EC, no role is provided for that institution”<sup>66</sup>.

### 3.3 Breach of human rights

The second claim in the *Kadi* case concerns the, according to *Kadi*, breach of human rights. He claimed that there has been a breach of three fundamental rights, namely the right to a fair hearing, the violation of the right to an effective judicial review and the violation of the right to property and of the principle of proportionality<sup>67</sup>.

The case of *Kadi* and *Al Barakaat* is interesting because the Council executed a resolution of the Security Council. Normally, the European Court of Justice only scrutinize the legislation and decisions based on Community law. In this case the CFI as well as the ECJ had to review a regulation of the Council which is a direct outcome of an international agreement. Thus, before the courts could even decide if the the fundamental rights were violated, the CFI as well as the ECJ had to decide whether they were competent to review the contested regulation, which gave effect to a Security Council resolution, before they started to review the alleged breaches of the right to a fair hearing, the right to have an effective judicial review and the right to property en the principle of proportionality. Both courts decided they had the competence to review Regulation 881/2002. The CFI considered that they were empowered to check indirectly the lawfulness of the resolutions with regard to *jus cogens*<sup>68</sup>, however the CFI also considered that the resolutions of the Security Council, in the light of Community law, fall outside the ambit of the Court’s judicial review. The ECJ decided that a Community court is authorized to determine a contradiction between a Community measure which gave effect to a resolution. The ECJ noted that “an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that the Court has, moreover, already held to form part of the very foundations of the Community”<sup>69</sup>. The ECJ also believes that when a Community court decides that a Community measure, which gives effect to a resolution, is contrary to the fundamental rights and the general principles of law of the

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<sup>66</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 235.

<sup>67</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 139.

<sup>68</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 226.

<sup>69</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 282.

Community, this decision does not entail the undermining of the primacy of that resolution and the international law<sup>70</sup>. According to the ECJ, such a judgement would not entail any challenge to the primacy of that resolution in international law<sup>71</sup>, because the court had to review the lawfulness of the Community measure and not the implemented resolution<sup>72</sup>.

### 3.3.1 Right to a fair hearing

According to the Human Rights Council, key aspects of the right to a fair trial are essential to respecting the human rights, while countering terrorism<sup>73</sup>. This paragraph will outline a legal framework about the right to a fair hearing, by examining the following Articles regarding the right to a fair hearing or in other words, the right to a fair trial. Later on, this framework will be compared with the procedure of freezing assets by the Council after the ruling of the ECJ in the case of *Kadi and Al Barakaat*. The purpose is to detect whether or not the new Council Regulation 1286/2009 repealing Regulation 881/2002 is improved on the subject of the fundamental rights.

The right to a fair hearing is included in:

- Article 6 of the European Convention on Human Rights (ECHR);
- Article 14 of the International Convention on Civil and Political Rights (ICCPR) and;
- Article 10 of the the Universal Declaration of Human Rights (UDHR).

These three Articles, all emphasizes the importance of a public and fair hearing by a competent, independent and impartial tribunal which is established by law. In several cases, the European Court of Human Rights (later: ECtHR) explained the content of a fair hearing. In the case of *Fischer v Austria*<sup>74</sup> the Court noted that a public hearing also includes the right to an oral hearing and in *Weber v Switzerland*<sup>75</sup> the Court considered that the right to a fair and public hearing also implies the right to be actually heard, and when there is no hearing at all, there is a breach of Article 6 paragraph 1.

### 3.3.2 Presumption of innocence

The presumption of innocence is a basic requirement for a fair hearing. Everyone charged with a criminal charge shall be presumed innocent until the guilt is proved according to law. To benefit the rights of Article 6 ECHR and Article 14 ICCPR, there must be a 'criminal charge'. The ECtHR created in *Öztürk*, three criteria to detect a criminal charge. First, the committed offence must belong to the legal system of the responding state. Subsequently,

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<sup>70</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 288.

<sup>71</sup> Joined Cases C-402/05 P and C-415/05 P (summary of the judgement), *Kadi and Al Barakaat*, paragraph 4.

<sup>72</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 286.

<sup>73</sup> UNHCR 'Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism' (HR/PUB/03/1).

<sup>74</sup> ECHR *Fischer v Austria* (App no 16922/90) 26 April 1995, paragraph 44.

<sup>75</sup> ECHR *Weber v Switzerland* (App no 11034/84) 22 May 1990, paragraph 39.

there must be looked at the nature of the offence and thereafter the nature and the degree of severity of the penalty the person in question is risking, must be examined<sup>76</sup>. When such a charge is determined, the accused must be presumed innocent until he is proved guilty according to law. This principle distinguishes several aspects, like the right to be treated as an innocent individual and the accused does not need to prove his innocence<sup>77</sup>. The presumption of innocence can not only be violated by a judicial authority, but also by other public authorities. In *Alenet de Ribemont* the ECtHR stated that the presumption of innocence is violated when a judicial decision is based on the opinion that a person charged with a criminal offence is guilty before he is proved guilty according to law and noted that the scope of this principle is not limited to only a judge of a court, but that it also concerns other public authorities<sup>78</sup>.

An other aspect of the presumption of innocence is the right to not incriminate yourself, *Nemo tenetur prodere se ipsum*, which basically means that an accused has the right to remain silence and is not obligated to provide material which could incriminate himself<sup>79</sup>.

### 3.3.3 The minimum guarantees for a fair hearing

Paragraph 3 of Article 6 ECHR and of Article 14 ICCPR contains minimum guarantees for a fair hearing. These guarantees are specified by the ECtHR and the Human Rights Committee<sup>80</sup>. This paragraph will outline the minimum standards for a fair hearing supplemented with the jurisprudence of the ECtHR on the subject of Article 6 ECHR and the opinion of the Human Rights Committee on the subject of Article 14 ICCPR.

Firstly, paragraph 3(a) provides that every individual must, in full equality, be informed promptly and in detail about the nature and the cause of the charge against him<sup>81</sup>. In *Pélissier and Sassi*<sup>82</sup>, the ECtHR notified that it's essential to give a defendant full and detailed information concerning the charges against him and consequently the legal characterisation which the court might adopt in that matter. The term 'promptly' is explained by the Human Rights Committee in their General Comment on 'the equality before the courts and the right to a fair and public hearing by an independent court established by law, Article

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<sup>76</sup> ECHR *Öztürk v Germany* (App no 8544/79) (1984) Series A no 73, 28 September 1999, paragraph 50.

<sup>77</sup> Hartevelde 2004, p. 105.

<sup>78</sup> Hartevelde 2004, p. 106; ECHR *Alenet de Ribemont* (App no 15175/89) 10 February 1995, paragraph 35-36.

<sup>79</sup> See: ECHR *Funke v France* (App no 10828/84) 25 February 1993; ECHR *Saunders v The United Kingdom* (App no 19187/91) 17 December 1996.

<sup>80</sup> The Human Rights Committee finds its mandate in Article 28 of the International Covenant on Civil and political Rights. This Committee is a body of independent experts which monitors the implementation of the Covenant by its State parties and also publishes its interpretation of the content of human rights provisions through General Comments.

<sup>81</sup> See Article 6 paragraph 3(a) ECHR, Article 14 paragraph 3(a) (ICCPR).

<sup>82</sup> ECHR *Pélissier and Sassi v France* ( App no 25444/94) 25 March 1999, paragraph 52.

14 ICCPR<sup>83</sup>. The Human Rights Committee notes in paragraph 8 that “the right to be informed of the charge ‘promptly’ requires that information is given in the manner described as soon as the charge is first made by a competent authority”. In the opinion of this Committee this right must arise when in the course of an investigation, a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based”.

Further, paragraph 3 (b) of the ECHR and the ICCPR stresses that everyone charged with a criminal offence must have the adequate time and facilities for the preparation of his defence. This paragraph indirectly shows us the right of a sufficient defence. The Human Rights Committee notes in its General Comment that the explanation of ‘adequate time’ depends on the circumstances of the case. The interpretation on ‘adequate facilities’ is more detailed. In their opinion ‘facilities’ must include the access to documents and other evidence which the suspect demands to use for the preparation of his defence, and furthermore the accused must have the opportunity to engage and communicate with a legal counsel<sup>84</sup>. The ECtHR also attempted to specify this subparagraph. Relevant to this thesis, is the ruling in the *Edwards*<sup>85</sup> case. The Court noted that a case file not necessarily contains all the relevant information and recognizes that Article 6 ECHR also recommends that the competent authorities disclose other relevant information, if requested by the accused<sup>86</sup>. However, the right to disclose relevant information is not an absolute right. There is the opportunity to restrict this right, when the protection of the national security or vulnerable witnesses has priority. The Court stresses that it’s sometimes necessary to withhold certain evidence, to protect the human rights of another individual or to protect an important public interest<sup>87</sup>. Paragraph 3(c) of the ECHR and paragraph 3(d) ICCPR directly refers to the right of defence. In these paragraphs is stated that everyone, charged with a criminal offence, has the right to defend himself in person or through legal assistance. The Human Rights Committee stresses that an accused or his lawyer must have the right “to act dilligently and fearlessly all available defences”. Further, they notify that paragraph 3(d) of the ICCPR contains the right to challenge the conduct of the case if the accused and his lawyer believe it to be unfair<sup>88</sup>. According to the ECtHR every measure that is restricting the right of the defence, should be absolutely necessary and if a less restrictive measure is sufficient, then that measure must

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<sup>83</sup> UNHCR, ‘equality before the courts and the right to a fair and public hearing by an independent court established by law (Art.14)’, CCPR General Comment no. 13, 13 April 1984.

<sup>84</sup> UNHCR, CCPR General Comment no 13, paragraph 9.

<sup>85</sup> ECHR *Edwards v the United Kingdom* (App no 13071/87) 16 December 1992.

<sup>86</sup> ECHR *Edwards v The United Kingdom*, paragraph 36.

<sup>87</sup> Harteveld 2004, p. 127; ECHR *Jasper v United Kingdom* (App no 27052/95) 16 February 2000, paragraph 52.

<sup>88</sup> UNHCR, CCPR General Comment no 13, paragraph 11.

be applied<sup>89</sup>. In *Pakelli*, the ECtHR decided that when a domestic court refuses to provide an offender with a defence counsel, the specific court will then deprives the offender, during the oral stage of the proceedings, of his opportunity to influence the outcome of the case<sup>90</sup>. Although it's not absolute, everyone charged with a criminal offence has the right to be effectively defended by a lawyer. According to the ECtHR this right is one of the fundamental features of a fair trial<sup>91</sup> and an offender does not lose the benefit of this right by not being present at the trial. The right of a legal counsel does not only exist during a hearing. In *Imbrioscia*<sup>92</sup> the ECtHR points out that the rights included in Article 6 ECHR, may be relevant before a case goes to court, if there is a reasonable chance that the fairness of a trial can be seriously impaired.

Thereupon, the next subparagraph both in the ECHR (d) as well as the ICCPR (e) contains the right to 'examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. A key point of a fair hearing is that the accused is able to defend him against the evidence and besides that he should have the opportunity to supply evidence that works in his advantage<sup>93</sup>. One of the most 'famous' cases on this matter is the case of *Kostovski v The Netherlands*<sup>94</sup>. The ECtHR considered that "all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument", and noted that the right of paragraph 3(e) of Article 6 "require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or in a later stage of the proceedings"<sup>95</sup>. The Human Rights Committee also made a statement on this particular part of the right of a fair and public hearing. In its General Comment on Article 14 ICCPR, the Human Rights Committee underscored that this provision is designed to guarantee the accused the same legal powers of compelling the attendance of a witness and of examining any witness as are available to the prosecution<sup>96</sup>, in other words there must be an equality of arms. This principle contributes to the equality between the offender and the prosecution and implies that in the different stages of a trial, both parties should have an equivalent position: the accused must have the same opportunities as the prosecution<sup>97</sup>.

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<sup>89</sup> ECHR *Van Mechelen and others v The Netherlands* (App no 21363/93; 21364/94; 21427/93; 22056/93) 23 April 1997, paragraph 58.

<sup>90</sup> ECHR *Pakelli v Germany* (App no 8398/78) (1983) Series A no 64, 25 April 1983, paragraph 39.

<sup>91</sup> ECHR *Poitrimol v France* (App no 14032/88) 23 November 1993, paragraph 34.

<sup>92</sup> ECHR *Imbrioscia v Italy* (App no 13972/88) 24 November 1993, paragraph 36.

<sup>93</sup> Hartevelde 2004, p. 116.

<sup>94</sup> ECHR *Kostovski v The Netherlands* (App no 11454/85) 20 November 1989.

<sup>95</sup> ECHR *Kostovski v The Netherlands*, paragraph 41; ECHR *Unterpertinger v Austria* (App no 9120/80) 24 November 1986, paragraph 31.

<sup>96</sup> UNHCR, CCPR General Comment no 13, paragraph 12.

<sup>97</sup> Kulk 2008, p. 74.

The last subparagraph of Article 6 ECHR and subparagraph f of Article 14 ICCPR provides the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court. In principle, this right is applicable during a trial before a court. However, the ECtHR determined that this right of free assistance is also applicable during the pre-trial and on the translation of all the documents and statements the accused must understand to have a fair trial<sup>98</sup>. The Human Rights Committee stresses in its General Comment that when there is an ignorance of the language or difficulty in understanding, this could constitute an obstacle to the right of defence. Hence, it's important to provide a free interpreter in case of unfamiliarity with the language used in court<sup>99</sup>.

### 3.3.4 Right to an effective remedy

*Kadi* did not only claim a breach of the right to a fair hearing, but he also claimed that his right to an effective judicial review was violated. Therefore, this paragraph will show the standards concerning the right to an effective judicial review.

The right to an effective judicial review is deposited in Article 6 ECHR and Article 13 ECHR. Article 13 of the ECHR contains the right to an effective remedy before a national authority, when rights and freedoms as set forth in the ECHR are violated. In *Johnston*<sup>100</sup> the ECJ stipulated that judicial control reflects a general principle of Community law which underlies the constitutional traditions common to the member states, and that this principle is also laid down in Article 6 and Article 13 of the ECHR. The right to an effective remedy before a national court obligates States to provide effective legal protection. When someone claims that his or her right to an effective judicial remedy is violated, it is not required that there is already a determined violation of one of the rights or freedoms as set forth in the ECHR<sup>101</sup>.

### 3.3.5 Right to respect of property

The right to property is laid down in Article 1 of Protocol No. 1 to the ECHR. This article prescribes that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except for the public interest and subject to the conditions provided for by law and by the general principles of international law". Surprisingly, the right to property is not mentioned in the ICCPR neither in the UDHR. The right to property protects the possessions of individuals and legal persons against the

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<sup>98</sup> ECHR *Luedicke, Belkacem and Koç v Germany* (App no 6210/73; 6877/75; 7132/75) 28 November 1978, paragraph 43; ECHR *Kamasinski v Austria* (App no 9783/82) 19 December 1989, paragraph 74.

<sup>99</sup> UNHCR, CCPR General Comment no 13, paragraph 13.

<sup>100</sup> Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, reference for a preliminary ruling by the Industrial Tribunal of Belfast (Northern Ireland) [1986] ECR I-1651.

<sup>101</sup> ECHR *Klass and others v Germany* (App no 5029/71 Series A vol. 28) 6 September 1978. See also T. Barkhuysen and M. L. Van Emmerik, 'Rechtsbescherming bij schending van het EVRM: betere (samen)werking van Straatsburgse en Nederlandse instanties gewenst,' NJCM-Bulletin 1998 vol. 23-6.

interference of a State<sup>102</sup>. However, according to Article 1 of the first Protocol, every Member State is allowed to control the use of property and a State can even deprive an individual or legal person from its possessions. This may only happen in accordance with the general interest or for the payment of taxes or other contributions or penalties, and in accordance with the principle of proportionality. In case of a deprivation of property, there must exist a fair balance between the fundamental rights of the individual or legal person and the public interest<sup>103</sup>. Further, there must be a reasonable relationship of proportionality between the pursued aim and the measure of depriving an individual or legal person of his, her or its possession<sup>104</sup>. The right to property is not an absolute right, given the possibility for States to control or deprive it. States have a broad discretion, also known as the margin of appreciation. According to the handbook of human rights on the right to property, the scope of this margin of appreciation depends on the case, the nature of the guaranteed right of the ECHR, the nature of the legitimate aim which caused the interference and the intensity of this interference<sup>105</sup>.

### **3.3.6 Summary of the framework**

Article 6 of the ECHR and Article 14 of the ICCPR both provides a handhold for a fair and public hearing. In the first paragraph is stated that everyone is entitled to have a fair and public hearing by a competent, independent and impartial tribunal. This provision also includes the right to an oral hearing and the right to be actually heard. The rights, mentioned in these Articles only apply when a 'criminal charge' is determined.

The second paragraph of both Articles shows the right to be presumed innocent before the guilt is proved according to law. This principle contains several aspects, including the right not to incriminate yourself and the right to remain silence. In principle, the presumption of innocence concerns a judge or a court. However, the scope of this principle is extended by the ECtHR resulting that also other public authorities must presume an accused innocent, until the guilt is proved by law.

The last paragraph of Article 6 ECHR and the third paragraph of the ICCPR provide minimum guarantees for a fair and public hearing. Paragraph A contains the right to be informed promptly. Inform must happen as soon as the charge is made by a competent authority or when a judicial authority decides to take procedural steps. Paragraph B shows the right to have the adequate time and facilities for the preparation of the defence.

'Adequate time' depends on the circumstances of the case and adequate facilities also

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<sup>102</sup> Grgić 2001, p. 5.

<sup>103</sup> ECHR *Former king of Greece and others v Greece* (App. no 25701/94) 23 November 2000, paragraph 89.

<sup>104</sup> ECHR *Pressos Compania Naviera S.A. and others v Belgium* (App. no 17849/91) 20 November 1995, paragraph 38.

<sup>105</sup> Grgić 2001, p. 15.

include the right to have access to all relevant documents or other evidence outside the case file. Competent authorities should disclose all these other relevant material. However this is not an absolute right. In paragraph C the right of defence is described. To be effectively defended by a legal counsel, is one of the fundamental features of a fair trial and this right is also applicable during the pre-trial if there is a reasonable chance that the fairness of a trial can be seriously impaired. Further, paragraph D (paragraph E of the ICCPR) contains the right to examine witnesses or examine witnesses who are already examined under the same conditions as the prosecution. This provision is designed to guarantee the accused the same legal powers of compelling the attendance of a witness and of examining any witness as are available to the prosecution. There must be an equality of arms.

Paragraph 6(e) ECHR and paragraph 14(f) ICCPR provides the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court. If there are difficulties with the understanding of the language used in court or during the pre-trial, this could constitute an obstacle for the right of defence, therefore it's important to provide a free interpreter to translate all documents and statements during a trial, but also when there are difficulties in understanding before the case goes to court.

The right to an effective judicial review is a general principle of law. The ECJ recognized that the principle of an effective judicial review is laid down in Articles 6 and 13 ECHR.

The right to property is laid down in Article 1 of Protocol no. 1 to the ECHR. Every natural or legal person is entitled to have peaceful enjoyment of his possessions. However, States are allowed to control or deprive property, but only when for the public interest or for the payment of taxes, penalties or other contributions. Such a deprivation must be proportionate; a fair balance between the demands of the general interest of the Community and the requirements of the protection of the fundamental rights of the individual or legal person. States have a broad margin of appreciation regarding the right to property.

### **3.4 CFI v ECJ on the subject of the alleged breach of human rights**

Kadi and Al Barakaat complained about the procedure followed by the Council and the European Commission. In their opinion they had the right to protection of their property, the right to be heard before a sanction will be executed and the right of an effective judicial review. This paragraph will first show the opinion of the CFI regarding the alleged breach of the specific human rights and secondly the opinion of the ECJ regarding this issue will be set forth. After the exposition of the judgements of both courts, the next chapter shall show what happened after the judgement in the case of Kadi.

### 3.4.1 CFI: no violation of the right to property

The CFI first stated that they did not have the jurisdiction to review the lawfulness of the decision to freeze the assets of associates of Usama Bin Laden & Co, to the standard of protection of fundamental rights: Not on the grounds of international law neither on the basis of Community law<sup>106</sup>. As been said, the CFI concluded that it did had the jurisdiction to review the lawfulness of the Security Council resolutions in question, with regard to *jus cogens*, because these higher rules of law are binding on all subjects of international law, from which no derogation is possible<sup>107</sup>. The CFI appoints to the Charter of the United Nations, which stresses the importance of the protection of the fundamental rights of the human person, and the CFI concluded that there exists one limit to the principle that Security Council resolutions have always binding effect, and that limitation are the ‘fundamental peremptory provisions of *jus cogens*’<sup>108</sup>. Anyhow, the CFI concluded that there has not been a breach of the right to property, measured by the standard of universal protection of fundamental rights covered by *jus cogens*, and that the freezing of assets of Kadi did not had the purpose to submit him to inhuman or degrading treatment<sup>109</sup>. If that would be the case, the situation would be different and such ascertainment could have lead to a different ruling of the CFI. Further, the CFI concluded that *Kadi* has not been arbitrarily deprived of his right to property, because the freezing of assets constitutes an aspect of the sanctions decided by the Security Council<sup>110</sup>; because the CFI stressed the importance of the fight against international terrorism<sup>111</sup>; because the objective of the sanctions have a significantly importance, whereas these sanctions pursue an objective of fundamental public interest for the international community<sup>112</sup>; because the freezing of funds is a temporary precautionary measure which only affect the use of the financial assets and not the very substance of the right to property<sup>113</sup>; because the regime of sanctions, laid down in the specific resolutions contain the oppurtunity to be reviewed after a certain period<sup>114</sup>; and because Regulation 881/2002 provides a provison which give the persons concerned the possibility to present their case to the Committee for review, through the Member State of their nationality or that of their residence<sup>115</sup>.

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<sup>106</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 221.

<sup>107</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 226.

<sup>108</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 228-230.

<sup>109</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 238-240.

<sup>110</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 244.

<sup>111</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 245.

<sup>112</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 247.

<sup>113</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 248

<sup>114</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 249.

<sup>115</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 250.

### 3.4.2 CFI: No violation of the right to be heard

Subsequently, the CFI gave her opinion about the alleged breach of the right to be heard. The CFI drew a distinction between the right of *Kadi* to be heard by the Council with regard to Regulation 881/2002 and the right to be heard by the Committee concerning his inclusion in the list of persons whose funds must be frozen<sup>116</sup>. According to Article 6 ECHR and Article 14 ICCPR everyone on whom a penalty may be imposed, must have the opportunity to reveal his views on the evidence and to defend himself. This is a fundamental principle of Community law and must be guaranteed. Nevertheless, the CFI decided that the arguments of *Kadi* concerning the alleged violation of the right to be heard by the Council concerning the adoption of Regulation 881/2002 must be rejected, whereas the resolutions of the Security Council did not authorized the Council to provide for any Community mechanism which could scrutinize the situations of individuals. Such mechanism fell under the purview of the Committee and the Security Council, with the following consequences: 'The institutions of the Community had no power of investigation, they did not had the opportunity to check the matters taken to be facts by the Security Council and the Committee, they had no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants'<sup>117</sup>. The CFI stressed that there is a relation between the respect for the procedural rights guaranteed by the Community legal order and the exercise of discretion by the authority. Because the Council did not have any discretion, the Council was not obliged to hear Mr. Kadi about his inclusion in the European sanctions list, 'in the context of the adoption and implementation of the contested regulation'<sup>118</sup>. In my opinion the judgement of the CFI is short-sighted. Firstly, the CFI confirmed the importance of the right to be heard and accepted it as a fundamental principle of the Community legal order and subsequently, this principle is set aside by simply stating that the Council did not had the competence to review the sanctions against the applicants. This might be the case, but individuals already had the opportunity to institute proceedings against a decision of the Commission or the Council through Article 230 EC. Besides that, the fact that the EU is not a member of the UN which implies that the Council is not obligated to accept and carry out the decisions of the Security Council, should have encourage the CFI to gave a less easier commentary on the arguments of applicant.

Regarding the alleged violation of the right to be heard by the Committee, the CFI concluded that the particular resolutions do not provide such a right. The CFI did refer to the possibility to use the re-examination mechanism of the Committee and confirmed that this mechanism also does not provide the opportunity for individuals to be heard in person.

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<sup>116</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 254.

<sup>117</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 258.

<sup>118</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 259.

### **3.4.3 CFI: No violation of the right to an effective judicial remedy**

Finally, the CFI deals with the alleged breach of the right to an effective judicial review. The CFI confirmed that there was no judicial remedy available to the applicant, whereas the Security Council did not establish an independent international court, which would be responsible for ruling on actions against decisions taken by the Committee<sup>119</sup>. However, again the CFI reviews this alleged breach in the context of the norms of *jus cogens* and again the CFI came to the conclusion that on this matter there was no clash with the *jus cogens* norms and the CFI decided that there was no need for annulment of Regulation 467/2001 and dismissed the action against Regulation 881/2002 which repealed Regulation 467/2001.

### **3.4.4 ECJ: Violation of fundamental rights**

The ECJ had a different approach than the CFI in the *Kadi* case. First, the ECJ stated that every legislation of Community institutions must be fully reviewed by the Court, even when this legislation give effect to a resolution of the Security Council<sup>120</sup>, where the CFI only indirectly reviewed the lawfulness of the contested regulation. So, *Kadi* scored his first point in his battle against the European Commission and the Council. The next challenge for the ECJ was to decide on the matter of the alleged breach of human rights. The Court notified that all acts of the Community must respect the human rights and goes even further by stating that the 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty which include that all Community acts must respect the fundamental rights, that respect constituting a condition of their lawfulness'<sup>121</sup>.

### **3.4.5 ECJ: Violation of the right to an effective judicial remedy and the right to be heard**

Regarding the alleged breach of the right of the defence, particular the right to an effective judicial review, the ECJ firstly stressed that the principle of an effective judicial protection is a general principle of Community law and is a part of the constitutional traditions of the European Community and its Member States. An effective judicial review implies in this matter that the reasons of an inclusion on the sanctions list must be communicate to the person or entity in question<sup>122</sup>. Even though the ECJ recognizes that the measures of Regulation 881/2002 and the particular resolutions of the Security Council must have a

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<sup>119</sup> Case T-315/01 *Yassin Abdullah Kadi*, paragraph 285.

<sup>120</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 278.

<sup>121</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 285.

<sup>122</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 336.

“surprise effect”, the Court held that restrictive measures as imposed in Regulation 881/2002 cannot escape from the review of the Community judicature ‘once it has been claimed that the act laying them down concerns national security and terrorism’<sup>123</sup>. In other words, also measures that supposed to be protect the security and safety will be judicial reviewed by the Community judicature, such considerations of security cannot justify a system whereat legal security loses its value<sup>124</sup>. Further, the ECJ noticed that the contested regulation did not provide a procedure for communicating the evidence, which justified the inclusion of persons and entities on the European sanctions list neither a procedure for hearing those who are included<sup>125</sup>. The absence of such a procedure and the result of that absence, namely the impossibility for the appellants to make their point of view, made the ECJ decide that the right of the defence, in particular the right to be heard was not respected<sup>126</sup>. Besides that, the Court agreed with the appellants on the fact that they could not, given the failure to inform them on the evidence, execute their right to an effective legal remedy. *Kadi and Al Barakaat* could not dispute the evidence, because the reasoning of the inclusion on the sanctions list was not communicated to them. Hence, the ECJ held that also the right to an effective legal remedy was infringed<sup>127</sup>. In paragraph 352, the ECJ again stipulates the violation of the right to be heard and the right to an effective judicial remedy. The Court argued that the contested regulation is adjusted without the guarantee to be informed about neither the listing nor the right to be heard after an inclusion in Annex 1 of Regulation 881/2002. According to the ECJ, the absence of such rights violates the right to be heard as well as the principle of effective judicial protection.

### **3.4.6 ECJ: Violation of the right to property**

*Kadi* claimed that the freezing of his financial resources violated his right to respect of property. According to the ECJ, the right to respect of property is a general principle of Community law. However, the Court recognized that this right does not have an absolute character<sup>128</sup>, which implies that the possibility exists to restrict this right, if such a restriction corresponds with the public interest. In this matter, the public interest is obvious, namely the suppressing of the international terrorism and to safeguard the international peace and security. With reference to this matter of public interest, the ECJ noted that the assets freeze cannot be regarded as inappropriate or as disproportionate<sup>129</sup>. However, at the end of its argumentation, the Court did conclude that the right to respect to property was infringed.

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<sup>123</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 343.

<sup>124</sup> Janssens 2009, p. 1423.

<sup>125</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 345.

<sup>126</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 348.

<sup>127</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 349.

<sup>128</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 355.

<sup>129</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 363.

Although the ECJ first held that the assets freeze is, in principle, a justified restrictive measure<sup>130</sup>, the circumstances of the *Kadi* case made the Court decide that there has been a violation of this particular right. By circumstances the Court referred to the general application and actual continuation of the freezing measures, but most of all the lack of the possibility for *Kadi* to put his case to the competent authorities<sup>131</sup>.

### 3.4.7 Annulment of Regulation 881/2002

Whereas the ECJ ruled that there has been a breach of the right to be heard, the right to an affective judicial remedy and the right to respect to property by executing Regulation 881/2002, the ECJ declared that the contested regulation must be annulled<sup>132</sup>. Besides that, the ECJ sets aside the judgements of the CFI and decided that the effects of Regulation 881/2002 will be maintained in so far as they concerned *Kadi* and *Al Barakaat*, for a period with a maximum of three months, from the date of the delivery of the judgment in the *Kadi* case<sup>133</sup>. The reason for this maintenance is to give the Council the opportunity to repair the shortcomings of Regulation 881/2002. Furthermore, the ECJ acknowledged that an immediate annulment of the contested regulation could 'seriously prejudicing the effectiveness of the restrictive measures' and although the contested regulation was annulled, because of the violation of general principles of Community law, this does not mean that the imposition of the restrictive measures on *Kadi* and *Al Barakaat* can never prove to be justified<sup>134</sup>.

The approach of the CFI is entitled as daring<sup>135</sup> and less modest<sup>136</sup>, but the reasoning of the ECJ had better results in the light of the protection of the fundamental rights, namely the annulment of Regulation 881/2002 as so far it concerned Mr. Kadi and the Al Barakaat International Foundation. In Chapter 1 the question arose which weighs more: The fight against terrorism or the protection of fundamental rights? The ECJ gives primacy to the protection of fundamental rights, even though the Court only gave attention to the followed procedures and not the content of the fundamental rights<sup>137</sup>.

After the ruling in the *Kadi* case, the effective protection of the fundamental rights is further developed in subsequent cases before the European Court of Justice. In the joined cases of *Hassan and Ayadi*<sup>138</sup> and the case of *Othman*<sup>139</sup>, the CFI as well as the ECJ constitute the

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<sup>130</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 366.

<sup>131</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 369.

<sup>132</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 372.

<sup>133</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 380.

<sup>134</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, paragraph 374.

<sup>135</sup> Rijken 2009, p. 142.

<sup>136</sup> Janssens 2009, p. 1425.

<sup>137</sup> Rijken 2009, p. 142.

<sup>138</sup> Joined Cases C-399/06 P and C-403/06 P, *Hassan and Ayadi v Council of the European Union and the Commission of the European Communities* (3 December 2009).

judgement of the ECJ in the *Kadi* case. Again a breach of the right to be heard, the right to an effective remedy and the right to property was determined. *Hassan, Ayadi and Othman* claimed the annulment of Regulation 881/2002, and their claims were accepted by both courts.

On 22 December 2009, almost sixteen months after *Kadi*, the Council adopted Regulation 1286/2009. This regulation repealed Regulation 881/2002 and promises more legal certainty for persons and entities designated as 'associated with Usama Bin Laden, Al Qaida and the Taliban. In the next chapter, Regulation 1286/2009 will be compared with the legal framework among the right to a fair hearing. In the end, there will be an answer to the question, whether persons and entities, designated as associated with Usama Bin Laden, Al Qaida and the Taliban, still are exposed to violations of their right to be heard, the right to have an effective remedy and the right to respect for their property.

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<sup>139</sup> Case T-318/01, *Omar Mohammed Othman v Council of the European Union and the Commission of the European Communities* (11 June 2009).

## **4 European sanctions regime after *Kadi***

### **4.1 Introduction**

The judgement of the Court of Justice of the European Communities of 3 September 2008 in the case of *Kadi* and *Al Barakaat* confirmed on the one hand that the fundamental rights of the two plaintiffs were not respected, and gave on the other hand the Council the opportunity to repair the holes of Regulation 881/2002. In this chapter the new and hopefully, improved provisions of the regulation will be discussed, thereupon there will be a comparison between the “old” and the “new” regulation, and eventually Regulation 1286/2009 will be scrutinized on the hand of the legal framework as laid down in chapter 3 of this thesis. The question is, if Regulation 1286/2009 meets the standards and minimum guarantees of Article 6 ECHR and Article 14 ICCPR and if this regulation ensures the right of the defence.

### **4.2 Council Regulation (EC) 1268/2009**

In the proposal for a Council Regulation, amending Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama Bin Laden, the Al-Qaida network and the Taliban<sup>140</sup>, the Council recognizes the importance to adapt Regulation 881/2002. The modification is necessary, because new elements which respect the fundamental rights of persons and entities must be implemented<sup>141</sup>.

The proposal contains three main modifications which should ensure the legal certainty and the protection of the rights of the defence of the persons and entities designated as associated with Usama bin Laden & Co. Firstly, when the Committee decides to place the name of a person or entity on the sanctions list, the European Commission will take a provisional decision to freeze the funds and financial resources of the individual or entity concerned. Secondly, the European Commission will send the reasoning of that decision promptly and without delay to the person or entity concerned, which will give the individual or entity the opportunity to express his, her or its view. Finally, the European Commission will examine the views of the person or entity concerned. Thereafter, the European Commission will consult an advisory committee of experts of the Member States, before the final decision will be made<sup>142</sup>. Further, the proposal contains a provision, which ensure that the current sanctions list will get a new examination, in order to ensure the protection of the fundamental

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<sup>140</sup> Commission (EC), ‘Amending Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama Bin Lade, the Al-Qaida network and the Taliban’ COM (09) 187 final, 22 April 2009.

<sup>141</sup> Proposal for a Council Regulation COM (09) 187 final, 22 April 2009, Article 4 of the Explanatory Memorandum.

<sup>142</sup> Proposal for a Council Regulation COM (09) 187 final, 22 April 2009, Article 4 of the Explanatory Memorandum.

rights. When the UN decides to eliminate a name from the sanctions list, the Community should undertake the same action<sup>143</sup>.

Finally, funds and financial resources of persons and entities will not be frozen when a competent authority of a State has determined that these funds or other financial resources are necessary to cover basic expenses, such as payments for food, rent or mortgage, medicines and medical treatment, taxes, insurance premiums or public facilities. When such a competent authority has the intention to exclude some funds and economic resources, the authority must notify the Committee about this intention. After such a notification by a competent authority, the Committee has a non-objection period of 48 hours. The proposal contains an update of the non-objection period to three working days<sup>144</sup>.

#### 4.2.1 Modifications

On 22 December 2009, the Council finally adopted Regulation 1286/2009<sup>145</sup>, which gave effect to the Council proposal amending Regulation 881/2002. Regulation 1286/2009 contains several new aspects, which will now be discussed.

The Council refers to the judgement in the case of *Kadi* and *Al Barakaat* and underscribes the necessity of modifications in order to protect the fundamental rights of the defence<sup>146</sup>. These modifications contain a new listing procedure for individuals and entities that are designated by the Committee.

Paragraph 5 of the regulation contains the first diversification, which provides that the listed person, group, entity or body should be informed about the reasons for listing as transmitted by the Committee, in order to give them the opportunity to express their views. The amended Regulation 881/2002 only contained the obligation to inform the persons and entities concerned about their listing on the sanctions list. Regulation 1286/2009 improved evidently on this point. In the days of Regulation 881/2002 and before the *Kadi* case, persons and entities designated as associated with Usama Bin Laden, Al-Qaida or the Taliban did not had the opportunity to express their views, neither they had the right to be informed about the reasoning of their listing on the sanctions list.

The ECJ agreed with the fact that sanctions like the freezing of assets need to have an effect of surprise, so the persons and entities concerned will be informed after they are listed. The

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<sup>143</sup> Proposal for a Council Regulation COM (09) 187 final, 22 April 2009, Article 5-6 of the Explanatory Memorandum.

<sup>144</sup> Proposal for a Council Regulation COM (09) 187 final, 22 April 2009, Article 9 of the Explanatory Memorandum. Council Regulation (EC) 561/2003 of 27 March 2003 as regards exceptions to the freezing of funds and economic resources, inserted an Article in Regulation 881/2002 which made it possible for States to exclude basic expenses of persons and entities which funds and financial resources are frozen.

<sup>145</sup> Council Regulation (EC) 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2009] OJ L346.

<sup>146</sup> Council Regulation (EC) 1286/2009, paragraph 4.

difference is that now the European Commission takes a provisional decision, which is not final. In this way, the effect of surprise still exists, and the listed person or entity will have the opportunity to express his, her or its view.

Whereas the ECJ demanded that the Council would develop a listing procedure that respects the fundamental rights, the Council designed a new step in the whole procedure of listing. First, there was no space for the listed individuals and entities to express their views and the European Commission did not have the obligation to hear them. However, the Council took the statements of ECJ seriously and Regulation 1286/2009 now provides the obligation for the European Commission to examine submitted observations and review its provisional decision in the light of the submitted observations. This review must be in accordance with Council decision 1999/468/EC of 28 June 1999<sup>147</sup>, which regulates the procedures for the exercise of implementing powers conferred to the European Commission. Because of the major political responsibilities and the 'sensitive nature' of the international efforts in suppressing terrorism, the European Commission must follow the regulatory procedure<sup>148</sup>. That the Council is serious about the protection of fundamental rights can be seen in paragraph 9. This provision contains a declaration which underscribes that Regulation 1286/2009 recognizes the importance of the respect for the fundamental rights and the principles of the Charter of the Fundamental Rights of the European Union<sup>149</sup>. In particular, the regulation refers to the right to an effective remedy, a fair trial, the right to property and the right to protection of personal data. It seems that the institutions of the EU, actually listened to the judgement of the ECJ, whereas the violation of these rights caused the annulment of Regulation 881/2002.

Thereafter, the Council has modified a certain Articles of Regulation 881/2002. First, a new paragraph is added to Article 2, which claims that persons and entities, who did not know that their actions would infringe the prohibitions of the regulation, will not be held responsible. This provision shows that everyone should have a thorough investigation, and that prior to the freezing of assets it must be certain that a person, entity, group or legal person is definitely supporting the acts of Usama Bin Laden, Al-Qaida and the Taliban. It seems that this provision also gives a response to the critique, for example of Bulterman<sup>150</sup>.

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<sup>147</sup> Council Decision (EC) 1999/468 of 28 June laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184.

<sup>148</sup> The regulatory procedure must be used when measures with a general scope, designed to apply of essential elements of a basic decision, including measures concerning the protection of health and safety of humans, animals or plants, as well as measures aimed to modify some non-essential elements of a basic act, or updates of such measures. These measures should be adopted in accordance with an efficient procedure, in full respect of the Commission's right of initiative in legislative matters. See, Council Decision (EC) 1999/468, Article 7.

<sup>149</sup> Charter of the Fundamental Rights of the European Union of 18 December 2000, OJ C 364. Article 17 contains the right to property, Article 47 contains the right to an effective remedy, a fair and public hearing and the right to legal aid. Article 48 contains the presumption of innocence and the right of the defence.

<sup>150</sup> Bulterman 2006, p. 755.

She wondered when someone can be designated as a supporting act of Usama Bin Laden, Al-Qaida and the Taliban. Well, it is now procedure that a person, entity, group or legal person will not be held responsible for their actions, when it's obvious they did not know that these actions would infringe the prohibitions of the regulation. In my opinion, this provision can be seen as an exception, but at least individuals and entities now have the opportunity to express their views (paragraph 5) and they have a good reason to claim that they are not a "supporting act", namely the fact that they did not know, and had no reasonable cause to suspect, that their actions would infringe the prohibitions of the regulation (Article 2, paragraph 4 Regulation 1286/2009). Further, Regulation 1286/2009 contains five new paragraphs, inserted in Article 7. Article 7a contains a whole new procedure in the process of decision-making on the listing of individuals and entities. This procedure contains the following steps:

1. When the Security Council or the Committee decides to list the name of individual, group entity or legal person, the European Commission will also take a decision whether this person or group will be included in the European sanctions list.
2. The decision of the European Commission will be communicated to the person or group concerned, including the reasoning of the Committee. This communication will also contain the appeal to the individual or entity, to express his, her or its view on this matter.
3. When there are observations, the European Commission is obligated to review its own decision in the light of the observations. Submitted observations will also be communicated to the Committee. Afterwards, the European Commission must communicate the results of its review to the nominated person, entity, group or legal person.
4. When new evidence appears, and a request is made to remove a name from the European sanctions list, the European Commission shall conduct a new review in accordance with paragraph 2 and 3<sup>151</sup>.
5. When the UN decides to de-list the name of person, group, entity or legal person, the European Commission will follow this action and shall amend Annex 1 accordingly.

Further, Article 7b establishes a committee and the European Commission shall be assisted by this committee. When reference is made to this paragraph, Articles 5 and 7 of decision 1999/468/EC shall apply. This paragraph does not explicitly mention the function of the committee. In its proposal, amending Regulation 881/2002, the Council stated that the European Commission will consult a member of the advisory-committee, before a final decision will be made about the listing of person or entity<sup>152</sup>. In my opinion, this implies that

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<sup>151</sup> See also paragraph 7c of Regulation 1286/2009.

<sup>152</sup> Proposal for a Council Regulation COM (09) 187 final, 22 April 2009, Article 4 of the Explanatory Memorandum.

the committee has an advisory function, which is not binding, and that this extra step provides more legal protection for the people and organizations that are designated as an associate of Usama Bin Laden, Al-Qaida and the Taliban.

Articles 7d and 7e declares that the personal information of the listed individuals and entities will be processed in accordance with Regulation 45/2001<sup>153</sup>, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. These two paragraphs of Article 7 also provide the possibility to include information about the listed natural persons, legal persons or entities, with the purpose to identify these persons or entities, in Annex 1 of Regulation 1286/2009.

#### **4.2.2 Conclusion**

The modifications mentioned above, have the purpose to give effect to the judgement of the ECJ in the *Kadi* case. The new improved provisions also aim to protect and respect the fundamental rights, in particular the right to an effective remedy, a fair trial, the right to property and the right to protection of personal data.

The following provisions are modified or completely new and added to Regulation 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban:

1. Designated persons, entities, groups or legal persons now have the opportunity to express his, her or their view, after the European Commission took a provisional decision.
2. Submitted observations will be examined, and the European Commission will review its decision in the light of the submitted observations.
3. If necessary, a member of the advisory committee can be consulted.
4. Individuals, entities, groups or legal persons, whose assets are frozen have the right to be informed about the reasoning for inclusion in Annex 1 of Regulation 1268/2009.
5. Individuals, entities, groups or legal persons, whose assets are frozen before 3 September 2008, have the right to request a new review, when new evidence appears. The review of the decision to include him, her or them in the European sanctions list must follow the new procedure of Regulation 1268/2009.
6. Individuals, entities, groups or legal persons who did not know that their actions would infringe the prohibitions of the regulation, will not be held responsible.

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<sup>153</sup> Council and European Parliament Regulation (EC) 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L 008.

## **5 Conclusion: Improvement or unchanged practice?**

### **5.1 Introduction**

The main question of this thesis is whether Regulation 1286/2009 improved the protection of the fundamental rights of the individuals, entities, groups and legal persons who are designated by the Committee as an associate of Usama Bin Laden, Al-Qaida or the Taliban, in particular the right to be heard, the right to an effective remedy and the right to property and secondly, if Regulation 1286/2009 meets the standards of Article 6 ECHR and Article 14 ICCPR.

The ECJ already concluded that Regulation 881/2002 infringed the right to be heard, the right to an effective remedy and the right to property. Now its time to scrutinize Regulation 1286/2009, to find out if the European sanction regime has improved on the subject of the right to be heard, the right to an effective remedy and the right to property. The new and modified provisions of Regulation 1286/2009 will be discussed in the light of these particular rights. The framework of chapter 3 will be used; the provisions will be compared with the standards of Article 6 ECHR, Article 14 ICCPR, and the opinion of the Human Rights Committee and the jurisprudence of the European Court of Human Rights.

### **5.2 Right to be promptly informed**

The right of every individual to be informed promptly and in detail about the nature and the cause of the charge against him is laid down in Articles 6, paragraph 3(a) ECHR and 14, paragraph 3(a) ICCPR. The right to be promptly informed is explained by the Human Rights Committee. This committee notes that this right, in their opinion, must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person. Further, the ECtHR notified in *Pélissier and Sassi*, that it is essential to give a defendant full and detailed information concerning charges against him and stresses in *Edwards* that competent authorities should disclose all relevant information if requested by the accused. Well, it must be said that Regulation 1286/2009 now contains the obligation for the European Commission to communicate its decision to the listed individual or entity, including the reasoning of the Committee. This complies with the requirements of Articles 6 ECHR, 14 ICCPR and the opinion of the ECtHR in *Pélissier and Sassi* and *Edwards*. The information is not promptly communicated, because the restrictive measures of Regulation 1286/2009 need to have the effect of a surprise. This is also recognized by the ECJ in their ruling in the *Kadi* case, thus it must be concluded that Regulation 1286/2009 respects the right to be informed of Article 6, paragraph 3(a) of the ECHR and Article 14, paragraph 3(a) of the ICCPR.

### **5.3 Right to be heard**

Article 6 ECHR and Article 14 ICCPR emphasize the importance of a fair and public hearing. The ECtHR stresses that a public hearing also includes the right to an oral hearing (*Fischer*) and that the right to a fair and public hearing also implies the right to be actually heard and if there is no hearing at all, Article 6 paragraph 1 has been violated (*Weber*). The ECJ noticed in *Kadi* that the contested regulation did not provide a procedure for communicating the evidence, which justified the inclusion of persons and entities on the European sanctions list or a procedure for hearing those who are included. The absence of such a procedure and the result of that absence, namely the impossibility for the appellants to make their point of view, made the ECJ decide that the right of the defence, in particular the right to be heard was not respected. Regulation 1286/2009 now provides the opportunity for listed individuals, groups, entities and legal persons to express her, his or its view about the decision of the European Commission to include her, him or them in the European sanctions list. Further, the reasoning of the inclusion will be communicated. It seems that regulation 1286/2009 complies with the requirements of the ECtHR and the ECJ. However, the regulation does not specify how the listed persons and entities should express their views; if they can express their views in written or during an oral hearing.

### **5.4 Right to an effective remedy**

The ECJ concluded in *Kadi* that the appellants could not execute their right to an effective legal remedy, because they were not informed about the evidence. *Kadi* and *Al Barakaat* could not dispute the evidence, because the reasoning of the inclusion on the sanctions list was not communicated to them. Hence, the ECJ held that the right to an effective legal remedy was infringed. Individuals, groups, legal persons or entities have the right to institute proceedings before the ECJ, against a decision addressed to that person or against a decision, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former, according to Article 230 EC. The actual problem was that they could not express their views on the evidence and they could not dispute the evidence, because Regulation 881/2002 did not provide the obligation for the European Commission to communicate the reasoning of the listing and the evidence to the listed individual or entity. Regulation 1286/2009 does provide the obligation to communicate the evidence and the reasoning of the Committee to the listed individual or entity, which give them the opportunity to express their views about the argumentation of the Committee and dispute the evidence before a court. The right to institute proceedings before the ECJ of Article 230 EC, together with the obligation for the European Commission to communicate the reasoning of the listing and the opportunity to express views about this evidence, shows that Regulation 1286/2009 improved compared to Regulation 881/2002. The right of an effective legal remedy will no

longer be infringed, because individuals and entities now have the possibility to acquaint themselves of the reasoning of their listing on the UN sanctions list and the European sanctions list and they are now able to dispute the evidence before a court.

### **5.5 Right to property**

The ECJ recognized in *Kadi* that the right to property does not have an absolute character, which implies that the possibility exists to restrict this right, if such a restriction corresponds with the public interest. The ECJ also holds that a measure like the freezing of assets, is a justified restrictive measure. However, the court decided that the right of property was infringed. Not because of the content of the restrictive measure, but mostly because the lack of a possibility for *Kadi* to put his case to the competent authorities. In other words, the ECJ connected the right to property to the right to have an effective remedy before a competent authority.

The ECtHR gives States a broad margin of appreciation regarding the depriving of property. However, deprivation or control of someones property must be proportionate and there must exist a fair balance between the demands of the general interest of the Community and the requirements of the protection of the fundamental rights of the individual or legal person.

The Council stipulates in Regulation 1286/2009 that the freezing of assets, which can be seen as a deprivation of property, is a restrictive measure in order to prevent terrorist crimes, including terrorist financing, in order to maintain the international peace and security<sup>154</sup>. Obviously, protection of the international peace and security is a matter of the public interest, especially in the 21<sup>st</sup> century. A measure like the freezing of assets must be proportionate and when such a measure is executed, the individual or legal person concerned should be able to put his case to the competent authorities. Regulation 881/2002 did not provide the possibility for individuals or entities to express their views. Subsequent Regulation 1286/2009 does provide this opportunity and for that, the demand of the ECJ, allow individuals and entities to bring their case to a competent authority, is fulfilled. The question that remains is whether the freezing of assets is proportionate. There must be a fair balance between the protection of the international peace and security and the protection of the fundamental rights of the individuals and entities which financial resources are frozen. It seems that this particular measure is proportionate, whereas the individual, entity, group or legal person has the opportunity to express his, her or its view and the European Commission is obligated to review its decision in the light of these observations. Further, the listed persons, groups, entities and legal persons have the right to institute proceedings before the ECJ, against a decision adressed to that person or against a decision, although in the form of a regulation or

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<sup>154</sup> Regulation 1286/2009, paragraph 11.

a decision addressed to another person, is of direct and individual concern to the former<sup>155</sup>. During such proceedings, the ECJ must decide whether the decision of the European Commission to freeze the assets of an individual or entity was proportionate or not, in the light of the circumstances of the case.

Overall, it must be concluded that the Council treated the judgement of the ECJ seriously. Regulation 1286/2009 repealing Regulation 881/2002 improved on the subject of the fundamental rights. The fundamental rights, in particular the right to be heard, the right to an effective remedy and the right to respect for property of persons, entities, groups and legal persons designated by the Committee as an associate of Usama Bin Laden, Al-Qaida or the Taliban, are much better protected in Regulation 1286/2009. At least, there is no unchanged practice; Regulation 1286/2009 does provide more legal certainty for persons and entities designated by the Committee as associated with Usama Bin Laden, Al-Qaida or the Taliban and included in the European sanctions list.

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<sup>155</sup> Article 230 EC Treaty.

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