

# Case T-306/01

**Ahmed Ali Yusuf and Al Barakaat International Foundation**

**v**

**Council of the European Union and  
Commission of the European Communities**

(Common foreign and security policy — Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Competence of the Community — Freezing of funds — Fundamental rights — Jus cogens — Review by the Court — Action for annulment)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 21 September 2005 . . . . . II - 3544

## Summary of the Judgment

*1. Procedure — Regulation replacing the contested regulation during the proceedings — New factor — Extension of the original claims and pleas in law*

II - 3533

2. *Acts of the institutions — Choice of legal basis — Regulation imposing on certain persons and entities sanctions intended to interrupt or reduce economic relations with a third country — Articles 60 EC and 301 EC — Whether permissible*  
(Arts 60 EC and 301 EC; Council Regulation No 467/2001)
  
3. *Acts of the institutions — Choice of legal basis — Regulation imposing sanctions on certain persons and entities in no way connected with a third State — Articles 60 EC, 301 EC and 308 EC in combination — Whether permissible*  
(Arts 60 EC, 301 EC and 308 EC; Art. 3 EU; Council Regulation No 881/2002)
  
4. *Free movement of capital and freedom to make payments — Restrictions — National measures relating to the fight against international terrorism and the imposition for that purpose of economic and financial sanctions on individuals in no way connected with a third State — Whether permissible — Conditions*  
(Art. 58 EC)
  
5. *Acts of the institutions — Legal nature — Regulation or decision — Distinction — Criteria — Concept of addressee of an act — Object of an act — Immaterial criterion*  
(Art. 230 EC, fourth para., and Art. 249 EC; Council Regulation No 881/2002)
  
6. *Public international law — Charter of the United Nations — Decisions of the Security Council — Obligations resulting therefrom for the Member States — Primacy over domestic law and Community law — Obligations under that Charter — Binding on the Community*
  
7. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Act implementing resolutions of the United Nations Security Council — Indirect review of the lawfulness of decisions of the Security Council — Review in light of Community law — Excluded — Review in light of jus cogens — Whether permissible*  
(Arts 5 EC, 10 EC, 230 EC, 297 EC, 307, first para., EC; Art. 5 EU; Council Regulation No 881/2002)

8. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Act implementing resolutions of the United Nations Security Council — Regulation No 881/2002 — Specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Fundamental rights of the persons concerned — Freezing of funds — Review in light of jus cogens — Right to property of the persons concerned — Principle of proportionality — No breach (Council Regulation No 881/2002, as amended by Council Regulation No 561/2003)*
9. *European Communities — Judicial review of the lawfulness of the acts of the institutions — Act implementing resolutions of the United Nations Security Council — Regulation No 881/2002 — Specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Right of the persons concerned to be heard — No breach (Council Regulation No 881/2002)*
10. *Actions for annulment — Community act implementing resolutions of the United Nations Security Council — Regulation No 881/2002 — Specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban — Judicial review — Limits — Lacuna in the judicial protection of the applicants — Review in light of jus cogens — Right to an effective judicial remedy — No breach (Art. 226 EC; Council Regulation No 881/2002)*

1. In an action for annulment, when a regulation of direct and individual concern to a person is replaced, during the proceedings, by another regulation having the same subject-matter, the latter must be considered a new factor allowing the applicant to adapt its pleas in law and claims for relief. It would indeed be contrary to the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application. Moreover, it would be inequitable if the Commission were able, in order to counter criticisms of a regulation contained in an application made to the Community judicature, to amend the contested regulation or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the

other party of the opportunity of extending his original claims and pleas in law to the later regulation or of submitting supplementary claims and pleas in law directed against that regulation.

(see paras 72-73)

2. The Council was competent to adopt Regulation No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, on the basis of Articles 60 EC and 301 EC.

Nothing in the wording of those provisions makes it possible to exclude the adoption of restrictive measures affecting specifically the rulers of a third country, rather than the country as such, and also the individuals and entities associated with those rulers or directly or indirectly controlled by them, wherever they may be, in so far as such measures actually seek to reduce, in part or completely, economic relations with one or more third countries. That interpretation, which is not contrary to the letter of Article 60 EC or 301 EC, is justified both by considerations of effectiveness and by humanitarian concerns.

The measures laid down by Regulation No 467/2001 were intended to interrupt or reduce economic relations with Afghanistan, in connection with the international community's fight against

international terrorism and, more specifically, against Usama bin Laden and the Al-Qaeda network.

What is more, those measures, intended to exert effective pressure on the rulers of the country concerned, while restricting as far as possible the impact of those measures on the population of that country, in particular by confining their personal ambit to a certain number of individuals referred to by name, were in keeping with the principle of proportionality, according to which sanctions may not go beyond what is appropriate and necessary to the attainment of the objective pursued by the Community legislation imposing them.

(see paras 108, 112, 115-116, 121-122, 124)

3. Articles 60 EC and 301 EC do not constitute in themselves a sufficient legal basis on which to adopt a Community regulation concerning the fight against international terrorism and the imposition to that end of economic and financial sanctions, such as the freezing

of funds, on individuals, when there is no link whatsoever between those individuals and a non-member country.

Likewise, Article 308 EC does not, taken in isolation, constitute of itself a sufficient legal basis for adoption of such a regulation. Although no provision of the Treaty gives the Community institutions the necessary power to impose sanctions on individuals or entities in no way linked to a non-member country, the fight against international terrorism, more particularly the imposition of economic and financial sanctions, in respect of individuals and entities suspected of contributing to the funding of terrorism, cannot be made to refer to one of the objects which Articles 2 EC and 3 EC expressly entrust to the Community. Furthermore, nowhere in the preamble to the EC Treaty is it stated that that act pursues a wider object of safeguarding international peace and security. The latter falls exclusively within the objects of the Treaty on European Union. While, admittedly, it may be asserted that that objective of the Union must inspire action by the Community in the sphere of its own competence, it is not however a sufficient basis for the adoption of measures under Article 308 EC. It appears impossible to interpret Article 308 EC as giving the institutions general authority to use that provision as a basis with a view to attaining one of the objectives of the EU Treaty.

Nevertheless, the Council was competent to adopt Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, which sets in motion in the Community the economic and financial sanctions provided for by Common Position 2002/402, in the absence of any link with the territory or rulers of a non-member country, on the joint basis of Articles 60 EC, 301 EC and 308 EC.

In the circumstances, account has to be taken of the bridge explicitly established at the time of the Maastricht revision between Community actions imposing economic sanctions under Articles 60 EC and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations. On this score, it must be held that Articles 60 EC and 301 EC are quite special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may be proved to be necessary in order to achieve not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the Union by Article 2 of the Treaty on European Union, viz., the implementation of a common foreign and security policy. So, when the powers to impose economic and financial sanctions provided for by Articles 60 EC and 301 EC, namely, the interruption or reduction of economic relations with one or more

third countries, especially in respect of movements of capital and payments, may be proved insufficient to allow the institutions to attain the objective of the CFSP, recourse to the additional legal basis of Article 308 EC is justified in the specific context of those two articles for the sake of the requirement of consistency laid down in Article 3 EU. Thus, recourse to the cumulative legal bases of Articles 60 EC, 301 EC and 308 EC makes it possible to attain, in the sphere of economic and financial sanctions, the objective pursued under the CFSP by the Union and its Member States, as it is expressed in a common position or joint action, despite the lack of any express attribution to the Community of powers to impose economic and financial sanctions on individuals or entities with no sufficient connection to a given third country.

adopt under Article 58(1)(b) EC measures relating to the fight against international terrorism and the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals where no connection whatsoever has been established with the territory or the governing regime of a third State. In so far as those measures are in keeping with Article 58(3) EC and do not go beyond what is necessary in order to attain the objective pursued, they are compatible with the rules on free movement of capital and payments and with the rules on free competition laid down by the Treaty.

(see para. 146)

(see paras 132-133, 136, 152, 154-157, 159-160, 163-166, 170)

4. The Community has no express power to impose restrictions on the movement of capital and payments. On the other hand, Article 58 EC allows the Member States to adopt measures having such an effect to the extent to which this is, and remains, justified in order to achieve the objectives set out in the article, in particular, on grounds of public policy or public security. The concept of public security covering both the State's internal and external security, the Member States are therefore as a rule entitled to
5. Article 249 EC, in that it provides that a regulation has general application, whereas a decision is binding only upon those to whom it is addressed, contemplates only the concept of the addressee of an act. By contrast, the object of an act is immaterial as a criterion for its classification as a regulation or a decision.

Consequently, Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama

bin Laden, the Al-Qaeda network and the Taliban has general application, since it prohibits anyone to make available funds or economic resources to certain persons. The fact that those persons are expressly named in Annex I to the regulation, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, in no way affects the general nature of that prohibition.

(see paras 186-187)

Nations, under which the Members of the United Nations are bound to accept and carry out the decisions of the Security Council.

Although it is not a member of the United Nations, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it. First, it may not infringe the obligations imposed on its Member States by that charter or impede their performance. Second, in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.

(see paras 231, 234, 242-243, 254)

6. From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and, for those that are also members of the Community, their obligations under the EC Treaty. That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the Members of the United Nations are bound to accept and carry out the decisions of the Security Council.
7. Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, adopted in the light of Common Position 2002/402, constitutes the implementation at Community level of the obligation placed on the Member States of the Community, as Members of the United Nations, to give effect, if appropriate by means of a Community act, to

the sanctions against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, which have been decided and later strengthened by several resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations.

In that situation, the institutions acted under circumscribed powers, with the result that they had no autonomous discretion. In particular, they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration. Any review of the internal lawfulness of Regulation 881/2002 would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions.

In light of the principle of the primacy of UN law over Community law, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of decisions of the Security Council according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law. First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25, 48 and 103 thereof, and also with Article 27 of the

Vienna Convention on the Law of Treaties. Second, it would be contrary to provisions both of the EC Treaty, especially Articles 5 EC, 10 EC, 297 EC and the first paragraph of Article 307 EC, and of the Treaty on European Union, in particular Article 5 EU. It would, what is more, be incompatible with the principle that the Community's powers and, therefore, those of the Court of First Instance, must be exercised in compliance with international law.

Resolutions of the Security Council, adopted under Chapter VII of the Charter of the United Nations, therefore fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

None the less, the Court is empowered to check, indirectly, the lawfulness of such resolutions with regard to *jus cogens*, understood as a body of higher

rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

In addition, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*. Such is not the case here.

(see paras 264-266, 272-274, 276-277)

8. The freezing of funds provided for by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, does not infringe the fundamental rights of the persons concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*.

In that regard, the express provision of possible exemptions and derogations attaching to the freezing of the funds of the persons in the Sanctions Committee's list clearly shows that it is neither the purpose nor the effect of that measure to submit those persons to inhuman or degrading treatment.

In the first place, the freezing of their funds constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, having regard to the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations. In the second place, freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. In the third place, the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions. Finally, the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.

Having regard to those facts, the freezing of the funds of persons and entities suspected, on the basis of information communicated by the Member States of the United Nations and checked by the Security Council, of being linked to Usama bin Laden, the Al-Qaeda network or the Taliban and of having participated in the financing, planning, preparation or perpetration of terrorist acts cannot be held to constitute an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned.

(see paras 289, 291, 293-296, 299-302)

9. The right of the persons concerned to be heard has been infringed neither by the Sanctions Committee before their inclusion in the list of persons whose funds must be frozen pursuant to the Security Council's resolutions at issue nor by the Community institutions before the adoption of Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.

First, the right of the persons concerned to be heard by the Sanctions Committee before their inclusion in the list of persons suspected of contributing to the funding of terrorism whose funds must be frozen pursuant to the resolu-

tions of the Security Council in question is not provided for by those resolutions, and it appears that no mandatory rule of public law requires such a prior hearing. In particular, when what is at issue is a temporary precautionary measure restricting the availability of the property of the persons concerned, observance of their fundamental rights does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community's security that militate against it.

Second, the Community institutions were not obliged to hear the persons concerned before the contested regulation was adopted either, because they had no discretion in the transposition into the Community legal order of resolutions of the Security Council or decisions of the Sanctions Committee, with the result that to hear the person concerned could not in any case lead the institution to review its position.

(see paras 306-307, 320, 328-329, 331)

10. In dealing with an action for annulment directed at Regulation No 881/2002

imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, the Court carries out a complete review of the lawfulness of that regulation with regard to observance by the Community institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions. The Court also reviews the lawfulness of that regulation having regard to the Security Council's regulations which that act is supposed to put into effect, in particular from the viewpoints of procedural and substantive appropriateness, internal consistency and whether the regulation is proportionate to the resolutions. What is more, it reviews the lawfulness of that regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person.

On the other hand, it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the Community legal order. Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent of the review carried out in light

of *jus cogens*, to check indirectly the appropriateness and proportionality of those measures. To that extent, there is no judicial remedy available to the applicants, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.

However, that lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*. As a matter of fact, the right of access to the courts is not absolute. The limitation of the applicants' right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, is inherent in that right as it is guaranteed by *jus cogens*. The applicants' interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations. Consequently, there has been no breach of the applicants' right to an effective judicial remedy.

(see paras 334-335, 337-344, 346)