JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

21 September 2005 *

In Case T-306/01,

Ahmed Ali Yusuf, residing at Spånga (Sweden),

Al Barakaat International Foundation, established at Spånga,

represented by L. Silbersky and T. Olsson, lawyers,

applicants,

v

Council of the European Union, represented by M. Vitsentzatos, I. Rådestad, E. Karlsson and M. Bishop, acting as Agents,

and

* Language of the case: Swedish.

Commission of the European Communities, represented by A. Van Solinge, J. Enegren and C. Brown, acting as Agents, with an address for service in Luxembourg,

defendants,

supported by

United Kingdom of Great Britain and Northern Ireland, originally represented by J. Collins, and then by R. Caudwell, acting as Agents, and by S. Moore, Barrister, with an address for service in Luxembourg,

intervener,

APPLICATION, originally, for annulment of, first, Council Regulation (EC) No 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 and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 67, p. 1) and, second, Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16) and, subsequently, an application for annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of N.J. Forwood, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 14 October 2003,

gives the following

Judgment

Legal framework

1 Under Article 24(1) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the members of the United Nations 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

2 Under Article 25 of the Charter of the United Nations, '[t]he Members of the [UN] agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

3 In accordance with Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'.

4 According to Article 103 of the Charter of the United Nations, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

5 In accordance with Article 11(1) EU:

'The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:

— to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,

— to strengthen the security of the Union in all ways,

— to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter ...

— ...'

6 Under Article 301 EC:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.'

7 Article 60(1) EC provides:

'If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.'

8 In accordance with the first paragraph of Article 307 EC:

'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

9 Lastly, Article 308 EC provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

Background to the dispute

10 On 15 October 1999 the Security Council of the United Nations ('the Security Council') adopted Resolution 1267 (1999), in which it inter alia condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security, deplored the fact that the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international

terrorist operations. In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Usama bin Laden over to the appropriate authorities. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, 'freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need'.

11 In paragraph 6 of Resolution 1267 (1999) the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members ('the Sanctions Committee'), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4.

12 Taking the view that action by the Community was necessary in order to implement that resolution, on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban (OJ 1999 L 294, p. 1). Article 2 of that Common Position prescribes the freezing of funds and other financial resources held abroad by the Taliban under the conditions set out in Security Council Resolution 1267 (1999).

13 On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan (OJ 2000 L 43, p. 1).

14 On 19 December 2000 the Security Council adopted Resolution 1333 (2000), demanding, inter alia, that the Taliban should comply with Resolution 1267 (1999), and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organisations and turn Usama bin Laden over to appropriate authorities to be brought to justice. The Security Council decided in particular to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999). Accordingly paragraph 8(c) of Resolution 1333 (2000) provides that the States are, inter alia, '[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [Sanctions Committee], including those in the Al-Qaeda organisation, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaeda organisation'.

15 In the same provision, the Security Council instructed the Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation.

16 In paragraph 23 of Resolution 1333 (2000), the Security Council decided that the measures imposed inter alia by paragraph 8 were to be established for 12 months and that, at the end of that period, it would decide whether to extend them for a further period on the same conditions.

17 Taking the view that action by the Community was necessary in order to implement that resolution, on 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP (OJ 2001 L 57, p. 1). Article 4 of that Common Position provides:

'Funds and other financial assets of Usama bin Laden and individuals and entities associated with him, as designated by the Sanctions Committee, will be frozen, and funds or other financial resources will not be made available to Usama bin Laden and individuals or entities associated with him as designated by the Sanctions Committee, under the conditions set out in [Resolution 1333 (2000)].'

18 On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1).

19 The third recital in the preamble to that regulation states that the measures provided for by Resolution 1333 (2000) 'fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned'.

20 Article 1 of Regulation No 467/2001 defines what is meant by 'funds' and 'freezing of funds'.

21 Under Article 2 of Regulation No 467/2001:

'All funds and other financial resources belonging to any natural or legal person, entity or body designated by the ... Sanctions Committee and listed in Annex I shall be frozen.

No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of, persons, entities or bodies designated by the Taliban Sanctions Committee and listed in Annex I.

Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained through the competent authorities of the Member States listed in Annex II.'

22 Annex I to Regulation No 467/2001 contains the list of persons, entities and bodies affected by the freezing of funds imposed by Article 2. Under Article 10(1) of Regulation No 467/2001, the Commission is empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.

23 On 8 March 2001 the Sanctions Committee published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000). That list has since been amended and supplemented several times. The Commission has therefore adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.

24 On 9 November 2001 the Sanctions Committee published a new addendum to its list of 8 March 2001, including in particular the names of the following body and three individuals:

— 'Barakaat International Foundation, Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04 Spånga, Sweden';

— 'Aden, Abdirisak; Akaftingebacken 8, 16367 Spånga, Sweden; DOB 01 June 1968'

— 'Ali, Abdi Abdulaziz, Drabantvagen 21, 17750 Spånga, Sweden; DOB 01 January 1955';

— 'Ali, Yusaf Ahmed, Hallbybybacken 15, 70 Spånga, Sweden; DOB: 20 November 1974'.

25 By Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16), the names of the entity and the three natural persons in question were added, with others, to Annex I to that regulation.

26 On 16 January 2002 the Security Council adopted Resolution 1390 (2002), which lays down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Articles 1 and 2 of that resolution provide, in essence, that the measures, in particular the freezing of funds, imposed by Article 4(b) of Resolution 1267 (1999) and by Article 8(c) of Resolution 1333 (2000) are to be maintained. In accordance with paragraph 3 of Resolution 1390 (2002), those measures are to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council will either allow those measures to continue or decide to improve them.

27 Considering that action by the Community was necessary in order to implement that resolution, on 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP (OJ 2002 L 139, p. 4). Article 3 of that Common Position prescribes, inter alia, the continuation of the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in the list drawn up by the Sanctions Committee in accordance with Security Council Resolutions 1267 (1999) and 1333 (2000).

28 On 27 May 2002, on the basis of Articles 60 EC, 301 EC and 308 EC, the Council adopted Regulation (EC) 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, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9).

29 According to the fourth recital in the preamble to that regulation, the measures laid down by, inter alia, Security Council Resolution 1390 (2002) fall within the scope of the Treaty and, 'therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.'

30 Article 1 of Regulation No 881/2002 defines 'funds' and 'freezing of funds' in terms which are essentially identical to those used in Article 1 of Regulation No 467/2001.

31 Under Article 2 of Regulation No 881/2002:

'All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.

No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.'

32 Annex I to Regulation No 881/2002 contains the list of persons, groups and entities affected by the freezing of funds imposed by Article 2. That list includes, inter alia, the name of the following entity and persons:

— 'Al Barakaat International Foundation; Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden';

— 'Aden, Adirisak; Skaftingebacken 8, 16367 Spånga, Sweden, DOB 1.6.1968';

— 'Ali, Abdi Abdulaziz, Drabantvagen 21, 17750 Spånga, Sweden, DOB 1.1.1955';

— 'Ali, Yusaf Ahmed, Hallbybybacken 15, 70 Spånga, Sweden, DOB 20.11.1974'.

33 On 26 August 2002 the Sanctions Committee decided to remove the persons known as 'Abdi Abdulaziz Ali' and 'Abdirisak Aden' from the list of persons to whom and groups and entities to which the freezing of funds and other economic resources must apply.

34 In consequence, on 4 September 2002 the Commission adopted Regulation (EC) No 1580/2002 amending for the second time Council Regulation (EC) No 881/2002 (OJ 2002 L 237, p. 3).

35 In accordance with Article 1(2) of Regulation No 1580/2002, the following persons are removed from the list at Annex I to Regulation No 881/2002:

— 'Ali, Abdi Abdulaziz, Drabantvägen 21, 17750 Spånga, Sweden, date of birth 1 January 1955';

— 'Aden, Adirisak, Skäftingebacken 8, 16367 Spånga, Sweden, date of birth 1 June 1968'.

36 On 20 December 2002 the Security Council adopted Resolution 1452 (2002), intended to facilitate the implementation of counter-terrorism obligations. Paragraph 1 of that resolution provides for a number of derogations from and exceptions to the freezing of funds and economic resources imposed by Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) which may be granted by the Member States on humanitarian grounds, on condition that the Sanctions Committee gives its consent.

37 On 17 January 2003 the Security Council adopted Resolution 1455 (2003), intended to improve the implementation of the measures imposed in paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000) and paragraphs 1 and 2 of Resolution 1390 (2002). In accordance with paragraph 2 of Resolution 1455 (2003), those measures are again to be improved after 12 months or earlier if necessary.

38 Taking the view that action by the Community was necessary in order to implement Security Council Resolution 1452 (2002), on 27 February 2003 the Council adopted Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP (OJ 2003 L 53, p. 62). Article 1 of that Common Position provides that, when implementing the measures

set out in Article 3 of Common Position 2002/402/CFSP, the European Community is to provide for the exceptions permitted by United Nations Security Council Resolution 1452 (2002).

39 On 27 March 2003 the Council adopted Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 (OJ 2003 L 82, p. 1). In the fourth recital in the preamble to that regulation, the Council states that it is necessary, in view of the Security Council's Resolution 1452 (2002), to adjust the measures imposed by the Community.

40 Under Article 1 of Regulation No 561/2003:

'The following Article shall be inserted in Regulation (EC) No 881/2002:

"*Article 2a*

1. Article 2 shall not apply to funds or economic resources where:

(a) any of the competent authorities of the Member States, as listed in Annex II, has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are:

(i) necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(ii) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services;

(iii) intended exclusively for payment of fees or service charges for the routine holding or maintenance of frozen funds or frozen economic resources; or

(iv) necessary for extraordinary expenses; and

(b) such determination has been notified to the Sanctions Committee; and

(c) (i) in the case of a determination under point (a)(i), (ii) or (iii), the Sanctions Committee has not objected to the determination within 48 hours of notification; or

(ii) in the case of a determination under point (a)(iv), the Sanctions Committee has approved the determination.

2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State as listed in Annex II.

The competent authority listed in Annex II shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted.

The competent authority shall also inform other Member States whether the request for such an exception has been granted.

3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.

...".'

41 On 19 May 2003 the Commission adopted Regulation (EC) No 866/2003 of 19 May 2003 amending for the 18th time Council Regulation (EC) No 881/2002 (OJ 2003 L 124, p. 19). Under Article 1 of, and paragraph 1 of the Annex to, that regulation, Annex I to Regulation No 881/2002 are amended to the effect that the entry 'Ali, Yusaf Ahmed, Hallbybybacken 15, 70 Spanga, Sweden, date of birth 20 November 1974' under the heading 'natural persons' is replaced with the following:

'Ali Ahmed Yusaf (alias Ali Galoul), Krälingegränd 33, S-16362 Spånga, Sweden; date of birth 20 November 1974; place of birth: Garbaharey, Somalia; nationality: Swedish; passport No: Swedish passport 1041635; national identification No: 741120-1093.'

Procedure and forms of order sought by the parties

42 By application lodged at the Registry of the Court of First Instance on 10 December 2001, registered under number T-306/01, Messrs Abdirisak Aden, Abdulaziz Ali and Ahmed Yusuf, and the Al Barakaat International Foundation ('Al Barakaat'), brought an action against the Council and the Commission under Article 230 EC, claiming that the Court should:

— annul Regulation No 2199/2001;

— annul Regulation No 467/2001 and, as a subsidiary claim, declare it inapplicable pursuant to Article 241 EC;

— make an order as to costs in an amount to be specified later.

43 The applicants also applied in that document for suspension of the operation of Regulation No 2199/2001 pursuant to Article 243 EC.

44 By separate document lodged at the Court Registry on 10 December 2001, the applicants applied for adjudication under an expedited procedure, in accordance with Article 76a of the Court of First Instance's Rules of Procedure. Having heard the defendants, the Court of First Instance (First Chamber) rejected that application by decision of 22 January 2002, on the grounds of the complicated and delicate legal issues raised by the case.

45 By letter of the Court Registry of 24 January 2002, the applicants were told that the Court could not rule on the application for suspension of operation of Regulation No 2199/2001, because it had not been made by separate document in accordance with the Rules of Procedure. It was, however, stated in that letter that it remained possible to make a subsequent application for interim measures in compliance with the provisions of those Rules.

46 In their defences, lodged at the Registry of the Court of First Instance on 19 February 2002, the Council and the Commission contend that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

47 By document lodged at the Registry of the Court of First Instance on 8 March 2002, the applicants requested suspension of the operation of Regulations Nos 467/2001 and 2199/2001, in so far as the regulations concerned them, until judgment should have been given in the main proceedings.

48 The President of the Court of First Instance heard the parties' oral arguments on 22 March 2002, the Kingdom of Sweden being represented at the hearing.

49 By order of 7 May 2002 (Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387), the President of the Court of First Instance rejected the application for interim relief on the ground that the condition of urgency had not been satisfied, reserving costs.

50 By letter from the Court Registry of 27 June 2002 the parties were invited to submit their observations on the consequences of repeal of Regulation No 467/2001 and of its replacement by Regulation No 881/2002.

51 In their observations, lodged at the Court Registry on 29 July 2002, the applicants declared that they adapted the forms of order they sought, their pleas in law and arguments so that those were thenceforth directed to the annulment of Regulation No 881/2002 ('the contested regulation'), adopted in the light of the resolution of the Security Council 1390 (2002) maintaining the sanctions against them. They pointed out that the original action brought against Regulation No 467/2001 must be regarded as having become devoid of purpose, because of its repeal by the contested regulation.

52 In its observations, lodged at the Registry on 12 July 2002, the Council acknowledged that the applicants were entitled to extend or adapt the original claims in their action so that those claims henceforth sought the annulment of the contested regulation.

53 In its observations, lodged at the Court Registry on 10 July 2002, the Commission, in view of the fact that the legal effects of Regulation No 2199/2001 are continued in the contested regulation, stated that it had no objection to the applicants' amending their original claims so that the latter referred to the contested regulation.

54 Furthermore, the Commission asks the Court to declare, in accordance with Article 113 of its Rules of Procedure, that the action has become devoid of purpose in so far as it is directed against Regulation No 2199/2001 and that there is no need to adjudicate on it so far as that institution is concerned.

55 In addition, the Commission requests, pursuant to Articles 115(1) and 116(6) of the Rules of Procedure, that it should be granted the status of intervener in support of the forms of order sought by the Council. None the less, it states that it maintains its contention that the applicants should pay the costs incurred by the Commission in the period during which they challenged Regulation No 2199/2001.

56 By order of the President of the First Chamber of the Court of First Instance of 12 July 2002, the United Kingdom of Great Britain and Northern Ireland was given leave to intervene in support of the forms of order sought by the defendants.

57 By letter from the Court Registry of 11 September 2002, the applicants were requested to submit their observations on the possible consequences of the adoption of Regulation No 1580/2002 for the continued conduct of the action.

58 As a result of the changes to the composition of the chambers of the Court of First Instance in the new judicial year beginning 1 October 2002, the Judge-Rapporteur was attached to the Second Chamber to which this case has, in consequence, been assigned.

59 In their observations on the consequences of the adoption of Regulation No 1580/2002, lodged at the Court Registry on 11 November 2002, the applicants state, first, that their action is no longer directed against the Commission and, second, that Messrs Abdirisak Aden and Abdulaziz Ali no longer have any particular and individual interest in pursuing their action, except so far as the payment of costs is concerned.

60 By decision of 20 November 2002 the Registrar of the Court refused to add to the file the comments made by the applicants in those observations on the Council and Commission's rejoinders, on the ground that no provision is made in the Rules of Procedure for such comments.

61 In its statement in intervention, lodged at the Court Registry on 27 February 2003, the United Kingdom contended that the Court should dismiss the application.

62 By letter from the Court Registry of 13 June 2003, Mr Yusuf was requested to submit his observations on the possible consequences of the adoption of Regulation No 866/2003 for the continued conduct of the action.

63 In his observations, lodged at the Registry on 7 July 2003, Mr Yusuf indicated, essentially, that the amendments made by Regulation No 866/2003 were merely of a drafting nature and that they would have no effect on the future conduct of the proceedings.

64 After hearing the parties the Court referred the case to a Chamber composed of five Judges, in accordance with Article 51 of its Rules of Procedure.

65 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure and, in respect of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put a written question to the Council and the Commission, which answered it within the period prescribed.

66 By order of the President of the Second Chamber (Extended Composition) of 18 September 2003, this case and Case T-315/01 *Kadi* v *Council and Commission* were joined for the purposes of the oral procedure, in accordance with Article 50 of the Rules of Procedure.

67 By letter of 8 October 2003 the Commission asked the Court of First Instance to add to the file the 'Guidelines of the [Sanctions] Committee for the conduct of its work', as adopted by that Committee on 7 November 2002 and amended on 10 April 2003. That request was granted by the President of the Second Chamber (Extended Composition) of the Court of First Instance on 9 October 2003.

68 Messrs Aden and Ali having informed the Court, in accordance with Article 99 of the Rules of Procedure, that they wished to discontinue their action and that they had concluded an agreement with the defendants as to costs, the President of the Second Chamber (Extended Composition) of the Court of First Instance, by order of 9 October 2003, ordered the names of those two applicants to be removed from the register in Case T-306/01 and ruled on the costs in accordance with the agreement reached by the parties.

69 By separate documents lodged at the Registry on 13 October 2003, Mr Yusuf and Al Barakaat applied for legal aid. Those applications were dismissed by two orders of the President of the Second Chamber (Extended Composition) of the Court of First Instance of 3 May 2004.

70 The oral arguments of the parties were heard, and their replies to the questions asked by the Court of First Instance were given, at the hearing of 14 October 2003.

On the procedural consequences of the adoption of the contested regulation

71 The main parties in the proceedings are at one in acknowledging that the applicants are entitled to alter their claims, pleas in law and arguments so as to seek annulment of the contested regulation that repeals and replaces Regulation No 467/2001, as amended by Regulation No 2199/2001. In their observations lodged at the Registry on 29 July 2002, the applicants announced the alteration of the original claims and pleas in law in their action to that effect.

72 On this point, it must be borne in mind that where, during the proceedings, one decision is replaced by another having the same subject-matter, this 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 decision contained in an application made to the Community judicature, to amend the contested decision 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 pleadings to the later decision or of submitting supplementary pleadings directed against that decision (Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 8; Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Huttenwerke* v *Commission* [1987] ECR 3639, paragraph 11; Case 103/85 *Stahlwerke Peine-Salzgitter* v *Commission* [1988] ECR 4131, paragraphs 11 and 12, and Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission* [2000] ECR II-167, paragraph 33).

73 That case-law may be applied to a situation in which a regulation of direct and individual concern to a person is replaced, during the proceedings, by another regulation having the same subject-matter.

74 That hypothesis corresponding on all points to that at issue in this case, the applicants' request that their action should be regarded as seeking annulment of the contested regulation, in so far as it concerns them, must be allowed, and the parties must be permitted to redraft their claims for relief, pleas in law and arguments in the light of that new factor.

75 Furthermore, the applicants argue that their application for annulment of Regulation No 467/2001 must be considered to have become devoid of purpose on account of the repeal of that act by the contested regulation (see paragraph 51 above). In those circumstances, there is no longer any need to give a decision on that application or, consequently, on the application for annulment of Regulation No 2199/2001, that too having been rendered devoid of purpose.

76 It follows from the foregoing that there are no longer any grounds for ruling on the action in so far as it is directed against the Commission. In the circumstances of the case, however, the principle of proper administration of justice and the requirements of procedural economy on which the decisions cited in paragraph 72 above are based provide justification for account to be taken also of the Commission's claims, pleas in law and arguments, redrafted as mentioned in paragraph 74 above, but without its being necessary formally to readmit that institution to the proceedings under Articles 115(1) and 116(6) of the Rules of Procedure, as intervening in support of the forms of order sought by the Council.

77 Having regard to the foregoing, this action must be regarded as being directed henceforth against the Council alone, supported by the Commission and the United Kingdom, and its sole object must be considered to be a claim for annulment of the contested regulation, in so far as it concerns Mr Yusuf and Al Barakaat.

On the substance

78 In support of their claims, the applicants have put forward three grounds of annulment: the first alleges that the Council was incompetent to adopt the contested regulation, the second alleges infringement of Article 249 EC and the third alleges breach of their fundamental rights.

1. *Concerning the first ground, alleging that the Council was incompetent to adopt the contested regulation*

79 This ground may be broken down into three parts.

The first part

Arguments of the parties

80 In their application originally directed against Regulation No 467/2001, the applicants argued that Articles 60 EC and 301 EC, on the basis of which that regulation had been adopted, authorise the Council solely to take measures against third countries and not, as it did in this case, against nationals of a Member State residing in that Member State.

81 On this point, the applicants denied the allegation that sanctions were imposed on them on account of their association with the regime of the Taliban in Afghanistan. In their view, the sanctions were not imposed on them because there existed any link with that regime but because of the Security Council's desire to combat international terrorism, regarded as a threat to international peace and security. The applicants also argued that the list mentioned in Paragraph 8(c) of Security Council Resolution 1333 (2000), in which they were included by decision of the Sanctions Committee of 9 November 2001 (see paragraph 24 above), referred to Usama bin Laden and the entities and individuals associated with him, rather than the Taliban.

82 Since the sanctions adopted by the Community institutions must correspond on all points to those adopted by the Security Council, the applicants argued that Regulation No 467/2001 was no longer aimed at a third country but at individuals, with the object of combating international terrorism. In their view, such measures did not fall within the competence of the Community, unlike the trade embargo measures against Iraq examined by the Court of First Instance in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667.

83 The applicants also maintained that an interpretation of Articles 60 EC and 301 EC that amounted to treating Community nationals like third countries is contrary to the principle of lawfulness as expressed in Articles 5 EC and 7 EC, and to the principle that Community legislation must be certain and its application foreseeable by those subject to it (Case 348/85 *Denmark* v *Commission* [1987] ECR 5225).

84 In their observations on the consequences of repeal of Regulation No 467/2001, and its replacement by the contested regulation, adopted on the basis of Articles 60 EC, 301 EC and 308 EC, the applicants add that Article 308 EC, taken alone or together with Articles 60 EC and 301 EC, does not confer on the Council the power to impose sanctions, direct or indirect, on citizens of the Union. Indeed, such a power could not be considered as either implied or necessary in order to attain one of the

objectives of the Community for the purposes of Article 308 EC. In particular, the freezing of the applicants' funds has nothing to do with 'notably ... avoiding distortion of competition' as referred to in the fourth recital in the preamble to the contested regulation.

85 In their defences and statement in intervention, the institutions and the United Kingdom have maintained, first, that nothing in the wording of Articles 60 EC and 301 EC gives grounds for excluding the adoption of economic sanctions directed at individuals or organisations established in the Community, provided that such measures are intended to interrupt or to reduce, in part or completely, economic relations with one or more third countries. It must be recognised, as a matter of fact, that citizens of the Member States may, individually or jointly, supply funds and resources to third countries or to factions within them, so that measures intended to control those citizens' economic resources will have the effect of interrupting or reducing economic relations with those countries. The Community judicature has moreover implicitly recognised the lawfulness of that practice (order of the President of the Second Chamber of the Court of First Instance of 2 August 2000 in Case T-189/00 R *'Invest' Import und Export and Invest Commerce* v *Commission* [2000] ECR II-2993, paragraph 34, upheld on appeal by order of the President of the Court of Justice in Case C-317/00 P(R) *'Invest' Import und Export and Invest Commerce* v *Commission* [2000] ECR I-9541, paragraphs 26 and 27).

86 Second, those parties have disproved the applicants' argument that there was no link between the measures laid down by Regulation No 467/2001 and Afghanistan, by pointing to the links that existed at the time between Usama bin Laden, Al-Qaeda and the Taliban regime.

87 In its rejoinder and its observations on the consequences of repeal of Regulation No 467/2001 and its replacement by the contested regulation, the Council has however noted that the latter regulation applied to terrorists or terrorist groups in general, without further establishing a connection with a particular country or territory. That reflects the difference between Security Council Resolution 1333 (2000), which

referred to the Taliban and the individuals and entities associated with them, and Resolution 1390 (2002) which, because of the disappearance of the 'Islamic Emirate of Afghanistan', no longer confines the sanctions it imposes to a country or specific territory, but refers also to terrorist groups and individuals generally.

88 In the first case, the Council considered that Regulation No 467/2001 did in fact fall within the ambit of Articles 60 EC and 301 EC, since there was an obvious link to Afghanistan. No such link existing any longer in the case of the contested regulation, the Council considered it necessary to supplement its legal basis by adding Article 308 EC. The Council argued that that alteration of the contested regulation's legal basis made the first part of the first ground of annulment irrelevant.

89 On being requested, in a written question asked by the Court of First Instance, to express a view, in the light of Opinion 2/94 of the Court of Justice of 28 March 1996 (ECR I-1759, paragraphs 29 and 30), on the applicants' argument set out in paragraph 84 above and, more particularly, to state what Community objectives under the EC Treaty it sought to attain by means of the provisions laid down in the contested regulation, the Council answered, in essence, that those provisions pursue an objective of economic and financial coercion which is, in its view, an objective of the EC Treaty.

90 On this point, the Council argues that the Community's objectives are not only those defined in Article 3 EC, but that they may also flow from more specific provisions.

91 Since the revision under the Maastricht Treaty, Articles 60 EC and 301 EC have defined the tasks and activities of the Community in the domain of economic and financial sanctions and have offered a legal basis for an express transfer of powers to the Community in order to attain them. Those powers are expressly linked to and

actually depend on the adoption of an act pursuant to the provisions of the Treaty on European Union in the field of the common foreign and security policy (CFSP). Now, one of the objectives of the CFSP is, under the third indent of Article 11(1), 'to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter'.

92 It has therefore to be admitted that economic and financial coercion for reasons of policy, especially in the implementing of a binding decision of the Security Council, constitutes an express and legitimate objective of the EC Treaty, even if that objective is marginal, linked only indirectly to the chief objectives of that Treaty, in particular those concerned with the free movement of capital (Article 3(1)(c) EC) and the establishment of a system ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC), and linked to the Treaty on European Union.

93 The Council submits that, in the circumstances of this case, Article 308 EC was included as a legal basis for the contested regulation in order to supplement the base supplied by Articles 60 EC and 301 EC, so as to make it possible to adopt measures not only in respect of third countries but also in respect of individuals who and non-State bodies which are not necessarily linked to the governments or regimes of those countries, in cases where the EC Treaty does not provide the powers of action necessary to that end.

94 By so doing, the Community has been able, continues the Council, to keep up with the development of international practice, which has been to adopt 'smart sanctions' aimed at individuals who pose a threat to international security rather than at innocent populations.

95 The Council maintains that the conditions in which it had recourse to Article 308 EC are no different from those in which that provision has been used in the past in order to attain one of the objects of the EC Treaty in the course of the operation of

the common market, where the Treaty has not provided the powers of action necessary to that end. To that effect it refers:

— in the sphere of social policy, to the various directives which, on the basis of Article 235 of the EC Treaty (now Article 308 EC), sometimes supplemented by Article 100 of the EC Treaty (now Article 94 EC), have extended the principle of equal pay for male and female workers, as laid down in Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), to convert it into a general principle of equal treatment in all areas in which potential discrimination might subsist and to allow self-employed workers, including those in the agricultural sector, to benefit from it too, in particular Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40); Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24); Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40) and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56);

— in the sphere of free movement of persons, the several acts which, on the basis of Article 235 of the EC Treaty and Article 51 of the EC Treaty (now, after amendment, Article 42 EC), have extended to self-employed persons, to members of their families and to students the rights enjoyed by employed persons moving within the Community, in particular Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1981 L 143, p. 1);

— and, more recently, Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (OJ 1997 L 151, p. 1), adopted on the basis of Article 213 of the EC Treaty (now Article 284 EC) and Article 235 of the EC Treaty.

96 The Court of Justice itself has confirmed that this practice is lawful (Case C-114/88 *Delbar* [1989] ECR 4067).

97 What is more, the Community legislature has in the past resorted to the legal basis of Article 235 of the EC Treaty in the field of sanctions. On this point, the Council explains that before Articles 301 EC and 60 EC were added to the EC Treaty various Council regulations imposing commercial sanctions were based on Article 113 of the EC Treaty (now, after amendment, Article 133 EC) (see, for example, Council Regulation (EEC) No 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USSR (OJ 1982 L 72, p. 15); Council Regulation (EEC) No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina (OJ 1982 L 102, p. 1) and Council Regulation (EEC) No 3302/86 of 27 October 1986 suspending imports of gold coins from the Republic of South Africa (OJ 1986 L 305, p. 11)). However, when those measures went beyond the ambit of the common commercial policy or concerned natural or legal persons within the Community, they were also based on Article 235 of the EC Treaty. Such was the case in particular of Council Regulation (EEC) No 3541/92 of 7 December 1992 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions, the performance of which was affected by United Nations Security Council Resolution 661 (1990) and related resolutions (OJ 1992 L 361, p. 1), Article 2 of which provides that '[i]t shall be prohibited to satisfy or to take any step to satisfy a claim made by ... any person or body acting, directly or indirectly, on behalf of or for the benefit of one or more persons or bodies in Iraq'.

98 In answer to that same written question asked by the Court of First Instance, the Commission has argued that implementation of sanctions imposed by the Security Council could fall, in whole or in part, within the scope of the EC Treaty, either under the common commercial policy or in connection with the internal market.

99 In this instance, the Commission maintains, referring to the fourth recital in the preamble to the contested regulation, that the measures at issue were necessary to ensure uniform implementation and application of the restrictions on the movement of capital introduced in accordance with the resolutions concerned of the Security Council, so as to preserve the free movement of capital within the Community and to avoid distortions of competition.

100 Furthermore, the Commission considers that the promotion of international security, both within the Union and without, must be regarded as forming part of the general framework of the provisions of the EC Treaty. In that regard, it refers first to Articles 3 EU and 11 EU and second to the preamble to the EC Treaty, in which the Contracting Parties confirmed 'the solidarity which binds Europe and the overseas countries ... in accordance with the principles of the Charter of the United Nations' and declared themselves resolved to 'strengthen peace and liberty'. The Commission infers therefrom a 'general objective which the Community has to ensure peace and security', of which Articles 60 EC and 301 EC are specific emanations, while at the same time they are also specific emanations of the Community's competence in regulating the movement of capital, internally and externally.

101 Title III, Chapter 4, of the EC Treaty on the movement of capital not conferring any specific powers on the Community, Article 308 EC has been used, in this instance, as an additional legal basis in order to ensure that the Community should be able to impose the restrictions in question, especially those vis-à-vis individuals, in accordance with the common position adopted by the Council.

102 At the hearing the United Kingdom described the Community objective sought by adoption of the contested regulation as being the uniform implementation across the Community of obligations as regards restrictions on capital movement imposed on Member States by the Security Council.

103 The United Kingdom emphasises that the creation of an internal market in the sphere of capital movements is one of the objectives of the Community identified in Article 3 EC. It submits that it is an essential part of the creation of an internal market that any restrictions on the free movement of capital on the market should be applied uniformly.

104 If, however, action at Community level had not been taken to implement the resolutions of the Security Council concerned, that would, according to the United Kingdom, have created a danger of differences in the application of the freezing of assets from one Member State to another. Had the Member States implemented those resolutions individually, then differences of interpretation as regards the scope of the obligation imposed upon them would have been inevitable and would have created disparities in the sphere of free movement of capital between Member States, thus creating a risk of distortion of competition.

105 Furthermore, the United Kingdom submits that action freezing the funds of individuals with a view to interrupting economic relations with international terrorist organisations, rather than with third countries, cannot be regarded as widening 'the scope of Community powers beyond the general framework created by the Treaty', as stated in Opinion 2/94 (paragraph 89 above). Under the general framework of the Treaty the Community has competence to take action to regulate capital movements and, moreover, to do this by taking action against individuals. It follows that whilst action regulating capital movements by individuals with a view to interrupting economic relations with international terrorist organisations is a matter

for which the EC Treaty has not provided specific powers and whilst such action requires resort to Article 308 EC, it cannot be considered to go beyond the general framework of the Treaty.

106 The United Kingdom maintains that the use of Article 308 EC in the circumstances of the present case is no different from its use in situations, especially in the sphere of social policy, in which that article has been relied upon in order to attain other Community objectives, where the Treaty had not provided a specific legal basis (see paragraph 95 above).

Findings of the Court

107 Regulation No 467/2001 and the contested regulation were adopted on partly different legal bases: Articles 60 EC and 301 EC for the former, and Articles 60 EC, 301 EC and 308 EC for the latter. Although the applicants' original arguments alleging the lack of a legal basis for Regulation No 467/2001 have become devoid of purpose because of the repeal of that act by the contested regulation, the Court considers it appropriate to set out first the grounds on which it judges them to be unfounded on any view, since those grounds constitute one of the premisses of its reasoning applied to the examination of the legal basis of the contested regulation.

— Concerning the legal basis of Regulation No 467/2001

108 Regulation No 467/2001 was adopted on the basis of Articles 60 EC and 301 EC, provisions which empower the Council to take the necessary urgent measures, particularly with regard to movements of capital and payments, where it is provided,

in a common position or a joint action adopted according to the provisions of the Treaty on European Union relating to the CFSP, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries.

109 Now, as is clear from the preamble thereto, Regulation No 467/2001 orchestrated the action by the Community provided for by common position 2001/154, which had been adopted under the CFSP and demonstrated the intention of the Union and of its Member States to implement certain facets of the sanctions taken by the Security Council against the Taliban of Afghanistan.

110 Nevertheless, the applicants maintained, first, that the measures at issue in this case affected individuals who were, moreover, nationals of a Member State, whereas Articles 60 EC and 301 EC authorise the Council to take measures against third countries only; second, that the measures at issue were not intended to interrupt or reduce economic relations with a third country but to combat international terrorism and, more particularly, Usama bin Laden and, third, that those measures were on any view disproportionate to the objective pursued by Articles 60 EC and 301 EC.

111 None of those arguments could have succeeded.

112 With regard, first, to the kind of measures that the Council is empowered to take under Articles 60 EC and 301 EC, the Court considers that nothing in the wording of those provisions makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organisations, whether or not established in the Community, in so far as such measures actually seek to reduce, in part or completely, economic relations with one or more third countries.

113 As the Council has correctly observed, the measures at issue in this case were among what are conventionally known as 'smart sanctions', which appeared in United Nations practice during the 1990s. Those sanctions replace classic general trade embargos aimed at a country with more targeted and selective measures, such as economic and financial sanctions, prohibition of travel, embargos on arms or specific goods, so as to reduce the suffering endured by the civilian population of the country concerned, while none the less imposing genuine sanctions on the targeted regime and those in charge of it.

114 The practice of the institutions has developed in the same way, the Council having successively considered that Articles 60 EC and 301 EC allowed it to take restrictive measures against entities which or persons who physically controlled part of the territory of a third country (see, for example, Council Regulation (EC) No 1705/98 of 28 July 1998 concerning the interruption of certain economic relations with Angola in order to induce the 'União Nacional para a Independência Total de Angola' (UNITA) to fulfil its obligations in the peace process, and repealing Council Regulation (EC) No 2229/97 (OJ 1998 L 215, p. 1)) and against entities which or persons who effectively controlled the government apparatus of a third country and also against persons and entities associated with them and who or which provided them with financial support (see, for example, Council Regulation (EC) No 1294/1999 of 15 June 1999 concerning a freeze of funds and a ban on investment in relation to the Federal Republic of Yugoslavia (FRY) and repealing Regulations (EC) No 1295/98 and (EC) No 1607/98 (OJ 1999 L 153, p. 63), and Council Regulation (EC) No 2488/2000 of 10 November 2000 maintaining a freeze of funds in relation to Mr Milosevic and those persons associated with him and repealing Regulations (EC) Nos 1294/1999 and 607/2000 and Article 2 of Regulation (EC) No 926/98 (OJ 2000 L 287, p. 19)). That development is fully compatible with the measures provided for in Articles 60 EC and 301 EC.

115 In fact, just as economic or financial sanctions may legitimately be directed specifically at the rulers of a third country, rather than at the country as such, they may be directed at the persons or entities associated with those rulers or directly or indirectly controlled by them, wherever they may be. As the Commission has rightly pointed out, Articles 60 EC and 301 EC would not provide an efficient means of

applying pressure to the rulers with influence over the policy of a third country if the Community could not, on the basis of those provisions, adopt measures against individuals who, although not resident in the third country in question, are sufficiently connected to the regime against which the sanctions are directed. Furthermore, as the Council has emphasised, the fact that some of those individuals so targeted happen to be nationals of a Member State is irrelevant, for, if they are to be effective in the context of the free movement of capital, financial sanctions cannot be confined solely to nationals of the third country concerned.

116 That interpretation, which is not contrary to the letter of Article 60 EC or Article 301 EC, is justified both by considerations of effectiveness and by humanitarian concerns.

117 With regard, second, to the objective pursued by Regulation No 467/2001, the Council has argued, referring to Security Council Resolutions 1267 (1999) and 1333 (2000), Common Position 2001/154 and to the first and second recitals in the preamble to that regulation and to its actual title, that the measures at issue were directed essentially against the Taliban regime which, at the time, effectively controlled 80% of Afghan territory and called itself the 'Islamic Emirate of Afghanistan' and, incidentally, against persons who and entities which, by means of economic or financial transactions, assisted that regime by providing sanctuary and training for international terrorists and their organisations, thus in fact acting as agents of that regime or being closely connected to it.

118 In so far as the applicants complained that Regulation No 467/2001 was directed at Usama bin Laden and not the Taliban regime, the Council has added that Usama bin Laden was in fact the head and 'éminence grise' of the Taliban and that he wielded the real power in Afghanistan. His temporal and spiritual titles of 'Sheikh' (head) and 'Emir' (prince, governor or commander) and the rank he held beside the other Taliban religious dignitaries can leave little doubt on that score. Moreover, even before 11 September 2001, Usama bin Laden had sworn an oath of allegiance

('Bay'a') making a formal religious bond between him and the Taliban theocracy. He was thus in a situation comparable to that of Mr Milosevic and the members of the Yugoslav Government at the time of the economic and financial sanctions taken by the Council against the Federal Republic of Yugoslavia (see paragraph 114 above). With regard to Al-Qaeda, the Council has observed that it was common knowledge that it had many military training camps in Afghanistan and that thousands of its members had fought beside the Taliban between October 2001 and January 2002, during the intervention of the international coalition.

119 There are no grounds for challenging the validity of those considerations as to which there exists, within the international community, a broad consensus expressed, inter alia, by the several resolutions adopted unanimously by the Security Council and which have not been specifically rebutted or even challenged by the applicants.

120 More particularly, the chief object of the sanctions at issue in this case was to prevent the Taliban regime from obtaining financial support from any source whatsoever, as is apparent from Paragraph 4(b) of Resolution 1267 (1999). The sanctions might have been circumvented if the individuals who were thought to maintain that regime had not been affected by them. As regards the relations between the former Taliban regime and Usama bin Laden, the Security Council considered that the latter, during the period in question, received assistance, at this point crucial, from the regime of which he could be regarded as forming part. Thus it is that, in the 10th recital in the preamble to Resolution 1333 (2000), the Security Council deplored the fact that the Taliban continued to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations. Furthermore, in the seventh recital in the preamble to Resolution 1333 (2000), the Security Council reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security.

121 Thus, contrary to what the applicants maintained, the measures at issue were indeed intended to interrupt or reduce economic relations with a third country, in connection with the international community's fight against international terrorism and, more specifically, against Usama bin Laden and the Al-Qaeda network.

122 With regard, third, to the proportionality of the measures at issue, that must be assessed in the light of the purpose of Regulation No 467/2001. As has been explained above, the imposing of 'smart' sanctions is intended precisely 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. Now, in the circumstances of this case, Regulation No 467/2001 tended to increase the pressure on the Taliban regime, inter alia by freezing the funds and other financial assets of Usama bin Laden and the individuals and entities associated with him, as identified by the Sanctions Committee. Such measures are 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.

123 By contrast, the fact that the measures at issue also affected transactions having no cross-border element is not relevant. If it was the legitimate object of those measures to cause the sources of funding for the Taliban and international terrorism operating out of Afghanistan to dry up, they necessarily had to affect both international and purely internal transactions, given that the latter were just as likely as the former to supply such funding, having regard in particular to the free movement of persons and capital and the lack of transparency in international financial channels.

124 It follows from the foregoing that, contrary to what the applicants claimed, the Council was indeed competent to adopt Regulation No 467/2001 on the basis of Articles 60 EC and 301 EC.

— Concerning the legal basis of the contested regulation

125 Unlike Regulation No 467/2001, the contested regulation has for its legal basis not only Articles 60 EC and 301 EC but also Article 308 EC. That reflects the development of the international situation of which the sanctions decreed by the Security Council and implemented by the Community successively form part.

126 Adopted in connection with the actions taken for the purpose of suppressing international terrorism, considered essential for the maintenance of international peace and security (see the seventh recital in the preamble), Resolution 1333 (2000) of the Security Council none the less specifically referred to the Taliban regime which at the time controlled the greater part of Afghan territory and offered refuge and assistance to Usama bin Laden and his associates.

127 As has been stated above, it is just that expressly established link with the territory and governing regime of a third country which made it possible for the Council to base Regulation No 467/2001 on Articles 60 EC and 301 EC.

128 On the other hand, Security Council Resolution 1390 (2002) was adopted on 16 January 2002 after the collapse of the Taliban regime following the armed intervention of the international coalition in Afghanistan, launched in October 2001. As a result, and although it still expressly refers to the Taliban, the resolution is no longer aimed at their fallen regime, but rather directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them.

129 The fact that there is nothing to link the sanctions to be taken under that resolution with the territory or governing regime of a third country, as pointed out in paragraph 2 of the statement of reasons for the proposal for a Council regulation presented by the Commission on 6 March 2002, which is the source of the contested regulation [document COM(2002) 117 final], was explicitly acknowledged by the Council in paragraphs 4 and 5 of its rejoinder.

130 In the absence of such a connection, the Council and the Commission considered that Articles 60 EC and 301 EC did not, in themselves, constitute an adequate legal basis allowing for the adoption of the contested regulation. Those considerations must be upheld.

131 Indeed, Article 60(1) EC provides that the Council, in accordance with the procedure provided for in Article 301 EC, may 'as regards the third countries concerned' take the necessary urgent measures on the movement of capital and payments. Article 301 EC expressly permits action by the Community to interrupt or reduce, in part or completely, economic relations 'with one or more third countries'.

132 Furthermore, the fact that those provisions authorise the adoption of 'smart sanctions' against individuals and entities associated with the rulers of a third country or controlled by them, directly or indirectly (see paragraphs 115 and 116 above) does not give grounds for considering that those individuals and entities may still be targeted when the governing regime of the third country in question has disappeared. In such circumstances, there in fact exists no sufficient link between those individuals or entities and a third country.

133 It follows that on any view Articles 60 EC and 301 EC did not constitute in themselves a sufficient legal basis for the contested regulation.

134 Moreover, contrary to the view expressed by the Commission in the proposal for a Council regulation which is the source of the contested regulation (see paragraph 129 above), the Council considered that Article 308 EC did not on its own constitute an adequate legal basis for the adoption of the regulation either. Those considerations must also be approved.

135 On this point, according to the case-law (Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 13), it follows from the very wording of Article 308 EC that recourse to that provision as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question. In such a situation, Article 308 EC allows the institutions to act with a view to attaining one of the objectives of the Community, despite the lack of a provision conferring on them the necessary power to do so.

136 As regards the first condition for the applicability of Article 308 EC, it is not disputed that no provision of the EC Treaty provides for the adoption of measures of the kind laid down in the contested regulation relating to the fight against international terrorism and, more particularly, to the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, where no connection whatsoever has been established with the territory or governing regime of a third state. The first condition is therefore satisfied in the instant case.

137 In order for the second condition of the applicability of Article 308 EC to be satisfied in the instant case, it is necessary, in accordance with the case-law cited in paragraph 135 above, that it should be possible to connect the fight against international terrorism and, more particularly, the imposition of economic and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, to one of the objects which the Treaty entrusts to the Community.

138 In this instance, the preamble to the contested regulation wastes very few words on that point. At the very most, the Council has stated in the fourth recital of the preamble to that regulation that the measures necessary under Resolution 1390 (2002) and Common Position 2002/402 fell 'under [sic] the scope of the Treaty' and that Community legislation had therefore to be adopted, 'notably with a view to avoiding distortion of competition'.

139 With regard to the statement that the measures at issue fall within the scope of the Treaty, which begs the question, it must on the contrary be held straight away that none of the objectives of the Treaty, as expressly set out in Articles 2 EC and 3 EC, appears capable of being attained by the measures at issue.

140 In particular, unlike the measures provided for by Regulation No 3541/92 against certain natural or legal persons established in the Community, relied on by the Council in support of its arguments (see paragraph 97 above), the measures provided for by the contested regulation could not be authorised by the object of establishing a common commercial policy (Article 3(1)(b) EC), in connection with which it has been held that the Community has the power to adopt trade embargo measures under Article 133 EC, since the Community's commercial relations with a third country are not at issue in this case.

141 As regards the objective of creating a system ensuring that competition in the internal market is not distorted (Article 3(1)(g) EC), the assertion that there is a risk of competition's being distorted, which according to its preamble the contested regulation seeks to prevent, fails to persuade.

142 The competition rules of the EC Treaty are addressed to undertakings and Member States when they disturb equal competition between undertakings (see, with regard to Article 87 EC, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13, and with regard to Article 81 EC, Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11).

143 Now, in this case, it has not been alleged that the reference to individuals or entities by the contested regulation is made to them as undertakings for the purposes of the EC Treaty rules on competition.

144 Nor has any explanation been put forward that might make it possible to understand how competition between undertakings could be affected by the implementation, whether at Community level or at the level of its Member States, of the specific restrictive measures against certain persons and entities prescribed by Security Council Resolution 1390 (2002).

145 The foregoing considerations are not called in question by the connection made by the United Kingdom and the Commission in their written pleadings between the objective sought in Article 3(1)(g) EC and the objective seeking to create an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of capital (Article 3(1)(c) EC) (see, inter alia, paragraphs 99 and 102 to 104 above).

146 In this regard, it must be pointed out that 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 (see, by analogy with Article 30 EC, Case C-367/89 *Richardt* [1991] ECR I-4621, paragraph 19, and the decision cited therein). The concept of public security covering both the State's internal and external security, the Member States are therefore as a rule entitled to adopt under Article 58(1)(b) EC measures of the kind laid down by the contested regulation. 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 EC Treaty.

147 It has to be added that, if a mere finding that there was a danger of disparities between the various national rules and an abstract risk of obstacles to the free movement of capital or payments or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 308 EC as a legal basis for a regulation together with Article 3(1)(c) and (g) EC, not only would the provisions of Chapter 3 of Title VI of the EC Treaty be rendered ineffective, but also review by the court of compliance with the proper legal basis might be rendered quite nugatory. The Community judicature would then be prevented from discharging the function entrusted to it by Article 220 EC of ensuring that the law is observed in the interpretation and application of the Treaty (see, to that effect, with regard to Article 100a of the EC Treaty, now, after amendment, Article 95 EC, Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, paragraphs 84, 85 and 106 to 108, and the case-law cited therein).

148 In any case, the criteria put before the Court do not give grounds for considering that the contested regulation actually helps to avoid the danger of impediments to the free movement of capital or of appreciable distortion of competition.

149 The Court considers in particular that, contrary to what the Commission and the United Kingdom maintain, the implementation of the Security Council resolutions in question by the Member States rather than by the Community is not capable of giving rise to a likely and serious danger of discrepancies in the application of the freezing of funds from one Member State to another. First, those resolutions in fact contain clear, precise, detailed definitions and obligations that leave scarcely any room for interpretation. Second, the importance of the measures they call for, with a view to their implementation, does not appear to be such that there is reason to fear such a danger.

150 In those circumstances, the measures at issue in this case cannot find authorisation in the objective referred to in Article 3(1)(c) and (g) EC.

151 Moreover, the various examples of recourse to the additional legal basis of Article 308 EC adduced by the Council (see paragraphs 95 and 97 above) are irrelevant in this instance. First, it is not apparent from those examples that the conditions for the application of Article 308 EC, particularly the condition relating to the attainment of a Community objective, were not satisfied in the circumstances of the cases concerned. Second, the legal acts at issue in those cases were not challenged on that ground before the Court of Justice, particularly in the case giving rise to the judgment in *Delbar*, paragraph 96 above. In any event, it is settled case-law that what is merely Council practice cannot derogate from the rules laid down in the Treaty, and cannot therefore create a precedent binding on the Community institutions with regard to the choice of the correct legal basis (see, in particular, Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 24, and the Opinion of the Court 1/94 of 15 November 1994, ECR I-5267, paragraph 52).

152 It follows from all the foregoing that the fight against international terrorism, more particularly the imposition of economic and financial sanctions, such as the freezing of funds, 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.

153 In addition to the Treaty objectives expressly set out in Articles 2 EC and 3 EC, the Commission has also put forward in its written pleadings a more general object of the Community which in the circumstances, it claimed, justified recourse to the legal basis of Article 308 EC. The Commission thus infers from the preamble to the EC Treaty a 'general objective which the Community has to ensure [international] peace and security' (see paragraph 100 above). That argument cannot be accepted.

154 Contrary to what the Commission maintains, indeed, nowhere in the preamble to the EC Treaty is it stated that that act pursues a wider object of safeguarding international peace and security. Although it is unarguably a principal aim of that treaty to put an end to the conflicts of the past between the peoples of Europe by

creating 'an ever closer union' among them, that is without any reference whatsoever to the implementation of a common foreign and security policy. The latter falls exclusively within the objects of the Treaty on European Union which, as emphasised in the preamble thereto, seeks to 'mark a new stage in the process of European integration undertaken with the establishment of the European Communities'.

155 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, such as the common commercial policy, it is not however a sufficient basis for the adoption of measures under Article 308 EC, above all in spheres in which Community competence is marginal and exhaustively defined in the Treaty.

156 Last, 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 Treaty on European Union. In particular, the Court considers that the coexistence of Union and Community as integrated but separate legal orders, and the constitutional architecture of the pillars, as intended by the framers of the Treaties now in force, authorise neither the institutions nor the Member States to rely on the 'flexibility clause' of Article 308 EC in order to mitigate the fact that the Community lacks the competence necessary for achievement of one of the Union's objectives. To decide otherwise would amount, in the end, to making that provision applicable to all measures falling within the CFSP and police and judicial cooperation in criminal matters (PJC), so that the Community could always take action to attain the objectives of those policies. Such an outcome would deprive many provisions of the Treaty on European Union of their ambit and would be inconsistent with the introduction of instruments specific to the CFSP (common strategies, joint actions, common positions) and to the PJC (common positions, decisions, framework decisions).

157 It must therefore be concluded that Article 308 EC does not, any more than Article 60 EC or Article 301 EC taken in isolation, constitute of itself a sufficient legal basis for the contested regulation.

158 However, both in the recitals in the preamble to the contested regulation and in its pleadings, the Council has argued that Article 308 EC, in conjunction with Articles 60 EC and 301 EC, gives it the power to adopt a Community regulation relating to the battle against the financing of international terrorism conducted by the Union and its Member States under the CFSP and imposing, to that end, economic and financial sanctions on individuals, without establishing any connection whatsoever with the territory or governing regime of a third country. Those considerations must be accepted.

159 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.

160 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.

161 Under Articles 60 EC and 301 EC, action by the Community is therefore in actual fact action by the Union, the implementation of which finds its footing on the Community pillar after the Council has adopted a common position or a joint action under the CFSP.

162 According to Article 3 EU, the Union is to be served by a single institutional framework which is to ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*. The Union is in particular to ensure the consistency of its

external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission are to be responsible for ensuring such consistency and are to cooperate to this end. They are to ensure the implementation of these policies, each in accordance with its respective powers.

163 Now, just as the powers provided for by the EC Treaty may be proved to be insufficient to allow the institutions to act in order to attain, in the operation of the common market, one of the objectives of the Community, so 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, under the Treaty on European Union, in view of which those provisions were specifically introduced into the EC Treaty.

164 There are therefore good grounds for accepting that, in the specific context contemplated by Articles 60 EC and 301 EC, recourse to the additional legal basis of Article 308 EC is justified for the sake of the requirement of consistency laid down in Article 3 of the Treaty on European Union, when those provisions do not give the Community institutions the power necessary, in the field of economic and financial sanctions, to act for the purpose of attaining the objective pursued by the Union and its Member States under the CFSP.

165 Thus it is possible that a common position or joint action, adopted under the CFSP, should demand of the Community measures for economic and financial sanctions going beyond those expressly provided for by Articles 60 EC and 301 EC, which consist of the interruption or reduction of economic relations with one or more third countries, especially with regard to movements of capital and payments.

166 In such a situation, 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.

167 In this instance, the fight against international terrorism and its funding is unarguably one of the Union's objectives under the CFSP, as they are defined in Article 11 EU, even where it does not apply specifically to third countries or their rulers.

168 Furthermore, it is not disputed that Common Position 2002/402 was adopted by the Council acting unanimously in relation to that fight and that it prescribes the imposition by the Community of economic and financial sanctions in respect of individuals suspected of contributing to the funding of terrorism, where no connection whatsoever has been established with the territory or governing regime of a third country.

169 Against that background, recourse to Article 308 EC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 EC and 301 EC, is justified by the consideration that, as the world now stands, States can no longer be regarded as the only source of threats to international peace and security. Like the international community, the Union and its Community pillar are not to be prevented from adapting to those new threats by imposing economic and financial sanctions not only on third countries, but also on associated persons, groups, undertakings or entities developing international terrorist activity or in any other way striking a blow at international peace and security.

170 The institutions and the United Kingdom are therefore right to maintain that the Council was competent to adopt the contested regulation which sets in motion the economic and financial sanctions provided for by Common Position 2002/402, on the joint basis of Articles 60 EC, 301 EC and 308 EC.

171 The first part of the first ground of annulment must in consequence be rejected.

Concerning the second part

Arguments of the parties

172 In the second part of the first ground of annulment, the applicants argue that the ambit of the powers granted to the Commission, first pursuant to Article 10(1) of Regulation No 467/2001 and subsequently pursuant to Article 7(1) of the contested regulation, is far wider than that of mere power to implement a Council regulation and that it therefore infringes Article 202 EC. In their view, in fact, a decision by the Commission to add a person to the list in Annex I to the contested regulation is in fact tantamount to altering Article 2 thereof.

173 The Council and the Commission maintain that the delegation of implementing powers conferred in this instance on the Commission is consonant with Article 202 EC.

Findings of the Court

174 The second part of the first ground has become inconsequential as a result of the repeal of Regulation No 467/2001 and its replacement by the contested regulation. As a matter of fact, while it is true that the applicants had originally been included in Annex I to Regulation No 467/2001 by Commission Regulation No 2199/2001, adopted on authority given by the Council under Article 10(1) of the former of those regulations, their inclusion in Annex I to the contested regulation is now due to that regulation itself, as adopted by the Council without any further action by the Commission.

175 The amendments made by Regulation No 866/2003 (paragraph 41 above) are matters of a formal drafting nature only, as Mr Yusuf has acknowledged (paragraph 63 above), and they must therefore be regarded as falling within the ambit of a mere implementing power, which it is in keeping with Article 202 EC to delegate to the Commission.

176 It follows that the second part of the plea must be rejected.

Concerning the third part

Arguments of the parties

177 In the third part of the first ground, the applicants claim that it was not within the purview of the Council's powers to delegate to a body outside the Community — in this instance, the Sanctions Committee — decision-making power in the sphere of the civil and economic rights of the Member States and their nationals.

178 The United Kingdom counters that there has in the circumstances been no delegation of Community powers to the bodies of the United Nations. Quite on the contrary, the institutions acted solely for the purpose of ensuring that the Member States of the Community complied with their obligations under the Charter of the United Nations, which prevail over every other obligation, in accordance with Article 103 of that Charter.

Findings of the Court

179 The decisions affecting the applicants were taken in this case by the Sanctions Committee on the authority of the Security Council, using information gathered on its own responsibility. Furthermore, the resolutions of the Security Council at issue do not constitute the exercise of powers delegated by the Community but the exercise by the Security Council of its own powers under the Charter of the United Nations. The fact that the Community institutions, following the adoption of Common Position 2002/402, deemed themselves bound to abide by those decisions and resolutions in the exercise of their own powers is, in this respect, irrelevant.

180 The third part of the ground would seem to be based on a misapprehension and must, accordingly, be rejected.

2. *Concerning the second ground of annulment, alleging infringement of Article 249 EC*

Arguments of the parties

181 The applicants maintain that, in so far as the contested regulation directly prejudices the rights of individuals and prescribes the imposition of individual sanctions, it has

no general application and therefore contravenes Article 249 EC. It is contrary to the condition of general application, laid down by that provision, for individual cases to be governed, as in this instance, by means of a regulation. That condition derives from the general principle of equality under the law and is an essential precondition if Community law is not to run foul of the Member States' constitutional laws or the general principles relating to human rights and fundamental freedoms. They submit that the method of action consisting of laying down a legislative provision by means of a list is also contrary to the principles of lawfulness and legal certainty.

182 In their reply, the applicants emphasise that the individuals and entities referred to by the contested regulation do not come from some circle of persons designated in the abstract, but rather correspond name by name to the persons in the Sanctions Committee's list. Nor is there any objectively determined situation, described by conditions formulated in a general manner, that might explain why the applicants' names appear precisely in Annex I to the contested regulation. In those circumstances, the contested regulation cannot be understood to be a regulation, but rather a bundle of individual decisions, within the meaning of Joined Cases 41/70 to 44/70 *International Fruit and Others* v *Commission* [1971] ECR 411.

183 The institutions and the United Kingdom argue that the contested regulation is indeed of general application.

Findings of the Court

184 In accordance with the second paragraph of Article 249 EC, a regulation has general application and is directly applicable in all Member States, whereas a decision is binding only on those to whom it is addressed.

185 According to established case-law, the criterion for distinguishing between a regulation and a decision must be sought in the general application or otherwise of the measure in question. The essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, is applicable to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract. Furthermore, the legislative nature of a measure is not called in question by the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom it applies at any given time, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (see judgments in Joined Cases 19/62 to 22/62 *Fédération nationale de la Boucherie* v *Council* [1962] ECR 491, paragraph 2; Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409, at p. 415; Case 242/81 *Roquette Frères* v *Council* [1982] ECR 3213, paragraphs 6 and 7; Case C-298/89 *Gibraltar* v *Council* [1993] ECR I-3605, paragraph 17; Case C-41/99 P *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239, paragraph 24, and orders in Case C-87/95 P *CNPAAP* v *Council* [1996] ECR I-2003, paragraph 33, and Case T-45/02 *DOW AgroSciences* v *Parliament and Council* [2003] ECR II-1973, paragraph 31).

186 In the circumstances of the case, the contested regulation unarguably 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 which is effective erga omnes, as is made clear in particular by Article 11, by virtue of which the contested regulation applies:

— within the territory of the Community, including its airspace,

— on board any aircraft or any vessel under the jurisdiction of a Member State,

— to any person elsewhere who is a national of a Member State,

— to any legal person, group or entity which is incorporated or constituted under the law of a Member State,

— to any legal person, group or entity doing business within the Community.

187 In actual fact, the applicants' line of argument stems from a confusion of the concept of the addressee of an act with the concept of the object of that act. Article 249 EC contemplates only the former, in that it provides that a regulation has general application, whereas a decision is binding only upon those to whom it is addressed. By contrast, the object of an act is immaterial as a criterion for its classification as a regulation or a decision.

188 Thus, an act the object of which is to freeze the funds of the perpetrators of terrorist acts, viewed as a general and abstract category, would be a decision if the persons to whom it was addressed were one or more persons expressly named. On the other hand, an act the object of which is to freeze the funds of one or more persons expressly named is in fact a regulation if it is addressed in a general and abstract manner to all persons who might actually hold the funds in question. That is precisely the situation in this case.

189 The second ground must accordingly be rejected.

3. *Concerning the third ground of annulment, alleging breach of the applicants' fundamental rights*

Arguments of the parties

190 The applicants, referring both to Article 6(2) of the Treaty on European Union and to the Court's case-law (Case 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13), maintain that the contested regulation infringes their fundamental rights, in particular their right to the use of their property and the right to a fair hearing, as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), inasmuch as that regulation imposes on them heavy sanctions, both civil and criminal, although they had not first been heard or given the opportunity to defend themselves, nor had that act been subjected to any judicial review whatsoever.

191 With more particular regard to the alleged breach of the right to a fair hearing, the applicants stress that they were not told why the sanctions were imposed on them, that the evidence and facts relied on against them were not communicated to them and that they had no opportunity to explain themselves (Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063; Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 14; Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, and Case C-49/88 *Al-Jubail Fertilizer and Another* v *Council* [1991] ECR I-3187). The only reason for their names being entered in the list in Annex I to the contested regulation is the fact that they were entered in the list drawn up by the Sanctions Committee on the basis of information provided by the States and international or regional organisations. Neither the Council nor the Commission examined the reasons for which that committee included the applicants in that list. The source of the information received by that committee is especially obscure and the reasons why certain

individuals have been included in the list, without first being heard, are not mentioned. The entire procedure leading to the addition of the applicants to the list in Annex I to the contested regulation is thus stamped with the seal of secrecy. Such infringements of their rights cannot be remedied after the event (Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235).

192 With more particular regard to the alleged breach of the right to judicial review, the applicants note that in Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45, the Court of Justice held that, according to settled case-law, the requirement of such review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the ECHR. That right implies the existence of effective legal proceedings before a judicial body that satisfies certain conditions such as independence and neutrality.

193 They argue that in this case neither the Commission nor the Council satisfied those conditions.

194 The same is true of the Security Council and its Sanctions Committee, which are political bodies before which only States are authorised to appear. In this case, the Sanctions Committee informed the Swedish Government that it was not possible to undertake an in-depth examination of the applicants' request to have their names removed from the list drawn up by that committee. The request was, however, communicated to the 15 members of the Sanctions Committee as a proposal for a decision. Only three members of the Committee, namely, the United States of America, the United Kingdom and Russia, opposed the request. However, on

account of the rule of unanimity which governs the work of the Sanctions Committee, the applicants' names remained in the list at issue.

195 With regard to the review carried out by the Court of First Instance in this action, the applicants object that an action for annulment, which concerns only the lawfulness of the contested regulation as such, does not allow of an in-depth examination of the lawfulness of the sanctions in the light of the fundamental rights allegedly infringed. In addition, having regard to the legislative technique used, which consisted of drawing up lists of persons and entities covered by those sanctions, such an in-depth examination would be pointless, since it would be limited to ascertaining whether the names in those lists corresponded to those in the Sanctions Committee's lists.

196 None the less, the applicants point out various errors or irregularities that vitiate the contested regulation. Thus, the entity 'Barakaat International, Hallbybacken 15, 70 Spånga, Sweden', mentioned in Annex I to that regulation, under the heading 'Legal persons, groups and entities', is the same entity as the applicant Al Barakaat, mentioned in the same section. The applicants explain that Al Barakaat has transferred its principal office. Moreover, the address given is incorrect.

197 Similarly, the entity 'Somali Network AB, Hallbybacken 15, 70 Spånga, Sweden', mentioned in the same section of Annex I to the contested regulation, previously held by three of the original applicants, Messrs Aden, Ali and Yusuf, whose activity consisted of the sale of telephone cards, stopped trading at the end of the year 2000 and was transferred in the summer of 2001, its company name being changed to 'Trä & Inredningsmontage I Kärrtorp' on 4 October 2001. The new shareholders have nothing to do with the applicants and seem to carry on business in the building sector. The Sanctions Committee having nevertheless placed that entity on its list on 9 November 2001, it is clear that its documentation was patchy and that there was no checking case-by-case.

198 The applicants add that, on its own initiative, Al Barakaat handed its account books to the Swedish police department responsible for combating terrorism, the SÄPO. After analysis, the SÄPO returned the documents to the applicants, informing them that they were in order, which goes to show that the sanctions imposed on Al Barakaat were unwarranted.

199 In order to produce his evidence, the first applicant, Mr Yusuf, has sought to be heard by the Court. He has requested that Sir Jeremy Greenstock, Chairman of the Sanctions Committee at the time when the sanctions against him were adopted, should also be heard.

200 In their reply, in addition, the applicants challenge the argument that the Council was obliged to implement the sanctions decided on by the Security Council on the ground that they were binding on the Member States of the Community by virtue of the Charter of the United Nations.

201 According to the applicants, there is no absolute obligation under Article 25 of the Charter of the United Nations and Article 103 of that Charter is not binding except in public international law and does not on any view mean that the members of the United Nations must fail to have regard to their own laws.

202 They submit that resolutions of the Security Council are not directly applicable in the Member States of the United Nations, but must be transposed into their internal law, in accordance with their constitutional provisions and the fundamental principles of law. If those provisions preclude such transposition, they must be amended in order to make transposition possible.

203 Thus, in Sweden, a draft law intended to put into effect Security Council Resolution 1373 (2001) of 28 September 2001, which provides inter alia for the freezing of the assets of persons who and entities which commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, was withdrawn by the Government after the Lagrådet (Legislation Council) observed that every decision to freeze assets must be taken by the State Prosecutor's Office and could be the subject of judicial review.

204 In addition, the applicants maintain that it is clear from Article 24(2) of the Charter of the United Nations that the Security Council must always act in accordance with the purposes and principles of the United Nations. One condition set on the obligation of the members of the United Nations under Article 25 of the Charter is that the Security Council's powers to adopt binding decisions are derived from other provisions of that Charter. The Charter of the United Nations being addressed to the States alone and creating neither rights nor duties for individuals, it may be wondered whether the Member States of the United Nations are bound by the Security Council's decisions imposing sanctions on Usama bin Laden and persons associated with him. It might even be asked whether those decisions are not contrary to the express objective of the United Nations, which is to promote respect for human rights and for fundamental freedoms in accordance with Article 1(3) of the Charter of the United Nations.

205 The Council primarily maintains that the circumstances in which the contested regulation was adopted preclude any unlawful conduct on its part.

206 In this regard, the Council and the Commission, referring in particular to Articles 24 (1), 25, 41, 48 and 103 of the Charter of the United Nations, submit, first, that the Community, like the Member States of the United Nations, is bound by international law to give effect, within its spheres of competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the Charter of

the United Nations; second, that the powers of the Community institutions in this area are limited and that they have no autonomous discretion in any form; third, that they cannot therefore alter the content of those resolutions or set up mechanisms capable of giving rise to any alteration in their content and, fourth, that any other international agreement or rule of domestic law liable to hinder such implementation must be disregarded.

207 The Council and the Commission also observe that the Security Council, acting in the name of the Members of the United Nations, exercises the chief responsibility for maintaining international peace and security. They claim that the resolutions adopted by the Security Council under Chapter VII of the Charter are universally applicable and wholly binding without any reservation for the members of the United Nations, who must recognise that those resolutions prevail over every other international obligation. In that way Article 103 of the Charter of the United Nations makes it possible to disregard any other provision of international law, whether customary or laid down by convention, in order to apply the resolutions of the Security Council, thus creating an 'effect of legality'.

208 Nor, according to the institutions, can national law stand in the way of implementing measures adopted pursuant to the Charter of the United Nations. If a member of the United Nations were able to alter the contents of Security Council resolutions the uniformity of their application, essential to their effectiveness, could not be maintained.

209 The Commission adds that, in accordance with Article 27 of the Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969, a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty. If a provision of national law is inconsistent with an obligation under international law, it is for the State concerned to interpret that provision in the spirit of the Treaty or

amend its national legislation so as to make it compatible with the obligation under international law.

210 Although the Community itself is not a member of the United Nations, it is required to act, in its spheres of competence, in such a way as to fulfil the obligations imposed on its Member States as a result of their belonging to the United Nations. On that point the Commission notes that the Community's powers must be exercised in compliance with international law (Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 45). The Council and the Commission also cite *Dorsch Consult* v *Council and Commission*, paragraph 82 above. Although that judgment concerned the imposition of a trade embargo, a measure of common commercial policy falling, in accordance with Article 133 EC, within the exclusive competence of the Community, the Council and the Commission consider that the principle laid down in that judgment applies equally to restrictions on the movement of capital and payments adopted, as in this case, pursuant to Articles 60 EC and 301 EC, having regard to the development of the Community's powers in the field of sanctions against third countries.

211 The Council puts that proposition in general terms, arguing that when the Community acts to discharge obligations imposed on its Member States as a result of their belonging to the United Nations, either because they have transferred to it the necessary powers or because they consider it politically opportune, the Community must be regarded for all practical purposes as being in the same position as the members of the United Nations, having regard to Article 48(2) of the Charter of the United Nations.

212 It follows, according to the Council, that when the Community takes measures for purposes reflecting the desire of its Member States to perform their obligations under the Charter of the United Nations, it necessarily enjoys the protection conferred by the Charter and, in particular, the 'effect of legality'.

213 The Council emphasises, in addition, that when the Community acts in that context, its powers are bound by the decisions of common foreign and security policy putting into effect Security Council resolutions, in particular those taken under Chapter VII of the Charter of the United Nations, which must be introduced into the Community legal order.

214 In this instance, the contested regulation was adopted with a view to implementing in the Community legal order Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002) through the automatic transposition of any list of persons or entities drawn up by the Sanctions Committee in accordance with the applicable procedures, without any autonomous discretion whatsoever being exercised, as is clearly apparent from both the preamble to the contested regulation and Article 7(1) thereof.

215 In the view of the Council and the Commission, such circumstances exclude a priori any illegality on the part of the institutions. Once the Community had decided to act by virtue of Common Position 2002/402, it was not open to it, without infringing its own international obligations, the international obligations of its Member States and the duty of cooperation between the Member States and the Community, laid down in Article 10 EC, to exclude given persons from the list or to inform them beforehand or, failing that, to provide the means by which to bring proceedings making it possible to check whether the measures at issue were justified.

216 The same would hold, according to the Council, even if the contested regulation were to be regarded as violating the applicants' fundamental rights. The Council submits that the 'effect of legality' applies also with regard to fundamental rights which may, as provided for by international legal instruments, be temporarily suspended in time of emergency.

217 The applicants having in their reply called into question whether the Security Council resolutions at issue are compatible with Article 1(3) of the Charter of the United Nations, the Council responds that there are grounds for supposing that, under the special powers conferred on it by Chapter VII of the Charter, the Security Council weighed up the fundamental rights of the victims of the sanctions against those of the victims of terrorism, in particular the right of the latter to life.

218 Moreover, the Council and the Commission take the view that there is no connection between this case and the applicants' arguments concerning the legislative process by which Security Council Resolution 1373 (2001) was put into effect in Sweden, the context of which is radically different from that of the implementation of Resolution 1390 (2002). When putting Resolution 1373 (2001) into effect, the Member States and the Community did in fact enjoy broad discretion.

219 In any event, the Council and the Commission are of the opinion that in this case the Court's jurisdiction must be limited to considering whether the institutions committed a manifest error in implementing the obligations laid down by Security Council Resolution 1390 (2002). Beyond that limit, any claim of jurisdiction, which would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council in carrying out its function of maintaining international peace and security, would risk undermining one of the foundations of the world order established in 1945, would cause serious disruption to the international relations of the Community and its Member States, would be open to challenge in the light of Article 10 EC and would conflict with the obligation on the Community to comply with international law, of which resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations from part. The institutions and the United Kingdom submit that such measures may not be challenged at national or Community level, but only before the Security Council itself, through the Government of the State of which the applicants are nationals or in the territory of which they reside (order in *'Invest' Import und Export and Invest Commerce* v *Commission*, cited in paragraph 85 above, paragraph 40).

220 As their secondary argument, if the Court should decide to proceed to a full examination of the merits of the various arguments put forward by the applicants, the Council and the Commission contend that the contested regulation does not violate fundamental rights or freedoms as alleged.

221 First, the measures implemented by the contested regulation do not interfere with the applicants' right to possess their property, since that right does not enjoy absolute protection and its exercise may be made the subject of restrictions justified by public interest objectives.

222 Second, the contested regulation does not prejudice the right to a fair hearing either.

223 Third, with regard to the right to an effective judicial remedy, the institutions and the United Kingdom observe that the applicants were in a position to make their views known to the Security Council and that they have been able to bring this action before the Court of First Instance pursuant to Article 230 EC, in connection with which they may plead, inter alia, that the Community institutions lacked competence to adopt the contested regulation and that the interference with their property rights was unlawful.

224 According to the Council, the dispute between the parties does not relate to the actual existence of a right to an effective judicial remedy but to the scope of the judicial review that would appear to be justified or appropriate in the circumstances of the case.

225 On this point, the Council acknowledges that, where the Community decides on its own initiative to take unilateral measures of economic and financial coercion, the judicial review must extend to examination of the evidence against the persons on whom the sanctions are imposed. However, according to the Council and the United Kingdom, where the Community acts without exercising any discretionary power, on the basis of a decision taken by the body on which the international community has conferred considerable powers with a view to preserving international peace and security, full judicial review would risk undermining the system of the United Nations as established in 1945, might seriously damage the international relations of the Community and its Member States and would conflict with the obligation on the Community to comply with international law. The Council considers that, in the circumstances, review by the Community judicature cannot go beyond the review recognised in the Member States so far as concerns the transposition into the internal legal order of decisions taken by the bodies of the international community acting with the object of preserving international peace and security. In this connection, the Council observes that in several Member States acts implementing Security Council resolutions are called 'acts of State' and escape the jurisdiction of the courts entirely. In other Member State, the scope of judicial review is very limited.

Findings of the Court

Preliminary observations

226 The Court can properly rule on the plea alleging breach of the applicants' fundamental rights only in so far as it falls within the scope of its judicial review and as it is capable, if proved, of leading to annulment of the contested regulation.

227 In this instance, the institutions and the United Kingdom maintain, in essence, that neither of those two conditions is satisfied, because the obligations imposed on the Community and its Member States by the Charter of the United Nations prevail over every other obligation of international, Community or domestic law. Consideration of those parties' arguments thus appears to be a precondition to any discussion of the applicants' arguments.

228 The Court considers it appropriate to consider, in the first place, the relationship between the international legal order under the United Nations and the domestic or Community legal order, and also the extent to which the exercise by the Community and its Member States of their powers is bound by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations.

229 This consideration will effectively determine the scope of the review of lawfulness, particularly having regard to fundamental rights, which the Court will carry out in the second place in respect of the Community acts giving effect to such resolutions.

230 Thirdly and finally, if it should find that it falls within the scope of its judicial review and that it is capable of leading to annulment of the contested regulation, the Court will rule on the alleged breach of the applicants' fundamental rights.

Concerning the relationship between the international legal order under the United Nations and the domestic or Community legal order

231 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 ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.

232 As regards, first, the relationship between the Charter of the United Nations and the domestic law of the Member States of the United Nations, that rule of primacy is derived from the principles of customary international law. Under Article 27 of the Vienna Convention on the Law of Treaties, which consolidates those principles (and Article 5 of which provides that it is to apply to 'any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation'), a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

233 As regards, second, the relationship between the Charter of the United Nations and international treaty law, that rule of primacy is expressly laid down in Article 103 of the Charter which provides that, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations (judgment of 26 November 1984, delivered in the case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), *ICJ Reports*, 1984, p. 392, paragraph 107).

234 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 agree to accept and carry out the decisions of the Security Council. According to the International Court of Justice, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement (Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America), *ICJ Reports*, 1992, p. 16, paragraph 42, and Order of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom), *ICJ Reports*, 1992, p. 113, paragraph 39).

235 With more particular regard to the relations between the obligations of the Member States of the Community by virtue of the Charter of the United Nations and their obligations under Community law, it may be added that, in accordance with the first paragraph of Article 307 EC, 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

236 According to the Court of Justice's settled case-law, the purpose of that provision is to make it clear, in accordance with the principles of international law, that application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder (Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 27; Case 10/61 *Commission* v *Italy* [1962] ECR 1; Case C-158/91 *Levy* [1993] ECR I-4287, and Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraph 56).

237 Now, five of the six signatory States to the Treaty establishing the European Economic Community, signed at Rome on 25 March 1957, were already members of the United Nations on 1 January 1958. While it is true that the Federal Republic of Germany was not formally admitted as a member of the United Nations until 18 September 1973, its duty to perform its obligations under the Charter of the United Nations also predates 1 January 1958, as is apparent from the Final Act of the Conference held in London from 28 September to 3 October 1954 (known as 'The Conference of the Nine Powers') and the Paris Agreements signed on 23 October 1954. Furthermore, all the States that subsequently acceded to the Community were members of the United Nations before accession.

238 What is more, Article 224 of the Treaty establishing the European Economic Community (now Article 297 EC) was specifically introduced into the Treaty in order to observe the rule of primacy defined above. Under that provision, 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take ... in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

239 Resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are thus binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect (Opinions of Advocate General Jacobs in Case C-84/95 *Bosphorus* [1996] ECR I-3953, at I-3956, paragraph 2, and Case C-177/95 *Ebony Maritime and Loten Navigation* [1997] ECR I-1111, at I-1115, paragraph 27).

240 It also follows from the foregoing that, pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations.

241 Thus, in *Centro-Com*, cited in paragraph 236 above, the Court of Justice specifically held that national measures contrary to Article 113 of the EC Treaty could be justified under Article 234 of the EC Treaty (now, after amendment, Article 307 EC) if they were necessary to ensure that the Member State concerned performed its obligations under the Charter of the United Nations and a resolution of the Security Council.

242 However, it follows from the case-law (*Dorsch Consult* v *Council and Commission*, paragraph 82 above, paragraph 74) that, unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law.

243 Nevertheless, 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.

244 In that regard, it is not in dispute that at the time when they concluded the Treaty establishing the European Economic Community the Member States were bound by their obligations under the Charter of the United Nations.

245 By concluding a treaty between them they could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under that Charter (see, by analogy, Joined Cases 21/72 to 24/72 *International Fruit Company and Others* ('*International Fruit*') [1972] ECR 1219, paragraph 11).

246 On the contrary, their desire to fulfil their obligations under that Charter follows from the very provisions of the Treaty establishing the European Economic Community and is made clear in particular by Article 224 and the first paragraph of Article 234 (see, by analogy, *International Fruit*, paragraphs 12 and 13, and the Opinion of Advocate General Mayras in those cases, ECR 1231, at page 1237).

247 Although that latter provision makes mention only of the obligations of the Member States, it implies a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from that Charter (Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 9).

248 It is also to be observed that, in so far as the powers necessary for the performance of the Member States' obligations under the Charter of the United Nations have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those powers to that end.

249 In this context it is to be borne in mind, first, that in accordance with Article 48(2) of the Charter of the United Nations, the decisions of the Security Council 'shall be

carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members' and, second, that according to the case-law (*Poulsen and Diva Navigation*, paragraph 210 above, paragraph 9, and *Racke*, paragraph 210 above, paragraph 45, and Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 22), the Community must respect international law in the exercise of its powers and, consequently, Community law must be interpreted, and its scope limited, in the light of the relevant rules of international law.

250 By conferring those powers on the Community, the Member States demonstrated their will to bind it by the obligations entered into by them under the Charter of the United Nations (see, by analogy, *International Fruit*, paragraph 15).

251 Since the entry into force of the Treaty establishing the European Economic Community, the transfer of powers which has occurred in the relations between Member States and the Community has been put into concrete form in different ways within the framework of the performance of their obligations under the Charter of the United Nations (see, by analogy, *International Fruit*, paragraph 16).

252 Thus it is, in particular, that Article 228a of the EC Treaty (now Article 301 EC) was added to the Treaty by the Treaty on European Union in order to provide a specific basis for the economic sanctions that the Community, which has exclusive competence in the sphere of the common commercial policy, may need to impose in respect of third countries for political reasons defined by its Member States in connection with the CFSP, most commonly pursuant to a resolution of the Security Council requiring the adoption of such sanctions.

253 It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community (see, by analogy, on the question whether the Community is bound by the General Agreement on Tariffs and Trade (GATT) of 1947, *International Fruit*, paragraph 18; see also, in that it recognises that the Community exercises circumscribed powers when giving effect to a trade embargo imposed by a resolution of the Security Council *Dorsch Consult* v *Council and Commission*, paragraph 82 above, paragraph 74).

254 Following that reasoning, it must be held, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that 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.

255 In this instance, the Council found in Common Position 2002/402, adopted pursuant to the provisions of Title V of the Treaty on European Union, that action by the Community within the confines of the powers conferred on it by the EC Treaty was necessary in order to put into effect certain restrictive measures against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, in accordance with Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002).

256 The Community put those measures into effect by adopting the contested regulation. As has been held at paragraph 170 above, it was competent to adopt that act on the basis of Articles 60 EC, 301 EC and 308 EC.

257 It must therefore be held that the arguments put forward by the institutions, as summarised in paragraph 206 above, are valid, subject to this reservation that it is not under general international law, as those parties would have it, but by virtue of the EC Treaty itself, that the Community was required to give effect to the Security Council resolutions concerned, within the sphere of its powers.

258 However, the applicants' arguments based, on the one hand, on the autonomy of the Community legal order vis-à-vis the legal order under the United Nations and, on the other, on the necessity of transposing Security Council resolutions into the domestic law of the Member States, in accordance with the constitutional provisions and fundamental principles of that law, must be rejected.

259 The applicants' argument alleging that the Security Council resolutions at issue are incompatible with the provisions of the Charter of the United Nations itself is inseparable from their arguments relating, first, to the judicial review that the Court of First Instance must carry out in respect of Community acts giving effect to those resolutions and, second, to the alleged breach of the fundamental rights of the persons concerned. It will, therefore, be examined with those other arguments.

Concerning the scope of the review of legality that the Court must carry out

260 As a preliminary point, it is to be borne in mind that the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23; Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 16; Case C-314/91 *Weber* v *Parliament* [1993] ECR I-1093, paragraph 8; Joined Cases

T-222/99, T-327/99 and T-329/99 *Martinez and Others* v *Parliament* [2001] ECR II-2823, paragraph 48; see also Opinion 1/91 of the Court of Justice of 14 December 1991, ECR I-6079, paragraph 21).

261 As the Court has repeatedly held (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 14, Case C-1/99 *Kofisa Italia* [2001] ECR I-207, paragraph 46; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39), 'judicial control ... reflects a general principle of law which underlies the constitutional traditions common to the Member States ... and which is also laid down in Articles 6 and 13 of the [ECHR]'.

262 In the case in point, that principle finds expression in the right, conferred on the applicants by the fourth paragraph of Article 230 EC, to submit the lawfulness of the contested regulation to the Court of First Instance, provided that the act is of direct and individual concern to him, and to rely in support of his action on any plea alleging lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers.

263 The question that arises in this instance is, however, whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which it falls to the Court of First Instance to carry out with regard to that regulation.

264 It must be recalled that the contested regulation, 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. The recitals of the preamble to that regulation refer expressly to Resolutions 1267 (1999), 1333 (2000) and 1390 (2002).

265 In that situation, as the institutions have rightly claimed, they 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.

266 Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions (see, by analogy, *Dorsch Consult* v *Council and Commission*, paragraph 82 above, paragraph 74).

267 In particular, if the Court were to annul the contested regulation, as the applicants claim it should, although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.

268 The institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the Member States of the Community, are mandatory for the Court as they are for all the Community institutions. Those parties are of the view, essentially, that the Court's review ought to be confined, on the one hand, to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect.

269 It must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order.

270 As has already been explained, the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the Charter.

271 Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.

272 In light of the considerations set out in paragraphs 243 to 254 above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision 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

273 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.

274 Second, such jurisdiction 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, in accordance with which the Community judicature is to exercise its powers on the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union. 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 (*Poulsen and Diva Navigation*, paragraph 210 above, paragraph 9, and *Racke*, paragraph 210 above, paragraph 45).

275 It has to be added that, with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community (see by analogy, *Internationale Handelsgesellschaft*, paragraph 190 above, paragraph 3; Case 234/85 *Keller* [1986] ECR 2897, paragraph 7, and Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 38).

276 It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that 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.

277 None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question 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.

278 In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply 'to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation', provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (*jus cogens*), defined as 'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Similarly, Article 64 of the Vienna Convention provides that: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

279 Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. In addition, it is apparent from Chapter I of the Charter, headed 'Purposes and

Principles', that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

280 Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act 'in accordance with the Purposes and Principles of the United Nations'. The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

281 International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

282 The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, in some circumstances, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law' (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of Nuclear Weapons, Reports 1996, p. 226, paragraph 79; see also, to that effect, Advocate General Jacobs's Opinion in *Bosphorus*, paragraph 239 above, paragraph 65).

283 It is in the light of those considerations that the pleas alleging breach of the applicants' fundamental rights must be examined.

Concerning the alleged breach of the applicants' fundamental rights

284 The arguments put forward by the applicants in relation to the alleged breach of their fundamental rights may be grouped under three headings: breach of their right to make use of their property, breach of the right to a fair hearing and breach of their right to an effective judicial remedy.

— Concerning the alleged breach of the applicants' right to make use of their property

285 The applicants plead breach of their right to make use of their property, as protected by the Community legal order.

286 Nevertheless, in so far as the alleged infringement arises exclusively from the freezing of the applicants' funds, as decided by the Security Council, through its Sanctions Committee, and put into effect by the contested regulation, without the exercise of any discretion whatsoever, it is in principle by the sole criterion of the standard of universal protection of the fundamental rights of the human person falling within the ambit of *jus cogens* that the applicants' claims may appropriately be examined, in accordance with the principles set out above.

287 The extent and severity of the freezing of the applicants' funds having altered with the passage of time (see, successively, Article 2 of Regulation No 467/2001, Article 2 of Regulation No 881/2002 in its original version and, finally, Article 2a of the contested regulation, as inserted by Article 1 of Regulation No 561/2003), it is

moreover appropriate to point out that, in the context of the present action for annulment, the Court's judicial review must relate solely to the state of the legislation as it is currently in force. In proceedings for annulment, the Community judicature usually takes account of events that affect the actual substance of the dispute during the course of the proceedings, such as the repeal, extension, replacement or amendment of the contested act (see, in addition to *Alpha Steel* v *Commission*, *Fabrique de Fer de Charleroi and Dillinger Huttenwerke* v *Commission* and *CEMR* v *Commission*, paragraph 72 above, the order of the Court of Justice of 8 March 1993 in Case C-123/92 *Lezzi Pietro* v *Commission* [1993] ECR I-809, paragraphs 8 to 11). All the parties signified their agreement on this point at the hearing.

288 It falls therefore to be assessed whether the freezing of funds provided for by the contested regulation, as amended by Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, infringes the applicants' fundamental rights.

289 The Court considers that such is not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*, and that there is no need here to distinguish the situation of the entity Al Barakaat, as a legal person, from that of Mr Yusuf, as a natural person.

290 On this point, it is to be emphasised straight away that the contested regulation, in the version amended by Regulation No 561/2003, adopted following Resolution 1452 (2002) of the Security Council, provides, among other derogations and exemptions, that on a request made by an interested person, and unless the Sanctions Committee expressly objects, the competent national authorities may declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges (see paragraph 40 above). In addition, funds necessary for any 'extraordinary expense' whatsoever may henceforth be unfrozen, on the express authorisation of the Sanctions Committee.

291 The express provision of possible exemptions and derogations thus 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.

292 Moreover, it must be noted that while Article 17(1) of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, provides that '[e]veryone has the right to own property alone as well as in association with others', Article 17(2) of that Universal Declaration specifies that '[n]o one shall be arbitrarily deprived of his property'.

293 Thus, 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*.

294 Here, however, it is clear that the applicants have not been arbitrarily deprived of that right.

295 In fact, 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.

296 In that regard, it is appropriate to stress the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations.

297 In the preamble to Resolution 1390 (2002), the Security Council formally condemned, inter alia, the terrorist attacks of 11 September 2001, expressing its determination to prevent all such acts; noted that Usama bin Laden and the Al-Qaeda network continued to support international terrorism; condemned the Al-Qaeda network and associated terrorist groups for the multiple criminal terrorist acts they had committed, aimed at causing the deaths of numerous innocent civilians and the destruction of property, and reaffirmed further that acts of international terrorism constituted a threat to international peace and security.

298 It is in the light of those circumstances that the objective pursued by the sanctions assumes considerable importance, which is, in particular, under Resolution 1373 (2001) of the Security Council, referred to by the third recital in the preamble to the contested regulation, to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. The measures in question pursue therefore an objective of fundamental public interest for the international community.

299 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.

300 In the third place, the resolutions of the Security Council at issue provide for a means of reviewing, after certain periods, the overall system of sanctions (see paragraphs 16, 26 and 37 above, and paragraph 313 below).

301 In the fourth place, as will be explained below, 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.

302 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.

303 It follows from the foregoing that the applicants' arguments alleging breach of their right to make use of their property must be rejected.

— The alleged breach of the right to a fair hearing

304 The applicants' arguments alleging breach of the right to a fair hearing amount, in essence, to the claim that their views were not heard and they were not given the opportunity to defend themselves before the adoption of the sanctions imposed on them. In that context, the applicants emphasise that they were not informed of the reasons for or justification of those sanctions.

305 In this regard, a distinction must be drawn between the applicants' alleged right to be heard 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 and their alleged right to be heard by the Community institutions before the adoption of the contested regulation.

306 With regard, first, to the applicants' alleged right to be heard 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, clearly no such right is provided for by the resolutions in question.

307 Moreover, it appears that no mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case, in which the Security Council, acting under Title VII of the Charter of the United Nations, decides, through its Sanctions Committee, that the funds of certain individuals or entities suspected of contributing to the funding of terrorism must be frozen.

308 Furthermore, it is unarguable that to have heard the applicants before they were included in that list would have been liable to jeopardise the effectiveness of the sanctions and would have been incompatible with the public interest objective pursued. A measure freezing funds must, by its very nature, be able to take advantage of a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented.

309 Nevertheless, although the resolutions of the Security Council concerned and the subsequent regulations that put them into effect in the Community do not provide for any right of audience for individual persons, they set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds (see, inter alia, paragraphs 11, 21, 36 and 38 to 40 above).

310 The Sanctions Committee is a subsidiary body of the Security Council, composed of representatives of States which are members of the Security Council. It has developed into an important standing body responsible for the day-to-day supervision of the enforcement of the sanctions and can promote the consistent interpretation and application of the resolutions by the international community (Advocate General Jacobs's Opinion in *Bosphorus*, paragraph 239 above, paragraph 46).

311 With particular regard to an application for re-examination of an individual case, for the purpose of having the person concerned removed from the list of persons affected by the sanctions, section 7 of the 'Guidelines of the [Sanctions] Committee for the conduct of its work', adopted on 7 November 2002 and amended on 10 April 2003 (see paragraph 67 above), provides as follows:

'(a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings, and/or entities on the 1267 Committee's consolidated list) may petition the government of residence and/or citizenship to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;

(b) The government to which a petition is submitted (the petitioned government) should review all relevant information and then approach bilaterally the government(s) originally proposing designation (the designating government(s)) to seek additional information and to hold consultations on the de-listing request;

(c) The original designating government(s) may also request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations;

(d) If, after reviewing any additional information, the petitioned government wishes to pursue a de-listing request, it should seek to persuade the designating

government(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned government may, without an accompanying request from the original designating government(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;

(e) The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.'

312 The Court finds that, by adopting those Guidelines, the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard.

313 The importance attached by the Security Council to observance of those rights is, moreover, clearly apparent from its resolution 1526 (2004) of 30 January 2004 which is intended, on the one hand, to improve the implementation of the measures imposed by paragraph 4(b) of Resolution 1267 (1999), paragraph 8(c) of Resolution 1333 (2000), and paragraphs 1 and 2 of Resolution 1390 (2002) and, on the other, to strengthen the mandate of the Sanctions Committee. In accordance with paragraph 18 of Resolution 1526 (2004), the Security Council '[s]trongly encourages all States to inform, to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them, and of the Committee's guidelines and resolution 1452 (2002)'. Paragraph 3 of Resolution 1526 (2004) states that those measures are to be further improved in 18 months, or sooner if necessary.

314 Admittedly, the procedure described above confers no right directly on the persons concerned themselves to be heard by the Sanctions Committee, the only authority competent to give a decision, on a State's petition, on the re-examination of their case. Those persons are thus dependent, essentially, on the diplomatic protection afforded by the States to their nationals.

315 Such a restriction of the right to be heard, directly and in person, by the competent authority is not, however, to be deemed improper in the light of the mandatory prescriptions of international law. On the contrary, with regard to the challenge to the validity of decisions adopted by the Security Council through its Sanctions Committee under Chapter VII of the Charter of the United Nations on the basis of information communicated by the States and regional organisations, it is normal that the right of the persons involved to be heard should be adapted to an administrative procedure on several levels, in which the national authorities referred to in Annex II of the contested regulation play an indispensable part.

316 Further, Community law itself recognises the lawfulness of such procedural adaptations in the context of economic sanctions against individuals (see, by analogy, the order in *'Invest' Import und Export and Invest Commerce* v *Commission*, paragraph 85 above).

317 It may be added that, as the United Kingdom has rightly pointed out at the hearing, it is open to the persons involved to bring an action for judicial review based on domestic law, indeed even directly on the contested regulation and the relevant resolutions of the Security Council which it puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination (see, by analogy, the order of the President of the Court of First Instance in Case T-47/03 R *Sison* v *Council* [2003] ECR II-2047, paragraph 39).

318 In this instance, moreover, the applicants were in fact heard by the Sanctions Committee, through the Swedish Government, and their hearing was so effective that two of the original applicants, Messrs Aden and Ali, were removed from the list of persons to whom the freezing of funds applies and, in consequence, were also removed from the list in Annex I to the contested regulation (see points 33 to 35 above). In this respect, it is appropriate to refer to paragraph 11 of the Sanctions Committee's 2002 report:

'At its 11th meeting, on 11 February 2002, the Committee considered two "notes verbales" from Sweden requesting the removal of three individuals of Swedish nationality and one entity from the Committee's list and decided to undertake a substantial examination of that request. Sweden was invited to participate in the meeting and was represented by the Director-General for Legal Affairs of the Swedish Ministry of Foreign Affairs. Committee members recognised the importance of striking a balance between speed and effectiveness in the fight against terror, on the one hand, and the human rights of individuals protected on the international and national levels on the other. Following the meeting, the Chairman gave a briefing to the press and interested Member States. The briefing was attended by a large audience, suggesting that the issue raised by Sweden was of importance to other countries also.'

319 The fact remains that any opportunity for the applicants effectively to make known their views on the correctness and relevance of the facts in consideration of which their funds have been frozen and on the evidence adduced against them appears to be definitively excluded. Those facts and that evidence, once classified as confidential or secret by the State which made the Sanctions Committee aware of them, are not, obviously, communicated to them, any more than they are to the Member States of the United Nations to which the Security Council's resolutions are addressed.

320 None the less, in circumstances such as those of this case, in which what is at issue is a temporary precautionary measure restricting the availability of the applicants'

property, the Court of First Instance considers that observance of the fundamental rights of the persons concerned 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.

321 It follows that the applicants' arguments alleging breach of their right to be heard by the Sanctions Committee in connection with their inclusion in the list of persons whose funds must be frozen pursuant to the resolutions of the Security Council in question must be rejected.

322 Second, the applicants cannot be denied their alleged right to be heard before the contested regulation was adopted on the sole ground, advanced by the Council and the United Kingdom, that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature.

323 It is true that the case-law on the right to be heard cannot be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned (Case T-521/93 *Atlanta and Others* v *EC* [1996] ECR II-1707, paragraph 70, upheld on appeal by the Court of Justice in Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraphs 31 to 38).

324 In the instant case, however, the contested regulation is not of an exclusively legislative nature. While applying to the generality of economic operators concerned (see paragraph 186 above), it is of direct and individual concern to the applicants, to whom it refers by name, indicating that sanctions must be imposed on them. The case-law cited in the previous paragraph is therefore irrelevant.

325 It must therefore be borne in mind that, according to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings at issue. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his views on the evidence on the basis of which the sanction is imposed (see, to that effect, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraphs 39 and 40; Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21, and Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36).

326 The Council and the Commission were, however, right in observing that this case-law was developed in areas such as competition law, anti-dumping action and State aid, but also disciplinary law and the reduction of financial assistance, in which the Community institutions enjoy extensive powers of investigation and inquiry and wide discretion.

327 As a matter of fact, according to case-law, respect for the procedural rights guaranteed by the Community legal order, especially the right of the person concerned to make his point of view known, is correlated to the exercise of discretion by the authority which is the author of the act at issue (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

328 In this instance, as is apparent from the preliminary observations above on the relationship between the international legal order under the United Nations and the Community legal order, the Community institutions were required to transpose into the Community legal order resolutions of the Security Council and decisions of the Sanctions Committee that in no way authorised them, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations, since both the substance of the measures in question and the mechanisms for re-examination (see paragraphs

309 et seq. above) fell wholly within the purview of the Security Council and its Sanctions Committee. As a result, the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, 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. The principle of Community law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position.

329 It follows that the Community institutions were not obliged to hear the applicants before the contested regulation was adopted.

330 The applicants' arguments based on the alleged infringement of their right to be heard by the Community institutions before the contested regulation was adopted must therefore be rejected.

331 It follows that the applicants' arguments alleging breach of the right to a fair hearing must be rejected.

— Concerning the alleged breach of the right to an effective judicial remedy

332 Examination of the applicants' arguments relating to the alleged breach of their right to an effective judicial remedy must take into account the considerations of a general nature already given to them in connection with the examination of the extent of the review of lawfulness, in particular with regard to fundamental rights, which it falls to the Court to carry out in respect of Community acts giving effect to resolutions of the Security Council adopted pursuant to Chapter VII of the Charter of the United Nations.

333 In the circumstances of this case, the applicants have been able to bring an action for annulment before the Court of First Instance under Article 230 EC.

334 In dealing with that action, the Court carries out a complete review of the lawfulness of the contested regulation with regard to observance by the institutions of the rules of jurisdiction and the rules of external lawfulness and the essential procedural requirements which bind their actions.

335 The Court also reviews the lawfulness of the contested 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.

336 Giving a decision pursuant to that review, the Court finds that the alleged errors in the identification of the applicants and two other entities that vitiate the contested regulation (see paragraphs 196 and 197 above), are without relevance for the purposes of these proceedings, since it is not disputed that the applicants are indeed one of the natural persons and one of the entities respectively entered in the Sanctions Committee's list on 9 November 2001 (see paragraph 24 above). The same applies to the fact that according to the Swedish police authorities considered, after checking, that the second applicant's accounts were in order (see paragraph 198 above).

337 In this action for annulment, the Court has moreover held that it has jurisdiction to review the lawfulness of the contested 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.

338 On the other hand, as has already been observed in paragraph 276 above, 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.

339 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 defined in paragraph 337 above, to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.

340 It must thus be concluded that, to the extent set out in paragraph 339 above, there is no judicial remedy available to the applicant, 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.

341 However, it is also to be acknowledged that any such lacuna in the judicial protection available to the applicants is not in itself contrary to *jus cogens*.

342 Here the Court would point out that the right of access to the courts, a principle recognised by both Article 8 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, is not absolute. On the one hand, at a time of public emergency which threatens the life of the nation, measures may be taken derogating from that right, as provided for on certain conditions by Article 4(1) of that Covenant. On the other hand, even where those exceptional circumstances do not obtain, certain restrictions must be held to be inherent in that right, such as the limitations generally recognised by the community of nations to fall within the doctrine of State immunity (see, to that effect, the judgments of the European Court of Human Rights in *Prince Hans-Adam II of Liechtenstein* v *Germany* of 12 July 2001, *Reports of Judgments and Decisions* 2001-VIII, paragraphs 52, 55, 59 and 68, and in *McElhinney* v *Ireland* of 21 November 2001, *Reports of Judgments and Decisions* 2001-XI, in particular paragraphs 34 to 37) and of the immunity of international organisations (see, to that effect, the judgment of the European Court of Human Rights in *Waite and Kennedy* v *Germany* of 18 February 1999, *Reports of Judgments and Decisions,* 1999-I, paragraphs 63 and 68 to 73).

343 In this instance, the Court considers that the limitation of the applicants' right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by *jus cogens.*

344 Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, 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. In this regard, special significance must attach to the fact that, far from providing for measures for an unlimited period of application, the

resolutions successively adopted by the Security Council have always provided a mechanism for re-examining whether it is appropriate to maintain those measures after 12 or 18 months at most have elapsed (see paragraphs 16, 26, 37 and 313 above).

345 Last, the Court considers that, in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the 'petitioned government' and the 'designating government' (see paragraphs 310 and 311 above), constitute another reasonable method of affording adequate protection of the applicants' fundamental rights as recognised by *jus cogens*.

346 It follows that the applicants' arguments alleging breach of their right to an effective judicial remedy must be rejected.

347 None of the applicants' pleas in law or arguments having been successful, and the Court considering that it has sufficient information available to it from the documents in the file and the statements made by the parties at the hearing, the action must be dismissed, and there is no need to allow the application for the first applicant and Sir Jeremy Greenstock, former Chairman of the Sanctions Committee, to be heard.

Costs

348 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the other party's pleadings.

Under the first subparagraph of Article 87(4), the Member States and institutions which have intervened in the proceedings are to bear their own costs. Under Article 87(6), where a case does not proceed to judgment, costs are to be in the Court's discretion.

349 Having regard to the circumstances of the case and the forms of order sought by the parties, those provisions will find equitable application in a decision that the applicants will bear, in addition to their own costs, those of the Council and those incurred by the Commission up until 10 July 2002, including the costs of the interlocutory proceedings. The United Kingdom, and the Commission for the period after 10 July 2002, must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Declares that there is no longer any need to adjudicate on the application for annulment of Council Regulation (EC) No 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 and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 and for annulment of Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001;**

2. **Dismisses the action in so far as it is brought against Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001;**

3. **Orders the applicants to bear, in addition to their own costs, those of the Council and those incurred by the Commission until 10 July 2002, including the costs of the interlocutory proceedings;**

4. **Orders the United Kingdom of Great Britain and Northern Ireland, and the Commission for the period after 10 July 2002, to bear their own costs.**

Forwood Pirrung Mengozzi

Meij Vilaras

Delivered in open court in Luxembourg on 21 September 2005.

H. Jung — Registrar

J. Pirrung — President

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