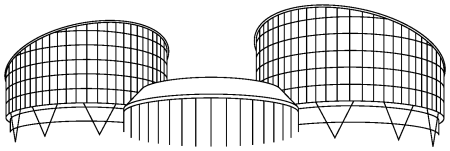

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AL-DULIMI AND MONTANA MANAGEMENT INC. v. SWITZERLAND

(Application no. 5809/08)

JUDGMENT

STRASBOURG

26 November 2013

REFERRED TO THE GRAND CHAMBER

14/04/2014

This judgment may be subject to editorial revision.

In the case of Al-Dulimi and Montana Management Inc. v. Switzerland,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 22 October 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5809/08) against the Swiss Confederation lodged with the Court on 1 February 2008 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Khalaf M. Al-Dulimi ("the first applicant"), and by Montana Management Inc. ("the second applicant"), a company incorporated under the laws of Panama and having its registered office in Panama, of which the first applicant was formerly the managing director.

2. The applicants were represented by Mr J.-C. Michel, a lawyer practising in Geneva. The Swiss Government ("the Government") were represented by their Agent, Mr A. Scheidegger, of the European law and international human rights protection unit of the Federal Office of Justice.

3. The applicants alleged, in particular, that the confiscation of their assets had been ordered in the absence of any procedure complying with Article 6 of the Convention.

4. On 12 March 2009 notice of the application was given to the Government. It was also decided that the Chamber would examine the admissibility and merits of the application at the same time (Article 29 § 1) and that the case would be given priority (Rule 41 of the Rules of Court).

5. On 1 February 2011 the Court's Sections were reorganised. The application was allocated to the Second Section (Article 25 § 1 and Rule 52 § 1).

6. The parties each submitted written comments on the other's observations. Observations were also received from the French and United Kingdom Governments, which had been given leave by the President to

intervene in the written procedure (Article 36 § 2 and Rule 44 § 2 [as then in force]).

7. In a decision of 4 November 2010 the Chamber decided to adjourn the examination of the case until the Grand Chamber had delivered its judgment in the case of *Nada v. Switzerland* ([GC], no. 10593/08, ECHR 2012).

8. The applicants also requested that their case be heard in public before the Court. The Chamber did not consider it necessary for the discharge of its functions under the Convention to hold a public hearing on the merits of the case (Rule 59 § 3).

9. On 28 May 2013 the Section expressed its intention to relinquish the case to the Grand Chamber, in accordance with Article 30 of the Convention. In a letter of 18 June 2013 the respondent Government objected to relinquishment. On 17 September 2013 the Chamber took note of the Government's opposition and continued to examine the case.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1941 and lives in Amman (Jordan). According to the United Nations Security Council, he was head of finance for the Iraqi secret services under the regime of Saddam Hussein.

A. Background to the case

11. After Iraq invaded Kuwait on 2 August 1990, the United Nations Security Council adopted Resolution 661 (1990) of 6 August 1990 and Resolution 670 (1990) of 25 September 1990, calling upon United Nations member States and non-member States to apply a general embargo against Iraq and on any Kuwaiti resources confiscated by the occupier, together with an embargo on air transport.

12. On 7 August 1990 the Swiss Federal Council adopted an ordinance providing for economic measures against the Republic of Iraq (the "Iraq Ordinance"; see paragraph 75 below). The applicants alleged that since that date their assets in Switzerland had remained frozen.

13. On 10 September 2002 Switzerland became a member of the United Nations.

14. On 22 May 2003 the United Nations Security Council adopted Resolution 1483 (2003), superseding Resolution 661 (1990), among others. Paragraph 23 of Resolution 1483 (2003) reads as follows:

> "The Security Council

...

Decides that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22."[1]

15. The Iraq Ordinance of 7 August 1990 underwent numerous amendments, in particular on 30 October 2002, to take into account the entry into force of the Federal Law of 22 March 2002 on the application of international sanctions (the Embargo Act, in force since 1 January 2003), and on 28 May 2003, to take account of Resolution 1483 (2003). Article 2 of the Iraq Ordinance provided in substance for the freezing of assets and economic resources belonging to the former Iraqi Government, to senior officials thereof and to companies or bodies under the control or management of that Government or its officials. Pursuant to the Ordinance, the Federal Department for Economic Affairs was responsible for establishing a list of those assets and resources based on the United Nations data (Article 2, paragraph 2, of the Iraq Ordinance).

16. On 24 November 2003 a Sanctions Committee (the "1518 Committee"), created by Security Council Resolution 1518 (2003), and consisting of all member States, was given the task of listing the senior officials of the previous Iraqi regime and their immediate family members, together with any entities owned or controlled by them or by persons acting on their behalf or at their direction, in accordance with paragraph 23 of Resolution 1483 (2003). For that purpose, the committee was to keep up to date the lists of individuals and entities already compiled by the former Sanctions Committee, created under Resolution 661 (1990), which had been adopted during the armed conflict between Iraq and Kuwait.

17. On 26 April 2004 the 1518 Committee added to the list of individuals and entities, respectively, the second applicant, which had its

[1] For the full text of Resolution 1483 (2003), see paragraph 47 below.

registered office in Geneva, and the first applicant, who was the managing director of the applicant company.

18. On 12 May 2004 the applicants' names were added to the list of individuals, legal entities, groups and organisations concerned by the national measures under Article 2 of the Iraq Ordinance.

19. On 18 May 2004 the Federal Council also adopted, under Article 184, paragraph 3, of the Federal Constitution, an ordinance on the confiscation of the frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq (the "Confiscation Ordinance"; see paragraph 76 below). That Ordinance was initially valid until 30 June 2010 and was then extended until 30 June 2013.

20. The applicants indicated that a confiscation procedure had been initiated in respect of their assets in Switzerland, which had been frozen since 7 August 1990, by the Federal Department for Economic Affairs, when the Confiscation Ordinance entered into force on 18 May 2004.

21. The first applicant, wishing to apply directly to the 1518 Committee for the removal of his name from the list, called upon the Federal Department for Economic Affairs, in a letter of 25 August 2004, to suspend the confiscation procedure in respect of his assets.

22. The Swiss Government, in a letter of 5 November 2004 to the Chair of the Sanctions Committee, through its Permanent Representative to the United Nations, supported that application.

23. In a letter of 3 December 2004, the Chair of the Sanctions Committee informed the applicants that the committee had examined their application and that it was under consideration. He asked them to send supporting documents and any additional information that might substantiate the application.

24. The first applicant replied in a letter of 21 January 2005 that he wished to give oral evidence to the Sanctions Committee.

25. As the application remained without effect, the applicants sought, in a letter of 1 September 2005, the continuation of the confiscation procedure in Switzerland.

26. On 22 May 2006 the Federal Department for Economic Affairs sent the applicants a draft decision on the confiscation and transfer of the funds that were deposited in their names in Geneva.

27. In observations of 22 June 2006 the applicants challenged that decision.

28. In a decision of 16 November 2006 addressed to the applicants' representative, the Federal Department for Economic Affairs ordered the confiscation of the assets, representing sums in Swiss francs (CHF) that were specific to each applicant. It stated the conditions in which the sums would be transferred, within ninety days from the entry into force of the decision, to the bank account of the Development Fund for Iraq.

29. In support of its decision, the Federal Department for Economic Affairs observed that the applicants' names appeared on the lists of individuals and entities established by the Sanctions Committee, that Switzerland was bound by the resolutions of the Security Council and that it could only delete a name from the annex to the Iraq Ordinance where the relevant decision had been taken by the Sanctions Committee.

30. The Federal Department further observed that the applicants had discontinued their discussions with the Sanctions Committee. It indicated that an administrative-law appeal could be lodged against its decision before the Federal Court.

31. On 19 December 2006 the Security Council, being committed to ensuring that fair and clear procedures existed for placing individuals and entities on sanctions lists, including those of the 1518 Committee, and for removing their names, as well as for granting humanitarian exemptions, adopted Resolution 1730 (2006) (see paragraph 48 below), which created a delisting procedure.

32. The applicants lodged three administrative-law appeals before the Federal Court, one in respect of the first applicant and two in respect of the second applicant, against the Federal Department's decision of 16 November 2006. The appeals concerned the confiscation of the assets frozen in Switzerland that were deposited in bank X and bank Y.

33. In their appeals, the applicants sought the annulment of the decision of 16 November 2006. In support of their submissions, they argued that the confiscation of their assets breached the property right guaranteed by Article 26 of the Federal Constitution and that the procedure leading to the addition of their names to the lists annexed to Resolution 1483 (2003) and to the Iraq Ordinance had breached the basic procedural safeguards enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, in Articles 6 and 13 of the Convention and in Articles 29 to 32 of the Federal Constitution. The applicants took the view that the Federal Court, and before it the Federal Department for Economic Affairs, had jurisdiction to review the legality and the conformity with the Convention and the ICCPR of the 1518 Committee's decision to add their names to the list provided for in paragraph 23 (b) of Resolution 1483 (2003). They submitted that there was no incompatibility or conflict between the obligations under the Charter and the fundamental rights guaranteed by the Convention or the ICCPR.

34. The Federal Department for Economic Affairs submitted that the appeals should be dismissed.

35. In a decision of 22 March 2007, the President of the Second Public-Law Division of the Federal Court ordered a second round of pleadings. The applicants filed a rejoinder on 27 April 2007 and the Federal Department for Economic Affairs a surrejoinder on 12 June 2007. The parties maintained their submissions.

36. On 10 December 2007, spontaneously, the applicants filed additional observations limited to an assessment of the scope of a judgment of the Federal Court dated 14 November 2007 (in the case which ultimately led to the *Nada v. Switzerland* judgment, cited above) concerning the merits of their own appeals. They further sought the opportunity to present oral argument on that point. A copy of these observations was sent to the Federal Department for Economic Affairs for information purposes.

37. On 18 January 2008 the applicants wrote to the Federal Court drawing its attention to the opinion delivered on 16 January 2008 by the Advocate General in the case of *Yassin Abdullah Kadi*, then pending before the Court of Justice of the European Communities (which on 1 December 2009 became known as the Court of Justice of the European Union), and reiterating their request of 10 December 2007 to present oral argument.

B. Federal Court judgments of 23 January 2008

38. In three almost identical judgments, the Federal Court dismissed the appeals on the merits. The relevant parts of those judgments read as follows (unless otherwise stated, this is the text of the judgment concerning the first applicant):

> "5.1 On 10 September 2002 Switzerland became a member of the United Nations and ratified the United Nations Charter of 26 June 1945 (the Charter; RS 0.120). Article 24, paragraph 1, of the Charter provides that, in order to ensure prompt and effective action by the United Nations, its members 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. Under Article 25 of the Charter, the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. The binding nature of Security Council decisions concerning measures taken in accordance with Articles 39, 41 and 42 to maintain or restore international peace and security also stems from Article 48, paragraph 2, of the Charter, which provides that such decisions must 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. The mandatory effect of Security Council decisions is the basis for the similar effect of decisions taken by subsidiary organs such as the Sanctions Committees (see Eric Suy and Nicolas Angelet in Jean-Pierre Cot, Alain Pellet and Mathias Forteau, *La Charte des Nations Unies, commentaire article par article*, 3rd edition, Economica 2005, Article 25, pp. 915 et seq.).
>
> 5.2 It was under Chapter VII (Articles 39 to 51) of the Charter that the Security Council adopted Resolution 1483 (2003): having regard to the situation in Iraq, the Security Council considered that it had to take measures 'to maintain or restore international peace and security'. Those measures included, in particular, the decisions stated in paragraphs 19 and 23 of the Resolution: in particular, the Security Council decided that member States were required to freeze and transfer to the Development Fund for Iraq the assets described in paragraph 23 of the Resolution. It also decided that Sanctions Committee 1518 would have the task of identifying the individuals and entities referred to in paragraph 23.

5.3 At the outset, Sanctions Committee 1518 published a set of guidelines for the application of paragraphs 19 and 23 of Resolution 1483 (2003) (see http://www.un.org/french/sc/committees/1518/indexshtml); they described the manner in which the lists of individuals and entities would be drawn up and disseminated. In that document the Committee requests as follows: 'The names of individuals and entities proposed for identification should be accompanied by, to the extent possible, a narrative description of the information that forms the basis or justification for taking action pursuant to resolution 1483 (2003)'. The procedure is then described in the following terms. The Committee will reach decisions by consensus. If consensus cannot be reached, the Chairman should 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. Where the Committee agrees, decisions may be taken by a written procedure. In such cases, the Chairman will circulate to all members of the Committee the proposed decision of the Committee, under the 'no-objection' procedure within three working days. If no objection is received within such a period, the decision will be deemed adopted.

5.4 Company S. SA and [the first applicant] appear on the lists of entities and individuals drawn up by Sanctions Committee 1518 under number ... for the company and ... for the latter, on the ground that its managing director is [the first applicant], the head of finance, at the time, of the Iraqi secret services, who also controls the companies H., K. SA and M. [the second applicant], three entities entrusted with the management of the assets of the former regime and its high-ranking members. The decision taken on 16 November 2006 by the Federal Department for Economic Affairs to confiscate the appellant's assets pursuant to the Iraq Ordinance and the Confiscation Ordinance is thus based on Resolution 1483 (2003)."

The two judgments concerning the second applicant:

"5.4 The [second applicant] appears on the lists of entities and individuals drawn up by Sanctions Committee 1518 under number ..., on the ground that its managing director is [the first applicant], who also controls H. et K. SA, two entities entrusted with the management of the assets of the former regime and its high-ranking members. The decision taken on 16 November 2006 by the Federal Department for Economic Affairs to confiscate the appellant's assets pursuant to the Iraq Ordinance and the Confiscation Ordinance is thus based on Resolution 1483 (2003)."

The judgment concerning the first applicant (continued):

"The decision taken on 16 November 2006 by the Federal Department for Economic Affairs to confiscate the appellant's assets pursuant to the Iraq Ordinance and the Confiscation Ordinance is thus based on Resolution 1483 (2003).

6.1 Since 28 November 1974 Switzerland has been a Contracting Party to the European Convention on Human Rights. However, even though it signed, on 19 May 1976, the additional Protocol No. 1 of 20 March 1952, which guarantees in particular the protection of property (Article 1), it has not ratified it to date. That Protocol has not therefore entered into force in respect of Switzerland. Consequently, in Switzerland, the protection of property is guaranteed by the Federal Constitution alone (Article 26). Under Article 1 ECHR, the High Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention (Articles 2 to 18 ECHR). Article 6 § 1 ECHR, in particular, grants everyone the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of an

individual's civil rights and obligations or of any criminal charge against him or her. Under Article 13 ECHR, everyone whose rights and freedoms as set forth in the Convention are violated is entitled to an effective remedy before a national authority.

...

6.4 Even though he relies on the guarantee of the protection of property and points out that restrictions on property are possible only under the conditions laid down in Article 36 of the Constitution, the appellant is in reality only complaining of a breach of procedural safeguards and not of a violation of Articles 26 and 36 of the Constitution. He observes that restrictions on the enjoyment of his possessions, such as the confiscation of his property, can be ordered only after due process under domestic law, including a substantive examination of the legal conditions for such restriction, while ensuring the observance of fundamental rights, basic procedural safeguards, and defence rights, or the right to be heard, and in compliance with the requirement to state reasons, the prohibition of any denial of justice, and the equality of arms and adversarial principles (see appellant's observations, ch. 76-80). He complains that the reasons for his inclusion on the list of Sanctions Committee 1518 were never brought to his knowledge and that he was not able to comment on them or defend himself adversarially before an independent and impartial judicial body, this not being disputed – quite rightly – by the Department for Economic Affairs in the light of the listing procedure (see above, point 4.3).

In this connection, the appellant is of the opinion that Switzerland is required to apply Resolution 1483 (2003), but also the provisions of the European Convention on Human Rights and those of the International Covenant on Civil and Political Rights concerning procedural safeguards; he argues that there is no contradiction between those various obligations, and that for this reason the decision appealed against should be quashed and the matter referred back for fresh confiscation proceedings before the Swiss courts, which would examine the merits of the measure in compliance with basic procedural safeguards.

It is therefore appropriate to examine the procedural safeguards that Switzerland is required to comply with, having regard to its obligations under the Charter and Resolution 1483 (2003), in the proceedings initiated by the Federal Department for Economic Affairs leading to the confiscation of the appellant's assets.

7.1 Pursuant to Article 5 paragraph 4, of the Constitution, the Confederation and the Cantons comply with international law. Under Article 190 of the Constitution, the Federal Court and the other authorities are required to apply federal laws and international law. International law, within the meaning of Article 190 of the Constitution, is defined by jurisprudence as the entire body of international law that is binding on Switzerland, comprising international agreements, customary international law, the general rules of the law of nations and the decisions of international organisations that have mandatory effect in Switzerland. Accordingly, the Federal Court is in principle required to comply with the provisions of the Charter, United Nations Security Council resolutions, the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

7.2 Article 190 of the Constitution does not, however, provide for any rule of conflict between the various norms of international law that are equally binding on Switzerland. However, under Article 103 of the Charter, in the event of a conflict between the obligations of the member States of the United Nations under the Charter and their obligations under any other international agreement, their Charter obligations prevail. This primacy is also enshrined in Article 30 § 1 of the Vienna

Convention on the Law of Treaties of 23 May 1969 ("VCLT"; RS 0.111; entered into force in respect of Switzerland on 6 June 1990).

According to legal opinion and case-law, this is an absolute and general primacy which applies regardless of the nature of the treaty which is in conflict with the Charter, whether it is bilateral or multilateral, or whether the treaty entered into force before or after the entry into force of the Charter. The primacy is granted not only to the obligations expressly laid down in the Charter, but also, according to the International Court of Justice, to those that stem from binding decisions of United Nations organs, in particular the binding decisions taken by the Security Council pursuant to Article 25 of the Charter (see the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, ICJ Reports 1992, p. 15, paragraph 39; see also Felipe Paolillo in *Les conventions de Vienne sur le droit des traités, commentaire article par article*, Olivier Corten and Pierre Klein (eds), Bruylant, Brussels 2006, no. 33 on Article 30 VCLT and the numerous references cited). This primacy does not render null and void the treaty which is in conflict with the Charter obligations, but merely suspends the treaty for as long as the conflict remains (see Eric Suy in *Les conventions de Vienne sur le droit des traités*, *op. cit.*, no. 15 on Article 53 VCLT and the references cited).

Moreover, neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights contains clauses which would, in themselves or by virtue of another treaty, prevail over the conflict clause that is enshrined in both Article 103 of the Charter and Article 30 § 1 VCLT.

Article 46 ICCPR certainly provides that '[n]othing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant'. However, according to legal opinion, this provision simply means that the International Covenant on Civil and Political Rights cannot hinder the task of the political organs and specialised agencies which have been entrusted under the Charter with duties relating to human rights (see Manfred Nowak, *U.N. Covenant on civil and political Rights, CCPR Commentary*, Kehl 2005, no. 3, on Article 46 ICCPR, p. 798). It does not therefore establish any hierarchy between the decisions of the Security Council and the rights guaranteed by the ICCPR – the United Nations as such is not a party to the latter in any event. It cannot be concluded that the International Covenant on Civil and Political Rights prevails over Charter obligations.

7.3 Consequently, in the event of any conflict between Switzerland's obligations under the Charter and those deriving from the European Convention on Human Rights or the International Covenant on Civil and Political Rights, the Charter obligations in principle prevail over the latter, as the appellant has not in fact denied. He takes the view, however, that this principle is not absolute. In his opinion, the obligations arising from the Charter, in particular those imposed by Resolution 1483 (2003), lose their binding character if they contravene the rules of *jus cogens*.

8. The appellant argues that the procedural safeguards under Article 14 ICCPR and Article 6 ECHR constitute *jus cogens* norms. In breaching those safeguards, Resolution 1483 (2003) should lose its binding effect.

8.1 Under the heading '*Treaties conflicting with a peremptory norm of general international law (*jus cogens*)*', Article 53 VCLT provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international

law, that is, 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. Moreover, Article 64 VCLT 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. Article 71 VCLT governs the consequences of the invalidity of a treaty in such cases.

8.2 Article 53 VCLT does not contain any example of peremptory norm of general international law (Report of the International Law Commission, Commentary on Art. 50, ILC Yearbook 1966 II, pp. 269 et seq.). The words 'by the international community of States as a whole' do not mean that a norm must be accepted and recognised as peremptory by States unanimously. A significant majority is sufficient. By way of example, the norms concerning the prohibition of the use of force, slavery, genocide, piracy, unequal treaties and racial discrimination are generally cited (see Eric Suy, *op. cit.*, no. 12 on Article 53 VCLT, p. 1912; Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit international public*, 7th edition, LGDJ 2002, no. 127, pp. 205 et seq.; and Joe Verhoeven, *Droit international public*, Larcier 2000, pp. 341 et seq.).

This list of examples does not include the rights deriving from Article 14 ICCPR and Article 6 ECHR, which are relied upon by the appellant. Their mere recognition by the International Covenant on Civil and Political Rights and the European Convention on Human Rights does not go so far as making them peremptory norms of general international law. It transpires, moreover, from the preparatory work in respect of Article 53 VCLT and the wording of that provision that in principle there can be no regional *jus cogens* norms (see Eric Suy, *op. cit.*, no. 9 on Article 53 VCLT, p. 1910; this is a controversial matter in legal opinion, see *inter alia*: Eva Kornicker, *Ius cogens und Umweltvölkerrecht*, Thesis Basle 1997, pp. 62 et seq. and the numerous references cited therein).

8.3 It is true that, in the event of a public emergency which threatens the life of the nation, Article 4, paragraphs 1 and 2, ICCPR authorises, under certain conditions, measures that derogate from the obligations under the Covenant, except for those deriving from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 (right to life, prohibition of torture, prohibition of slavery, prohibition of imprisonment on the ground of inability to fulfil a contractual obligation, prohibition of retrospective criminal legislation, recognition of legal personality, freedom of thought, conscience and religion). Article 15, paragraphs 1 and 2, ECHR also contain a public emergency clause permitting derogation from Convention obligations, similarly excluding any derogation from Articles 2, 3, 4 (paragraph 1) and 7 (right to life, prohibition of torture, prohibition of slavery, no punishment without law). Some authors take the view that the rights and prohibitions listed in Article 4, paragraph 2, ICCPR and Article 15, paragraph 2, ECHR correspond to the core human rights and could therefore be regarded as peremptory norms of international law (see Stefan Oeter, 'Ius cogens und der Schutz der Menschenrechte', in Liber amicorum *Luzius Wildhaber* 2007, pp. 499 et seq. and pp. 507 et seq.); for other authors the provisions merely point in that direction (see Eva Kornicker, *op. cit.*, pp. 58 et seq.). The latter opinion seems to correspond to that of the (former) Commission on Human Rights, which found that the list of rights from which Article 4, paragraph 2, ICCPR authorised no derogation might admittedly be linked, but not assimilated, to the question whether certain human rights corresponded to peremptory norms of general international law (General Comments 29/72 of 24 July 2001 based on Article 40, paragraph 4, ICCPR, ch. 11, in Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR*

Commentary, Kehl 2005, pp. 1145 et seq. and 1149). In the present case it is not necessary to settle this question in so far as Article 14 ICCPR and Article 6 ECHR do not, in any event, appear in the lists given in Article 4, paragraph 2, ICCPR and Article 15, paragraph 2, ECHR.

8.4 Consequently, contrary to what the appellant has claimed, neither the fundamental procedural safeguards, nor the right to an effective remedy, under Articles 6 and 13 ECHR and Article 14 ICCPR, have *per se* the nature of peremptory norms of general international law (*jus cogens*), in particular in the context of the confiscation procedure affecting the appellant's property (see, to the same effect, the judgment of the Swiss Federal Court no. 1A.45/2007 of 14 November 2007 in the case of *Nada v. DFE*, point 7.3; judgment of the Court of First Instance of the European Communities, 21 September 2005, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, T-306/01 Reports 2005 II, p. 3533, paragraphs 307 and 341; judgment of the Court of First Instance of the European Communities, 21 September 2005, *Kadi v. Council and Commission*, T-315/01 Reports 2005 II p. 3649, paragraphs 268 and 286; judgment of the Court of First Instance of the European Communities, 12 July 2006, *Ayadi v. Council*, T-253/02 Reports 2006 II p. 2139, paragraph 116; judgment of the Court of First Instance of the European Communities, 12 July 2006, *Hassan v. Council and Commission*, T-49/04 Reports 2006 II p. 52, paragraph 92).

As to the rights guaranteed by Articles 29 et seq. of the Constitution, this is a matter of domestic law which cannot constitute *jus cogens* or hinder the implementation by Switzerland of Resolution 1483 (2003).

9. According to the appellant, Switzerland should have sufficient latitude, even in the light of its obligations *vis-à-vis* the Security Council, to fulfil its duties under Article 14 ICCPR and Article 6 ECHR. In his view it is necessary to distinguish between the question of the deletion of his name from the list of Sanctions Committee 1518 and that of the confiscation of the frozen assets: the question of confiscation could be dealt with in fair proceedings without contravening the Charter obligations.

9.1 That opinion cannot be upheld. The description of the measures (freezing of funds or other financial assets, immediate transfer thereof to the Development Fund for Iraq), of the individuals and entities concerned (previous Iraqi government, Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction), and of the mandate given to Sanctions Committee 1518 (to enumerate the individuals and entities mentioned in paragraph 23), is detailed and leaves no room for interpretation. Similarly, the list of individuals and entities drawn up by Sanctions Committee 1518 is not indicative in nature. It is not a matter of deciding whether the appellant's name should be, or is legitimately, included on that list, it can only be observed that his name does appear on the list in question, which must be transposed into Swiss domestic law. In asserting that it should be possible to deal separately with the question of the confiscation of his assets, the appellant loses sight of the fact that the measures imposed on member States include the immediate transfer of the frozen assets to the Development Fund for Iraq. This order does not call for any interpretation, nor does it grant any latitude in the result that it requires of member States as to the treatment of the frozen assets of persons who, like the appellant, are included in particular on the list of Sanctions Committee 1518. Being clearly ascertained, those assets must be transferred to the Development Fund for Iraq. From that perspective, the present case differs from a case examined by the Court of First Instance of the European Communities, *Organisation des Modjahedines du peuple*

d'Iran v. Council of the European Union. It concerned Resolution 1373 (2001) of 28 September 2001 laying down strategies to combat terrorism, which required the member States of the United Nations – in that case the European Community – to identify individuals, groups and entities whose funds had to be frozen, because no list of the latter had been forthcoming. The Court of First Instance found that procedural safeguards had to be observed in the keeping of such a list (judgment of the Court of First Instance of the European Communities, 12 December 2006, *Organisation des Modjahedines du peuple d'Iran v. Council*, T-228/02, not yet reported).

9.2 In those circumstances, contrary to what the appellant has claimed, the implementation of Resolution 1483 (2003) requires Switzerland to adhere strictly to the measures introduced and to the decisions of Sanctions Committee 1518, which, unless found by the Security Council to be in breach of *jus cogens* norms, does not leave any room, even on the grounds of ensuring the procedural safeguards provided for in the European Convention on Human Rights, the International Covenant on Civil and Political Rights or the Swiss Constitution, for an examination of the procedure by which the appellant's name was added to the list issued by Sanctions Committee 1518, or for verification of the justification for such addition.

10. The appellant further argued that Article 4 of the Confiscation Ordinance granted the Federal Court full jurisdiction to deal with the various aspects of the matter, enabling it to find that the authority below had failed to ascertain the merits of the confiscation of his assets or, in other words, that the authority had wrongly accepted their confiscation solely on the basis that his name appeared on the list annexed to Resolution 1483 (2003), without remedying the breach of his procedural rights under, *inter alia*, Articles 29 et seq. of the Constitution.

10.1 According to the foregoing considerations, Article 4 of the Confiscation Ordinance cannot authorise the Federal Court, any more than the authority below, to verify whether the appellant's inclusion on the list issued by Sanctions Committee 1518 complied with the procedural safeguards of Article 14 ICCPR, Article 6 ECHR and Article 29 et seq. of the Constitution. With the exception of an examination of a possible breach of *jus cogens* norms, as shown above, Switzerland is thus not authorised to scrutinise the validity of Security Council decisions, and in particular that of Resolution 1483 (2003), not even in terms of compliance with procedural safeguards, or to provide redress for any defects in such decisions. For that could have the effect of depriving Article 25 of the Charter of any effectiveness, as would be the case if the appellant's frozen assets were not confiscated and transferred to the Development Fund for Iraq (see Eric Suy and Nicolas Angelet in *La Charte des Nations Unies, Commentaire article par article*, Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds.), 3rd edition, Economica 2003, Art. 25, p. 917).

10.2. However, with that reservation, Switzerland is free to choose how it transposes into domestic law the obligations arising from Resolution 1483 (2003) and the arrangements for transferring the frozen assets. The Federal Council has made use of this discretion in distinguishing between the measures introduced for the freezing of the assets and those governing the transfer of frozen assets. The Federal Department, for its part, suspended the confiscation procedure at the request of the appellant, who sought to have the matter examined by the Sanctions Committee, and resumed it only upon his express application. With the same reservation, the Federal Council was entitled to guarantee the right of the frozen asset-holders to be heard before the confiscation decision was taken. It was also entitled to make available an administrative-law appeal against such decisions.

In the present case, the appellant made full use of his right to be heard because he obtained access to the file of the Federal Department for Economic Affairs, or at least to the relevant bank documents, and had the opportunity to express himself before that authority. He also fully availed himself of the right provided for in Article 4 of the Confiscation Ordinance by lodging the present administrative appeal. As to that matter, falling as it does within the jurisdiction of Switzerland, it should be noted that the applicant has not submitted any complaint of a violation of Articles 26 and 36 of the Constitution in respect of the confiscation procedure (see point 5.4).

In a further complaint, lastly, the appellant contended that the refusal to annul the decision of the Federal Department for Economic Affairs of 16 November 2006 for a breach of procedural safeguards ran counter to the position defended on many occasions by Switzerland, the Federal Council or the Federal Department for Foreign Affairs, asserting an intangible principle of respect for human rights. He argued that this was an 'indivisible' position in relation to other Nations which had been negated by the decision of the Federal Department for Economic Affairs of 16 November 2006.

10.3 The appellant seems to be unaware of the meaning that should be given to indivisibility (in the area) of human rights. According to legal opinion, the principle of indivisibility of human rights means that States cannot choose between human rights in order to give priority to some over others. The aim of this principle is to prevent governments from claiming to defend human rights by choosing from the list, as they see fit, those they accept and those they ignore (see Françoise Bouchet-Saulnier, *Droits de l'homme, droit humanitaire et justice internationale*, Acte Sud 2002, pp. 23 and 27 et seq.).

10.4 In the present case, to the extent that his position can be understood, the appellant is complaining more about Switzerland's attitude, which he regards as contradictory. This opinion disregards the fact that the positive legal order, as set out above, is mandatory under Article 190 of the Constitution for reasons of legal security. Switzerland cannot, by itself, delete the appellant's name from the list established by the Sanctions Committee, which has sole competence for that purpose, even if the procedure for that purpose is not fully satisfactory (see judgment 1A.45/2007 of 14 November 2007, point 8.3). Moreover, it is not contradictory for the federal authorities to find the system deficient and yet, as in the present case, to advocate and act on a political level in favour of an intangible respect for human rights, especially in respect of the listing and delisting procedures applied by Sanctions Committee 1518. Switzerland's conduct does not therefore breach Articles 26 and 29 et seq. of the Constitution, Articles 6 and 13 ECHR or Article 14 ICCPR, under that head either.

11. The appeal must accordingly be dismissed. The Federal Court finds, however, that, in the context of Switzerland's power and freedom of implementation (see point 10.2), the authority below should grant the appellant a brief and final period of time, before implementing the decision of 16 November 2006 – which enters into force with the dismissal of the present appeal – to allow him to apply, should he so wish, to Sanctions Committee 1518 for a new delisting procedure in accordance with the improved arrangements of Resolution 1730 (2006) of 19 December 2006, the appellant not having had the opportunity to make use of the latter because he wrongly placed all his hopes in the present administrative-law appeal.

12. The appeal is thus dismissed for the foregoing reasons ..."

C. Subsequent developments

39. On 13 June 2008 the applicants lodged a delisting application in accordance with the procedure introduced by Resolution 1730 (2006). The application was rejected on 6 January 2009**.**

40. In a favourable opinion issued by the State Secretariat for Economic Affaires (the "SECO") on 26 September 2008, the applicants were informed that they would be authorised to make use of the assets frozen in Switzerland to pay the fees charged by a lawyer in the United States, that lawyer's activities being confined to their defence in connection with the Swiss confiscation procedure and the delisting procedure.

41. On four occasions, the last being on 26 February 2009, the SECO, on the basis of Article 2, paragraph 3, of the Iraq Ordinance, granted the applicants' requests and authorised the release of certain sums for the payment of lawyer's fees in respect of the confiscation decisions.

42. On 6 March 2009 the Swiss authorities stayed the execution of the confiscation decisions pending the judgment of the European Court of Human Rights, and that of the Federal Court on an application to re-open the domestic proceedings if the Court were to find a violation of the Convention.

43. In its Resolution 1956 (2010) of 15 December 2010 the Security Council decided to terminate the Development Fund for Iraq no later than 30 June 2011 and to transfer the proceeds from that Fund to the Government of Iraq's "successor arrangements account or accounts". The Sanctions Committee set up under Resolution 1518 (2003) continued to operate.

44. In a letter of 21 February 2013 the applicants' lawyer informed the Court that the confiscation of his clients' assets had still not taken place, given that the respondent Government had stayed the execution of the relevant decisions. He nevertheless added that the Government could implement the decisions at any time.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW

A. International law

1. The United Nations Charter

45. The relevant provisions of the United Nations Charter read as follows:

"Preamble

"*We the peoples of the United Nations, determined*

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

...”

Article 1

“The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.”

Article 25

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Article 103

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

2. The Vienna Convention on the Law of Treaties

46. The relevant provisions of the Vienna Convention on the Law of Treaties of 1969, which entered into force in respect of Switzerland on 6 June 1990, read as follows:

Article 30 - *Application of successive treaties relating to the same subject matter*

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

Article 53 - *Treaties conflicting with a peremptory norm of general international law (*"jus cogens"*)*

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized 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."

Article 64 - *Emergence of a new peremptory norm of general international law (*"jus cogens"*)*

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

3. Relevant Security Council resolutions in the present case

47. Resolution 1483 (2003) of 22 May 2003 reads as follows:

"*The Security Council*,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, *welcoming* the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and *expressing* resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, *recalls* resolution 1325 (2000) of 31 October 2000,

Welcoming the first steps of the Iraqi people in this regard, and *noting* in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

Noting the statement of 12 April 2003 by the Ministers of Finance and Central Bank Governors of the Group of Seven Industrialized Nations in which the members recognized the need for a multilateral effort to help rebuild and develop Iraq and for the need for assistance from the International Monetary Fund and the World Bank in these efforts,

Welcoming also the resumption of humanitarian assistance and the continuing efforts of the Secretary-General and the specialized agencies to provide food and medicine to the people of Iraq,

Welcoming the appointment by the Secretary-General of his Special Adviser on Iraq,

Affirming the need for accountability for crimes and atrocities committed by the previous Iraqi regime,

Stressing the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments,

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the "Authority"),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third-State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

3. *Appeals* to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

6. *Calls upon* the Authority and relevant organizations and individuals to continue efforts to locate, identify, and repatriate all Kuwaiti and Third-State Nationals or the remains of those present in Iraq on or after 2 August 1990, as well as the Kuwaiti archives, that the previous Iraqi regime failed to undertake, and, in this regard, *directs* the High-Level Coordinator, in consultation with the International Committee of the Red Cross and the Tripartite Commission and with the appropriate support of the people of Iraq and in coordination with the Authority, to take steps to fulfil his mandate with respect to the fate of Kuwaiti and Third-State National missing persons and property;

7. *Decides* that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph;

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

10. *Decides* that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply;

11. *Reaffirms* that Iraq must meet its disarmament obligations, *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to keep the Council informed of their activities in this regard, and *underlines* the intention of the Council to revisit the mandates of the United Nations Monitoring, Verification, and Inspection Commission and the International Atomic Energy Agency as set forth in resolutions 687 (1991) of 3 April 1991, 1284 (1999) of 17 December 1999, and 1441 (2002) of 8 November 2002;

12. *Notes* the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank;

13. *Notes further* that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below;

14. *Underlines* that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq;

15. *Calls upon* the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community, and *welcomes* the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems;

16. *Requests* also that the Secretary-General, in coordination with the Authority, continue the exercise of his responsibilities under Security Council resolution 1472 (2003) of 28 March 2003 and 1476 (2003) of 24 April 2003, for a period of six months following the adoption of this resolution, and terminate within this time period, in the most cost effective manner, the ongoing operations of the "Oil-for-Food" Programme (the "Programme"), both at headquarters level and in the field, transferring responsibility for the administration of any remaining activity under the Programme to the Authority, including by taking the following necessary measures:

(a) to facilitate as soon as possible the shipment and authenticated delivery of priority civilian goods as identified by the Secretary-General and representatives designated by him, in coordination with the Authority and the Iraqi interim administration, under approved and funded contracts previously concluded by the previous Government of Iraq, for the humanitarian relief of the people of Iraq, including, as necessary, negotiating adjustments in the terms or conditions of these contracts and respective letters of credit as set forth in paragraph 4 (d) of resolution 1472 (2003);

(b) to review, in light of changed circumstances, in coordination with the Authority and the Iraqi interim administration, the relative utility of each approved and funded contract with a view to determining whether such contracts contain items required to meet the needs of the people of Iraq both now and during reconstruction, and to postpone action on those contracts determined to be of questionable utility and the respective letters of credit until an internationally recognized, representative government of Iraq is in a position to make its own determination as to whether such contracts shall be fulfilled;

(c) to provide the Security Council within 21 days following the adoption of this resolution, for the Security Council's review and consideration, an estimated operating budget based on funds already set aside in the account established pursuant to paragraph 8 (d) of resolution 986 (1995) of 14 April 1995, identifying:

(i) all known and projected costs to the United Nations required to ensure the continued functioning of the activities associated with implementation of the present resolution, including operating and administrative expenses associated with the relevant United Nations agencies and programmes responsible for the implementation of the Programme both at Headquarters and in the field;

(ii) all known and projected costs associated with termination of the Programme;

(iii) all known and projected costs associated with restoring Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992); and

(iv) all known and projected costs associated with the Special Representative and the qualified representative of the Secretary-General identified to serve on the International Advisory and Monitoring Board, for the six month time period defined above, following which these costs shall be borne by the United Nations;

(d) to consolidate into a single fund the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995);

(e) to fulfil all remaining obligations related to the termination of the Programme, including negotiating, in the most cost effective manner, any necessary settlement payments, which shall be made from the escrow accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), with those parties that previously have entered into contractual obligations with the Secretary-General under the Programme, and to determine, in coordination with the Authority and the Iraqi interim administration, the future status of contracts undertaken by the United Nations and related United Nations agencies under the accounts established pursuant to paragraphs 8 (b) and 8 (d) of resolution 986 (1995);

(f) to provide the Security Council, 30 days prior to the termination of the Programme, with a comprehensive strategy developed in close coordination with the Authority and the Iraqi interim administration that would lead to the delivery of all relevant documentation and the transfer of all operational responsibility of the Programme to the Authority;

17. *Requests further* that the Secretary-General transfer as soon as possible to the Development Fund for Iraq 1 billion United States dollars from unencumbered funds in the accounts established pursuant to paragraphs 8 (a) and 8 (b) of resolution 986 (1995), restore Government of Iraq funds that were provided by Member States to the Secretary-General as requested in paragraph 1 of resolution 778 (1992), and *decides* that, after deducting all relevant United Nations expenses associated with the shipment of authorized contracts and costs to the Programme outlined in paragraph 16 (c) above, including residual obligations, all surplus funds in the escrow accounts established pursuant to paragraphs 8 (a), 8 (b), 8 (d), and 8 (f) of resolution 986 (1995) shall be transferred at the earliest possible time to the Development Fund for Iraq;

18. *Decides* to terminate effective on the adoption of this resolution the functions related to the observation and monitoring activities undertaken by the Secretary-General under the Programme, including the monitoring of the export of petroleum and petroleum products from Iraq;

19. *Decides* to terminate the Committee established pursuant to paragraph 6 of resolution 661 (1990) at the conclusion of the six month period called for in paragraph 16 above and *further decides* that the Committee shall identify individuals and entities referred to in paragraph 23 below;

20. *Decides* that all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board referred to in paragraph 12 above in order to ensure transparency, and *decides further* that, except as provided in paragraph 21 below, all proceeds from such sales shall be

deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted;

21. *Decides further* that 5 per cent of the proceeds referred to in paragraph 20 above shall be deposited into the Compensation Fund established in accordance with resolution 687 (1991) and subsequent relevant resolutions and that, unless an internationally recognized, representative government of Iraq and the Governing Council of the United Nations Compensation Commission, in the exercise of its authority over methods of ensuring that payments are made into the Compensation Fund, decide otherwise, this requirement shall be binding on a properly constituted, internationally recognized, representative government of Iraq and any successor thereto;

22. *Noting* the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further *decides* that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the above-mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution;

23. *Decides* that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;

24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United

States of America to inform the Council at regular intervals of their efforts under this resolution;

25. *Decides* to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary;

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter."

48. Security Council Resolution 1730 (2006) of 19 December 2006, establishing the delisting procedure, reads as follows in its relevant part:

"*The Security Council*,

Recalling the statement of its President of 22 June 2006 (S/PRST/2006/28),

Emphasizing that sanctions are an important tool in the maintenance and restoration of international peace and security,

Further emphasizing the obligations placed upon all Member States to implement, in full, the mandatory measures adopted by the Security Council,

Continuing in its resolve to ensure that sanctions are carefully targeted in support of clear objectives and implemented in ways that balance effectiveness against possible adverse consequences,

Committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions,

1. *Adopts* the de-listing procedure in the document annexed to this resolution and *requests* the Secretary-General to establish within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests and to perform the tasks described in the attached annex;

2. *Directs* the sanctions committees established by the Security Council, including those established pursuant to resolution 1718 (2006), 1636 (2005), 1591 (2005), 1572 (2004), 1533 (2004), 1521 (2005), 1518 (2003), 1267 (1999), 1132 (1997), 918 (1994), and 751 (1992) to revise their guidelines accordingly;

3. *Decides* to remain seized of the matter.

De-listing procedure

The Security Council requests the Secretary-General to establish, within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests. Petitioners seeking to submit a request for de-listing can do so either through the focal point process outlined below or through their state of residence or citizenship.[2]

The focal point will perform the following tasks:

1. Receive de-listing requests from a petitioner (individual(s), groups, undertakings, and/or entities on the Sanctions Committee's lists).

2 A State can decide, that as a rule, its citizens or residents should address their de-listing requests directly to the focal point. The State will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee's website.

2. Verify if the request is new or is a repeated request.

3. If it is a repeated request and if it does not contain any additional information, return it to the petitioner.

4. Acknowledge receipt of the request to the petitioner and inform the petitioner on the general procedure for processing that request.

5. Forward the request, for their information and possible comments to the designating government(s) and to the government(s) of citizenship and residence. Those governments are encouraged to consult with the designating government(s) before recommending de-listing. To this end, they may approach the focal point, which, if the designating state(s) so agree(s), will put them in contact with the designating state(s).

6. (a) If, after these consultations, any of these governments recommend de-listing, that government will forward its recommendation, either through the focal point or directly to the Chairman of the Sanctions Committee, accompanied by that government's explanation. The Chairman will then place the de-listing request on the Committee's agenda.

(b) If any of the governments, which were consulted on the de-listing request under paragraph 5 above oppose the request, the focal point will so inform the Committee and provide copies of the de-listing request. Any member of the Committee, which possesses information in support of the de-listing request, is encouraged to share such information with the governments that reviewed the de-listing request under paragraph 5 above.

(c) If, after a reasonable time (3 months), none of the governments which reviewed the de-listing request under paragraph 5 above comment, or indicate that they are working on the de-listing request to the Committee and require an additional definite period of time, the focal point will so notify all members of the Committee and provide copies of the de-listing request. Any member of the Committee may, after consultation with the designating government(s), recommend de-listing by forwarding the request to the Chairman of the Sanctions Committee, accompanied by an explanation. (Only one member of the Committee needs to recommend de-listing in order to place the issue on the Committee's agenda.) If after one month, no Committee member recommends de-listing, then it shall be deemed rejected and the Chairman of the Committee shall inform the focal point accordingly.

7. The focal point shall convey all communications, which it receives from Member States, to the Committee for its information.

8. Inform the petitioner:

(a) Of the decision of the Sanctions Committee to grant the de-listing petition; or

(b) That the process of consideration of the de-listing request within the Committee has been completed and that the petitioner remains on the list of the Committee."

4. Work of the United Nations International Law Commission

49. The report of the study group of the International Law Commission (ILC) entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", published in 2006, contains the following observations concerning Article 103 of the Charter:

4. Harmonization - systemic integration

"37. In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well. As Rousseau puts the duties of a judge in one of the earlier but still more useful discussions of treaty conflict:

... lorsqu'il est en présence de deux accords de volontés divergentes, il doit être tout naturellement porté a rechercher leur coordination plutôt qu'à consacrer à leur antagonisme [Charles Rousseau, "De la compatibilité des normes juridiques contradictoires dans l'ordre international", RGDIP vol. 39 (1932), p. 153].

38. This has emerged into a widely accepted principle of interpretation and it may be formulated in many ways. It may appear as the thumb-rule that when creating new obligations, States are assumed not to derogate from their obligations. Jennings and Watts, for example, note the presence of a:

presumption that the parties intend something not inconsistent with generally recognized principles of international law, or with previous treaty obligations towards third States [Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (London: Longman, 1992) (9th ed), p. 1275. For the wide acceptance of the presumption against conflict - that is the suggestion of harmony - see also see Pauwelyn, *Conflict of Norm* ... supra note 21, pp. 240-244].

39. As the International Court of Justice stated in the *Right of Passage* case:

it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it [*Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) I.C.J. Reports 1957* p. 142].

...

331. Article 103 does not say that the *Charter* prevails, but refers to *obligations under the Charter*. Apart from the rights and obligations in the Charter itself, this also covers duties based on binding decisions by United Nations bodies. The most important case is that of Article 25 that obliges Member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine ..."

5. Relevant international case-law

50. The measures taken under the Security Council resolutions establishing a listing system and the possibility of reviewing the legality of such measures have been examined, at international level, by the European Court of Justice and by the United Nations Human Rights Committee.

(a) The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (European Court of Justice)

51. The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (joined cases C-402/05 P and C-415/05 P;

hereinafter "the *Kadi* judgment") concerned the freezing of the applicants' assets pursuant to European Community regulations adopted in connection with the implementation of Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which, among other things, required all United Nations member States to take measures to freeze the funds and other financial resources of the individuals and entities identified by the Security Council's Sanctions Committee as being associated with Osama bin Laden, al-Qaeda or the Taliban. In that case the applicants fell within that category and their assets had thus been frozen – a measure that for them constituted a breach of their fundamental right to respect for property as protected by the Treaty instituting the European Community ("the EC Treaty"). They contended that the EC regulations had been adopted *ultra vires*.

52. On 21 September 2005 the Court of First Instance (which on 1 December 2009 became known as the "General Court") rejected those complaints and confirmed the lawfulness of the regulations, finding mainly that Article 103 of the Charter had the effect of placing Security Council resolutions above all other international obligations (except for those covered by *jus cogens*), including those arising from the EC treaty. It concluded that it was not entitled to review Security Council resolutions, even on an incidental basis, to ascertain whether they respected fundamental rights.

53. Mr Kadi appealed to the Court of Justice. The appeal was examined by a Grand Chamber jointly with another case. In its judgment of 3 September 2008 the Court of Justice found that, in view of the internal and autonomous nature of the Community legal order, it had jurisdiction to review the lawfulness of a Community regulation adopted within the ambit of that order even if its purpose was to implement a Security Council resolution. It thus held that, even though it was not for the "Community judicature" to examine the lawfulness of Security Council resolutions, it was entitled to review Community acts or acts of member States designed to give effect to such resolutions, and that this "would not entail any challenge to the primacy of that resolution in international law".

54. The Court of Justice concluded that the Community judicature had to ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, were designed to give effect to resolutions of the Security Council. The judgment contained the following relevant passages:

> "...
>
> 281. In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC 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).

...

293. Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

294. In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

...

296. Although, because of the adoption of such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.

297. Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (Möllendorf and Möllendorf-Niehuus, paragraph 54 and case-law cited).

298. It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299. It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300. What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.

...

319. According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.

320. In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.

321. In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.

322. Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.

323. In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.

324. The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.

325. Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.

326. It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

327. The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of *Kadi* and 263 to 282 of *Yusuf and Al Barakaat*, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must

enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens.

328. The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.

329. It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens and that it is, therefore, no longer necessary to examine the United Kingdom's cross-appeal on this point either.

330. Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter part of those judgments must also be set aside.

Concerning the actions before the Court of First Instance

331. As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.

332. In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.

333. It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.

334. In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

335. According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37).

336. In addition, having regard to the Court's case-law in other fields (see, inter alia, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of

restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

337. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature (see, to that effect, *Heylens and Others*, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

338. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by the contested regulation, the Community authorities cannot be required to communicate those grounds before the name of a person or entity is entered in that list for the first time.

339. As the Court of First Instance stated in paragraph 308 of *Yusuf and Al Barakaat*, such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation.

340. In order to attain the objective pursued by that regulation, such measures must, by their very nature, take advantage of a surprise effect and, as the Court has previously stated, apply with immediate effect (*Möllendorf and Möllendorf-Niehuus*, paragraph 63).

341. Nor were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation, for reasons also connected to the objective pursued by the contested regulation and to the effectiveness of the measures provided by the latter.

342. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

343. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.

344. In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal* v. *United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131).

...

356. In order to assess the extent of the fundamental right to respect for property, a general principle of Community law, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR, which enshrines that right.

357. Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.

358. That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property. It does, however, undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.

..."

55. The Court of Justice concluded that the contested regulations, which did not provide for any remedy in respect of the freezing of assets, were in breach of fundamental rights and were to be annulled.

56. In a judgment of 30 September 2010, in a case to which the same applicant and the Commission were parties (Case T-85/09), the General Court largely confirmed the findings of the Court of Justice. The General Court found, in the light of the latter's judgment, that its task, in the circumstances of the case, was to ensure full review of the lawfulness of the contested regulation, without affording the regulation any immunity from jurisdiction on the ground that it gave effect to resolutions adopted by the UN Security Council. The relevant paragraphs of the General Court's judgment read as follows:

"115. More fundamentally, certain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the United Nations and, on the other hand, the EC and EU Treaties, and more particularly Article 177(3) EC, Articles 297 EC and 307 EC, Article 11(1) EU and Article 19(2) EU (see, also Article 3(5) TEU and Article 21(1) and (2) TEU, as well as declaration No 13 of the Conference of the Representatives of the Governments of the Member States concerning the common foreign and security policy annexed to the Treaty of Lisbon, which stresses that 'the [EU] and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security council and of its members for the maintenance of international peace and security'.

116. In that regard, it has in particular been asserted that, even though the Court of Justice stated, at paragraph 287 of *Kadi*, that it was not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the legality of a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, the fact remains that a review of the legality of a Community act which merely implements, at Community level, a resolution affording no latitude in that respect necessarily amounts to a review, in the light of the rules and principles of the Community legal order, of the legality of the resolution thereby implemented.

117. It has, moreover, been observed that, at paragraphs 320 to 325 of *Kadi*, the Court of Justice in any event carried out a review of the conformity of the system of sanctions set up by the United Nations with the system of judicial protection of fundamental rights laid down by the EC Treaty and did so in response to the

Commission's argument that those fundamental rights were now sufficiently protected in the framework of the system of sanctions, in view in particular of the improvement in the re-examination procedure which afforded the individuals and entities concerned an acceptable opportunity to be heard by the Sanctions Committee. In particular, the Court of Justice held, at paragraphs 322 and 323 of its judgment, that the re-examination procedure 'clearly ... [did] not offer the guarantees of judicial protection' and that the individuals or entities concerned 'had no real opportunity of asserting their rights'.

...

119. Accordingly, while the Court of Justice normally views relations between Community law and international law in the light of Article 307 EC (see, in that regard, Case C-124/95 *Centro-Com* [1997] ECR I-81, paragraphs 56 to 61, in which the Court held that Article 234 of the EC Treaty (subsequently, after amendment, Article 307 EC) may allow derogations even from primary law – in that instance Article 133 EC), it held in *Kadi* that Article 307 EC does not apply when at issue are 'the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union' (paragraph 303) or, in other words, 'the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights' (paragraph 304). So far as those principles are concerned, the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations.

...

126. The General Court therefore concludes that, in circumstances such as those of this case, its task is to ensure – as the Court of Justice held at paragraphs 326 and 327 of *Kadi* – 'in principle the full review' of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

127. That must remain the case, at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, as the Court of Justice considered to be the case at paragraph 322 of *Kadi* (see also, to that effect, point 54 of the Opinion of Advocate General Poiares Maduro in that case).

128. The considerations in this respect, set out by the Court of Justice at paragraphs 323 to 325 of *Kadi*, in particular with regard to the focal point, remain fundamentally valid today, even if account is taken of the 'Office of the Ombudsperson', the creation of which was decided in principle by Resolution 1904 (2009) and which has very recently been set up. In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombusdperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which

has requested his inclusion on the Sanctions Committee's list). For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee (see also, in that regard, the observations made at paragraphs 77, 78, 149, 181, 182 and 239 of the UK Supreme Court judgment in *Ahmed and Others* and the considerations expressed in Point III of the Ninth Report of the Monitoring Committee).

...

148. Those considerations, well established in the case-law resulting from *OMPI*, should be supplemented by certain considerations based on the nature and effects of fund-freezing measures such as those at issue here, viewed from a temporal perspective.

149. Such measures are particularly draconian for those who are subject to them. All the applicant's funds and other assets have been indefinitely frozen for nearly 10 years now and he cannot gain access to them without first obtaining an exemption from the Sanctions Committee. At paragraph 358 of its judgment in *Kadi*, the Court of Justice had already noted that the measure freezing his funds entailed a restriction of the exercise of the applicant's right to property that had to be classified as considerable, having regard to the general application of the measure and the fact that it had been applied to him since 20 October 2001. In *Ahmed and Others* (paragraphs 60 and 192), the UK Supreme Court took the view that it was no exaggeration to say that persons designated in this way are effectively 'prisoners' of the State: their freedom of movement is severely restricted without access to their funds and the effect of the freeze on both them and their families can be devastating.

150. It might even be asked whether – given that now nearly 10 years have passed since the applicant's funds were originally frozen – it is not now time to call into question the finding of this Court, at paragraph 248 of its judgment in *Kadi*, and reiterated in substance by the Court of Justice at paragraph 358 of its own judgment in *Kadi*, according to which the freezing of funds is a temporary 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. The same is true of the statement of the Security Council, repeated on a number of occasions, in particular in Resolution 1822 (2008), that the measures in question 'are preventative in nature and are not reliant upon criminal standards set out under national law'. In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one (see also, in that connection, the Ninth Report of the Monitoring Team, paragraph 34). That is also the opinion of the United Nations High Commissioner for Human Rights who, in a report to the General Assembly of the United Nations of 2 September 2009, entitled 'Report ... on the protection of human rights and fundamental freedoms while countering terrorism' (document A/HRC/12/22, point 42), makes the following statement:

'Because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition, there is no uniformity in relation to evidentiary standards and procedures. This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review.'

151. Although a discussion of this question is outside the scope of these proceedings as it is defined by the pleas set out in the application, the General Court considers that, once there is acceptance of the premiss, laid down by the judgment of the Court of Justice in *Kadi*, that freezing measures such as those at issue in this instance enjoy no immunity from jurisdiction merely because they are intended to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned.

152. With the benefit and in the light of the above observations, it is appropriate now to examine the second and fifth pleas.

..."

57. The Commission, the Council of the European Union and the United Kingdom appealed against that judgment. The Court of Justice of the European Union (sitting as a Grand Chamber) delivered its judgment on 18 July 2013 (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P); the relevant passages read as follows:

"...

111. In proceedings relating to the adoption of the decision to list or maintain the listing of the name of an individual in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee (see, to that effect, the *Kadi* judgment, paragraphs 336 and 337), so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union.

112. When that disclosure takes place, the competent Union authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him (see, to that effect, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36, and the judgment of 22 November 2012 in Case C-277/11 *M*. [2012] ECR I-0000, paragraph 87 and case-law cited).

113. As regards a decision whereby, as in this case, the name of the individual concerned is to be maintained on the list in Annex I to Regulation No 881/2002, compliance with that dual procedural obligation must, contrary to the position in respect of an initial listing (see, in that regard, the *Kadi* judgment, paragraphs 336 to 341 and 345 to 349, and *France* v *People's Mojahedin Organization of Iran*, paragraph 61), precede the adoption of that decision (see *France* v *People's Mojahedin Organization of Iran*, paragraph 62). It is not disputed that, in the present case, the Commission, the author of the contested regulation, complied with that obligation.

114. When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments

(see, by analogy, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 58, and *M*., paragraph 88).

115. In that context, it is for that authority to assess, having regard, inter alia, to the content of any such comments, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.

116. Lastly, without going so far as to require a detailed response to the comments made by the individual concerned (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 141), the obligation to state reasons laid down in Article 296 TFEU entails in all circumstances, not least when the reasons stated for the European Union measure represent reasons stated by an international body, that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraphs 140 and 142, and *Council* v *Bamba*, paragraphs 49 to 53).

117. As regards court proceedings, in the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name in Annex I to Regulation No 881/2002, the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed (see, to that effect, the *Kadi* judgment, paragraphs 121 to 236; see also, by analogy, the judgment of 13 March 2012 in Case C-376/10 P *Tay Za* v *Council* [2012] ECR I-0000, paragraphs 46 to 72).

118. The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards set out in paragraphs 111 to 114 of this judgment and the obligation to state reasons laid down in Article 296 TFEU, as mentioned in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119. The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 (the *Kadi* judgment, paragraph 336), the Courts of the European Union are to ensure that that decision, which affects that person individually (see, to that effect, the judgment of 23 April 2013 in Joined Cases C-478/11 P to C-482/11 P *Gbagbo and Others* v *Council* [2013] ECR I-0000, paragraph 56), is taken on a sufficiently solid factual basis (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 68). That entails a verification of the factual allegations in the summary of reasons underpinning that decision (see to that effect, *E and F*, paragraph 57), with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

120. To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination (see, by analogy, *ZZ*, paragraph 59).

121. That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.

...

125. Admittedly, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned. In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process (see, to that effect, the *Kadi* judgment, paragraphs 342 and 344; see also, by analogy, *ZZ*, paragraphs 54, 57 and 59).

126. To that end, it is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded (see, by analogy, *ZZ*, paragraphs 61 and 62).

...

135. It follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

136. Second, respect for those rights implies that, in the event of a legal challenge, the Courts of the European Union are to review, in the light of the information and evidence which have been disclosed inter alia whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

...

161. In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the indications that Depositna Banka was used for the planning of an attack in Saudi Arabia serve as partial corroboration that Mr Kadi had used his position for purposes other than ordinary business purposes.

> 162. However, since no information or evidence has been produced to support the claim that planning sessions might have taken place in the premises of Depozitna Banka for terrorist acts in association with Al-Qaeda or Usama bin Laden, the indications relating to the association of Mr Kadi with that bank are insufficient to sustain the adoption, at European Union level, of restrictive measures against him.
>
> 163. It follows, from the analysis set out in paragraph 141 and paragraphs 151 to 162 of this judgment, that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.
>
> 164. In those circumstances, the errors of law, identified in paragraphs 138 to 140 and 142 to 149 of this judgment, which vitiate the judgment under appeal are not such as to affect the validity of that judgment, given that its operative part, which annuls the contested regulation in so far as it concerns Mr Kadi, is well founded on the legal grounds stated in the preceding paragraph.
>
> 165. Consequently, the appeals must be dismissed.
>
> ..."

(b) The case of *Sayadi and Vinck v. Belgium* (United Nations Human Rights Committee)

58. In the case brought by Nabil Sayadi and Patricia Vinck against Belgium (Views of the Human Rights Committee of 22 October 2008, concerning communication no. 1472/2006), the Human Rights Committee had occasion to examine the national implementation of the sanctions regime established by the Security Council in Resolution 1267 (1999). The two complainants, Belgian nationals, had been placed on the lists appended to that resolution in January 2003, on the basis of information which had been provided to the Security Council by Belgium, shortly after the commencement of a domestic criminal investigation in September 2002. They had submitted several delisting requests at national, regional and United Nations levels, all to no avail. In 2005, the Brussels Court of First Instance had ordered the Belgian State, *inter alia*, to urgently initiate a delisting procedure with the United Nations Sanctions Committee, and the State had subsequently done so.

59. In the Committee's opinion, although the State party itself was not competent to remove the names from the list, it had the duty to do all it could to obtain that deletion as soon as possible, to provide the complainants with compensation, to make public the requests for delisting, and to ensure that similar violations did not occur in the future.

60. On 20 July 2009 the complainants' names were removed from the list pursuant to a decision of the Sanctions Committee.

61. As regards Article 14 of the International Covenant on Civil and Political Rights[3], the Committee found as follows:

> "10.9 With regard to the allegation of a violation of article 14, paragraph 1, the authors contend that they were placed on the sanctions list and their assets frozen without their being given access to 'relevant information' justifying the listing, and in the absence of any court ruling on the matter. The authors also draw attention to the prolonged imposition of those sanctions and maintain that they did not have access to an effective remedy, in violation of article 2, paragraph 3, of the Covenant. The Committee notes, in this connection, the assertion of the State party that the authors did have a remedy, since they took the State party to the Brussels Court of First Instance and obtained an order requiring it to submit a de-listing request to the Sanctions Committee. Based solely on consideration of the actions of the State party, the Committee therefore finds that the authors did have an effective remedy, within the limits of the jurisdiction of the State party, which guaranteed effective follow-up by submitting two requests for de-listing. The Committee is of the view that the facts before it do not disclose any violation of article 2, paragraph 3, or of article 14, paragraph 1, of the Covenant."

6. Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 26 September 2012 (A/67/396)

62. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted his second annual report to the United Nations General Assembly on 26 September 2012. He listed the key activities undertaken by the Special Rapporteur between 3 April and 31 August 2012 and evaluated the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009) (and amended by resolution 1989 (2011)) and its compatibility with international human rights norms, assessing in particular its impact on the due process deficits inherent in the Council's Al-Qaida sanctions regime. The report made recommendations for amending the mandate to bring it into full conformity with international human rights norms. The paragraphs of the report that are relevant for the present case read as follows (footnotes omitted):

> "16. Under the Al-Qaida regime, the Council, through its Sanctions Committee, is responsible for designating individuals and entities on the Consolidated List and for

3. Article 14 § 1 of the Covenant reads as follows: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

adjudicating upon applications for their removal. This is inconsistent with any reasonable conception of due process, and gives the appearance that the Council is acting above and beyond the law. However, some members of the Council are unwilling to cede their Chapter VII powers to any form of binding review by an independent body. Indeed, some argue that this would be contrary to the provisions of the Charter of the United Nations itself, and therefore would be *ultra vires*.

17. The Special Rapporteur does not share this analysis. While the Security Council is primarily a political body, rather than a legal one, it exercises both quasi legislative and quasi-judicial functions in the present context. Under Articles 25 and 103 of the Charter, States are required to comply with binding decisions of the Council adopted under Chapter VII, even where this would entail violating their obligations under another international treaty. Given the presumption in international law against normative conflict, human rights treaty bodies have developed a principle of construction to the effect that Council resolutions should be read subject to a presumption that it was not the Council's intention to violate fundamental rights. In the case of the Al-Qaida sanctions regime, however, the language of the relevant resolutions does not allow for this approach.

...

19. In 2005, the World Summit Outcome document called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures existed for placing individuals and entities on sanctions lists, for removing them and for granting humanitarian exemptions. On 22 June 2006, at the conclusion of its thematic debate on the rule of law, the Security Council expressed its commitment to carrying this recommendation forward. The Council itself has acknowledged that human rights and international law should guide counter-terrorism initiatives. Pertinently, the Council has, since 2008, included a statement to this effect in the preamble to each of its resolutions on the 1267/1989 sanctions regime.

20. Pursuant to Article 39 of the Charter, the Council has determined that international terrorism associated with Al-Qaida represents a threat to international peace and security, and that an effective sanctions regime adopted under Article 41 is necessary to address that threat. Since the Council lacks enforcement mechanisms of its own, however, it is dependent on the ability of States to implement its resolutions. Even if the Council itself is not formally bound by international human rights law when acting under Chapter VII (a proposition that is heavily disputed), there is no doubt that Member States are bound by human rights obligations when implementing Council decisions. Experience has shown that the absence of an independent judicial review mechanism at the United Nations level has seriously undermined the effectiveness and the perceived legitimacy of the regime. National and regional courts and treaty bodies, recognizing that they have no jurisdiction to review Council decisions *per se*, have focused their attention instead on domestic measures of implementation, assessing their compatibility with fundamental norms of due process. A series of successful legal challenges has highlighted the problem by quashing implementing legislation, or declaring it unlawful, for precisely this reason.

21. The most recent such decision is the Judgement of the Grand Chamber of the European Court of Human Rights in *Nada v. Switzerland*. The Court held that restrictions on the applicant's freedom of movement, imposed by an ordinance of the Swiss Federal Council implementing resolution 1267 (1999) (as amended) had violated his right to respect for his private life, in breach of article 8 of the European Convention on Human Rights. Of much greater practical significance, however, was the Court's finding of a violation under article 13 of the Convention (the right to an

effective domestic remedy). The Court concluded that in the absence of effective judicial review at the United Nations level, there was a duty on State parties to the Convention to provide an effective remedy under national law. This implied a full review on fact and law by an entity with jurisdiction to determine whether the measures were justified and proportionate in the individual case and power to order their removal. The *Nada* Judgement thus echoes the approach of the European Court of Justice and the General Court in the *Kadi* litigation, holding that regional implementing measures taken by the European Commission were to be judged against human rights standards binding on the Community institutions. However, the principle in the *Nada* case has wider geographical ramifications than the *Kadi* litigation since it applies to all 47 member States of the Council of Europe, including three permanent members of the Security Council.

22. Foreshadowing the decision in the *Nada* case, the former Special Rapporteur had already expressed the view that as long as there is no effective and independent judicial review of listings at the United Nations level 'it is essential that listed individuals and entities have access to domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999)'. However, domestic judicial review is not an adequate substitute for due process at the United Nations level since the State responsible for implementation may not have access to the full justification for the listing ... Even if it does, it may not have the designating State's consent to reveal the information. This can obstruct the ability of national or regional courts to carry out an effective judicial review. More generally, as the High Commissioner for Human Rights has observed, the ability of individuals and entities to challenge their listing at the national level remains constrained by the obligation on Member States under Articles 25 and 103 of the Charter.

23. While none of the judicial rulings to date has directly impugned Council resolutions, their effect has been to render those resolutions effectively unenforceable. If the measures cannot be lawfully implemented at the national and regional levels, then the logic of universal sanctions falls away, raising the spectre that targeted funds could begin migrating towards those jurisdictions that cannot lawfully implement the regime. It is therefore imperative that the Council find a solution that is compatible with the human rights standards binding on Member States ..."

63. As regards, more specifically, the improving of the procedural safeguards for individuals whose names appeared on the list established by the Security Council under Resolutions 1267 (1999) and 1333 (2000), the Special Rapporteur found as follows (footnotes omitted):

"27. On 17 December 2009, the Council adopted resolution 1904 (2009), which introduced an independent Ombudsperson for an initial period of 18 months to assist the Committee in its consideration of delisting requests. The first Ombudsperson, Kimberly Prost, a former *ad litem* judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 with 20 years experience as a federal prosecutor in Canada, was appointed by the Secretary-General on 3 June 2010. Under resolution 1904 (2009), she was mandated to investigate delisting requests according to the procedure set out in annex II to the resolution and to prepare a 'comprehensive report' for the Committee within a set time frame. She is also required to report to the Council twice a year on the operation of her mandate.

28. There were two major shortcomings to the procedure under resolution 1904 (2009). The first was that the Ombudsperson was given no formal power to make

recommendations. Ms. Prost nonetheless took the view that her comprehensive reports should address, to the defined standard, the question whether the continued listing was justified. Resolution 1989 (2011) recognizes and now endorses this practice and gives the Ombudsperson a mandate to make consequential recommendations regarding processed delisting requests.

29. The second shortcoming was that a consensus of the Committee was required for delisting. The most far-reaching change introduced by resolution 1989 (2011) was to reverse this consensus presumption. A delisting recommendation by the Ombudsperson now takes effect automatically 60 days after the Committee completes its consideration of the comprehensive report, unless the Committee decides otherwise by consensus. If there is no consensus, any member of the Committee may refer the delisting request to the Security Council (the 'trigger mechanism' procedure).

...

34. However, as regards an (objective) appearance of independence, the structural flaws remain the same. The United Nations Human Rights Committee has held that the power of an executive body to 'control or direct' a judicial body 'is incompatible with the notion of an independent tribunal'. The European Court of Human Rights has similarly held that a requirement for quasi-judicial determinations to be ratified by an executive body with power to vary or rescind it contravenes the 'very notion' of an independent tribunal. This principle does not depend upon a perception that the existence of such a power might indirectly influence the manner in which such a body handles and decides cases. The 'very existence' of an executive power to overturn the decision of a quasi-judicial body is sufficient to deprive that body of the necessary 'appearance' of independence however infrequently such a power is exercised, and irrespective of whether its exercise was, or even could have been, at issue in any particular case.

35. It follows that, despite the significant improvements brought about by resolution 1989 (2011), the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee. The Special Rapporteur endorses the recommendation of the High Commissioner for Human Rights that the Security Council must now explore 'every avenue of possibility' for establishing 'an independent quasi-judicial procedure for review of listing and delisting decisions'. This necessarily implies that the Ombudsperson's comprehensive reports should be accepted as final by the Committee and that the decision-making powers of the Committee and Council should be removed. To reflect this modification, the Special Rapporteur invites the Security Council to consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator.

..."

64. The Special Rapporteur gave the following conclusions and recommendations:

"59. The Special Rapporteur acknowledges and welcomes the significant due process improvements brought about by resolution 1989 (2011), but nevertheless concludes that the Al-Qaida sanctions regime continues to fall short of international minimum standards of due process, and accordingly recommends that:

(a) The mandate of the Office of the Ombudsperson should be amended to authorize it to receive and determine petitions from designated individuals or entities (i) for their removal from the Consolidated List and (ii) for the authorization of

humanitarian exemptions; and to render a determination that is accepted as final by the Al-Qaida Sanctions Committee and the Security Council.

..."

7. Relevant case-law of other States

65. The measures in question have also been examined at national level, by the United Kingdom Supreme Court and the Canadian Federal Court.

(a) The case of *Ahmed and others v. HM Treasury* (United Kingdom Supreme Court)

66. The case of *Ahmed and others v. HM Treasury*, examined by the Supreme Court of the United Kingdom on 27 January 2010, concerned the freezing of the appellants' assets in accordance with the sanctions regime introduced by Resolutions 1267 (1999) and 1373 (2001). The Supreme Court took the view that the Government had acted *ultra vires* the powers conferred upon it by section 1 of the United Nations Act 1946 in making certain orders to implement Security Council resolutions on sanctions.

67. In particular, Lord Hope, Deputy President of the Supreme Court, made the following observations:

"6. ... The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them. Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty."

68. He acknowledged that the appellants had been deprived of an effective remedy and in that connection found as follows:

"81. I would hold that G is entitled to succeed on the point that the regime to which he has been subjected has deprived him of access to an effective remedy. As Mr Swift indicates, seeking a judicial review of the Treasury's decision to treat him as a designated person will get him nowhere. G answers to that description because he has been designated by the 1267 Committee. What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review. This is something that, under the system that the 1267 Committee currently operates, is denied to him. I would hold that article 3(1)(b) of the AQO [al-Qaeda Order], which has this effect, is ultra vires section 1 of the 1946 Act. It is not necessary to consider for the purposes of this case whether the AQO as a whole is ultra vires except to say that I am not to be taken as indicating that article 4 of that Order, had it been applicable in G's case, would have survived scrutiny.

82. I would treat HAY's case in the same way. He too is a designated person by reason of the fact that his name is on the 1267 Committee's list. As has already been observed, the United Kingdom is now seeking that his name should be removed from it. By letter dated 1 October 2009 the Treasury's Sanctions Team informed his solicitors that the de-listing request was submitted on 26 June 2009 but that at the committee's first consideration of it a number of States were not in a position to accede to the request. Further efforts to obtain de-listing are continuing, but this has

still not been achieved. So he remains subject to the AQO. In this situation he too is being denied an effective remedy."

69. The Supreme Court found unlawful both the order implementing Resolution 1373 (2001) in a general counter-terrorism context (the "Terrorism Order") and the order implementing the al-Qaeda and Taliban resolutions (the "al-Qaeda Order"). However, it annulled the al-Qaeda Order only in so far as it did not provide for an effective remedy (see Lord Brown's dissenting opinion on this point).

(b) The case of *Abdelrazik v. Canada (Minister of Foreign Affairs)* (Canadian Federal Court)

70. In its judgment of 4 June 2009 in the case of *Abdelrazik v. Canada (Minister of Foreign Affairs)*, the Federal Court of Canada took the view that the listing procedure of the al-Qaeda and Taliban Sanctions Committee was incompatible with the right to an effective remedy. The case concerned a ban on the return to Canada of the applicant, who had Canadian and Sudanese nationality, as a result of the application by Canada of the Security Council resolutions establishing the sanctions regime. The applicant was thus forced to live in the Canadian embassy in Khartoum, Sudan, fearing possible detention and torture should he leave this sanctuary.

71. Zinn J, who pronounced the lead judgment in the case, stated in particular:

"[51] I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness."

72. He further observed:

"[54] ... it is frightening to learn that a citizen of this or any other country might find himself on the 1267 Committee list, based only on suspicion."

73. After reviewing the measures implementing the travel ban on the basis of the al-Qaeda and Taliban resolutions, the judge concluded that the applicant's right to enter Canada had been breached, contrary to the provisions of the Canadian Charter of Rights and Freedoms (see paragraphs 62 et seq. of the judgment).

B. Domestic law

74. Article 190 ("Applicable law") of the Federal Constitution provides:

"The Federal Court and the other authorities shall be required to apply federal statutes and international law."

75. The relevant provisions of the Ordinance of 7 August 1990, instituting economic measures in respect of the Republic of Iraq (the "Iraq Ordinance"), read as follows:

Article 1: Ban on supply of military equipment

"1. The supply, sale or brokerage of arms to anyone in Iraq, with the exception of the Iraqi Government or the multinational force within the meaning of Security Council Resolution 1546 (2004) shall be prohibited.

2. Paragraph 1 shall apply only to the extent that the Federal War Materiel Act of 13 December 1996 and the Property Regulation Act of 13 December 1996, and their respective implementing ordinances, are not applicable."

Article 2: Freezing of assets and economic resources

"1. The following assets and economic resources shall be frozen:

(a) Those belonging to or under the control of the previous Government of Iraq or to undertakings or corporations under its control. The scope of this freezing measure shall not extend to the assets and economic resources of Iraqi representations in Switzerland or to any assets and economic resources which have been deposited in Switzerland by Iraqi State-owned undertakings or corporations or which have been paid or transferred thereto after 22 May 2003.

(b) Those belonging to or under the control of senior officials of the former Iraqi regime and their immediate family members.

(c) Those belonging to or under the control of undertakings or corporations which are themselves controlled by persons listed in paragraph (b) or which are under the management of persons acting on behalf of or at the direction of persons listed in paragraph (b).

2. The individuals, undertakings and corporations referred to in paragraph 1 are mentioned in the annex hereto. The Federal Department for Economic Affairs shall draw up the annex based on data from the United Nations.

3. The State Secretariat for Economic Affairs ("SECO") may, after consulting the competent services of the Federal Department of Foreign Affairs and the Federal Department of Finance, authorise payments from blocked accounts, transfers of frozen capital assets and the release of frozen economic resources, in order to protect Swiss interests or to prevent hardship cases."

Article 2a: Mandatory declarations

"1. Any person or organisation holding or managing assets acknowledged to be covered by the freezing of assets under Article 2 § 1 hereof must immediately declare them to the SECO.

1 *bis*. Any person or organisation knowing of economic resources acknowledged to be covered by the freezing of economic resources under Article 2 § 1 hereof must immediately declare them to the SECO.

2. The declaration must give the name of the beneficiary, the object and the amount of the assets or economic resources frozen.

3. Persons or organisations in possession of cultural property within the meaning of Article 1a hereof must declare them immediately to the Federal Office of Culture."

Article 2c: Implementation of the freezing of economic resources

"On the direction of the SECO, the competent authorities shall take the necessary measures for the freezing of the economic resources, for example, by an indication of freezing in the land register or the seizure or placing under seal of luxury goods."

76. The Ordinance of 18 May 2004 on the confiscation of frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq (the "Confiscation Ordinance") reads as follows:

Article 1: Object

"The present Ordinance shall govern:

(a) The confiscation of the assets and economic resources which have been frozen pursuant to Article 2 § 1 of the Ordinance of 7 August 1990 instituting economic measures in respect of the Republic of Iraq; and

(b) The transfer of the assets and the proceeds from the sale of the economic resources to the Development Fund for Iraq."

Article 2: Confiscation procedure

"1. The Federal Department for Economic Affairs, Training and Research (DEFR) shall be authorised to confiscate, by means of a decision, the assets and economic resources under Article 1 hereof.

2. Before notifying the confiscation decision it shall transmit to the parties in writing a draft of that decision. The parties may express their views within 30 days."

Article 3: Exceptions

"The DEFR may, after consulting the competent offices of the Federal Department for Foreign Affairs and the Federal Department for Finance authorise exceptions in order to prevent hardship cases. Requests pertaining thereto shall be submitted to the DEFR within the time-limit provided for in Article 2 § 2."

Article 4: Appeals

"Confiscation decisions taken by the DEFR may be appealed against to the Federal Administrative Court."

Article 5: Transfer to the Development Fund for Iraq

"As soon as the confiscation decision has become *res judicata*, the DEFR shall proceed with the transfer of the confiscated assets, and the proceeds from the sale of the confiscated economic resources, to the Development Fund for Iraq."

Article 6: Entry into force and term

"1. The present Ordinance shall enter into force on 1 July 2004 and shall remain in effect until 30 June 2007.

2. The validity of the present Ordinance is extended until 30 June 2010.

3. The validity of the present Ordinance is extended until 30 June 2013."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

77. The applicants complained that the confiscation of their assets had been ordered in the absence of a procedure complying with Article 6 of the Convention, a provision that they submitted was applicable under both civil and criminal heads. The relevant passage of Article 6 § 1 reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] tribunal ..."

78. The Government contested that argument.

79. The Court, being master of the characterisation to be given in law to the facts of the case (see, for example, *Glor v. Switzerland*, no. 13444/04, § 48, ECHR 2009, and *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), finds that the applicants' complaint must be regarded as an allegation of a breach of their right of access to a court. It is on the basis of that right that notice of the application was given to the respondent Government and that the Court will now proceed with its examination of the case.

A. Admissibility

1. *Compatibility* ratione personae *of the Article 6 § 1 complaint with the Convention and the Protocols thereto*

(a) The parties' submissions

(i) The respondent Government

80. The Government asked the Court to declare the application inadmissible as being incompatible *ratione personae* with the Convention. They argued that the impugned provisions had been adopted on the basis of Security Council Resolutions 661 (1990), 670 (1990) and 1483 (2003) (superseding Resolution 661 (1990)), which, under Articles 25 and 103 of the United Nations Charter, were binding and prevailed over obligations arising from any other international agreement. In this connection they referred in particular to a provisional measures order of the International Court of Justice in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 15, § 39). The Government argued that, in those circumstances, Switzerland could not be held accountable at an international level for the implementation of the measures in question.

(ii) The applicants

81. In the applicants' submission, it could not be disputed that the impugned measures were directly imputable to Switzerland and that the protection of their fundamental rights at United Nations level was manifestly insufficient in relation to that provided for under the Convention. Therefore there was no incompatibility *ratione personae*. The applicants concluded that their application was admissible and that the Court had jurisdiction to examine it.

(b) Comments of third-party interveners

(i) The French Government

82. The French Government took the view that the measures taken by Switzerland necessarily stemmed from UN Security Council resolutions, which were binding on all States and which, moreover, took priority over any other international rule. In those conditions, France argued that the measures in question could not be regarded as falling within Switzerland's "jurisdiction" within the meaning of Article 1 of the Convention, otherwise that notion would be rendered meaningless.

83. The French Government observed that whilst, in its judgment of 30 June 2005 in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, ECHR 2005-VI), the Court had found compatible with Article 1 of the Convention an application disputing the validity of a domestic measure which merely implemented a Community regulation, itself stemming from a Security Council resolution, it noted in that same judgment that it was the Community regulation and not the Security Council resolution which constituted the legal basis for the domestic measure in question (they referred to paragraph 145 of that judgment).

84. The French Government were also convinced that, even though the measures in question did not relate to missions performed outside the territory of the member State, as in the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec., [GC], nos. 71412/01 and 78166/01), but measures implemented in domestic law, the arguments set out in those cases concerning the nature of Security Council missions and the obligations arising therefrom for States should lead the Court to declare those measures imputable to the United Nations and therefore to consider the applicants' complaints incompatible *ratione personae* with the Convention. The present case thus provided the Court with an opportunity to transpose to the actual territory of the member States the principles laid down in *Behrami and Behrami* (cited above), taking into account the hierarchy of norms of international law and of the various related legal spheres.

(ii) The United Kingdom Government

85. The Government of the United Kingdom observed that Security Council resolutions adopted under Chapter VII of the United Nations Charter were legally binding and that the obligations arising therefrom prevailed, pursuant to Article 103 of the Charter, over any other international agreement. This was therefore the case with regard to obligations of States parties to the Convention under Article 6 thereof, which did not constitute a peremptory norm (*jus cogens*). In this connection, the United Kingdom was of the opinion that the effectiveness of the sanctions regime established for the maintenance of international peace and security would be fatally undermined if priority were to be given to the rights under Article 6 of the Convention.

(c) The Court's assessment

86. In the light of the arguments set out by the parties and third-party interveners, the Court must determine whether it has jurisdiction to hear the complaints submitted by the applicants. To that end it will have to examine whether the application falls within the scope of Article 1 of the Convention and therefore engages the responsibility of the respondent State.

87. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

88. As provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011; *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 74, ECHR 2011; *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR 2001-XII; and *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161). "Jurisdiction" under Article 1 is a threshold criterion for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Al-Skeini and Others*, cited above, § 130; *Al-Jedda*, cited above, § 74; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

89. The concept of jurisdiction must be considered to reflect the term's meaning in public international law (see *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II; *Gentilhomme, Schaff-Benhadji and Zerouki v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, 14 May 2002; and *Banković and Others*, decision cited above, §§ 59-61), such that a State's jurisdiction is primarily territorial (see *Al-Skeini and Others*, cited above, § 131, and *Banković and Others*, decision cited above, § 59) and is

presumed to be exercised normally throughout the State's territory (*Ilaşcu and Others*, cited above, § 312).

90. Relying on the decision in *Behrami and Behrami* (cited above), the French Government, in particular, as a third-party intervener, argued that the measures taken by the member States of the United Nations to implement Security Council resolutions under Chapter VII of the Charter were attributable to the United Nations and thus fell outside the Court's jurisdiction *ratione personae*. The Court cannot endorse that argument. It would point out that it found in *Behrami and Behrami* (cited above) that the impugned acts and omissions of KFOR, whose powers had been validly delegated to it by the Security Council under Chapter VII of the Charter, and those of UNMIK, a subsidiary organ of the United Nations set up under the same Chapter, were directly attributable to the United Nations, an organisation of universal jurisdiction fulfilling its imperative collective security objective (ibid., § 151). In the present case, by contrast, the relevant Security Council resolutions, especially Resolution 1483 (2003), required the State to act in its own name and to implement those resolutions at national level.

91. In the present case the measures imposed by the Security Council resolutions were implemented at national level by an Ordinance of the Federal Council. The applicants' assets were frozen and the Federal Department for Economic Affairs issued a decision of 16 November 2006 whereby certain assets were to be confiscated. The acts in question therefore correspond clearly to the national implementation of a UN Security Council resolution (see, *mutatis mutandis*, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 137, and contrast *Behrami and Behrami*, decision cited above, § 151). The alleged violations of the Convention are thus imputable to Switzerland (see, *mutatis mutandis*, *Nada*, cited above, § 121).

92. The measures in issue were therefore taken in the exercise by Switzerland of its "jurisdiction" within the meaning of Article 1 of the Convention. The impugned acts and omissions are thus capable of engaging the respondent State's responsibility under the Convention. It also follows that the Court has jurisdiction *ratione personae* to entertain the present application (see, *mutatis mutandis*, ibid., § 122).

93. Accordingly, the Court dismisses the objection that the application is incompatible *ratione personae* with the Convention. However, it will take into account, in examining the merits of the present case, the arguments set forth extensively by the parties and third-party interveners concerning the primacy of Security Council resolutions adopted under Chapter VII of the Charter.

2. Compatibility ratione materiae *of the complaint under Article 6 § 1*

94. The respondent Government claimed that the applicants' assets had been frozen pursuant to Article 23 of Resolution 1483 (2003), which, in their view, was directly applicable in the domestic legal order. They added that the freezing of those assets, together with their confiscation, was the direct consequence of the inclusion of the applicants' names on the list compiled in accordance with the Resolution. The alleged breach of the applicants' property rights thus originated in the Resolution itself, regardless of any rule of domestic law. The applicants could not therefore claim any "right" within the meaning of the Court's case-law. For the respondent Government, it followed that the subsequent procedure, as complained of in the present application, concerning the confiscation of those assets and their transfer to the Development Fund for Iraq, did not fall within the scope of Article 6 of the Convention.

95. The applicants disputed that argument.

96. The Court cannot endorse the respondent Government's opinion. It would observe that the applicants complained before it that they did not have access to a procedure complying with Article 6 by which they could have challenged the confiscation of their assets. As that measure directly concerns their right to enjoy their property, which is guaranteed in particular by Article 26 of the Swiss Constitution, the applicants are entitled to invoke a "civil right". It is of little consequence in this connection that Switzerland has not ratified Protocol No. 1, of which Article 1 guarantees the right to the peaceful enjoyment of one's possessions.

97. In view of the foregoing, the Court dismisses the respondent Government's objection that the complaint under Article 6 § 1 is incompatible *ratione materiae* with the Convention.

3. Conclusion

98. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

99. The applicants doubted that the measures taken had been necessary and proportionate to the aim of maintaining peace. In their view, Resolution 1483 (2003) had certainly, at the outset, pursued a legitimate aim, namely the maintenance of international peace and security, at a time when they

were really threatened by the former Iraqi Government. Proportionality might be arguable in the event, for example, of a temporary freezing of assets or other classical short-term embargo-type restrictions over a limited period. By contrast, Resolution 1483 (2003), adopted several years after the overthrow of the Iraqi regime, no longer bore any objective or direct relation to the maintenance of international peace and security.

100. The applicants were convinced that the targeted sanctions regime set up by the Security Council was manifestly insufficient to ensure the protection guaranteed under the Convention. Accordingly, by implementing Resolution 1483 (2003) without guaranteeing them the protection provided for under Article 6, Switzerland had breached the Convention.

101. The applicants commended the undertaking by Switzerland at an international level to improve the legal situation of persons on the UN lists, but they were of the view that such efforts failed to remedy the violations of fundamental rights that they had sustained. Switzerland had, in their submission, nevertheless seen fit to implement the impugned resolutions as they stood, in breach of its Convention obligations.

102. According to the applicants, the respondent Government had expressly acknowledged that the delisting procedure introduced at UN level was not compliant with the Convention, thus implying that it would also fail to satisfy the principle of equivalent protection, which in their view was engaged in the present case. Moreover, Switzerland seemed to have accepted that there had been a violation of the Convention, but not that it was responsible. For the applicants, where a State party acknowledged the existence of a violation of the Convention, it could not use the excuse that it had been obliged to comply with another international obligation. The Court's task was to safeguard the rights protected by the Convention and it should therefore ensure the autonomous and faultless application of the obligations thereunder in an individual, concrete case.

(b) The respondent Government

103. The respondent Government indicated that the right to have access to the courts in civil matters was not absolute. Being one of the rights recognised by the Convention, certain limitations were implicitly accepted. In addition, the States was afforded a certain margin of appreciation in such matters.

104. Having regard to the wording of the Security Council resolutions, and as the domestic authorities had no latitude, any judicial scrutiny was limited to the question whether the applicants' names were on the lists established by the Sanctions Committee and whether the assets in question belonged to them. Such a restriction on the right of access to a court pursued a legitimate aim, namely the maintenance of international peace and security, which had been continuously threatened and breached on various occasions by the former Iraqi Government. For their aim to be met, the

resolutions adopted in this connection had to be applied consistently by the international community. The correction of any shortcomings, whether procedural or substantive, required action within the United Nations.

105. The respondent Government further stated that, since becoming a member of the United Nations on 10 September 2002, Switzerland had been committed, together with other States, to improving the legal situation of the persons concerned and to ensuring a fair listing and delisting procedure. Nevertheless, Switzerland was required, under the Charter, to implement the sanctions in question.

106. The respondent Government did not deny that the applicants had been unable to obtain any judicial review of their listing. They indicated, however, that the applicants did have the possibility of applying for their delisting under Resolution 1730 (2006). In the Government's view, the possibility of a direct application for delisting, which had been introduced following the initiative of Switzerland and other States, served to compensate for the lack of judicial review within the United Nations system. The Government observed that it could be seen from the relevant practice that applications sent to the Focal Point were examined in detail. Accordingly, the system established by the Security Council provided, as a whole, for adequate protection of human rights, even if it was not satisfactory or equivalent to that required by the Convention.

107. The Government further observed that the Federal Court had expressly asked the Federal Department for Economic Affairs to allow the applicants a period of time for the purpose of lodging an application for delisting before the transfer of their assets to the Development Fund for Iraq was carried out (point 11 of the judgment). They pointed out that the application in question had been rejected on 6 January 2009.

108. Moreover, since the Federal Court's judgment, the SECO had granted the four requests of the first applicant to have access to the frozen assets in order to pay for the costs of his defence. In a favourable opinion issued by the SECO on 26 September 2008, the applicants had been informed that they would be authorised to make use of the assets frozen in Switzerland to pay the fees charged by a lawyer in the United States, that lawyer's activities being confined to their defence in connection with the Swiss confiscation procedure and the delisting procedure.

109. As regards the proportionality of the impugned measure, the respondent Government further observed that the measures ordered in paragraph 23 of Security Council Resolution 1483 (2003) were specifically targeted and concerned only a limited circle of individuals, including the first applicant in his capacity as senior official of the former Iraqi regime and managing director of the applicant company.

110. Were the Court to find that the applicants had not had access to a court within the meaning of Article 6, the respondent Government argued that the limitation of that right pursued a legitimate aim and maintained a

reasonable relationship of proportionality. In their view, if the Court were to find a violation of Article 6 § 1, it should nevertheless be able to acknowledge that Switzerland, on account of its obligations under the Charter, could not be held responsible. In the Government's submission, the Court could thus maintain its full jurisdiction to examine acts of a State on its territory while preserving some coherence between the legal systems of the Council of Europe and the United Nations.

2. The Court's assessment

(a) Preliminary question: Coexistence of Convention guarantees and obligations imposed on States by Security Council resolutions

111. According to settled case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 153, ECHR 2005-VI, and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, *Reports* 1998-I). Treaty commitments entered into by a State subsequent to the entry into force of the Convention in respect of that State may thus engage its responsibility for Convention purposes (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 154, with the references cited).

112. Moreover, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties", and in particular the rules concerning the international protection of human rights (see, for example, *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 131, ECHR 2010; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18).

113. The respondent Government, together with the French and British Governments, as third-party interveners, contended that the Swiss authorities had no latitude in the implementation of the relevant Security Council resolutions. The Court observes that in the case of *Al-Jedda* (judgment cited above, § 109), it found that the resolution in question, namely Security Council Resolution 1546 (2004), authorised the United Kingdom to take measures to contribute to the maintenance of security and

stability in Iraq, but that neither Resolution 1546 nor any other subsequent Security Council Resolution expressly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In the subsequent case of *Nada* (judgment cited above, § 172), the Court found, by contrast, that Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, in the Court's view, the presumption that "the Security Council [did] not intend to impose any obligation on Member States to breach fundamental principles of human rights" (*Al-Jedda*, cited above, § 102), was rebutted in *Nada*, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in Resolution 1390.

114. The Court reiterates that the Convention does not prohibit Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. States nevertheless remain responsible under the Convention for all acts and omissions of their organs stemming from domestic law or from the necessity to comply with international legal obligations (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi,* cited above, §§ 152-153). State action taken in compliance with such obligations is justified where the relevant organisation protects fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. In other words, if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation (see *Michaud v. France*, no. 12323/11, § 103, 6 December 2012). However, a State will be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it has exercised State discretion (see *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 338, ECHR 2011, and *Michaud*, cited above, § 103).

115. The criterion of equivalent protection is well-established in the Court's case-law (apart from the *Michaud* and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* judgments, cited above, see, in particular, *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009, where the Court found that "the protection afforded to the applicant in the present case by NATO's internal dispute resolution mechanism was not 'manifestly deficient' within the meaning given to that expression by the *Bosphorus* judgment, particularly in the specific context of an organisation such as NATO" (for other, albeit less explicit, references to the criterion of equivalent protection, see *Galić v. the Netherlands* (dec.), § 46, no. 22617/07, 9 June 2009; *Blagojević v. the Netherlands* (dec.), § 46,

no. 49032/07, 9 June 2009; and *Rambus Inc. v. Germany* (dec.), no. 40382/04, 16 June 2009).

116. Most of the above-mentioned cases concern the relationship between European Union law and the Convention guarantees. The Court observes, however, that it has never ruled out the application of the equivalent protection criterion to a situation concerning the compatibility with the Convention of acts of international organisations other than the European Union. It thus takes the view that the presumption of equivalent protection is intended, in particular, to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of any international organisation which is not party to the Convention (see *Michaud*, cited above, § 104). As illustrated by the present case, a State may face such a dilemma not only as a result of its membership of the European Union, as a supranational organisation with a European vocation, but also as a member State of the United Nations.

117. The Court takes the view that the present case should be examined in the light of the equivalent protection criterion, particularly on account of the fact that the relevant Security Council resolutions, especially paragraph 23 of Resolution 1483 (2003), do not confer on the States concerned any discretion in the implementation of the obligations arising thereunder. This essentially distinguishes the situation in the present case from that of the *Nada* case, where the Grand Chamber found that Switzerland had a certain latitude in implementing the relevant Security Council resolutions (see *Nada*, cited above, §§ 175-180).

118. As to the protection afforded in the present case, the Court observes that the respondent Government themselves admit that the system in place, even in its improved form since Resolution 1730 (2006), enabling the applicants to apply to a "Focal Point" for the deletion of their names from the Security Council lists, does not provide a level of protection that is equivalent to that required by the Convention (see paragraph 106 above). The Court shares that view.

119. That conclusion is moreover confirmed by the report of 26 September 2012 of the United Nations Special Rapporteur on the "Promotion and protection of human rights and fundamental freedoms while countering terrorism" (see paragraph 62 above). The Special Rapporteur clearly expresses the opinion that in spite of the significant due process improvements brought about by Security Council Resolutions 1904 (2009) and 1989 (2011), which had created the Office of the Ombudsperson, the Al-Qaida sanctions regime established by Resolution 1267 (1999) continued to fall short of international minimum standards in such matters (see paragraph 59 of the report [UN document A/67/396]). The Court unreservedly agrees with that conclusion of the UN Special Rapporteur.

120. As no supervisory mechanism comparable to the Office of the Ombudsperson had been introduced in the context of the sanctions regime against the former Iraqi Government under Resolution 1483 (2003), it follows, all the more so, that the protection afforded at international level in this context was not equivalent to that required by the Convention. Furthermore, the procedural shortcomings in the sanctions regime cannot in the present case be regarded as compensated for by domestic human rights protection mechanisms, given that the Federal Court refused to examine the merits of the impugned measures (see, *mutatis mutandis*, the *Nada* judgment, cited above, § 213, where the Court found that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore had no remedy in respect of the Convention violations that he had alleged).

121. Having regard to the foregoing, the presumption of equivalent protection is therefore rebutted in the present case.

122. The Court must accordingly rule on the merits of the complaint concerning the right of access to a court.

(b) Examination of the complaint concerning the right of access to a court

(i) General principles

123. The Court reiterates that the right to a fair trial, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Cudak v. Lithuania* [GC], no. 15869/02, § 54, ECHR 2010; *Golder*, cited above, § 36; and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII).

124. However, the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate

aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Cudak*, cited above, § 55; *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999−I; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; and *Fogarty v. the United Kingdom* [GC], no. 37112/97, § 33, ECHR 2001-XI).

125. Furthermore, it should be remembered that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, *Reports* 1998-VIII). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

(ii) Application of the above-mentioned principles to the present case

– Limitation of the right of access to a court

126. The Court takes the view that the applicants, who unsuccessfully attempted to challenge the confiscation of their assets before the Swiss courts, sustained a limitation of their right of access to a court. This does not seem to have been called into question by the respondent State. Accordingly, it should be examined whether this limitation pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

– Whether the limitation was justified

127. In the respondent Government's submission, the restriction on the right of access to a court pursued a legitimate aim, namely the maintenance of international peace and security. The Court is prepared to accept that conclusion. Adopted by the Security Council under Chapter VII of the UN Charter, Resolution 1483 (2003), on which the impugned restriction was based, had the aim of imposing on member State a series of measures that would contribute to the stability and development of Iraq. In particular, under paragraph 23 of that Resolution, it guaranteed that the assets and property of the senior officials of the former Iraqi regime, including the first applicant, who, according to the Security Council, was a former head of finance of the Iraqi secret services, would be transferred to the Development

Fund for Iraq and, accordingly, returned to the Iraqi people for their own benefit, such an aim being fully compatible with the Convention.

128. The Court accepts the respondent Government's argument that the refusal by the domestic courts to examine on the merits the applicants' complaints about the confiscation of their assets could be explained by their concern to ensure effective domestic implementation of the obligations arising from that Resolution.

– *Whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised*

129. As regards the relationship between the means employed and the aim sought to be realised, the Court would first observe that the Federal Court set out, in very detailed judgments, the grounds on which it considered itself not to have jurisdiction to examine the applicants' requests for the annulment of the confiscation measure (see paragraph 38 above). It moreover verified whether the applicants' names were actually on the lists established by the Sanctions Committee and whether the assets in question belonged to them. However, it refused to examine on the merits the applicants' allegations concerning their civil rights.

130. The Court is of the view that, unlike the situation giving rise to the measures complained of by the applicant in *Nada* (cited above), it was not a question, in the present case, with the adoption of Resolution 1483 (2003), of responding to an imminent threat of terrorism, but of re-establishing the autonomy and sovereignty of the Iraqi Government and of securing the right of the Iraqi people freely to determine their own political future and control their own natural resources (see paragraph 4 of the preamble to Resolution 1483 (2003). The impugned measures were thus taken in the wake of an armed conflict, which originated in 1990. Therefore, more differentiated and specifically targeted measures would probably have been more conducive to the effective implementation of the resolutions (see, to the same effect, *Nada*, cited above, § 186, where the Court found that the maintaining or even reinforcement of the impugned measures over the years had to be explained and justified convincingly by the domestic authorities).

131. The Court further finds that the applicants sustained major restrictions. They alleged that their assets had already been frozen back in 1990, that allegation not being contested by the Government. The confiscation of their assets was decided on 16 November 2006. The applicants have therefore been deprived of access to their assets already for a considerable period of time, even though the confiscation decision has not yet been implemented. Without having to address the merits of these measures, the Court is of the view that the applicants are entitled, in accordance with Article 6 § 1, to have those merits examined by a court. Their inability to challenge the confiscation measure for several years is difficult to accept in a democratic society (see, as to the fundamental nature

of the right of access to a court, the *Kadi* judgment of the European Court of Justice, §§ 335 et seq. (paragraphs 51 et seq. above), Lord Hope's opinion in *Ahmed and others v. HM Treasury*, judgment of the United Kingdom Supreme Court of 27 January 2010 (paragraphs 67 et seq. above), and the lead judgment of Mr Justice Zinn in *Abdelrazik v. Canada (Minister of Foreign Affairs)*, Federal Court of Canada, 4 June 2009, § 51 (paragraph 71 above).

132. Moreover, the Federal Court found that it was for the competent authority to grant the first applicant a short and final period of time for the purpose of lodging a fresh delisting application with the Sanctions Committee in accordance with the improved arrangements under Resolution 1730 (2006), which included in particular the creation of a Focal Point to receive such applications. However, the application to that effect was rejected on 6 January 2009 (see paragraph 39 above).

133. The Government further observed that the Swiss authorities had granted four requests by the applicants to have access to their frozen assets for the purpose of paying the costs of their defence. They had also been informed that they would be authorised to make use of the assets frozen in Switzerland to pay the fees charged by a lawyer in the United States in connection with the Swiss confiscation procedure and the delisting procedure before the Sanctions Committee (paragraphs 40-41 above). The Court is of the view that whilst these measures were capable of alleviating, to a certain extent, the restrictions on the applicants' peaceful enjoyment of their possessions, they did not provide a remedy for the applicants' inability to have examined by a court the merits of the restrictions of which they complained before the Court under Article 6.

134. Having regard to the foregoing, the Court takes the view that, for as long as there is no effective and independent judicial review, at the level of the United Nations, of the legitimacy of adding individuals and entities to the relevant lists, it is essential that such individuals and entities should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime. Such review was not available to the applicants. It follows that the very essence of their right of access to a court was impaired.

135. Accordingly, there has been a violation of Article 6 § 1.

II. THE OTHER ALLEGED VIOLATIONS

136. The applicants further complained that there had been a number of other violations of the right to a fair hearing, alleging *inter alia* that the grounds for the impugned confiscation had not been notified to them.

The Court takes the view that these complaints have not been sufficiently substantiated. In any event, the allegation concerning the lack of reasoning is manifestly ill-founded, having regard to the very detailed decisions of the

domestic authorities, in particular the Federal Court judgments of 23 January 2008.

137. In the applicants' submission, the confiscation disregards the principle of the presumption of innocence and therefore breaches Article 6 § 2 of the Convention. Moreover, they claimed that their defence rights and the equality of arms had not been respected, in breach of Article 6 § 3. The applicants further alleged that there had been a violation of Article 7 of the Convention, taking the view that the principle of "no punishment without law" had been contravened.

The Court takes the view that the procedure complained of by the applicants did not concern a "criminal charge" within the meaning of Article 6. Moreover, they have not been "held guilty of a criminal offence" within the meaning of Article 7 of the Convention. Accordingly, these complaints are incompatible *ratione materiae* with the Convention.

138. Relying on Article 8 of the Convention, the applicants further argued that the addition of their names to the Security Council lists established under Resolution 1483 (2003) also constituted a stigmatisation affecting their private life.

The Court observes that the applicants, who were duly represented before the domestic authorities, did not raise this complaint at domestic level, not even in substance.

139. Lastly, the applicants alleged that there had been a violation of Article 13 of the Convention, on the ground that Swiss law did not offer any remedy by which to challenge a person's inclusion on the above-mentioned lists.

The Court finds that this complaint does not raise any questions that are fundamentally different from those it has examined under Article 6 § 1. Accordingly, it considers that it is not necessary to examine this complaint separately under Article 13.

140. It follows that these complaints are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

141. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

142. The applicants indicated that Switzerland had decided, on 6 March 2009, to stay the execution of the impugned confiscation decisions confirmed by the domestic courts. Thus the assets concerned had not yet been physically confiscated. The applicants observed that at the present stage they had not therefore sustained, as a result of the alleged violations,

any pecuniary damage that could be remedied by way of just satisfaction, but they nevertheless asked the Court to reserve the question of just satisfaction, under Rule 75, in case the confiscation decisions were executed by Switzerland at a later stage.

143. The Government were of the view that the only contentious question in the present case was whether the applicants had had access to a court within the meaning of Article 6 § 1. Any breach of that guarantee would not have any bearing on the legitimacy of the applicants' claims concerning the confiscated assets.

144. The Court shares the Government's view and finds that there is no causal link between the finding of a violation of Article 6 § 1 and the allegation of pecuniary damage, which in fact remains purely hypothetical for the time being. The Court further observes that the applicants have not sought redress for any non-pecuniary damage or the reimbursement of their costs and expenses.

145. In those circumstances, the Court finds that there is no need to reserve the question of just satisfaction and rejects the claim in this connection. Accordingly, it considers that no sum is due under Article 41 of the Convention.

FOR THESE REASONS, THE COURT

1. *Dismisses*, by a majority, the Government's preliminary objections that the application is incompatible *ratione personae* and *ratione materiae* with the Convention;

2. *Declares*, by a majority, that the complaint under Article 6 § 1 of the Convention is admissible;

3. *Declares*, unanimously, the remainder of the application inadmissible;

4. *Holds*, by four votes to three, that there has been a violation of Article 6 § 1 of the Convention;

5. *Dismisses*, unanimously, the applicants' claim for just satisfaction.

Done in French, and notified in writing on 26 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to the present judgment:

– the partly dissenting opinion of Judge Sajó;

– the dissenting opinion of Judge Lorenzen joined by Judges Raimondi and Jočienė.

G.R.A.
S.H.N.

PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I do not share the view of the majority with regard to the admissibility of this case. I believe that under Articles 25, 48, and 103 of the United Nations (UN) Charter, the obligations set forth in Security Council Resolution 1483 are binding and prevail over any other international agreement. Moreover, the provisions of the Resolution provide little room for interpretation or flexibility with regard to State implementation measures. Consequently, I believe this case should have been declared inadmissible *ratione personae*. As the case has proceeded, however, to a judgment on the merits, I join the majority regarding the finding of a violation with respect to Article 6 of the Convention.

Supremacy of UN Security Council resolutions

It is a well-established principle of international law that UN Member States' obligations under a UNSC resolution prevail over obligations arising under any other international agreement, regardless of whether the latter treaty was concluded before or after the UN Charter or was a regional arrangement (see, for example, *Nicaragua v. United States of America*, ICJ Reports 1984, § 107; *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* and *Libyan Arab Jamahiriya v. United Kingdom*), ICJ Reports 1992, 16 § 42 and 113 § 39; the Vienna Convention on the Law of Treaties, Article 30, 1155 U.N.T.S. 331, 23 May 1969; and see the Report of the Study Group of the International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, document A/CN.4/L.702, §§ 34-35, 18 July 2006[4]).

Article 25 of the UN Charter lays down an unqualified obligation for Members of the United Nations "to accept and carry out the decisions of the Security Council in accordance with the present Charter", while Article 48 (2) provides that such decisions "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". Article 103 further

[4] "(34) *Recognized hierarchical relations by virtue of a treaty provision: Article 103 of the Charter of the United Nations.* A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the United Nations Charter ...
(35) *The scope of Article 103 of the Charter.* The scope of Article 103 extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council. Given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law."

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". (For a discussion of the scope and effects of Article 103 and the primacy of State obligations as regards Security Council resolutions, see Marko Milanovic, "Norm Conflict in International Law: Whither Human Rights?", 20 *Duke Journal of Comparative & International Law* 69, 76-78 (2009)). Taken together with Chapter VII, these provisions leave little place for judicial review of Security Council decisions which are consistent with the objectives of the Charter.

The Court, in *Behrami and Behrami v. France* ([GC], no. 71412/01, ECHR 2007), reaffirmed the primary responsibility of the UNSC under Chapter VII to maintain international peace and security, stating that "[w]hile it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace ... the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures" (§ 148). The increasing tendency of some regional and national bodies to adopt pluralistic approaches which put domestic constitutional or regional orders in competition with the UN Charter risks fragmenting the existing system at significant expense to international order and stability (see, for example, Gráinne de Búrca, "The European Court of Justice and the International Legal Order After *Kadi*," 51 *Harvard International Law Journal* 1 (2010), for a discussion comparing the ECJ's ruling in *Kadi* to the sharply dualist tone of the United States Supreme Court in *Medellín v. Texas*).

Not a *jus cogens* norm

The sole exception to these principles of hierarchy involves *jus cogens*, the body of peremptory norms of international law from which no derogation is permitted. These rules have been referred to as possible limits for Security Council sanctions (see, for example, Alexander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions," 16 *European Journal of International Law* 59, 63 (2005); however, see Milanovic, cited above, at 71: "*[J]us cogens* is used rarely, if ever, to invalidate supposedly conflicting norms").

Established peremptory norms include the prohibition against the use of force, the right to self-determination, the prohibition of genocide, and certain fundamental human rights (see Rüdiger Wolfrum, "Judicial Control of Security Council Decisions," *Yearbook of Institute of International Law*, Tokyo Session, 1, 42-43 (2013)). These rights do not include the enjoyment of possessions, economic freedom or access to a court or tribunal,

particularly in civil proceedings. Nor have these rights yet attained the status of customary international law. Consequently, they do not fall under the *jus cogens* exception limiting States' duties to implement non-conforming Security Council resolutions.

Lack of flexibility in implementing Security Council Resolution 1483: distinction from *Al-Jedda* and *Nada*

There is a clear distinction between this case and *Al-Jedda v. the United Kingdom* ([GC], no. 27021/08, ECHR 2011). *Al-Jedda* involved the three-year internment of an Iraqi civilian by British forces in Iraq under Security Council Resolution 1546, which did not specifically call for that action. The Court found that in the absence of clear and explicit language to the contrary, there was a presumption that the Security Council did not intend to impose any obligation on member States to breach fundamental principles of human rights.

The Court's finding in *Nada v. Switzerland* ([GC], no. 10593/08, ECHR 2012) must also be distinguished from the facts in the current case. In *Nada* the Court found two provisions in Security Council Resolution 1390 (2002) which left Switzerland with some "free choice among the various possible models for transposition of those resolutions into [its] domestic legal order" (§ 176).

This is not the case in *Al-Dulimi and Montana Management Inc. v. Switzerland*. In contrast to Resolution 1390, Resolution 1483 is clear and detailed in its directives, and leaves no choice in its implementation. The sole exception contained in Resolution 1483 provides merely for a restriction on funds which are the subject of prior claims, and does not provide any flexibility for States to avoid executing the binding directives of the resolution with regard to funds which do not fall under this exception. The subsequent establishment of the Sanctions Committee in Resolution 1518 (2003) and the detailed procedure for delisting set forth in Resolution 1730 (2006) further centralise these efforts through Security Council mechanisms and limit the ability of States to manoeuvre independently with regard to individuals on the sanctions list. Clearly identified, the assets of such individuals and entities must be transferred to the Development Fund for Iraq.

The discharge of an unconditional duty that arises once the Security Council has determined that the situation in Iraq continues to constitute a threat to international peace and security under Chapter VII reduces State action to that of an agent of the UN. In this case, Switzerland's choices were limited to the form of promulgation, as determined by domestic law. Switzerland implemented a judicial procedure by which to challenge identity and ownership, and the Swiss Government allowed the applicant to present delisting requests. Thus Switzerland seems to have made a genuine

effort to harmonise its UNSCR and Convention obligations, while respecting the supremacy of the Charter.

Conclusion

There is a duty under international law to interpret the Convention in accordance with the UN Charter and Chapter VII, and not outside these binding frameworks. Individual State agency is limited under Security Council Resolution 1483, with implementation and redress measures heavily centralised under the Sanctions Committee.

Given the inflexibility of Resolution 1483, the case should have been declared inadmissible. As the majority has found the case admissible, however, I join them regarding the finding of a violation. While *Golder v. the United Kingdom* (21 February 1975, § 29, Series A no. 18) allows for implicit exceptions to the right to a fair procedure even in the criminal context, there does not appear to be any reason sufficient to justify limiting the availability of such procedures to the applicants more than twenty years after the introduction of the listing regime. Examined on its merits, therefore, the sanctions system does not meet the requirements of Article 6. It should, however, be the responsibility of the States Parties to the UN Charter to address the failings of the sanctions system and to ensure the system's consistency with established norms of international human rights.

DISSENTING OPINION OF JUDGE LORENZEN JOINED BY JUDGES RAIMONDI AND JOČIENĖ

I am unable to agree with the majority that there has been a violation of Article 6 of the Convention in the present case. My reasons are as follows.

I fully agree with the majority's finding that the applicants' complaint must be understood as an allegation that there has been a violation of the right of access to a court under Article 6 of the Convention. For the reasons given in the judgment I also agree with the majority that the Court had jurisdiction to examine this complaint under Article 1 of the Convention.

It is undisputed that the applicants did not have access to a court to the extent required by Article 6 of the Convention. A crucial question is therefore whether this was justified by the fact that the decision to confiscate their assets was taken in order to comply with Resolution 1483 (2003) adopted by the UN Security Council. According to the majority, a condition for restricting the applicants' right of access to a court on account of obligations for the respondent State under other international instruments must be the establishment of "an equal protection" within the relevant international organisation. As this is not the case in respect of the measures prescribed in Resolution 1483 (2003), the majority conclude that Article 6 has been violated.

I am not able to agree with this reasoning, which in my opinion overlooks important issues which the Court has not ruled upon so far in its jurisprudence. The most crucial one is the impact of Article 103 of the Charter of the United Nations, under which the obligations of the member States of the United Nations prevail in case of a conflict with other international instruments. Such an obligation follows from Article 25 of the Charter, pursuant to which the member States are obliged "to accept and carry out" the decisions of the Security Council.

In earlier cases the Court had to rule on an alleged conflict between decisions of the Security Council and the obligations of a member State under the Convention, but in none of them was it found that a real conflict actually existed. Thus in the *Al-Jedda* case (*Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011) the Grand Chamber found that the decision of the Security Council did not specifically mention internment without trial, which was found to be in breach of Article 5 of the Convention. Furthermore, in the *Nada* case (*Nada v. Switzerland* [GC], no. 10593/08, § 180, ECHR 2012) the Court found that Switzerland "enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council".

In *Al-Jedda* (cited above, § 102) the Court assumed that "it [was] to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict

with their obligations under international human rights law". Even if there are no indications in Resolution 1483 (2003) that it was the intention that member States should take measures in conflict with such obligations, it remains nevertheless clear that the resolution imposes an unconditional obligation on member States to freeze certain funds or other financial assets and to transfer them to the Development Fund for Iraq. It is undisputed that the assets of the applicants, who were on the list established under Resolution 1518 (2003), were covered by that obligation. The majority have accordingly, like the Swiss Federal Court, concluded that these resolutions "[did] not confer on the States concerned any discretion in the implementation of the obligations arising thereunder" (paragraph 117 of the judgment). I can only agree with that.

In the present case the Court was therefore confronted with a situation where a conflict between obligations under the United Nations Charter and under the Convention could only be solved by giving one of them priority. With sole reference to the "equal protection" principle – which was not applied or even mentioned by the Grand Chamber in *Al-Jedda* and *Nada* – the majority have not directly addressed the issue of how such a conflict should be resolved but have only indirectly concluded that, where no equal protection exists, the Convention obligations prevail.

In my opinion the judgment should have addressed the importance of Article 103 of the United Nations Charter, and I find it regrettable that the Swiss Government vetoed the well-founded decision of the Chamber to relinquish this case, raising novel and important issues, to the Grand Chamber.

In the circumstances of the present case, the conflict between the United Nations Charter and the Convention can, in my opinion, only be resolved by accepting that the decision of the Swiss authorities to confiscate the applicants' assets in order to comply with Resolution 1483 (2003) could not be judged on the merits in national court proceedings, as the outcome of such proceedings might have had the effect of setting aside the obligations imposed on member States by the Resolution. In this respect I entirely share the detailed and convincing analysis of the Federal Court, which concludes that in case of a conflict between the obligations under Article 103 of the Charter and obligations under the Convention, States parties to both legal instruments are bound to give the Charter obligations priority. According to the interpretation of the International Court of Justice, the obligations under Article 103 of the Charter include those stemming from the measures adopted by the Security Council under Chapter VII of the Charter. I likewise agree that no other result can in the present case be justified by *jus cogens*, as the right of access to a court clearly does not belong to such norms. I furthermore observe that the case before the Federal Court only concerned the claim that the decision to confiscate the applicants' assets should be annulled and that they were heard before the decision on

confiscation was taken and during the Federal Court proceedings. Even though the proceedings thus did not, as such, concern the question whether the applicants had rightly or wrongly been placed on the list under Resolution 1518 (2003), the Federal Court accorded them further time in order to address to the UN Sanctions Committee a new request to have their names deleted from the list. I have noted the judgments of the European Court of Justice in *Kadi* and the Supreme Court of the United Kingdom in *Ahmed and others* but have not found that in the circumstances of the present case they could lead to a different result. The *Kadi* case exclusively related to a measure adopted by an institution within the legal system of the European Union, which is not itself a party to the UN Charter.

If what is stated in paragraph 130 of the judgment intends to say that Resolution 1483 (2003) should be attributed less importance because its aim is not to prevent an immediate threat of terrorism but to re-establish the autonomy and sovereignty of the Iraqi Government and to give the Iraqi people the possibility of determining their political future and controlling their natural resources, I am not able to agree with such an interpretation. The Resolution states expressly that the situation in Iraq continues to threaten international peace and security, and in any event it is not for the Court to make an assessment of whether the Security Council was justified in prescribing the measures in the Resolution.

The Federal Court therefore did not violate Article 6 of the Convention by refusing to consider the applicants' claim on the merits. Even if the Convention – unlike Article 30 of the Vienna Convention on Treaties – does not contain an express provision giving priority where necessary to the obligations under the United Nations Charter, it must be applied as if this were the case. Furthermore in respect of the right of access to a court, this can be said to follow already from the Court's interpretation of Article 6. The right of access to a court is thus not absolute, but may be subject to limitations permitted by implication. Even if these limitations may normally not restrict or reduce that right to such an extent that its very essence is impaired, there are examples where the Court has accepted limitations which left little, if anything at all, of the right of access to a court (see, for example, concerning State immunity, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, and concerning parliamentary immunity, *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X). The priority for implementing binding resolutions of the UN Security Council can be said to belong to this category of exceptions.

Based on what is said above, I can only come to the conclusion that there has been no violation of Article 6 of the Convention. However, that being said, I would like to add that I fully share the opinions expressed by the majority and by national and international institutions that the proceedings in respect of establishing the lists under the resolutions of the UN Security Council and the possibility of challenging them are clearly unsatisfactory

and do not comply with international human rights standards. Nevertheless as long as this has not been remedied by the Security Council – of which three member States of the Council of Europe are permanent members – the obligation under Article 103 of the UN Charter must in my opinion be respected.