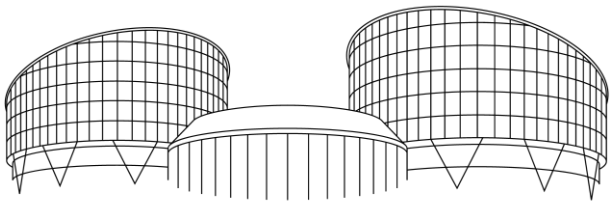

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF NADA v. SWITZERLAND

(Application no. 10593/08)

JUDGMENT

STRASBOURG

12 September 2012

This judgment is final but may be subject to editorial revision.

In the case of Nada v. Switzerland**,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Christos Rozakis,
Corneliu Bîrsan,
Karel Jungwiert,
Khanlar Hajiyev,
Ján Šikuta,
Isabelle Berro-Lefèvre,
Giorgio Malinverni,
George Nicolaou,
Mihai Poalelungi,
Kristina Pardalos,
Ganna Yudkivska, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 23 March 2011, 7 September 2011 and on 23 May 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 10593/08) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian and Egyptian national, Mr Youssef Moustafa Nada ("the applicant"), on 19 February 2008.

2. The applicant was represented by Mr J. McBride, a barrister in London. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

3. In his application, Mr Nada alleged that the ban on entering or transiting through Switzerland, which had been imposed on him as a result of the addition of his name to the list annexed to the Federal Taliban Ordinance, had breached his right to liberty (Article 5 of the Convention) and his right to respect for private and family life, honour and reputation (Article 8). He submitted that this ban was thus also tantamount to ill-

treatment within the meaning of Article 3. He further complained of a breach of his freedom to manifest his religion or beliefs (Article 9), arguing that his inability to leave the enclave of Campione d'Italia had prevented him from worshipping at a mosque. Lastly, he complained that there had been no effective remedy in respect of those complaints (Article 13).

4. The application was assigned to the Court's First Section (Rule 52 § 1 of the Rules of Court), which decided to deal with it on a priority basis under Article 41 of the Rules of Court. On 12 March 2009 a Chamber of that Section decided to give notice to the Government of the complaints under Articles 5, 8 and 13.

5. 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 of the Convention and Rule 44 § 2 as then in force). The Italian Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

6. On 20 January 2010 the parties were informed that the Chamber intended to examine the admissibility and merits of the application at the same time (former Article 29 § 3 of the Convention together with former Rule 54A).

7. On 30 September 2010 the Chamber, composed of Christos Rozakis, Nina Vajić, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni, and George Nicolaou, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment after being consulted for that purpose (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Jean-Paul Costa, Christos Rozakis, Giorgio Malinverni and Mihai Poalelungi continued to deal with the case after their term of office expired, until the final deliberations, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

9. The applicant and the Government each filed written observations on the merits of the case. The French and United Kingdom Governments submitted the same observations as before the Chamber. In addition, the President of the Grand Chamber authorised JUSTICE, a non-governmental organisation based in London, to submit written comments (Article 36 § 2 of the Convention taken in conjunction with Rule 44 § 2). Lastly, the President of the Grand Chamber authorised the United Kingdom Government to take part in the hearing.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 March 2011 (Rule 59 § 3).

There appeared before the Court:

– *for the Government*
Mr F. SCHÜRMANN, Head of European law and international human rights section, Federal Office of Justice, Federal Police and Justice Department, *Agent*,
Mr J. LINDENMANN, Ambassador, Deputy Director of Public International Law Directorate, Federal Department of Foreign Affairs,
Mr R. E. VOCK, Head of Sanctions Division, State Secretariat for Economic Affairs, Federal Department of Economic Affairs,
Ms R. BOURGUIN, Specialised legal adviser with policy responsibility, Legal Affairs Section, Migration policy division, Federal Office of Migration, Federal Police and Justice Department,
Ms C. EHRICH, Technical adviser, European law and international human rights section, Federal Office of Justice, Federal Police and Justice Department, *Advisers*;

– *for the applicant*
Mr J. MCBRIDE, barrister, *Counsel*,

– *for the United Kingdom Government (third party)*
Mr D. WALTON, *Agent*,
Mr S. WORDSWORTH, *Counsel*,
Ms C. HOLMES, *Adviser*.

The applicant and his wife were also present.

The Court heard addresses by Mr Schürmann, Mr McBride and Mr Wordsworth. It also heard the replies of the parties' representatives to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

11. The applicant was born in 1931 and has been living since 1970 in Campione d'Italia, which is an Italian enclave of about 1.6 sq. km in the

Province of Como (Lombardy), surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano.

12. He describes himself as a practising Muslim and a prominent businessman in the financial and political world, in which he purports to be highly regarded. An engineer by training, he has worked in very diverse sectors, in particular banking, foreign trade, industry and real estate. In the course of his business activities he founded numerous companies of which he was the sole or principal shareholder.

13. In his submission, he is opposed to all uses of terrorism and has never had any involvement with al-Qaeda. On the contrary, he has consistently denounced not only the means used by that organisation, but also its ideology.

14. The applicant has further indicated that he has only one kidney (the other having deteriorated in recent years). He also suffers from bleeding in his left eye, as shown by a medical certificate of 20 December 2001, and arthritis in the neck. In addition, according to a medical certificate issued by a doctor in Zurich on 5 May 2006, he sustained a fracture in his right hand which was due to be operated on in 2004. The applicant has alleged that, because of the restrictions imposed on him which gave rise to the present application, he was unable to undergo this operation and has continued to suffer from the consequences of the fracture.

15. On 15 October 1999, in response to the 7 August 1998 bombings by Osama bin Laden and members of his network against the United States embassies in Nairobi (Kenya) and Dar-es-Salaam (Tanzania) the Security Council of the United Nations (the "UN") adopted, under Chapter VII of the UN Charter, Resolution 1267 (1999), providing for sanctions against the Taliban (see paragraph 70 below) and created a committee consisting of all the members of the Security Council to monitor the enforcement of that resolution (the "Sanctions Committee").

16. On 2 October 2000, to implement that resolution, the Swiss Federal Council (the federal executive) adopted an Ordinance "instituting measures against the Taliban" (the "Taliban Ordinance" – see paragraph 66 below), which subsequently underwent a number of amendments, including to its title.

17. By Resolution 1333 (2000) of 19 December 2000 (see paragraph 71 below) the Security Council extended the sanctions regime. It was now also directed against Osama bin Laden and the al-Qaeda organisation, as well as the Taliban's senior officials and advisers. In both Resolutions 1267 (1999) and 1333 (2000), the Security Council requested the Sanctions Committee to maintain a list, based on information provided by States and regional organisations, of individuals and entities associated with Osama bin Laden and al-Qaeda.

18. On 11 April 2001 the Swiss Government amended the Taliban Ordinance in order to implement Resolution 1333 (2000). It added a new

Article 4a, paragraph 1 of which prohibited entry into and transit through Switzerland for the individuals and entities concerned by the resolution (but without naming them).

19. On 24 October 2001 the Federal Prosecutor opened an investigation in respect of the applicant.

20. On 7 November 2001 the President of the United States of America blocked the assets of Bank Al Taqwa, of which the applicant was the chairman and principal shareholder.

21. On 9 November 2001 the applicant and a number of organisations associated with him were added to the Sanctions Committee's list. On 30 November 2001 (or 9 November according to the applicant's observations), their names were added to the list in an annex to the Taliban Ordinance.

22. On 16 January 2002 the Security Council adopted Resolution 1390 (2002) introducing an entry and transit ban in respect of individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) (see paragraphs 70-71 and 74 below). On 1 May 2002 Article 4a of the Federal Taliban Ordinance was amended accordingly: the entry and transit ban applied henceforth to all individuals named in Annex 2 to the Ordinance, including the applicant.

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

24. When he visited London in November 2002, the applicant was arrested and removed to Italy, his money also being seized.

25. On 10 October 2003, following criticism by the Monitoring Group for the application of the sanctions (see paragraph 72 below), the Canton of Ticino revoked the applicant's special border-crossing permit. The Monitoring Group had observed, in the course of its inquiry into the applicant's activities, that he was able to move relatively freely between Switzerland and Italy. In the Government's submission, it was only from this time onwards that the applicant was actually affected by the entry and transit ban.

26. On 27 November 2003 the Swiss Federal Office for Immigration, Integration and Emigration (the "IMES") informed the applicant that he was no longer authorised to cross the border.

27. On 23 March 2004 the applicant lodged a request with the IMES for leave to enter or transit through Switzerland for the purposes of medical treatment in that country and legal proceedings in both Switzerland and Italy. The IMES dismissed that request on 26 March 2004 as being ill-founded. Moreover, it indicated to the applicant that the grounds put forward in support of his request, namely, the need to consult his lawyers and receive treatment and, secondly, the specific situation related to his

residence in Campione d'Italia, were not such as to permit the authorities to grant him an exemption from the measure taken against him.

28. In a decision of 27 April 2005 the Federal Criminal Court ordered the Federal Prosecutor either to discontinue the proceedings or to send the case to the competent federal investigating judge by 31 May 2005. In an order of that date the Federal Prosecutor, finding that the accusations against the applicant were unsubstantiated, closed the investigation in respect of the applicant.

29. On 22 September 2005 the applicant requested the Federal Council to delete his name and those of the organisations associated with him from the annex to the Ordinance. He argued, in support of his claim, that the police investigation concerning him had been discontinued by a decision of the Federal Prosecutor and that it was therefore no longer justified to subject him to sanctions.

30. In a decision of 18 January 2006 the State Secretariat for Economic Affairs (the "SECO") rejected his request on the grounds that Switzerland could not delete names from the annex to the Taliban Ordinance while they still appeared on the UN Sanctions Committee's list.

31. On 13 February 2006 the applicant lodged an administrative appeal with the Federal Department for Economic Affairs (the "Department").

32. In a decision of 15 June 2006 the Department dismissed that appeal. It confirmed that the deletion of a name from the annex to the Ordinance could be envisaged only once that name had been deleted from the Sanctions Committee's list, and explained that, for this purpose, it was necessary for the State of citizenship or residence of the person concerned to apply for delisting to the UN institutions. As Switzerland was neither the applicant's State of citizenship nor his State of residence, the Department found that the Swiss authorities were not competent to initiate such a procedure.

33. On 6 July 2006 the applicant appealed to the Federal Council against the Department's decision. He requested that his name and those of a certain number of organisations associated with him be deleted from the list in Annex 2 to the Taliban Ordinance.

34. On 20 September 2006 the Federal Office of Migration (the "ODM"), which had been created in 2005, incorporating the IMES, granted the applicant an exemption for one day, 25 September 2006, so that he could go to Milan for legal proceedings**.** The applicant did not make use of that authorisation.

35. On 6 April 2007 the applicant sent to the "focal point" of the Sanctions Committee – a body set up by Resolution 1730 (2006) to receive requests for delisting from individuals or entities on the Sanctions Committee's lists (see paragraph 76 below) – a request for the deletion of his name from the relevant list.

36. In a decision of 18 April 2007 the Federal Council, ruling on the appeal of 6 July 2006, referred the case to the Federal Court, finding that the applicant had been subjected to direct restrictions on his right to enjoy his possessions; also that Article 6 of the European Convention on Human Rights consequently applied to his request for deletion from the annex to the Ordinance, and that, accordingly, the case had to be examined by an independent and impartial tribunal.

37. In its observations, the Department submitted that the appeal should be dismissed, pointing out that Security Council Resolution 1730 (2006) of 19 December 2006 allowed persons and organisations whose names appeared on the Sanctions Committee's list to apply for delisting on an individual basis rather than through their State of citizenship or residence.

38. The applicant maintained his submissions. Moreover, he alleged that on account of the ODM's evident reluctance to grant exemptions under Article 4a § 2 of the Taliban Ordinance, he could not leave his home in Campione d'Italia despite the lack of adequate medical facilities there, or even go to Italy for administrative or judicial reasons, and that he had therefore effectively spent the past years under house arrest. The addition of his name to the Sanctions Committee's list was also tantamount to accusing him publicly of being associated with Osama bin Laden, al-Qaeda and the Taliban, when that was not the case. Furthermore, he argued that the listing, without any justification or any possibility for him to be heard beforehand, breached the principles of prohibition of discrimination, individual freedom, enjoyment of possessions and economic freedom, together with the right to be heard and the right to a fair trial. Lastly, taking the view that the Security Council's sanctions were contrary to the United Nations Charter and to the peremptory norms of international law (*jus cogens*), he argued that Switzerland was not obliged to implement them.

39. In a decision of 11 May 2007, in which it indicated the remedy available, the ODM dismissed a new exemption request by the applicant. In a decision of 12 July 2007, once again indicating the available remedies, it refused to examine a letter from the applicant that it regarded as a request for review. In a letter of 20 July 2007 the applicant explained that there had been a misunderstanding and that his previous letter had in fact been a new request for exemption. On 2 August 2007 the ODM again rejected his request, reminding him that he could challenge the decision by lodging an appeal with the Federal Administrative Court. The applicant did not appeal against the decision.

40. On 29 October 2007 the focal point for delisting requests, set up by Security Council Resolution 1730 (2006), denied the applicant's request of 6 April 2007 to have his name removed from the Sanctions Committee's list (see paragraph 35 above). On 2 November 2007 the focal point also rejected a request for information concerning the country that had designated him for listing and the reasons for that designation, invoking the confidentiality of

the process. Lastly, in letters of 19 and 28 November 2007 the focal point reaffirmed the confidentiality of the process, but nevertheless informed the applicant that an undisclosable State had opposed his delisting.

B. Federal Court judgment of 14 November 2007

41. In a judgment of 14 November 2007 the Federal Court, to which the Federal Council had referred the applicant's appeal (see paragraph 36 above) declared that appeal admissible but dismissed it on the merits.

42. It first pointed out that, under Article 25 of the United Nations Charter, the UN member States had undertaken to accept and carry out the decisions of the Security Council in accordance with the Charter. It then observed that under Article 103 of the Charter the obligations arising from that instrument did not only prevail over the domestic law of the member States but also over obligations under other international agreements, regardless of their nature, whether bilateral or multilateral. It further stated that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council.

43. The Federal Court observed, however, that the Security Council was itself bound by the Charter and was required to act in accordance with its purposes and principles (Article 24 § 2 of the Charter), which included respecting human rights and fundamental freedoms (Article 1 § 3 of the Charter). At the same time, it took the view that the member States were not permitted to avoid an obligation on the grounds that a decision (or resolution) by the Security Council was substantively inconsistent with the Charter, in particular decisions (resolutions) based on Chapter VII thereof (action with respect to threats to the peace, breaches of the peace, and acts of aggression).

44. The Federal Court then observed that under Article 190 of the Federal Constitution (see paragraph 65 below), it was bound by federal laws and international law. It took the view that the applicable international law, in addition to international treaties ratified by Switzerland, also included customary international law, general principles of law and the decisions of international organisations which were binding on Switzerland, including the Security Council's decisions concerning the sanctions regime.

45. However, it observed that Article 190 of the Constitution contained no rules on how to settle possible conflicts between different norms of international law which were legally binding on Switzerland, and that in the present case there was such a conflict between the Security Council's decisions on the one hand and the guarantees of the European Convention on Human Rights and the International Covenant on Civil and Political Rights on the other. It took the view that unless the conflict could be resolved by the rules on the interpretation of treaties, it would be necessary, in order to settle the issue, to look to the hierarchy of international legal norms, according to which obligations under the United Nations Charter

prevailed over obligations under any other international agreement (Article 103 of the Charter, taken together with Article 30 of the Vienna Convention on the Law of Treaties; see paragraphs 69 and 80 below). The Federal Court was of the opinion that the uniform application of UN sanctions would be endangered if the courts of States Parties to the European Convention or the International Covenant on Civil and Political Rights were able to disregard those sanctions in order to protect the fundamental rights of certain individuals or organisations.

46. The court nevertheless accepted that the obligation to implement the Security Council's decisions was limited by norms of *jus cogens.* Accordingly, it considered itself bound to ascertain whether the sanctions regime set up by the Security Council was capable of breaching the peremptory norms of international law, as the applicant had claimed.

47. The Federal Court then cited as examples of *jus cogens* norms: the right to life, protection from torture and inhuman or degrading treatment, prohibition of slavery, prohibition of collective punishment, the principle of individual criminal responsibility and the *non-refoulement* principle. It took the view, however, that the enjoyment of possessions, economic freedom, the guarantees of a fair trial or the right to an effective remedy did not fall within *jus cogens*.

48. As regards the consequences for the applicant of the measures taken against him, in particular the ban on entry into and transit through Switzerland, the Federal Court found as follows:

> "7.4 ... These sanctions include far-reaching commercial restrictions for those affected; the funds necessary for their survival are not, however, blocked (see Resolution 1452 (2002) paragraph 1(a)), as a result of which there is neither any threat to their life or health nor any inhuman or degrading treatment.
>
> The travel ban restricts the freedom of movement of those concerned but in principle represents no deprivation of liberty: they are free to move around within their country of residence (see, however, point 10.2 below regarding the appellant's particular situation); journeys to their home country are also specifically permitted (see Resolution 1735 (2006), paragraph 1(b)).
>
> ..."

49. The Federal Court further indicated that, generally speaking, sanctions were decided by the Security Council without individuals or organisations being afforded the opportunity to comment either in advance or afterwards or to appeal against them before international or national courts. It mentioned in this connection that, in particular under the terms of Resolution 1730 (2006), the delisting procedure allowing individuals to have direct access to the Sanctions Committee already represented substantial progress, even though the system still had considerable shortcomings from the point of view of human rights.

50. The Federal Court then examined the question of the extent to which Switzerland was bound by the relevant resolutions, in other words whether it had any latitude (*Ermessensspielraum*) in implementing them:

> "8.1 The Security Council adopted Resolution 1267 (1999) and the subsequent resolutions regarding sanctions affecting al-Qaeda and the Taliban on the basis of Chapter VII of the UN Charter, with the express obligation on all member States to adopt an integral and strict approach to implementing the sanctions envisaged therein, ignoring any existing rights and obligations under international agreements or contracts (see paragraph 7 of Resolution 1267 (1999)).
>
> The sanctions (freezing of assets, entry and transit ban, arms embargo) are described in detail and afford member States no margin of appreciation in their implementation. The names of those affected by the sanctions are also indicated to the member States: this is determined by the list drawn up and maintained by the Sanctions Committee (see paragraph 8(c) of Resolution 1933 (2000)).
>
> As regards the possibility of obtaining deletion from the list, the Sanctions Committee has introduced a specific procedure (see paragraphs 13 et seq. of Resolution 1735 (2006) and the directives of the Sanctions Committee dated 12 February 2007). The member States are thus debarred from deciding of their own motion whether or not sanctions should continue to be imposed on a person or organisation appearing on the Sanctions Committee's list.
>
> Switzerland would therefore be in breach of its obligations under the Charter were it to delete the names of the appellant and his organisations from the annex to the Taliban Ordinance.
>
> ...
>
> 8.3 In view of the foregoing, Switzerland is not permitted, of its own motion, to delete the appellant's name from Annex 2 to the Taliban Ordinance.
>
> It is to be admitted that in this situation no effective remedy is available to the appellant. The Federal Court may certainly examine whether and to what extent Switzerland is bound by the resolutions of the Security Council, but it is not permitted to remove the sanctions against the appellant on the ground that they breach his fundamental rights.
>
> The Sanctions Committee alone is responsible for the delisting of persons or entities. In spite of the improvements mentioned above, the delisting procedure fails to meet both the requirement of access to a court under Article 29a of the Federal Constitution, Article 6 § 1 of the ECHR and Article 14 § 1 of the United Nations Covenant on Civil and Political Rights, and that of an effective remedy within the meaning of Article 13 of the ECHR and Article 2(3) of the United Nations Covenant ..."

51. The Federal Court further examined whether Switzerland, even if it were not authorised to delete the applicant's name from the list on its own initiative, was nevertheless at least obliged to assist him in connection with the delisting procedure. Its reasoning was as follows:

> "9.1 The lower courts examined whether Switzerland was obliged to initiate the delisting procedure on behalf of the appellant. In the meantime, this issue has become irrelevant as, since the amendment of the delisting procedure, the appellant has been

able to make an application himself and has indeed availed himself of this opportunity.

9.2 For his application to be successful he nevertheless relies on the support of Switzerland, since this is the only country to have conducted a comprehensive preliminary investigation, with numerous letters of request, house searches and questioning of witnesses.

United Nations member States are obliged to prosecute persons suspected of financing or supporting terrorism (see paragraph 2(e) of Security Council Resolution 1373 (2001)) ...

On the other hand, should the criminal proceedings end in an acquittal or be discontinued, this should lead to the removal of the preventive sanctions. Admittedly, the country which has conducted the criminal proceedings or preliminary investigation cannot itself proceed with the deletion, but it can at least transmit the results of its investigations to the Sanctions Committee and request or support the person's delisting."

52. Lastly, the Federal Court examined whether the travel ban enforced under Article 4a of the Taliban Ordinance extended beyond the sanctions introduced by the Security Council resolutions and whether the Swiss authorities thus had any latitude in that connection. The court found as follows:

"10.1 Article 4a § 1 of the Taliban Ordinance prohibits the individuals listed in Annex 2 from entering or transiting through Switzerland. Article 4a § 2 provides that, in agreement with the UN Security Council decisions or for the protection of Swiss interests, the Federal Office of Migration is entitled to grant exemptions.

According to the Security Council resolutions the travel ban does not apply if the entry or transit is required for the fulfilment of a judicial process. In addition, exemptions can be granted in individual cases with the agreement of the Sanctions Committee (see paragraph 1(b) of Resolution 1735 (2006)). This includes in particular travel on medical, humanitarian or religious grounds (Brown Institute, cited above, p. 32).

10.2 Article 4a § 2 of the Taliban Ordinance is formulated as an 'enabling' provision and gives the impression that the Federal Office of Migration has a certain margin of appreciation. Constitutionally however, the provision is to be interpreted as meaning that an exemption should be granted in all cases where the UN sanctions regime so permits. A more far-reaching restriction on the appellant's freedom of movement could not be regarded as based on the Security Council resolutions, would not be in the public interest and would be disproportionate in the light of the appellant's particular situation.

The appellant lives in Campione, an Italian enclave in Ticino, with an area of 1.6 sq. km. As a result of the ban on entry into and transit through Switzerland, he is unable to leave Campione. Practically speaking, as the appellant correctly argued, this is tantamount to house arrest and thus represents a serious restriction on his personal liberty. In these circumstances the Swiss authorities are obliged to exhaust all the relaxations of the sanctions regime available under the UN Security Council resolutions.

The Federal Office of Migration thus has no margin of appreciation. Rather, it must examine whether the conditions for the granting of an exemption are met. Should the

request not fall within one of the general exemptions envisaged by the Security Council, it must be submitted to the Sanctions Committee for approval.

10.3 The question whether the Federal Office of Migration has disregarded the constitutional requirements in dealing with the appellant's applications for leave to travel abroad does not need to be examined here: the relevant orders of the Federal Office have not been challenged by the appellant and are not a matter of dispute in the present proceedings.

The same applies to the question whether the appellant should have moved his place of residence from the Italian enclave of Campione to Italy. To date the appellant has made no such request."

C. Developments subsequent to the Federal Court's judgment

53. Following the Federal Court's judgment the applicant wrote to the ODM to request it to re-examine the possibility of applying general exemptions to his particular situation. On 28 January 2008 he lodged a new request seeking the suspension of the entry and transit ban for three months. In a letter of 21 February 2008 the ODM denied that request, stating that it was unable to grant a suspension for such a long period without referring the matter to the Sanctions Committee, but that it could grant one-off safe conducts. The applicant did not challenge that decision.

54. On 22 February 2008, at a meeting between the Swiss authorities and the applicant's representative on the subject of the support that Switzerland could provide to the applicant in his efforts to obtain his delisting, a representative of the Federal Department of Foreign Affairs observed that the situation was rather singular, as the applicant, on the one hand, was asking what support the Swiss authorities could give him in the UN delisting procedure, and on the other, had brought a case against Switzerland before the Court.

During the meeting the applicant's representative explained that he had received verbal confirmation from the ODM to the effect that his client would be granted one-off authorisations to go to Italy, in order to consult his lawyer in Milan. The representative of the Federal Department of Foreign Affairs also indicated that the applicant could ask the Sanctions Committee for a more extensive exemption on account of his particular situation. However, she also repeated that Switzerland could not itself apply to the Sanctions Committee for the applicant's delisting. She added that her government would nevertheless be prepared to support him, in particular by providing him with an attestation confirming that the criminal proceedings against him had been discontinued. The applicant's lawyer replied that he had already received a letter attesting to the discontinuance in favour of his client and that this letter was sufficient.

As to the applicant's requests to the Italian authorities with a view to obtaining their support in a delisting procedure, the Federal Department's representative suggested that the lawyer contact the Italian Permanent

Mission to the United Nations, adding that Italy had, at that time, a seat on the Security Council.

55. The Government informed the Court that in April 2008 an Egyptian military tribunal had sentenced the applicant *in absentia* to ten years' imprisonment for providing financial support to the Muslim Brotherhood organisation (see the article on this subject dated 16 April 2008 in the daily newspaper *Corriere del Ticino*). The applicant did not dispute the fact that he had been convicted but argued that he had never been informed of the proceedings against him and that he had therefore never had the possibility of defending himself in person or through the intermediary of a lawyer. For those reasons, and also taking into account the fact that the trial was held before a military tribunal even though he was a civilian, he claimed that the proceedings in question were clearly in breach of Article 6.

56. On 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for the applicant's delisting on the ground that the case against him in Italy had been dismissed. The Committee denied that request by a decision of 15 July 2008. In the applicant's submission, the Committee had not allowed him to submit his observations to it beforehand.

57. On 11 September 2008 the ODM granted the applicant the right to enter Switzerland and to remain in the country for two days, but the applicant did not make use of this authorisation.

58. In a letter of 23 December 2008 the ODM informed the applicant that the entry of Switzerland into the Schengen area, on 12 December 2008, did not affect his situation.

59. In their observations before the Chamber, the Swiss Government stated that, to their knowledge, the applicant's listing had been initiated by a request from the United States of America, and that the USA had submitted to the Sanctions Committee, on 7 July 2009, a request for the delisting of a number of individuals, including the applicant.

60. On 24 August 2009, in accordance with the procedure laid down by Security Council Resolution 1730 (2006), the applicant submitted to the focal point for delisting requests a request for the deletion of his name from the Sanctions Committee's list.

61. On 2 September 2009 Switzerland sent to the Sanctions Committee a copy of a letter of 13 August 2009 from the Federal Prosecutor's Office to the applicant's lawyer, in which that Office confirmed that the judicial police investigation in respect of his client had not produced any indications or evidence to show that he had ties with persons or organisations associated with Osama bin Laden, al-Qaeda or the Taliban.

62. On 23 September 2009 the applicant's name was deleted from the list annexed to the Security Council resolutions providing for the sanctions in question. According to the applicant, the procedure provided for under Resolution 1730 (2006) was not followed and he received no explanation in this connection. On 29 September 2009 the annex to the Taliban Ordinance

was amended accordingly and the amendment took effect on 2 October 2009.

63. By a motion passed on 1 March 2010, the Foreign Policy Commission of the National Council (lower house of the federal parliament) requested the Federal Council to inform the UN Security Council that from the end of 2010 it would no longer, in certain cases, be applying the sanctions prescribed against individuals under the counter-terrorism resolutions. It moreover called upon the Government to reassert its steadfast commitment to cooperate in the fight against terrorism in accordance with the legal order of the States. The motion had been introduced on 12 June 2009 by Dick Marty, a member of the Council of States (upper house of parliament), and it referred to the applicant's case by way of example.

D. Efforts made to improve the sanctions regime

64. The Government asserted that even though Switzerland was not a member of the Security Council it had, with other States, actively worked since becoming a member of the UN on 10 September 2002 to improve the fairness of the listing and delisting procedure and the legal situation of the persons concerned. Thus, in the summer of 2005, it had launched with Sweden and Germany a new initiative to ensure that fundamental rights would be given more weight in the sanctions procedure. Pursuing its initiative, Switzerland had submitted to the Security Council in 2008, together with Denmark, Germany, Liechtenstein, the Netherlands and Sweden, concrete proposals for the setting-up of an advisory panel of independent experts authorised to submit delisting proposals to the Sanctions Committee. Moreover, in the autumn of 2009 Switzerland had worked intensively with its partners to ensure that the resolution on the renewal of the sanctions regime against al-Qaeda and the Taliban, scheduled for adoption in December, met that need. In the meantime Switzerland had supported the publication in October 2009 of a report proposing, as an option for an advisory review mechanism, the creation of an ombudsperson. On 17 December 2009 the Security Council adopted Resolution 1904 (2009) setting up the office of ombudsperson to receive complaints from individuals affected by the UN Security Council counterterrorism sanctions (see paragraph 78 below). Lastly, Switzerland had called on many occasions, before the UN Security Council and General Assembly, for an improvement in the procedural rights of the persons concerned by the sanctions.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law

1. Federal Constitution

65. 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."

2. Ordinance of 2 October 2000 instituting measures against persons and entities associated with Osama bin Laden, the group "al-Qaeda" or the Taliban (the "Taliban Ordinance")

66. The Ordinance of 2 October 2000 instituting measures against persons and entities associated with Osama bin Laden, the group "al-Qaeda" or the Taliban, has been amended several times. The relevant provisions read as follows, in the version that was in force in the period under consideration in the present case, and in particular at the time when the Federal Court delivered its judgment (14 November 2007):

Article 1 - Ban on supply of military equipment and similar goods

> "1. The supply, sale or brokerage of arms of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts or accessories for the aforementioned, to the individuals, undertakings, groups or entities referred to in annex 2 hereto, shall be prohibited.
>
> ...
>
> 3. The supply, sale or brokerage of technical advice, assistance and training related to military activities, to the individuals, undertakings, groups or entities referred to in annex 2 hereto, shall be prohibited.
>
> 4. Paragraphs 1 and 3 above shall apply only to the extent that the Property Regulation Act of 13 December 1996, the Federal Act on War Materiel of 13 December 1996, and their respective implementing ordinances, are not applicable.
>
> ..."

Article 3 – Freezing of assets and economic resources

> "1. Assets and economic resources owned or controlled by the individuals, undertakings, groups or entities referred to in annex 2 hereto shall be frozen.
>
> 2. It shall be prohibited to supply funds to the individuals, undertakings, groups or entities referred to in annex 2 hereto, or to make assets or economic resources available to them, directly or indirectly.
>
> 3. The State Secretariat for Economic Affairs (SECO) may exempt payments related to democratisation or humanitarian projects from the prohibitions under paragraphs 1 and 2 above.

4. The SECO may authorise, after consulting the competent services of the Federal Department of Foreign Affairs and the Federal Department of Finance, 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 4 – Mandatory declaration

"1. Anyone holding or managing assets acknowledged to be covered by the freezing of assets under Article 3 § 1 hereof must immediately declare them to the SECO.

2. Any person or organisation knowing of economic resources acknowledged to be covered by the freezing of economic resources under Article 3 § 1 hereof must immediately declare them to the SECO.

3. The declaration must give the name of the beneficiary, the purpose and the amount of the assets or economic resources frozen."

Article 4a – Entry into and transit through Switzerland

"1. Entry into and transit through Switzerland shall be prohibited for the individuals listed in annex 2 hereto.

2. The Federal Office for Migration may, in conformity with the decisions of the United Nations Security Council or for the protection of Swiss interests, grant exemptions."

B. International law

1 United Nations Charter

67. The United Nations Charter was signed at San Francisco on 26 June 1945. The relevant provisions for the present case 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,

have resolved to combine our efforts to accomplish these aims

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

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;

...

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

..."

Article 24

"1. 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.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

..."

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."

68. Chapter VII of the Charter is entitled "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". Article 39 reads as follows:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

69. Chapter XVI is entitled "Miscellaneous Provisions". Article 103 reads as follows:

> "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. Resolutions adopted by the Security Council in connection with its measures against al-Qaeda and the Taliban, in so far as relevant to the present case

70. Resolution 1267 (1999) was adopted on 15 October 1999. It created the Sanctions Committee, consisting of all Security Council members. This Committee was in particular entrusted with the task of requesting all States to keep it informed of the steps taken to ensure the effective implementation of the measures required under the resolution, namely the denial of permission for aircraft associated with the Taliban to use their territory for take-off or landing, unless the Sanctions Committee had approved the flight in advance for humanitarian reasons and, secondly, the freezing of the Taliban's funds and other financial resources. The passages of this Resolution that are relevant to the present case read as follows:

> **Resolution 1267 (1999)**
>
> Adopted by the Security Council at its 4051st meeting on 15 October 1999
>
> "*The Security Council*,
>
> *Reaffirming* its previous resolutions, in particular resolutions 1189 (1998) of 13 August 1998, 1193 (1998) of 28 August 1998 and 1214 (1998) of 8 December 1998, and the statements of its President on the situation in Afghanistan,
>
> *Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and its respect for Afghanistan's cultural and historical heritage,
>
> *Reiterating* its deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls, and over the significant rise in the illicit production of opium, and stressing that the capture by the Taliban of the Consulate-General of the Islamic Republic of Iran and the murder of Iranian diplomats and a journalist in Mazar-e-Sharif constituted flagrant violations of established international law,
>
> *Recalling* the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists,
>
> *Strongly condemning* the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and *reaffirming* its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security,
>
> *Deploring* the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and noting also the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021),

Determining that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security,

Stressing its determination to ensure respect for its resolutions,

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

...

3. *Decides* that on 14 November 1999 all States shall impose the measures set out in paragraph 4 below, unless the Council has previously decided, on the basis of a report of the Secretary-General, that the Taliban has fully complied with the obligation set out in paragraph 2 above;

4. *Decides further* that, in order to enforce paragraph 2 above, all States shall:

(a) Deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban as designated by the Committee established by paragraph 6 below, unless the particular flight has been approved in advance by the Committee on the grounds of humanitarian need, including religious obligation such as the performance of the Hajj;

(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need;

5. *Urges* all States to cooperate with efforts to fulfil the demand in paragraph 2 above, and to consider further measures against Usama bin Laden and his associates;

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

...

7. *Calls upon* all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraph 4 above;

8. *Calls upon* States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 above and to impose appropriate penalties;

9. *Calls upon* all States to cooperate fully with the Committee established by paragraph 6 above in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution;

10. *Requests* all States to report to the Committee established by paragraph 6 above within 30 days of the coming into force of the measures imposed by paragraph 4 above on the steps they have taken with a view to effectively implementing paragraph 4 above;

...”

71. By Resolution 1333 (2000), adopted on 19 December 2000, the Security Council extended the application of the sanctions provided for under Resolution 1267 (1999) to any individuals or entities identified by the Sanctions Committee as being associated with al-Qaeda or Osama bin Laden. The resolution further required a list to be maintained for the implementation of the UN sanctions. The passages that are relevant to the present case read as follows:

Resolution 1333 (2000)

“*... The Security Council ...*

Reaffirming its previous resolutions, in particular resolution 1267 (1999) of 15 October 1999 and the statements of its President on the situation in Afghanistan,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and its respect for Afghanistan’s cultural and historical heritage,

Recognizing the critical humanitarian needs of the Afghan people,

...

8. *Decides* that all States shall take further measures:

(a) To close immediately and completely all Taliban offices in their territories;

(b) To close immediately all offices of Ariana Afghan Airlines in their territories;

(c) To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization and *requests* the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization;

...

12. *Decides further* that the Committee shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian

assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate, that the prohibition imposed by paragraph 11 above shall not apply to humanitarian flights operated by, or on behalf of, organizations and governmental relief agencies on the list approved by the Committee, that the Committee shall keep the list under regular review, adding new organizations and governmental relief agencies as appropriate and that the Committee shall remove organizations and governmental agencies from the list if it decides that they are operating, or are likely to operate, flights for other than humanitarian purposes, and shall notify such organizations and governmental agencies immediately that any flights operated by them, or on their behalf, are thereby subject to the provisions of paragraph 11 above;

...

16. *Requests* the Committee to fulfil its mandate by undertaking the following tasks in addition to those set out in resolution 1267 (1999):

(a) To establish and maintain updated lists based on information provided by States, regional, and international organizations of all points of entry and landing areas for aircraft within the territory of Afghanistan under control by the Taliban and to notify Member States of the contents of such lists;

(b) To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden, in accordance with paragraph 8 (c) above;

(c) To give consideration to, and decide upon, requests for the exceptions set out in paragraphs 6 and 11 above;

(d) To establish no later than one month after the adoption of this resolution and maintain an updated list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, in accordance with paragraph 12 above;

...

17. *Calls upon* all States and all international and regional organizations, including the United Nations and its specialized agencies, to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraphs 5, 8, 10 and 11 above; ..."

72. In Resolution 1363 (2001), adopted on 30 July 2001, the Security Council decided to set up a mechanism to monitor the measures imposed by Resolutions 1267 (1999) and 1333 (2000) ("the Monitoring Group"), consisting of up to five experts selected on the basis of equitable geographical distribution.

73. In Resolution 1373 (2001), adopted on 28 September 2001 – following the events of 11 September 2001 – the Security Council decided that States should take a series of measures to combat international terrorism and ensure effective border controls in this connection. The passages that are relevant to the present case read as follows:

Resolution 1373 (2001)

"*... The Security Council ...*

1. *Decides* that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; ...

3. *Calls upon* all States to:

...

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts; ..."

74. In Resolution 1390 (2002), adopted on 16 January 2002, the Security Council decided to impose a ban on entry and transit for individuals and

entities concerned by the international sanctions. This resolution also made the sanctions regime more precise and transparent, because the Sanctions Committee was requested to regularly update the list of persons concerned by the sanctions, to promulgate expeditiously such guidelines and criteria as might be necessary to facilitate the implementation of the sanctions and to make any information it considered relevant, including the list of persons concerned, publicly available. The passages that are relevant to the present case read as follows:

Resolution 1390 (2002)

"*... The Security Council ...*

2. *Decides* that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999) hereinafter referred to as 'the Committee';

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;

(b) Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry into or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities;

...

8. *Urges* all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory, to prevent and punish violations of the measures referred to in paragraph 2 of this resolution, and to inform the Committee of the adoption of such measures, and *invites* States to report the results of all related investigations or enforcement actions to the Committee unless to do so would compromise the investigation or enforcement actions; ..."

75. In Resolution 1526 (2004), adopted on 30 January 2004, the Security Council requested States, on the submission of new names to be added to

the Committee's list, to supply information facilitating the identification of the persons or entities concerned. It also expressly encouraged States to inform, as far as possible, the persons and entities on the Committee's list of the measures taken against them, of the Committee's guidelines, and of Resolution 1452 (2002) concerning the possibility of exemption from certain sanctions.

76. In response to a surge in criticism of the sanctions regime, the Security Council adopted increasingly detailed resolutions to strengthen the procedural safeguards. In this connection, Resolution 1730 (2006) established the current procedure by creating a "focal point" to receive delisting requests in respect of persons or entities on the lists kept by the Sanctions Committee. Under that resolution the focal point was responsible for forwarding such requests, for their information and possible comments, to the designating government(s) and to the government(s) of citizenship and residence. That was to be followed by a consultation between the governments concerned, with or without the focal point acting as an intermediary. If recommended by one of those governments, the delisting request was to be placed on the agenda of the Sanctions Committee, which would take decisions by consensus among its fifteen members.

77. Resolution 1735 (2006) established a procedure for notifying the individuals or entities whose names were on the list. It further clarified the criteria for delisting as follows:

> "14. ... the Committee, in determining whether to remove names from the Consolidated List, may consider, among other things, (i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular Resolution 1617 (2005); in making the evaluation in (ii) above, the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in resolution 1617 (2005), with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List ..."

78. The procedure was subsequently reinforced with the adoption of Resolutions 1822 (2008) and 1904 (2009), which post-date the present case. In the latter, adopted on 17 December 2009, the Security Council decided to create an Office of the Ombudsperson, whose task is to receive requests from individuals concerned by the sanctions imposed by the Security Council in the fight against terrorism. Under that resolution, persons on the sanctions list are entitled to obtain information on the reasons for the measures taken against them and to file delisting petitions with the Ombudsperson, who examines each case impartially and independently and then submits a report to the Sanctions Committee explaining the reasons for or against delisting.

3. Vienna Convention on the Law of Treaties (1969)

79. Article 27 ("Internal law and observance of treaties") of the Vienna Convention on the Law of Treaties reads as follows:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ..."

80. Article 30 ("Application of successive treaties relating to the same subject matter") reads as follows:

> "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."

4. Work of the United Nations International Law Commission

81. 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

82. 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 Court of Justice of the European Communities ("CJEC") and by the United Nations Human Rights Committee.

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

83. 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 UN 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*.

84. 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.

85. Mr Kadi appealed to the CJEC (which on 1 December 2009 became known as the "Court of Justice of the European Union"). The appeal was examined by a Grand Chamber jointly with another case. In its judgment of 3 September 2008 the CJEC 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".

86. The CJEC 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).
>
> ...
>
> 290. It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the Community legal order, any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is in principle excluded, notwithstanding the fact that, as is clear from the

decisions referred to in paragraphs 281 to 284 above, such review is a constitutional guarantee forming part of the very foundations of the Community.

...

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."

87. The CJEC 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.

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

88. 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.

89. The Human Rights Committee noted that the travel ban imposed on the complainants resulted from the transmittal by Belgium of their names to the Sanctions Committee, before they had been heard. It thus took the view that even though Belgium was not competent to remove their names from either the United Nations or the European Union lists, it was responsible for the presence of their names on the lists, and for the resulting travel ban. The Committee found a violation of the complainants' right to freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, because both the dismissal of the criminal investigation and the State party's delisting requests showed that the restrictions were not necessary to protect national security or public order.

90. The Committee also found an unlawful attack on the complainants' honour and reputation, in breach of Article 17 of the Covenant, based on the accessibility of the list on the Internet, a number of press articles, the transmittal of the information about them prior to the conclusion of the criminal investigation, and the fact that, despite the State party's requests for removal, their contact data were still accessible to the public.

91. 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.

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

6. Relevant case-law of other States

93. 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)

94. 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.

95. 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."

96. 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."

97. 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)

98. 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.

99. 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."

100. 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."

101. 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).

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Compatibility of the complaints with the Convention and Protocols thereto

1. The parties' submissions

(a) The respondent Government

102. The Government requested the Court to declare the application inadmissible as being incompatible *ratione personae* with the Convention. They argued that the impugned measures had been based on Security Council Resolutions (1267 (1999) et seq.), which, under Articles 25 and 103 of the United Nations Charter, were binding and prevailed over any other international agreement. In this connection they referred in particular to the 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):

> "Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;"

The Government argued that, in those circumstances, Switzerland could not be held responsible internationally for the implementation of the measures at issue.

103. The Government added that those measures, emanating as they did from the United Nations Security Council, fell outside the scope of the Court's review. The application in the present case was therefore also inadmissible *ratione materiae.*

(b) The applicant

104. The applicant argued that his application was compatible *ratione personae* with the Convention. He took the view that the direct effect of the obligations under the Security Council resolutions was irrelevant to the issue of whether or not the restrictions imposed on him were attributable to the respondent State, since those restrictions had been authorised by the Government at national level in accordance with Article 190 of the Federal

Constitution. Relying on Article 27 of the Vienna Convention on the Law of Treaties, he added that Switzerland could not hide behind its domestic legal arrangements when it came to fulfilling its international obligations (see paragraph 79 above).

105. The applicant also took the view that the Swiss authorities had applied the possibilities of derogation envisaged in the Security Council resolutions in a much more restrictive manner than was required by the sanctions regime. The Federal Court itself had noted this in its judgment of 14 November 2007. Rather than automatically having to implement the Security Council resolutions, the national authorities had therefore enjoyed a certain margin of appreciation in taking the measures at issue. The applicant added in this connection that his delisting, as decided by the Sanctions Committee on 23 September 2009, had not taken effect in Switzerland until a week later. He saw this as further proof that the application of the Security Council resolutions was not automatic.

106. Lastly, the applicant argued that it was not a matter, in the present case, of calling into question the primacy of the United Nations Charter under Article 103 thereof – a finding of a violation of the Convention not being, in his opinion, capable of affecting the validity of States' international obligations – but simply of ensuring that the Charter was not used as a pretext to avoid compliance with the provisions of the Convention.

2. Submissions of third-party interveners

(a) The French Government

107. The French Government took the view that the reservation of Convention observance, in the sense of ensuring "equivalent protection", could not be applied appropriately in the present case because the measures laid down by Switzerland arose necessarily from the UN Security Council resolutions, which all States were required to apply and which also had to be given precedence over any other international rule. In those circumstances France was of the view that the measures in question could not be regarded as falling within Switzerland's "jurisdiction" for the purposes of Article 1 of the Convention; otherwise that notion would be rendered meaningless.

108. The French Government pointed out that, although 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 regarded as compatible with Article 1 of the Convention an application disputing the validity of a national measure simply implementing a regulation of the European Communities that itself stemmed from a Security Council resolution, the Court had noted in that judgment that it was the EC regulation and not the Security Council resolution that constituted the legal basis of the national measure in issue (ibid., § 145).

109. The French Government were also convinced that, even though the measures in issue did not concern missions conducted outside the territory of the member States, like those in the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* ((dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007), but rather measures implemented in domestic law, the arguments emerging from that case-law, which stemmed from the nature of the Security Council's missions and States' obligations arising therefrom, should lead the Court likewise to declare the disputed measures attributable to the UN and thus to find the applicant's complaints incompatible *ratione personae* with the Convention. Thus they argued that the present case provided the Court with an opportunity to transpose onto the member States' actual territory the principles established in *Behrami and Behrami*, taking into account the hierarchy of international law norms and the various legal spheres arising therefrom.

110. The French Government also pointed out that, in its *Kadi* judgment (see paragraph 83 above), the Court of Justice of the European Communities had relied on the constitutional nature of the EC Treaty for its review of a regulation implementing Security Council resolutions. Such considerations being absent in the present case, the French Government had difficulty conceiving what could justify a finding by the Court, in disregard of Article 103 of the UN Charter, that Switzerland was responsible for the implementation of resolutions that it was required to apply and to which it also had to give precedence over any other undertaking.

(b) The United Kingdom Government

111. The United Kingdom Government observed that the entry and transit ban had been imposed on the applicant in the context of the Taliban Ordinance, which they regarded as having merely implemented Security Council resolutions that were binding on all States, having been adopted under Chapter VII of the United Nations Charter (Article 25 thereof): the obligations arising from those resolutions thus took precedence, under Article 103 of the Charter, over all other international agreements. In this connection the United Kingdom Government were of the opinion that the effectiveness of the sanctions regime set up to maintain international peace and security would be seriously compromised if priority were given to the rights arising from Articles 5 or 8 of the Convention. They took the view that, particularly in paragraph 2 (b) of Resolution 1390 (2002), the Security Council had used "clear and explicit language" to impose on States specific measures that might conflict with their other international obligations, in particular those arising from human rights instruments. Referring to the judgment recently delivered in the case of *Al-Jedda v. the United Kingdom* ([GC], no. 27021/08, § 102, ECHR 2011), they thus argued that the respondent State had been obliged to apply the measures in issue.

(c) JUSTICE

112. The organisation JUSTICE considered that the sanctions regime established by Security Council Resolution 1267 (1999) was the source of the draconian restrictions on the Convention rights of the listed persons and their families, in particular the right to respect for private and family life, the right to the enjoyment of property and freedom of movement.

113. The severity of that interference with Convention rights was exacerbated by the inability of the listed persons to challenge effectively the decision to list them, including the evidential basis for the decision. Consequently, the sanctions regime also failed to afford those persons and their families the right of access to a court and the right to an effective remedy. JUSTICE took the view that the procedures of the sanctions committee did not therefore provide equivalent protection for those Convention rights.

114. Those conclusions, it observed, were reflected in the findings of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, the UN Special Rapporteur on Terrorism and Human Rights and in the decisions of the Federal Court of Canada (*Abdelrazik*), the United Kingdom Supreme Court (*Ahmed*) and the European Court of Justice (*Kadi*) (see "Relevant international case-law" and "Relevant case-law of other States", paragraphs 82-92 and 93-101, above).

115. JUSTICE was convinced that the Court was not obliged to interpret Article 103 of the Charter in such a manner that it would result in Convention rights being displaced. In particular, the "maintenance of international peace and security", though the primary function of the Security Council, was not the pre-eminent principle either of international law or of the Charter. At least equal importance was to be attached to the principle of respect for fundamental rights, as indeed was reflected in the Preamble to the Charter.

3. The Court's assessment

116. In the light of the arguments set out by the parties and third-party interveners, the Court must determine whether it has jurisdiction to entertain the complaints raised by the applicant. For that purpose it will have to examine whether the application falls within the scope of Article 1 of the Convention and thus engages the responsibility of the respondent State.

(a) Compatibility *ratione personae*

117. 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."

118. 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*, cited above, § 74; *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], 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 attributable to it which give rise to an allegation of 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).

119. The notion of jurisdiction reflects the meaning given to that term in public international law (see *Assanidze v. Georgia*, no. 71503/01, § 137, ECHR 2004-II; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, § 20, 14 May 2002; and *Banković and Others*, 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*, cited above, § 59) and is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312).

120. Relying on the Court's decision in *Behrami and Behrami* (cited above), the intervening French Government, in particular, 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 were thus incompatible *ratione personae* with the Convention. The Court cannot endorse that argument. It would point out that it found in *Behrami and Behrami* 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 Resolutions 1267 (1999), 1333 (2000), 1373 (2001) and 1390 (2002), required States to act in their own names and to implement them at national level.

121. In the present case the measures imposed by the Security Council resolutions were implemented at national level by an Ordinance of the Federal Council and the applicant's requests for exemption from the ban on entry into Swiss territory were rejected by the Swiss authorities (the IMES, then the ODM). The acts in question therefore relate to the national implementation of UN Security Council resolutions (see, *mutatis mutandis*, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 137, and contrast *Behrami and Behrami*, cited above, § 151). The alleged violations of the Convention are thus attributable to Switzerland.

122. 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.

123. Accordingly, the Court dismisses the objection that the application is incompatible *ratione personae* with the Convention.

(b) Compatibility *ratione materiae*

124. The respondent Government argued that the present application was also incompatible *ratione materiae* with the Convention. In this connection they emphasised the binding nature of the resolutions adopted by the Security Council under Chapter VII of the United Nations Charter and its primacy over any other international agreement, in accordance with Article 103 thereof.

125. The Court finds that these arguments concern more the merits of the complaints than their compatibility with the Convention. Consequently, the respondent Government's objection as to the incompatibility *ratione materiae* of the application with the Convention should be joined to the merits.

B. Whether the applicant is a "victim"

1. The parties' submissions

126. The respondent Government pointed out that on 23 September 2009 the applicant's name had been deleted from the list annexed to the Security Council resolutions providing for the impugned sanctions and on 29 September 2009 the Taliban Ordinance had been amended accordingly, with effect from 2 October 2009. Thus, they argued, the impugned measures against the applicant had been completely discontinued. In the Government's opinion, the dispute had therefore been resolved within the meaning of Article 37 § 1 (b) of the Convention and, as a result, they asked the Court to strike the application out of its list, in accordance with that provision.

127. The applicant disagreed with that argument. He took the view that the mere fact that the situation had evolved in such a way that his name had been deleted from the Sanctions Committee's list, that the Taliban Ordinance had been amended accordingly and that the sanctions against him had been lifted, since the beginning of October 2009, had not deprived him of his victim status as regards the breaches of his rights prior to that date.

2. The Court's assessment

128. It is the settled case-law of the Court that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010; *Association Ekin v. France* (dec.), no. 39288/98, 18 January 2000; *Brumărescu v. Romania* [GC], no. 28342/95, § 50, ECHR 1999-VII; *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III; and *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51).

129. In the present case, the Court observes that the sanctions imposed on the applicant have been lifted and that he is now authorised to cross the border of Campione d'Italia to enter or pass through Switzerland freely. However, the lifting of sanctions, which was not decided until September-October 2009, has not deprived the applicant of his status as victim of the restrictions from which he suffered from the time his name was added, in November 2001, to the Sanctions Committee's list and to the list annexed to the Taliban Ordinance, or at least from 27 November 2003, when he was informed that he was no longer authorised to cross the border (see paragraph 26 above). The lifting of the sanctions cannot be regarded as an acknowledgment by the Government, even implicitly, of a violation of the Convention, for the purposes of the above-cited case-law. Moreover, it was not followed by any redress within the meaning of that case-law.

130. Accordingly, the applicant may claim to have been the victim of the alleged violations of the Convention for a period of at least six years. As a result, the Government's objection as to an alleged lack of victim status should be dismissed.

C. Whether domestic remedies have been exhausted

1. The parties' submissions

(a) The respondent Government

131. The respondent Government observed that, according to the Security Council's sanctions regime, exemptions from the entry and transit ban could be granted when they were necessary for the fulfilment of a judicial process, or for other reasons, in particular of a medical, humanitarian or religious nature, subject to the approval of the Sanctions

Committee (see Resolution 1390 (2002), paragraph 2(b)). To take account of such situations, Article 4a § 2 of the Taliban Ordinance provided that the Federal Office of Migration (the ODM) could, in accordance with the decisions of the Security Council or for the protection of Swiss interests, grant exemptions.

132. The Government contended that the various decisions given by the Office had not been appealed against, and the action taken before it concerned only the question of the delisting of the applicant and the organisations associated with him from Annex 2 to the Taliban Ordinance.

133. The Government pointed out that, both before and after the Federal Court's judgment, the applicant had not appealed against any decision of the former Federal Office for Immigration, Integration and Emigration (the IMES, incorporated into the ODM on its creation in 2005) or of the ODM concerning exemptions from the sanctions regime. In addition, the authorities had granted exemptions (in decisions of 20 September 2006 and 11 September 2008) that had not been used by the applicant. The applicant had explained in this connection that the duration of the exemptions had not been sufficient, in view of his age and the distance to be travelled, for him to make the intended journeys. On this subject the Government pointed out that the first exemption, for one day, had been granted for a journey to Milan in connection with judicial proceedings, and that it took only one hour to drive from Campione d'Italia to the centre of Milan. The second exemption, for two days, had been granted to the applicant for a journey to Berne and Sion, both cities being less than three and a half hours away from Campione by car.

134. Lastly, the Government argued that the applicant could at any time have requested to move house, even temporarily, to another part of Italy, the country of which he was a national. Such a request would have been submitted by the competent Swiss authority (the IMES, then the ODM) to the Sanctions Committee. As the sanctions had been formulated in general terms, the Government were of the opinion that the Committee would most probably have authorised the applicant's move.

135. For these reasons the Government submitted that the applicant had failed to exhaust domestic remedies.

(b) The applicant

136. Concerning the first three refusals by the ODM (26 March 2004, 11 May 2007 and 2 August 2007), the applicant contended that there was no clear domestic case-law as to whether the Swiss authorities had any margin of appreciation in the granting of exemptions from the restrictions imposed on him and that no clarification had been provided by the Federal Court in this connection. Furthermore, no action appeared to have been taken by the ODM or any other authority to clarify the position regarding the grant of

exemptions. In his submission it could not therefore be said that an effective remedy, within the meaning of the Court's case-law, was available.

137. As regards the Government's argument that he had failed to make use of the exemptions granted to him by the ODM (on 20 September 2006 and 11 September 2008), he alleged that they concerned only a partial lifting of the measures imposed on him, in respect of very specific situations. Given his age and the length of the journeys involved, he argued that the exemptions for one or two days were far from sufficient.

138. As to the general sanctions regime, the applicant submitted that he had exhausted domestic remedies, because he had challenged before the Federal Court the restrictions imposed by the Taliban Ordinance, of which he complained before the Court.

139. The applicant further observed that the Government's argument that a request to move to another part of Italy would have had greater prospects of success than the request for delisting was purely speculative. He also pointed out that such an option – which he did not consider possible in his case, particularly because of the freezing of his assets by the sanctions regime and the fact that it had not been envisaged by the Federal Court – would in any event have provided redress only for part of the impugned restrictions.

2. The Court's assessment

140. The Court reiterates that the only remedies Article 35 of the Convention requires to be exhausted are those that are available and sufficient and relate to the breaches alleged (see *Tsomtsos and Others v. Greece*, 15 November 1996, § 32, *Reports* 1996-V).

141. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX).

142. Moreover, an applicant who has availed himself of a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see, for example, *Aquilina v. Malta* [GC], no. 25642/94, § 39, ECHR 1999-III, and *Manoussakis and Others v. Greece*, 26 September 1996, § 33, *Reports* 1996-IV).

143. In the present case the Court notes that the applicant did not challenge the refusals by the IMES and the ODM to grant his requests for exemption from the sanctions regime and that on two occasions he was granted exemptions that he did not use (see paragraphs 34 and 57 above).

144. However, even supposing that those exemptions had alleviated certain effects of the sanctions regime, by allowing him to leave the enclave

of Campione d'Italia for medical or legal reasons, the Court is of the view that the issue of exemptions was part of a broader situation whose origin lay in the addition by the Swiss authorities of the applicant's name to the list annexed to the Taliban Ordinance, which was based on the Sanctions Committee's list. In this connection, it should be observed that the applicant submitted many requests to the national authorities for the deletion of his name from the list annexed to the Taliban Ordinance – requests that were denied by the SECO and the Federal Department for Economic Affairs (see paragraphs 30-32 above). The Federal Council, to which he appealed against the Department's decision, referred the case to the Federal Court. In a judgment of 14 November 2007, that court dismissed his appeal without examining the merits of the complaints under the Convention. Consequently, the Court takes the view that the applicant has exhausted domestic remedies relating to the sanctions regime as a whole, the application of which in his case stemmed from the addition of his name to the list annexed to the Taliban Ordinance.

145. In these circumstances, the Court does not find it necessary to address, at this stage, the argument raised by the Government to the effect that the applicant could have been reasonably expected to move from Campione d'Italia, where he had been living since 1970, to another region of Italy. That question will, by contrast, play a certain role when it comes to examining the proportionality of the impugned measures (see paragraph 190 below).

146. As to the complaint under Article 8 that the addition of the applicant's name to the list annexed to the Taliban Ordinance had impugned his honour and reputation, the Court acknowledges that it was raised, at least in substance, before the domestic authorities. The applicant indeed claimed that the addition of his name to the Sanctions Committee's list was tantamount to accusing him publicly of being associated with Osama bin Laden, al-Qaeda and the Taliban, when that was not the case (see paragraphs 33 and 38 above).

147. Consequently, the Court dismisses the Government's objection as to the inadmissibility of the application for failure to exhaust domestic remedies in respect of the applicant's complaints under Articles 5 and 8.

148. As regards the complaint under Article 13, the Court finds that the objection of non-exhaustion of remedies is closely linked to the merits of the complaint. Accordingly, the Court joins it to the merits.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

149. The applicant complained that the measure by which he was prohibited from entering or passing through Switzerland had breached his right to respect for his private life, including his professional life, and his family life. He contended that this ban had prevented him from seeing his

doctors in Italy or in Switzerland and from visiting his friends and family. He further claimed that the addition of his name to the list annexed to the Taliban Ordinance had impugned his honour and reputation. In support of these complaints he relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

150. The Court finds that it should first examine the applicability of Article 8 in the present case.

151. It reiterates that "private life" is a broad term not susceptible to exhaustive definition (see, for example, *Glor v. Switzerland*, no. 13444/04, § 52, ECHR 2009; *Tysiąc v. Poland*, no. 5410/03, § 107, ECHR 2007-I; *Hadri-Vionnet v. Switzerland*, no. 55525/00, § 51, 14 February 2008; *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III; and *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008). The Court has found that health, together with physical and moral integrity, falls within the realm of private life (see *Glor*, cited above, § 54, and *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91; see also *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 36, Series A no. 247-C). The right to private life also encompasses the right to personal development and to establish and develop relationships with other human beings and the outside world in general (see, for example, *S. and Marper*, cited above, § 66).

152. It should moreover be observed that Article 8 also protects the right to respect for "family life". Under that provision the State must in particular act in a manner calculated to allow those concerned to lead a normal family life (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31). The Court determines the existence of family life on a case-by-case basis, looking at the circumstances of each case. The relevant criterion in such matters is the existence of effective ties between the individuals concerned (ibid.; see also *K. and T. v. Finland* [GC], no. 25702/94, § 150, ECHR 2001-VII, and *Şerife Yiğit v. Turkey* [GC], no. 3976/05, § 93, 2 November 2010).

153. The Court would further reiterate that Article 8 also protects the right to respect for one's home (see, for example, *Gillow v. the United Kingdom*, 24 November 1986, § 46, Series A no. 109).

154. In the light of that case-law, the Court finds that the complaints submitted by the applicant under Article 8 are indeed to be examined under that Article. It cannot be excluded that the measure prohibiting him from entering Switzerland prevented him – or at least made it more difficult for him – to consult his doctors in Italy or Switzerland or to visit his friends and family. Article 8 therefore applies in the present case in both its "private life" aspect and its "family life" aspect**.**

155. Furthermore, this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and no other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

156. The applicant alleged that the restrictions on his freedom of movement had prevented him from taking part in family events (such as funerals or weddings) which had taken place during the period when he was unable to travel freely on account of the sanctions regime. He thus claimed to be a victim of a violation of his right to respect for his private and family life. In this connection, he contended that his status as an Italian national, not resident on the territory of the respondent State, did not prevent him from complaining of a violation of his rights by Switzerland, especially given the very special situation of the Campione d'Italia enclave, being surrounded by Swiss territory. He even took the view that, given the integration of Campione d'Italia into the Canton of Ticino, in particular its economic integration, it would have been appropriate for the Swiss authorities to treat him as a Swiss national for the purposes of the sanctions regime. Moreover, he asserted that, contrary to the Government's allegation, he did not have the option of living elsewhere in Italy.

157. The applicant further observed that the addition of his name to the list annexed to the Taliban Ordinance had caused damage to his honour and reputation, since that list enumerated persons suspected of helping to finance terrorism. In support of that view he referred to the case of *Sayadi and Vinck v. Belgium* (see paragraphs 88-92 above) in which the Human Rights Committee found that the addition of the complainants' names to the Sanctions Committee's list had constituted an unlawful attack on their honour.

158. In the applicant's submission, those circumstances were aggravated by the fact that he had never been given an opportunity to challenge the merits of the allegations against him.

159. There had thus been a violation of Article 8 on various accounts.

(b) The respondent Government

160. The Government observed that the applicant had been free to receive all the visits he wished in Campione d'Italia, in particular from his grandchildren. The applicant had not alleged that it would have been impossible or particularly difficult for his family or friends to go to Campione d'Italia, where he could have carried on his family and social life as he saw fit, without any restriction whatsoever. As regards exceptional events, such as the marriage of a friend or relative, he could have sought an exemption from the applicable rules. In addition, as shown in connection with the exhaustion of domestic remedies, the applicant could have requested to move to another part of Italy. Lastly, the Convention did not protect the right of a foreign national to visit a State that had prohibited him from entering it simply so that he could maintain his residence in an enclave which he could not leave without crossing that State. For all those reasons the Government were of the opinion that the disputed measures did not constitute interference with the rights guaranteed by Article 8.

161. In response to the applicant's allegation that he had never been able to find out the factors which had led to the impugned measures, or to challenge them before a court, the Government stated that, as shown in their earlier observations, the impugned measures had not breached the applicant's rights under Article 8. Consequently, the procedural aspect of that provision was not applicable.

162. For those reasons the Government were of the opinion that the restrictions imposed did not constitute an interference with the applicant's rights under Article 8. If the Court were to find otherwise, the Government argued that the measure was in any event necessary in a democratic society under Article 8 § 2.

2. The Court's assessment

(a) Whether there has been an interference

163. The Court finds it appropriate to begin by examining the applicant's allegation that he sustained interference with his right to respect for his private and family life on account of the fact that he was prohibited from entering or passing through Switzerland.

164. The Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of non-nationals into its territory. In other words, the Convention does not as such guarantee the right of an alien to enter a particular country (see, among many other authorities, *Maslov v. Austria* [GC], no. 1638/03, § 68, ECHR 2008; *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Boujlifa v. France*, 21 October 1997, § 42, *Reports* 1997-VI; and *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94).

165. In the present case, the Court observes that the Federal Court found that the impugned measure constituted a significant restriction on the applicant's freedom (see paragraph 52 above), as he was in a very specific situation on account of the location of Campione d'Italia, an enclave surrounded by the Swiss Canton of Ticino. The Court would endorse that opinion. It takes the view that the measure preventing the applicant from leaving the very confined area of Campione d'Italia for at least six years was likely to make it more difficult for him to exercise his right to maintain contact with others – in particular his friends and family – living outside the enclave (see, *mutatis mutandis*, *Agraw v. Switzerland*, no. 3295/06, § 51, and *Mengesha Kimfe v. Switzerland*, no. 24404/05, §§ 69-72, both judgments of 29 July 2010).

166. In view of the foregoing, the Court finds that there has been an interference with the applicant's right to respect for his private and family life within the meaning of Article 8 § 1.

(b) Whether the interference was justified

167. The interference with the applicant's right to respect for his private and family life, as found above, will breach Article 8 unless it satisfies the requirements of paragraph 2 of that provision. It thus remains to be determined whether it was "in accordance with the law", pursued one or more of the legitimate aims enumerated in that paragraph and was "necessary in a democratic society" to achieve such aims. The Court finds it appropriate first to reiterate certain principles that will guide it in its subsequent examination.

(i) General principles

168. According to established 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*, cited above, § 153, 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, and the cases cited therein).

169. 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 1969 Vienna Convention on the Law of Treaties, 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).

170. When creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law (see, to this effect, *Al-Saadoon and Mufdhi*, cited above, § 126; *Al-Adsani*, cited above, § 55; and the *Banković* decision, cited above, §§ 55-57; see also the references cited in the ILC study group's report entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", paragraph 81 above).

171. As regards, more specifically, the question of the relationship between the Convention and Security Council resolutions, the Court found as follows in its *Al-Jedda* judgment (cited above):

> "101. Article 103 of the United Nations Charter provides that the obligations of the Members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.
>
> 102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to 'achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms'. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations'. Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the

> requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is 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."

172. The Grand Chamber confirms those principles. However, in the present case it observes that, contrary to the situation in *Al-Jedda*, where the wording of the resolution at issue did not specifically mention internment without trial, 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, the above-mentioned presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in that resolution (see also paragraph 7 of Resolution 1267 (1999), paragraph 70 above, in which the Security Council was even more explicit in setting aside any other international obligations that might be incompatible with the resolution).

(ii) Legal basis

173. The Court notes that the question of the existence of a legal basis is not a matter of dispute between the parties. It observes that the impugned measures were taken pursuant to the Taliban Ordinance, adopted to implement the relevant Security Council resolutions. To be precise, the ban on entry into and transit through Switzerland was based on Article 4a of that Ordinance (see paragraph 66 above). The measures therefore had a sufficient legal basis.

(iii) Legitimate aim

174. The applicant did not appear to deny that the impugned restrictions were imposed in pursuit of legitimate aims. The Court finds it established that those restrictions pursued one or more of the legitimate aims enumerated in Article 8 § 2: first, they sought to prevent crime, and second, as the relevant Security Council resolutions had been adopted to combat international terrorism under Chapter VII of the United Nations Charter ("Action with respect to threats to the peace, breaches of the peace, and acts of aggression"), they were also capable of contributing to Switzerland's national security and public safety.

(iv) "Necessary in a democratic society"

(α) Implementation of Security Council resolutions

175. The respondent Government, together with the French and United Kingdom Governments, intervening as third parties, argued that the Swiss authorities had no latitude in implementing the relevant Security Council

resolutions in the present case. The Court must therefore first examine those resolutions in order to determine whether they left States any freedom in their implementation and, in particular, whether they allowed the authorities to take into account the very specific nature of the applicant's situation and therefore to meet the requirements of Article 8 of the Convention. In order to do so, it will particularly take account of the wording of those resolutions and the context in which they were adopted (see *Al-Jedda*, cited above, § 76, with the reference cited therein to the relevant case-law of the International Court of Justice). It will moreover have regard to the objectives pursued by those resolutions (see, to that effect, the *Kadi* judgment of the CJEC, § 296, paragraph 86 above), as stated mainly in the preambles thereto, read in the light of the purposes and principles of the United Nations.

176. The Court observes that Switzerland did not became a member of the United Nations until 10 September 2002: it had thus adopted the Taliban Ordinance of 2 October 2000 before even becoming a member of that organisation, whereas it was already bound by the Convention. Similarly, it had implemented at domestic level the entry and transit ban concerning the applicant, as required by Resolution 1390 (2002) of 16 January 2002 (see paragraph 74 above), on 1 May of that year by the amendment of Article 4a of the Taliban Ordinance. The Court acknowledges that this resolution, particularly in the light of paragraph 2, was addressed to "all States" and not only the members of the United Nations. However, the Court observes that the United Nations Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII. Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order. The Charter thus imposes on States an obligation of result, leaving them to choose the means by which they give effect to the resolutions (see to the same effect, *mutatis mutandis*, the *Kadi* judgment of the CJEC, § 298, paragraph 86 above).

177. In the present case, the applicant mainly challenged the Swiss entry and transit ban imposed on him in particular through the implementation of Resolution 1390 (2002). Whilst paragraph 2(b) of that resolution required States to take such measures, it stated that the ban did "not apply where entry or transit [was] necessary for the fulfilment of a judicial process..." (see paragraph 74 above). In the Court's view, the term "necessary" was to be construed on a case-by-case basis.

178. In addition, in paragraph 8 of Resolution 1390 (2002), the Security Council "[urged] all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their

territory ...” (see paragraph 74 above). The wording “where appropriate” also had the effect of affording the national authorities a certain flexibility in the mode of implementation of the resolution.

179. Lastly, the Court would refer to the motion by which the Foreign Policy Commission of the Swiss National Council requested the Federal Council to inform the UN Security Council that it would no longer unconditionally be applying the sanctions prescribed against individuals under the counter-terrorism resolutions (see paragraph 63 above). Even though that motion was drafted in rather general terms, it can nevertheless be said that the applicant’s case was one of the main reasons for its adoption. In any event, in the Court’s view, the Swiss Parliament, in adopting that motion, was expressing its intention to allow a certain discretion in the application of the Security Council’s counter-terrorism resolutions.

180. In view of the foregoing, the Court finds that Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council.

(β) Whether the interference was proportionate in the present case

181. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see, for example, *S. and Marper*, cited above, § 101, and *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, 18 January 2001, with the cases cited therein).

182. The object and purpose of the Convention, being a human rights treaty protecting individuals on an objective basis (see *Neulinger and Shuruk*, cited above, § 145), call for its provisions to be interpreted and applied in a manner that renders its guarantees practical and effective (see, among other authorities, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). Thus, in order to ensure “respect” for private and family life within the meaning of Article 8, the realities of each case must be taken into account in order to avoid the mechanical application of domestic law to a particular situation (see, *mutatis mutandis*, *Emonet and Others v. Switzerland*, no. 39051/03, § 86, 13 December 2007).

183. The Court has previously found that, for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out (see *Glor*, cited above, § 94).

184. In any event, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see, for example, *S. and Marper*, cited

above, § 101, and *Coster*, cited above, § 104). A margin of appreciation must be left to the competent national authorities in this connection. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference (see *S. and Marper*, cited above, § 102).

185. In order to address the question whether the measures taken against the applicant were proportionate to the legitimate aim that they were supposed to pursue, and whether the reasons given by the national authorities were "relevant and sufficient", the Court must examine whether the Swiss authorities took sufficient account of the particular nature of his case and whether they adopted, in the context of their margin of appreciation, the measures that were called for in order to adapt the sanctions regime to the applicant's individual situation.

186. In doing so, the Court is prepared to take account of the fact that the threat of terrorism was particularly serious at the time of the adoption, between 1999 and 2002, of the resolutions prescribing those sanctions. That is unequivocally shown by both the wording of the resolutions and the context in which they were adopted. However, the maintaining or even reinforcement of those measures over the years must be explained and justified convincingly.

187. The Court observes in this connection that the investigations conducted by the Swiss and Italian authorities concluded that the suspicions about the applicant's participation in activities related to international terrorism were clearly unfounded. On 31 May 2005 the Swiss Federal Prosecutor closed the investigation opened in October 2001 in respect of the applicant, and on 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for the applicant's delisting on the ground that the proceedings against him in Italy had been discontinued (see paragraph 56 above). The Federal Court, for its part, observed that the State which had conducted the investigations and criminal proceedings could not itself proceed with the deletion, but it could at least transmit the results of its investigations to the Sanctions Committee and request or support the person's delisting (see paragraph 51 above).

188. In this connection the Court is surprised by the allegation that the Swiss authorities did not inform the Sanctions Committee until 2 September 2009 of the conclusions of investigations closed on 31 May 2005 (see paragraph 61 above). Observing, however, that the veracity of this allegation has not been disputed by the Government, and without any explanation having been given by the latter for such delay, the Court finds that a more prompt communication of the investigative authorities' conclusions might have led to the deletion of the applicant's name from the United Nations list at an earlier stage, thereby considerably reducing the period of time in which he was subjected to the restrictions of his rights

under Article 8 (see, in this connection, *Sayadi and Vinck* (Human Rights Committee), § 12, paragraphs 88-92 above).

189. As regards the scope of the prohibition in question, the Court emphasises that it prevented the applicant not only from entering Switzerland but also from leaving Campione d'Italia at all, in view of its situation as an enclave, even to travel to any other part of Italy, the country of which he was a national, without breaching the sanctions regime.

190. Moreover, the Court considers that the applicant could not reasonably have been required to move from Campione d'Italia, where he had been living since 1970, to settle in another region of Italy, especially as it cannot be ruled out that, as a result of the freeze imposed by paragraph 1(c) of Resolution 1373 (2001) (see paragraph 73 above), he could no longer dispose freely of all his property and assets. Regardless of whether a request for authorisation to move house would have had any chance of success, it should be pointed out that the right to respect for one's home is protected by Article 8 of the Convention (see, for example, *Prokopovich v. Russia*, no. 58255/00, § 37, ECHR 2004-XI, and *Gillow*, cited above, § 46).

191. The Court would further observe that the present case has a medical aspect that should not be underestimated. The applicant was born in 1931 and has health problems (see paragraph 14 above). The Federal Court itself found that, although Article 4a § 2 of the Taliban Ordinance was formulated more as an enabling provision, it did oblige the authorities to grant an exemption in all cases where the UN sanctions regime so permitted, as a more far-reaching restriction on individual freedom of movement would not have been justified either by the Security Council resolutions or by the public interest and would have been disproportionate in the light of the applicant's particular situation (see paragraph 52 above).

192. In reality, the IMES and the ODM denied a number of requests for exemption from the entry and transit ban that had been submitted by the applicant for medical reasons or in connection with judicial proceedings. He did not appeal against those refusals. Moreover, in the two cases where his requests were accepted, he waived the use of those exemptions (for one and two days respectively), finding that their length was not sufficient for him to make the intended journeys in view of his age and the considerable distance to be covered. The Court can understand that he may have found those exemptions to be insufficient in duration, in view of the above-mentioned factors (see, in particular, paragraph 191 above).

193. It should be pointed out in this connection that, under paragraph 2(b) of Resolution 1390 (2002), the Sanctions Committee was entitled to grant exemptions in specific cases, especially for medical, humanitarian or religious reasons. During the meeting of 22 February 2008 (see paragraph 54 above), a representative of the Federal Department of Foreign Affairs indicated that the applicant could request the Sanctions

Committee to grant a broader exemption in view of his particular situation. The applicant did not make any such request, but it does not appear, in particular from the record of that meeting, that the Swiss authorities offered him any assistance to that end.

194. It has been established that the applicant's name was added to the United Nations list, not on the initiative of Switzerland but on that of the United States of America. Neither has it been disputed that, at least until the adoption of Resolution 1730 (2006), it was for the State of citizenship or residence of the person concerned to approach the Sanctions Committee for the purposes of the delisting procedure. To be sure, in the applicant's case Switzerland was neither his State of citizenship nor his State of residence, and the Swiss authorities were not therefore competent to undertake such action. However, it does not appear that Switzerland ever sought to encourage Italy to undertake such action or to offer it assistance for that purpose (see, *mutatis mutandis*, the case of *Sayadi and Vinck* (Human Rights Committee), § 12, paragraphs 88-92 above). It can be seen from the record of the meeting of 22 February 2008 (paragraph 54 above) that the authorities merely suggested that the applicant contact the Italian Permanent Mission to the United Nations, adding that Italy at that time had a seat on the Security Council.

195. The Court acknowledges that Switzerland, along with other States, made considerable efforts that resulted, after a few years, in improvement to the sanctions regime (see paragraphs 64 and 78 above). It is of the opinion, however, in view of the principle that the Convention protects rights that are not theoretical or illusory but practical and effective (see *Artico*, cited above, § 33), that it is important in the present case to consider the measures that the national authorities actually took, or sought to take, in response to the applicant's very specific situation. In this connection, the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health. It further finds that the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein.

196. In the light of the Convention's special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see, for example, *Soering*, cited above, § 87, and *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25), the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court

that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation.

197. That finding dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court's view, the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent (see, in this connection, paragraphs 81 and 170 above).

198. Having regard to all the circumstances of the present case, the Court finds that the restrictions imposed on the applicant's freedom of movement for a considerable period of time did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland's national security and public safety, on the other. Consequently, the interference with his right to respect for private and family life was not proportionate and therefore not necessary in a democratic society.

(γ) Conclusion

199. In view of the foregoing, the Court dismisses the Government's preliminary objection that the application was incompatible *ratione materiae* with the Convention and, ruling on the merits, finds that there has been a violation of Article 8 of the Convention. Having regard to that conclusion, and notwithstanding that the applicant's allegation that the addition of his name to the list annexed to the Taliban Ordinance also impugned his honour and reputation constitutes a separate complaint, the Court finds that it does not need to examine that complaint separately.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

200. The applicant complained that he had not had an effective remedy by which to have his Convention complaints examined. He thus alleged that there had been a violation of Article 13, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

201. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It finds, moreover,

that, no other ground for declaring it inadmissible has been established. The complaint should thus be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

202. The applicant argued, relying on the *Al-Nashif v. Bulgaria* case (no. 50963/99, 20 June 2002), that the competing interests of the protection of sources and information critical to national security, on the one hand, and the right to an effective remedy, on the other, could be reconciled through a specially adapted procedure. In the present case, however, no such procedure had been available, either before United Nations bodies or before the domestic authorities.

203. He further pointed out that the above-mentioned *Sayadi and Vinck* case (see paragraphs 88-92 above), where the Human Rights Committee had concluded that an effective remedy was constituted by the court order requiring the Belgian Government, which had forwarded the complainants' names to the Sanctions Committee in the first place, to submit a delisting request to that Committee, was not relevant to the present case for two reasons. First, because he was not complaining that Switzerland had failed to have his name removed from the United Nations list; the Human Rights Committee had clearly confirmed that the relevant authority lay entirely with the Sanctions Committee and not with the State itself. Secondly, in his case, the Federal Court, unlike the Brussels Court of First Instance in *Sayadi and Vinck*, although observing that the respondent Government were obliged to support the applicant in any endeavour to secure delisting, had not actually ordered it to do so.

204. The applicant thus argued that the conformity of the impugned measures with Articles 3, 8 and 9 of the Convention was not subject to the scrutiny of any domestic court and that, accordingly, there had been a violation of Article 13.

(b) The respondent Government

205. In the Government's submission, Article 13 required that where an individual had an arguable complaint that there had been a violation of the Convention, he or she should have a remedy before a "national authority". The Government submitted that, having regard to their previous arguments, the applicant's complaints were not made out. They argued that, should the Court decide not to follow that assessment, there had not in any event been a violation of Article 13 taken together with Article 8 in the present case.

206. The Government pointed out that the applicant had requested the deletion of his name and those of the organisations with which he was

associated from the list annexed to the Taliban Ordinance. That request had apparently been examined by the Federal Court, which had found that the applicant did not have an effective remedy in respect of that issue since, being bound by the Security Council resolutions, it was not able to annul the sanctions imposed on the applicant. The Federal Court had nevertheless emphasised that, in that situation, it was for Switzerland to request the applicant's delisting or to support such a procedure initiated by him. In this connection, the Government observed that Switzerland was not itself entitled to lodge a delisting request – as the applicant did not have Swiss nationality and did not live in Switzerland – as had been confirmed by the Sanctions Committee. Switzerland had simply had the possibility of supporting a request lodged by the applicant himself, and it had apparently done so by sending his lawyer a formal attestation of the discontinuance of criminal proceedings against him.

2. The Court's assessment

(a) Applicable principles

207. The Court observes that Article 13 guarantees the availability at national level of a remedy by which to complain about a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State (see *Büyükdağ v. Turkey*, no. 28340/95, § 64, 21 December 2000, with the cases cited therein, especially *Aksoy v. Turkey*, 18 December 1996, § 95, *Reports* 1996-VI). Under certain conditions, the aggregate of remedies provided for under domestic law may satisfy the requirements of Article 13 (see, in particular, *Leander v. Sweden*, 26 March 1987, § 77, Series A no. 116).

208. However, Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 54, Series A no. 131). It does not go so far as to guarantee a remedy allowing a Contracting State's laws to be challenged before a national authority on the ground of being contrary to the Convention (see *Costello-Roberts*, cited above, § 40), but seeks only to ensure that anyone who makes an arguable complaint about a violation of a

Convention right will have an effective remedy in the domestic legal order (ibid., § 39).

(b) Application of those principles to the present case

209. The Court is of the opinion that, in view of its finding of a violation of Article 8 above, the complaint is arguable. It therefore remains to be ascertained whether the applicant had, under Swiss law, an effective remedy by which to complain of the breaches of his Convention rights.

210. The Court observes that the applicant was able to apply to the national authorities to have his name deleted from the list annexed to the Taliban Ordinance and that this could have provided redress for his complaints under the Convention. However, those authorities did not examine on the merits his complaints concerning the alleged violations of the Convention. In particular, the Federal Court took the view that whilst it could verify whether Switzerland was bound by the Security Council resolutions, it could not lift the sanctions imposed on the applicant on the ground that they did not respect human rights (see paragraph 50 above).

211. The Federal Court, moreover, expressly acknowledged that the delisting procedure at United Nations level, even after its improvement by the most recent resolutions, could not be regarded as an effective remedy within the meaning of Article 13 of the Convention (ibid.).

212. The Court would further refer to the finding of the CJEC 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" (see the *Kadi* judgment of the CJEC, § 299, see paragraph 86 above). The Court is of the opinion that the same reasoning must be applied, *mutatis mutandis*, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.

213. Having regard to the foregoing, the Court finds 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 no remedy in respect of the Convention violations that he alleged (see, *mutatis mutandis*, Lord Hope, in the main part of the *Ahmed and others* judgment, §§ 81-82, paragraph 96 above).

214. Accordingly, the Court dismisses the preliminary objection raised by the Government as to the non-exhaustion of domestic remedies and,

ruling on the merits, finds that there has been a violation of Article 13 taken together with Article 8.

IV. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

215. Relying on Article 5 § 1 of the Convention, the applicant argued that by preventing him from entering or transiting through Switzerland, because his name was on the Sanctions Committee's list, the Swiss authorities had deprived him of his liberty. Under Article 5 § 4, he complained that the authorities had not undertaken any review of the lawfulness of the restrictions to his freedom of movement. Those provisions read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> ...
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> ..."

1. Submissions of the parties and third-party interveners

(a) The Government

216. The Government, referring to the *Guzzardi v. Italy* (6 November 1980, Series A no. 39) and *S.F. v. Switzerland* (no. 16360/90, Commission decision of 2 March 1994, Decisions and Reports 76-B, pp. 13 et seq.) cases, argued that there had been no "deprivation of liberty" in the

present case. They stated that the purpose of the measure in question had never been to confine the applicant to the territory of Campione d'Italia. Only a ban on entering and transiting through Switzerland had been imposed on him. The fact that the applicant found that his movements were restricted by the impugned measure was attributable only to himself, because he had chosen to live in an Italian enclave surrounded by Swiss territory. Neither the sanctions as decided by the United Nations, nor their implementation by the Swiss authorities, had obliged him to remain a resident of Campione d'Italia. At any time he could thus have requested authorisation to transfer his home to another part of Italy.

217. As regards the effects and conditions of the measure, the Government observed that the applicant was not subject to any restriction apart from the ban – albeit theoretical in their view – on his entry into or transit through Switzerland. In particular, he was not under surveillance by the Swiss authorities, had no specific obligations and could have received as many visits as he wished. He was also able, at all times, to meet his lawyers freely. The Government further pointed out that the border between Campione d'Italia and Switzerland was not patrolled, so the ban on entry into Switzerland could not have been perceived by him as a physical obstacle.

218. For those reasons the Government contended that the impugned measure could not be regarded as a deprivation of liberty within the meaning of Article 5 § 1.

(b) The applicant

219. The applicant argued that the present case could not be compared to *S.F. v. Switzerland* (cited above), in which the Commission had declared inadmissible the complaint of an applicant under Article 5 that he had not been authorised to leave Campione d'Italia for several years. Firstly, in the applicant's case the inability to leave the area was not the result of a criminal conviction and, secondly, he had been unable to challenge the impugned restrictions in the context of a fair hearing, unlike the applicant in *S.F.*

220. The applicant did not dispute the fact that no physical obstacle prevented him from leaving Campione d'Italia, but he pointed out that the border with Switzerland was nevertheless occasionally subject to spot-checks and that, if it had been discovered in the context of such a check that he was attempting to enter a territory from which he was banned, he would have faced proceedings entailing heavy penalties.

221. The applicant stated that Campione d'Italia had a surface area of 1.6 sq. km and that, therefore, the space in which he could move freely was even smaller than that of the applicant in *Guzzardi* (cited above), who was on an island of 2.5 sq. km.

222. Moreover, the applicant pointed out that even the Federal Court itself had recognised that the restrictions amounted in effect to house arrest. For all those reasons, he contended that Article 5 § 1 should be applicable in his case.

(c) The French Government

223. The French Government, intervening as a third party, were of the opinion that Article 5 of the Convention could not be applicable to the situation of a person who was refused entry into or transit through a given territory, and that the particular circumstances of the case, stemming from the applicant's residence in an Italian enclave within the Canton of Ticino, could not change that assessment, unless the substance of that provision were to be substantially distorted.

2. The Court's assessment

224. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or is provided for by a lawful derogation under Article 15 of the Convention, which allows for a Contracting State "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under Article 5 "to the extent strictly required by the exigencies of the situation" (see, among other authorities, *Al-Jedda*, cited above, § 99; *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-163, ECHR 2009; and *Ireland v. the United Kingdom*, cited above, § 194).

225. Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4, a protocol not ratified by Switzerland. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, 15 March 2012; *Stanev v. Bulgaria* [GC], no. 36760/06, § 115, 17 January 2012; *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010; *Guzzardi*, cited above, §§ 92-93; *Storck v. Germany*, no. 61603/00, § 71, ECHR 2005-V;

and *Engel and Others v. the Netherlands*, 8 June 1976, § 59, Series A no. 22).

226. The Court is further of the view that the requirement to take account of the "type" and "manner of implementation" of the measure in question (see *Engel and Others*, § 59, and *Guzzardi*, § 92, both cited above) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell (see, for example, *Engel and Others*, § 59, and *Amuur*, § 43, both cited above). Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (see, *mutatis mutandis*, *Austin and Others*, cited above, § 59).

227. The Court observes that, in support of his argument that Article 5 must apply in the present case, the applicant relied particularly on the above-cited *Guzzardi* case. In that case, the application had been lodged by an individual who, being suspected of belonging to a "band of mafiosi", had been forced to live on an island within in an (unfenced) area of 2.5 sq. km, together with other residents in a similar situation and supervisory staff. The Court found that the applicant had been "deprived of his liberty" within the meaning of Article 5 and that he could therefore rely on the guarantees under that provision (see also *Giulia Manzoni v. Italy*, 1 July 1997, §§ 18-25, *Reports* 1997-IV).

228. By contrast, in the *S.F. v. Switzerland* case (cited above), where the applicant complained about not being authorised to leave Campione d'Italia for several years, the Commission declared the complaint inadmissible, finding that Article 5 was not applicable in that case. The Grand Chamber finds it appropriate in the present case to opt for the latter approach, for the following reasons.

229. In the applicant's concrete situation, the Court acknowledges that the restrictions were maintained for a considerable length of time. However, it observes that the area in which the applicant was not allowed to travel was the territory of a third country, Switzerland, and that, under international law, that country had the right to prevent the entry of an alien (see paragraph 164 above). The restrictions in question did not prevent the applicant from freely living and moving within the territory of his permanent residence, where he had chosen, of his own free will, to live and carry on his activities. The Court considers that, in these circumstances, his case differs radically from the factual situation in *Guzzardi* (cited above) and that the prohibition imposed upon the applicant does not raise an issue under Article 5 of the Convention.

230. The Court further recognises that Campione d'Italia represents a small area of territory. However, it observes that the applicant was not, strictly speaking, in a situation of detention, nor was he actually under

house arrest: he was merely prohibited from entering or transiting through a given territory, and as a result of that measure he was unable to leave the enclave.

231. In addition, the Court notes that the applicant did not dispute before it the Swiss Government's assertion that he had not been subjected to any surveillance by the Swiss authorities and had not been obliged to report regularly to the police (contrast *Guzzardi*, cited above, § 95). Nor does it appear, moreover, that he was restricted in his freedom to receive visitors, whether his family, his doctors or his lawyers (ibid.).

232. Lastly, the Court would point out that the sanctions regime permitted the applicant to seek exemptions from the entry or transit ban and that such exemptions were indeed granted to him on two occasions but he did not make use of them.

233. Having regard to all the circumstances of the present case, and in accordance with its case-law, the Court, like the Federal Court (see paragraph 48 above), finds that the applicant was not "deprived of his liberty" within the meaning of Article 5 § 1 by the measure prohibiting him from entering and transiting through Switzerland.

234. It follows that the complaints under Article 5 are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

235. Relying essentially on the same arguments as those examined by the Court under Articles 5 and 8, the applicant complained of treatment in breach of Article 3. He further alleged that his inability to leave the enclave of Campione d'Italia to go to a mosque had breached his freedom to manifest his religion or belief as guaranteed by Article 9.

236. In view of all the material in its possession, and even supposing that those complaints had been duly raised before the domestic courts, the Court does not find any appearance of a violation of Articles 3 and 9 of the Convention.

237. It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

238. 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."

A. Damage

239. The applicant did not submit any claim in respect of pecuniary or non-pecuniary damage.

240. Accordingly, there is no call to award him any sum on that account.

B. Costs and expenses

241. As regards costs and expenses, the applicant sought the reimbursement of 75,000 pounds sterling (GBP) plus value-added tax, for his lawyers' fees in connection with the proceedings before the Court, together with 688.22 euros (EUR) for expenses incurred by his lawyer in travelling to Campione d'Italia, for telephone calls and for office expenses.

242. The Government pointed out that the applicant had chosen to be represented by a lawyer practising in London who charged an hourly rate that was much higher than the average rates in Switzerland, and that this choice had entailed considerable travel expenses. In their submission, even if it were to be accepted that the present case was indeed as complex as the applicant claimed, the number of hours invoiced was excessive. Consequently, they submitted that in the event of the application being upheld, an amount of no more than 10,000 Swiss francs (CHF) would be a fair award.

243. The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of that violation by them (see *Neulinger and Shuruk*, cited above, § 159). Moreover, such costs and expenses must have been actually and necessarily incurred and must be reasonable as to quantum (ibid.).

244. The Court does not share the Government's opinion that the applicant should assume the consequences of his choice to be represented by a British lawyer. It would point out in this connection that, under Rule 36 § 4 (a) of the Rules of Court, the applicant's representative must be "an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them ...". However, it notes that only the complaints submitted under Articles 8 and 13 resulted, in the present case, in a finding of a violation of the Convention. The remainder of the

application is inadmissible. The sum claimed by the applicant is therefore excessive.

245. Consequently, having regard to the material in its possession and the criteria set out above, the Court finds it reasonable to award the applicant the sum of EUR 30,000 for the costs and expenses he has incurred in the proceedings before it.

C. Default interest

246. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objections that the application is incompatible *ratione personae* with the Convention and that the applicant lacks victim status;

2. *Joins to the merits* the Government's preliminary objection that the application is incompatible *ratione materiae* with the Convention;

3. *Dismisses* the Government's preliminary objection of non-exhaustion of domestic remedies in respect of the complaints under Articles 5 and 8, and *joins this objection to the merits* in respect of the Article 13 complaint;

4. *Declares* the complaints concerning Articles 8 and 13 admissible and the remainder of the application inadmissible;

5. *Dismisses* the Government's preliminary objection that the application is incompatible *ratione materiae* with the Convention and *holds* that there has been a violation of Article 8 of the Convention;

6. *Dismisses* the Government's preliminary objection of non-exhaustion of domestic remedies in respect of the Article 13 complaint and *holds* that there has been a violation of Article 13 of the Convention in conjunction with Article 8;

7. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the sum of EUR 30,000 (thirty thousand euros), plus any tax that may be

chargeable to the applicant on that sum, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 September 2012.

Michael O'Boyle	Nicolas Bratza
Deputy 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 this judgment:

(a) joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska;

(b) concurring opinion of Judge Rozakis joined by Judges Spielmann and Berro-Lefèvre;

(c) concurring opinion of Judge Malinverni.

N.B.
M.O'B.

JOINT CONCURRING OPINION OF JUDGES BRATZA, NICOLAOU AND YUDKIVSKA

1. While we have joined in the finding a violation of Article 8 of the Convention in the present case, we cannot fully share the reasoning in the judgment leading to such a finding. In particular, we entertain considerable doubts about the conclusion that Switzerland "enjoyed some latitude which was admittedly limited but nevertheless real in implementing the relevant binding resolutions of the UN Security Council" (paragraph 180). This conclusion is not in our view borne out by the terms of the resolutions themselves or by the provisions of the United Nations Charter under which they were issued. Moreover, despite the attention devoted to the point in the judgment, it does not ultimately appear to have played a central role in the Court's conclusion that Article 8 was violated, a conclusion which is founded less on Switzerland's failure to exploit any latitude afforded to it in the relevant resolutions than on its failure to take any, or any sufficient, measures to safeguard the applicant's Convention rights within the constraints set by those resolutions.

2. As is correctly pointed out in the judgment, Resolution 1390 (2002) expressly required States to prevent individuals whose names appeared in the list of the sanctions Committee of the United Nations from entering or transiting through their territory. In this respect, the case differs from that examined by the Court in *Al-Jedda v. the United Kingdom* ([GC], no. 27021/08, ECHR 2011), where the Court held that the wording of the resolution in issue did not specifically mention internment without trial and 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. In the present case, clear and specific language was used in the relevant Resolution, as well as in paragraph 7 of Resolution 1267 (1999) in which the Security Council was even more explicit, setting aside any other international obligations that might be incompatible with the Resolution in question.

3. True it is, as is pointed out in the judgment, that at the time when it adopted the Taliban Ordinance of 2 October 2000 and when it added Article 4 (a) of the Ordinance to give effect to Resolution 1390 (2002), Switzerland was not a member of the United Nations but was already bound by the European Convention. However, this is we consider of little significance. As is noted in the judgment, the relevant resolutions were addressed to "all States" and not only to the member States of the United Nations. It is also clear that the requirement to prevent the entry into or transit through Swiss territory in any event applied to Switzerland from the date on which it became a member of the United Nations in September 2002. Not only was Switzerland obliged to add the applicant to the list of

proscribed persons at the latest from that date but we note that, in October 2003, following criticism by the Monitoring Group established under Resolution 1363 (2001), Switzerland was obliged to revoke the applicant's special border-crossing permit which had enabled him to travel relatively freely between Switzerland and Italy (see paragraph 25 of the judgment).

4. The finding in the judgment that a latitude was left to States is essentially based on an argument that the United Nations Charter does not impose a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, the Charter leaving in principle to the member States of the United Nations a free choice among the various possible models for transposing those resolutions into their domestic legal order (paragraph 176).

5. We readily accept that different means may be open to States by which to give effect to obligations imposed on them by the relevant Security Council resolutions. But the obligation imposed on States under Resolution 1390 (2002) was a binding one which, subject to the exceptions or exemptions expressly contained in the Resolution itself, allowed no flexibility or discretion to the States as to whether to give full effect to the sanctions imposed but required them to prohibit the entry into or transit through their territories of all persons included in the Sanctions Committee list. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disapplied the provisions where entry or transit was necessary for the fulfilment of a judicial process.

6. We similarly find no support for the view in paragraph 178 of the judgment that latitude was afforded to States by paragraph 8 of the Resolution itself, in which States were urged to take immediate steps to enforce and strengthen "through legislative and enactments or administrative measures, where appropriate, the measures imposed under domestic law or regulations against their nationals and other individuals or entities, operating on their territory, to prevent and punish violations of the measures referred to in paragraph 2 of this resolution". Certainly, as noted in the judgment, the words "where appropriate" contemplated that the authorities would have a choice between legislative and administrative measures and were thereby granted a certain flexibility in the means by which the measures were enforced and strengthened. But those words certainly do not suggest that any latitude was granted so far as concerned the obligations on States to give full effect to the terms of paragraph 2 of the Resolution.

7. We are also unpersuaded by the reliance in paragraph 179 of the judgment on the motion of 1 March 2010 by which the Foreign Policy Commission of the Swiss National Council requested the Federal Council to inform the UN Security Council that, from the end of 2010, it would no longer in certain cases apply the sanctions prescribed against individuals under the counter-terrorism resolutions. Doubtless, the Swiss Parliament by

adopting that motion may have been "expressing its intention to allow a certain discretion in the application of the counter-terrorism resolutions". However, the fact that several months after the applicant's name had been deleted from the list the Parliament unilaterally asserted a discretion to refuse to comply unconditionally with the terms of the Resolution is one thing; whether any such discretion or latitude was afforded to Switzerland under the Resolution itself is quite another. In our view, it clearly was not.

8. Like the Swiss Federal Court, we accordingly consider that States enjoyed no latitude in their obligation to implement the sanctions imposed by the relevant Security Council Regulations and that Switzerland was debarred from deciding of its own motion whether or not sanctions should continue to be imposed on a person or organisation appearing on the Sanctions Committee list.

9. However, this does not resolve the issue under Article 8 of the Convention. Although constrained to act strictly in accordance with the provisions of Resolution 1390 (2002) notwithstanding any rights or obligations conferred under the Convention, States were not absolved from the obligations to take such steps as were open to them to mitigate the effects of the measures insofar as they had an impact on the private or family life of the individuals concerned.

10. The situation of the present applicant was, if not unique, highly exceptional and the impact of the Taliban Ordinance on his private and family life was indisputably serious. The impugned measures constituted, as the Federal Court expressly found, a significant restriction on the applicant's freedom on account of the location of Campione d'Italia, a small enclave surrounded by the Swiss Canton of Ticino where he had established his home since 1970. He was prevented, at least from October 2003, not only from entering Switzerland but from leaving Campione d'Italia at all, even to travel to other parts of Italy, the country of which he was a national. The prohibition made it exceptionally difficult for him to maintain contact with others, including members of his own family, living outside the enclave. In these circumstances, the Swiss authorities were, as the Federal Court put it, "obliged to exhaust all the relaxations of the sanctions regime available under the UN Security Council resolutions". They were also, in our view, required to take all such other steps as were reasonably open to them to bring about a change in the regime so as to reduce so far as possible its serious impact on the private and family life of the applicant.

11. Switzerland was not able of its own motion and consistently with the relevant Resolutions, to delete the applicant's name from Annex 2 to the Taliban Ordinance, the Sanctions Committee alone being responsible for the deletion of persons or entities. Nor, since the applicant's name was not added to the list on the initiative of Switzerland and since it was neither the State of the applicant's citizenship nor that of his residence, did Switzerland have any formal competence under the Resolutions to take action to have

the applicant's name deleted by the Sanctions Committee. Nevertheless, in common with the other members of the Grand Chamber, we consider that the Swiss authorities did not sufficiently take into account the specific circumstances of the applicant's case, including the considerable duration of the measures imposed, and the applicant's nationality, age and health. Nor, in our view, did those authorities take all reasonable steps open to them to seek to mitigate the effect of the sanctions regime by the grant of requests for exemption for medical reasons or in connection with judicial proceedings, or to bring about a change in the sanctions regime against the applicant so as to secure so far as possible his Convention rights.

12. Of the measures open to the authorities which are referred to in the judgment, we attach special importance to the failure of the authorities to inform the Sanctions Committee until 2 September 2009 of the conclusions of the investigation against the applicant, which had been discontinued well over four years before, on 31 May 2005. The fact that the investigation against the applicant had been discontinued was of obvious importance to the prospect of the removal of the sanctions against him. In this regard, we note that the applicant's name was in fact deleted from the list on 23 September 2009, shortly after Switzerland sent to the Sanctions Committee a copy of the letter from the Federal Prosecutor's Office confirming that the judicial police investigation against the applicant had not produced any indications or evidence to show that he had ties with persons or organisations associated with Osama bin Laden, al-Qaeda or the Taliban. The failure to communicate this information was the subject of specific criticism by the Federal Court which, while noting that by the date of its judgment in November 2007 the applicant was able to apply himself to initiate the delisting procedure, emphasised that he continued to rely on the support of Switzerland, since this was the only country to have conducted a comprehensive preliminary investigation into the applicant's activities. We fully share the view of the Federal Court that, while Switzerland could not itself proceed with deletion, it could at the very least have transmitted the results of the investigation to the Sanctions Committee and have actively supported the delisting of the applicant. With the benefit of the results of its own investigation, it could also have encouraged Italy, as the State of nationality and residence of the applicant, to take steps earlier than July 2008 to request the deletion of the applicant's name. Such measures were not bound to have met with success. There remained, however, a real prospect that they would have resulted in the deletion of the applicant's name and the restoration of his Article 8 rights at a much earlier stage than eventually occurred.

CONCURRING OPINION OF JUDGE ROZAKIS JOINED BY JUDGES SPIELMANN AND BERRO-LEFEVRE

I fully share the decisions of the Court under all heads, and have voted accordingly. There is nevertheless a point on which I wish to depart from the reasoning of my colleagues. It is a matter which does not affect the overall approach or the way that I have voted. And it consists of the following.

The applicant complained that the measure by which he was prohibited from entering or passing through Switzerland had breached his right to respect for his private life, including his professional life and his family life (see paragraph 149 of the judgment). In support of his contention, he invoked a number of instances showing that his private and family life had been affected. Among them he claimed that the addition of his name to the list annexed to the Taliban Ordinance had impugned his honour and reputation, and he thus relied for all these complaints on Article 8 of the Convention.

The Court, while it examined in detail all the particular aspects of his complaints, when dealing both with the admissibility and with the merits of the case, preferred not to raise at all the issue of his honour and reputation. In its concluding paragraph (paragraph 199) it simply refers to the honour and reputation complaint by "side-stepping" it, using the well-known formula that there is no need to examine this complaint separately.

Here, then, lies my difference of approach. The applicant's complaint concerning his honour and reputation is not a distinct complaint which is independent from all the other aspects of his allegation of a violation of Article 8 of the Convention. It is one of the constitutive parts of his main complaint that his private and family life were affected by the Swiss authorities' conduct. It is well known – and undoubtedly the applicant was relying on this – that honour and reputation have been considered by the Court as an element of private life worthy of particular protection under Article 8. By discarding this particular aspect of an otherwise homogeneous and comprehensive complaint, the Court has given the wrong impression that honour and reputation should be examined separately – if at all – and that they do not necessarily belong to the hard core of the constitutive parts of private life.

For these reasons I would like to express my disagreement with the way that paragraph 199 is drafted and the failure by the Court to take on board the issue of honour and reputation. After all, the reasoning required to encompass that particular aspect as well would not have differed radically from that adopted by the Court in its overall analysis of Article 8, leading to the finding of a violation.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

1. I share the Court's opinion that in the present case there has been a violation of Article 8 of the Convention. I am not, however, convinced by the reasoning through which it reached that conclusion.

I

2. The Court's entire line of argument is based on the statement that, in implementing the Security Council resolutions, the respondent State "enjoyed some latitude, which was admittedly limited but nevertheless real" (paragraph 180). To support that statement it gives the following reasons (see paragraphs 175-179).

3. The Court begins by noting that the respondent State's latitude derives from the very wording of those resolutions. Paragraph 2(b) of Resolution 1390 (2002) thus provides that the prohibition does not apply "where entry or transit is necessary for the fulfilment of a judicial process...". The Court infers from this that the adjective "necessary" allows the authorities a certain latitude and is "to be construed on a case-by-case basis" (paragraph 177). Whilst that is certainly true, the Court appears to overlook the fact that the wording here concerns an exception to the general rule set out in that same provision, far more than being an acknowledgment of any room for manoeuvre that the domestic authorities may have had in applying the latter. Moreover, apart from the case of judicial proceedings, this provision grants such latitude to the Sanctions Committee, but not to the States.

4. The Court further relies on the expression "where appropriate" in paragraph 8 of Resolution 1390 (2002) to assert that the wording also had the effect of "affording the national authorities a certain flexibility in the mode of implementation of the resolution" (paragraph 178). In my view, however, it misconstrues that provision of Resolution 1390. The expression "where appropriate" in fact relates to the words immediately before it, namely "legislative enactments or administrative measures". This simply means that, depending on the legal order of the various States, and in the particular circumstances, the State will either have to make legislative enactments or to take administrative measures. No conclusion can thus be drawn from this about the latitude afforded to States in the implementation of the resolution.

5. The Court's last argument concerns the motion by which the Foreign Policy Commission of the Swiss National Council requested the Federal Council to inform the UN Security Council that it would no longer unconditionally be applying the sanctions prescribed against individuals

under the counter-terrorism resolutions. In adopting that motion, it is said, the Federal Parliament was expressing "its intention to allow a certain discretion in the application of the Security Council's counter-terrorism resolutions" (paragraph 179). Whilst that is certainly true, no inferences can be drawn from this about the latitude afforded to Switzerland in the present case, as the motion was adopted on 1 March 2010 (see paragraph 63), that is to say after the applicant's name had been deleted from the list, on 23 September 2009 (see paragraph 62).

6. On the strength of its finding that the respondent State enjoyed a certain latitude in the implementation of the UN resolutions, the Court then examined whether, in the present case, the interference with the rights protected by Article 8 respected the proportionality principle. It answered that question in the negative, finding in particular that "the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health". Accordingly, in the Court's view, the interference with the applicant's right to respect for his private and family life "was not necessary in a democratic society".

7. Some of the arguments used by the Court to reach this conclusion do not, however, appear convincing. Thus, can Switzerland seriously be criticised – bearing in mind that the applicant was not a Swiss national – for failing to provide him with assistance in seeking from the Sanctions Committee a broader exemption from the sanctions affecting him because of his specific situation, when he had not even requested such assistance (paragraph 193)? Or for failing to encourage Italy to take steps to obtain the deletion of the applicant's name from the Sanctions Committee's list, when it was for the State of citizenship or residence of the person concerned to initiate the delisting procedure (paragraph 194)?

II

8. The opinion that Switzerland had not been afforded any room for manoeuvre was, moreover, also expressed by the Federal Court, which found as follows in this connection (see paragraph 50):

> "8.1 ... The sanctions (freezing of assets, entry and transit ban, arms embargo) are described in detail and afford member States no margin of appreciation in their implementation ... The member States are thus debarred from deciding of their own motion whether or not sanctions should continue to be imposed on a person or organisation appearing on the Sanctions Committee's list."

Further on, the Federal Court examined whether the travel ban under Article 4(a) of the Federal Taliban Ordinance went beyond the sanctions introduced by the Security Council resolutions and, if so, whether the Swiss

authorities had a certain latitude in this area. It answered in the negative (see paragraph 52):

> "10.2 Article 4a § 2 of the ... Ordinance is formulated as an 'enabling' provision and gives the *impression*[1] that the Federal Office of Migration has a certain margin of appreciation ... The Federal Office of Migration thus has no margin of appreciation. Rather, it must examine whether the conditions for the granting of an *exemption*[2] are met."

9. The French and United Kingdom Governments, intervening as third parties, shared this opinion and stated that the Swiss authorities had no latitude in the implementation of the Security Council resolutions (see paragraph 175). In the submission of the UK Government, in particular, the Security Council had used "clear and explicit language" to impose specific measures on States (see paragraph 111).

10. In conclusion, taking into account the very clear and mandatory terms of the Security Council resolutions in question, obliging States to apply them strictly and in full, without consideration of the rights and obligations arising from any other international conventions that they had ratified, and since the sanctions were described in a detailed manner, with the names of the persons concerned appearing on exhaustive lists, it is difficult, in my opinion, to sustain the argument that Switzerland had any room for manoeuvre in the present case. The situation here was undeniably one of *mandatory* power and not one of *discretionary* power. I therefore believe that the Court erred in its approach. In my view, it should have followed that of the Federal Court, but to arrive at the opposite conclusion.

III

11. The Federal Court, as it could not infer from the wording of the UN resolutions which it had to apply that there was any room for manoeuvre enabling it to interpret them consistently with the applicant's fundamental rights, had no choice but to settle the question before it on the basis of the hierarchy of norms principle. It gave priority to Switzerland's obligations under the resolutions in question over those imposed on it by the Convention and by the International Covenant on Civil and Political Rights. Was that decision correct or can the Swiss supreme court be criticised for blindly enforcing, without calling into question, the obligations imposed on Switzerland by the Security Council resolutions?

12. The Court did not address this question. In its view, the conclusion that it had reached dispensed it from "determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on

[1] Emphasis added
[2] Emphasis added

the one hand, and those arising from the United Nations Charter, on the other. .... [T]he important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent" (paragraph 197). I have great difficulty sharing this view, for the following reasons.

13. The Security Council was well aware of the conflict that would inevitably arise between its own resolutions and the obligations that certain States had assumed in ratifying international human rights treaties. For each of the resolutions that it adopted, it thus expressly stipulated that States were obliged to comply with them "notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ... prior to the date of coming into force of the measures imposed" (Resolution 1267 (1999) paragraph 7; Resolution 1333 (2000), paragraph 17; quoted in paragraphs 70-71 of the judgment).

14. Was the Security Council entitled to act in that manner? Of course, under Article 25 of the United Nations Charter, the member States are required to accept and apply its decisions. Moreover, Article 103 of the Charter stipulates that in the event of any conflict between the obligations of United Nations members under the Charter and their obligations under any other international agreement, the Charter obligations will prevail. And according to the case-law of the International Court of Justice, that primacy is not limited to the provisions of the Charter itself but extends to all obligations arising from binding resolutions of the Security Council[3].

15. But do those two Charter provisions actually give the Security Council carte blanche? That is far from certain. Like any other organ of the United Nations, the Security Council is itself also bound by the provisions of the Charter. And Article 25 *in fine* thereof stipulates that members of the world organisation are required to carry out the decisions of the Security Council "in accordance with the present Charter". In Article 24 § 2 the Charter also provides that in discharging its duties "the Security Council shall act in accordance with the Purposes and Principles of the United Nations". Article 1 § 3 of the Charter reveals that those purposes and principles precisely include "respect for human rights and for fundamental freedoms". One does not need to be a genius to conclude from this that the Security Council itself must also respect human rights, even when acting in its peace-keeping role. This view indeed seems to have been confirmed by decisions recently taken by certain international bodies.

16. In its *Kadi and Al Barakaat* judgment of 3 September 2008[4], the Court of Justice of the European Communities ("CJEC") readily found that it had jurisdiction to examine the lawfulness of Regulation (EC)

[3] *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,* § 42

[4] See paragraph 83 of the present judgment.

No 881/2002, which implemented the Security Council's al-Qaeda and Taliban resolutions. It went on to find that the applicants' rights, in particular their defence rights, right to effective judicial review and their right to property, had been infringed:

> "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*." (§ 326)[5]

17. The CJEC thus set aside the two judgments under appeal, finding that the Court of First Instance had erred in law when it held 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 [was] 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 concern[ed] its internal lawfulness ..." (§ 327).

18. That judgment of the Luxembourg Court may be described as historic, as it made the point that respect for human rights formed the constitutional foundation of the European Union, with which it was required to ensure compliance, including when examining acts implementing Security Council resolutions[6].

19. The Human Rights Committee, in its findings of 22 October 2008 in *Sayadi and Vinck v. Belgium* (see paragraph 88 of the judgment), also found that it was competent to rule on the communication addressed to it, "regardless of the source of the obligations implemented by the State party" (point 7.2), that is to say even if that source were to be found in a Security Council resolution. It therefore examined the compatibility with the Covenant of the national measures adopted to implement the relevant Security Council resolution and found that there had been a violation of some of the Covenant's provisions.

20. This raises a question: should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case? After all, is the Court not the "ultimate bulwark against the violation

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[5] Emphasis added.

[6] See Hanspeter Mock and Alvaro Borghi, "Vers une sortie du labyrinthe des listes antiterroristes de l'ONU", in *Les droits de l'homme en évolution : mélanges en l'honneur du professeur Petros J. Pararas*, Athens-Brussels, 2009, p. 406.

of fundamental rights"?[7]. I am totally aware of the fact that the Security Council resolutions as such fall outside the Court's direct supervision, the United Nations not being a party to the Convention. That is not the case, however, for acts taken by States pursuant to those resolutions. Such acts are capable of engaging the responsibility of States under the Convention. Moreover, the fundamental principles in matters of human rights are nowadays not only enshrined in specific international instruments, but are also part of customary law, which is binding on all subjects of international law, including international organisations.[8]

IV

21. Article 103 of the Charter played a decisive role in the Federal Court's reasoning. It was on the basis of that provision that it gave priority to the Security Council resolutions over Switzerland's obligations under the Convention and the International Covenant on Civil and Political Rights. It may be questioned, however, whether such an interpretation of Article 103 is not open to criticism from the standpoint of the balance that States should strike between the requirements of collective security and respect for fundamental rights, since it means that rights will be sacrificed for the sake of security[9]. In its *Kadi* judgment the CJEC certainly implied that Security Council resolutions did not enjoy absolute priority in the hierarchy of Community norms, especially in relation to fundamental rights (see *Kadi*, § 293). In other words, the *Kadi* judgment is unquestionably the result of a balance between the requirement of the fight against terrorism on the one hand and respect for human rights on the other.

22. Article 103 of the Charter provides for the pre-eminence of that instrument over any other international agreement. As I have already noted, according to the International Court of Justice this primacy is not confined to the Charter provisions alone but extends to all binding provisions of Security Council resolutions. Nevertheless, according to the very wording of Article 103 of the Charter, this provision applies exclusively to "the obligations ... under the present Charter". Would it not then be appropriate to draw a distinction between the Charter itself, as the *primary* legislation of the United Nations, and the Security Council resolutions, which, although

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[7] See Josiane Auvret-Finck, "Le contrôle des décisions du Conseil de sécurité par la Cour européenne des droits de l'homme", in *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne ; équilibres et déséquilibres de la balance*, Constance Grewe et al. (eds.), Brussels, 2010, p. 214.

[8] See, to this effect, Luigi Condorelli, "Conclusions", in G.M. Palmieri (ed.), *Les évolutions de la protection juridictionnelle des fonctionnaires internationaux et européens - développements récents*, Brussels, 2012, p. 359.

[9] See Pasquale De Sena, "Le Conseil de sécurité et le contrôle du juge", in *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne* (note 7, supra), p. 44.

binding (Article 25), may be regarded more as *secondary* or *subordinate* UN legislation? Their superiority over "any other international agreement" could then be seen in relative terms, in the light of Article 103 of the Charter, particularly where the agreement in question is an international human rights treaty[10].

23. Such an approach would be all the more justified by the consideration that, as the Parliamentary Assembly resolution of 23 January 2008[11] rightly stated, despite some recent improvements, the basic substantive and procedural standards applied by the Security Council "in no way fulfil the minimum standards ... and violate the fundamental principles of human rights and the rule of law". The system in place in the United Nations at the material time was thus far from offering an *equivalent* protection to that guaranteed by the Convention, with the result that it does not seem possible to rely here on a presumption of Convention compliance on the part of the Security Council. The *Bosphorus* case-law is not yet applicable to the law of the United Nations[12].

24. This is all the more true as the situation in the present case concerned not *general* sanctions but *targeted* sanctions, which as such had a direct impact on the applicant's fundamental rights, in relation both to the manner of his inclusion on the Sanctions Committee's list and to the lack of remedies[13]. As one commentator has rightly stated "for as long as the United Nations has not introduced a human rights protection mechanism ... comparable or equivalent to that introduced in the member States and at European level, the domestic and European courts remain competent to verify that acts implementing Security Council decisions respect fundamental rights"[14]. Accordingly, any insufficient, or even deficient, protection of those rights in the context of the United Nations system, where it has not been compensated for by a review of such respect at domestic level, should lead the Court to find a violation of the Convention[15].

25. It cannot be claimed nowadays that the human rights obligations of States vanish in the event that, instead of acting individually, they decide to cooperate by entrusting certain powers to international organisations that they themselves have set up. In its *Waite and Kennedy v. Germany* judgment of 18 February 1999 the Court indeed asserted that "where States establish international organisations in order to pursue or strengthen their

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[10] See, to this effect, Mock/Borghi (note 6, supra), p. 42

[11] Resolution 1597 (2008), *United Nations Security Council and European Union blacklists.*

[12] See Josiane Auvret-Finck (note 7, supra), p. 235.

[13] See the report by Dick Marty, Doc. 11454, *United Nations Security Council and European Union blacklists.*

[14] Constance Grewe, "Les exigences de la protection des doits fondamentaux", in *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne* (note 7, supra).

[15] See Josiane Auvret-Fink (note 7, supra), p. 241.

cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights". Also that it "would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution"[16].

26. International organisations themselves are thus also bound by international human rights norms, since respect for such rights "far from hindering the fight against terrorism, constitutes a weapon against extremist ideologies that prosper by negating them"[17].

V

27. One last point: in paragraph 199 of its judgment the Court states that "[h]aving regard to that conclusion [the finding of a violation of Article 8 on account of the restriction of the applicant's freedom of movement], and notwithstanding that the applicant's allegation that the addition of his name to the list annexed to the Taliban Ordinance also impugned his honour and reputation constitutes a separate complaint, ... it does not need to examine that complaint separately".

28. The merits of that conclusion are open to question. The applicant certainly raised two totally separate complaints before the Court (see paragraphs 156 and 157), even though they both fell within the scope of Article 8 in terms of the protection of private life. However, whilst the first complaint concerned physical liberty to move around freely, the second concerned damage to the applicant's moral integrity, resulting from the very fact that his name appeared on the Sanctions Committee's list. In addition, whilst the first complaint was intrinsically linked to the highly specific geographical situation of the Campione d'Italia enclave, with its very confined territory, the second was much more general in effect. That aspect of his application was certainly, in the applicant's view, equally as important – if not more so – as the restrictions that had been imposed on his freedom of movement.

29. For all these reasons, the applicant's second complaint, in my view, warranted a separate examination; especially as I fail to see how the Court could have, in respect of this complaint, used the same reasoning as that adopted for the first complaint, which was based solely on the latitude afforded to the respondent State in implementing the Security Council

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[16] See *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I. See also, to this effect, Luigi Condorelli, "Conclusions", in *La soumission des organisations internationales aux normes internationales relatives aux droits de l'homme*, Paris, Pédone, 2009, p. 132.

[17] See Josiane Auvret-Finck (note 7, supra), p. 243.

resolutions, or could then have found a violation of Article 8 for failure to respect the proportionality principle. For the purposes of examining whether a person's name should be included on the Sanctions Committee's list, I certainly find it difficult to imagine a balancing of the interests at stake by the respondent State.