IN THE EUROPEAN COURT OF HUMAN RIGHTS **APP. NO. 10593/08**
B E T W E E N:-

NADA

Applicant

-v-

SWITZERLAND

Respondent Government

THIRD PARTY INTERVENTION SUBMISSIONS BY JUSTICE[1]

INTRODUCTION AND SUMMARY

1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance access to justice, human rights and the rule of law. It is the British section of the International Commission of Jurists and one of the leading civil liberties and human rights organisations in the UK. It welcomes the opportunity to intervene as a third party in this case, by the leave of the President of the Court granted 18 November 2010.

2. These submissions address (i) the compatibility of the sanctions regime under the United Nations Security Council Resolution 1267 with fundamental rights; and (ii) more generally, the relevant principles in determining the relationship between a High Contracting Party's obligations under the Convention and its obligations under a UN Security Council Resolution.

3. In outline, JUSTICE submits that:

   (a) The sanctions regime established by UNSCR 1267 involves draconian restrictions on the Convention rights of designated persons and their family members, including their rights to respect for private and family life, enjoyment of property, and freedom of movement;

   (b) The severity of this interference with Convention rights is exacerbated by the inability of designated persons to challenge effectively the decision to list them, including the evidential basis for the decision. Consequently, the sanctions regime also fails to afford designated persons and family members the right of access to a court and the right to an effective remedy. Nor do the procedures of the sanctions committee otherwise provide equivalent protection for these Convention rights;

   (c) These conclusions are 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 the decisions of the Federal Court of Canada, the UK Supreme Court, and the Court of Justice of the European Union; and

   (d) The Court is not obliged to interpret Article 103 of the Charter in such a manner that it would result in Convention rights being displaced.

4. As directed, these submissions do not comment on the facts or merits of the case.

COMPATIBILITY OF THE SANCTIONS REGIME UNDER UN SECURITY COUNCIL RESOLUTION 1267 WITH FUNDAMENTAL RIGHTS

5. The compatibility of the sanctions regime established by UN Security Council Resolution 1267 (1999) ('UNSCR 1267') with fundamental rights has been called into question on a number of occasions, including decisions by courts in Canada, Europe and the UK, and reports by the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights and the UN Special Rapporteur on Human Rights and Terrorism.

6. In particular, judges in different countries have repeatedly expressed concerns about (i) the severity of the sanctions UNSCR 1267 imposes on designated persons, including travel restrictions and the freezing of assets, giving rise to significant interference with basic rights, including the right to respect for private and family life, the right to enjoyment of property and the right to freedom of movement; and (ii) the wholesale lack of effective judicial review to enable designated persons to challenge their listing, including the evidential basis upon which they have been listed.

2009 Findings of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights

7. In February 2009, the Eminent Jurists Panel – an initiative of the International Commission of Jurists – published its report, *Assessing Damage, Urging Action*;[2] the culmination of a three year investigation which involved 16 hearings covering more than 40 countries in different parts of the world.

8. The Panel, chaired by Justice Arthur Chaskalson – the former Chief Justice of South Africa and the first President of its Constitutional Court, noted that while the 'listing' of individuals suspected of involved in terrorism may seem 'on the face of it' to be 'the least far-reaching or intrusive of the various preventive measures' it had encountered:[3]

> *yet its impact can be considerable. Advances in modern technology and international cooperation also make the potential impact of listing even greater. The Panel learnt that this measure (like deportation, administrative detention and control orders)* has had disastrous effects on the life and the livelihood of an individual who is listed, or who is associated with a listed organisation, as well as their families. *The consequences can be legal, social, reputational, and financial.*

9. Referring in particular to the procedure of the 1267 Committee it said:[4]

> *It is disturbing to report that there is not due process in the listing procedures carried out by the United Nations. Belatedly, some incremental changes have been introduced in response to criticism, including for example a requirement for subsequent notification that the individual or entity has been listed, and the provision of a 'statement of the case' outlining allegations against them. There are however no effective means for challenging a listing decision once made because, despite some reforms, the listed individual or entity seeking de-listing or exemptions must continue to rely on the goodwill of a State, and has no possibility of directly petitioning the Committee. The decision to remove someone from a list is essentially a political one, in that it is taken by consensus by the Sanctions Committee whose membership corresponds to that of the Security Council, allowing any Member State the power to veto a de-listing decision. There is no option for independent review. Once listed by the UN, there is no time-limit to the listing, and de-listing will prove extremely difficult, since it requires the agreement of all five permanent members.*
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> *…. The Panel received virtually uniform criticism of the system as it presently operates. The UN sanctioning lists is seen as arbitrary, and this then causes difficulties for Member States if they try to abide by UN procedures. On the one hand, States have their domestic and international human rights obligations, and on the other hand, their obligations to implement decisions under Chapter VII of the UN Charter. The contradiction leaves States open to legal challenge*
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> *… Nor is it necessary to rehearse again the problems likely to be created by such lists when they are maintained in large part as a result of secret intelligence: difficult as it might be for courts to assess intelligence sources in the domestic context, it is even less likely that courts will be in a position to challenge any secret information on which the Security Council sanctioning system is based. The decision to place individuals on the UN or EU listings lacks even the rudimentary safeguards that may exist at the national level.*

10. Among the report's conclusions was the recommendation that:[5]

> *the freezing of assets and other actions on the basis of terrorist lists, must in the first place be necessary and proportionate, limited in time, non-discriminatory and subject to independent periodic review*. Furthermore, those affected must have an effective and speedy opportunity to challenge the allegation before a judicial body.

***2009 Judgment of the Federal Court of Canada in* Abdelrazik v Canada (Minister of Foreign Affairs)**

11. In *Abdelrazik v Canada (Minister of Foreign Affairs)* [2010] 1 FCR 267, the applicant - a dual Sudanese Canadian national - challenged the refusal of the Canadian government to issue him with a passport in order that he might return to Canada from Sudan. He alleged this breached his right as a Canadian citizen under section 6(1) of the Canadian Charter of Rights and Freedoms 1982 to enter Canada.

12. In response, the Canadian government relied on the fact that the applicant had been listed by the Sanctions Committee of the UN Security Council, known as the 1267 Committee, as grounds for its refusal to issue him with a passport. To do otherwise, the government said, would put it in breach of its obligations under the resolution.

13. However, the court held that the terms of the travel ban under resolution 1267 did not in fact raise a bar to his repatriation[6] and, as such, could not excuse a violation of his constitutional right to return under the Canadian Charter. In the course of his judgment, Justice Zinn criticised the operation and procedures of the 1267 Committee:[7]

> *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. Unlike the first Canadian security certificate scheme that was rejected by the Supreme Court in* Charkaoui v. Canada (Citizenship and Immigration) *… the 1267 Committee listing and de-listing processes do not even include a limited right to a hearing. It can hardly be said that the 1267 Committee process meets the requirement of independence and impartiality when, as appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body that decides whether to list or, equally as important, to de-list a person. The accuser is also the judge.*

In particular, the judge was strongly critical of the lack of an effective opportunity to obtain de-listing by the Committee:[8]

> *It is difficult to see what information any petitioner could provide to prove a negative, i.e. to prove that he or she is not associated with Al-Qaida. One cannot prove that fairies and goblins do not exist any more than Mr. Abdelrazik or any other person can prove that they are not an Al-Qaida associate. It is a fundamental principle of Canadian and international justice that the accused does not have the burden of proving his innocence, the accuser has the burden of proving guilt. In light of these shortcomings, it is disingenuous of the respondents to submit, as they did, that if he is wrongly listed the remedy is for Mr. Abdelrazik to apply to the 1267 Committee for de-listing and not to engage this Court. The 1267 Committee regime is, as I observed at the hearing, a situation for a listed person not unlike that of Josef K. in Kafka's* The Trial, *who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.*

***2010 Judgment of the UK Supreme Court in* Ahmed and others v HM Treasury**

14. The impact of the asset-freezing regime under UN Security Council Resolution 1267 upon fundamental rights was also considered in some detail by the UK Supreme Court in *Ahmed and others v HM Treasury* [2010] UKSC 2.

15. In that case, two of the appellants Mohammed al-Ghabra (who had previously been referred to as 'G' in the courts below) and Hani El Sayed Sabaei Youssef (previously referred to as 'HAY') had had their names added to the consolidated list by the Sanctions Committee of the UN Security Council, known as the 1267 Committee. This resulted in the UK government deeming both men to be designated under the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952) ('the Al Qaida Order') – an Order in Council made by the Treasury under the United Nations Act 1946 to give effect to the UK's obligations under UNSCR 1267.

16. The effect of designation was described by Lord Hope, the Deputy President of the Supreme Court, in the following terms:[9]

> *The Orders provide for the freezing, without limit of time, of the funds, economic resources and financial services available to, among others, persons who have been designated.* Their freedom of movement is not, in terms, restricted. But the effect of the Orders is to deprive the designated persons of any resources whatsoever. So in practice they have this effect. Persons who have been designated, as Sedley LJ observed in the Court of Appeal, are effectively prisoners of the state: A and others v HM Treasury *[2008] EWCA Civ 1187; [2009] 3 WLR 25, para 125. Moreover the way the system is administered affects not just those who have been designated. It affects third parties too, including the spouses and other family members of those who have been designated. For them too it is intrusive to a high degree: see* R(M) v HM Treasury (Note) *[2008] UKHL 26, [2008] 2 All ER 1097.*

17. He continued:[10]

> *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.*

18. In particular, he noted:[11]

> *The effect of the regimes that the [Terrorism Order] and the [Al Qaeda Order] impose is that every transaction, however small, which involves the making of any payments or the passing of funds or economic resources whatever directly or indirectly for the benefit of a designated person is criminalised.* This affects all aspects of his life, including his ability to move around at will by any means of private or public transport. *To enable payments to be made for basic living expenses a system of licensing has been created. It is regulated by the Treasury, whose interpretation of the sanctions regime and of the system of licensing and the conditions that it gives rise to is extremely rigorous.* The overall result is very burdensome on all the members of the designated person's family. The impact on normal family life is remorseless and it can be devastating…

19. Lord Brown described the asset-freezing regime in the following terms:[12]

> The draconian nature of the regime imposed under these asset-freezing Orders can hardly be over-stated. *Construe and apply them how one will – and to my mind they should have been construed and applied altogether more benevolently than they appear to have been* – they are scarcely less restrictive of the day to day life of those designated (and in some cases their families) than are control orders. In certain respects, indeed, they could be thought even more paralysing. *Undoubtedly, therefore, these Orders provide for a regime which considerably interferes with the article 8 and article 1 of Protocol 1 rights of those designated. Similarly, it is indisputable that serious questions arise as to the sufficiency of protection of the article 6 rights of those designated.*

20. The President of the Court, Lord Phillips, similarly found that:[13]

> *The common law rights of [Mr al-Ghabra] and [Mr Youssef] to the enjoyment of their property, to privacy and to family life* are very severely invaded by the [Al Qaeda Order].

21. In addition, Lord Phillips noted the complaint that those designated under the Order had no right to challenge before a court their inclusion on the list maintained by the 1267 Committee. He described as 'unreal' the argument of Treasury counsel that it was open to the appellants to seek judicial review of the lawfulness of the Order but not the basis upon which the listing decision itself was taken:[14]

> *On the Treasury's case, the relevant resolutions and the 1946 Act* have had a devastating effect on [the appellant's] rights and left them unable to make an effective judicial challenge to the reasons for treating them in this way.

22. In Mr al-Ghabra's case, his listing by the 1267 Committee had been requested by the UK government.[15] In Mr Youssef's case, he was not told which government had requested his listing save that it was not the United Kingdom. Through the Foreign and Commonwealth Office, his solicitors requested

disclosure of the identity of the requesting state, as well as the information that the 1267 Committee had relied upon in reaching its decision. As the Supreme Court described:[16]

> *The Foreign and Commonwealth Office made repeated requests over a long period to the nominating state and to the Committee in an attempt to satisfy these requests. As a result an Interpol Red Note relating to [Mr Youssef] was sent to his solicitors under cover of a letter dated 26 September 2008. It was made clear in this letter that this was not the only information provided to the Committee. But the United Kingdom did not have permission to release any other information, and the nominating state refused to allow its identity to be disclosed.*

The UK had sought his delisting but the Supreme Court noted that 'its efforts so far to obtain the de-listing of [his] name have proved to be unsuccessful'.[17]

23. Despite these shortcomings, however, the Supreme Court did not find that the UK government had gone further than the Security Council had required. On the contrary, the Court found that the Al Qaeda Order made by the Treasury had 'faithfully' implemented the requirements of UNSCR 1267.[18]

24. The Supreme Court also did not find the Order incompatible with the appellants' Convention rights under the Human Rights Act 1998, despite being invited to do so by Mr al-Ghabra's counsel. This was because the Court considered that the requirements of UNSCR 1267 gave rise to a conflict between the UK's obligation to give effect to Convention rights and its obligation under the UN Charter to implement the resolution. Accordingly, the Court took the view that it was bound to follow the decision of the House of Lords in *Al Jedda v Secretary of State for Defence* [2007] UKHL 58 which held that, in such cases, article 103 of the UN Charter meant the UK's obligation under the Charter took precedence over its obligations under the Convention.[19] As Lord Hope said:[20]

> *I do not think that it is open to this court to predict how the reasoning of the House of Lords in* Al-Jedda *would be viewed in Strasbourg. For the time being we must proceed on the basis that article 103 leaves no room for any exception, and that the Convention rights fall into the category of obligations under an international agreement over which obligations under the Charter must prevail.*

25. In the absence of Convention rights, the Court instead considered the *vires* of Order by reference to the common law principle of legality, which includes respect for fundamental rights as one of the canons of statutory interpretation. As Lord Hope said:[21]

> *Fundamental rights may not be overridden by general words. This can only be done by express language or by necessary implication. So it was not open to the Treasury to use its powers under the general wording of section 1(1) of the 1946 Act to subject individuals to a regime which had these effects …. I would accept [the] proposition that, as fundamental rights may not be overridden by general words, section 1 of the 1946 Act does not give authority for overriding the fundamental rights of the individual.*

26. In addition to the Order's interference with the common law rights of privacy and enjoyment of property, the Court held that – in faithfully implementing SCR 1267 – the Al Qaeda Order violated the common law right of access to a court because it did not provide the appellants with an effective remedy:[22]

> *As Zinn J said in* Abdelrazik v The Minister of Foreign Affairs *[2009] FC 580, para 51, there is nothing in the listing or de-listing procedure [operated by the 1267 Committee] that recognises the principles of natural justice or that provides for basic procedural fairness. Some steps have been taken to address this problem, but there is still much force in these criticisms ….* I would hold that [Mr al-Ghabra] 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. [Mr al-Ghabra] 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.

27. In particular, Lord Phillips noted that although various measures had been introduced by the Security Council with a view to enabling persons to challenge their listing by the 1267 Committee, they were very far from providing an effective judicial remedy:[23]

> *these provisions fall far short of the provision of access to a court for the purpose of challenging the inclusion of a name on the Consolidated List, and far short of ensuring that a listed individual receives sufficient information of the reasons why he has been placed on the list to enable him to make an effective challenge to the listing.*

The majority of the Supreme Court held that the Order was therefore *ultra vires* the 1946 Act as section 1 of that statute did 'not give authority for overriding the fundamental rights of the individual',[24] or – as Lord Phillips put it – did not authorise the executive to implement:[25]

> *measures that seriously interfered with the rights of individuals in the United Kingdom on the ground of the behaviour of those individuals without providing them with a means of effective challenge before a court.*

28. In particular, Lord Roger held:[26]

> *I have come to the conclusion that, by enacting the general words of section 1(1) of the 1946 Act, Parliament could not have intended to authorise the making of [the Al Qaeda Order]* which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the courts.

2010 Conclusions of the UN Special Rapporteur on Human Rights and Terrorism

29. In August 2010, Martin Scheinin, the UN Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism, made his annual report to the General Assembly,[27] in which he updated and expanded upon earlier criticisms he had made of the problems with the sanctions regime established by UNSCR 1267. Summarising his previous criticisms, the report stated:[28]

> *The Special Rapporteur has expressed concern that the listing practice created pursuant to resolution 1267 (1999) has had a serious impact on due process-related rights for individuals suspected of terrorism, as well as their families (see A/63/223, para. 16, and A/HRC/17/6/Add.2, paras. 33-36). In his 2008 report to the General Assembly, he argued that because of the indefinite freezing of the assets of those listed, the listing amounted to a criminal charge owing to the severity of the sanction (A/63/223, para. 16). In 2006, the Special Rapporteur highlighted a number of basic principles and safeguards to be respected and applied in order to bring the listing procedures in line with generally accepted human rights standards (ibid.). The Special Rapporteur further noted that the listing was often the result of political decisions taken by the diplomatic representatives of States within political bodies, based on classified evidence not necessarily evenly shared between the deciding States.*

30. The Special Rapporteur noted that the Security Council had introduced a number of reforms to the sanctions regime, including UNSCR 1904 which in 2009 established 'an Office of the Ombudsperson to receive requests from individuals and entities seeking to be removed from the consolidated list'.[29] Despite these reforms, however, he expressed his concern that:[30]

> *the revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law. Under resolution 1904 (2009), the Ombudsperson does not have the decision-making power to overturn the listing decision of the Committee. The Ombudsperson is not even mandated to make recommendations to the Committee, and de-listing decisions are still taken confidentially and by consensus of a political body (the Security Council Committee established pursuant to resolution 1267 (1999)), as opposed to being the result of judicial or quasi-judicial examination of evidence. Further, access to information by the Ombudsperson continues to depend on the willingness of States to disclose information, as States may choose to withhold information in order to safeguard their security or*

other interests. The system continues to lack transparency since there is no obligation for the Committee to publish in full the Ombudsperson's report or to fully disclose information to the petitioner. Without decision-making powers, the Ombudsperson cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights.

31. In the absence of such independent review at the international level, the Special Rapporteur stressed the importance of member states ensuring that their domestic implementation of UNSCR 1267 provided for effective review:

> *As long as there is no independent review of listings at the United Nations level, and in line with the principle that judicial or quasi-judicial decisions by the Security Council should be interpreted as being of a preliminary rather than final character, it is essential that listed individuals and entities have access to the domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999) …. In paragraph 20 of its resolution 63/185, the General Assembly urged States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism. This statement should be seen as an appeal to States to implement sanctions against persons listed by the Security Council, not blindly, but subject to adequate human rights guarantees. (para 58)*

32. More generally, the Special Rapporteur expressed his view that the entire sanctions regime established under UNSCR 1267 was itself *ultra vires* the powers of the Security Council under the UN Charter:[31]

> *Through the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law. For these reasons, the Special Rapporteur considers that sanctions regime to amount to action ultra vires, and the imposition by the Council of sanctions on individuals and entities under the current system to exceed the powers conferred on the Council under Chapter VII of the Charter.*

***2010 Judgment of the General Court of the European Union in* Kadi v Commission (No 2)**

33. On 30 September 2010, the General Court delivered its latest judgment (*Kadi v Commission* (T-85/09)) in the ongoing series of cases involving actions taken against the applicant by the European institutions following his listing by the 1267 Committee. This followed the judgment of the Grand Chamber of the Court of Justice in 2008, which overturned the earlier Court of First Instance ruling in 2005.

34. Among other things, the General Court reiterated the conclusions of the Court of Justice that:[32]

> *the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations must be undertaken in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations*

And:

> *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 a Community measure such as 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 such a resolution…*

35. The General Court therefore concluded that its task was to ensure:[33]

> *'in principle the full review' of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.*

36. Like the UN Special Rapporteur, the General Court considered the reforms introduced by UNSCR 1904, including the Office of the Ombudsperson. It concluded that its task remained unchanged, 'at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection':[34]

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

37. In particular, the General Court made clear that 'full review' should 'extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based'.[35] It also held that:[36]

> *the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned.*

38. Adopting the principle identified by the Grand Chamber in *A and others v United Kingdom* (application no 3455/05, judgment of 19 February 2009), the General Court noted that the applicant was not 'in a position to mount an effective challenge to any of the allegations against him, given that all that was disclosed to him was the summary of reasons'.[37] Thus, the General Court found that the procedures adopted by the European institutions in the applicant's case breached his right to a defence and to effective judicial review.[38]

RELEVANT PRINCIPLES GOVERNING THE RELATIONSHIP BETWEEN OBLIGATIONS UNDER THE UN CHARTER AND THE CONVENTION

39. The relationship between the obligations of a High Contracting Party under the Convention and its obligations arising from membership of an international organisation is governed by the presumption of equivalent protection, as notably applied by the Grand Chamber in *Bosphorus Hava Yollari v Ireland* (2006) 42 EHRR 1, involving Ireland's obligations under UNSCR 820 (1993) that had been implemented by way of EC regulation 990/93 and an Irish statutory instrument.

40. This provides that, where membership of the international organisation has involved a partial transfer of sovereignty, and implements legal obligations as a result of that membership, then the state's conduct is *presumed* to be compatible with its obligations under the Convention where the international organisation provides equivalent protection to that of the Convention:[39]

> *However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was* manifestly deficient*. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights.*[40]

On the facts of *Bosphorus*, the Grand Chamber held that, in light of the fundamental rights guaranteed by EC law, the presumption that the applicant enjoyed protection equivalent to his Convention rights was not rebutted.

41. The principle was also applied more recently in the admissibility decision of *Cooperatieve Producenteorganisatie Van De Nederlandse Kokkelvisserij UA v The Netherlands* (app no 13645/05, 20 January 2009), in relation to an alleged breach of the right to a fair hearing under article 6 ECHR and the complaint that the parallel provisions of EC law were 'manifestly deficient'. The Court rejected the application as manifestly ill-founded, noting that:

> *there is a presumption that a Contracting Party has not departed from the requirements of the Convention where it has taken action in compliance with legal obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. As a corollary, this presumption applies not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation itself and, in particular, to the procedures of the ECJ. In that respect, the Court also reiterates that such protection need not be identical to that provided by Article 6 of the Convention; the presumption can be rebutted only if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.*

42. In relation to the operation of the sanctions regime established by UNSCR 1267, the successive judgments of the Court of Justice and the General Court in *Kadi* make clear that there is no question that the regime itself is deficient in its protection of fundamental rights, at least as far as Community law is concerned. Following the Treaty of Lisbon and the forthcoming accession of the European Union to the Convention itself, it would be – at the very least – incongruous if those fundamental rights derived from the Convention enjoyed greater weight and protection within the framework of EU law than under the very framework of the Convention itself.

43. In its written observations before the Chamber in the present case, the UK government submitted *inter alia* that:[41]

> *Decisions of the Security Council contained in resolutions adopted under Chapter VII create legal obligations binding on all States (Article 25 of the UN Charter). These obligations prevail over obligations arising under any other international agreement (Article 103 of the UN Charter). Where States act pursuant to a binding resolution of the Security Council, or by reference to the decision of a subsidiary organ such as the Sanctions Committee, Article 103 has the effect that the resolution and the action taken pursuant to it displaces any other inconsistent Convention obligation, including under Articles 5 and 8. It would be of the greatest concern if it were to be held that a sanctions regime, which has been established pursuant to binding UNSCRs precisely because it is necessary for the maintenance of international peace and security, could not be given effect to because of any inconsistent rights under Articles 5 and/or 8 of the Convention.*

And, more specifically: [42]

> *Where the effect of a UNSCR is to create a conflict with the Convention, the Court is bound as a matter of international law to treat the relevant provisions of the Convention as displaced to that extent.*

44. Moreover, the government suggests that 'even if a norm of *ius cogens* had been involved, that would not give the Court a jurisdiction that it did not otherwise possess to engage in a judicial review of decisions of the Security Council'.[43]

45. JUSTICE submits that the UK government's submissions are misconceived for at least three reasons.

46. First, the Court is not obliged to interpret Article 103 of the Charter in a vacuum. Among other things, the 'maintenance of international peace and security' – though the primary function of the Security Council – is neither the preeminent principle of international law nor the UN Charter. At least equal importance must be attached to the principle of respect for fundamental rights, c.f. the Preamble to the Charter, which identifies as one of the purposes of the United Nations as being:

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women…

In particular, the right of access to a court and the right to an effective remedy are not only fundamental rights in themselves but also essential to securing protection for all such rights. Nor is it necessary to conclude that these rights are *ius cogens* in order to recognise their fundamental nature. As Lord Phillips said in *Ahmed and others v HM Treasury*, 'access to a court to protect one's rights is the foundation of the rule of law'.[44] Without independent judicial review of international measures, it would otherwise be impossible to assess whether, for instance, the substantive requirements of article 5(1) had been met in a particular case, or whether an interference with a person's right to respect for their privacy was 'in accordance with the law'. Even the House of Lords in *Al Jedda* found that the qualification of the right to liberty imposed by UNSCR 1542 did not extend to the procedural safeguards contained in article 5(4).[45]

47. Secondly, as the Special Rapporteur made clear in his most recent report, the establishment of the sanctions regime under UNSCR 1267 involves a considerable extension of the mandate of the Security Council beyond international peace and security and towards the adoption of a judicial or quasi-judicial function. It is one thing for a Security Council resolution to engage or interfere with a fundamental right: such interference may or may not be justified, depending among other things upon the nature of the right in question and the nature of the interference. It is another for a Security Council resolution to abrogate the judicial function unto itself, leaving those affected without any recourse but to petition a committee that lacks the essential requirements of a judicial body.

48. Thirdly, the UK government's objection concerning *ius cogens* proves too much. If, hypothetically, the Security Council were to adopt a resolution under Chapter VII requiring member states to employ so-called 'enhanced interrogation' techniques against designated persons, for example, the logical outcome of the UK government's submissions on Article 103 would be that the Court would have no choice but to treat the guarantee of freedom from torture under article 3 of the Convention as having been displaced. JUSTICE submits that, on the contrary, the Court is not obliged to interpret Article 103 of the Charter in such a way that would enable either Convention rights to be displaced or the integrity of the international rule of law itself to be undermined.

CONCLUSION

49. The sanctions regime established by UNSCR 1267 interferes severely and profoundly with the Convention rights of designated persons and their family members, first by way of the draconian restrictions that it requires member states to impose and secondly by failing to afford those designated the right to an effective judicial review of the decision to list them, including its evidential basis.

50. In light of the decisions of the UK Supreme Court in *Ahmed* and the Court of Justice and the General Court in *Kadi,* the conclusion that the 1267 Committee's procedures are manifestly deficient in protecting Convention rights is unavoidable. Nor is the Court obliged to interpret Article 103 of the UN Charter in such a manner that it would result in Convention rights being displaced.

16 December 2010

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[1] Pursuant to Art. 36(2) and Rule 44(3).
[2] *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (February 2009). The members of the Panel were Justice Arthur Chaskalson (South Africa), Georges Abi-Saab (Egypt), Robert K Goldman (USA), Hina Jilani (Pakistan), Vitit Muntarbhorn (Thailand), Mary Robinson (Ireland), Stefan Treschsel (Switzerland), Justice Raúl Zaffaroni (Argentina).
[3] Ibid, pp 113-114. Emphasis added.
[4] Ibid, pp 115-117.
[5] Ibid, p 166. Emphasis added.
[6] See e.g. ibid, para 129: 'I find that properly interpreted the UN travel ban presents no impediment to Mr. Abdelrazik returning home to Canada'.
[7] Ibid, para 51.
[8] Ibid, para 53.
[9] *Ahmed and others v HM Treasury* [2010] UKSC 2 at paragraph 4. Emphasis added.
[10] Ibid, para 6. Emphasis added.
[11] Ibid, para 38. Emphasis added. See also Lord Hope's description of the orders as striking 'at the very heart of the individual's basic right to live his own life as he chooses …. I repeat: their freedom of movement is severely restricted without access to funds or other economic resources, and the effect on both them and their families can be devastating' (ibid, para 60).
[12] Ibid, para 192. Emphasis added.
[13] Ibid, para 145. Emphasis added.
[14] Ibid, para 147. Emphasis added.
[15] Ibid, para 33.
[16] Ibid, para 35.
[17] Ibid, para 63. As of 1 December 2010, Mr Youssef remains on the consolidated list.
[18] See Lord Hope at para 64; Lord Brown at para 197.See also Lord Hope at para 80: 'the [Al Qaeda Order] does what SCR 1267 and subsequent resolutions required of it'.
[19] See e.g. Lord Hope paras 71-74; Lord Phillips, paras 89-106.
[20] Ibid, para 74.
[21] Ibid, para 75.
[22] Ibid, paras 80-81. Emphasis added. See also para 82: '[Mr Youssef] too is being denied an effective remedy' and Lord Mance at para 246: 'The basic common law right at issue on these appeals is G's and HAY's right to access to a domestic court or tribunal to challenge the basis for including their names in the list of persons associated with Al-Qaida or the Taliban and so freezing their property with the severe personal consequences already indicated'.
[23] Ibid, para 149 per Lord Phillips.
[24] Ibid, para 76.
[25] Ibid, para 154.
[26] Ibid, para 185. Emphasis added. See also Lord Mance at para 249: 'in my view, section 1(1) [of the 1946 Act] was and is an inappropriate basis for the Al-Qaida Order, freezing indefinitely the ordinary rights of individuals to deal with or dispose of property on the basis that they were associated with Al-Qaida or the Taliban, without providing any means by which they could challenge the justification for treating them as so associated before any judicial tribunal or court, at a domestic or international level'.
[27] Sixth Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN General Assembly, A/65/258: 6 August 2010).
[28] Ibid, para 54.
[29] Ibid, para 56.
[30] Ibid.
[31] Ibid, para 57.
[32] Para 125, and para 298 of the CJEU's 2008 judgment.
[33] Ibid, para 126.
[34] Ibid, paras 127-128.
[35] Ibid, para 135.
[36] Ibid, para 151.
[37] Ibid, para 177.
[38] See ibid, paras 179-183.
[39] Paras 154-155.
[40] Ibid, para 156.
[41] Paragraph 4(b) of the UK government's written observations.
[42] Ibid, para 15.
[43] Ibid, para 23.
[44] Ibid, para 146.
[45] See paras 37 and 39 per Lord Bingham, para 46 per Lord Rodger, paras 125–126 per Baroness Hale, paras 130 and 136 per Lord Carswell and para 139 per Lord Brown.