



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Ninety-fourth session  
13-31 October 2008

**VIEWS**

**Communication No. 1472/2006**

*Submitted by:* Nabil Sayadi and Patricia Vinck (represented by counsel,  
Georges-Henri Beauthier)

*Alleged victims:* The authors

*State party:* Belgium

*Date of communication:* 14 March 2006 (initial submission)

*Document references:* Special Rapporteur's rule 97 decision, transmitted to the State  
party on 10 May 2006 (not issued in document form)  
  
CCPR/C/89/D/1472/2006 - decision on admissibility of  
30 March 2007

*Date of decision:* 22 October 2008

*Subject matter:* Application to have names removed from the Consolidated  
List of the United Nations Sanctions Committee

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\* Views made public by decision of the Committee.

- Procedural issues:* Individuals subject to the jurisdiction of the State party; non-exhaustion of domestic remedies; same matter currently being examined under another procedure of international investigation or settlement
- Substantive issues:* Lack of an effective remedy; right to liberty of movement; right to leave a country, including one's own; right to a fair trial; principle of equality of arms; presumption of innocence; reasonable time frame for proceedings; right to enforcement of remedies; principle of legality of penalties; protection from arbitrary or unlawful interference with one's privacy; right to freedom of thought, conscience and religion; right to freedom of association; principle of non-discrimination
- Articles of the Covenant:* 2, paragraph 3, 12, 14, paragraphs 1, 2 and 3, 15, 17, 18, 22, 26 and 27
- Articles of the Optional Protocol:* 1 and 5, paragraphs 2 (a) and (b)

On 22 October 2008, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1472/2006.

[ANNEX]

**Annex**

**VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5,  
PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE  
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

**Ninety-fourth session**

**concerning**

**Communication No. 1472/2006\***

<i>Submitted by:</i>	Nabil Sayadi and Patricia Vinck (represented by counsel, Georges-Henri Beauthier)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Belgium
<i>Date of communication:</i>	14 March 2006 (initial submission)
<i>Decision on admissibility:</i>	30 March 2007

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on 22 October 2008,*

*Having concluded* its consideration of communication No. 1472/2006, submitted to the Human Rights Committee on behalf of Nabil Sayadi and Patricia Vinck, under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the authors and the State party,

*Adopts* the following:

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\* The following members of the Committee participated in the consideration of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanut, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer. The texts of individual opinions signed by Committee members Mr. Ivan Shearer, Mr. Yuji Iwasawa, and Sir Nigel Rodley are appended to the present document.

### Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication dated 14 March 2006 are Mr. Nabil Sayadi and Ms. Patricia Vinck. Mr. Sayadi was born on 1 January 1966 in Lebanon and Ms. Vinck, his wife, was born on 4 January 1965 in Belgium. They hold Belgian nationality. They claim to be the victims of violations by Belgium of article 2, paragraph 3, article 14, paragraphs 1, 2 and 3, and articles 12, 15, 17, 18, 22, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Georges-Henri Beauthier. The Covenant and the Optional Protocol thereto entered into force for the State party on 21 April 1983 and 17 May 1994 respectively. The Committee's Special Rapporteur on new communications decided that the question of the communication's admissibility should be considered separately from the merits.

#### Factual background

2.1 On the basis of United Nations Security Council resolutions 1267 (1999),<sup>1</sup> 1333 (2000), 1390 (2002) and 1455 (2003) and European Union Council Regulation No. 881/2002,<sup>2</sup> a criminal investigation of the authors was initiated on 3 September 2002 at the request of the Belgian Public Prosecutor's Office.

2.2 On 19 November 2002, the State party informed the Sanctions Committee that the authors were, respectively, the director and secretary of *Fondation Secours International*, reportedly the European branch of the Global Relief Foundation, an American association that has been on the sanctions list since 22 October 2002.

2.3 The authors' names were placed on the lists appended to the Security Council resolution (23 January 2003), the European Union Council Regulation (27 January 2003)<sup>3</sup> and a Belgian ministerial order (31 January 2003),<sup>4</sup> but the authors were not given access to the "relevant information" justifying their listing. Enforcement of the provisions of international and Community law is provided for in Belgian legislation by the laws of 11 May 1985 and

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<sup>1</sup> On the creation of the United Nations Sanctions Committee, one of whose tasks is "to update regularly the list referred to in paragraph 2 of resolution 1390 (2002), including through the designation of individuals, groups, undertakings and entities that are subject to the measures referred to above, on the basis of relevant information provided by Member States and regional organizations".

<sup>2</sup> Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, *Official Journal*, L139/9, 29 May 2002.

<sup>3</sup> Commission Regulation (EC) No. 145/2003 of 27 January 2003 amending Regulation (EC) No. 881/2002 for the ninth time.

<sup>4</sup> Ministerial order of 31 January 2003 amending the ministerial order of 15 June 2000 implementing the Royal Decree of 17 February 2000 concerning the restrictive measures directed against the Taliban in Afghanistan.

3 May 2003, the Royal Decree of 17 February 2000<sup>5</sup> and various ministerial implementing orders. While the authors, who have four children, have not been convicted or prosecuted and have a clean judicial record, the freezing of all their financial assets following their listing prevents them from working, travelling, moving funds and defraying family expenses.

2.4 The authors submitted several requests in 2003 to Belgian ministers and the Prime Minister, the European authorities, the United Nations and the Belgian civil authorities. The ministers invoked the Belgian State's international obligations, the European Commission said it had no authority to remove the names of the plaintiffs from a list drawn up by the Sanctions Committee,<sup>6</sup> and the Prime Minister simply referred to the fact that an investigation was under way to examine new evidence.

2.5 As far as judicial procedures are concerned, the authors found themselves in a situation where the law was not being applied, as neither had been charged with an offence. On 11 February 2005, they obtained from the Brussels Court of First Instance an order requiring the Belgian State to initiate the procedure to have their names removed from the Sanctions Committee's list. While there was "relevant information" to hand - namely the absence of any indictment of the authors in February 2004 - the Belgian State did not initiate the de-listing procedure. The Court ordered the Belgian State to "urgently initiate a de-listing procedure with the United Nations Sanctions Committee and to provide the petitioners with proof thereof, under penalty of a daily fine of €250 for delay in performance". Pursuant to this order, on 25 February 2005 the State party requested the Sanctions Committee to delist the authors. At the time of the communication, no decision on the matter had been taken by the Sanctions Committee.

2.6 The Judge's Chambers of the Brussels Court of First Instance also confirmed the plaintiffs' innocence, dismissing the case on 19 December 2005 after more than three years of criminal investigation. Neither of these two decisions has been appealed and they are now final.

### **The complaint**

3.1 The authors allege violations of article 2, paragraph 3, article 4, paragraph 1, article 14, paragraphs 1, 2 and 3, and articles 12, 15, 17, 18, 22, 26 and 27 of the Covenant.

3.2 Counsel for the authors considers that all possible domestic remedies have been exhausted. The petitioners instituted civil proceedings, which ended on 11 February 2005 with the final ruling against the Belgian State, and the charges were dismissed by a summary judgement on 19 December 2005. The authors' counsel sent numerous letters to the counsel for the Belgian State to ask what follow-up had been given to the de-listing request submitted to the Sanctions

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<sup>5</sup> Royal Decree of 17 February 2000 concerning the restrictive measures directed against the Taliban in Afghanistan.

<sup>6</sup> The letter of 28 October 2003 indicates that, while the Commission is empowered to amend the list attached to the Regulation, it cannot do so unless the Sanctions Committee alters its decision of 22 January 2003.

Committee. Counsel states that Belgian ministers and European Community and international political bodies were apprised of the State party's failure to act on the authors' request for de-listing.

3.3 With regard to the allegation of a violation of article 14, paragraph 1, the authors were placed on the list and their assets frozen in the absence of any court ruling on the matter. In counsel's view there is no doubt that the "administrative and temporary" nature of these measures, as they were presented by the Belgian State, cannot hide the fact that they are tantamount to criminal sanctions and cannot justify the lack of judicial intervention and the prolonged imposition of sanctions.

3.4 Respect for the presumption of innocence, the right to an effective remedy, and the right to a procedure with all due structural and functional guarantees have been violated. The presumption of innocence had been flouted by the Belgian State's proposal to place the authors' names on the Sanctions Committee list without "relevant information", in breach of article 14, paragraph 2, of the Covenant. While States may make this type of proposal on the basis of "relevant information", and even though the concept is not precisely defined, with regard to the restriction of the freedoms of the individuals concerned, such relevant information must be supported by a detailed statement of reasons. The only justification adduced by the Belgian State is the existence of grounds for believing that "the plaintiffs have links to the parent association, the Global Relief Foundation, and, hence, to the Al-Qaida terrorist group". What is more, the proposal for the listing on 19 November 2002 came only a few days after the opening of the investigation on 3 September 2002 and would therefore appear to have been premature and unjustified.

3.5 With respect to article 15 of the Covenant, counsel argues that the authors' listing breaches the principle of the legality of penalties. For the Belgian State, the listing is the consequence of an offence committed by the authors, but the definition of that offence and its essential elements were not known. Counsel further argues that, while States alone are competent to activate the de-listing procedure on the basis of "relevant information", the Belgian State consistently refused to do so until the investigation was over. In so doing, it gave precedence to proof of the plaintiffs' lack of culpability over the presumption of innocence. Counsel maintains that, although the Belgian civil courts duly found in favour of the authors in February 2005, the principle of the presumption of innocence was patently violated.

3.6 With regard to the allegation of a violation of article 2, paragraph 3, counsel argues that the authors have no effective remedy in the criminal courts that would enable them to instigate the closure of the investigation that has been under way for over three years. Article 136 of the Criminal Investigation Code provides that "if the investigation is not closed after one year, the indictments chamber may hear a petition addressed to the clerk of the court of appeal by the accused or the complainant". According to counsel, however, the European Court of Human Rights deemed that this article "raises certain issues of Belgian domestic law that have yet to be

resolved and that the Belgian Government has not provided an example of a domestic court finding under that provision in favour of a person who, invoking a petition based on article 136, paragraph 2, had not been charged”.<sup>7</sup> That remedy cannot, therefore, be considered to be effective.

3.7 Counsel argues that the information and sanctions procedure reveals a lack of functional guarantees, such as the principle of equality of arms, in breach of article 14, paragraph 3. The authors are at a disadvantage in presenting their case, owing to the violation of their right to information and the lack of transparency in their regard. The Belgian State is not complying with the humanitarian clause contained in paragraph 1 of Security Council resolution 1452 (2002), which provides that the freezing of assets shall not apply to funds and other financial assets necessary for basic expenses. Whereas resolution 1452 (2002) leaves it to States to determine the nature of such funds and assets, it does not require the interested parties to file a petition in order to benefit from the humanitarian clause. It is for the Belgian State to alert the authors to this clause, in accordance with the Act of 29 July 1991 on the formal justification of administrative acts and the Act of 11 April 1994 on public access to the administration and remedies. It was not until 11 February 2003 that the authors became aware of that clause. The Belgian State invokes the fact that the Community Regulation had not yet entered into force for Belgium on the date of the authors’ request to benefit from the clause. Counsel for the authors points out that the petition existed and continued to exist after its entry into force. The Brussels Court of First Instance has not ruled on that point.

3.8 With regard to the lack of structural guarantees, in violation of article 14, paragraph 3, of the Covenant, in counsel’s view the application of sanctions was marked by the lack of a reasonable time frame for the proceedings and, more particularly, for the investigation. The latter lasted three years and three months, which also implies a breach of article 2, paragraph 3 (c), of the Covenant, on the right to enforcement of remedies. The virtual absence of any effort by the Belgian State to secure de-listing by the Sanctions Committee is characteristic of a situation marked by the implicit acceptance of sanctions and their intolerable consequences for the authors. Although the Belgian State had undertaken to renew its de-listing petition in the event the case was dismissed by the Belgian courts, it never did so.

3.9 Counsel further maintains that the question of the responsibility of certain States represented on the Sanctions Committee is raised directly in the case of those which, in the absence of any “relevant information”, blocked the de-listing of the plaintiffs, in violation of the ruling delivered by the Belgian courts on 11 February 2005 and of the right to enforcement of remedies enshrined in article 2 of the Covenant.

3.10 With regard to the allegation of a violation of article 12 of the Covenant, the authors cannot travel freely or leave Belgium. Mr. Sayadi has been unable to take up an offer of employment with the Red Crescent in Qatar.

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<sup>7</sup> *Stratégies et Communications et Dumoulin v. Belgique*, No. 37370/97 (sect. 3) (fr) - (15.7.02), paras. 53-56.

3.11 With regard to the allegation of a violation of article 17, counsel points out that the authors' full details have been made widely available through their listing by the Sanctions Committee. They are also regularly obliged to seek publication of rights of reply in order to correct newspaper articles. Mr. Sayadi's reputation has been tarnished and disparaged and he has been dismissed from the firm where he had worked since July 2002. He had to apply to the Malines labour tribunal in order to obtain unemployment benefits, which he had been denied.

3.12 With regard to the allegation of a violation of article 18, read together with article 22, paragraph 1, and article 27, of the Covenant, counsel argues that the Belgian State is holding up the establishment of Muslim associations whose aim is to fund humanitarian projects in various parts of the world. The authors are prevented from practising their religion and from developing and financing projects designed to improve the living conditions of other practitioners of the Muslim faith.

3.13 Counsel affirms that the conditions set forth in article 4, paragraph 1, of the Covenant have not been met. The "public emergency" supposedly posed by terrorism and its financing results in the adoption of measures and the implementation of procedures that generate discrimination based on the practice of the Muslim faith, in violation of article 26 of the Covenant. The only allowable restrictions on rights protected by the Covenant are those that are necessary in a democratic society. And yet, the contrary is being done with regard to one part of the population, calling into question the basic principles of a democratic society. The power to judge individuals belongs to the judiciary, and the fact that the Belgian Government has frozen the bank accounts of the authors' association and the authors themselves attests to legislative encroachment on the judicial sphere. The principle of equality has also been violated in that, in the name of combating terrorism, the mere listing of individuals is sufficient to justify the institution of special procedures against them in the courts and the imposition of sanctions without trial, effective remedy or rights of defence.

### **State party's observations**

4.1 On 6 July 2006, the State party invoked the Security Council resolution calling on all States to "cooperate fully with the [Sanctions] Committee ... in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution".<sup>8</sup> On 20 December 2002, the Security Council adopted resolution 1455 (2003) containing the humanitarian clause. The guidelines of the Committee for the conduct of its work contain the procedure for requesting Sanctions Committee de-listing.<sup>9</sup> In particular, requests must be based on "relevant information" to be provided by the person wishing to submit a request for a review of his or her case. As far as the State party is concerned, all the Security Council resolutions have been transposed to the European regulations, since, following

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<sup>8</sup> Security Council resolution 1267 (1999), para. 9.

<sup>9</sup> Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002 and amended on 10 April 2003.

a transfer of competence from the member States to the European Community, the implementation of the economic measures determined by the United Nations falls within the Community's sphere of competence.

4.2 Regarding the facts, the State party states that the *Fondation Secours Mondial* is the European branch of the Global Relief Foundation, an Islamic charitable organization active in the United States and suspected of involvement in the financing of Al-Qaida. The criminal investigation initiated on 3 September 2002 examined the authors' involvement in the *Fondation Secours Mondial*, as well as Mr. Sayadi's numerous alleged contacts, including those of a financial nature, with a number of leaders linked to the Al-Qaida network. On 22 October 2002 the Global Relief Foundation was placed on the Sanctions Committee list. This listing mentions, inter alia, its links with its European branches, including the *Fondation Secours Mondial*. On 22 January 2003, after studying the information in its possession, and following an initiative by the State party, the Sanctions Committee decided to list the authors. On 28 January 2003, the European Commission published an updated Sanctions Committee list containing the authors' names. On 31 January 2003, the Minister of Finance issued a ministerial order, published on 19 February 2003, updating that list, with the authors' names included. On 27 February 2003, the authors requested the Ministers of Finance, Justice and Foreign Affairs to take the steps needed for their de-listing, but furnished no relevant information. The authors received a reply from each of the Ministers: on 26 March 2003, the Minister of Justice affirmed that the assets freeze was no more than a temporary administrative measure totally unconnected to any criminal conviction or judicial confiscation. It could not, therefore, be maintained that the authors had been convicted "without any kind of trial". The Minister of Justice informed them that their listing was justified by their membership of the Global Relief Foundation; the same information was transmitted to them on 8 April 2003 by the Minister for Foreign Affairs. On 30 December 2003, the Prime Minister replied that he had requested the Minister of Justice to make enquiries of the Federal Prosecutor's Office on the progress of the investigation and that the Office considered that the investigation could not yet be closed as there was new information to be examined.

4.3 On 3 February 2004, the authors brought an action against the Belgian State in the Brussels Court of First Instance, the aim being to secure an order for it to file a de-listing request with the Sanctions Committee, on the grounds that they had not been charged after an investigation lasting a year and a half. The State party claimed that the relevant information on the basis of which it could profitably submit a de-listing request would be the closure of the investigation without an indictment. The Court, however, ruled on 11 February 2005 that after two and a half years of investigation it was reasonable to demand that a de-listing request be submitted to the Committee. The State party immediately complied with the judgement. The de-listing request was distributed by the secretariat of the Sanctions Committee to all Committee members on 4 March 2005. The no-objection procedure (implying de-listing in the absence of objections within 48 hours (counted in working days)) was, however, blocked when members of the Sanctions Committee expressed reservations about the Belgian State's petition within the established time limit. On 10 January 2006, the State party submitted to the Sanctions Committee, for the necessary follow-up, the order dismissing the case in the criminal proceedings delivered by the Judge's Chambers of the Brussels Court of First Instance.

4.4 The State party asked the Public Prosecutor's Office for permission to peruse the criminal file on the authors, in order to look for any relevant information it could submit to the Sanctions Committee. On 4 April 2006, the State party reiterated its de-listing request on the basis of the

decision of the Judge's Chambers and the lack of any evidence in the criminal file to justify maintaining the authors' names on the list. The State party went beyond not only what had been required by the ruling of the Brussels Court of First Instance, but also the commitment expressed in an official letter dated 22 September 2005 to the authors' counsel. Examination of the de-listing request is currently still pending before the Sanctions Committee.

4.5 With regard to admissibility, the State party points out that the matter raised by the authors is already being examined under another procedure of international investigation or settlement, the United Nations Sanctions Committee.<sup>10</sup> This Committee meets the conditions for definition as "another procedure of international investigation or settlement" within the meaning of article 5, paragraph 2, of the Optional Protocol. As a result, the Human Rights Committee must decline jurisdiction with regard to the authors' communication.

4.6 With regard to the merits of the case and the alleged violations of the presumption of innocence, the right of access to justice and a fair trial, the State party contends, firstly, that, in accordance with the Security Council resolutions, it was obliged to furnish information on the authors. The State party notes that the Sanctions Committee has confirmed that when a charitable organization is listed, the main persons connected to such bodies must also be listed. Secondly, the measure in dispute could violate the presumption of innocence and the principle of legality of penalties only if it took the form of a criminal sanction. The grounds for inclusion on the list, namely the existence of "ties" to Al-Qaida, is not in itself a criminal offence. The authors are wrong to claim that because the judicial investigation had been initiated a few months earlier, the State party's action was premature and unjustified. Thirdly, the authors are wrong to maintain that the State party breached the presumption of innocence. While the State party did claim that the de-listing request should be filed after the criminal investigation had been closed - which in its view constituted "relevant information" to be submitted to the Committee - the Court of First Instance ruled that it should be filed without awaiting the closure of the investigation and the State party has complied with this ruling.

4.7 As for the alleged lack of effective remedies in the criminal courts to have the investigation closed, the State party asserts that the authors did have a remedy in this particular case, since they took the Government to court and obtained an order requiring it to submit a de-listing request to the Sanctions Committee.

4.8 As for the allegation that the information and sanctions procedure followed by the Belgian State attests to the absence of functional guarantees, the State party notes that article 14, paragraph 3, of the Covenant provides for anyone charged with a criminal offence to be informed of the charge against him, and that it therefore does not apply to measures that are neither charges nor criminal sanctions. The authors were informed of the facts on which their listing was based.

4.9 As for the alleged violations in relation to the humanitarian clause in resolution 1452 (2002), the exemption for humanitarian reasons is provided for in Regulation (EC) No. 561/2003

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<sup>10</sup> The State party refers to a note from the Sanctions Committee dated 25 May 2006 stating that the matter is still pending.

amending Regulation No. 881/2002, which, pursuant to the Treaty establishing the European Community, is binding and directly applicable in all member States. It does not need to be incorporated into Belgian law and no notification is required. The Regulation contains all the information concerning the procedure to be followed in order to benefit from this exemption. Resolution 1452 (2002) provides that the State must determine the funds needed for basic expenses. The State is unable to make such a determination unless the individuals provide it with information on, for example, the amount of their rent or mortgage, or their medical expenses. Regulation (EC) No. 561/2003 provides that any person wishing to benefit from the humanitarian clause must address a request to the relevant competent authority of the member State, as listed in annex II of the regulation. The authors were informed of this regulation once it had been published in the *Official Journal*. In fact, while the absence of notification of an administrative act may hinder the imposition of obligations on the person it is addressed to - who, in any event, is aware of it - invoking a right does not require notification of the act on which it is based.<sup>11</sup> Hence, the absence of notification does not prevent the humanitarian clause from being invoked. That being said, in the case in point the authors were well aware of this possibility, thanks to, among other things, the reply to the parliamentary question posed to the Minister of Justice and the letter of 30 December 2003 from the Prime Minister asking them to provide a list of expenses for the purposes of the humanitarian clause procedure, since without it the procedure would be suspended. The authors, however, have still not submitted a valid application to the Ministry, nor have they produced any documentary evidence. The fact that they do not benefit from the clause is a problem entirely of their own making. For this reason the Committee should declare the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. Domestic remedies refer not only to legal remedies, but also to administrative remedies.<sup>12</sup> The fact that the humanitarian clause was not invoked means that (administrative) domestic remedies were not exhausted.<sup>13</sup>

4.10 Regarding the alleged lack of structural guarantees, including the failure to observe a reasonable time limit, the State party points out that the authors give no reasons for claiming this limit was breached with respect to the investigation. The reasonableness of a time limit depends on the circumstances and complexity of a given case. In this case, the three and a half years of investigation are justified by the complexity of the dossier and the fact that letters rogatory had to be executed abroad. As for the alleged violations of the right to enforcement of a remedy, the ruling of the Brussels Court of First Instance against the Belgian State was promptly implemented by the State party. It also points out that it went beyond what the ruling demanded by transmitting the dismissal ruling to the Sanctions Committee.

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<sup>11</sup> The State party refers to the case law of the Council of State of Belgium.

<sup>12</sup> The State party refers to communication No. 1184/2003, *Brough v. Australia*, Views adopted on 17 March 2006, para. 8.6: “The Committee recalls that the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, to exhaust ‘all available domestic remedies’ not only refers to judicial but also to administrative remedies, unless the use of such remedies would be manifestly futile or cannot reasonably be expected from the complainant.”

<sup>13</sup> The State party refers to communication No. 1159/2003, *Sankara v. Burkina Faso*, Views adopted on 28 March 2006, para. 6.4.

4.11 On 9 November 2006, the State party added that the authors were not subject to its jurisdiction within the meaning of article 1 of the Optional Protocol. The rules on communications preclude the authors from disputing United Nations rules concerning the fight against terrorism before the Committee. The same rules prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter of the United Nations. The State party understands this communication to be aimed solely at preventing the Belgian State from exercising any discretion it may have in the implementation of United Nations rules.

4.12 As for the alleged substantive violations of the Covenant, the State party claims that its role was limited to relaying information about the authors to the Sanctions Committee, as required under United Nations rules. The Sanctions Committee then examined this information and placed the authors on the list. The State party has taken all appropriate measures within its power to have the authors' names de-listed, consistent with respect for the authors' fundamental rights as well as United Nations rules. Moreover, the measures to combat the financing of terrorism were adopted by the Security Council under Chapter VII of the Charter of the United Nations. The existence of a threat to international peace and security is an exceptional circumstance justifying restrictions on the enjoyment of the individual rights established in international human rights instruments. Article 103 of the Charter provides that "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". Moreover, the measures adopted to combat the financing of terrorism are not definitive. For example, it is possible to submit a request for an exemption from the assets freeze and the travel ban to the Sanctions Committee. Contrary to the authors' implication, the measures taken by the United Nations are in no way directed against Islam as a religion.

### **Authors' comments on the State party's observations**

5.1 On 20 December 2006, the authors' counsel, in response to the State party's claim that the communication was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, submitted that the three requirements set out in that article were not met. Firstly, the Sanctions Committee does not constitute a procedure of international investigation or settlement as construed by the Committee.<sup>14</sup> The word *enquête* (investigation) means "an impartial procedure to establish the facts" or "aiming to clarify the facts". The English word "investigation" is derived from the verb "to investigate", which implies an effort to establish the truth. Thus the phrase "procedure of international investigation" refers to an international body that sets out to establish the facts.<sup>15</sup> Since the Sanctions Committee's listing and de-listing procedures do not provide for any investigation on the part of that Committee, the Sanctions Committee cannot be

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<sup>14</sup> Communications No. 118/1982, *J.B. et al. v. Canada*, decision on inadmissibility adopted on 18 July 1986, para. 6.3; No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2003, para. 10.4; and No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1987, para. 12.3.

<sup>15</sup> Communication No. 154/1983, *Baboeram et al. v. Suriname*, Views adopted on 4 April 1985, para. 9.1.

considered a “procedure of international investigation”. The role of the Sanctions Committee is limited to listing names submitted by States, without further investigation, and de-listing names at the request of a State, if none of the Committee members object.

5.2 Secondly, the Sanctions Committee is not an international settlement procedure. The ordinary meaning of the word “settlement” (*règlement*) is “a procedure which puts an end to a disagreement or dispute”. In the present case, de-listing the authors would put an end to the State party’s ongoing violation of the Covenant, but would not constitute the *restitutio in integrum* to which the authors are entitled<sup>16</sup> after four years of sanctions, which should include a finding that the Covenant was violated.

5.3 Thirdly, the Committee understands “the same matter” to mean “the same claim”.<sup>17</sup> The Sanctions Committee was set up by the Security Council to help combat terrorism. In the present case, the Sanctions Committee was asked to lift sanctions, whereas the Human Rights Committee is requested to make a finding that the State party has violated rights protected by the Covenant. The matter before the Human Rights Committee is therefore not the same as the matter before the Sanctions Committee, as required by article 5, paragraph 2 (a), of the Optional Protocol.

5.4 Fourthly, the de-listing request is no longer being examined by the Sanctions Committee, as the Human Rights Committee would require.<sup>18</sup> The Sanctions Committee did not agree to the State party’s de-listing requests of 4 March 2005 and 4 April 2006. Further, the note from the Sanctions Committee stating that the matter remains pending is dated 25 May 2006 - over seven months ago. The de-listing procedure was unsuccessful, and the State party is wrong to infer from the Sanctions Committee’s lack of response that it is currently considering the authors’ request.

5.5 Regarding the State party’s argument that the authors failed to exhaust domestic remedies because they did not have recourse to the humanitarian clause, counsel submits that a request to invoke this clause is not a domestic remedy within the meaning of the Covenant. A domestic remedy must potentially remedy the situation or, more specifically, it must have some prospect of success.<sup>19</sup> A request by the authors to benefit from this clause could not bring about a complete lifting of sanctions and thus end the violations of the Covenant. The clause therefore is not a domestic remedy within the meaning of article 5, paragraph 2 (b), of the Protocol.

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<sup>16</sup> General Assembly resolution 56/83, annex, “Responsibility of States for internationally wrongful acts”, art. 34 (“Forms of reparation”).

<sup>17</sup> Communication No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983, para. 7.2.

<sup>18</sup> Communication No. 577/1994, *Polay Campos v. Peru*, Views adopted on 6 November 1997, para. 6.1.

<sup>19</sup> Communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989, para. 12.3. General Assembly resolution 56/83, annex, “Responsibility of States for internationally wrongful acts”, art. 44 (b) (“Admissibility of claims”).

5.6 As to the merits, the State party must take responsibility for the implementation of Security Council resolution 1267 (1999) and related resolutions. It is not correct to say that the State party is bound to implement sanctions imposed by the Security Council. Article 103 of the Charter does not apply because the Security Council was acting *ultra vires* in adopting the resolutions that imposed the sanctions. Thus, the resolutions are not “obligations” within the meaning of Article 103. In imposing sanctions on individuals as part of its efforts to combat terrorism, the Security Council has exceeded its powers under the Charter. While the resolutions setting out the sanctions regime were adopted under Chapter VII, that does not mean that they are binding on Members of the United Nations, since a body must adopt decisions that are within its powers. The oversight of Member States and legal precedent are now the only constraints on the Security Council preventing it from imposing its will through a contrived finding of a threat to international peace and security. The Security Council must act in accordance with the purposes and principles of the United Nations, with the customary interpretation of the Charter and with international legal precedent. The authors in this case are not a threat to international peace and security as defined in Article 39 of the Charter of the United Nations. Recourse to Chapter VII is admissible where a situation has massive cross-border repercussions. In the alternative, recourse to Chapter VII has always been contested by certain States, indicating a lack of *opinio juris*. Given the lack of *opinio juris*, resolution 1267 (1999) and related resolutions are *contra legem*: the fight against an “invisible” enemy does not dispense with the obligation to respect the Charter as currently interpreted.

5.7 The imposition of sanctions on private individuals is not consistent with the purposes and principles of the United Nations. International case law establishes that Article 39 may be used only within the limits of the purposes and principles of the United Nations.<sup>20</sup> Those purposes and principles include the maintenance of international peace and security “in conformity with the principles of justice and international law”. The order in the present case to freeze the assets of charitable organizations and the individuals who direct them on the sole ground that they are suspected of financing international terrorism violates the principles of justice established in the Covenant, and is thus a violation of international law, and ultimately of the Charter. In these circumstances, the State party is not bound to enforce the sanctions. A decision taken *ultra vires* is not binding, and the State party must give precedence to the peremptory norms of international law (*jus cogens*) over any other obligation.<sup>21</sup> The Committee stated in general comment No. 29 that “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of ... peremptory norms of international law” (para. 11). Therefore the State party is not obliged to enforce sanctions which conflict with *jus cogens* and the peremptory norms of international law established in the Covenant.

5.8 Further, the enforcement of sanctions imposed by the Security Council and relayed by the European Union does not exempt the State party from its international responsibility under the

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<sup>20</sup> Case No. IT-94-I-AR72, *Dusko Tadic*, 2 October 1995, Tadic (1995) I ICTY JR 293, para. 29.

<sup>21</sup> General Assembly resolution 56/83, annex, “Responsibility of States for internationally wrongful acts”, art. 26 (“Compliance with peremptory norms”). Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969, United Nations Treaty Series, vol. 1155, I-18232, p. 362 (by extension to a unilateral act of an international organization).

Covenant. This interpretation is confirmed by the case law of the European Court of Human Rights, which has held that: “The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer.”<sup>22</sup> The State party must therefore respect its obligations under the Covenant regardless of the fact that it is a member of the European Union and the United Nations; Article 103 of the Charter does not override the illegality of violations of the Covenant. Article 103 does not exempt a State that gives Charter obligations precedence over other international obligations from its international responsibilities, and it is not a ground for precluding the wrongfulness of an act in the form of a violation of an obligation not contained in the Charter. According to the established interpretation of the law on international responsibility, only by invoking article 4 of the Covenant can a State party avoid all responsibility.<sup>23</sup> The Committee has stressed that for article 4 to apply, the State party must have officially proclaimed a state of emergency.<sup>24</sup>

5.9 On the merits of the case, counsel recalls that whether or not a measure is “criminal” in nature is not bound by the classification in domestic law. On the basis of international case law, the authors consider that the sanctions imposed on them are indeed criminal in nature. The European Court of Human Rights has found that the criminal nature of a sanction depends on whether or not it is associated with criminal proceedings, and whether the sanction is sufficiently severe to have a punitive and deterrent character.<sup>25</sup> In the present case, the State party, in addition to enforcing sanctions against the authors, has launched a criminal investigation. Further, the Monitoring Group established pursuant to Security Council resolution 1363 (2001) is of the view that “individuals designated on the list must be terrorists or suspected terrorists and must be apprehended. They should then be sent to their country of origin or to the country where they have been indicted”.<sup>26</sup> The wording of the French text - “*extradés*” (extradited) and “*lancé un mandat d’arrêt*” (indicted) - implies that the context is criminal law. An asset freeze and a travel ban may also amount to criminal sanctions within the meaning of the Covenant. The “ordinary meaning” of the word “sanction” also evokes a criminal context, as it is derived from the Latin word *sanctio*, which means “penalty” or “punishment”.

5.10 There are two types of violations of the Covenant. Violations of *jus cogens* relate to article 14, paragraph 2, and article 15 of the Covenant.<sup>27</sup> Regarding article 14, paragraph 2,

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<sup>22</sup> *Matthews v. United Kingdom* [GC], No. 24833/94, CEDH 1999-I - (18.2.99), para. 32.

<sup>23</sup> General Assembly resolution 56/83, annex, “Responsibility of States for internationally wrongful acts”, art. 55 (“*Lex specialis*”): the traditional grounds that preclude the wrongfulness of an act are invalid if *lex specialis* applies.

<sup>24</sup> General comment No. 29, para. 2.

<sup>25</sup> *Malige v. France*, Rec. 1998-VII, fasc. 93 (23.9.98), p. 2934.

<sup>26</sup> S/2002/1338, para. 53.

<sup>27</sup> Counsel is referring to general comment No. 29.

criminal sanctions have been imposed on the authors without their having been proved guilty according to law, and without any trial. The authors continue to be subject to sanctions despite the fact that the Judge's Chambers of the Brussels Court of First Instance ordered that their case should be dismissed. Counsel recalls that the Monitoring Group,<sup>28</sup> the Sanctions Committee's Analytical Support and Sanctions Monitoring Team<sup>29</sup> and the Legal Counsel of the United Nations<sup>30</sup> have repeatedly deplored States' "reluctance" to strictly implement the relevant resolutions, in the absence of any judicial review to test whether the sanctions are well founded. Regarding article 15 of the Covenant, the authors have been "held guilty" without trial for a criminal offence which the State party has expressly recognized does not exist, as is apparent from the closure of the investigation. Lastly, as to the violations of articles 12, 17, 27, and 18 taken together with 22, counsel refers to the original communication.

### **State party's reply**

6.1 On 17 January 2007, the State party submitted that the authors are not entitled to challenge United Nations regulations on the fight against terrorism before the Committee. Article 1 of the Optional Protocol precludes the authors from disputing measures taken by the State party to implement its Charter obligations. In the circumstances, the authors are not subject to the jurisdiction of the State party and the Committee is not entitled to consider their complaints. The authors do not dispute that the action of a State falls beyond the State's jurisdiction if it is dictated by an international obligation. The authors' argument wrongly implies that the Committee can pass judgement on the validity of Security Council resolutions. It also suggests that States Members of the United Nations are in a position to scrutinize the legitimacy of Security Council resolutions in terms of the Charter and to consider them alongside provisions of the Covenant. Even if Member States did have such discretion, at most it would imply marginal oversight restricted to manifest abuses by the Security Council. The Security Council emphasized only recently "the obligations placed upon all Member States to implement, in full, the mandatory measures adopted by the Security Council".<sup>31</sup> In this case, the authors have not identified any manifest violation of the Charter. Regarding the alleged action ultra vires on the part of the Security Council, the Security Council did not act ultra vires and it is well established that terrorism constitutes a threat to international peace and security.

6.2 As for the alleged non-conformity of Security Council resolutions with the purposes and principles of the United Nations, the maintenance of international peace and security and respect for the principles of justice and international law are both objectives of the Security Council. It is up to the Security Council to find an appropriate balance between the two objectives, and in this case, the actions of the Security Council were not manifestly inappropriate. The principle of

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<sup>28</sup> S/2003/1070, para. 28; S/2002/1338, para. 17.

<sup>29</sup> S/2004/679, para. 34.

<sup>30</sup> Letter from Denmark dated 7 June 2006 (S/2006/367), p. 4 (question); S/PV.5474 (response by the Legal Counsel), p. 5.

<sup>31</sup> Security Council resolution 1730 (2006).

*jus cogens* would be violated only if the assets freeze and travel ban constituted criminal sanctions, which they do not. In *Malige v. France*, the European Court of Human Rights requires more than an association with criminal proceedings for it to be established that a sanction is “criminal”. In this case, the assets freeze is not a penalty imposed in connection with a criminal procedure or conviction. The basis for the listing is not in itself a criminal offence in Belgian or international law: “the measures referred to ... are preventative in nature and are not reliant upon criminal standards set out under national law”.<sup>32</sup> The decision of the judicial authorities to initiate an investigation of the authors for conspiracy and money-laundering was not dependent on the authors’ inclusion on the list. Persons placed on the list may invoke the humanitarian clause and be granted an exemption from the travel ban.<sup>33</sup> These measures cannot be described as criminal in nature, such as to engage the presumption of innocence and principle of legality of penalties. In the circumstances, the State party had no option but to implement the Security Council resolutions, and the authors are not subject to the jurisdiction of the State party within the meaning of article 1 of the Optional Protocol.

6.3 As to the argument that the implementation of sanctions does not exempt the State party from its responsibilities under the Covenant, the determination of the European Court in *Matthews v. United Kingdom* is irrelevant, since it concerns the transfer of competences to an international organization subsequent to ratification of the European Convention on Human Rights. In ratifying the Charter, the State party transferred powers to the Security Council, and it has subsequently ratified the Covenant. At the time when the State party ratified the Covenant, the powers it had transferred to the Security Council were no longer within its competence, and so the State party cannot be held responsible under the Covenant for how those powers are exercised. As for Article 103 of the Charter, it establishes an order of precedence and absolves the State of responsibility for failure to fulfil a lower-ranking obligation. Article 103 is not merely an exemption clause which would permit a State not to comply with an obligation in conflict with a Charter obligation: it requires the State to comply with the Charter. Thus the State cannot be held responsible for failure to respect a lower-ranking obligation that runs counter to the Charter.

6.4 As for the lack of the notification required under article 4 of the Covenant, no such notification is required since the Covenant itself provides for restrictions on liberty of movement, respect for privacy and the right of access to a court. Standard practice is that States parties to the Covenant give notification only of measures taken on an individual basis, not of measures taken to implement United Nations sanctions. Thus, the authors’ complaint could only relate to the manner in which the State party exercised any discretion it might have in implementing United Nations rules. The State party has taken all measures open to it and has therefore respected the Covenant within the limits of its jurisdiction. Inclusion on the list is a preventive rather than a punitive measure, as is apparent from the fact that the persons affected can obtain authorization from the Sanctions Committee for an exemption from the assets freeze and travel ban.

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<sup>32</sup> Security Council resolution 1735 (2006).

<sup>33</sup> Security Council resolution 1390 (2002).

6.5 Regarding the authors' request that the State party offset the sanctions imposed on the authors at the domestic and Community levels, following the transfer of competence to the European Community in this matter, the implementation of economic measures adopted by the United Nations is a matter for the European Community. The European regulations incorporating the provisions of Security Council resolutions are binding and directly applicable in the State party, and take precedence over conflicting domestic legal provisions. As a result, even if the State party removed the authors from the Belgian list, that would have no impact on their personal situation since they would remain on the Community list, which takes precedence over Belgian legislation. It would be beyond the jurisdiction of a Belgian judge to disapply Community law on the basis of the Covenant. A Belgian judge would not be competent to determine this matter, which falls within the exclusive competence of the Court of Justice of the European Communities, and could only refer the point for a preliminary ruling.<sup>34</sup> The Court of First Instance of the European Communities has already found on several occasions that sanctions adopted by the Security Council in its efforts to combat the financing of terrorism are consistent with respect for human rights.<sup>35</sup> Even if the State party stopped implementing Security Council resolutions, the authors' names would remain on the United Nations list, and other Member States would be bound to uphold the travel ban, unless the Sanctions Committee authorized an exemption to it.

#### **Decision of the Committee concerning admissibility**

7.1 On 30 March 2007, at its eighty-ninth session, the Committee considered the admissibility of the communication.

7.2 It considered that article 1 of the Optional Protocol recognizes the competence of the Committee to receive and rule on communications from individuals who claim to be victims of a violation of any of the rights set forth in the Covenant, and who are subject to the jurisdiction of a State party. The State party contended that the authors were not subject to its jurisdiction within the meaning of article 1 of the Optional Protocol. According to the State party, the rules on communications precluded the authors from disputing United Nations rules concerning the fight against terrorism before the Committee. The same rules were said to prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter of the United Nations. While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party. The Committee concluded that the provisions of article 1 of the Optional Protocol did not preclude the consideration of the communication.

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<sup>34</sup> Articles 220, 230 and 234 of the Treaty establishing the European Community (as amended).

<sup>35</sup> Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, Judgement of the Court of 21 September 2005; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgement of the Court of 21 September 2005.

7.3 The Committee recalled that it was not competent to consider a communication if the same matter was already being examined under another procedure of international investigation or settlement. The State party contended that the same matter was pending before the Sanctions Committee of the United Nations, which constituted “another procedure of international investigation or settlement”. Without having to consider the question of the nature of the Sanctions Committee, the Committee limited itself to considering the words “the same matter”, and referred to its jurisprudence according to which the words “the same matter” must be understood as referring to one and the same claim concerning the same individual, as submitted by that individual, or by some other person empowered to act on his behalf, to the other international body.<sup>36</sup> In the case at issue, the petition for de-listing currently examined by the Sanctions Committee had not been submitted by the authors but by the State party under the guidelines of the Sanctions Committee.<sup>37</sup> The Committee therefore concluded that the same matter was not being examined under another procedure of international investigation or settlement and that, consequently, it was not prohibited from examining the communication in accordance with the provisions of article 5, paragraph 2 (a).

7.4 On the matter of exhaustion of domestic remedies, the State party claimed that the authors’ failure to invoke the humanitarian clause constituted a failure to exhaust (administrative) domestic remedies since the clause provided them with an effective domestic remedy. The Committee noted that the humanitarian clause in resolution 1452 (2002) and incorporated into Regulation (EC) No. 561/2003 amending Regulation No. 881/2002, authorized the State party not to apply the assets freeze to any funds it might determine to be necessary for the basic expenses of listed persons. The Committee noted that, even if the authors had applied for a release of funds under the humanitarian clause, they could have withdrawn an amount sufficient to cover their basic expenses but would still have had no effective remedy in respect of the alleged violations, i.e., a hearing of their allegations of violations of their rights under the Covenant. The Committee therefore found that application of the humanitarian clause did not constitute an effective remedy and that the authors had been under no obligation to avail themselves of it before applying to the Committee.

7.5 As to the authors’ claims under article 2, paragraph 3, article 12, article 14, paragraphs 1, 2 and 3, and articles 15 and 17 of the Covenant, the Committee found that the facts submitted by the authors were closely bound up with the substance of the case and should thus be considered on the merits. As to the claims under articles 18, 22, 26 and 27 of the Covenant, the Committee

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<sup>36</sup> Communications No. 75/1980, *Fanali v. Italy*, Views adopted on 31 March 1983; No. 777/1997, *Sánchez López v. Spain*, decision adopted on 25 November 1999.

<sup>37</sup> See in this regard the conclusions of the Analytical Support and Sanctions Monitoring Team: “although the guidelines [of the Sanctions Committee] allow parties to petition for de-listing, in accordance with United Nations practice they can only do so through their Government of residence and/or citizenship. If that Government is not sympathetic, the petition might not be presented to the Committee, regardless of the merits” (Second report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, S/2005/83, para. 56).

found that the authors had not sufficiently substantiated their complaints for the purposes of admissibility. The Committee therefore concluded that the communication was admissible under article 2, paragraph 3, article 12, article 14, paragraphs 1, 2 and 3, and articles 15 and 17 of the Covenant.\*

### **State party's observations on the merits**

8.1 On 21 December 2007, the State party reiterated its previous observations that it has done nothing contrary to the requirements of the Covenant. If the Committee were to conclude that the State party had conducted itself in a manner that was intrinsically incompatible with the requirements of the Covenant taken in isolation, *quod non*, Articles 25 and 103 of the Charter of the United Nations would preclude a determination that such conduct was unlawful, in other words, they would rule out any finding that the Covenant had been violated. Pursuant to Article 25 of the Charter of the United Nations, the State party must accept and carry out the decisions of the Security Council, a body that determines the existence of a threat to international peace and security justifying the application of Chapter VII and that decides on an appropriate response. Article 103 of the Charter is not merely an exemption clause authorizing non-fulfilment of an obligation that is in conflict with a Charter obligation; it requires compliance with the Charter, and therefore with the decisions of the Security Council, in the event of conflict between the latter and another international obligation. It therefore absolves States of responsibility for failure to fulfil a lower-ranking obligation. Hence, the Collective Measures Commission to strengthen the United Nations system of collective security<sup>38</sup> maintained that "it was of importance" that States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures",<sup>39</sup> and the General Assembly took note of this position.<sup>40</sup> Since under Article 103 of the Charter, Charter obligations prevail over any others, a State Member of the United Nations carrying out its obligations under the Charter cannot incur liability under the Covenant.

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\* The following members of the Committee participated in the consideration of the admissibility of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood. The texts of individual opinions signed by Committee members Sir Nigel Rodley, Mr. Ivan Shearer, Ms. Iulia Antoanella Motoc, Mr. Walter Kälin, Mr. Yuji Iwasawa and Ms. Ruth Wedgwood are appended to the present document.

<sup>38</sup> Established by the General Assembly by resolution 377 (A/RES/377 (V)).

<sup>39</sup> United Nations archive, V, 318, quoted in Simma, *Charta der Vereinten Nationen, Kommentar*, 1991, p. 1069.

<sup>40</sup> General Assembly resolution 503A (VI) of 12 January 1952.

8.2 In the present case, the Security Council adopted resolution 1267 (1999) et seq., introducing sanctions to counter terrorism financing. The State party was obliged to furnish information about the authors so that the Sanctions Committee could draw up a list of persons and entities that it identified as being linked to the Al-Qaida network or the Taliban.<sup>41</sup> For the State party this necessarily entailed an obligation towards the Sanctions Committee to act on the basis of information that the authors were the director and secretary of *Fondation Secours International*, an entity that has been on the United Nations list since 22 October 2002. This obligation was subsequently elucidated by the Sanctions Committee, which confirmed that when a charitable organization is listed, the main persons connected to such bodies must also be listed.<sup>42</sup> As a State Member of the United Nations, the State party may at most exercise marginal oversight of Security Council resolutions and identify only manifest abuses, which have not been observed in the present case.

8.3 The State party recalls that it did everything in its power to have the authors delisted and to end a situation that the authors consider to be contrary to the Covenant. In particular, it initiated a de-listing procedure, which it then carried out and initiated a second time. It cannot be held responsible for the fact that, in spite of its efforts, the members of the Security Council refuse to delist the authors. In these circumstances, it cannot be deemed to have violated the Covenant.

#### **Authors' comments on the State party's observations on the merits**

9.1 On 21 January 2008, the authors reiterated their previous comments and stated that they would shortly have been on the list for five years, the State party having initially asserted that relevant evidence had been found against them. The State party had subsequently been forced to admit that no such evidence had been found, following not only a criminal court decision but also a civil judgement which was not appealed by the State party. The latter maintains that there is nothing it can do, even though other nations, before rashly transmitting information, carry out an investigation and, if necessary, refuse to have the names of persons subject to their jurisdiction placed on an international list.<sup>43</sup>

9.2 Counsel points out that in the United States no member of the Global Relief Foundation is on the United Nations list, apart from the authors.<sup>44</sup> France, Kosovo, Bosnia and Herzegovina

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<sup>41</sup> The State party quotes Security Council resolution 1267 (1999): States Members of the United Nations must: "cooperate fully with the Committee [...] including [by] supplying such information as may be required by the Committee in pursuance of this resolution" (para. 9).

<sup>42</sup> Initial report of the Follow-Up Group, 16 June 2003, p. 17, No. 61.

<sup>43</sup> Counsel provides a report by the National Commission on Terrorist Attacks Upon the United States (*Staff Monograph on Terror Financing*, Chapter 5, *Al-Barakaat case study*) and an article from the Wall Street Journal Europe (*Asset-Freeze List Sparks Rift Between U.S., European Allies*) of 21 March 2002, which, according to counsel, demonstrate "this elementary prudence".

<sup>44</sup> Counsel provides a letter dated 9 July 2003 from a United States lawyer.

and Pakistan, where offices of this organization were operating, felt no need to make any declaration of any kind. The founder of the Global Relief Foundation was imprisoned in the United States for 19 months and subsequently extradited to Lebanon without standing trial. He is now free and is able to travel unhindered anywhere in the world. The authors, who have neither the role nor the responsibilities of the founder of the Global Relief Foundation, see their lives and those of their children as being frozen by this list: they cannot leave their country or hold a bank account but they have to pay charges on their blocked accounts.<sup>45</sup> Lastly, since 7 December 2005, the authors have been asking the Federal Prosecutor's Office, to no avail, for the return of the property and effects that were seized from them during searches. The different authorities attribute responsibility to one another for returning these items, even though the authors are no longer the subject of a criminal investigation.

### **Consideration of the merits**

10.1 The Human Rights Committee considered the communication in the light of all the information supplied to it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee recalls that, at the time of its decision on admissibility, it was of the view that the provisions of article 1 of the Optional Protocol did not preclude the consideration of the communication. In this regard, the Committee notes that the State party, in its various observations, has maintained that it is bound to comply with the decisions of the Security Council of the United Nations; and that all the Security Council resolutions have been transposed to the European regulations, since, following a transfer of competence from the member States to the European Community, the implementation of the economic measures determined by the United Nations falls within the Community's sphere of competence. The State party states that the European regulations incorporating the provisions of the Security Council resolutions are binding and directly applicable in the State party, and take precedence over conflicting domestic legal provisions. The Committee also recalls that the authors, in their comments on the merits, reiterate their previous observations and indicate that they have been on the sanctions list for over five years. The Committee notes that most of the facts concern parts of the communication that were already the subject of a thorough study when the question of admissibility was considered. Consequently, the Committee is of the view that there is no need to reconsider the Committee's competence to consider the present communication and that the other arguments must be analysed in the context of the consideration on the merits.

10.3 Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.

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<sup>45</sup> Counsel provides bank account statements.

10.4 The facts set before the Committee indicate that the State party froze the assets of the authors after their names were placed on the Consolidated List of the United Nations Sanctions Committee, which was subsequently appended to a European Community regulation and a ministerial order issued in the State party. The placement of the authors' names on the sanctions list prevents them from travelling freely. The authors allege violations of their right to an effective remedy, their right to travel freely, their right not to be subject to unlawful attacks on their honour and reputation, the principle of legality of penalties, respect for the presumption of innocence and their right to proceedings that afford procedural and structural guarantees.

10.5 With regard to the violation of article 12 of the Covenant, the authors indicate that they can no longer travel or leave Belgium, and that Mr. Sayadi was unable to accept an offer of employment in another country. The State party does not challenge this allegation, and the Committee observes from the outset that, in the present case, there has been a restriction of the authors' right to travel freely. While noting its general comment No. 27 on article 12, and that liberty of movement is an indispensable condition for the free development of the individual, the Committee nevertheless recalls that the rights covered by article 12 are not absolute. Paragraph 3 of article 12 provides for exceptional cases in which the exercise of the rights covered by article 12 may be restricted. In accordance with the provisions of that paragraph, the State party may restrict the exercise of those rights only if the restrictions are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant. In its general comment No. 27, the Committee notes that "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them" and that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function".

10.6 In the present case, the Committee recalls that the travel ban for persons on the sanctions list, particularly the authors, is provided by Security Council resolutions to which the State party considers itself bound under the Charter of the United Nations. Nevertheless, the Committee considers that, whatever the argument, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council. It is the duty of the Committee, as guarantor of the rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement of the right to liberty of movement, which is protected by article 12 of the Covenant.

10.7 The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a "restriction" covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors' names to the Sanctions Committee. The proposal for the listing, made by the State party on 19 November 2002, came only a few weeks after the opening of the investigation on 3 September 2002. According to the authors, this listing appears to have been premature and unjustified. On this point, the Committee notes the State party's argument that the authors' association is the European branch of the Global Relief Foundation, which was placed on the sanctions list on 22 October 2002, and the listing mentions the links of the Foundation with its European branches, including the authors' association. The State party has furthermore argued that, when a charitable organization is mentioned in the list, the main persons connected with

that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party's arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors' names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists and for the resulting travel ban.

10.8 The Committee notes that a criminal investigation that had been initiated against the authors at the request of the Public Prosecutor's Office was dismissed in 2005, and that the authors thus do not pose any threat to national security or public order. Moreover, on two occasions the State party itself requested the removal of the authors' names from the sanctions list, considering that the authors should no longer be subject, inter alia, to restrictions of the right to leave the country. The dismissal of the case and the Belgian authorities' requests for the removal of the authors' names from the sanctions list show that such restrictions are not covered by article 12, paragraph 3. The Committee considers that the facts, taken together, do not disclose that the restrictions of the authors' rights to leave the country were necessary to protect national security or public order. The Committee concludes that there has been a violation of article 12 of the Covenant.

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

10.10 With regard to the allegation of a violation of article 14, paragraph 3, of the Covenant, and to the authors' arguments that the application of sanctions was marked by the lack of a reasonable time frame for the proceedings and, more particularly, for the investigation into allegations of criminal association and money-laundering, the Committee notes that the criminal investigation was initiated on 3 September 2002 and that the dismissal order was issued by the Brussels Court of First Instance on 19 December 2005. The State party points out that the authors give no reasons for claiming a violation of the reasonable time limit for the investigation. It contends that the three and a half years of investigation were justified by the complexity of the dossier and the fact that several investigative measures had been carried out abroad. The Committee recalls that what constitutes an excessive and a reasonable length of time is a matter

that must be assessed on a case-by-case basis, taking account, inter alia, of the complexity of each case. In the present case, the Committee finds that the facts before it do not disclose any violation of article 14, paragraph 3, of the Covenant with respect to the duration of the investigation.

10.11 With regard to the allegation of a violation of article 14, paragraphs 2 and 3, and article 15, in respect of the sanctions procedure, the Committee recalls that, in its decision on admissibility, it found that the facts submitted by the authors were closely bound up with the substance of the case and should thus be considered on the merits. In this connection, it takes note of the arguments of the authors, who consider that the sanctions imposed on them are criminal in nature and that the State party launched a criminal investigation in addition to enforcing the sanctions (see paragraph 5.9). The Committee also takes note of the State party's arguments that the sanctions cannot be characterized as "criminal", since the assets freeze was not a penalty imposed in connection with a criminal procedure or conviction (see paragraph 6.2). Moreover, the State party maintains that placement on the list was a preventive rather than a punitive measure, as was apparent from the fact that the persons affected could obtain authorization for an exemption from the freeze on their assets and from the travel ban (see paragraph 6.4). The Committee recalls that its interpretation of the Covenant is based on the principle that the terms and concepts in the Covenant are independent of any national system or legislation and that it must regard them as having an autonomous meaning in terms of the Covenant.<sup>46</sup> Although the sanctions regime has serious consequences for the individuals concerned, which could indicate that it is punitive in nature, the Committee considers that this regime does not concern a "criminal charge" in the meaning of article 14, paragraph 1. The Committee therefore finds that the facts do not disclose a violation of article 14, paragraph 3, article 14, paragraph 2, or article 15 of the Covenant.

10.12 With regard to the allegation of a violation of article 17 of the Covenant, the Committee takes note of the authors' arguments that their full contact details have been made available to everyone through their inclusion on the Sanctions Committee's list. It recalls that article 17 recognizes the right of everyone to protection against arbitrary or unlawful interference with his privacy, family, home or correspondence, and against unlawful attacks on his honour and reputation. The obligations imposed by this article require the State party to adopt legal or other measures to give effect to the prohibition on such interference or attacks on the protection of this right. In the present case, the Committee finds that the sanctions list is available to everyone on the Internet under the title *The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama Bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them*. It also finds that the authors' names were included in the ministerial order of 31 January 2003 amending the ministerial order of 15 June 2000 implementing the Royal Decree of 17 February 2000, concerning restrictive measures against the Taliban of Afghanistan, as published in the State party's *Official Gazette*. It considers that the dissemination of personal information about the authors constitutes an attack

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<sup>46</sup> See, for example, communication No. 50/1979, *Van Duzen v. Canada*, Views adopted on 7 April 1982, para. 10.2.

on their honour and reputation, in view of the negative association that some persons could make between the authors' names and the title of the sanctions list. Moreover, many press articles that cast doubt on the authors' reputation have been published, and the authors are obliged, on a regular basis, to demand the publication of a right of reply.

10.13 The Committee takes note of the authors' argument that the State party should be held responsible for the presence of their names on the United Nations sanctions list, which has led to interference in their private life and to unlawful attacks on their honour and reputation. It recalls that it was the State party that communicated all the personal information concerning the authors to the Sanctions Committee in the first place. The State party argues that it was obliged to transmit the authors' names to the Sanctions Committee (see paragraph 10.7 above). However, the Committee notes that it did so on 19 November 2002, without waiting for the outcome of the criminal investigation initiated at the request of the Public Prosecutor's Office. Moreover, it notes that the names are still on the lists in spite of the dismissal of the criminal investigation in 2005. Despite the State party's requests for removal, the authors' names and contact data are still accessible to the public on United Nations, European and State party lists. The Committee therefore finds that, in the present case, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists. The Committee concludes that the facts, taken together, disclose that, as a result of the actions of the State party, there has been an unlawful attack on the authors' honour and reputation. Consequently, the Committee concludes that there has been a violation of article 17 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 12 and article 17.

12. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is bound to provide the authors with an effective remedy. Although the State party is itself not competent to remove the authors' names from the Sanctions Committee's list, the Committee is nevertheless of the view that the State party has the duty to do all it can to have their names removed from the list as soon as possible, to provide the authors with some form of compensation and to make public the requests for removal. The State party is also obliged to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also invited to publish the present Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

## Appendix A

### INDIVIDUAL OPINIONS ON THE COMMITTEE'S DECISION ON ADMISSIBILITY

#### **Individual opinion (partly dissenting) by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc**

Having separated admissibility from the merits, the Committee might have been expected to give some reasons for declaring this communication admissible. Instead, in respect of articles 2, paragraph 3; 12; 14, paragraphs 1, 2 and 3; 15; and 17, it contents itself with the unsupported assertion that "the facts submitted by the authors are closely bound up with the substance of the case and should thus be considered on the merits".

Although it failed to make the argument explicitly, it is evident that the State party has done what it could to secure the authors' de-listing. In so doing it has provided the only remedy within its power. Accordingly, unless the Committee believes that the State party's mere compliance with the Security Council listing procedure (in the absence of bad faith by the State party or of manifest abuse or overstepping of the Security Council's powers) is capable of itself of violating the Covenant, it is not clear how the authors can still be considered victims, under article 1 of the Optional Protocol, of violations of the State party's obligations under the Covenant.

We acknowledge, of course, that the authors may have been unjustly harmed by operation of the extravagant powers the Security Council has arrogated to itself, including the obstacles it has created to the correction of error. It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level, to simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action. However, the Security Council cannot be impleaded under the Covenant, much less the Optional Protocol.

Even if the authors were capable of being considered as victims of breaches of the State party's obligations under the Covenant, we are bemused by the Committee's novel assumption that there could be any merit to the authors' claims under article 2, paragraph 3, on its own. Nor do we understand on what basis it believes that articles 14 and 15 could be relevant to actions that the State party quite rightly maintains are administrative, not criminal.

*(Signed):* Sir Nigel Rodley

*(Signed):* Mr. Ivan Shearer

*(Signed):* Ms. Iulia Antoanella Motoc

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

**Individual opinion (partly dissenting) of Committee members  
Mr. Walter Kälin and Mr. Yuji Iwasawa**

We agree with the Committee that the authors' claims under article 2, paragraph 3, article 12, article 14, paragraph 1, and article 17 of the Covenant and the facts submitted by them are closely bound up with the substance of the case and therefore, without prejudice to the outcome of the case, should more appropriately be considered on the merits of the case.

At the same time, we maintain that the claims of violations of article 14, paragraphs 2 and 3, and article 15 should have been declared inadmissible *rationae materiae*. While it is true that freezing of the authors' financial assets is part of the fight against terrorism, this measure clearly does not serve the purpose of sanctioning the authors for their allegedly illegal behaviour but rather aims at preventing them from continuing their alleged support of terrorist activities, and thus is of administrative character.

(Signed): Mr. Walter Kälin

(Signed): Mr. Yuji Iwasawa

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### **Individual opinion (dissenting) of Ms. Ruth Wedgwood**

Under the Optional Protocol, this Committee has a limited purview. We can “consider” an individual communication invoking the norms of the International Covenant on Civil and Political Rights, only where the matter concerns “a violation by [a] State Party” that has joined the Optional Protocol.<sup>1</sup>

The matter under consideration here does not meet that test. The complaint of Belgian citizens Nabil Sayadi and Patricia Vinck is inadmissible because it pleads no cognizable violation by the State party.

The authors are complaining about the actions and decisions of the United Nations Security Council, not the acts of Belgium. Security Council resolutions have established administrative measures to prevent the financing and facilitation of international terrorism. These sanctions extend to “any individuals, groups, undertakings or entities associated with Al-Qaida, Usama bin Laden or the Taliban”, including those “who have participated in financing, planning, facilitating, recruiting for, preparing, perpetrating, or otherwise supporting terrorist activities or acts”.<sup>2</sup>

The Security Council acted under Chapter VII of the United Nations Charter to impose this mandatory regime of economic sanctions. The financial controls are designed to thwart acts of catastrophic terrorism by private actors, including violence against civilians. The Council has acted to meet a “threat to the peace” and “to maintain or restore international peace and security”.<sup>3</sup>

Article 48 (2) of the United Nations Charter provides that Security Council decisions “*shall be carried out* by the Members of the United Nations *directly* and through their action in the appropriate international agencies of which they are members” (emphasis added).<sup>4</sup> Article 25 likewise provides that “The Members of the United Nations *agree to accept and carry out the decisions* of the Security Council in accordance with the present Charter” (emphasis added). And ultimately, Article 103 provides that “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”.

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<sup>1</sup> Optional Protocol to the International Covenant on Civil and Political Rights, article 1.

<sup>2</sup> See Security Council resolution 1617, fifth preambular paragraph.

<sup>3</sup> See United Nations Charter, Article 39.

<sup>4</sup> Article 48 reads in full: “(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

The Committee is not entitled to use the hollow form of a pleading against a State to rewrite those provisions. As the Committee acknowledges, it has no appellate jurisdiction to review decisions of the Security Council. Neither can it penalize a State for complying with those decisions. It would be inconsistent with the constitutional structure of the United Nations Charter, and its own responsibilities under the Covenant.

Belgium was required by the Security Council to provide information about the authors. The decision to “list” the authors under the financial sanctions directed against Al-Qaida and its affiliates was taken by the Sanctions Committee of the Security Council, not by Belgium.<sup>5</sup>

Even apart from its limited remit, the Committee cannot take a blinkered account of what is at stake here. Human rights and the enforcement decisions of the Security Council share a common concern for the lives of innocent people. The Council’s authority to address threats to international peace and security is to prevent the scourge of war, and in modern practice, this has included internecine civil conflicts as well. The Security Council has also concluded that international peace requires preventing acts of catastrophic terrorism.

The United Nations Charter recognizes the centrality of human rights, see Articles 55 and 56. And the Security Council must continue to weigh how to employ sanctions effectively and fairly. Economic sanctions have a considerable impact on civilians, even where they are not directed at specific entities or individuals. Indeed, so-called “smart sanctions” are an attempt to limit the impact of sanctions to persons believed to be assisting in the prolongation of a conflict.

But the Security Council also has the competence to prevent the commission of crimes against humanity, whether committed by State or non-State actors, as threats to international peace and security.<sup>6</sup> The sanctions of the Security Council were undertaken to protect the foremost human right, namely, the right to life.

The authors of the complaint have not applied for the release of any portion of their assets under the humanitarian exception provided by Security Council resolution 1452 (2002). In addition, Belgium has obtained review of the basis for listing of the authors on two occasions.

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<sup>5</sup> It was also the determination of the Sanctions Committee, not of Belgium individually, that “when a charitable organization is listed” under the sanctions regime, “the main persons connected to such bodies must also be listed”. See Views of the Committee, para. 4.6. The authors served respectively as director and secretary of the Fondation Secours International, reported to be the European branch of an organization placed on the sanctions list as of October 2002. The authors assert that the Security Council’s “imposition of sanctions on private individuals is not consistent with the purposes and principles of the United Nations”. But that is not a question we are competent to entertain, and indeed, the authors’ claim runs against the Security Council’s established practice.

<sup>6</sup> See, e.g., *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, and Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change, 2004, paras. 199-205.

The authors invoke three other claims against the State party, and each is equally wide of the mark. The first is article 14 (3) of the Covenant, which only applies to criminal matters. Belgium's initial criminal investigation examined allegations of "Mr. Sayadi's numerous alleged contacts, including those of a financial nature, with a number of leaders linked to the Al-Qaida network".<sup>7</sup> There is no indication that the criminal investigation took excessively long,<sup>8</sup> and the criminal matter has been resolved.

Article 14 (3) does not apply as such to international organizations, but in any event, the sanctions regime imposed by the Security Council is not a criminal proceeding. The financial controls are stated by Security Council resolution 1735 to be "preventive in nature and ... not reliant upon criminal standards set out under national law".<sup>9</sup> The type and plentitude of evidence required for a criminal charge and conviction in a State party may differ from the standards deemed appropriate by the Council for the imposition of precautionary civil sanctions. Some members of this Committee may not agree with the Security Council's choice. But without minimizing the importance of fairness and adequate review, it is not up to this Committee to determine what are the appropriate evidentiary standards for the Security Council's action.<sup>10</sup>

Finally, there is no basis for claims under articles 15 and 17 of the Covenant. The authors have not been held guilty of a criminal offence, and the law defining terrorist crimes has not changed since the time of their challenged conduct. Hence, article 15 (1) does not apply. The exception of article 15 (2) also is relevant to Al-Qaida's violent acts targeting innocent civilians, or these are "criminal according to the general principles of law recognized by the community of nations". The idea of complicity and assistance to such acts, even by indirect means, is a part of customary law. As for article 17, there has been no "arbitrary" or "unlawful" interference with privacy, nor "unlawful attacks on [the authors'] honour or reputation". The only actions taken by Belgium were in accordance with the binding mandate of the Security Council.

*(Signed):* Ruth Wedgwood

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>7</sup> See Views of the Human Rights Committee, para. 4.2.

<sup>8</sup> See Views of the Human Rights Committee, para. 4.10. The Belgian criminal investigation required the gathering of evidence abroad, through the time-consuming process of "letters rogatory".

<sup>9</sup> See Security Council resolution 1735, tenth preambular paragraph.

<sup>10</sup> Compare High-Level Panel, para. 182 ("Where sanctions involve lists of individuals or entities, sanctions committees should establish procedures to review the cases of those claiming to have been incorrectly placed or retained on such lists.").

## Appendix B

### INDIVIDUAL OPINIONS ON THE COMMITTEE'S DECISION ON THE MERITS

#### Individual opinion of Committee member Mr. Ivan Shearer (dissenting)

The Committee has found that the action of the State party in transmitting the names of the authors to the United Nations Sanctions Committee on 19 November 2002 constituted a violation of articles 12 and 17 of the Covenant inasmuch as that transmittal led to the placing of the authors on the Sanctions List with adverse consequences for their freedom of movement, their honour and reputation, and to interference in their private life. The Committee has found that the State party acted prematurely, and therefore wrongfully, in transmitting the authors' names to the Sanctions Committee before the conclusion of the criminal investigation into the authors' activities initiated by the State party's Public Prosecutor.

In my opinion, the Committee should have rejected this communication as unsubstantiated.

The State party was under an obligation to carry out the decisions of the United Nations Security Council by reason of article 25 of the Charter of the United Nations. Obligations under the Charter have priority over all other obligations by reason of Article 103 of the Charter. The Committee's reasoning, especially in paragraph 10.6 of its Views, appears to regard the Covenant as on a par with the United Nations Charter, and as not subordinate to it. Human rights law must be accommodated within, and harmonized with, the law of the Charter as well as the corpus of customary and general international law.<sup>1</sup>

It may be that, with regard to the particular issue raised in the present communication of the implementation of UNSC resolution 1267 (1999) by the State party, there can be said to exist a certain margin of appreciation vested in States when giving effect to binding decisions of the Security Council. This discretion was recognized by the European Court of Justice in the joined cases of *Kadi and the Al Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities* in its judgement dated 3 September 2008, and handed down after the pleadings in the present communication had closed.<sup>2</sup> The Court nullified the European regulation under which the plaintiffs in that case had been sanctioned by reason of the failure to provide in the regulation a mechanism whereby those to be sanctioned would be informed of the evidence against them and allowed to be heard in answer. But the situation of the State party in the present case is different. It was not Belgium that ordered the authors' listing; it

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<sup>1</sup> For a relevant analogy, see the Committee's general comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paragraph 11, which, referring to human rights in times of armed conflict, stated that "While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."

<sup>2</sup> Cases C-402/05 and C-415/05 P, Judgement of the Court (Grand Chamber), paragraph 298.

merely provided information regarding the names of those associated with a certain organization. Only after the authors' names appeared as a consequence on the United Nations Sanctions List were the authors subject to the measures directed by the implementing Belgian ministerial orders and European orders.

The chronology of events, set out in paragraphs 2.1-2.3 of the Committee's Views, demonstrates, in my opinion, that the State party acted in good faith in responding to the demands of the United Nations Security Council under the terms of a binding resolution. It is not reasonable to assert that, even on the assumption of the possession of a degree of discretion as to the manner in which such obligations should be carried out, the State party should have awaited the outcome of its criminal investigation, launched on 3 September 2002 (and thus more than two months prior to the transmittal of their names to the Sanctions Committee), and not concluded until 19 December 2005. Regard must be had to the presumed imminence and seriousness of the danger posed by individuals and associations listed by the Sanctions Committee.

Indeed the European Court of Justice itself, in the case cited above, recognized that an immediate nullification of the impugned regulation implementing sanctions could lead to irreversible prejudice to the effectiveness of those measures found to be justified. Thus the Court suspended the execution of the order of nullification for a period of three months.<sup>3</sup>

Furthermore, the State party has tried to secure the authors' delisting but to no avail. There is no other avenue open to it to correct the mistake that was made. Nor can there be a remedy where the State party acted in good faith to discharge its obligations under a superior law. There can be no violation of the Covenant in these circumstances.

*(Signed):* Ivan Shearer

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>3</sup> Judgement, paragraphs 373-376.

**Individual opinion of Committee member Mr. Yuji Iwasawa (concurring)**

Article 103 of the Charter of the United Nations provides that “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”.

The State party argued that the rules on communications prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter, and that Article 103 of the Charter absolves States of responsibility for failure to fulfil a low-ranking obligation.

The majority’s Views dismiss the State party’s arguments, stating merely that “the Committee considers that, whatever the argument, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council” (para. 10.6, emphasis added). I do not believe that the Committee should sidestep the issue raised by Article 103 of the Charter in this manner, and I therefore offer this concurring opinion.

The International Court of Justice stressed in the *Lockerbie* case that “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” and that “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 ...” (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, 1992 ICJ 3, 15*, para. 39, *Libyan Arab Jamahiriya v. United States, 1992 ICJ 114, 126*, para. 42, emphasis added).

I take note that, besides Article 103, the Charter contains Article 24 which provides that in discharging its duties for the maintenance of international peace and security, “the Security Council shall act in accordance with the Purposes and Principles of the United Nations”. Article 1, paragraph 3, stipulates that one of the Purposes of the United Nations is to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”, and Article 55 (c) provides that “the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. And, under Article 25 of the Charter, the Members agreed to accept and carry out the decisions of the Security Council “in accordance with the present Charter”.

Against this background, in the present case, the Committee examined the actions of the State party in light of the obligations it had undertaken under the Covenant. The State parties to the Covenant are obliged to comply with the obligations under it to the maximum extent possible, even when they implement a resolution of the United Nations Security Council.

The Charter of the United Nations is a “relevant rule of international law” to be taken into account in interpreting the Covenant in accordance with article 31 (3) (c) of the Vienna Convention on the Law of Treaties. The Committee properly notes that “the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a ‘restriction’ covered by article 12, paragraph 3, which is necessary to protect national security or public order” (para. 10.7).

In this case, the authors argued that the State party’s proposal for the listing was premature and unjustified. The State party transmitted the authors’ names to the Sanctions Committee on 19 November 2002, only some weeks after the opening of the investigation on 3 September 2002. The State party argued that the authors’ association is the European branch of an organization which was placed on the sanctions list, and that when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed. The Committee finds that “the State party’s arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee” (para. 10.7), and concludes that “the facts, taken together, do not disclose that the restrictions of the authors’ rights to leave the country were necessary to protect national security or public order” (para. 10.8).

In a similar vein, with regard to article 17 of the Covenant, the Committee finds that the State party is responsible for the presence of the authors’ names on the list, and concludes that “as a result of the actions of the State party, there has been an unlawful attack on the authors’ honour and reputation” (para. 10.13).

The State party could have acted otherwise while in compliance with the resolutions of the Security Council of the United Nations.

For the reasons stated above, I am of the view that Article 103 of the Charter of the United Nations does not prevent the Committee from reaching the conclusions drawn in the Views.

*(Signed):* Yuji Iwasawa

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee’s annual report to the General Assembly.]

**Individual opinion of Committee member Sir Nigel Rodley (concurring)**

While I dissented on admissibility (together with Mr. Shearer and Ms. Motoc), I have joined the Committee in its finding on the merits of violations of articles 12 and 17, on the basis of the information submitted at the merits stage on behalf of the authors and uncontested by the State party. That information (para. 9.2) gave plausible grounds for concluding that the course of action adopted by the State party was not compelled by Security Council resolutions, notably resolution 1267 (1999).

The approach of the Committee is restricted to an analysis of the issues from the sole perspective of the Covenant. It does not directly address the possibility of conflict with the Security Council resolutions in question. If such a conflict exists, it is left to others to decide what may be the legal consequences.

My earlier dissent presumed that there was indeed a conflict between the State party's obligations under the Covenant and its "prima facie" obligation under Article 25 of the Charter of the United Nations to carry out the pertinent Security Council decisions (see *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. 3, para. 39; (*Libyan Arab Jamahiriya v. United States of America*), *ICJ Reports 1992*, p. 114, para. 42; emphasis added). It also presumed that Charter Article 103 decided the conflict in favour of the obligations arising from the Security Council decisions. There was also an implicit presumption that the Committee was not well placed to assess the legal validity of the decisions, that is, whether the prima facie obligation to carry out the decisions was a definitive obligation. On further reflection, I have come to the view that the Committee could itself take at least a prima facie view as to the existence or otherwise of a conflict.

This then begs the question of what criteria should be applied in interpreting the resolutions for the purposes of establishing whether there is indeed a conflict. Article 24 of the Charter obliges the Security Council to act "in accordance with the purposes and principles of the United Nations". Article 1, paragraph 3, of the Charter establishes that one of the purposes of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms". A strict interpretation of this language could suggest that the Security Council cannot act in a way that requires disrespect for those rights and freedoms.

I would not go that far. However, the Charter wording strongly suggests that the first interpretation criterion is that there should be a presumption that the Security Council did not intend that actions taken pursuant to its resolutions should violate human rights.

A second criterion would be a presumption that, in any event, there was no intention that a peremptory norm of international (human rights) law (*jus cogens*) should be violated. This has been recognized by both the European Court of Human Rights (*Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (2007)) and even the Court of First Instance of the European Communities (*Kadi and Al Barakaat Foundation v. Council of the European Union* (2005)).

A third criterion would be that rights that are non-derogable in times of grave public emergency under international human rights treaties would be presumed not to be intended to be violated. Not all such rights are necessarily rules of *jus cogens*.

A fourth criterion would be that, even in respect of rights that may be derogated from during a public emergency, any departures would be conditioned by the principles of necessity and proportionality. In other words the steps required would have to be the absolute minimum necessary by way of impinging on human rights norms (see Human Rights Committee general comment No. 29 (2001)). On the other hand, there is no firm basis for the claim sometimes made that, where the human rights rule in question is one of treaty obligation, there is a need for the pertinent procedural rules established by the relevant treaty to be followed. For instance, a treaty may require formal notification, perhaps via a declaration, in the case of derogation. I can see no reason why the operation of Security Council decisions adopted to address the threat to international peace and security should be hampered by such procedural provisions of an international agreement. It follows that the absence of compliance with such procedural rules by a State party to an international human rights agreement cannot be taken as evidence that derogation has not happened or cannot be effected.

Finally, State practice in relation to the Security Council decisions has to be a relevant interpretative factor. It is perhaps this criterion that has effectively been decisive for the Committee in the present case, insofar as the author argued and provided evidence that other States in the same position as the State party did not act in the same way as the State party.

While it is not an issue for the Committee, I would venture to suggest that these criteria would also be helpful to those called upon to assess the legal validity of a Security Council resolution.

Without aiming to apply the above criteria in a detailed way to the facts at hand, it could be that the Security Council, in its first response to the need to combat the uniquely virulent terrorism of Al-Qaida that culminated in the atrocities of 11 September 2001, might take measures involving derogation from rights susceptible of derogation (freedom of movement; privacy; property too, albeit not a right protected by the Covenant). Certainly, the listing procedure could be and was understood to contain such elements. Necessity and proportionality, however, do not vouchsafe permanent answers. On the contrary, the answers vary according to the conditions being faced. It is not easy to see why nearly a decade after the first resolution 1267 (1999) and seven years after 9/11 the Council could not have evolved procedures more consistent with the human rights values of transparency, accountability and impartial,

independent assessment of facts. It may be hoped that it will not too much longer delay adjusting the procedures in line with these values. This would avoid putting States, including States party to the Covenant or other international human rights treaties, when determining the legislative or executive action to be taken, in the unenviable position of having to engage in difficult exercises in interpretation of or even challenges to the validity of provisions of Security Council resolutions.

*(Signed):* Sir Nigel Rodley

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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