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Committee on Legal Affairs and Human Rights

Information note: Compatibility of UN Security Council and EU [terrorist] Black Lists with European Convention on Human Rights requirements

*On 7 October 2010 the Committee on Legal Affairs and Human Rights authorised Dick Marty (Switzerland, ALDE) to submit written comments before the European Court of Human Rights, in the form of a Third Party intervention,¹ in the case of *Nada v Switzerland* (Application No. 10593/08), which is presently pending before the Grand Chamber. This request was not accepted by the Court's President.*

The present document reproduces the exchange of correspondence which Mr Marty has had with the Court's President, as well as an extract from a press release concerning this case, issued by the Court's registry.²

¹ Article 36 of the European Convention on Human Rights stipulates: "1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings. 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings. 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings."

² An overview of the work undertaken by the AS/Jur on issues relating to human rights and terrorism can be found in document AS/Jur (2010) 03, which can be accessed at: http://assembly.coe.int/CommitteeDocs/2010/20101108_infogenerale_E.pdf

Committee on Legal Affairs and Human Rights
Commission des questions juridiques et des droits de l'homme

(translation)

Strasbourg, 3 November 2010

Dear Mr President,

In follow-up to the decision taken by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly on 7 October 2010, I write to inform you of my wish to submit written observations in a third party intervention (article 36 paragraph 2 of the European Convention on Human Rights) in the case of *Nada v. Switzerland*, application no. 10593/08. As you know, this case was recently referred to the Court's Grand Chamber.

In view of the interpretative authority (*res interpretata*) attached to the rulings of the Grand Chamber, the Committee on Legal Affairs and Human Rights believes it important to make the Court aware of the very clear stance taken by the Parliamentary Assembly regarding the blacklists of the United Nations Security Council and the European Union. The Assembly considers in its Resolution 1597 (2008) and its Recommendation 1824 (2008), adopted following a debate on a committee report (doc. 11454), that the procedures deployed at the United Nations and the European Union violate the fundamental principles of human rights and the rule of law and more specifically those of the European Convention on Human Rights, as interpreted by the Court.

Should you grant my request, I shall present written observations - on behalf of the Committee - drawing a number of considerations to the Court's attention in addition to those already set out in the aforementioned texts concerning the compatibility of the United Nations Security Council's anti-terrorist blacklist (applied by Switzerland in the case of Mr Nada) with the provisions of the Convention.

Yours sincerely,

Dick Marty

Mr Jean-Paul COSTA
President of the Court
European Court of Human Rights
67075 Strasbourg Cedex

EUROPEAN COURT OF HUMAN RIGHTS

The President

(translation)

Strasbourg, 8 November 2010

Dear Sir,

Thank you for your letter of 3 November 2010 concerning the case of *Nada v. Switzerland*.

I am aware of the role you played within the Parliamentary Assembly of the Council of Europe concerning the blacklists, both personally and as a member of the Committee on Legal Affairs and Human Rights.

I do not believe that it would be appropriate (or possible) for either you or the committee to make a third-party intervention in the case.

However, the Court will take the greatest possible account, as need be, of the relevant Assembly reports and resolutions, as it already does when considering international law in its judgments and decisions.

The Court Registry will keep you informed of the progress of the proceedings. As you may already be aware, the public hearing in *Nada v. Switzerland*, which I will be presiding over, is scheduled for Wednesday 23 March 2011 (9.15 am).

Yours faithfully,

(signed)

Jean-Paul Costa

Mr Dick MARTY
Committee on Legal Affairs and Human Rights
Parliamentary Assembly
Council of Europe

Committee on Legal Affairs and Human Rights
Commission des questions juridiques et des droits de l'homme

(translation)

26 November 2010

Dear Sir,

I thank you for your letter of 8 November 2010 and have noted your reply to my request to be allowed to make a third-party intervention in the case concerning the Security Council blacklists.

Allow me to clarify the thinking behind my request, without necessarily asking for the matter to be reviewed. My own person and my commitment regarding the blacklists are actually entirely secondary, not to say unrelated to the request to be allowed to intervene in the Nada case. It was the parliamentary dimension which mattered – and still matters – to me. In this case, the blacklists, whether those of the UN or the EU, the decisions to establish them and the decisions on how to manage them were taken by the governments alone, without any parliamentary involvement of the kind that is, however, necessary in a democratic system when the scope and effects of the relevant measures are considered.

The Swiss and, if I am informed correctly, the British and French governments are taking part in the proceedings. I would venture to suggest that these governments are representing only one of the branches of power in their respective countries. The British judicial authorities have come out clearly against the system of blacklists in their current form, as have the EU's judicial authorities.

The Swiss Parliament has passed a motion, against the advice of the government, requiring Switzerland no longer to apply the relevant sanctions if, after a three-year period, the individual concerned has not been brought before a judicial authority or has not been able to appeal to an independent authority. The motion was approved unanimously by the Council of States (Senate). The Swiss government was therefore obliged to notify the UN Security Council of the decision (the correspondence on the matter is appended).

As was established by the PACE – and has now been widely confirmed by a whole range of evidence – many European governments collaborated actively or, at least, passively in the conduct of illegal activities such as renditions, acts of torture and the setting up of secret prisons. The various actions all took place not only outside any legal framework but also without any possibility of parliamentary intervention. The governments systematically invoked “state secrets” and “the interests of national defence” as grounds for refusing any parliamentary intervention. The blacklists are part of this strategy: individuals have been blacklisted, some for almost 10 years now, without being able to defend themselves or appeal to an independent body.

Mr Jean-Paul Costa
President of the European Court
Of Human Rights
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F-67075 Strasbourg Cedex

In the blacklist cases, it is my view that governments are representing the interests of their citizens only very partially and inadequately and that one would be right to believe that their submissions might focus on defending acts committed outside any legal framework which were contrary to the fundamental principles of states based on the rule of law.

That is why I felt that an intervention by the PACE – not by the member, Dick Marty – in this case was justified and desirable. Such an intervention would naturally have been based on specific instructions from the Committee on Legal Affairs and Human Rights. I still believe that, in this particular case, the parliamentary element would enable the views and feelings of Europe's citizens to be expressed more effectively – including and, above all, before the highest judicial body entrusted with protecting our rights and freedoms.

Thank you for your attention.

Yours faithfully,

(Signed)

Dick Marty

Letter of 22 March 2010

(translation)

to His Excellency Mr Thomas Mayr-Harting

Chair of the Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, United Nations, New York

from Ambassador Peter Maurer, Permanent Representative [of Switzerland to the United Nations]

Communication regarding the regime of anti-terrorist sanctions introduced by the Security Council

Your Excellency,

On the instructions of my government, I have the honour to inform you that the Swiss Parliament has passed a motion concerning the anti-terrorist sanctions imposed by the Security Council. A motion is a parliamentary instrument which instructs the Government (Federal Council) to submit to Parliament a draft act of the Federal Assembly or to take a specific measure.

The motion is worded as follows:

"1. The Federal Council is asked to notify the UN Security Council that, from the end of this year, it will no longer apply the sanctions imposed against physical individuals on the basis of the resolutions adopted in the name of the fight against terrorism, since:

- the individuals concerned have been "blacklisted" for over three years and have still not been brought before a court;
- they have not been allowed to appeal to an independent authority;
- no charges have been brought against them by a judicial authority; and
- no new evidence against them has been put forward since they were blacklisted.

2. The Federal Council, while reiterating its unerring determination to cooperate in the fight against terrorism, is bound to clearly point out that it is not acceptable for a democratic country founded on the rule of law that sanctions imposed by the Sanctions committee, excluded from any procedural guarantee, result in the suspension, for years and without any democratic legitimacy, of the most elementary fundamental rights, rights that are justly proclaimed and promoted by the United Nations Organisation."

The granting of the motion will not cause any imminent changes in the application in Switzerland of sanctions against Al-Qaida, the Taliban and associated individuals and entities. Those sanctions will remain applicable in Switzerland as long as the four cumulative conditions stipulated in the motion are not found to characterise a given case.

The Swiss Government is willing to reply to any questions and keen to pursue dialogue with the members of the Committee.

Yours sincerely,

(signed)

Peter Maurer
Ambassador
Permanent Representative



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REFERENCE: S/AC.37/2010/OC.55

21 May 2010

Excellency,

I refer to your communication dated 22 March 2010 addressed to the Chairman of the Security Council Committee established by resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities concerning the counter-terrorism sanctions regime set up by the United Nations Security Council. In this letter you conveyed the text of a motion, adopted by the Swiss Parliament, mandating the Swiss Government that as of the end of this year it will no longer apply the sanctions taken against physical persons on the basis of the resolutions adopted in the name of the fight against terrorism if a number of criteria set out in the motion are met.

The Committee has taken note of the assurances contained in the communication that the adoption of this motion does not entail any imminent changes with respect to the implementation of the sanctions against Al-Qaida and the Taliban and associated individuals and entities in Switzerland and that these sanctions remain applicable in Switzerland until it has been determined, in a specific case, that all four criteria set out by the motion have been cumulatively met. At the same time, the Committee expresses its concern that this motion by the Swiss Parliament brings into question the ability of the Government of Switzerland to fulfill its obligation to apply measures adopted by the Security Council under Chapter VII of the Charter of the United Nations in the framework of the Al-Qaida/Taliban Sanctions Regime.

His Excellency
Mr. Peter Maurer
Permanent Representative of Switzerland
to the United Nations
New York, NY





Relatedly, the Committee wishes to recall the obligation of all members of the United Nations to carry out the decisions of the Security Council adopted under Chapter VII of the Charter of the United Nations. Pursuant to Article 25 of the Charter the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. Article 48 provides that 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. Further, Article 103 stipulates that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

I would be grateful if you would convey the contents of this letter to the relevant Swiss authorities and keep the Committee informed of any future developments related to this matter.

Please accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to be 'T. Mayr-Harting', written over a faint circular stamp.

Thomas Mayr-Harting
Chairman
Security Council Committee established
pursuant to resolution 1267 (1999)
concerning Al-Qaida and the Taliban
and Associated Individuals and Entities

**Extract from a press release issued by the Registrar of the Court
n° 769 – 20.10.2010**

Grand Chamber to examine case about measures taken under United Nations Security Council Resolutions against Al-Qaeda

The Chamber of the European Court of Human Rights to which the case **Nada v. Switzerland** (application no. 10593/08) had been allocated has relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the European Convention on Human Rights and Rule 72 of the Rules of Court).

Principal facts

The applicant, Youssef Moustafa Nada, is an Italian national who was born in 1931 and lives in Campione D'Italia, an Italian enclave of 1.6 km in the Swiss Canton of Tessin.

On 15 October 1999 the United Nations Security Council adopted Resolution 1267 (1999) providing for sanctions against the Taliban and setting up a Committee responsible for their implementation. On 19 December 2000, by the adoption of Resolution 1333 (2000), the sanctions regime was extended to include Osama bin Laden and al-Qaeda. In its resolutions, the Security Council called upon the Committee to maintain a list of individuals and entities associated with bin Laden and al-Qaeda.

Under those resolutions, on 2 October 2000 the Swiss Federal Council adopted an order laying down measures against individuals and entities associated with Osama bin Laden, al-Qaeda or the Taliban (the "anti-Taliban order"). The order provided for the freezing of assets and financial resources of those concerned, and prohibited the provision to them of funds or financial resources. It further restricted their entry into or transit through Switzerland.

On 9 November 2001 Mr Nada and a number of organisations associated with him were placed on the list of the United Nations Committee. On 30 November 2001 those names were added by the Swiss authorities to the list of people concerned by the anti-Taliban order.

On 22 September 2002 Mr Nada requested the deletion from the list of his name and those of the organisations associated with him, mainly because the Swiss investigation against him had been discontinued.

However, his request and subsequent administrative appeals were rejected. The Federal Council referred his case to the Federal Court, considering that the restrictions on Mr Nada's property rights had, under the European Convention on Human Rights, to be assessed by an independent and impartial tribunal. On 14 November 2007 the Federal Court dismissed Mr Nada's appeal. It found that Switzerland had acted in accordance with its international obligations. It nevertheless requested the Swiss authorities to ascertain whether it was possible, having regard to their international obligations, to waive the measure barring Mr Nada from entering the country. As he lived in a small Italian enclave in Switzerland he found himself virtually under house arrest. Mr Nada has stated that following that judgment he has asked the Swiss authorities several times to let him enter or pass through Switzerland, but without success.

Complaints and procedure

Relying on Article 5 §§ 1 and 4 (right to liberty and security), Mr Nada complains that he was deprived of his liberty by the Swiss authorities and had no effective procedure through which to challenge the restrictions on his freedom of movement. He further takes the view that the measures at issue were contrary to Article 8 (right to respect for private and family life). Lastly, he alleges that there has been a violation of Article 13 (right to an effective remedy), in that there was no remedy available in Switzerland by which he could have complained of a breach of Articles 5 and 8.

The application was lodged with the European Court of Human Rights on 19 February 2008.

It was [communicated](#) to the Swiss authorities, with questions from the Court, on 12 March 2009.

The Governments of France and the United Kingdom were authorized by the Chamber to intervene as third parties (Article 36 § 2 of the Convention).

It is not possible to give any indications about when the application will be examined.