Pleadings pronounced on May 30, 2006 by Jan Fermon, the counsel of Prof. Sison at the hearing of the Court of First Instance of the European Union

Mr. President, members of the Court

In my intervention on behalf of Prof. Sison I would like to make observations and highlight some points on 3 subjects:

1) I will make some comments on the question whether the basic legal requirement of a decision as defined by art 1(4) of common position 2001/931 referred to by 2 (3) of regulation 2580/2001 is fulfilled in the present case
2) In a second point I would like to emphasize some points in relation to the requirement of a fair trial and respect for the rights of defence
3) To conclude I will make some observations on the proportionality, the legality of the decision to include Prof. Sison in a list of persons committing or facilitating terrorism.

1) Art. 1(4) of common position 2001/931 and art. 2(3) of regulation 2580/2001 set the basic legal requirements that have to be met to allow the Council to include a person in the list.

   The questions this Court has addressed to the Council and to the Dutch intervener are related to these requirements.

   These requirements are multiple. "*The list shall be drawn up*", says the text

   a. *On the basis of precise information or material*
   b. *That a decision has been taken by a competent authority in respect of the persons concerned*
   c. *Concerns instigation of investigations or prosecution*
   d. *For a terrorist act, an attempt to perpetrate, participate in or facilitate such an act*
   e. *Based on serious and credible evidence or clues or condemnation for such deeds*

   These are very strict conditions and the Council does not comply with them in the present case.

   a. As this Court knows (under reservation of what the Dutch intervener will reply to the questions of the Court), no prosecution or investigation has ever been conducted against Prof. Sison by a law enforcement agency or a judicial authority outside the Philippines for any involvement in any act of terrorism. (Statement De Hoop Scheffer.) (Philippines see later)
   b. 3 decisions by judicial authorities were made on the asylum case of Prof. Sison: 2 by the Dutch State Council and one by the The Hague District Court (REK or Rechtbank). These decisions are referred to wrongly by the Council as a "decision by a competent authority" in the sense of the community law.

The legal requirement is indeed that the said "decisions by the competent authority" should be "*For a terrorist act, an attempt to perpetrate, participate in or facilitate such an act"* and "*Based on serious and credible evidence or clues or condemnation for such deeds*"
As the report clearly shows, none of the 3 aforecited decisions was about the involvement of Mr. Sison in any act of terrorism. The three decisions decided on whether the Dutch Minister of Justice could

- Exclude M. Sison from the protection he is entitled to receive as a refugee under art. 1(A) of the Geneva Convention and apply to him the exclusion clause of art. 1(F) applicable to persons that have committed war crimes, crimes against humanity or acts contrary to the aims of the United Nations.
- Refuse residence status to Jose Maria Sison on grounds of overriding public interest

To the first question the three courts identically and categorically said that art. 1(F) could not be applied to Prof. Sison and recognised him as a refugee under art. 1(A) of the Geneva Convention.

To the second question the State Council responded negatively, the Rechtbank however said that the Minister could take the decision to refuse residence status *"on considerations of overriding public interests"* as long as he is not deported to a country where his physical integrity might be in danger. No factual finding, conclusion or ruling was taken by the Rechtbank to make Prof. Sison liable or culpable for any act of terrorism.

How can one seriously read in the aforecited three decisions that these judicial authorities found *"serious and credible evidence or clues*" that prof. Sison was involved in *"terrorism"* while these questions were simply not debated by the Courts.

What happened in fact is that the Minister of Justice of the Netherlands for obvious diplomatic reasons (I'll get back to that later) didn't want M. Sison in the Netherlands and tried to get rid of him by invoking vague speculations of the secret services, kept secret and never submitted to any form of scrutiny and contestation by Prof. Sison. Two Courts in three decisions said that the Minister could not do so because he did not present *serious and credible evidence* for his allegations.

The Court of The Hague finally, upholding the core of the decisions of the State Council, said that the Minister had a discretionary power to refuse residence, even to a refugee, on grounds of overriding national interest, a vague, imprecise and highly political concept. Of course M. Sison never accepted this decision. And we want to emphasise this because we think that the report in point 104 has been drafted in terms which might be misinterpreted on this question.

Refugee status and residence status as an alien on considerations of overriding public interest. That is what the decisions were about. Not as

art. 1(4) of the CP requires about "*a terrorist act, an attempt to perpetrate, participate in or facilitate such an act".*

c. In order to be able to misuse these decisions nevertheless as grounds to include prof. Sison in the list the Council simply misrepresents the decisions of the State Council and The Hague Court.

For example in point 7 of its rejoinder the Council alleges that the State Council had made factual findings that were very negative to M. Sison and according to which he had sought to give effective leadership even to alleged "atrocities" committed in the Philippines. In fact the Council is not quoting the findings of the State Council but the summary the State Council gave of the position of the Minister of Justice. The State Council on the contrary found that the materials from the Dutch secret service that were seen by the Court, but never submitted to two-sided scrutiny and debate, were *"not sufficient evidence for the fundamental judgment that the applicant to that extent has given direction and carries responsibilities for such activities that it can be held that there are serious reasons to suppose that the appellant … has carried out those mentioned crimes"*

"No serious reasons, not sufficient evidence", that is what the State Council said and not *"factual findings confirming the allegations of the Dutch Justice Minister".*

The decision of The Hague Court is also misrepresented by the Council especially when the Council says that this Court upheld the decision of the Minister not to recognise refugee status to Prof. Sison. The Hague Court says on the contrary *"On the basis of this decision [Raad van State 21 February 1995] it must be accepted as established in law, that the provision of Article 1F of the Refugee Convention cannot be used against the plaintiff, that the plaintiff has a well-grounded fear of persecution in the meaning of Article 1A of the Refugee Convention…"*

The only point on which the Court upheld the decision of the Minister is precisely that he has the discretionary power not to admit Prof. Sison and to grant him residence even as a refugee *"for important reasons arising from the pubic interest*".

d. It is true that the State Council decision and the decision of The Hague Court refer to alleged personal contacts of Prof. Sison with terrorist organisations. The materials established by the Dutch secret service, examined by these jurisdictions but never submitted to contradiction and debate, are supposed to show contacts between Prof. Sison and terrorist organisations. Isn't that sufficient to put him on the list? The answer is no. Such allegations do not meet the legal conditions set out by the community law to include a person in the list. The text of article 1(4) of the Common position does not foresee that "contacts" with terrorist organisations are sufficient. The legal requirement is an investigation or a conviction for *"a terrorist act, an attempt to perpetrate, participate in or facilitate such an act".* Mere contacts are not mentioned as a legal basis for including

someone in the list. Of course Prof. Sison denies that he had any contact of a criminal nature with persons involved in terrorism. But what exactly is a contact? Is shaking hands or being introduced to a person in an international gathering sufficient? And what about participating in a panel in a public rally? What is the context of these alleged "contacts" of Prof. Sison with terrorists? What is the content of these contacts and their aim? No information whatsoever is made available. And is it reasonable to say that the information about these contacts should be kept secret? If such contacts existed at any time, Prof. Sison surely knows about them. The only "risk" is therefore that prof. Sison can show that these contacts do not exist. The Dutch authorities themselves have never found it necessary to call Prof. Sison to any kind of criminal investigation about any act of terrorism since he applied for political asylum in 1988.

e. There is also a problem of chronology related to these decisions. While there is not the slightest clue that Prof. Sison is held responsible for any criminal offence committed outside the Philippines, it can only be supposed that the so-called "terrorist" activities the Council refers to are events in the Philippines.

   The last decision taken by a Dutch judicial authority is dated September 11, 1997.

   On April 20 1998, 7 months after the decision by the Hague Court, the secretary of Justice of the Philippines confirmed that there were no pending criminal cases against Prof. Sison in the Philippines. Previously, the Philippine government had repealed in 1992 the Anti-Subversion Law as a bill of attainder and oppressive law by which anyone could be held responsible for those alleged atrocities cited in Point 7 of the rejoinder of the Council. Even then, Prof. Sison was never formally charged in court for any of the alleged atrocities. Also, the office of Manila prosecutors dismissed in 1994 a formal complaint filed by the Philippine military authorities for multiple murder as "*sheer speculation*."

   Therefore we can conclude not only that the Dutch Courts rejected the allegations of the Dutch Justice Minister that he held "*serious and credible evidence or clues*" that Prof. Sison was involved in criminal terrorist activity, but even the Philippine competent authorities in due course clearly dismissed such allegations formulated before April 1998 as unfounded by issuing the said certificate.

f. Finally the Court also addressed questions to the Council about the recent prosecution of Prof. Sison by the authorities of the Philippines.

   First of all, the concept "Terrorism" is <u>unknown</u> and <u>alien</u> to the Philippine criminal justice system and no one can be charged or prosecuted, much less, convicted and punished for any alleged act of "terrorism" as confirmed by a recent ruling of the Philippino Supreme Court. This court declared as unconstitutional a reference to "acts of terrorism" in the General Order No. 5 of Proclamation 1017 of President Gloria M. Arroyo.

A second question that arises is of course if any decision of a politically biased prosecutor or court in a country which is not applying the standards of fair trial and independence of the courts enshrined in for example the European Human Rights Convention or the International Covenant on Political and Civil Rights can be considered as a *"competent authority*" in the sense of art. 1(4) of the Common Position. If the answer to this question is positive the Council would have to include the name of any opponent to dictatorial regimes prosecuted on false charges before a kangaroo court. That can clearly not be the intention.

Furthermore the Council did not, at any time of the proceedings, say that the baseless and politically biased accusations brought against prof. Sison in the Philippines were considered as the decisions required by art. 1(4) of the Common Position.

And last but not least the three rebellion charges, which have been consolidated into one case and in which Prof. Sison was included together with 47 others, were recently rejected by the Regional Trial Court of Makati City on procedural and substantive grounds.

At this very moment, there is not one valid charge against Prof. Sison for any act of terrorism in the Philippines as well as for the political crime of rebellion or even for any common crime. Time and again the Philippine lawyers of Prof. Sison have caused the outright dismissal or archiving of the politically-motivated complaints against him because of the lack of factual and legal basis and the lack of jurisdiction over him in accordance with Philippine law as well as with international law. Philippine authorities have characteristically hurled accusations against Prof. Sison in the mass media but fail to make any valid formal charge in court.

As a conclusion of the first point I can say that none of the requirements of art. 1(4) of common position 2001/931 and art. 2(3) of regulation 2580/2001 are met in the present case.

2) The second subject I want to comment on briefly is the question of fair trial and the rights of defence.

There can be no doubt that fundamental rules of a fair trial should be applicable to the present matter.

Repeatedly the European Human Rights Court indicated that the eminent place that the right to a fair trial occupies in a democratic society must result in opting for a material design and not a formal one.

The three criteria set out by the European Human Rights Court to determine the existence of a criminal charge are met in the present case: a criminal legal qualification, an obvious criminal nature of the charge and harsh sanctions, depriving the listed persons of participation in economic and social life and stigmatizing them as criminals.

The question then is did M. Sison in the process of being included in the list benefit from a fair trial? Were his rights of defence respected? We explained at length that this was not the case: no hearing, no file and no contradiction whatsoever … I will not go any further here into the reasons why obviously the basic rules of a fair trial were not respected.

The Council and the Dutch and British interveners submit to the Court a series of answers to this point which are difficult to understand, sometimes excessively formalistic and to some extend contradictory with what has been said before this court in other occasions.

I wish to comment on three aspects:

1. The Council said that M. Sison has in no way been deprived of the right to be heard or to a fair trial because on one hand he benefited from a due process of law before the national Courts and subsequently before the Community Court.

   However, as I explained, the proceedings before the national courts were of a totally different nature. The task of these courts was not to decide whether M. Sison was involved in terrorism but to see if the Dutch alien's law allowed the Dutch Minister of Justice to refuse admission of M. Sison as a refugee to The Netherlands. This Court knows from the background information that has been provided by Prof. Sison that the fair character even of those trials before the national courts can be discussed. However that is not under discussion here. Because even when the Dutch national courts would have respected to perfection the rules of fair trial that would be without any significance in the present case. Indeed the absurd position of the Council is that once M. Sison benefited from a fair trial in a proceeding concerning matter A he automatically also benefited from a fair trial in matter B. Of course the situation would have been different if the Council included M. Sison in the list after he had been convicted by a Dutch criminal court for having committed "a terrorist act, an attempt to perpetrate, participate in or facilitate such an act". Then the argument of the Council that the listed person's had been heard properly by a national instance would make sense. Not in the concrete situation that obtains here.

   And of course M. Sison has no reason to deny that the proceedings in this Court respect the standards of a fair trial. However this Court does not have full jurisdiction over the matter. This Court can only annul decisions of the Council. The fact that an applicant can file an application for annulment of the decision in this Court of course does not imply that the standards of a fair trial can be ignored in the stage prior to the decision.

2. The British intervener argues that the right to a fair trial enshrined in art. 6 of the EHRC is not engaged by the adoption of legislation or administrative measures.

I will not go into the allegation that the proceedings to include M. Sison were of an administrative nature and therefore not submitted to art. 6. We argued extensively why the sanctions and the proceedings applied to M. Sison were tantamount to criminal charges according to the criteria set out by the EHRC.

However a few words should be said about the allegation that M. Sison is merely *"negatively affected by the adoption of legislation*" exactly like the owners of an industry that is subject to nationalisation legislation. The parallel made by the British intervener is not adequate. The process leading to the establishment of the terrorist listing has two clearly distinct periods: in the first period the Council establishes a general legislation, defining the criteria that can lead to inclusion in the listing. In a second period the Council decides which individuals and entities will be included in the list, acting in fact during this second stage as a judicial authority or at least exerting similar powers to that of a criminal court, applying general criteria set out by the law to an individual case and imposing sanctions upon a person. What is the difference with a national legislator setting out criteria in the law to determine what should be considered as a criminal offence and who can be subject to criminal sanctions and subsequently a national criminal court applying then the law to individual situations? The Council in the present case played both roles at the same time. The reasoning held by the British intervener might apply to the first stage but does not apply to the second stage when general criteria are applied to an individual case. The formalistic approach by the British intervener based not on the nature of the decision but merely on the body that took the decision would lead to a complete ineffectiveness of art. 6 EHRC.

3. Finally I wish to draw the attention of the Court to the behaviour of the Council in the present case which is in total contradiction with its statements in case T-306/01 (Yusuf) *"where the community decides on its own initiative to take unilateral measures of economic and financial coercion the judicial review must extend to examination of the evidence against the persons on whom the sanctions are imposed"*

To justify its attitude the Council (as well as the British intervener) repeat once again that a person can only be included in the list once a competent national authority has established that the person is involved in terrorism in a way described in art. 1(4) of the Common Position. Therefore the Council would not have benefited from a wide discretion. Again if M. Sison was convicted by a national criminal court for participating in a terrorist act, such a line of reasoning could make some sense. However as this court knows, the question of the involvement of M. Sison in terrorist activities was never submitted to a Court and the Dutch Minister of Justice declared that there were insufficient elements even to start an investigation.

It is of course not sufficient to continuously repeat that inclusion in the list is only possible after a decision of a competent national authority and that the person has been included in the list to prove that such a decision effectively exists.

> The Council has of course a wide discretion to adopt or reject the names proposed by the member states and can and must investigate whether the criteria set out by art. 1(4) of the common position are met in a particular case.

As a conclusion to this point we say that there is no good argument that would justify the Council to impose sanctions upon Prof. Sison without respecting the elementary and basic principles of a fair trial and the basic rights of defence.

3) Finally I will make some very short comments on the lack of proportionality and the misuse of powers by the Council.

Freezing the assets of persons involved in terrorism has a clear aim: avoiding that funds could be used to organise terrorist attacks on innocent civilians. Nobody can deny that such an aim is legitimate.

However the question if legislation to install in general mechanisms to freeze assets on one hand and whether these mechanisms should be applied to a specific person or entity are two different questions, the first one at a macro level, the second one at a micro level.

The Council is constantly confusing both discussions. That is not surprising because the Council indeed acts on both levels: first as a legislator, installing the principle of the list and defining the criteria, then as a pseudo-judicial body applying it to individuals and entities when it establishes the list.

The principles of proportionality and a correct use of powers have to be assured at both levels.

I will not go into the discussion whether the decision at the macro level, to install the mechanism of assets freezing lists and the proceeding that has been set up is in conformity with both principles.

But the concrete application of the mechanism to Prof. Sison definitely is not.

Nobody has been able to explain how the freezing of all assets of Prof. Sison, the deprivation of any form of participation in economical life and the stigmatisation that results from it, could eventually contribute to the struggle against the financing, directly or indirectly of terrorism.

This Court knows that the only result of the freezing of the assets of Prof. Sison is that he has been deprived of his social allowance and of his health insurance. The only bank account that has been blocked didn't show any suspect transaction. All the funds in that account have originated from the Dutch state welfare agency. Payments have been made for essential needs of the Sison couple. The amount remaining in the account consists mainly of savings slated for dental expenses not covered by health insurance of Prof. Sison.

When confronted with the argument that the freezing of the Sison couple's bank account and termination of Prof. Sison's social benefits are totally irrelevant to the struggle against terrorism the Council only answers at the macro level, arguing

in general that an assets freezing mechanism can contribute to the struggle against terrorism and that therefore the decision is not in violation of the principle of proportionality and does not constitute a misuse of powers.

On the micro level, the concrete freezing of the assets of Prof. Sison, the only answer is that the general mechanism foresees in a possibility for the national authorities to grant exceptions for funds necessary for basic living necessities. This is again an answer at the macro level.

There is however not the slightest answer at the micro level. The only element of answer we get there is that the Council does not have the ability to conduct a concrete investigation into a specific situation and *"anyhow*" says the Council *"because a competent national authority has already taken a decision"* such an investigation is not necessary. This case shows very clearly that a mechanism, as it is conceived now, can lead to decisions at the micro level that are not in conformity with the principles of proportionality and correct use of powers.

Finally in the case of Prof. Sison it seems very clear to us that his name is included in the list for reasons that have strictly nothing to do with the fight against terrorism.

The website of the Dutch foreign ministry is very clear in that perspective. Its shows beyond any doubt that purely diplomatic reasons are at the basis of the listing: maintaining intense political and economical relations with the present corrupt and repressive regime in the Philippines and pleasing its protector in Washington.

Immediately after mentioning the intensive traderelations and the fact that the Netherlands are one of the major investors in the Phillipines with more then 15o companies present, the Dutch Foreign Ministry writes:

"The only burden for the Dutch-Philippine relations is comprised of the stay of the leadership of the Communist resistance in Utrecht. Peace talks between the Philippine government and the resistance leadership, which formerly were facilitated by the Neherlands, now take place in Norway. Only back-door talks are still held in the Netherlands. In this way, the Netherlands maintains a hands-off policy. The most prominent leader of the resistance, Jose Maria Sison, has been denied political asylum in the Netherlands. He has an appeal going on at the European Court for Human Rights. The Philippines has welcomed the measures taken by the Netherlands, among others, upon an American request, to freeze the assets of Mr. Sison, the Philippine Communist party (CPP) and its armed wing, the New People's Army". (pp. 7-8 of the country report on the Philippines, updated August 2005, under the heading: 4.1 "Betrekkingen met Nederland" Relations with the Netherlands

M. President, members of the Court,

In 30 minutes I can of course not go into the detail of all important matters that have been discussed during the written proceedings. I therefore refer of course to all written submissions for a more detailed argumentation.

However, we think that this case is important. An individual citizen who has been living for almost 20 years in a country of the EU and has never been, up to today, under investigation, prosecuted or convicted even for a traffic offence suddenly is submitted to very harsh sanctions and exposed to the public, without any form of trial, as a criminal. The party responsible for such situation is acting as legislator and as a judge at the same time. No evidence, even not a case file is presented. The convicted person has no possibility whatsoever to contradict the accusations brought against him. Such a way of proceeding is not only destroying, in its concrete application, completely all guarantees provided by instruments like the EHRC but takes us in fact back to an époque when heretics were burned after a ritual that was named a "trial" but had nothing to do with what a trial should be. Your Court is at this time the only barrier that can protect fundamental rights against the tsunami of so called anti-terrorist policies. You are the barrier against the misuse of the anti-terrorist measures to achieve all kinds of political and diplomatic goals. And we are confident that this Court will play its role.