EUROPEAN CFI REPORT, WITH ANNOTATIONS OF JOSE MARIA SISON

General Annotation: The claim of legality for the decision of the Council in blacklisting the applicant revolves around the gross misrepresentation of the decisions on his asylum case by the Raad van State in 1992 and 1995 and the REK (Rechtbank) in 1997, especially this last decision, as the judicially authoritative basis for listing the applicant as a terrorist.

The annotation under No. 104 of the report is therefore in bold caps to alert the counsel of the applicant to deny full acceptance of the 1997 REK decision and to point to its objectionable parts. No. 104 makes it appear that the applicant accepts the false claim against him of terrorist links and possible complicity with territorist acts, as supposedly established by said REK decision.

Annotations are made by JMS only to reaffirm, stress or augment points in his favor, introduce new points, reinforce points against the other side, call attention to certain points and raise questions. When JMS makes no annotations, either he has nothing new to say, he agrees with what is already favorable to him or he lets his counsel and supporting intervener do further what they can

3 May 2006

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Mr Jan Fermon
Mr Antoine Comte
Mr Dundar Gurses
Mr Hans-Eberhard Schultz
Chaussee de Haecht, *55*
B- **1** 2 10 Brussels
Belgium

In Case **T-47/03**
Jose Maria Sison
against
Council of the European Union
Interveners:
Kingdom of the Netherlands
United Kingdom of Great Britain and Northern Ireland
Negotiating Panel of the National Democratic Front of the Philippines

the Registrar of the Court of First Instance encloses herewith a copy of the Report for the Hearing on 30 May 2006 (reg **no** 296045). This document, drafted by the Judge-Rapporteur, constitutes an objective resume of the case and does not set out all the ramifications of the parties' arguments. It is intended, on the one hand, to enable the parties to ascertain whether their pleas in law and arguments are correctly understood and, on the other hand, to facilitate the study of the file by the other judges hearing the case.

In the event that you wish to submit observations on this report, these may be made either orally at the hearing or, whenever possible, in writing. However, if you decide to submit your observations in writing these should be lodged with the Registry at least one week prior to the hearing, thus enabling the Judges and the other parties to be notified in due time.

REPORT FOR THE HEARING*

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* **Language** of the **case:** English.

REPORT FOR THE HEARING - **CASE T-47/03**

(Common foreign and security policy - Restrictive measures against certain persons and.entities with a view to combating terrorism - Freezing of funds - Action for annulment - Application for compensation)

In Case T-47/03,

Jose Maria Sison, residing in Utrecht (Netherlands), represented by J. Ferrnon, A. Cornte, H.E. Schultz and D. Gurses, lawyers,

applicant,

supported by
Negotiating Panel of the National Democratic Front of the Philippines, Luis G. Jalandoni, Fidel V. Agcaoili, and Maria Consuelo Ledesma, established or residing in Utrecht, represented by B. Tornlow, lawyer,
interveners,

Council of the European Union, represented by M. Vitsentzatos and M. Bishop, acting as Agents,
defendant,

supported by
Kingdom of the Netherlands, represented by **H.G.** Sevenster, acting as Agent, and by
United Kingdom of Great Britain and Northern Ireland, represented **by** R. Caudwell, acting as Agent, and by S. Moore, Barrister, with an address for service in Luxembourg,
interveners,

APPLICATION for, first, partial annulment of Council Decision 20051930lEC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 258012001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 20051848lEC (OJ 2005 L 340, p. 64) and, secondly, compensation.

Legal framework and background to the dispute

1 Article 301 EC states:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.'

2 Article 60(1) EC provides:
'If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments **as** regards the third countries concerned.'

3 Article 308 EC provides:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'
4 On 28 September 2001, the United Nations Security Council ('the Security Council') adopted Resolution 1373 (2001) laying down strategies to combat terrorism and in particular the financing of terrorism by all possible means. Paragraph l(c) of that Resolution provides, in particular, that all States are to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons **and** entities acting on behalf of, or at the direction of, such persons and entities.

5 Taking the view that action by the Community was necessary in order to implement, pursuant to the obligations imposed on Member States by the Charter of the United Nations, Security Council Resolution 1373 (2001), the Council adopted on 27 December 2001, under Articles 15 EU and 34 **EU,** Common Positions 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90) and 2001/931/CFSP on the application of specific measures to combat terrorism **(OJ** 2001 L 344, p. 93).

JMS Annotation on No.4 and 5: As a result of the blacklist, the applicant is deprived of two things: 1. The frozen funds in the joint postal bank account with his wife consist of subsistence allowance from the Dutch state welfare agency, reimbursements from health insurance for advance payments for medical expense by the couple and savings for dental expenses not covered by insurance. 2. The social benefits (living allowance, housing rent, health insurance and civil liability insurance) that have been terminated by the Dutch government since October 2002. What do these funds and benefits for essential human needs have to do with terrorism?

6 Article l(1) of Common Position 2001/931 provides that it applies 'to persons, groups and entities involved in terrorist acts and listed in the Annex'. Article l(2) and **(3)** defines 'persons, groups and entities involved in terrorist acts' and 'terrorist act', respectively. The applicant's name is not included in the list in the Annex.

JMS Annotation: In the case of the applicant, what terrorist act or acts has he been involved in since the promulgation of UNSC Resolution 1373 and Common Positions of the Council?

7 The first subparagraph of Article **1(4)** of Common Position 2001/931 states that 'the list in the **Annex** shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for **a** terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds'. The second subparagraph of Article l(4) of Common Position 20011931 states: '"competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area'.

JMS Annotation: What precise information or material that becomes the basis for the

imputation of a public crime and sanctions and yet the applicant cannot contest such basis. Is there a lack of competent judicial authorities in The Netherlands so that the Council of the EU, an executive body, becomes the equivalent (judicial) competent authority?

8 Article l(5) of Common Position 200 1/93 1 provides that 'the Council shall work to ensure that names of natural or legal persons, groups or entities listed in the Annex have sufficient particulars appended to permit effective identification of specific human beings, legal persons, entities or bodies, thus facilitating the exculpation of those bearing the same or similar names'.

JMS Annotation: There is the hypocritical expression of care to exculpate persons with similar names. But what about the rush to impose on the applicant the burden of guilt, such as stigmatization as "terrorist", deprivation of the essential means to human existence, moral and material damage and incitation of violence and hatred against his moral and physical integrity?

9 Article 1(6) of Common Position 2001/931 states that 'the names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list'.

JMS: The periodic review of the list is part of the pretense of a pseudo-judicial body that the assaults on the rights of those in the list are temporary and therefore restrictive and not violative of rights. But the assaults on those rights are indefinite, serialized and possibly permanent, without the victim knowing how he gets into the list and how he gets out of it.

10 Articles 2 and 3 of Common Position 2001/931 provide that the European Community, acting within the limits of the powers conferred on it by the EC Treaty, is to order the freezing of the funds and other financial assets or economic resources of persons, groups **and** entities listed in the Annex and is to ensure that funds, financial assets or economic resources or financial services are not made available, directly or indirectly, for the benefit of those persons.

JMS Annotation: Even if the funds come from the Dutch social welfare agency and even if those funds are for the essential means of human existence?

11 Taking the view that a regulation was required in order to implement the measures set out in Common Position 20011931 at Community level, the Council adopted on 27 December 2001, on the basis of Articles 60 **BC,** 301 EC and 308 EC, Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism **(OJ** 2001 L 344, p. 70) ('the contested regulation').

12 Article 2 of the contested regulation states:
' 1. Except as permitted under Articles 5 and 6:
(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;
(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

2. Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.
3. The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article **1(4),** (5) and (6) of Common Position 2001/931/CFSP; such list shall consist of:
(i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;
(ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of **any** act of terrorism;
(iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or
(iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points?(, i) and (ii).'

JMS Annotation: Since time immemorial, terrorism has been a political expression used by repressive regimes to arouse mob hatred against the opposition. It is a favorite cussword of despotic regimes and colonial and imperialist powers against the resisting people. Turned into a legal expression, it becomes catchall phrase for criminalizing political movements and for arbitrarily converting definable common crimes (e.g. murder, etc.) or politically-motivated crimes (e.g. rebellion, etc.) into elements of a vague supercrime.

13 Article 1 of the contested regulation provides that the following definitions are to apply:
1 . "Funds, other financial assets and economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.
2. "Freezing of funds, other financial assets and economic resources" means the prevention of **any** move, transfer, alt on, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management.'

JMS Annotation: The foregoing is a lot of verbiage that does not apply to the applicant. He has no possessions at issue other than his frozen joint postal bank account and the social benefits which have been unjustly terminated. All these are for the essential needs of the applicant for human existence.

14 Article 5(2) and **(3)** of the contested regulation states:
'2. The competent authorities of the Member States listed in the Annex may grant specific authorisations, under such conditions as they deem appropriate, in order to prevent the financing of acts of terrorism, for
(1) the use of frozen funds for essential human needs of a natural person included in the list referred to in Article **2(3)** or a member of his family, including in particular payments for foodstuffs, medicines, the rent or mortgage for the family residence and fees and charges concerning medical treatment of members of that family, to be fulfilled within the Community;

(2) payments from frozen accounts for the following purposes:
(a) payment of taxes, compulsory insurance premiums and fees for public utility services such as gas, water, electricity and telecommunications to be paid in the Community; and
(b) payment of charges due to a financial institution in the Community for the maintenance of accounts;
(3) payments to a person, entity or body included in the list referred to in Article 2(3), due under contracts, agreements or obligations which were concluded or arose before the entry into force of this Regulation provided that those payments are made into a frozen account within the Community.
3. Requests for authorisations shall be made to the competent authority of the Member State in whose territory the funds, other financial assets or other economic resources have been frozen. '

15 In addition, Article 6 of the contested regulation provides:
' 1. Notwithstanding the provisions of Article 2 and with a view to the protection of the interests of the Community, which include the interests of its citizens and residents, the competent authorities of a Member State may grant specific authorisations:
- to unfieeze funds, other financial assets or other economic resources,
- to make funds, other financial assets or other economic resources available to a person, entity or body included in the list referred to in Article 2(3), or
- to render financial services to such person, entity or body,
after consultation with the other Member states, the Council and the Commission in accordance with paragraph 2.'

16 As regards the competent authorities referred to in Article *5* of the contested regulation, the list annexed to the regulation refers, for the Netherlands, to the 'Ministerie van Financien' (Ministry of Finance).

JMS Annotation on 14, 15 and 16: Against the request of the applicant, the Dutch state has completely deprived the applicant of his living allowance and other social benefits and has continued to ban him from any gainful employment. The Dutch Finance Minister has invoked among others the unanimity of the Member States of the Council to terminate the social benefits of the applicant.

17 The original list of the persons, groups and entities to which the contested regulation applies was set out in Council Decision 2001/927/EC of 27 December 2001 (OJ 2001 L 344, p. 83). The applicant's name does not appear in it.

18 On 28 October 2002, the Council adopted, under Articles 15 EU and 34 EU, Common Position 20021847lCFSP updating Common Position 200119311CFSP and repealing Common Position 2002/462/CFSP (OJ 2002 L 295, p. 1).

19 The h e x to Common Position 2002/ 47 updates the list of persons, groups and entities to which Common Position 2001/931 applies. Part l, headed 'Persons', includes the name of the applicant, who is described as follows:

'32. **SISON,** Jose Maria (aka Armando Liwanag, aka Joma, in charge of **MA)** born 8.2.1939 in Cabugao, Philippines.'
Part 2, headed 'Groups and entities', includes the name of the New People's Army ('the **NPA'),** which is described as follows:
' 17. New People's ***Army*** (NPA), Philippines, linked to Sison Jose Maria C. (aka Armando Liwanag, aka Joma, in charge of NPA). '
20 By Decision 20021848EC of 28 October 2002 implementing Article 2(3) of

Regulation No 2580/2001 and repealing Decision 2002/460/EC, the Council adopted **an** updated list of the persons, groups and entities to which the contested regulation applies. The name of the applicant and that of the **NPA** are repeated in that list, in the same terms as those used in the Annex to Common Position 20021847,

21 By Decision 2002/974/EC of 12 December 2002 implementing Article 2(3) of Regulation **No** 2580/2001 and repealing Decision 20021848EC (OJ 2002 L 337, p. 85), the Council adopted a fresh updated list of the persons, groups and entities to which the contested regulation applies. The name of the applicant and that of the **NPA** are repeated in that list, in the same terms as those used in the Annex to Common Position 20021847 and the Annex to Decision 20021848.
22 Since then, the Council has adopted several common positions and decisions updating the lists provided for under Common Position 20011931 and the contested regulation ('the lists at issue') (see, most recently, Council Common Position 2005/936/CFSP of 21 December 2005 updating Common Position 2001/931 and repealing Common Position 2005/847/CFSP (OJ 2005 L 340, p. 80); see also, in order of adoption, Council Decision 2003/480/EC of 27 June 2003 implementing Article 2(3) of Regulation No 258012001 and repealing Decision 20021974 **(OJ** 2003 L 160, p. %l), Council Decision 2003/646/EC of 12 September 2003 implementing Article 2(3) of Regulation No 258012001 and repealing Decision 2003/480 (OJ 2003 L 229, p. 22), Council Decision 2003/902/EC of 22 December 2003 implementing Article 2(3) of Regulation No 258012001 and repealing Decision 20031646 **(OJ** 2003 L 340, p. **63),** Council Decision 2004/306lEC of 2 April 2004 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 20031902 **(OJ** 2004 L 99, p. **28),** Council Decision 2005122l/CFSP of 14 March 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2004/306/EC (OJ 2005 L 69, p. 64), Council Decision 2005/428/CFSP of 6 June 2005 implementing Article 2(3) of Regulation (EC) No 258012001 and repealing Decision 2005/221lCFSP (OJ 2005 L 144, p. 59), Council Decision 2005/722/EC of 17 October 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 20051428lCFSP (OJ 2005 L 272, p, 15), Council Decision 2005/848/EC of 29 November 2005 implementing Article 2(3) of Regulation (EC) No 258012001 and repealing Decision 2005/722/EC (OJ 2005 L **3** 14, p. 46), and Council Decision 20051930/EC of 21 December 2005 implementing Article 2(3) of Regulation (EC) No 258012001 and repealing Decision 20051848/EC (OJ 2005 L 340, p. 64) ('the contested decision')). The applicant's name continued to appear in those decisions, both in the list of persons and, associated with the name of the NPA, in the list of groups and entities.

Procedure

23 By application lodged at the Registry of the Court of First Instance on 6 February 2003, the applicant brought an action against the Council and the Commission for partial annulment of Decision 20021974 and for compensation.

24 By a separate document lodged at the Registry of the Court of First Instance on 28 February 2003, the applicant brought an application for interim measures against the same institutions, seeking, first, suspension of the operation of Article 1, point 1.25 and point 2.14, of Decision 20021974 in so far **as** it mentions his name; secondly, that the Council and the Commission be prohibited from mentioning his name in any fresh decision implementing Article 2(3) of the contested regulation; and thirdly, an order requiring the Council and the Commission to inform all the Member States that the restrictive measures taken in his regard are without any

legal basis.

25 By a separate document lodged at the Registry of the Court of First Instance on 12 March 2003, the Commission raised, under Article 114 of the Rules of Procedure of the Court of First Instance, an objection of inadmissibility against the action in so far as it was directed against that institution.

26 By order of the President of the Court of First Instance of 7 May 2003, the application for interim measures against the Commission was removed from the register.

27 By order of 15 May 2003, the President of the Court of First Instance dismissed the application for interim measures against the Council on the ground that the requirement of urgency was not satisfied, and reserved costs.

28 By documents lodged at the Registry of the Court of First Instance on 27 May 2003 and 11 June 2003 respectively, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in these proceedings in support of the forms of order sought by the defendants. By a document lodged at the Registry of the Court of First Instance on 10 June 2003, the Negotiating Panel of the National Democratic Front of the Philippines, together with Messrs Jalandoni and Agcaoili and MS Ledesrna ('the Negotiating Panel and Others'), sought leave to intervene in these proceedings in support of the forms of order sought by the applicant. By orders of 16 July 2003 and 22 October 2003, the President of the Second Chamber of the Court of First Instance granted leave to intervene. The interveners lodged their statements and the other parties were able to lodge their observations on them during the prescribed periods.

29 By a document lodged at the Registry of the Court of First Instance on 11 July 2003, the applicant stated that he was abandoning his application in so far as it was directed against the Commission.

30 By order of the President of the Second Chamber of the Court of First Instance of 22 September 2003, Case T-47/03 was removed from the register in so far as it was directed against the Commission.

3 1 In his reply, lodged at the Registry of the Court of First Instance on 15 July 2003 and thereafter by a document lodged at the Registry of the Court of First Instance on 29 September 2003, in his observations on the statements in intervention of the United Kingdom and of the Netherlands, lodged at the Registry of the Court of First Instance on 5 February 2004, by a document lodged at the Registry of the Court of First Instance on 7 May 2004, by **a** document lodged at the Registry of the Court of First Instance on 4 May 2005, by a document lodged at the Registry of the Court of First Instance on 7 July 2005, by a document lodged at the Registry of the Court of First Instance on 17 December 2005, and lastly by a document lodged at the Registry of the Court of First Instance on 16 February 2006, the applicant amended in turn the forms of order sought by him, his pleas in law and his arguments so as to refer in turn to Decision 20031480 repealing Decision 20021974, Decision 20031646 repealing Decision 2003/480, Decision 20031902 repealing Decision 20031646, Decision 20041306 repealing Decision 20031902, Decision 20051221 repealing Decision 2004/306, Decision 20051428 repealing Decision 2005/221, Decision 20051722 repealing Decision 20051428, Decision 20051848 repealing Decision 20051722, and lastly Decision 20051930 repealing Decision 20051848. He relied, in that respect, on the case-law which

states that where a Community measure is replaced during the course of proceedings by another measure having the same object, the latter measure must be regarded as a new factor, enabling the applicant to adapt the forms of order sought by him and his pleas in law (Case 1418 1 ***Alpha Steel*** v ***Commission*** [l9821 ECR 749, paragraph 8; Joined Cases 351185 and 360/85 ***Fabrique de*** fer ***de Charleroi*** v ***Commission*** [l9871 ECR3639, paragraph 11; and Case 103185 ***Stahlwerke Peine-Salzgitter*** v ***Commission [l*** 9881 ECR 4 13 1, paragraphs 1 1 and 12). The applicant added that his application should be regarded as challenging the lawfulness of all decisions including him on the lists at issue.

32 The Council has stated that it has no objection to those amendments to the forms of order sought by the applicant and his pleas in law and arguments.

33 By a letter lodged at the Registry of the Court of First Instance on 22 October 2003, the applicant asked to be allowed to lodge his observations on the rejoinder. That request was rejected both on the ground that the Rules of Procedure do not allow for such a possibility and on the ground that the applicant could submit his observations at the hearing.

34 In the document lodged at the Registry of the Court of First Instance on 17 December **2005** and referred to in paragraph **3** 1 above, the applicant made certain remarks on the relevance, for the purposes of this case, of the judgment of the Court of First Instance of **21** December **2005** in Case **T-306101** ***Yusuf and A2 Barakaat International Foundation*** v ***Council and Commission*** ('Yusuf, not yet published in the ECR). Those remarks and the written observations made in response by the other parties were placed in the file.

35 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, to put written questions to the Netherlands and the Council, to be answered at the hearing.

Forms of order sought by the parties

36 The applicant claims that the Court should:
- annul, on the basis of Article **230** EC, Article **1** of the contested decision in so far as it mentions the name of the applicant;
- declare the contested regulation to be unlawful on the basis of Article 241 EC ;

- order the Community and the Council to compensate the applicant, on the basis of Article 235 EC and the second paragraph of Article **288** EC, in an amount to be fixed ***ex aequo et bono*** of not less than EUR 100 000;
- order the Council to pay the costs.

37 The Negotiating Panel and Others support the first two forms of order sought by the applicant and claim in addition that the Council should be ordered to pay the costs of their intervention.

38 The Council contends that the Court should:
- dismiss the action in its entirety;
- order the applicant to pay the costs;
- order the Negotiating Panel and Others to pay the costs arising as a result of their intervention.

39 The Kingdom of the Netherlands and the United Kingdom support the first form of order sought by the Council. REPORT FOR THE HEARING – CASE T-47/03

Facts
Administrative and judicial proceedings relating to the applicant in the Netherlands

40 The papers before the Court indicate that the applicant, who has Filipino nationality, has resided in the Netherlands since 1987. In September 1988, after the Philippine Government withdrew his passport, he applied for refugee status and a residence permit there on humanitarian grounds. That application was refused by decision of the State Secretary for Justice ('the State Secretary') of **13** July 1990, on the basis of Article IF of the Geneva Convention of 28 July **1951** on the status of refugees, amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), which states:
'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations. '

41 **As** the applicant's request for a review of that decision was impliedly rejected by the State Secretary, the applicant brought an action before the Raad van State (Netherlands Council of State) against that implied decision to reject.

42 By judgment of 17 December 1992 ('the judgment of the Raad van State of 1992') (Appendix 3 to the application), **the Raad van State annulled the implied decision to reject. It held essentially that the State Secretary had not demonstrated to the requisite legal standard which of the acts allegedly committed by the applicant had led him to conclude that the applicant fell within the scope of Article IF of the Geneva Convention. The Raad van State stated in that regard that the documents supplied to it on a confidential basis by the State Secretary were not sufficiently clear on the point. Since the confidential nature of the documents in question meant that that lack of clarity could not be remedied by an *inter partes* hearing, the Raad van State held that the information contained in those documents, in so far as it was unclear, could not be construed in a manner which was unfavourable to the applicant. (Bold letters mine. JMS)**

43 By decision of 26 March 1993, the State Secretary again rejected the applicant's request for a review of his decision of 13 July 1990 (paragraph 40 above). That decision to reject was taken primarily on the basis of Article IF of the Geneva Convention and in the alternative on the basis of the second paragraph of Article 15 of the Netherlands Law on Aliens (Vreemdelingenwet), by reason of the overriding interests of the Netherlands State, that is to say the integrity and credibility of the Netherlands as a sovereign State, particularly with regard to its responsibilities towards other States.

44 In an action to challenge that brought by the applicant, the Raad van State annulled the State Secretary's decision of 26 March 1993 by judgment of 21 February 1995 ('the Raad van State judgment of 1995').

45 In that judgment, the Raad van State held that the State Secretary had reached his decision on the basis of the following criteria:
- a letter from the Netherlands internal security service (Binnenlandse Veiligheidsdienst, 'the BVD') of **3** March 1993, which stated (i) that the applicant held the post of chairman and was the head of the Communist Party of the Philippines ('the CPP'), (ii) that the military wing of the CPP, the NPA, was under the Central Committee of the CPP and, accordingly, the applicant;
- the findings of the BVD that: (i) the applicant was, in fact, the head of the NPA; (ii) the NPA - and thus the applicant - was responsible for a large number of terrorist acts in the Philippines.

46 The Raad van State noted the following examples of such terrorist acts, given by the State Secretary in his decision of **26** March 1993:
- the murder of 40 inhabitants (mostly defenceless women and children) of the village of Digos, on the Island of Mindanao (Philippines) on 25 June 1989;
- the shooting of 14 people, including six children, in the village of Dipalog (Philippines) in August 1 989;
- the execution of four inhabitants of the village of Del Monte (Philippines) on 16 October 1991.
47 The Raad van State also noted that the State Secretary had mentioned the purges carried out in 1985 at the CPP and the NPA, in the course of which it was estimated that 800 of their members were assassinated without any form of trial taking place.
48 Lastly, the Raad van State noted that, according to the State Secretary, the BVD had also determined that the CPP/NVA maintained contacts with terrorist organisations throughout the world and that personal contacts between the applicant and representatives of those organisations had also been observed.
49 The Raad van State next examined by special procedure certain confidential evidence in the State Secretary's file together with the 'operational material' ('operationele materieel') on which the letter sent to him by the BVD on **3** March 1993 (paragraph 45 above) was based.

50 Taking the above matters into account, the Raad van State went on to rule as follows:
'In the light of the above evidence, the [Raad van State] holds there to be sufficient indication [voldoende aannemelijk] that the [applicant] was, at the time the decision [of 26 March 19931 was taken, the chairman and the head of the CPP. In addition, the evidence supports the conclusion that the NPA is subject to the Central Committee of the CPP and the conclusion that, at the time the decision [of 26 March 19931 was taken, the [applicant] had at least attempted to effectively direct the NPA from the Netherlands. The [Raad van State] also holds there to be sufficient indication based on public sources alone, such as reports by Amnesty International, that the NPA is responsible for a large number of terrorist acts in the Philippines. The evidence also provides support for the conclusion that the [applicant] has at least attempted to direct the abovementioned activities carried out under the control of the NPA in the Philippines. The evidence supplied also provides support for the [State Secretary's] contention that the CPP/NPA maintain contacts with terrorist organisations throughout the world and that there have been personal Contacts between the [applicant] and representatives of such organisations. **However, the evidence does not provide support for the conclusion that the [applicant] directed the operations in question and is responsible for them to such an extent that it may be held that there are serious reasons to suppose that the [applicant] has actually committed the serious crimes referred to in [Article IF**

of the Geneva Convention]. In that regard, the [Raad van State] has expressly taken into account the fact that, as it has already held in its judgment of 17 December 1992, Article IF of the Geneva Convention must be narrowly construed,
The [Raad van State] considers accordingly that the [State Secretary] was not entitled to conclude, on the basis of the abovementioned evidence, that the [applicant] should be denied the protection afforded by the [Geneva] Convention.'

51 The Raad van State also held that the applicant had sound reasons to fear that he would be persecuted if he was sent back to the Philippines and that he should accordingly be treated as a refugee for the purposes of Article 1(A)(2) of the Geneva Convention.

52 The Raad van State then considered the merits of the State Secretary's alternative reason for refusing the applicant admission to the Netherlands on grounds of public interest, on the basis of the second paragraph of Article 15 of the Netherlands Law on Aliens.

53 **In that regard, the Raad van State held in particular as follows:**

'While the [Raad van State] acknowledges the importance of the [State Secretary's] concern, particularly in view of the indications he has recorded of personal contacts between the [applicant] and representatives of terrorist organisations, that cannot justify recourse to the second paragraph of Article 15 of the Law on Aliens if there is no guarantee that the [applicant] will be permitted to enter a country other than the Philippines. It is precluded by the fact that such a refusal to admit the [applicant] must be regarded as being contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms' .

54 Following that judgment, the State Secretary, by decision of 4 June 1996, again rejected the applicant's request for review of his decision of 13 July 1990 (paragraph 40 above). He ordered the applicant to leave the Netherlands, but decided at the same time that the applicant should not be deported to the Philippines for so long as he had a well-founded fear of being persecuted within the meaning of the Geneva Convention or of treatment contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

55 By decision of 11 September 1997 ('the decision of the Rechtbank', Annexes 1 and 2 to the defence), the **Arrondissementsrechtbank** te 'S Gravenhage, Sector Bestuursrecht, Rechtseenheidskamer Vreemdelingenzaken (the Hague District Court, Administrative law section, Chamber responsible for the uniform application of the law, cases involving aliens, 'the Rechtbank') dismissed the action brought by the applicant against the State Secretary's decision of 4 June 1996 on the basis that it was unfounded.

56 In the course of the proceedings before the Rechtbank, all the documents relating to the investigation carried out by the BVD into the applicant's activities in the Netherlands, and in particular the letter from that organisation to the State Secretary of **3** March 1993 (paragraph 45 above), as well as the operational material on which that letter is based, were produced in confidence to the Rechtbank. The President of the Rechtbank examined them under a special procedure. On the basis of the report prepared by its President, the Rechtbank decided that the restriction on making those documents available to the applicant

was justified. **As the latter had given the consent to that effect required by the legislation, the Rechtbank none the less took account of the content of those documents in order to decide the case (see paragraph 6 of the decision).**

JMS Annotation: Despite the favorable final judgment of the Raad van State in 1995 , the legal counsel (van As) unnecessarily entered the framework of the then newly-created Alien's Court and, against the position of client and Atty. Capulong, agreed to let the secret dossiers of the BVD (earlier examined and evaluated by the Raad van State) be examined and evaluated again by REK (Rechtbank). But in the course of time, all the secret dossiers of the BVD against the applicant have proven to be mere rubbish because the Philippine government in 1998 completely cleared the applicant of any criminal charge.

57 The Rechtbank then considered whether the decision contested before it could be upheld, in so far as it refused the applicant admission as a refugee and the granting to him of a residence permit (see paragraph 7 of the decision).

58 With regard to the facts on which the decision was based, the Rechtbank referred back to the judgment of the Raad van State of 1995 (see paragraph 8 of the decision).

***59* On the basis of that judgment, the Rechtbank considered that it must be regarded as settled in law that Article IF of the Geneva Convention could not be invoked against the applicant, that the latter had a well-founded fear of being persecuted within the meaning of Article 1A of that Convention and of Article 15 of the Netherlands Law on Aliens and that Article 3 of the ECHR prevented the applicant from being deported, directly or indirectly, to his country of origin (see paragraph 9 of the decision).**

60 The Rechtbank next considered the question whether the judgment of the Raad van State of 1995 entitled the State Secretary to refuse the applicant admission as a refugee, pursuant to the second paragraph of Article 15 of the Netherlands Law on Aliens, which provides that 'admission can be refused only on important grounds of public interest if that refusal would compel the alien to go immediately to a country referred to in the first paragraph', when the State Secretary had failed to guarantee the applicant admission to a country other than the Philippines (see paragraph 10 of the decision).

61 In that regard, the Rechtbank quoted in full the para of the judgment of the Raad van State of 1995 set out in paragraph 53 above (see paragraph 11 of the decision).

62 The Rechtbank then ruled on the question whether the State Secretary properly s power to derogate from the rule that an alien is normally to be admitted to the Netherlands as a refugee where he can establish a well-founded fear of being persecuted within the meaning of Article 1A of the Geneva Convention and no other country will admit him as an asylum seeker, as, in the Rechtbank's opinion, was the position in that case. In that regard, the Rechtbank held as follows:

'In the opinion of the Rechtbank, it cannot be argued that the [State Secretary] has not used this power reasonably in respect of the [applicant], taking into account the "essential interests of the Netherlands State, namely the integrity and credibility of the Netherlands as a sovereign State, particularly with regard to its responsibilities towards other States", also recognised by the [Raad van State].

The facts on which the [Raad van State] based that assessment are also of overriding importance as far as the Rechtbank is concerned. It has not been shown that a different significance should have been attributed to those facts by the [State Secretary] at the time the decision [at issue in the case] was taken. The [applicant's] observations on the changed political situation in the Philippines and on his role in the negotiations between the Philippine authorities and the [CPP] do not affect that, since **the** important reasons - as is clear from the judgment of the [Raad van State] - are based on other facts' (see paragraph 15 of the decision).

63 **The Rechtbank accordingly dismissed as unfounded the applicant's appeal against the refusal to admit him to the Netherlands as a refugee (see paragraph 16 of the decision).**

64 The Rechtbank also dismissed as unfounded the applicant's challenge to the refusal to grant him a residence permit (see paragraph 21 of the decision). Ruling more particularly on the question whether the State Secretary had taken his decision after a reasonable balancing of interests, the Rechtbank referred to its findings quoted in paragraph 62 above and added that the State Secretary had acted reasonably in attaching less weight to the interests invoked by the applicant in that regard (see paragraph 20 of the decision).

JMS Annotation: In No. 59 above, the REK (Rechtbank) conformed to the 1995 Raad van State decision. But it screwed it up in Nos. 62 to 64. It was in contempt of the Raad van State by reexamining and reevaluating the secret dossiers that the latter had examined and evaluated and proceeded to balance the interests of the state against the applicant in order to contravene the jurisprudence established in the Chahal case and to negate the Raad van State decision that the applicant has to be admitted and permitted to reside if he cannot transfer to another country where he is not at risk of ill-treatment in violation of Article 3 of ECHR>

Other factual allegations of the applicant and the Negotiating Panel and Others

65 The applicant states that he is a Filipino intellectual and patriot, who has held various academic positions and received several literary awards. From the 1960s until the 1980s, he was, with President Ferdinand E. Marcos and Senator Benigno 'Ninoy' Aquino Jr., one of the three key personalities on the political scene in the Philippines.

66 The applicant admits that he was chairman of the Central Committee of the CPP from 26 December 1 968 until 10 November 1977, on which date he was replaced in that post by Rodolfo Salas, following his arrest and imprisonment by the Marcos regime, which lasted until 5 March 1986. After his release, he taught briefly at the University of the Philippines, under constant surveillance by the military authorities and without the opportunity of being involved in any underground activity. On 3 1 August 1986, he left the Philippines to start a lecture tour in universities, first in the Asia-Pacific region and then, from **23** January 1987, in Europe. Since then, he has lived in exile, carrying out research, writing and participating in various peaceful activities in the Filipino community. The applicant contends that at no point in his stay abroad from 1986 to the present has it been possible for him to assume the position of chairman of the Central Committee of the CPP, as the CPP Constitution requires that that person be present in the Philippines on a daily basis.

67 Following civil proceedings brought before the United States courts in 1986 with the assistance of the American Civil Liberties Union (ACLU), the estate of

Ferdinand E. Marcos agreed in 1997 to a 'stipulated judgment7 awarding him USD 750 000 by way of damages. That sum has never been paid to the applicant.

68 The applicant states that he is not the subject of 'any valid criminal charge' anywhere in the world and that, historically, **neither the Philippine Government nor the international community has ever regarded him as a terrorist or a common criminal.** He adds, however, that recently the administration of Philippine President Mrs Gloria Macapagal-Arroyo has brought criminal charges against him. He maintains that those charges are baseless and form part of a campaign to persecute him.

JMS: The Rapporteur uses the word "regarded" imprecisely. The applicant has been "regarded" as a terrorist (in a politically loose sense) by the Philippine and a few other governments. But it is true that he has never been charged for terrorism before any court by any government. Until now, the Philippine government cannot bring any charge of rebellion (not terrorism) against the applicant because of lack of factual and legal basis. Under Philippine law, the application is beyond the jurisdiction of Philippine authorities. Under international law, he is protected by Article 3 of ECHR and the principle of nonrefoulement in the Refugee Convention. In recent months, the Philippine government has filed the charge of rebellion against him, together with progressive members of Congress, military officers of the Philippine government and suspected revolutionary leaders. But this was dismissed by the Makati Regional Trial Court on 5 May 2006. The charge was refiled in court but the five members of Congress and others accused have filed a petition to the Supreme Court to invalidate the charge as fatally defective in fact and in law.

69 With more particular regard to the Philippines, the applicant refers to two certificates confirming the absence of any criminal charges against him, issued to him on 2 March 1994 by the Office of the public prosecutor of the City of Manila (Philippines) (Appendix 8 to the application) and on 20 April 1998 by the Secretary of Justice of the Philippine Government (Appendix 7 to the application).

The latter document refers inter alia to a decision of a Philippine court of 22 September 1992 dismissing the charges brought against the applicant in October 1998 for subversive activities, following the repeal of the anti-subversion law in 1992. It also refers to a decision of 2 March 1994 dismissing for 'lack of sufficient evidence' the charges brought against the applicant in 1991 by the Office of the public prosecutor of the City of Manila. According to the applicant, those charges involved an accusation of multiple murder in connection with a bombing in 197 1.

70 With more particular regard to the Netherlands, the applicant refers to a statement by the Minister of Foreign Affairs, Mr J. De Hoop Scheffer, who confirmed, in reply to a parliamentary question put on 16 August 2002, that the public prosecutor's office was of the view there was no basis for instigating a criminal investigation against the applicant. (Appendix 26 to the application).

JMS Annotation: Nos. 69 and 70 are okay.

71 The applicant, supported by the Negotiating Panel and Others, states that he has been the chief political consultant of the National Democratic Front of the Philippines ('the NDFP') since 1990 and that in that capacity he plays an important role in the negotiations between the NDFP and the Philippine Government, seeking to find a peaceful solution to the continuing armed conflict in the Philippines. His participation was crucial in achieving signature of the

Hague Joint Declaration of 1 September 1992, which forms the basis of those negotiations. He was, in his capacity as an observer, a co-signatory of all the main agreements concluded between the NDFP and the Philippine Government. He also encouraged the NDFP Negotiating Panel to induce that organisation to make the unilateral declaration of 1996 by which the NDFP undertook to apply the Geneva Conventions of 1949 and the First Additional Protocol of 1997 on the protection of the victims of international armed conflicts. He also contributed significantly to the drawing up of the Comprehensive Agreement between the Philippine Government and the NDFP of 16 March 1998 on Respect for Human Rights and International Humanitarian Law (CARHRIHL). On several occasions, he helped the negotiating panels or special representatives of the Philippine Government and the NDFP to conclude temporary cease-fire agreements during the Christmas and New Year holidays and on the safe and orderly release of prisoners of war in cooperation with the International Committee of the Red Cross (ICRC). In resolutions adopted in 1997 and 1999, the European Parliament gave its support to those negotiations. They were also supported by the whole of the Filipino people and the international community, in particular the Netherlands, Belgian and Norwegian Governments **.**

72 As chief political consultant of the NDFP, the applicant enjoys the protection of the Joint Agreement on Safety and Immunity Guarantees concluded between the NDFP and the Philippine Government, as well as protection by agreements related to that joint agreement, which provide that acting as consultant on any side in the peace negotiations is at no time to be considered by the other side as a criminal act.

73 The applicant concludes from the above that for over 25 years he has been prevented, both physically and for organisational reasons, from playing a leading role, or even participating, in the continuing civil war in the Philippines.

74 The applicant states, however, that on 9 August 2002 the United States Secretary of State designated the CPP and the NPA as 'foreign terrorist organisations' and that on 12 August 2002 the Office of Foreign Assets Control (OFAC) of the United States Treasury Department included the CPPNPA and the applicant in the list of individual and terrorist groups covered by Executive Order No 13224, signed by President George W. Bush on **23** September 2001, and ordered the freezing of their assets (Appendix 11 to the application).

75 On. 13 August 2002, the Netherlands Minister of Foreign Affairs adopted a regulation on the fight against terrorism (Sanctieregeling Terrorisme 2002 111, Staatscourant No 153) (Appendix 12 to the application), which places the CPP/NPA and the applicant on a list of individuals and groups subject to economic sanctions. On the same day, the Netherlands Minister of Finance ordered, and subsequently put into effect, the freezing of the applicant's joint postal bank account with his wife, and the cancellation of the social security benefits which he received as a refugee in the Netherlands. Those benefits were partially restored on **9** October 2002 on humanitarian grounds, and then suspended again on 13 December 2002 (Appendices 13 to 15 to the application).

76 Lastly, the applicant claims that, in late January 2003, the Minister of Foreign Affairs of the Philippines stated as follows: 'Once there is a peace agreement, I will request the European Union, the United States and other countries to delist [the rebels] as terrorists. If they sign, they will no longer be terrorists' (Appendix 16 to the application).

77 Messrs Jalandoni and Agcaoili and MS Ledesma state that they are members of the Negotiating Panel of the NDFP. In that capacity, they have participated in peace negotiations between the NDFP and the Philippine Government. In the course of those negotiations, they have concluded, on behalf of the NDFP, various agreements with that Government.

JMS Annotation: Nos. 71 to 77 are okay.

Law

The application for annulment

78 In support of the forms of order sought by him seeking the annulment of the contested decision, the applicant relies on a series of pleas alleging infringement of the EC Treaty and of the general principles of Community law. He also pleads that the contested regulation is unlawful on the ground that it infringes the EC Treaty and constitutes a misuse of powers. The Negotiating Panel and Others put forward arguments which, at the same time as seeking to establish their own interest in having the contested decision annulled, essentially aim to support the applicant's plea based on a misuse of powers.

Plea based on infringement of Article 253 EC

The applicant submits that the contested decision fails to satisfy the requirement to state reasons laid down by Article 253 EC, as the second recital merely states that it is 'desirable' to adopt an updated list of persons, groups and entities to which the contested regulation applies, without actually stating the reasons which led the Council to draw up that list in the form in which it is presented. In particular, the Council provides no links between the general criteria set out in the contested regulation and the personal situation of the applicant (see, by way of analogy, Joined Cases T-204197 and T-270197 ***EPAC*** v ***Commission*** [2000] ECR 11-2267, paragraph 36, and Joined Cases T-228199 and T-233199 ***Westdeutsche Landesbank Girozentrale*** v ***Commission*** [2003] ECR 11-435, paragraph 281). The applicant states that the contested decision fails to provide even the 'precise information' or the 'material in the relevant file' to indicate that a decision justifying his inclusion in the lists at issue has been taken in his respect by a competent authority.

The applicant contends that the requirement to state adequate reasons applies with particular force in the present case since the Council has a broad discretion and the effects of the discretionary measure are severe (see Joined Cases 36, 37 and 38159 and 40159 ***Geitling*** v ***High Authority*** [l9601 ECR 423; Case C-367195 P ***Commission*** v ***Sytraval and Brink 'S France*** [l9981 ECR 1-1 71 9; and Joined Cases T-4410 1, T- 1 1 910 1 and T- 12610 1 ***Vieira and Vieira Argentina*** v ***Commission*** [2003] ECR 11- 1209).

The applicant is thus unable to know the justification for the serious sanctions to which he is subject, in order that he may defend his rights, and the Community judicature cannot exercise its power of review of the lawfulness of the contested decision (Joined Cases 67185, 68185 and 70185 ***Van der Kooy*** v ***Commission*** [l9881 ECR 219, paragraph 71; Case C-350188, ***Delacre and Others*** V ***Commission*** [l9901 ECR 1-395, paragraph 15; and Case T-105195 *WWF* ***UK*** v ***Commission*** [l9971 ECR 11-3 13, paragraph 66).

The applicant adds that his various requests for access to the documents on the

basis of which the Council adopted the contested decision, made under Regulation (EC) No 104912001 of the European Parliament and of the Council of **30** May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), were systematically refused on the ground that those documents are classified as 'CONFIDENTIAL EU' and that their disclosure would undermine the protection of the public interest as regards security and international relations,

In his reply, the applicant states that there is a clear contradiction between those reasons for the decisions to refuse access to the documents in question and the explanations given by the Council in its defence, from which **it appears that the only basis for justifying the applicant's inclusion in the lists at issue is a public document, namely the decision of the Rechtbank.** That contradiction affects the validity of the contested decision by reason of the case-law which provides that a contradiction in the statement of reasons on which a decision is based constitutes a breach of the obligation laid down in Article 253 EC if it is established that, as a result of that contradiction, the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (Case 158180 Rewe [l98 l] ECR 1805, paragraph 26; Case T-5/93 Tremblay ***and*** Others v Commission [l 9951 ECR **11-** 185, paragraph 42).

84 In his observations on ***Yusuf,*** the applicant also points out that, unlike what was held in that case with regard to Usama bin Laden and the persons associated with him, **the applicant has never been listed by the UN Security Council. The decision to freeze his funds was therefore taken on the initiative of the Council in the exercise of a discretionary power of assessment.** Paragraph 225 of the judgment in ***Yusuf*** makes it clear that in such cases **the Council itself acknowledges that judicial review must extend to examination of the evidence relied on against the persons on whom the sanctions are imposed**. **The attitude of the Council in the present case is in total contradiction with that statement, however.** The Council never presented the slightest evidence to enable the applicant to defend itself and the Court to exercise a full review. On the contrary, the Council refused to grant the applicant access to the documents purportedly used as the basis for the contested decision.

85 The Council and the ***Netherlands*** accept that the contested decision, which consists merely of an updated list of persons covered by the contested regulation, **does not itself contain a detailed statement of reasons.** It is none the less clear from the preamble and the recitals that that implementing decision is based on the contested regulation, Article 2(3) of which sets out the criteria governing the inclusion of persons in the lists at issue and Article l(4) of which defines a terrorist act by reference to Article l(3) of Common Position 2001193 1. Furthermore, the objective of the contested regulation, namely to combat any form of financing of terrorist activities, is clear from the second recital.

86 The contested acts, taken together, satisfy the obligation to state reasons set out in Article 253 EC, as interpreted in the case-law. In that regard, **the Council and the Netherlands point out that it is not necessary for details of all relevant factual and legal aspects to be given** and that regard should be had to the context and to all the legal rules governing the matter in question. n **The degree of precision of the statement of reasons for a decision must also be weighed against practical realities and the time and technical facilities available for making the decision**(Delacre, cited in paragraph 8 1 above, paragraphs 15 and 16).

87 In its rejoinder, the Council adds that it was not under any obligation to disclose the specific factual elements which led it to conclude that the applicant was involved in terrorist activities, since the applicable procedure involved the use of sensitive material which could not be made publicly available without seriously compromising public security (see also paragraph 121 below).

In its observations in response to the applicant's observations on *Yusuf,* the Council acknowledges that it has a wider margin of discretion in this case than it had in the circumstances of ***Yusuf.*** **It also accepts that the scope for judicial review of the contested decision may be greater than it was in *Yusuf.* However, that does not mean that all the evidence concerning the applicant should be disclosed and reviewed in these proceedings. That applies particularly as regards the documents examined by the Raad van State and the Rechtbank, the confidential nature of which was accepted by those courts.**

Plea based on a manifest error of assessment

In the first part of the plea, the applicant contends that the contested decision is based on an error of fact since, contrary to what it states, he is neither Armando Liwanag nor is he in charge of the NPA.
According to the applicant, Arrnando Liwanag is the chairman of the Central Committee of the CPP. **For the reasons given at paragraph 66 above, it has been physically impossible for the applicant to perform such duties during the last 25 years.**

The applicant also denies that he is 'in charge of the **NPA'** or that the NPA is 'linked' to him in any operational way. He left the CPP and NPA more than 25 years ago and, as political consultant, he deals with the NDFP Negotiating Panel.
In the second part of the plea, the applicant maintains that the contested decision is vitiated by a manifest error of assessment in that it classifies him as a terrorist and as a person linked to a terrorist organisation.

As regards, in the first place, the NPA, the applicant denies that it is a terrorist organisation and that his association with it implies guilt by association. He puts forward three specific arguments in that regard.
First, the Philippine Government considers it to be established that the activities of the NPA fall within its jurisdiction and that the appropriate charge in relation to them is one of rebellion and not of terrorism, which, moreover, does not constitute a criminal offence under Philippine law.
Secondly, the applicant refers to the guarantees of safety and immunity which cover him for the purposes of the negotiations between the Philippine Government and the NDFP (paragraph 72 above), and the support given by the European Parliament to those negotiations (paragraph 7 1 above).
Thirdly, the applicant contends that the activities of the armed forces of the Philippine Government and the NDFP during periods of armed conflict are governed by international humanitarian law but not by Council Framework Decision of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3).

As regards, in the second place, the applicant himself, he states that he is outraged at being labelled as a terrorist and claims that, on the contrary, he is a respected intellectual and progressive activist, who has always been opposed to terrorism. The applicant has never intended to commit a terrorist act and has never supported, advocated or facilitated any such act or participated in its perpetration. On the contrary, he has often spoken and written against terrorism, emphasising the need for the progressive movement in the Philippines to uphold, defend and

promote human rights, and, in particular, he has expressed sympathy for the victims of the terrorist attacks of 11 September 2001 in the United States. In that respect, the applicant also refers to the matters set out in paragraphs 71 and 72 above. The acts concerned, motivated by humanitarian considerations, by a concern for the protection of civilians and combatants, and for the promotion of human rights, are incompatible with charges of terrorism.

The applicant also contends that numerous key figures of Philippine society, comprising representatives of the churches, the political world, including high government officials, members of the legal profession, academics and the human rights community, have made it be known, publicly and in writing, in particular for the benefit of the Court in the present case, that the applicant is a peace militant and that the charge of terrorism against him is baseless. He refers in particular to the statements of Tomas Millamena, Supreme Bishop of the Philippines Independent Church, of Teofisto Guingona, Vice-President of the Republic of the Philippines, of Jose de Venecia, Speaker of the House of Representatives of the Philippines, of Julio X. Labayen, Prelate Bishop of Infanta (Appendices 24 and 25 to the application and Annex 11 to the reply), of the Society of Ex-Political Detainees for Liberation from Detention and Amnesty (SELDA) (Annex ***6*** to the reply), of Senator Loren Legarda, majority leader in the Philippine Senate (Annex 7 to the reply), of Bishop Deogracias **S.** Iniguez **(Annex** 8 to the reply), of Bishop Julio X. Labayen (Annex **9** to the reply), of the National Council of Churches in the Philippines (Annex 10 to the reply), of Dr Francisco Nemenzo, President of the University of the Philippines (Annex 12 to the reply), of Professor Luis Teodoro, former dean of the University of the Philippines (Annex 13 to the reply), of Jose Aguila Grapilon, former President of the Bar of the Philippines (Annex 14 to the reply) and of Romeo T. Capulong, attorney and judge ***ad litem*** of the International Criminal Tribunal for the former Yugoslavia (Annex 15 to the reply).

100 The applicant refers in addition to a legal opinion attached to his application (Appendix 27), which confirms the legitimacy under international law of the 'national and social liberation struggle waged in the Philippines'. He submits that that struggle, which, he contends, involves the 'popular masses', cannot be regarded as terrorism. While stating that his contribution to the 'people's movement in the Philippines' is, in fact, limited to his role as chief political consultant of the NDFP, the applicant claims that the Council committed a manifest error by labelling what he himself considers to be 'legitimate organisations or individuals involved in the struggle of the Filipino people' as 'terrorists'. Moreover, the Council does not provide any explanation as to why the conduct of the armed conflict in the Philippines should be regarded as a terrorist act, nor does it provide examples of acts of terrorism allegedly committed or facilitated by the applicant,

101 Above all, according to the applicant, it follows from the matters referred to in paragraphs 44 to 64 and 68 to 70 above that there is no objective element which allows him to be associated with a terrorist organisation or activity.

102 In that regard, the applicant and the Negotiating Panel and Others contend that the Council and the Netherlands deliberately misconstrue the judgments of the Raad van State of 1992 and 1995 and the decision of the Rechtbank, and interpret them in a manner which is completely erroneous. The question whether the applicant has committed or facilitated acts of terrorism or has been involved in their perpetration has never been submitted to those courts, nor, ***a*** fortiori, has it been decided by them. The decision of the Rechtbank, in particular, concerns only the

question whether the applicant should be legally admitted as a refugee into the Netherlands and granted a residence permit (see paragraph 7 of the decision, referred to at paragraph 57 above).
103 With more particular reference to the judgment of the Raad van State of 1995, the Negotiating Panel and Others state that, far from having considered the facts alleged by the State Secretary to have been proved to the requisite legal standard, the Raad van State decided on the contrary that the documents relied on by him did not support the view that the applicant had given directions and borne responsibility for activities to such an extent that there were serious reasons to believe that he had committed crimes within the meaning of Article IF of the Geneva Convention (see paragraph 50 above).

JMS Annotation: Nos. 78 to 103 appear to be excellent summary of the position of the applicant.

104 With more particular reference to paragraph 15 of the decision of the Rechtbank, the applicant accepts that the latter held that the State Secretary was entitled to refuse to admit him to the Netherlands as a refugee and to grant him a residence permit on considerations of public interest. He adds, however, that the concept of 'public interest' is not equivalent in any way to 'committing or facilitating an act of terrorism'. In addition, the decision of the Rechtbank shows that the State Secretary did not claim that the applicant posed a risk to public security, but referred only to 'the essential interests of the Netherlands State, namely the integrity and credibility of the Netherlands as a sovereign State, particularly with regard to its responsibilities towards other States' (see paragraph 62 above).

JMS Annotation: THIS NUMBER LOOKS LIKE A BOMB PLANTED BY THE RAPPORTEUR AGAINST THE APPLICANT. IT IS NOT TRUE THAT APPLICANT ACCEPTS THAT THE DUTCH STATE SECRETARY OF JUSTICE WAS ENTITLED TO REFUSE TO ADMIT HIM TO THE NETHERLANDS AS A REFUGEE AND GRANT HIM A R4ESIDENCE PERMIT ON CONSIDERATIONS OF PUBLIC INTEREST. IT IS ALSO UNTRUE THAT THE APPLICANT HAS EVER WASTED TIME QUIBBLING WHETHER PUBLIC INTEREST IS EQUIVALENT OR NOT TO COMMITTING OR FACILITATING AN ACT OF TERRORISM. THE TRUTH IS THAT THE APPLICANT HAS CONSISTENTLY OPPOSED THE REK (RECHTBANK) DECISION FOR CONTRAVENING THE CHAHAL CASE LAW AND THE 1995 RAAD VAN STATE RULING THAT THE APPLICANT SHOULD BE ADMITTED AS REFUGEE AND GRANTED THE PERMIT TO RESIDE IF THERE IS NO COUNTRY TO WHICH HE COULD TRANSFER WITHOUT BEING PUT AT RISK OF ILL TREATMENT IN VIOLATION OF ARTICLE 3 OF ECHR. IN FACT, HE APPEALED THE REK DECISION TO THE EUROPEAN COURT OF HUMAN RIGHTS. NEVER IN HIS LIFE WOULD HE ACCEPT THE OBJECTIONABLE PARTS OF THE REK DECISION WHICH ARE BASED ON THE SECRET DOSSIERS OF THE B.V.D.

105 The applicant also maintains that the Council's statement that the applicant is not subject to the Geneva Convention because refugee status has not been conferred on him is erroneous for three reasons.

106 First, in its 1992 and 1995 decisions, the Raad van State: (i) recognised that the applicant was a political refugee for the purposes of Article lA(2) of the Geneva Convention; (ii) annulled the decision taken in relation to the applicant by the State Secretary under Article IF of the Geneva Convention; and (iii) held that the applicant **was** entitled to the protection of Article **3** of the ECHR, to be admitted as a refugee and to be granted a residence permit for the Netherlands if there was no other country to which he could transfer without violating Article **3** (see, in particular, paragraphs 50, 5 1 and 53 above).

107 Secondly, the decision of the Rechtbank upheld the judgment of the Raad van State of 1995, as is shown by paragraph 9 of the decision (see paragraph 59 above).

108 Thirdly, the applicant relies on the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (HCR/IP/4/Eng/REV. l, UNHCR 1979, reedited, Geneva, January 1992), which states:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee. '

109 As regards the reference to indications of personal contacts between the applicant and representatives of terrorist organisations made in the judgment of the Raad van State of 1995 and also in paragraph 11 of the decision of the Rechtbank (see paragraphs 53 and 61 above), the applicant submits that this represents a vague and unfounded insinuation in a decision taken on grounds of public interest and not on the basis of any criminal charge. He contends that it cannot be regarded as 'serious and credible evidence or clues' of the instigation of investigations or the bringing of charges against him for terrorist activities nor, a fortiori, as a finding of culpability in relation to such matters.

JMS Annotation: To be most precise, the 1995 Raad van State judgment and the Rechtbank decision were on the asylum case of the applicant and dealt with the issue of public interest and the rights of the Applicant in that regard. They did not make decisions on any criminal charge against the application. It is gross misrepresentation for the Council and/or the Dutch state to claim or suggest that any Dutch court has tried and judged the applicant for terrorism.

110 The applicant denies having or having had personal contacts with any representative of a terrorist organisation which could be considered in any way as amounting to participation in or the facilitation of a terrorist act. He states that he was never shown any evidence regarding those alleged contacts and was never given any opportunity to refute them. The Rechtbank's statement is based on documents from the intelligence and national security services which he could neither examine nor contest (see paragraph ***6*** of the decision of the Rechtbank, referred to at paragraph *56* above). That procedure contravenes Article 6 of the ECHR, as does that followed by the Council in the present case (see judgments of the European Court of Human Rights in Barber&, Messeguk and Jabardo of ***6*** December 1988, Series **A** no 146, $89, and in ***Ludi*** of 15 June 1992, Series A no 238).

JMS Annotation: It was in 1993 (more than 13 years ago) when the Dutch state and its intelligence BVD made false claims against the applicant as having personal contacts of a with representatives of a "terrorist organization". If the personal contacts were true and had a criminal character, are not the Dutch authorities derelict in their duty in failing after all this time to bring charges against the applicant? Time has exposed the falsity of so many false claims against the applicant. And by the way, the applicant should neither be blamed nor praised as a Christian saint for having personal contacts with Catholic and Protestant bishops. The Dutch

intelligence should also record and proclaim such contacts.

l l l Even if the applicant could have met a member of an organisation regarded as terrorist, that does not in any case prove that he himself participated in or facilitated the perpetration of a terrorist act. Otherwise, all peace negotiators would have to be included on the lists at issue.
As regards, more particularly, the examples of terrorist acts mentioned in the letter of the BVD of **3** March 1993 and referred to at paragraph 46 above, the ***Negotiating Panel and Others*** maintain that they refer to alleged facts dating from 1989 and 1991, that is to say more than 12 years before the adoption of the contested decision.

As regards the incident which took place at Digos on 25 June 1989, the official documents of the Philippine authorities annexed to the statement in intervention establish conclusively that the applicant was not involved in that incident. An investigation file relating to the matters which occurred at Digos was opened by the Provincial Prosecutor of Davao City on 31 January 1990 (Annex 7 to the statement) and the arrest of a number of persons was ordered on 15 February 1990 (Annex 8 to the statement). On 14 May 1999, Judge Matas ordered that no further action be taken in the proceedings (Annex 9 to the statement), after the main suspect, Amado Payot, alias Commander Benzar, was released on bail on 23 March 1999 (Annex 10 to the statement). No judicial document relating to that case mentions the name of the applicant as having been involved in that incident. Similarly, as regards the incidents at Dipalog and Del Monte, no document, charge or indictment of any kind has ever been presented to the applicant or his lawyers, a point which is confirmed by the certificate issued by the Secretary of Justice of the Philippines on 20 April 1998 (paragraph 69 above).

JMS Annotation: By the way, in a radio interview, the applicant demanded an investigation of the Digos incident. And this led to a successful investigation by the National Council of Churches in the Philippines.

It is thus conclusively proved, in the light of the documents from the Philippine authorities themselves, that the letter of the BVD of 3 March 1993 is without foundation. The Council has not offered any evidence against the applicant and blindly relies on doubtful and unconfirmed information. It has plainly failed to address the fact that neither the judicial nor any other authorities have ever established that the applicant was involved in any way in the incidents at Digos, Dipalog or Del Monte or that he ordered NPA units to commit the acts in question.

On the basis of, first, the fact that the incidents in question were mentioned for the first time by the Council in its rejoinder and, secondly, the time which has elapsed since the facts occurred, the distance between Luxembourg and Manila, the number of courts and local authorities having jurisdiction or powers in the matter and their alleged reluctance to cooperate with the Negotiating Panel and Others, the latter ask the Court to allow them to submit, by way of measures of organisation of procedure, further evidence relating to the abovementioned incidents, including further certificates from the competent Philippine Government bodies, confirming that no charges of any kind concerning those incidents have been brought against the applicant.

JMS Annotation: Would the Council and its intervenors still be able to bring up further false accusations against the applicant? Are they allowed by the rules of the court? They have not mentioned at all the false accusation about the killing of Colonel Nick

Rowe. The applicant was never implicated in any investigation. The suspects were arrested, tried and convicted. They have even finished their prison sentences.

117 The ***Council*** and the ***Netherlands*** refer first to the procedure applicable to the inclusion of persons in the lists at issue (paragraphs 7 to 9 above). The Council next states that the applicant was identified in the lists at issue as being in charge of the NPA, under the pseudonym of Arrnando Liwanag. The NPA is the armed wing of the CPP which the applicant founded. The NPA and the CPP both belong to the NDFP.

118 In that regard, the Netherlands emphasises the fact that the Council cannot conduct its own examination of the facts but must satisfy itself on the basis of the evidence placed before it. For the purposes of the present case, it is therefore not relevant whether the facts alleged by the applicant are established. What is relevant is whether the procedure whereby the Council decided to place the applicant on the lists at issue was adequate.

JMS Annotation: At least since 1988 when the applicant applied for political asylum in The Netherlands, the Dutch state has been swallowing hook, line and sinker so many false accusations against the applicant from the Philippine government. By 1998 all the false accusations used by the Dutch state to deny the applicant's admission as refugee and permit to reside have been proven false by official acts of Philippine authorities. And yet the Dutch state has never apologized to the applicant and has continued to echo further false accusations from the Philippine government. It is a matter of justice for the applicant that the court takes into account the proven falsity of the accusations against the applicant. To use false accusations to stigmatize as a terrorist and penalize the applicant is never a fair and adequate procedure. The Council should not be allowed to act as a kangaroo court, with mere intelligence dossiers and feeds from the Philippine government as the basis of its actions against the applicant.

1 19 The Netherlands also states that the relevant procedure in this case involves extremely sensitive material. Preparations for a decision to place a person on the lists at issue must be conducted under conditions of maximum secrecy, in order to preserve the effect of surprise.

JMS Annotation: It has been more than three years since the blacklisting of the applicant. And yet the Netherlands still wants maximum secrecy for its provenly rotten intelligence dossiers. If true that the applicant is liable for any act of terrorism, why is he not duly investigated and charged. Is the Dutch state derelict in its duty to the Dutch people or is it merely persecuting the applicant and violating his rights?

120 In the present case, the Council submits that the contested decision was taken on the basis of the investigation carried out by the competent Netherlands authorities into the applicant's participation in terrorist activities, together with the judgments of the Raad van State of 1992 and 1995 and the decision of the Rechtbank, which took note of the results of that investigation and drew the appropriate conclusions from it. The Council makes more particular reference to the findings and determinations of those courts referred to in paragraphs 45,49 to 53, 56, 58 to 60 and 64 above. The Council also submits that there was nothing inaccurate in the analysis of the judgment of the Raad van State of 1995 in its documents, contrary to what the applicant and the Negotiating Panel and Others maintain.

JMS Annotations: Review the 1992 and 1995 judgments of the Raad van State and the decision of the 1997 REK decision. These documents have narrative sections to

present the positions of sides of the state and the applicant in the asylum case. Such sections are entitled " considerations" (overwegingen). The Council and the Dutch state misrepresent as rulings of the court the summaries of the position of the Dutch state. The 1992 and 1995 judgments of the Raad van State are entirely favorable to the applicant regarding the asylum application and the accusations of the Dutch state against the applicant. The REK decision deprives the applicant of admittance as refugee and the permit to reside. But the REK was a court for asylum cases and not a criminal court.

121 The Council contends that it took due account of those matters too, that is to say not only the judgments mentioned above, but also the further evidence they refer to, when it adopted the contested decision. However, that evidence cannot be made public by reason of its confidential nature, as the Netherlands courts themselves have acknowledged.

The Netherlands confirms that the national decision on the basis of which the contested decision was adopted is the decision of the Rechtbank, which followed upon the judgment of the Raad van State of 1995. The requirement laid down under Article **l(4)** of Common Position 2001193 1 was accordingly satisfied, as the national court had access to the file of the BVD. The Netherlands adds, however, that other matters on file also played a role in the decision taken by the Council. Those matters are confidential, they have not been made public and the documents have not been retained by the Council.

JMS Annotation: The defendants are playing tricks here in 121 and 122. They misrepresent court decisions on the asylum case of the defendant as criminal judgment. They are confronted on the falsity of accusations that they put forward. But still they claim that they have more false accusations that they cannot reveal to the applicant and the people.

123 In reply to the argument of the applicant and of the Negotiating Panel and Others that the applicant has never been prosecuted for terrorist acts (paragraphs 101, 102, 1 14 and 1 1 5 above), particularly in relation to the incidents at Digos, Dipalog and Del Monte, the Council states that the bringing of such charges against a person is not a necessary condition for the inclusion of the person concerned in the lists at issue. Article l(4) of Common Position 2001/931 also applies where it is only investigations that are instigated.

In the present case, the competent Netherlands authorities had instigated an investigation into the applicant's participation in terrorist activities and both the Raad van State and the Rechtbank had given decisions and made findings as to the facts on the basis of that investigation. On the other hand, it is irrelevant that charges were brought in the Philippines against other persons, such as those mentioned by the Negotiating Panel and Others (paragraph 1 13 above).
The Council accepts that no one has ever accused the applicant of actually taking part at the scene of the terrorist acts mentioned above. However, there are serious grounds for concluding that the applicant sought to give directions with a view to those acts, and other acts committed by the NPA in the Philippines, being perpetrated. That conclusion is consistent with the findings set out in the judgment of the Raad van State of 1995 (paragraph 50 above).

JMS Annotation: The Dutch state continues to misrepresent here a court's summary of the state's position in the applicant's asylum case as findings, conclusions and even rulings of the court on the criminal liability of the applicant. It is overweening arrogance for the Dutch state to know events and criminal cases in the Philippines

more than the Philippine authorities, to impute acts of terrorism in the Philippines where there is no law on terrorism and tom extrapolate that the applicant is engaged in acts of terrorism. The nonsequiturs of the Dutch state are amazing.

The Council rejects the applicant's arguments summarised in paragraphs 66, 71, 90, 91 and 97 to 99 above, arguing, first, that there are many well-known examples of leaders of terrorist or revolutionary groups continuing to operate while in prison or in exile and, secondly, that many terrorist acts have been disowned by the persons themselves who perpetrated them, or condemned by other terrorist groups.

JMS Annotation: Are these arguments before a court of law? Or is the Council engaged in gossip and speculation, without respect for the rules of evidence and due process. The line of reasoning is practically fascist or medievally inquisitorial: squeeze the life out of a political prisoner or refugee lest he continue to engage in terrorism, wherever he is.

The Council considers the applicant's arguments summarised at paragraphs 96 and 100 above to be inconsistent with the arguments which precede them. The Council and the United ***Kingdom*** add that terrorist acts cannot be excused on such grounds, which are, in any event, not covered by the contested regulation. In any case, should the applicant consider it worthwhile to pursue this line of argument, the United Kingdom states that he could seek to persuade the competent national authorities to reverse their decision. It observes that Article 7 of the contested regulation permits the Commission to amend the lists at issue on the basis of information supplied by the Member States.

JMS Annotation: It is utterly wrong for the Council and the United Kingdom to presume that the applicant is liable for or has been convicted for acts of terrorism and that the applicant has simply to persuade the competent national authorities to reverse their decision. In the Netherlands, there is no basis for the applicant to complain against any charge for or conviction of acts of terrorism. In the Philippines, the charge against revolutionaries is rebellion, not terrorism. There is no crime of terrorism in the penal code and there is no terrorist blacklist, only the secret lists of death squads.

The Council also states that the applicant has not been granted either refugee status or a residence permit in the Netherlands, contrary to what he claims. **(JMS Annotation: The lawyer of the Council seems to be ignorant of terms in asylum law. The status of refugee arises from the well-grounded fear of persecution. That status is subsequently recognized by the authorities concerned. And further on, there is a legal distinction of the recognized refugee and the admitted refugee, such as the applicant who is a recognized refugee but not admitted refugee.)** In that regard, the Council recognises that the decision of the State Secretary not to grant those benefits to the applicant, on the basis of Article IF of the Geneva Convention, was annulled by the judgments of the Raad van State of 1992 and 1995. In the latter judgment, the Raad van State acknowledged the interest relied on by the State Secretary, in the light of the indications of personal contacts between the applicant and representatives of terrorist organisations he has recorded. The Raad van State held, however, that that could not justify refusing the applicant admission as a refugee under the Netherlands Law on Aliens, if there was no guarantee that he could be admitted to a country other than the Philippines, since such a refusal would be contrary to Article **3** of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment.

130 The applicant has omitted to mention, however, that the decision of the State Secretary was subsequently upheld by the decision of the Rechtbank (paragraph 55 above), another court with special jurisdiction.

131 In that decision, the Rechtbank held that the judgments of the Raad van State of 1992 and 1995 were based on the premise that the applicant was going to be expelled. The Rechtbank went on to note that this was no longer the intention of the State Secretary and that there was accordingly no longer any risk of infringing Article **3** of the ECHR, and held that the State Secretary was no longer prevented from using his discretionary power under the Law on Aliens to refuse the applicant refugee status **(JMS: to be precise "refuse the applicant admittance as a refugee")**and a residence permit on grounds of public interest.

132 Furthermore, the Rechtbank expressly held in that connection, in the light of the information available to it, that the State Secretary had rightly exercised his discretion in the public interest, although this was an anomalous and in principle undesirable, situation, it being the intention not to expel the applicant, but not to grant him refugee status or a residence permit either. **(JMS: Thank you for saying "anomalous and undesirable".)**

133 The Council therefore submits that there are no grounds for doubting the correctness of the factual basis on which the applicant was included in the lists at issue.

JMS Annotation: What factual basis?

Plea based on infringement of the principle of proportionality and the right to life

134 The applicant contends that it is contrary to the principle of proportionality to deprive him of the freedom to dispose of all his financial assets and to dispossess him of them for an unspecified period, under the pretext of combating the funding of terrorism.

JMS: Also refer to the permanent termination of the social benefits for essential human needs (living allowance, housing rent, health insurance. civil liability insurance, AOW pension). These are considered possessions of the beneficiary under the ECHR jurisprudence.

135 That applies all the more since those assets comprise only the post office account held by the applicant jointly with his wife and the various social security benefits paid to him by the Netherlands authorities. The statements relating to this account, supplied as an annex to the reply, show that it was used only for essential human needs. The Council made no attempts to establish whether the freezing of those assets contributed to the objective of combating terrorism pursued by the contested regulation. Moreover, that is plainly not the case.

136 That measure also deprived the applicant of the opportunity of obtaining compensation awarded to him by a United States court in compensation for the infringement of his fundamental rights by the Marcos regime (paragraph 67 above), as well as of the opportunity of benefiting from **an** income from lectures and publication of his books and articles and from possible employment as a teacher.

137 The freezing of the applicant's bank account and the termination of the social security benefits to which he was entitled deprive him of all means of subsistence

and infringe his basic right to life.

138 With regard to the possibility alluded to by the Council of obtaining a derogation from the freezing of funds under Article 5(2) of the contested regulation, the applicant explains that the Netherlands Government refuses to extend the benefit of such a derogation to him, on the grounds that it is not strictly required to and that the Netherlands could make no exceptions to a decision of the Council taken by unanimity. The applicant relies to that effect on the documents produced in the interlocutory proceedings and, more particularly, the decision of the Netherlands Minister of Finance of 7 March 2003.

139 The applicant adds that the Council cannot escape its responsibilities by taking refuge behind the powers of the Member States in the area of derogations. According to the applicant, the Council should have taken greater care and drafted Article 5(2) of the contested regulation so as to impose a strict obligation on the Member States to allow persons targeted to use, under precisely defined conditions, their funds for essential human needs, as Security Council Resolution 1452 (2002), adopted on 20 December 2002, provides. In his observations on the Statement in intervention of the United Kingdom, the applicant adds that the Netherlands Minister of Finance decided that the applicant was no longer to be paid any form of social security benefit, precisely because Resolution 1452 (2002) did not apply to him (see Annex 3 to those observations).

JMS: The Dutch state violates the right against discrimination and the right to the equal protection of the law when it argues that Usama bin Laden and the like are entitled to the essential means of human existence but not the applicant.

140 The ***Council*** submits that the conditions laid down in the case-law for establishing whether a provision of Community law is consistent with the principle of proportionality (see Case 66/82 ***Fromangais*** [l9831 ECR 395, paragraph 8) are satisfied in the present case.

14 1 First, the freezing of the funds of persons such as the applicant is indeed necessary in order to combat the funding of terrorism, which is a decisive aspect of the fight against terrorism (see recital 2 to the contested regulation and recital **2** to Common Position 2001193 1). The Netherlands adds that the contested regulation is in line with Security Council Resolution **1373** (2001), which sets out far reaching strategies to combat terrorism and its funding.

JMS: Stopping the social benefits from the Dutch welfare agency, which has a measly cash component of 201 euros monthly, is an important strategy or tactic of combatting the funding of terrorism?

142 Secondly, the Council took due account of the interests of the persons targeted, and in particular their fundamental right to life, by providing at Articles 5(2) and ***6*** of the contested regulation that the Member States may authorise the necessary exemptions to the freezing of funds in order to provide for the essential human needs of the persons targeted. It thus struck a proper balance between the particular interests of the persons targeted and the public interest in combating the funding of terrorism.

JMS: But why is the applicant in fact deprived of the essential means of human existence? This is a violation of the right to life, to property , to human dignity and against inhuman treatment.

143 The Council adds, however, that the application of Article 5(2) of the contested regulation is a matter within the competence of the Member States alone, which are in a better position to assess the individual situation of persons residing in their territory. Any difficulties experienced by the applicant in that regard in his relations with the Netherlands authorities would not constitute valid grounds for annulling the contested decision or for the contested regulation to be declared unlawful.

JMS: The violation of fundamental rights are permissible in the name of combatting terrorism? A member state is allowed to violate fundamental rights by passing the victim between the Council and member state?

Similarly, the United Kingdom considers that the question whether the Netherlands authorities could, or should, have extended the benefit of that provision to the applicant is an issue distinct from the one of which the Court is seised and is not a matter for the Community Courts.

The Netherlands adds that, unlike the exemptions provided for in Article 6 of the contested regulation, which allow the Member States a margin of discretion, those laid down by Article 5(2) of the regulation are based on an objective criterion. It follows that, contrary to what the applicant asserts, Member States do not enjoy a broad discretion in this area.

JMS: The UK says that the Dutch authorities should have extended the social benefits and that the the Community Courts should wash their hands off the matter. But the Dutch state says that the Member States do not enjoy broad discretion under Article 5 (2). No quarters are given to the victim and a mere provision of a Council decision prevails over the fundamental rights to life and human dignity.

As regards the argument based on a comparison between the exemptions permitted under the contested regulation and those laid down under Security Council Resolution 1452 (2002), the United Kingdom states that that Resolution was adopted to amend the provisions of Resolution 1390 (2002), which is specifically directed towards the Taliban, the Al-Qaida network and persons associated with them, and not the provisions of Resolution 1373 (2001), on which the contested regulation is based. In any event, the United Kingdom maintains that there is no material distinction between Article 5(2) of the contested regulation and paragraph l(a) of Resolution 1452 (2002), which provides that the specific sanctions taken with a view to combating terrorism 'do not apply to funds and other financial assets or economic resources that have been determined by the relevant State(s) to be . . . necessary for basic expenses'.

According to the United Kingdom, Article 5(2) of the contested regulation is drafted sufficiently broadly to permit the competent national authorities to authorise the use of frozen funds in a situation where, in the absence of such an authorisation, a breach of Article 2 or Article 3 of the ECHR would, or might, occur. Moreover, a remedy would lie in the relevant Member State for any failure to exercise that discretion compatibly with Community law and the ECHR.

JMS: In the foregoing, the UK seems to benevolent and respectful of the right to life and the equal protection of the law. At the same time, it does not want the court to tell the Dutch state what to do about the social benefits.

Plea based on infringement of Article 56 EC

According to the applicant, the freezing of his assets constitutes a serious restriction on the free movement of capital between Member States and between the Member States and third countries prescribed by Article 56 EC. That restriction is neither proportionate nor justified on grounds linked to public policy or public security within the meaning of Article 58 EC, as interpreted by the Court of Justice (Case 36175 Rutili [l9751 ECR 1219, paragraph 28; Joined Cases C-163194, C-165194 and C-250/94 ~ a ndze Lera and others [l9951 ECR 1-4821, paragraph 23; and Case C-348196 *Calf**a*** [l 9991 ECR 1-1 1, paragraph 2 l), a mere reference to the fight against terrorism being insufficient in that regard.

149 In that context, the applicant emphasises more particularly that the payment of financial compensation to which he is entitled from the Marcos estate (paragraph 67 above) risks being blocked by reason of the contested decision.

150 The ***Council*** simply states that Article 60 EC allows it to take the necessary urgent measures to interrupt capital movements in the cases envisaged in Article 301 EC, and, for the rest, refers to its arguments in reply to the plea by way of objection based on the Council's lack of competence to adopt the contested decision (see paragraph 206 et seq. below). In that context, the reference to Article 58 EC is wholly irrelevant, as that provision concerns the right of Member States to take measures by way of derogation, and not that of the Community, the only entity at issue in the present case.

Pleas based on infringement of the general principles of Community law

151 In the light of Article 6 EU and the general principles of Community law, the applicant alleges several infringements of his fundamental rights and freedorns guaranteed by the ECHR.

-Infringement of the right to a fair trial, the rights of the defence and of the presumption of innocence

152 In the first part of the plea, the ***applicant*** submits that the contested decision infringes the right to a fair trial before an impartial court, guaranteed by Article 6(1) of the ECHR and recognised in the case-law of the Court of Justice (Case C-97/91 ***Oleificio Borelli*** v ***Commission*** [l9921 ECR 1-6313, paragraph 14; Case C- 185/95 P ***Baustahlgewebe*** v ***Commission*** [l 9981 ECR 1-841 **7,** paragraph 2 1 ; Case C-7/98 ***Krombach*** [2000] ECR 1-1935, paragraph 26; and Case C-1/99 ***Kofisa Italia*** [2001] ECR 1-207, paragraph 46).

153 He argues in that regard that his inclusion in the lists at issue is tantamount to being 'charged with a criminal offence' for the purposes of those provisions, as interpreted in a 'material' and not a 'formal' manner by the European Court of Human Rights ***(Deweer,*** ECHR judgment of 27 February 1980, Series **A** no 35, **9** 44).

154 In that context, the applicant argues that the European Court of Human Rights considers that three criteria determine whether such a charge exists, namely the legal classification of the infringement in national law, the nature of the charge, and the nature and degree of severity of the sanctions imposed.

155 In the present case, those three criteria are satisfied. First, the contested decision is concerned with the fight against terrorism, which forms an integral part of Community criminal law, as is confirmed by the framework decision on combating terrorism (paragraph 96 above). Secondly, the nature of the charge

leaves no room for doubt, since the contested regulation refers to persons who 'commit, or attempt to commit, terrorist acts or who participate in or facilitate the commission of any such acts'. Thirdly, the freezing of funds is comparable to a total deprivation, for an unspecified duration, of the right of ownership of the frozen assets.

156 By the contested decision, the Council is, moreover, imposing a criminal penalty on the applicant, without any judicial decision having been taken upon the conclusion of a fair trial.

157 In his reply, the applicant contests the Council's arguments based on the absence of any classification of the acts he is alleged to have committed as a criminal offence, on the fact that the measure in question concerns only a specific group of persons and on the severity of the measure being insufficient for such purpose (paragraph 177 below). The first of those arguments, which is a very formal one, confirms that the Council, using a procedure classified as administrative, sought to circumvent the guarantees provided for under Article 6 of the ECHR. It falls to be rejected under the case-law of the European Court of Human Rights ***(Engel,*** ECHR judgment of 8 June 1976, Series **A** no **22, 8** 81). The second of those arguments is irrelevant, as Article **2(3)** of the contested regulation provides that the Council may choose any person or group to which the sanctions apply at its discretion. Lastly, the third of those arguments is incompatible with the case-law of the European Court of Human Rights which provides that not only a sentence of imprisonment, but also a confiscatory measure, constitutes a punishment for the purposes of the ECHR (see Phillips v United Kingdom, ECHR judgment of *5* July 200 1, Reports of Judgments ***and*** Decisions, 2001 -VII, **5** 5 1).

158 In reply to the Council's argument that the applicant's right to a fair trial was guaranteed in the present case under the national procedures leading to his inclusion in the lists at issue (see paragraph 169 et seq. below), the applicant submits that the proceedings before the Raad van State and the Rechtbank were wholly irrelevant in that regard, because they did not concern his involvement in terrorist acts, but only the recognition of his refugee status and the issuing of a residence permit. There was thus no national procedure guaranteeing the right to a fair trial.

159 In reply to the Council's argument that the right to a fair trial is also guaranteed in the present proceedings, the applicant states that that fails to provide such a guarantee, by reason of the nature and the limits of the Court's jurisdiction in actions for annulment.

160 In the second part of the plea, the applicant submits that the contested decision infringes the principle of the presumption of innocence enshrined in Article 6(2) of the ECHR.

161 By that decision, which has the force of law in all Member States, the applicant is in effect suspected or accused by the Council of the crime of committing or attempting to commit, participating in or facilitating the commission of a terrorist act, without his culpability having been established in law (see ***Minelli,*** ECHR judgment of 25 March 1983, Series **A** no 62, 37, and ***Allenet de Ribemont,*** ECHR judgment of 10 February 1995, Series **A** no 308,s 36).

162 The applicant adds, that, were he to be the subject of charges on the basis of national provisions transposing the framework decision on the fight against terrorism, the national court having jurisdiction would inevitably be compelled to

take account of the fact that the Council already considers him to be a terrorist. An impartial judgment would thus be impossible in such a case.

163 In the third part of the plea, the applicant contends that the contested decision was taken in contravention of his rights of defence, in particular the right to be heard.

164 In effect, the sanctions in question have been imposed on the applicant in the present case, and he has been accused of the crime of terrorism, without his previously having been heard or having had the opportunity of defending himself, without his having had any access to the confidential documents and information on the basis of which those measures were taken and without those measures having been subjected to the slightest judicial review (Case C-296190 ***Technische Universitdt Miinchen*** [l9911 ECR 1-5469, paragraph 25; Case C-32/95 P ***Commission*** v ***Lisrestal and Others*** [l9961 ECR 1-5373, paragraph 21; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 ***Cimenteries CBR and Others*** v ***Commission*** [l9921 ECR 11-2667, paragraph 38; and Case T-36/91 ICI v ***Commission*** [l9951 ECR 11-1847, paragraph 69). An irregularity of that kind cannot be remedied in proceedings before the Court of First Instance (Joined Cases T-305194 to T-307194, T-3 13/94 to T-3 16/94, T-3 18194, T-325194, T-328194, T-329194 and T-335194 ***LVM*** v ***Commission*** [l9991 ECR 11-931, paragraph 1022).

165 In reply to the Council's argument that the regulation at issue in the present case does not provide for the right to be heard before a decision is taken, the applicant states that the right to be heard represents an application of the general principle that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known (Case 17/74 ***Transocean Marine Paint Association*** v ***Commission*** [l 9741 ECR p. 1063, paragraph 15). He adds that observance of the rights of the defence in all proceedings which may result in sanctions being imposed is a fundamental principle of Community law which must be respected in all circumstances, even in the absence of any provision to that effect (LVM, cited in paragraph 164 above, at paragraph 10 1 1).

166 The Council's argument based on the precedent of the sanctions taken against Yugoslavia (paragraph 176 below) is equally irrelevant because in that precedent, by contrast to the present case, the companies included in the 'black list' had had prior contacts with the German authorities, which had alerted them to their imminent inclusion in that list. They were thus in a position to submit their detailed observations to the German authorities and to the Commission. It was precisely for that reason that the Court of First Instance refused to declare that their rights of defence had been infringed (order of the President of the Second Chamber of the Court of First Instance in Case T-189100 R ***Invest Import und Export and Invest Commerce*** v ***Commission*** [2000] ECR 11-2993, paragraph 41).

167 In his observations on the judgment in ***Yusuf,*** the applicant acknowledges that in paragraph 308 of the judgment the Court found that it was unarguable that to have heard the persons concerned before their funds were frozen would have been liable to jeopardise the effectiveness of the sanctions and would thus have been incompatible with the public interest objective pursued. The applicant considers, however, that the eventual necessity to take advantage of the effect of surprise must not lead to the removal of all guarantees. The effectiveness of the measure could thus be preserved by a hearing a posteriori. The applicant refers in this regard to the legal guarantees provided for by the criminal procedural law in the Member States where prosecuting authorities or investigating magistrates decide

to freeze funds.

168 The ***Council*** argues that the procedure leading to the inclusion of the applicant in the lists at issue is such that his rights of defence are guaranteed at both national and Community level.

169 First, the Council notes that Article l(4) of Common Position 20011931 provides that a person may only be included in the lists at issue where it is established that a decision has been taken in his respect by a competent national authority, that is to say by **a** court or its equivalent (see paragraph 7 above). The Council states that that authority will naturally have had to respect the rights of defence of the person targeted in taking the decision concerned. The Netherlands confirms that such a decision must be subject to all the guarantees required by the national legal order.

170 In the present case, the applicant was the subject of several administrative and judicial proceedings in the Netherlands to determine his administrative status (see paragraphs 40 to 64 above) and he had ample opportunity to state his position effectively in the course of those proceedings, subject to the rules applied by the courts and tribunals concerned to safeguard the confidentiality of sensitive information. Thus, it appears from the judgment of the Raad van State of 1992 that that court gave the applicant the benefit of the doubt with regard to confidential information which he had not been able to contest (see paragraph 42 above).

JMS: The 1992 Raad van State judgment criticized as contrary to the principle of fair administration to use secret dossiers against someone who cannot contest it. The Dutch state should not make it appear that the Raad van State condoned the use of the secret dossiers.

171 In reply to the applicant's argument that those proceedings should not be taken into account since they concerned the issuing of a resident's permit and not his involvement in terrorist activities (see paragraph 158 above), the Council states that that involvement played a fundamental part in the decision of the State Secretary, confirmed by the decision of the Rechtbank, to refuse to issue such a permit to him. Far from being regarded as peripheral, the facts show that that involvement was held by the Rechtbank to be 'of overriding importance' (see paragraph 62 above)
.
JMS: After so many years, what acts of terrorism are in the secret dossiers that can stand scrutiny and be used against the application in a criminal charge? Those secret dossiers are worthless and do not amount tp evidence. Otherwise, the Dutch government would have gone to court to prosecute and try the applicant.

172 Secondly, the Council points out that the applicant has had the opportunity of bringing the present action for annulment and compensation before the Court of First Instance. In a decision of 23 May 2002 in ***Segi and Others and Gestoraspro Arnnistia*** v ***The 15 Member States of the European Union*** (Nos 6422102 and 9916102, ***Reports of Judgments and Decisions,*** 2002-V), the European Court of Human Rights dismissed the claim of certain entities included in the lists at issue for the very reason, inter alia, that the contested regulation is subject to review by the Community judicature.

173 On the other hand, the Council denies that the applicant should have been heard in person before the contested decision was adopted.

174 In that regard, the Council notes, first, that the case-law on which the applicant relies (paragraph 164 above) concerns the right to a hearing in regulated administrative procedures relating to competition and anti-dumping. Referring to paragraphs 326 and 327 of ***Yusuf,*** the Council adds that it did not have, in this case, 'extensive powers of investigation and inquiry' to determine whether the applicant's funds should be frozen. The Community institutions have neither the powers nor the resources to conduct the kind of investigation and inquiry which would be necessary to establish whether a person such as the applicant is involved in terrorist activities. For those matters it is therefore bound to rely on the assessment made by the national authorities. Consequently, it is also before those national authorities that the rights of defence of those concerned fall to be exercised.

JMS Annotation: Could Hans Langenberg have pursued a case against the Dutch authorities even after the sanctie regeling tegen terrorisme was repealed in October 2002? It was then the view of the applicant that he should pursue a case against the Dutch authorities on the principle that they had already plunged a knife into him and harm had already been done to him even if the knife was withdrawn (repeal of the regeling). Further, the Dutch government went into collaboration with other Member States of the Council to gang up on the applicant. Now, the Council is telling the applicant that he should have first countered the Dutch state on its assessment or claims of terrorist acts against him. What about the legal actions taken by the applicant in The Netherlands against the withdrawal of social benefits?

175 Secondly, the Council and the United Kingdom contend that it would not have been possible in any event to provide for a procedure involving the prior consultation of the persons targeted where funds are to be frozen, as that would have rendered the measure wholly ineffective. The United Kingdom adds that there are likely to be compelling reasons of national security for not disclosing the information and evidence upon which a competent authority may take a decision that a person is involved in terrorism.

JMS Annotation: Just imagine that if I had been tipped off that the Dutch authorities were going to blacklist me, I would have run away with the amount in the joint postal bank account. Okay the Dutch authorities were best able to use the element of surprise against the applicant's joint postal account. But after the element of surprise was gone, there should have been a hearing in the Netherlands to precede the next stage of blacklisting by the Council?

176 Thirdly, the Council submits that, according to the case-law of the Court of First Instance, there is no requirement for a hearing of the parties concerned by the Community institutions when the latter draw up, on the basis of names put forward by the national authorities, a 'blacklist' of persons subject to sanctions, such as the list drawn up under Council Regulation (EC) No 1294199 of 15 June 1999 concerning a freeze of funds and a ban on investment in relation to the Federal Republic of Yugoslavia (FRY) and repealing Regulations (EC) No 1295198 and (EC) No 1607198 (OJ 1999 L 153, p. 63). Such a list is drawn up in a two-stage administrative procedure in which the national authorities play a considerable part and the right of parties concerned to be heard must actually be secured in the first place in their relations with the national administrative authority (order in Invest Import *und* Export and Invest Commerce v Commission, cited in paragraph 166 above, at paragraph 40; see also Yusuf, paragraphs 3 15 and **3** 16). In this case the applicant would have had ample opportunity to present his point of view before the Raad van State and the Rechtbank.

JMS: Why did the Council decide to blacklist the applicant even before the Dutch state could afford a hearing to the applicant on the question of blacklist? Cannot the court rule against the actions violating the rights of the applicant at the level of the Dutch state and the Council?

177 Fourthly, there is nothing in the case-law of the European Court of Human Rights to suggest that the guarantees laid down in Article ***6*** of the ECHR should have been made applicable to the procedure leading to the adoption of the contested decision. The Council notes, in particular, that the freezing of the applicant's funds is not a criminal conviction for the purposes of that case-law, since there has not been any classification as a criminal offence, since the measure in question concerns only a specific group of persons and since the severity of the measure is not sufficient for such purpose (see Engel, cited in paragraph 157 above, Ozturk, ECHR judgment of 21 February 1984, Series A no 73, and Campbell and Fell, ECHR judgment of 28 June 1984, Series A no 80).

JMS Annotation: There is nothing severe about imputing terrorist acts, taking way the essential means of human existence and violating fundamental rights?

178 For the same reasons, the Council contests the complaint based on an alleged infringement of the presumption of innocence.

179 The United Kingdom also denies that Article 6(1) of the European Convention on Human Rights concerns the adoption of legislation or administrative measures. It applies only to disputes regarding civil rights and obligations or criminal charges, and the guarantees laid down under it in the former case are applicable only to the extent that there is a dispute requiring a determination. Accordingly, it does not confer on an individual the right to be heard before the adoption of legislation which affects his rights to property. In such a case, an individual is entitled to challenge the lawfulness of that legislation or its application to the circumstances at issue only after the measure has been adopted (see Lithgow and Others, ECHR judgment of 8 July 1986, Series A no 102, 192, and Jarnes and Others, ECHR judgment of 21 February 1986, Series **A** no 98, 81).

JMS Annotation: Is the issue about the adoption of legislation or administrative measures by the Council or is it about the partial annulment of a decision insofar as it unjustly affects the applicant and violates his rights.

180 In the present case, the United Kingdom maintains that neither the inclusion of the applicant in the lists at issue nor, accordingly, the freezing of his assets were covered by Article 6(1) of the ECHR. Those measures did not involve a determination of the applicant's civil rights or a criminal charge against him but the adoption of legislation by the Community institutions. The question of 'rights of the defence' therefore simply does not arise. However, the applicant's rights under Article 6(1) of the ECHR are protected by having access to a court or tribunal which can determine whether the legislation in question has been lawfully enacted andlor whether the applicant properly falls within its scope. Furthermore, the applicant has availed himself of those rights in bringing the present action before the Court of First Instance.

JMS Annotation: Is not the applicant complaining precisely because the Council has blacklisted the appellant as a terrorist, taken punitive measures against him and violated his rights?

18 1 As regards the presumption of innocence set out in Article 6(2) of the ECHR, the

United Kingdom observes that it applies to those 'charged with a criminal offence' and means that, in the determination of any criminal charge against him, an individual is entitled to the benefit of that presumption. The word 'charge' has been defined in general terms as 'the official notification given to **an** individual by the competent authority of an allegation that he has committed a criminal offence' (see Deweer, cited in paragraph 153 above, **9** 46).

JMS Annotation: The Council has imputed the crime of terrorism or terrorist acts to the applicant and without any formal charge indeed it has undertaken punitive measures and curtailed the rights of the applicant. The worst violators of due process are those who presume the guilt of terrorism, try the victim behind his back and prevent him from scrutinizing and contesting the basis of the punitive actions against him.

182 In the present case, no proceedings have been brought against the applicant, and in any event the Community institutions would have no jurisdiction to take any such steps. The inclusion of the applicant's name in the lists at issue has an effect only in relation to his assets and has only administrative consequences. It is not even possible to interpret such a measure as a decision by the competent authorities to seize the applicant's assets, as the assets remain in his ownership and are not expropriated to the benefit of the Member State. Furthermore, for the reasons set out at paragraphs 179 and 180 above, there has been no determination of any criminal charge against the applicant, to which process the presumption of innocence could apply.

JMS Annotation: The termination of the social benefits for the applicant, including his AOW pension, is confiscation of his possessions. The indefinite and serialized freezing of his joint postal bank account is tantamount to confiscation of his assets. The AOW pension is recently terminated, as a consequence of the 2005 Raad van State decision. The applicant is bringing the pension case to court.

- Infringement of the principle that every punishment must have a lawful basis
183 The applicant maintains that the contested decision infringes the principle that every punishment must have a lawful basis, established by Article 7(1) of the ECHR, under which any punishment must have a basis in the law and must accordingly be created by an assembly of representatives of the nation.

184 The measures laid down in the contested regulation, which he contends amount to a confiscation of his assets and thus to a punishment within the meaning of the ECHR (see Phillips v United Kingdom, cited in paragraph 157 above), were created by a simple decision of the Council.

JMS Annotation: Simple decision of the Council?

185 The principle requiring a legal basis for the offence has not been respected either, since Article l(4) of the contested regulation defines a 'terrorist act', an essential element of the offence established under Article 2 of that regulation, simply by reference to Article l(3) of Common Position 2001/93 1. The legal basis of the offence thus rests on a measure which, as Article 15 EU makes clear, is nonbinding in nature and incapable of having direct effect. It is neither clear nor unambiguous (Case C- 18189 Maizena [l 9901 ECR 1-2587, paragraph 15).

186 The Council maintains that the contested acts comply fully with the principle of lawfulness invoked by the applicant, as they were duly adopted by the Community legislature and they have a clear legal basis.

187 There is likewise no reason, in the Council's view, why reference cannot be made to Article l(3) of Common Position 20011931 for the purpose of defining the concept of a terrorist act.

- **Infringement of the right to freedom of expression and association**

188 The applicant submits that the contested decision infringes the rights to freedom of expression and association guaranteed by Articles 10 and 11 of the ECHR respectively (Young, Jarnes *and* Webster, ECHR judgment of **23** April 1987, Series A no 44, 57, and Vogt, ECHR judgment of 26 September 1995, Series A no 323, 64).

189 First, the sanctions imposed on him prevent him almost completely from carrying out his activities as a writer and teacher and, more particularly, his role as chief political consultant of the NDFP, even though the Philippine Government has guaranteed him immunity in that regard.

190 Secondly, those sanctions prevent him from attending meetings which are essential for carrying out his political activities.

191 Furthermore, the extremely broad definition of the concept of 'funds' in Article 1 of the contested regulation represents an attack on the right of every citizen to give financial support to the person or association of his choice.

192 The Council submits that the contested decision does not infringe the rights of the applicant to freedom of expression and of association, as the restrictions on those freedoms are an unintended or incidental consequence of that decision (see, **a** contrario, Piermont, ECHR judgment of 27 April 1995, Series **A** no 3 14).

JMS Annotation: "Restrictions" on freedoms are an unintended or incidental consequence of the decision of the Council?

- Infringement of the right to property

193 The applicant submits that the contested decision infringes the right to enjoyment of his possessions guaranteed by Article 1 of the First Protocol to the ECHR.

194 That measure deprives him of the freedom to dispose of all of his financial assets and amounts to a complete dispossession of them. Such a measure, adopted without any limitation as to time, constitutes a disproportionate and intolerable interference which encroaches upon the very substance of the right to property (Case 265187 ***Schrader*** [l9891 ECR 2237, paragraph 15, and the case-law cited there)
.
195 In reply to the argument of the United Kingdom summarised at paragraph 198 below, the applicant contends that no legal instrument of the United Nations can be used to infringe fundamental rights. He relies, to that effect, on a speech given on 12 April 2002 by the Secretary General of the United Nations, **Mr** Kofi Annan, before the United Nations Commission for Human Rights, which states that it is necessary to protect rights that are threatened as a result of counter-terrorism measures.

196 The Council states that fundamental rights are not absolute prerogatives and that their exercise may be subject to restrictions justified by objectives of general

interest pursued by the Community (Case C-84/95 Bosphorus **[l996]** ECR 1-3953, paragraph 21). The Council observes more particularly that the Court of Justice held in that judgment (at paragraphs 22 and 23) that any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing serious harm to persons who are in no way responsible for the situation which led to the adoption of the

sanctions. The Court of Justice went on to hold that the importance of the aims pursued by the disputed legislation was such as to justify negative consequences, even of a substantial nature, for some operators.

197 Whilst accepting that the freezing of the applicant's assets engaged his rights under Article 1 of the First Protocol to the ECHR, the ***United Kingdom*** states that, when applying that provision, the European Court of Human Rights considers whether a 'fair balance' has been struck between the demands of the general community and the overriding requirements of fundamental rights, thereby according the State a significant margin of assessment.

198 In the present case the freezing of the applicant's assets was not only in accordance with, but also prescribed by, Community law and international law. In that regard, the United Kingdom submits that, once an individual has been identified by the competent authorities as involved in terrorist activities, the obligation imposed on Member States under paragraph l(c) of Resolution 1373 (2001) to freeze the funds of the person targeted takes effect and, under Article 103 of the Charter of the United Nations, prevails over any other obligation (see the order in ***Invest Import und Export and Invest Commerce*** v ***Commission,*** cited in paragraph 166 above, at paragraphs **36** to 38). Furthermore, the measure at issue pursues an objective of fundamental importance for the international community as a whole, the Council having declared that 'terrorism is a real challenge to the world and to Europe and . . . the fight against terrorism will be a priority objective of the European Union' (see recital 1 to Common Position 2001/931). An essential part of that fight consists in depriving those involved in terrorist activities of their financial assets and economic resources.

199 As regards the proportionality of the measure at issue, the intervening governments stress that both the derogations laid down in Articles 5(2) and ***6*** of the contested regulation and the periodic review of the position of targeted persons provided for under Article l(6) of Common Position 20011931 have the effect of giving significant protection to the rights and interests of persons included in the lists at issue.

Plea by way of objection based on the lack of competence of the Council to adopt the contested regulation

200 The ***applicant*** argues that the Council was not competent to adopt the contested regulation on the legal basis of Articles 60 EC, 301 EC and 308 EC.
201 First, Articles 60 EC and 301 EC authorise only the adoption of measures against third countries and not, as in the present case, against individuals and organisations within the Community.

202 Referring to recital 14 in the preamble to the contested regulation, which provides that the lists at issue may include persons and entities having links or relations with third countries, the applicant adds that, on any view, those persons and entities cannot be compared to third countries.

203 Secondly, Article 308 EC does not authorise the Council, under the pretext of ensuring the effectiveness of Community action, to exercise powers inconsistent with its fundamental nature, which is that of an executive body. In that regard, the applicant states that Article **2(3)** of the contested regulation confers on the Council the power to establish, unilaterally and without reference to any objective criteria, the list of individuals and groups allegedly linked to terrorism and to which sanctions of a penal nature are to apply. In so doing, the contested regulation confers on the Council, which is already equipped with broad executive powers, a judicial role which is not provided for in the Treaty, resulting in an unprecedented concentration of powers.

204 In support of his arguments, the applicant refers to the Resolution of the European Parliament of 24 October 2002 on assessment of and prospects for the European Union strategy on terrorism one year after 11 September **2001** (Appendix **30** to the application). In that resolution, the European Parliament expressed 'doubts that effective coordination of a European anti-terrorism policy is possible under the present structure of the Union' and urged the Convention on the Future of Europe to create 'the necessary legal basis to allow the European Union to freeze assets and cut off funds of persons, groups and entities of the European Union involved in terrorist acts and included in the European Union list'.

205 In the reply, the applicant contends that the examples of uses made of Article **308** EC relied on by the Council (paragraph 213 below) are irrelevant. On the contrary, it is clear from Opinion 2/94 of the Court of Justice of **28** March 1996 ([l9961 ECR 1-1759, paragraphs 29 and 30) that that provision cannot be regarded **as** a sufficient legal basis for the adoption of the contested measures.

206 The ***Council*** accepts that Articles 60 **EC** and 301 EC provide for the interruption or reduction of capital movements and economic relations with third countries.

207 Measures taken by the Community pursuant to those provisions have evolved from acts applying to third countries as a whole towards so-called 'smart' sanctions, which are targeted at individual members of the regime in control of the third country concerned and their associates and at persons or organisations in control of a substantial part of the territory of a third country.

208 In that regard, the United ***Kingdom*** maintains that there is nothing in Articles 60 EC and 301 EC which excludes the adoption of economic sanctions directed at individuals and organisations established within the Community, where those measures seek to interrupt or reduce, in whole or in **part,** economic relations with one or more third countries. Moreover, the Community judicature has impliedly recognised the lawfulness of that practice (see the order in ***Invest*** *Import und* ***Export*** *and* ***Invest Commerce*** v ***Commission,*** cited in paragraph 166 above, at paragraph 34, confirmed on appeal by the order of the President of the Court of Justice in Case C-3 17/00 **P(R)** [2000] ECR 1-954 1, paragraphs 26 and **27).**

209 Accordingly, the United Kingdom is of the view that, in so far as the contested regulation lays down measures taken against persons or entities 'linked or related to third countries' (recital 14), those measures are clearly within the competence of the Community.

210 In the present case, however, the Council and the intervening governments recognise that the contested regulation goes further, inasmuch as it also refers to entities and individuals, such as the applicant, who are not necessarily linked to the government of or the regime controlling a third country. **The United Kingdom**

adds that the contested regulation also seeks to interrupt economic relations with international terrorist organisations, rather than with third countries.

JMS Annotation: In the case of the applicant, what economic relations with which international terrorist organization are being interrupted?

211 It is precisely for that reason that the legal basis of Articles 60 EC and 301 EC was supplemented by that of Article 308 EC (see recital 14 to the contested regulation). The Council and the intervening governments maintain that, by proceeding in that way, the Community has been able to keep pace with the development of international practice, which has been to adopt 'smart sanctions' aimed at individuals and entities who pose a threat to international security, having regard in particular to the altered political circumstances after 11 September 2001. In that respect, the contested regulation is in line with Security Council Resolution 1373 (2001) (paragraph 4 above).
In the rejoinder, the Council adds that the use of Articles 60 EC and 301 EC to give effect to a common position adopted as part of the common foreign and security policy (CFSP) is in accordance with the requirement to ensure consistency in the activities of the Union laid down by Article **3** EU. Furthermore, one of the primary objectives of the CFSP is to preserve peace and strengthen international security, in accordance with the principles of the Charter of the United Nations (Article 11 EU). In addition, the EC Treaty itself includes a reference in the preamble to the Charter of the United Nations and expresses the resolve of the High Contracting Parties to preserve and strengthen peace and liberty. The Council deduces from that that the promotion of international peace and security is a principle of the Charter of the United Nations which is reflected in the general framework of the EC Treaty, and more specifically in Articles 60 EC and 301 EC. However, **inasmuch as neither of those articles, nor any other specific Treaty provision, covers the situation of persons such as the applicant, the use of Article 308 EC is shown to be necessary and justified.**

213 **As** regards, more particularly, the Community objective which the contested regulation seeks to attain, the United Kingdom describes this as the uniform implementation across the Community of obligations relating to restrictions on capital movement imposed on Member States by the Security Council.. In that respect, the United Kingdom submits that it is an essential part of the creation of an internal market within the meaning of Article 3(c) EC that any restrictions on freedom of movement of capital are applied uniformly. If action at Community level had not been taken in response to Resolution 1373 (2001), that would have created the potential for differences between the Member States as to the manner in which the freezing of funds was implemented. The United Kingdom refers in that regard to the lengthy and precise definitions contained in Article 1 of the contested regulation, which were not to be found in Resolution 1373 (2001).

214 The United Kingdom also submits that measures for freezing the funds of individuals with a view to interrupting economic relations with international terrorist organisations, rather than with third countries, cannot be said to widen 'the scope of Community powers beyond the general framework created by the Treaty', to adopt the terms of Opinion 2/94 of the Court of Justice, cited in paragraph 205 above. **Under the general framework of the Treaty, the Community has the competence to take action to regulate capital movements and, moreover, to do this by taking action against individuals.**

215 The Council and the intervening governments consider that the circumstances in which Article 308 EC was used in the present case are no different from those in

which that provision has been used in the past in order to attain, in the operation of the common market, one of the objectives of the EC Treaty wherever the Treaty has not provided the necessary powers. They refer in that regard:
in the area of social policy, to the various directives which, on the basis of Article 235 of the EC Treaty (now Article 308 EC), supplemented on occasion by Article 100 of the EC Treaty (now Article 94 EC), have extended the principle of equal pay for men and women laid down in Article 119 of the EC Treaty (now Article 141 EC), to make it a general principle of equal treatment in all areas where potential discrimination could exist, as well as to make it benefit self-employed workers, and in particular: Council Directive 761207lEEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40); and Council Directive 861613lEEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56);
in the area of free movement of persons, to the various measures which, on the basis of Article 235 of the EC Treaty and Article 51 of the EC Treaty (now, after amendment, Article 42 EC), have extended to self-employed persons, to members of their families and to students the rights recognised to employed persons moving within the Community, and in particular Council Regulation (EEC) No 139018 1 of 12 May 198 1 extending to self-employed persons and members of their families Regulation (EEC) No 140817 1 on the application of social security schemes to employed persons and their families moving within the Community (OJ 198 1 L 143, p. 1);
- more recently, to Council Regulation (EC) No 1035197 of **2** June 1997 establishing a European Monitoring Centre on Racism and Xenophobia (O 1997 L 15 1, p. l), adopted on the basis of Article 213 of the EC Treaty (now Article 284 EC) and Article 235 of the EC Treaty.

216 The Court of Justice itself has confirmed the legality of that practice. The Council relies to that effect on Case C-114/88 ***Delbar*** [l9891 ECR 1-4067. The ***Netherlands*** also refers to the judgment in Case 242187 ***Commission*** v ***Council*** [l9891 ECR 1425, paragraph 37.
Furthermore, the Community legislature has already had recourse in the past to the legal basis of Article 235 of the EC Treaty in the field of sanctions. In that regard, the Council argues that, prior to the introduction of Articles 301 EC and 60 EC, various Council regulations imposing trade sanctions were based on Article 113 of the EC Treaty (now, after amendment, Article 133 EC) (see, for example, Council Regulation (EEC) No 596182 of 15 March 1982 amending the import arrangements for certain products originating in the USSR (OJ 1982 L 72, p. 15); Council Regulation (EEC) No 877182 of 16 April 1982 suspending imports of all products originating in Argentina (OJ 1982 L 102, p. 1); and Council Regulation (EEC) No 3302/86 of 27 October 1986 suspending imports of gold coins from the Republic of South Africa (OJ 1986 L 305, p. 11)). However, when those measures went beyond the scope of the common commercial policy or concerned natural or legal persons established within the Community, they were also adopted on the basis of Article 235 of the EC Treaty. That was the case, inter alia, with Council Regulation (EEC) No 3541192 of 7 December 1992 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions, the performance of which was affected by United Nations Security Council Resolution 661 (1990) and related resolutions (OJ 1992 L 361, p. l), Article 2 of which provides that 'it shall be prohibited to satisfy or to take any step to satisfy a claim made by ... any person

or body acting, directly or indirectly, on behalf of or for the benefit of one or more persons or bodies in Iraq'.

218 The Netherlands claims in that regard that the areas of competence of the Community have frequently been supplemented on the occasion of Treaty amendments, with Article 308 EC being used as a legal basis prior to those changes being adopted. According to the Netherlands Government, when Article 301 EC was adopted, it was not possible to foresee that sanctions might have to be imposed on persons, groups and entities. As that necessity has subsequently become clear, recourse to Article 308 EC is justified pending amendment of the Treaty in the future. In that regard, the Netherlands points out that the draft constitutional treaty resulting from the preparatory work of the Convention on the Future of Europe (Doc. CONV 850103) states at Article 111-282(2) that the Council may adopt restrictive measures against natural or legal persons and non-State groups or bodies.

Plea by way of objection based on infringement of the principle of proportionality and of the principle of legal certainty

19 While accepting that the objectives of the contested regulation and the contested decision require that exceptional means be used, the ***applicant*** maintains that, by Article **2(3)** of the contested regulation, the Council, which is an institution already entrusted as legislative power with the task of creating the offences (see, in that regard, Common Position 20011931) has also conferred on itself a role which is traditionally that of the judicature, namely the designation and punishment of those guilty of the offences, without any of the safeguards inherent in the judicial process. Such a concentration of powers also infringes the principle of the separation of the functions of investigation and judgment. It is contrary both to the common constitutional traditions of the Member States and to Article 6(4) EU, which requires that the means employed by Community institutions be proportionate to the aims in view.

220 The attribution of such a discretionary power to the Council also contravenes the principle of legal certainty. In that regard, the applicant states that he was included in the lists at issue without any official notification or explanation, despite several requests for access to the documents deemed to justify that measure.

221 Without replying specifically to this plea, the ***Council*** considers that it has already rebutted it in its arguments in reply to the other pleas.

Plea by way of objection based on misuse of power

222 The ***applicant*** argues that the contested regulation allows the Council to include a person or an entity in the lists at issue and freeze all their funds on the sole ground that the ministers of the (then) 15 Member States consider it 'desirable'.

223 He contends that the regulation was adopted with the one specific aim of circumventing the judicial procedures in criminal cases prescribed both by the general principles of Community law and by Article 6 of the ECHR and which normally apply in all democratic countries.

224 In the applicant's case, it also seems that the Council used its powers for diplomatic reasons, in order to put pressure on certain groups under the pretext of combating terrorism. The applicant, supported by the ***Negotiating Panel and Others*** (see also paragraph 230 below), relies to that effect on the declaration of

the Philippine Minister of Foreign Affairs mentioned at paragraph 76 above, as well as on certain of the statements referred to at paragraph 99 above, in particular those of Jose Aguila Grapilon and Romeo T. Capulong.

225 According to the ***Council,*** the contested measures were not adopted in any way with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaty (Case C-248189 ***Cargill*** v ***Commission*** [l9911 ***ECR 1-2987,*** paragraph 26). On the contrary, the substantive content of those acts and the legal effects which they produce correspond exactly to their stated purpose, which is to combat terrorism (see recitals 2 to *5* to the contested regulation). Those acts also have as their basis the proper Treaty provisions for achieving such purpose, namely Articles ***60*** EC, 301 ***EC*** and 308 EC.

Arguments of the Negotiating Panel and Others

226 **After** referring to the key role played by the applicant as chief political consultant of the NDFP in the peace negotiations between the NDFP and the Philippine Government (see paragraph 71 above), the Negotiating Panel and Others argue that the contested decision seriously undermines those negotiations.

227 First, the patently erroneous categorisation of the applicant as a 'terrorist' or as a person 'facilitating terrorism' inevitably casts a negative reflection on the whole of the Negotiating Panel and Others, whereas since at least 1996 the NDFP has scrupulously respected international law and human rights,

228 Secondly, the contested decision seriously undermines the applicant's participation in the peace negotiations as chief political consultant of the NDFP, by reason of the impediments to his freedom of movement **and** the threats to his personal security resulting from it (see Article 10 of Common Position 2001193 1).

JMS Annotation: The IND of the Dutch state has not renewed the applicants' identity card, the W-document, since 15 October 2005. Without this, he cannot get the laissez passer and terugkeervisum from the Dutch Foreign Ministry and IND/Ministry of Justice, respectively, to be able to go to peace negotiations in Oslo or to attend the court hearing in Luxembourg.

229 Thirdly, the Philippine Government is taking advantage of the 'demonisation' of the applicant to violate agreements concluded with the NDFP. **(JMS: In turn, the violation of agreements by the Philippine government foul up the entire peace negotiations.)**

230 Fourthly, the Negotiating Panel and Others maintain that the **main** purpose of including the applicant in the lists at issue is to put pressure on the NDFP in the negotiations with the Philippines Government, in order to force it to sign a capitulation agreement. Furthermore, it was at that government's request that the applicant was put on the list of terrorist individuals in the United States and in the European Union (see also paragraph 224 above).

23 1 In reply to those arguments, the Council states in its observations on the statement
in intervention of the Negotiating Panel and Others that neither the fact that the applicant acted as chief political consultant of the NDFP in the peace negotiations with the Philippine Government, nor the fact that the parties to those negotiations had agreed among themselves to grant certain immunities, nor the support given to those negotiations by the Filipino people, as well as the international

community and the European Parliament, nor the applicant's efforts in support of human rights preclude the applicant being associated with terrorism (see also paragraph 126 above). Furthermore, it is a typical fallacy of terrorist organisations to use concepts of humanitarian law and of the law relating to armed conflicts.

JMS Annotation: NDFP Negotiating Panel should rebut the above.

232 As regards the allegation of a purported misuse of power, the Council states that it cannot see on what grounds any intention of putting pressure on the NDFP to capitulate could be ascribed to it on the basis of the declarations of the Philippine Minister of Foreign Affairs referred to at paragraph 76 above. The Council confirms that its one and only objective in referring to the applicant in the contested decision was that set out in the contested regulation, namely the fight against the financing of terrorism. The Negotiating Panel and Others have provided no evidence in support of their allegation, nor have they put forward any serious reason in support of it.

JMS Annotation: NDFP Negotiating panel should also rebut the above.

The application for compensation

233 The applicant relies on the second paragraph of Article 288 EC and describes the prejudice suffered by him by reason of the contested acts as follows:

- the freezing of his financial assets, in particular of his bank account;

- the prohibition on any financial institution or insurance agency providing him with services;

- the suspension of payment of his social security benefits;

- the obstacle to payments due to the applicant on various grounds;

- unjustified restrictions on his freedom of movement, increased surveillance of his person and orders to border police and customs authorities to hinder his passage;

- the physical and moral prejudice caused by the libel, slander and stigmatisation of the applicant as a 'terrorist' in official instruments, in the press and in the opinion of the public;

- the endangerment of his personal security and physical integrity by the threats and risks arising from the stigmatisation of the applicant as a 'terrorist';

- the prejudice to the applicant's role as chief political consultant to the **NDFP** in the peace negotiations.

234 In the reply, the applicant states that the wrongful conduct relied on in the present case consists in the manifest error of assessment committed by the Council in his regard by including him in the lists at issue and categorising him as a terrorist, without affording him any procedural guarantee and without providing any valid statement of reasons.

235 The **Council** submits that the Community can only incur liability where a

sufficiently serious breach of a superior rule of law for the protection of **an** individual has occurred (Joined Cases C- **104/89** and **C-37/90** ***Mulder*** *and.* ***Others*** V *Council and Commission* [l **9921** *ECR* **1-3061,** paragraph 12).

JMS Annotation: There is serious breach of the fundamental rights of the applicant (the superior rule of law for the protection of the individual) because he has no liability whatsoever for any act of terrorism. Not a single act of terrorism is cited in which he is allegedly complict in any way. By no stretch of the imagination can his fundamental rights be restricted and subordinated to the line of international cooperation on peace and security and combatting terrorism.SISON **v** COUNCIL

236 In the present case, as is clear from the above, the contested acts do not contravene any rule of law.

JMS Annotation: Is No. 236 above the position of the Council or the Judge Rapporteur?

N.J. Forwood
Judge-Rapporteur