LUXEMBOURG

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Soud prvního stupně Evropských společenství
De Europæiske Fællesskabers Ret i Første Instans
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Πρωτοδικειο των Ευρωπαϊκων Κοινοτητων
Court of First Instance of the European Communities
Tribunal de première instance des Communautés européennes
Cúirt Chéadchéime na gComhphobal Eorpach
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Euroopan yhteisöjen ensimmäisen oikeusasteen tuomioistuin
Europeiska gemenskapernas förstainstansrätt

1/25

Luxembourg, 07/12/2007
T-341/07-40

BY FAX
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Case : T-341/07

Jose Maria Sison
v
Council of the European Union

Please find enclosed, from the Registrar of the Court of First Instance:

– a certified copy of the **defence** (Reg. No. **342443**).

The written procedure ended when that document was lodged, unless the Court of First Instance subsequently decides otherwise.

You will be informed of the next steps to be taken in the procedure at a later date.

E. COULON
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COUNCIL OF
THE EUROPEAN UNION

LEGAL SERVICE

Certified true copy

Brussels, 5 December 2007

TO THE PRESIDENT AND THE MEMBERS
OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

STATEMENT OF DEFENCE

lodged pursuant to Article 46 (1)
of the Rules of Procedure of the Court of First Instance

in Case T-341/07

Jose Maria SISON,
Represented by Messrs. J. Fermon, A. Comte, H.E. Schultz, D. Gurses, W. Kaleck and R.T. Capulong,

Applicant

against

COUNCIL OF THE EUROPEAN UNION,
Represented by Ms. Emer Finnegan and Mr. Michael Bishop, legal advisers in the Council Legal Service, as Agents, having agreed that service may be effected on them at fax n° +00.32.2.281.56.56 and, where necessary, at the following address: Council of the European Union, Registry of the Legal Service, for the attention of Michael Bishop and Emer Finnegan, rue de la Loi, 175, 1048 Brussels,

Defendant

In proceedings in accordance with the expedited procedure for partial annulment of Council Decision 2007/445/EC of June 28, 2007 implementing Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, insofar as that decision includes the Applicant.

(Original received on 07/12/2007)
(Fax/Mail received on 05/12/2007)
REGISTERED AT THE COURT OF FIRST INSTANCE
Under no 342443
Luxembourg, 06/12/2007
The Registrar:
(Signature)

I. INTRODUCTION

1. In this Defence the Council will respond to those arguments raised by the Applicant in the abbreviated form of the Application which was notified to the Council by the Registry of the Court on 28 November 2007, as agreed at an informal meeting held at the Court on 8 November 2007. At that meeting it was also agreed (and subsequently confirmed by Order of the Court of 13 November 2007) that for the purposes of the expedited procedure it would only be necessary in this Defence for the Council to deal with those arguments of the Applicant relating to his action for annulment, as the action for damages will not form part of the expedited procedure. Instead, the Council may be invited to provide a defence relating to this action at a future date, as appropriate.

2. Concerning the action for annulment, the Council will deal in turn with the arguments of the Applicant as follows.

3. First, the Council will refute the plea based on the alleged error of assessment which it will treat together with the alleged violation of Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (the "Council Regulation") and of Article 1(4) of Common Position 2001/931/CFSP (the "Common Position").

4. Second, the Council will refute the alleged failure to state adequate reasons.

5. Third, the Council will refute the pleas based on the alleged violation of the principle of proportionality and of the general principles of Community law.

6. Finally, the Council will conclude that the present proceedings should be dismissed in their entirety.

II. ALLEGED ERROR OF ASSESSMENT AND ALLEGED VIOLATION OF THE COUNCIL REGULATION AND THE COMMON POSITION

(a) Alleged error of assessment

7. The Council rejects any suggestion by the Applicant that there has been an error of assessment on its part. It will deal together with the Applicant's claim that the Council has made erroneous factual allegations, as well as his claim that the Council has misinterpreted the Netherlands judicial decisions concerning him. The Council considers that the Applicant's suggestion that the Statement of Reasons concerning him is "*diametrically opposed to the judicial decisions it refers to*" is completely incorrect and that the Applicant's presentation of the facts and the relevant judgments is inaccurate and misleading. To set the record straight, and for the sake of clarity, the Council would like to set out the relevant facts in this case, including the details of the relevant findings of the Netherlands courts, as follows.

8. In 1993 the Netherlands Secretary of State for Justice (the "State Secretary") rejected the Applicant's request to review the original refusal (in 1990) of the Applicant's application for refugee status and for a residence permit in the Netherlands.

9. In its decision of 21 February 1995 concerning this rejection, the Administrative Law Division of the Council of State (the "Raad van State") held (based on material provided by the Netherlands intelligence services - BVD, now AIVD) that there was sufficient evidence that:
   - at the time of the State Secretary's rejection of that request, the Applicant was the chairman and the head of the Communist Party of the Philippines (CPP). The evidence also supported the conclusion that the New People's Army (NPA) was subject to the Central Committee of the CPP and that at the relevant time the Applicant had at least attempted to effectively direct the NPA from the Netherlands;

- that the NPA was responsible for a large number of terrorist acts in the Philippines and that the Applicant had at least attempted to direct these activities carried out under the control of the NPA; and

- that the CPP/NPA maintained contacts with terrorist organisations throughout the world and that there had been personal contacts between the Applicant and representatives of such organisations. (See paragraph 56 of Case T-47/03, *Sison v Council*).

10. The Raad van State went on to find that there was insufficient evidence to conclude that the Applicant had actually committed the serious crimes referred to in Article 1F of the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967 (the "Geneva Convention"). It also found that the Applicant had sound reasons to fear persecution if sent back to the Philippines and that accordingly he should be treated as a refugee for the purposes of Article 1A(2) of the Geneva Convention. In addition, it held that the Applicant could not be refused admission to the Netherlands on grounds of public interest, because there was no guarantee that the Applicant would be permitted to enter a country other than the Philippines in the event of such refusal. Such refusal would therefore be contrary to Article 3 of the European Convention on Human Rights (ECHR). (See paragraphs 56-59 of Case T-47/03).

11. In 1996 the State Secretary again rejected the Applicant's request to review the original refusal of the Applicant's application for refugee status and for a residence permit in the Netherlands. However, he decided that the Applicant should not be deported to the Philippines for so long as he had a well-founded fear of persecution within the meaning of the Geneva Convention or of treatment contrary to Article 3 of the ECHR. (See paragraph 60 of Case T-47/03).

12. On 11 September 1997 the Legal Uniformity Division of the District Court of the Hague (the "Rechtbank") upheld this decision of the State Secretary. It noted that the Raad van State had based its judgment on the original intention of the State Secretary to remove the Applicant to his country of origin, but that this was no longer proposed. Accordingly, violation of Article 3 ECHR was no longer an issue. The Rechtbank noted that, although it was the policy of the State Secretary to admit an alien as a refugee where there was a well-founded fear of persecution within the meaning of Article 1A of the Geneva Convention and where no other country would admit the alien, the State Secretary had the power in principle to make an exception to this rule. (See paragraphs 61-67 of Case T-47/03).

13. The Rechtbank then held that the State Secretary had used this power reasonably in respect of the Applicant. The Rechtbank specifically stated that the facts on which the Raad van State had based its judgment in 1995 were also "*of overriding importance for the court.*[1]" In particular, it held that it had "*not been shown that a different significance should have been attributed to these facts by the [State Secretary] at the time the now disputed decision [that of 1990] was taken.*" (See paragraph 68 of Case T-47/03).

14. Accordingly, the Rechtbank dismissed as unfounded the Applicant's appeal against the refusal to admit him to the Netherlands as a refugee. (See paragraph 69 of Case T-47/03).

15. It also dismissed as unfounded the applicant's appeal against the refusal to grant him a residence permit. In particular, it held that the State Secretary was entitled to reach such a decision "*on the basis of a reasonable weighing of interests*" (See paragraph 70 of Case T-47/03).

1 All underlining is ours.

16. It is clear from the foregoing that it is wrong for the Applicant to suggest that there is "*no evidence*" for the Council's assertion in the Statement of Reasons that the Applicant is the leader of the CPP, including the NPA. It is also wrong to suggest that there is "*no evidence*" for the Council's assertion that the Applicant had advocated the use of violence and that he had directed, or sought to direct, the NPA, which had been responsible for numerous terrorist attacks in the Philippines. Moreover, it is wrong to suggest that there is "*no evidence*" that the Applicant maintained contacts with terrorist organisations all over the world. Finally, it is misleading to state that the two Netherlands judgments cited "*recognised him as a refugee*" (see paragraph 84 of the Application), which implies that the Applicant was in fact granted refugee status in the Netherlands. In fact, the Applicant has never been granted refugee status or a residence permit in the Netherlands, and this position has been upheld by the 1997 judgment of the Rechtbank discussed above.

17. Concerning the Applicant's argument that it is impossible for him to be the leader of the CPP, including the NPA, because he is in exile, the Council would add that this is not necessarily the case at all: on the contrary, there are many well-known examples of leaders of terrorist or revolutionary groups continuing to operate while in prison or in exile.

18. Similarly, concerning the weight attached by the Applicant to the fact that he is a signatory to various agreements formulated during the peace negotiations in the Philippines, the Council considers that participation in peace negotiations does not as such indicate that the participants have renounced the use of violence. Indeed, the Applicant himself is the author of a document enclosed as part of Annex 10 to the present Application (the Introduction to "Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law and Related Documents (1992-1998) in the Peace Negotiations Between the Government of the Republic of the Philippines (GRP) and the National Democratic Front of the Philippines (NDFP)") where he explains in paragraph 3 that "*It is against the inherent character of peace negotiations for any side to impose on the other side such preconditions as that the latter must submit to the former's constitution or end the armed struggle without mutual satisfaction on substantive demands.*"

19. The Applicant also alleges at paragraph 88 of the Application that he was not properly able to defend himself before the Rechtbank concerning his alleged contacts with terrorist organisations, because certain information was treated as confidential and was not disclosed in court. First, the Council would point out that such a plea is a matter for the competent national authorities concerned and not for the Council (or for the Court).

20. Secondly, the Council would point out in any event that the documents in question[2] were examined by the President of the relevant Chamber of the Rechtbank in accordance with a special procedure and that paragraph 6 of the Rechtbank's judgment holds that : *"On the basis of the president's report, the court decided that the restriction on the inspection of those documents was justified. However, since the [Applicant] consented to such inspection (...) the court took account of the content of those documents in its assessment of the dispute insofar as they had been examined by the president of the Chamber".*[3]

21. Therefore, if the Applicant consented to the examination of the documents in question at the time, he is not entitled to insinuate now that it was somehow improper for the Rechtbank to have taken them into account.

22. In conclusion, the Council considers that it is clear that all the factual assertions made in the Statement of Reasons are accurate, and that the Council has correctly interpreted the Netherlands judicial decisions of 1995 and 1997 concerning the Applicant.

2 Exhibits nos. 27-34 from files in the Ministry of Justice and certain other operational material which had formed the basis of a letter dated 3 March 1993, from the head of the security services to the Secretary of State.

3 The second last paragraph on page 4 of the Raad van State's judgment indicates that it too had examined this information.

(b) Alleged violation of the Council Regulation and the Common Position

23. The Applicant claims that the acts mentioned in the Statement of Reasons do not meet the requirements of Article 1(4) of the Common Position[4]. He suggests that the acts mentioned do not constitute serious and credible evidence or clues of terrorist acts, or condemnation for such deeds as required by Article 1(4).

24. First, the Council recalls that the Common Position itself, which is an act founded on Articles 15 and 34 of the Treaty on European Union, is of course not susceptible to challenge in the present proceedings.

25. Moreover, as the Court held in paragraph 206 of the judgment in Case T-47/03, "*the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. Because the Community judicature may not, in particular, substitute its assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of First Instance of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such decisions are based...*".

4 The act quoted by the Applicant at paragraphs 86 and others should be the Common Position and not the Council Regulation.

26. In addition, the Council would make the following point. As indicated above, the 1995 Raad van State and the 1997 Rechtbank judgments clearly held certain facts to be proven concerning the Applicant's direction, or attempt to direct, the NPA, his advocacy of violence and his contacts with terrorist organisations. The Council considers that the Statement of Reasons correctly indicates that such actions fall within subpoints (i) (threatening to commit terrorist acts) and (j) (directing a terrorist group) of Article 1(3) of the Common Position. In citing only those subpoints the Council took account of the fact that the judgments in question found that there was insufficient evidence to conclude that the Applicant had actually committed the serious crimes mentioned in Article 1F of the Geneva Convention when considering that exclusion clause, which had to be interpreted restrictively.

27. Therefore, the Council considers that Article 2(3) of the Council Regulation (which in turn refers to Article 1(4) of the Common Position) has been correctly applied with respect to the applicant and that there has been no manifest error of assessment by the Council.

28. Concerning the order made in August 2002 by the Netherlands Minister of Foreign Affairs and the Netherlands Minister of Finance[5], as well as the US designation of the Applicant as a Specially Designated Global Terrorist pursuant to US Executive Order 13224, the Council would point out that Article 1(4) of the Common Position does not require the relevant decisions concerning involvement in terrorist acts to be taken by a competent <u>judicial</u> authority, as the Applicant suggests at paragraphs 94 and 127 of the Application. In fact, Article 1(4) specifically provides that the term competent authority shall mean a <u>judicial authority, or where judicial authorities have no competence in the area</u> covered by the paragraph, an <u>equivalent competent authority</u> in that area.

5 Sanction Regulation against Terrorism 2002 (III) (the "Sanctieregeling").

29. The Council recalls that, as the Applicant himself points out, such executive decisions are indeed subject to judicial review, in the Netherlands and in the US legal orders respectively.

30. The Sanctieregeling and US Executive Orders are also relevant in indicating that the Netherlands and US authorities had both considered it necessary to freeze the Applicant's funds in order to prevent the commission of further terrorist acts.

31. In any event, for the purposes of these proceedings, although the Council considers that it could have treated the Sanctieregeling and the US Executive Order as decisions of competent authorities on which it could have based its own decision, it is the Netherlands judicial decisions of 1995 and 1997 on which it relies as the relevant decisions of competent authorities, as is clear from the explanations given above in paragraphs 8-16 and 26 above.

32. Finally, to the extent that heading 1 of the abbreviated Application refers to an alleged violation of the principle of sound administration, the Council considers that this should not be treated as a separate plea as the Applicant has not indicated in what way this principle has been violated by the Council.

III. ALLEGED FAILURE TO STATE ADEQUATE REASONS

33. The Council does not accept that there has been any violation of the obligation to state reasons for Council Decision 2007/445/EC of 28 June 2007 (the "Council Decision"). On the contrary, the Council considers that it has amply complied with the requirements set out in Case T-228/02 of 12 December 2006 (the "OMPI judgment") and Case T-47/03 of 11 July 2007 (the "Sison judgment"). The Council has already discussed in some detail above the precise information provided in the Statement of Reasons which indicates that the appropriate decisions concerning terrorist acts which the Applicant committed or attempted to commit have been taken by competent authorities within the meaning of Article 1(4) of the Common Position.

34. The Council considers that accordingly it has already shown that the necessary elements have all been set out in the Statement of Reasons which was sent to the Applicant after the Council Decision was adopted. The Statement of Reasons also explains that the Council is satisfied that the reasons for including the Applicant on the list of person and entities subject to the restrictive measures imposed pursuant to the Council Regulation remain valid, and that therefore the Council has decided that the Applicant should continue to be subject to those measures.

35. In this regard the Council considers that the assessment of whether restrictive measures should be maintained against a terrorist or organisation is a policy matter for which the legislature alone is responsible. When carrying out its review, any decision by the Council to remove a person from the list must take all relevant considerations into account, including *inter alia* the person's past record of involvement in terrorist acts and the perceived future intentions of the person. The status of the decision or decisions of the competent authority or authorities which formed the basis for the original listing must also be taken into account. These are matters which concern, *inter alia*, the security of individuals, including EU citizens, and the preservation of public order, and in respect of which the Council enjoys broad discretion.

36. Concerning the Applicant's arguments at paragraph 97 of the Application, the Council considers that it is obvious that the freezing of any person's assets, where that person has been determined to have been involved in terrorist acts, can be useful in combating terrorism. The Council Regulation clearly explains that such is the very purpose of the asset freeze, since combating the funding of terrorism is a decisive aspect of the fight against terrorism (see the second recital of the Council Regulation). Equally, the Council considers that it is obvious that any decision to end an asset freeze could render it possible for the owner of the assets in question to commit, or attempt to commit terrorist acts again. It does not agree that either of these points call for the provision of any specific reasons on its part.

IV. ALLEGED VIOLATION OF THE PRINCIPLE OF PROPORTIONALITY AND OF THE GENERAL PRINCIPLES OF COMMUNITY LAW

37. The Applicant has retained the heading "Violation of the principle of proportionality" in the abbreviated Application, although without very much detail as to why he considers that this principle may have been infringed by the Council. Nevertheless, the Council would submit the following considerations concerning this principle.

38. The Council recalls that according to well-settled case-law : "*In order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement.*"[6] These conditions are clearly satisfied in this case: on the one hand, it is considered necessary to freeze the funds of individuals such as the Applicant in order to combat the funding of terrorism (cf. the second recital of the Council Regulation (already referred to): "*combating the funding of terrorism is a decisive aspect of the fight against terrorism*"), while on the other hand, the restrictive measures imposed by the Council do not go further than necessary to achieve their purpose.

6 Case 66/82, *Fromençais SA v. FORMA* [1983] ECR, p. 395, para. 8.

39. The ECJ has already held that the imposition of economic sanctions by the Community against private parties may be proportionate to the aim pursued. In Case C-84/95[7] it found that the impounding of an aircraft which was the subject of economic sanctions imposed against the Federal Republic of Yugoslavia by the Community, pursuant to Security Council Resolutions aimed at putting an end to the state of war in the region, could not "*be regarded as inappropriate or disproportionate*" as compared "*with an objective of general interest so fundamental for the international community*".[8]

40. More particularly, in Case T-189/00 R, which concerned Council Regulation (EC) No 1294/99 (also adopted in the context of the conflict in the Federal Republic of Yugoslavia) imposing an asset freeze on entities who were included by the Commission in the annex to that regulation, the CFI held: "*...there would appear to have been no infringement of the principle of proportionality by the Commission, since inclusion of the Applicant in Annex II to the basic regulation gives rise automatically to the freezing of their assets under Article 3 of the basic regulation, there having been no less stringent sanction available to the Commission*"[9].

41. In its judgment in Case T-315/01 of 21 September 2005 (the "Kadi judgment"[10]), the CFI also considered that an asset freeze imposed pursuant to Council Regulation (EC) No 881/2002 did not infringe the "*general principle of proportionality*" (para 252). In coming to this conclusion the CFI stressed "*the importance of the campaign against terrorism*" and noted that the measures in question "*pursue an objective of fundamental public interest for the international community*".

7 Case C-84/95, *Bosphorus v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, para. 26.

8 It is noted that in its judgment of 30 June 2005 in Bosphorus v. Ireland, No 45036/98, (Reports of Judgments and Decisions 2005-VI), the European Court of Human Rights held that the impoundment of the aircraft did not give rise to a violation of the ECHR (paragraph 167), having regard to the nature of the interference at issue and to the general interest pursued by the impoundment and by the sanctions regime (paragraph 166).

9 Case T-189/00 R *Invest Import und Export GmbH and Invest Commerce v Commission* [2000] ECR II-2993, para. 36.

10 ECR [2005] p. II-3649.

42. In this regard the CFI specifically cited Resolution 1373(2001), the preamble of which reaffirms that acts of international terrorism "*constitute a threat to international peace and security*" (third recital) and which calls on States "*to work together urgently to prevent and suppress terrorist acts*" (seventh recital). That Resolution further recognises the need for States to take "*additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism*" (eighth recital).

43. The Council recalls that the Council Regulation at issue in the present proceedings and the Common Position both constitute action by the European Community and by the European Union respectively in implementation of Resolution 1373(2001).

44. In the Kadi judgment the CFI went on to hold that the asset freeze at issue in that case was a temporary precautionary measure (para. 248 of the judgment); the same is true of the asset freeze imposed pursuant to the contested Council Regulation. This has also been confirmed in paragraph 101 of the Sison judgment.

45. The CFI also took into account the fact that the system of sanctions at issue in that case was subject to periodic review (para. 249 of the judgment). In that regard the Council would point out that under Article 1(6) of the Common Position the list of designated persons, groups and entities "*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*".

46. Finally, the CFI noted that under the system at issue in that case it was possible for the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence (para. 250 of the judgment). The Council would point out that, as discussed below, under the system of restrictive measures imposed by the Council Regulation at issue in these proceedings it is open to the Applicant to request the Council to review its case at any time and to submit documentation to that end[11], without any need to enlist the assistance of a Member State in order to do so. Such a possibility is of course without prejudice to the right of the Applicant to bring proceedings before the CFI as he has also chosen to do.

47. In its judgment in Case T-49/04 of 12 July 2006 (the "Hassan judgment"), the CFI also rejected the argument made by the applicant that the asset freeze was excessively strict. In that judgment the CFI noted that the asset freeze constituted an aspect of the sanctions decided by the Security Council "*against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities, for the purpose in particular of preventing terrorist attacks of the kind perpetrated in the United States of America on 11 September 2001*".

48. The CFI then recalled the ECJ's jurisprudence in the Bosphorus case, quoted above, before concluding that this jurisprudence, which held that the importance of the aims pursued justified serious negative consequences even for operators who were in no way responsible for the situation which led to the adoption of the sanctions, was all the more applicable in the case of sanctions imposed against persons who were identified as being involved in terrorist activity. It concluded that the applicant had not demonstrated any violation of his fundamental rights (see paras 98-102 of the Hassan judgment).

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11 The Applicant has chosen to avail of this possibility.

49. The Council would point out that the restrictive measures imposed by virtue of the Council Regulation are those directly required by UNSC Resolution 1373(2001), which requires all members of the UN to freeze funds, other financial assets and economic resources of persons involved in terrorist acts, and which also provides that no funds, other financial assets and economic resources may be made available to those concerned, whether directly or indirectly. Therefore, even if it is the Council itself which decides which persons and entities should be subjected to restrictive measures pursuant to the Council Regulation, the type and extent of measure to which those persons and entities should be made subject is prescribed by Resolution 1373(2001). The Council considers that it is appropriate for the review of legality to be carried out by the CFI to take account of this fact.

50. The Council therefore considers that, in addition to the jurisprudence cited in paragraphs 38-40 above, the Kadi and Hassan judgments also support its contention that the measures in question did not breach the Applicant's right to respect for his property, as a fundamental principle of Community law, because they were necessary in the public interest and were not disproportionate.

51. Indeed, it would be strange if the financial restrictive measures to which those associated with Usama bin Laden, Al Qaeda and the Taliban are subject pursuant to UNSC Resolutions 1267(2001) and 1390(2002) (as implemented in the EU by Common Position 2002/402/CFSP and Council Regulation (EC) No 881/2002), were to differ from those to which other persons and entities involved in terrorist acts of a similar nature, were subject. The Council contends that there would be no logical reason to make such a distinction, because the two sets of measures serve the same purpose. In fact, they have specifically been designed so as to complement each other. See recital 15 of the Council Regulation, which explains that the assets of those associated with Usama bin Laden, the Al-Qaeda network and the Taliban have already been frozen by the Community and that "*therefore those persons and groups are not covered by this Regulation*" (the same point is explained in recital 4 of the Common Position).

52. It should also be noted that the Council has been careful to take due account of the interests of those targeted, by including a provision in the Council Regulation whereby specific authorisations (limited exceptions) may be granted in order to take care of their essential needs. Article 5 (2) thereof reads as follows:

"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."

53. In the Hassan judgment the CFI has specifically considered that the exemptions which could be granted in the context of restrictive measures imposed pursuant to Council Regulation (EC) No 881/2002 enabled it to reach the conclusion that there was no breach of the applicant's fundamental rights in that case. Concerning the equivalent exemptions provided for under the Council Regulation at issue here, the Council would point out that the competent authorities of the Member States have discretion over the exemptions granted. It is clear that, when considering any requests for exemption, those authorities must respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

54. The ECHR, for its part, has held that there is a wide margin of appreciation for public authorities to determine the public interest[12], and in the present case the general interest of the Community and the Member States in ensuring that assets cannot be used to promote terrorism, could not be clearer. The Council considers that the measures in question are in accordance with the jurisprudence of the ECHR concerning permissible interference with the right to peaceful enjoyment of one's possessions. This is because they are in the general interest and are provided for by law; they are necessary to attain the stated objective; and they strike a fair balance between the general interest and the interests of those affected, in this case the Applicant.[13]

55. There has thus been no breach of the principle of proportionality: on the contrary, the Council struck a proper balance between the particular interests of those targeted, and the pursuit of the general interest in combating the financing of terrorism.

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12 See e.g. *James and others v UK*, judgment of 21 February 1986, Series A, no 98, para. 46.

13 The Council also notes the recent decision of the Grand Chamber of the European Court of Human Rights on 31 May 2007 as to the Admissibility of Application no. 71412/01 (Agim Behrami and Bekir Behrami) and Application no. 78166/01 (Rudi Saramati).

56. The Council will deal briefly in turn with each of the other general principles cited by the Applicant.

(i) Article 6(1) of the European Convention on Human Rights

57. The Council firstly notes that in the OMPI and Sison judgments the CFI considered that arguments relating to Article 6 of the ECHR were irrelevant to the plea concerning the right to a fair hearing, as *"the safeguarding of the right to a fair hearing in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure (see, to that effect, Case T-372/00 Campolargo v Commission [2002] ECR-SC I-A-49 and II-223, paragraph 36)."* (paragraph 142 of the Sison judgment).

58. Therefore, it appears to the Council that the Applicant's arguments concerning the jurisprudence of the ECHR on Article 6(1) and the right to an impartial court, with reference to the procedure followed by the Council in listing the Applicant, are misplaced (cf paragraph 145 of the Application: "*the Council cannot be compared to an impartial judicial organ.*")

59. The Council also notes that most of the Applicant's arguments with respect to Article 6(1) still relate to the suggestion made in his pleadings in Case T-47/03 that the inclusion of the Applicant in the list is tantamount to a criminal charge.

60. The Council would point out that the Court has specifically rejected this interpretation in paragraph 101 of the Sison judgment. This paragraph states: *"The allegation that the Council has arrogated to itself a judicial role and powers in criminal matters not envisaged by the Treaty, which is the only allegation that can distinguish this case from those giving rise to Yusuf and Kadi, must be rejected without any other form of examination since it would appear to be a mere corollary of the applicant's other arguments relating to competence. It is after all based on the mistaken premiss that the restrictive measures at issue in this case are of a criminal nature. The assets of the persons concerned not having been confiscated as the proceeds of crime but rather frozen as a precautionary measure, those measures do not constitute criminal sanctions and do not, moreover, imply any accusation of a criminal nature (see, to that effect and by analogy, Yusuf, paragraph 299, and Kadi, paragraph 248)."*

61. The Council respectfully suggests that if the Applicant had wanted to challenge this finding the proper course would have been for him to appeal against this judgment. In any event, the Council sees no reason for the Court to depart from the reasoning in the Sison judgment on this point.

62. The Council also considers that the Applicant is clearly wrong when he suggests in paragraph 145 of the Application that the Council Decision inflicts severe damage on him without any judicial oversight. The Council would recall that the purpose of the present proceedings is precisely to provide the judicial oversight which is required pursuant to Article 6(1).

(ii) Article 6(2) of the European Convention on Human Rights

63. Once again, the Council considers that the Applicant's arguments in relation to this paragraph of the Article (concerning the principle of the presumption of innocence) are irrelevant to the Council Regulation and Council Decision, as they are based on the erroneous premiss that the restrictive measures at issue in this case are of a criminal nature, a premiss which has already been rejected by the Court in the Sison judgment (see paragraph 60 above). They are therefore manifestly unfounded.

(iii) Right of defence and right to be heard

64. The Council considers that it has taken great care to comply with the requirements of the OMPI and Sison judgments concerning the right of defence and the right to be heard. It recalls that the Court found that the evidence adduced against the party concerned should be notified to it ("notification"), and that any subsequent decision to freeze funds must be preceded by the notification of any new incriminating evidence and the opportunity effectively to make known his view on that evidence ("hearing"). These constitute the two principal elements required in order to safeguard the rights of the defence, as set out in paragraphs 141 and 184 of the Sison judgment.

65. The Council considers that in providing the Applicant with a Statement of Reasons complementing the general information provided in the Council Decision, it has fully complied with its obligation to notify the Applicant of the evidence against him. The Statement of Reasons was initially sent to him on 23 April 2007, in advance of the adoption of the Council Decision itself, so that the Applicant could understand the basis for the original listing and for the Council's intention to renew that listing.

66. The Council also considers that it has fully complied with its obligation to afford the Applicant the opportunity effectively to make known his view on that evidence, by inviting him to make observations on that Statement of Reasons within one month of the Council's letter of 23 April.

67. Concerning the Applicant's allegation at paragraph 156 of the Application that the Council has provided no "*incriminating evidence*", the Council does not consider that it has failed to comply with its obligation to provide the Applicant with evidence of his involvement in terrorist acts within the meaning of the Council Regulation and Common Position. As indicated above, the Council considers that it has provided the necessary detailed reasons for the listing by indicating (as required pursuant to the OMPI and Sison judgments) on which decisions of competent authorities it relies and by specifying the terrorist acts in question.

68. The Council does not agree that the Applicant should have been heard by the Council in person and with the assistance of his lawyer, as he suggests at paragraph 157. There is no suggestion in either the OMPI or Sison judgments that the requirement to provide a hearing goes so far. Instead, the Council has complied with its obligation to provide the Applicant with a hearing as defined by the Court in those judgments (and as outlined in paragraph 64 above). As such, he has been in a position to make all the observations he wishes in writing (and has indeed done so on 22 May 2007; the observations can be found at annex 20 of the Application).

69. An examination of these observations shows that they have included comments on alleged *"errors of fact and law"*, as well as *"submissions on legal analysis and interpretation and about the applicability of the law to his specific case"* (see paragraph 157 of the Application). Therefore, the Council considers that the Applicant has had ample opportunity effectively to make his views known on the evidence, as required by the case-law. Indeed, he has also had the opportunity to make his views known on all other aspects of his listing as well.

70. The Council also denies that it had already decided to maintain the Applicant on the list in April 2007, as he alleges. It is obvious that in the context of the review which the Council commenced following the OMPI judgment, Statements of Reasons were only prepared in respect of those persons and entities for whom the Council believed in principle that there were grounds for maintaining them on the list. Otherwise, no Statement of Reasons would have been prepared as there would have been no need for a hearing within the meaning of the OMPI judgment. Instead, the Council would simply have decided not to keep such persons and entities on the list. However, the fact that a Statement of Reasons was sent to the Applicant at that time in no way indicates that a final decision had already been taken on whether to keep the Applicant on the list. On the contrary, the Applicant's observations of 22 May were circulated to all delegations and were discussed in a meeting of the relevant preparatory body before the new version of the list was finalised and adopted by the Council on 28 June 2007.

71. Nor does the Council accept that the fact that the Statement of Reasons was not amended following the submission of the Applicant's observations indicates that those observations were ignored, as he alleges. The Council believes that the hearing requirement laid down by the OMPI and Sison judgments obliges it to ask for observations from those listed and to consider any observations received. It does not oblige the Council to respond in turn to those observations. The Council's response is in fact contained in the Council Decision keeping the applicant on the list together with the Statement of Reasons which is sent in conjunction with that new decision. The letter which accompanied the transmission of the Statement of Reasons to the Applicant following adoption of the Council Decision also indicated that such consideration had taken place.

72. The fact that the Statement of Reasons was not amended simply indicates that the Council was not persuaded by any of the points made by the Applicant in his observations, and that there was no other new information which needed to be added. In no way does this constitute a circumvention of the substance of the OMPI or Sison judgments, as the Applicant alleges.

73. Therefore, the Council considers that the Applicant has not demonstrated any breach of his right of defence or of his right to be heard.

74. In conclusion, the Council considers that the Applicant has failed to prove any violation of the principle of proportionality or of the general principles of Community law.

V. CONCLUSION

75. The Council submits, for the reasons given above:

- that the Court should dismiss the Applicant's claim for annulment of the Council Decision, insofar as it relates to the Applicant, as unfounded; and

- that the Applicant should be ordered to pay the costs.

Emer FINNEGAN Michael BISHOP

Council Agents

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Agent of the Council