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APPLICATION FOR ANNULMENT AND COMPENSATION

IN THE CASE T- 341/07

ABBREVIATED VERSION LIMITED TO THE ANNULMENT GROUNDS (in accordance with the letter of the Registry of the Court of First Instance T-341/07-33, of 14/11/2007 and the minutes of the informal meeting of 08/11/2007)

THIS APPLICATION IS FOR:

I. Partial annulment of Council Decision 2007/445/EC of June 28, 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC (Annex 1, OJ of the EU, L 169 of 29 June 2007, pp. 58-62) insofar as that decision includes Professor Jose Maria Sison;

II. {omissis}

III. {omissis}

THE APPLICANT IS:

Jose Maria SISON, born 8/2/1939 in Cabugao, Ilocos Sur, Philippines, whose domicile is [deleted], the Netherlands.

Represented by the following lawyers :

Jan FERMON, Chaussée de Haecht 55, 1210 Bruxelles, Belgium
Antoine COMTE, Rue de Rivoli 48 bis, 75004 Paris, France
Hans Eberhard SCHULTZ, Lindenstrasse 14, 28755 Bremen, German Federal Republic
Dundar GURSES, Schoolplein 5A, 3581 PX Utrecht, Netherlands
Wolfgang KALECK,, Immanuelkirchstrasse 3-4, D-10405 Berlin , Germany
Romeo T. CAPULONG, Public Interest Law Center 7836, Kaija Bldg, Makati Avenue Cor. Valdez St., Makati City Metro Manila Philippines, as correspondent lawyer in the Philippines.

THE APPLICATION IS AGAINST: The Council of the European Union (“Council”)

In accordance with Article 44 § 2 subparagraph 2 of the Rules of Procedure of the Court, the applicant declares that he accepts notifications at the following address : by e-mail at jan.fermon@progresslaw.net and by fax at the n° 32/2/215.80.20.

SUBJECT MATTER OF THE PROCEEDINGS

The applicant respectfully requests the Court to order:

A. Partial annulment, on the basis of Article 230 of EC Treaty, of Council Decision 2007/445/EC of June 28, 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC (OJ, L 169 of 29 June 2007, pp. 58-62) and, more specifically, order:

- Annulment of Article 1 point 1.33 which states:

SISON, Jose Maria (a.k.a. Armando Liwanag, a.k.a. Joma, in charge of the Communist Party of the Philippines including NPA) born 8.2.1939 in Cabugao, Philippines

- Partial annulment of Article 1 point 2.7 insofar as it mentions the name of the applicant:

Communist Party of the Philippines, including New Peoples Army (NPA), Philippines, linked to Sison Jose Maria C. (a.k.a. Armando Liwanag, a.k.a. Joma, in charge of the Communist Party of the Philippines, including NPA);

B. {omissis}

C. {omissis}

D. Order the Council to bear the costs of this suit.

ABBREVIATED SUMMARY OF PLEAS

FACTS AT THE ORIGIN OF THE APPLICATION

Background, personal circumstances and present situation of the applicant

1. The applicant, Professor Jose Maria Sison, is a 68-year-old Filipino intellectual and patriot who comes from a prominent landlord family in the Northern Luzon Province of Ilocos Sur, Philippines.
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3. {omissis}
4. {omissis}
5. {omissis}
6. {omissis}
7. The applicant was chairman of the Central Committee of the Communist Party of the Philippines ("CPP") from December 26, 1968 to November 10, 1977, on which latter date he was arrested by the dictatorial regime of Marcos. He was detained until March 5, 1986 and for more than 8 years he was subjected to various forms of physical and mental torture. Upon his arrest on November 10, 1977, the applicant ceased to be chairman of the Central Committee of the CPP.
8. Shortly after his release on March 5, 1986 after the fall of Marcos, the applicant was appointed senior research fellow with the rank of associate professor at the Asian Studies Center of the University of the Philippines. Aside from research and lecture duties at the University of the Philippines, he was preoccupied with public speaking, press interviews and duties as chair of the preparatory committee for the establishment of the legal political party, Partido ng Bayan (People's Party). {omissis}
9. {omissis}
10. On August 31, 1986 the applicant left the Philippines on a global lecture tour of universities. {omissis}
11. In September 1988, the Philippine government arbitrarily cancelled his Philippine passport. In October 1988, the applicant requested political asylum from the Netherlands. In 1990, Amnesty International assisted and supported his asylum claim, as did the UN Office of the High Commission for Refugees in 1992.
12. In 1992 and 1995, the State Council of the Netherlands ("State Council") determined that "on the basis of the facts made known to the Afdeling, the appellant has valid reasons to fear persecution and therefore must be considered a refugee in the sense of Article I (A), under 2 of the treaty". The State Council nullified the decision by the Minister of Justice to exclude the applicant on the basis of Article 1 F of the Geneva Refugee Convention. {omissis} **(Annex 5 : Raad van State, n° R02.90.4934. (J M SISON / Staatsecretaris van Justitie) ; Annex 6 : Raad van State, n° R02.93.2274.**

(J M SISON / Staatsecretaris van Justitie), 21/2/1995 ; Annex 7 : AMNESTY INTERNATIONAL, Over de aanvraag voor politiek asiel van prof. Jose Ma. SISON, door JCE Hoftijzer ; Annex 8: United Nations High Commissioner for Refugees Submission to the Council of State of the Netherlands for J M SISON's case).

13. Since the applicant submitted his claim for political asylum, the military and some factions within different Philippine government administrations have brought various criminal charges for rebellion and related acts against the applicant. Each and every of these politically-motivated and false charges have been dismissed by the judicial authorities of the Government of the Republic of the Philippines ("GRP"). The latest decision was issued on July 2, 2007 by the Supreme Court of the Philippines. **(Annex 9: Resolution of the Regional Court of Makati of 4 May 2006 in case 06-452; Information of the prosecutor of 11 May 2006 in the case 06-944 before the Regional Court of Makati; Decision of the Supreme Court of the Philippines July, 2, 2007).**
14. As far as he knows, the applicant was not the subject of any valid criminal charge before any court anywhere in the world at the time the contested decision was made.
15. Since 1990, the applicant has been the chief political consultant of the National Democratic Front of the Philippines ("NDFP") in the peace negotiations with the GRP. In that capacity, he is a signatory to all the major bilateral agreements formulated during those negotiations, starting with the 1992 Hague Joint Declaration. {omissis}
16. {omissis} The governments of the Netherlands, Belgium and Norway have facilitated these negotiations. **(Annex 10 : "10 Years, 10 Agreements" (Pilgrims for Peace, Manila, October 2002)**
17. {omissis}
18. {omissis}
19. {omissis}
20. {omissis} it is clear that the applicant has been cut off physically and organizationally from leading or even participating in the on-going civil war in the Philippines for a period of 29 years, namely from the date of his arrest on November 10, 1977, his subsequent detention and continuously until the present time. He has been precluded by the CPP's Constitution from leading the CPP as chairman for more than 20 years.
21. {omissis}
22. On August 13, 2002 the Dutch Foreign Minister issued the "sanction regulation against terrorism" listing the {omissis} NPA and the applicant {omissis} and subjecting them to sanctions. (**Annex 13: Sanctieregeling terrorisme 2002, III, August 13, 2002, Staatscourant, 153**) Also on August 13, 2002, the Dutch Finance Minister ordered the freezing of the applicant's postal joint bank account with his wife, Julieta de Lima, and

the termination of the social benefits that he is entitled to receive as a recognized political refugee. On September 10, 2002, the City of Utrecht terminated his social allowance, his health insurance, and his third party liability insurance, and ordered him to leave his residence, which he and his wife rent from municipal authorities. (**Annex 14 : Letter of the "Dienst Maatschappelijke Ontwikkeling" of the City of Utrecht, September 10, 2002)**

23. {omissis}

24. On October 28, 2002, the Council adopted the decision 2002/848/EC by which the applicant is included in the list pertinent to Article 2§3 of Regulation 2580/ 2001. Since that time, the applicant has been maintained on this list every time the Council updates it, despite the fact that this Court annulled various Council decisions in Sison v. Council, judgment issued on July 11, 2007 (« Case T-47/03 »).

25. On May 23, 2003, the council of the municipality of Utrecht decided to terminate the monthly amount of 201,93 euros he received for his personal expenses pursuant to the regulation on asylum seekers. **(Annex 15: Decision of May 23, 2003 of the municipality of Utrecht).** The applicant appealed this decision to the local tribunal of Utrecht, which ruled against the applicant. The applicant challenged this decision before the State Council, which rejected the applicant's appeal on September 28, 2005 **(Annex 16 : Two Decisions of the State Council of September 28, 2005)**.

26 {omissis}

<u>Alleged bases and legal framework of sanction</u>

26. {omissis}

27. {omissis}

28. {omissis}

29. {omissis}

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31. {omissis}

32. {omissis}

33. Decision 2002/474/EC was the original contested decision in and the subject of Case T-47/03 before this Court. This decision was replaced several times by other similar decisions. On July 11, 2007, this Court annulled Council Decision 2006/379/EC of May 29, 2006 insofar as it concerned the applicant.

34. On April 23, 2007, the Council addressed a letter erroneously to Mr. Ruud Vleugel, one of the applicant's Dutch lawyers involved in proceedings in the Netherlands. Mr. Vleugel was not a representative of the applicant in Case T-47/03. In its letter, the Council announced its intention to maintain the applicant on the list. A so-called

"motivation" was annexed **(Annex 19 : Letter of the Council of 23 April 2007 to Mr. Ruud Vleugel)** {omissis}

35. {omissis}

36. On May 22, 2007, the applicant submitted written observations to the Council through Jan Fermon, one of his representatives in Case T-47/03. **(Annex 20: Observations of the applicant to the Council of 22 May 2007).** In his observations, the applicant explained why the two Dutch decisions cited by the Council did not meet the requirements of the applicable legislation (which includes the Common position 2001/931/CFSP) and requested the Council:

- Give him an opportunity to be heard prior to the Council's decision to include or retain him on the list;
- Send a copy of his written observations and of the proceedings and judgment in Case T-47/03 to all the members of the Council and of the Coreper;
- Make these observations directly accessible to the public in electronic form and through the public register of the Council in accordance with Articles 11 and 12 of regulation nr. 1049/2001, maximum 8 days after its reception;
- Declare itself incompetent to render any decision to include Jose Maria Sison in a list related to terrorist activities, since there is no legal basis for this;
- Not to include or retain Jose Maria Sison on a list adopted on the basis of Regulation 2580/2001.

37. On June 29, 2007, the Council wrote Jan Fermon giving notification of the issuance of Decision 2007/445/EC of June 28, 2007 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC (OJ of the EU, L 169 of 29 June 2007, pp. 58-62). Decision 2007/445/EC is the subject of the present application ("the contested decision"). **(Annex 21: Letter of the Council to Mr. Jan Fermon of 29 June 2007 containing the motivation of the contested decision)**

38. {omissis}

39. Annexed to the Council's June 29, 2007 letter was a "motivation" identical to that annexed to the Council's April 23, 2007 letter.

40. The contested decision also includes a generic statement of the Council's actions in regards to all persons and entities listed under the decision. In particular, the third paragraph of the contested decision state:

(3) The Council has provided all the persons, groups and entities for which this was practically possible with statements of reasons explaining the reasons why they have been listed in Decisions 2006/379/EC and 2006/1008/EC.

Furthermore, the fifth {omissis} paragraph of the contested decision state:

(5) The Council has carried out a complete review of the list of persons, groups and entities to which Regulation (EC) No 2580/2001 applies, as required by Article 2(3) of that Regulation. In this regard, it has taken account of observations and documents submitted to the Council by certain persons, groups and entities concerned.

GROUNDS OF THE APPLICATION AND SUPPORTING ARGUMENTS

A. GROUNDS FOR THE PARTIAL ANNULMENT OF DECISION 2007/445/EC (ARTICLE 230 EC)

41. The scope of this Court's review of a Council decision to freeze funds is noted in paragraph 206 of the judgement in Case T-47/03 as containing the following aspects:

…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.

1. Plea based on the failure to state adequate reasons for the contested decision (violation of Article 253 EC), on manifest error of assessment, and on the violation of the principle of sound administration

42. Article 253 of the EC treaty outlines the Council's obligation to state reasons for any decision it takes. At paragraph 156 of the judgment in Case T-47/03, this Court found that the obligation to state reasons applies in the context of a decision to freeze funds under Regulation No 2580/2001.

43. As noted by this Court at paragraph 185 in Case T-47/03, it is well-settled that:

…the purpose of the obligation to state the reasons for an act adversely affecting a person is, first, to provide the person concerned with sufficient information to make it possible for him to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Community judicature and, second, to enable the latter to review the lawfulness of that act.

{omissis}

44. In the abovenoted April 23, 2007 letter, the Council informed the applicant about its intention to maintain him on the list and provided a statement of reasons. The applicant sent detailed observations to the Council on May 22, 2007 to underline the erroneous aspects of the statement of reasons and request the Council not to include him on the list (See Annex 34).

45. The Council sent a June 29, 2007 letter including a copy of the contested decision and the statement of reasons, which was exactly identical to those reasons presented on April 23, 2007. The Council did not acknowledge or reply to the observations of the applicant which indicates that these were not taken into consideration at all during the process of adopting the contested decision. The statement of reasons contained in both letters of the Council of 23 April and 29 June 2007 does not meet the requirements of the settled case-law, confirmed by the Court in the previous case of the applicant for the several reasons developed hereafter.
46. This Court found at paragraph 187 of Case T-47/03 that the statement of reasons required in a case must be appropriate to the measure and context in which it was adopted. In particular, the Court noted that the statement of reasons must "disclose in a clear and unequivocal fashion the reasoning followed by the institution."
47. In the context of a decision to freeze funds, at paragraph 191 of Case T-47/03, this Court found that there is a distinction between the statement of reasons required when the Council is taking an initial decision to freeze funds and when the Council is taking subsequent decisions. However, in both instances, this Court found that the Council's statement of reasons must refer to each of the legal requirements of the Regulation. In addition to referencing those requirements, this Court found that the statement of reasons must provide an explanation of why the Council is exercising its discretion to list the party concerned.
48. In this case, it is the applicant's position that the Council's statement of reasons should have fulfilled the requirements for both an initial decision and a subsequent decision. Although in reality the applicant's funds remained frozen despite the favourable judgment in Case T-47/03, the initial Council decision to freeze his funds was annulled by this Court and, therefore, does not legally exist. Thus, the Council must bear the burden of meeting the legal requirements for an initial and subsequent decision.

1.1. Erroneous factual allegations of the Council

49. The statement of reasons annexed to the contested decision contains a series of unsubstantiated and unfounded allegations, without any specific reference to the evidence that could reasonably sustain such allegations. The first paragraph of the "motivation" states:

Jose Maria Sison is the founder and leader of the Philippine Communist Party, including the New People's Army (NPA) (Philippines), which is put on the list of groups involved in terrorist acts in the meaning of Article 1, paragraph 2, of the Common Position 2001/931/CFSP. He has repeatedly advocated the use of violence for the realization of political aims and has given leadership to the NPA, which is responsible for a number of

terrorist attacks in the Philippines. These acts fall under Article 1, paragraph 3, point iii, letters i) and j) of Common Position 2001/931/CFSP (hereafter "the Common Position") and have been perpetrated with the intention as meant in Article 1, paragraph 3, point iii) of the Common Position.

An accumulation of unsubstantiated and – as will be demonstrated below - erroneous allegations cannot be considered as an adequate statement of reasons in law.

1.1.1. The applicant is not Armando Liwanag

50. The Council erroneously asserts that the applicant is Armando Liwanag. It does not offer any evidence for this allegation and was not able to do so either in Case T-47/03.

1.1.2 The applicant is not the leader or the head of the "CPP, including the NPA"

51. The applicant denies that he is the leader or the head of the CPP because it is materially impossible to direct a political party from his situation of exile for more than 20 years. {omissis}
52. Furthermore, the applicant denies that he is in charge of the NPA or that the NPA is linked to him. It is publicly known that the NPA is in charge of its National Operational Command and is not linked in any material or operational way with him.
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54. {omissis}
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57. {omissis}
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59. {omissis}
60. {omissis}
61. {omissis}
62. Under section 4 of Article V of the Constitution of the CPP, the chairman of the Central Committee must be in the Philippines on a daily basis in order to be able to lead the meetings and work of the Political Bureau and Executive Committee of the Secretariat and others central organs. Under section 6 of the same Article, the chairman of the Central Committee must be able to preside over the plenum of the Central Committee once every six months. (**Annex 4: Article V of the CPP Constitution; Annex 22: National Democratic Front of the Philippines, National Council, Memorandum, 27 October 2002)**

63. For more than 29 years, including more than eight years of imprisonment with five years in solitary confinement under maximum security (1977 to 1986) and more than 20 years of exile (1986 to the present), the applicant was not in any position to serve and be elected as chairman of the Central Committee of the CPP and to perform the functions of leading the central organs and entirety of the CPP on a daily basis and of presiding over the plenary meetings of the CPP Central Committee, as required by various provisions of the CPP Constitution.

The Council's allegation that the applicant leads the CPP and NPA is erroneous and is not supported by any evidence. As this error of fact is a main part of the Council's statement of reasons, it undermines the validity and legality of the contested decision. The motivation is thus not adequate on that point.

1.1.3 The Council misrepresents the applicant as "an advocate of violence," despite his role in the NDFP – GRP peace process

64. As noted above, the applicant has served as the chief political consultant of the NDFP in the peace negotiations with the GRP since 1990. He has played a significant and key role in those negotiations. In his capacity as chief political consultant, he is a signatory to all the major bilateral agreements forged during the negotiations. {omissis} (**Annex 10 : "10 Years, 10 Agreements" (Pilgrims for Peace, Manila, October 2002**).

65. {omissis} The Council's misrepresentation of the applicant as an "advocate of violence" is in direct contradiction with his role in the peace process. Moreover, there is no evidence supporting the Council's misrepresentation.

66. {omissis}

1.1.4 The applicant never gave any instructions to alleged "terrorist attacks of the NPA

67. As noted above, the applicant is not the leader of the NPA. The Council's allegation that he gave "instructions" to the NPA relating to "terrorist actions" to be undertaken by this organisation is totally unsubstantiated and unfounded.

68. All these erroneous statements in the April 23, 2007 and June 29. 2007 letters of the Council form a infringement to the duty to state adequate reasons and also a patent error of assessment of the facts contained in the decisions it cited.

1.2. The Council misinterprets the Dutch judicial decisions concerning the applicant

69. The Council made a totally incorrect assessment of the content and consequences of the two Dutch court decisions cited in its statement of reasons. In particular, the Court decisions are erroneously cited as advancing certain propositions:

"The Legal Uniformity Chamber [Rechtseenheidskamer, REK] of the District Court in The Hague (Netherlands) confirmed on 11 September 1997 (reg. no. AWB 97/4707 VRWET) decision no. R02.93.2274 (RV 1995, 2) of the Administrative Law Division of the Council of State on 21 February 1995."

and :

The [State Council] came to the decision that the status of asylum seeker in the Netherlands was legitimately refused, because the proof was delivered that he gave leadership – or has tried to give – to the armed wing of the CPP, the NPA, which is responsible for a great number of terrorist attacks in the Philippines, and because it also turned out that he maintains contacts with terrorist organizations throughout the whole world.

Both of the Council allegations in this cited paragraph are <u>in total contradiction with the content of these decisions</u>.

<u>1.2.1. The REK did not "confirm" the decision of the State Council, with an exception of a point in favour of the applicant</u>

70. The REK could not "confirm" the State Council decision because the issue before the REK was completely different from the issue before the State Council.

71. The question in law before the State Council was whether or not the Dutch Minister of Justice could apply to the applicant the provision of Article 1 F of the Geneva Refugee Convention (the so-called exclusion clause). The State Council determined that the Dutch minister could not do so. Furthermore, the State Council recognised the refugee status of the applicant under Article 1 A of the Geneva Refugee Convention.

72. The REK considered a <u>totally different legal question</u>. The question before the REK was whether the Dutch Minister of Justice could legally refuse to <u>admit</u> the applicant as a recognised refugee in the Netherlands – in other words, could the Dutch Minister legally refuse to grant him a residence permit on considerations of general interest <u>although he had been recognised as a refugee</u>. It is clear that it is an erroneous assessment of the facts for the Council to conclude that the REK "confirmed" the decision of the State Council.

73. The only point on which the REK "confirmed" the decision of the State Council is a point that is in favour of the applicant **(See Annex 23: Decision of the REK of 11 September 1997)**. The REK indeed stated that:

On the basis of this decision [Raad van State 21 February 1995] it must be accepted as established in law, that the provision of Article 1F of the Refugee Convention <u>cannot be</u>

used against the plaintiff, that the plaintiff has a well-grounded fear of persecution in the meaning of Article 1A of the Refugee Convention…

74. {omissis}

1.2.2. The Dutch courts did not conclude that the applicant was responsible for terrorist activities in the Philippines

75. The legal issue before the Hague District Court ("REK") did not in any way involve whether the applicant was involved in terrorism or in any other type of criminal actions.
76. The general scope of the decision of the REK is explicitly stated in paragraph II (7) as, "The purpose of this action is to determine whether the disputed decision (of the Minister o Justice), insofar as it refuses the plaintiff admission as a refugee and the granting of the residency permit, can be upheld."
77. The narrow issue before the REK was whether the Minister had the discretionary power to refuse to admit the applicant – although he was recognised as a refugee by the 1995 decision of the State Council – or the discretionary power to refuse to grant him residence "*for important reasons arising from the pubic interest.*"
78. The REK concluded that the Dutch Minister of Justice had the discretion to refuse to admit the applicant as a refugee and to grant a residence permit on considerations of the public interest. It is beyond doubt that the concept of "*general interest*" is not automatically equivalent to "*committing or facilitating an act of terrorism.*" The concept of the general interest is much wider in scope than the latter notion, which remains vague and undefined even in international law and in the Community jurisprudence.
79. Moreover, the applicant emphasizes that the Minister, as quoted in the REK decision, did not claim that the applicant poses a risk to public security but referred only to "*important interest of the State of Netherlands, namely the integrity and credibility of the Netherlands as sovereign state, notably with regard to its responsibilities towards other states.*" (**Annex 23: Decision of the REK of 11 September 1997**).
80. Similarly, the legal issue before the State Council was not whether the applicant was involved in terrorism or in any other type of criminal actions. In that case, the State Council recognized that the applicant is a political refugee under Article 1A of the Geneva Refugee Convention. Also, the State Council nullified the decision of the Dutch Minister of Justice that the applicant should be excluded under Article 1F of the Geneva Refugee Convention. Moreover, the State Council affirmed the applicant is protected by Article 3 of the ECHR for the applicant and must be admitted as a refugee and granted a permit to reside in the Netherlands if there is no other country to which he can transfer without violating Article 3 of the ECHR.

81. In fact, in dealing with the weight of the evidence (which the applicant notes were seen by the Court but never disclosed to him), the State Council found that the materials from the Dutch secret service were *"not sufficient evidence for the fundamental judgment that Jose Maria Sison to that extent has given direction and carries responsibilities for such activities that it can be held that there are serious reasons to suppose that the appellant … has carried out those mentioned crimes".*

82. The fundamental issue of whether or not the applicant has committed or facilitated acts of terrorism or has been implicated in such acts has never been an issue before, much less addressed in passing by, any court or competent authority, including the State Council and the REK.

83. Neither of the two Dutch court decisions cited by the Council addressed or made any factual findings about the involvement of the applicant in any act of terrorism.

84. The two decisions decided on whether the Dutch Minister of Justice could

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

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

On the second question, the Rechtbank however said that the Minister could take the decision to refuse residence status *"on considerations of overriding public interests"* as long as he is not deported to a country where he is put at risk of ill treatment in violation of Article 3 of ECHR and where his physical integrity might be in danger.

No factual finding, conclusion or ruling was taken by the State Council or by the REK to make the applicant liable or culpable for any act of terrorism.

85. Thus, the Council's conclusion of its June 29, 2007 letter is diametrically opposed to the judicial decisions it refers to. {omissis}

1.2.3. The applicant's alleged contacts with terrorist organizations

86. In its June 29, 2007 letter, the Council alleges that the applicant "*maintains contacts with terrorist organizations throughout the whole world*". It should be noted that the REK decision, in a very peripheral point, merely refers to "*indications of personal contacts between the appellant and representatives of terrorist organisations*" (**Annex 23, paragraph 11**). This cannot be considered a ruling, even in obiter, of the

REK. Such a vague and unfounded insinuation cannot be regarded as "*serious and credible evidence or clues or a condemnation for acts of terrorism*" which is required by Article 1, Point 4 of the Regulation.

87. In fact, the REK could not and did not overturn the State Council's ruling that the information from secret service agencies were *"not sufficient evidence for the fundamental judgment that Jose Maria Sison to that extent has given direction and carries responsibilities for such activities that it can be held that there are serious reasons to suppose that the appellant … has carried out those mentioned crimes".*

88. The applicant denies having or having had any personal contacts with any representative of terrorist organisations and which could be considered in any way as participation in or facilitating an act of terrorism. The applicant calls attention to the fact that he was never shown any evidence whatsoever regarding his alleged personal contacts and neither was he given any opportunity to controvert them. The REK stated this consideration on the basis of materials from intelligence and security services that the applicant could not even examine and contest **(Annex 23, paragraph 6).** He could not properly defend himself because he did not know what the court took into account in rendering such decision. Such a procedure also contravenes Article 6 of the ECHR in the same way as the contested Council decision (ECHR, *Lüdi v Switzerland*, 15 June 1992; ECHR, *Barberà, Messegué, Jabardo v. Spain*, 6 December 1988, paragraph 89).

89. Granting *arguendo* that the applicant could have met a member of an organisation considered as terrorist by international authorities, this does not *per se* prove that he would himself have participated in or facilitated an act of terrorism. Otherwise, all peace negotiators – including many state leaders pursuing peace negotiations with such persons – should be included on the list.

90. Moreover, the applicant submits that mere contacts with alleged terrorist organizations does not meet the legal requirements of Article 1, Point 4 of the Regulation. The legal requirement is a "decision taken by a competent authority" concerning investigation, attempt to commit or commission of terrorist acts.

1.3. None of the four decisions cited by the Council meets the criteria required by Regulation 2580/2001 and Common Position 931/2001

91. The Council concludes its statement of reasons with the following paragraph:

"*The Minister of Foreign Affairs and the Minister of Finance decided, through ministerial ruling ("regeling") no. DJZ/BR/749-02 of 13 August 2002 (Sanction regulation terrorism 2002 III), which was published in the Netherlands Gazette on 13 August 2002, that all means which belong to Jose Maria Sison and the Philippine Communist Party, including the Philippine New People's Army (NPA) be frozen.*

The American government named Jose Maria Sison as "Specially Designated Global Terrorist" (specifically named as a world ["mondial"] terrorist person pursuant to US Executive Order 13224. This decision can be reviewed according to American law.

Thus with regards to Jose Maria Sison, decisions have been taken by authorized bodies in the meaning of Article 1, paragraph 4, of the Common Position".

92. The Council therefore seems to refer to four "*decisions (which) have been taken by authorized bodies in the meaning of Article 1, paragraph 4, of the Common Position":*

- September 11, 1997 decision of the Hague District Court ("REK")
- February 21, 1995 decision of the Dutch State Council
- August 13, 2002 decision of the Dutch Minister of Foreign Affairs and the Dutch Minister of Finance
- Decision of the United States government to label the applicant as a *"Specially Designated Global Terrorist"* pursuant to US Executive Order 13224.

93. Article 1, Point 4 of the Regulation requires the Council to draw up the list based on "*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…concerned*." A 'competent authority' is defined as a judicial authority or an equivalent competent authority where judicial authorities have no competence in this area.

94. Both US and Dutch executive decisions must patently not be considered as taken by "competent authorities" because these are adopted by executive and non- judicial bodies. The applicant will develop hereafter why none of these decisions meets the requirements of the pertinent legislation and refers to this argumentation. {omissis} By alleging that these four decisions had been taken by "*authorized bodies in the meaning of Article 1, paragraph 4, of the Common Position"*, the Council develops a statement of reasons obviously based on an error in law which cannot be considered as an adequate statement of reasons.

1.4.The statement of reasons of the letter of 29 June 2007 is not "actual and specific"

95. As this Court stated: "*the statement of reasons for an initial decision to freeze funds must at least make actual and specific reference to each of the aspects referred to in paragraph 163 above (= "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 or 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 conviction for such actions", note of the applicant*) and also, where applicable, to the aspects referred to in paragraphs 172 and 173 above (= "information or evidence communicated to (the Council) by representatives of the Member States without having been assessed by the competent national authority",* note of the applicant*), and state the reasons why the Council considers, in the exercise of its discretion, that such a measure must be taken in respect of the party concerned. Moreover, the statement of reasons for a subsequent decision to freeze funds must, subject to the same reservations, state the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified*." (Case T-47/03, paragraph 198)

96. This Court also held that "*inasmuch as the Council intended to base the decision originally challenged on the factors referred to in paragraph 211 above, the statement of reasons given for that decision ought to have mentioned, at the very least, the judgments of the Raad van State of 1992 and 1995 and the decision of the Rechtbank of 1997 and, subject to their possibly being of a confidential nature, to have indicated the main reasons why the Council took the view, in the exercise of its discretion, that the applicant was to be the subject of such a decision on the basis of those judgments and that decision. Moreover, in stating the reasons for the subsequent decisions to freeze funds, the Council ought, subject to the same reservations, to have indicated the main reasons why, after re-examination, it considered that there were still grounds for the freezing of the applicant's funds*." (Case T-47/03, paragraph 217)

The statement of reasons of the contested decision should have fulfilled both conditions of an initial decision and of a subsequent decision.

97. First it should be noted that the Council did not make a specific reference to each of the aspects of the definition of the Common position 931/2001 but only provided general assertions and wrong deductions from the decisions it cited.

In addition to this, the Council did not explain why the freezing of the applicant's funds should remain justified 10 years after the decision of the REK, 12 years after the last decision of the Council of State which are quoted in its letter, which referred to facts even more ancient.

The Council does not explain why the freezing of the applicant's funds should contribute, in a concrete manner, to the combat of terrorism. It does not provide any evidence to reasonably demonstrate that the applicant could use his funds to perpetrate or facilitate terrorist acts in the future.

The statements of reasons is completely lacking on this key point. There is thus no link between the purpose of the contested decision (freezing funds to avoid future terrorists acts), and the statement of reasons provided by the Council before adopting the contested decision.

98. {omissis} It follows that the Council infringed its obligation to state reasons, as interpreted by the case-law.

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3. Violation of Article 2(3) of Regulation 2580/2001/EC and of Article 1(4) of Common Position 2001/931/CFSP

121. According to article 2(3) of Regulation 2580/2001/EC, the Council, acting unanimously, is to establish, review and amend the list of persons, groups and entities to which the regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931.

{omissis} The legal requirements of the common position 2001/931 and of the Regulation 25801/2001 to include the applicant on the list are not met.

122. {omissis}

3.1. No precise information or material presented by the Council

123. As developed above, the factual allegations presented by the Council are merely erroneous and baseless allegations and thus do not comply with the requirements of "*precise information or material*".

3.2. The Dutch decisions cited by the Council have nothing to do with "*investigations or prosecution for a terrorist act"*

124. The State Council in 1995 and the REK in 1997 had no competence whatsoever to instigate or investigate or prosecute a terrorist act or an attempt to perpetrate, participate in or facilitate such an act. In that sense, although they are judicial authorities, they cannot be considered as "competent authorities" pursuant to the relevant provisions.

125. The allegations concerning contacts of the applicant with terrorist organisations do not meet the legal conditions set out by the community law to include a person in the list. The text of article 1(4) of the Common position does not foresee that "contacts" with terrorist organisations are sufficient. The legal requirement is an investigation or a conviction for *"a terrorist act, an attempt to perpetrate, participate in or facilitate such an act".* Mere contacts are not mentioned as a legal basis for including someone in the list.

3.3. Dutch and US executive decisions cannot offer a legal ground for the inclusion of Jose Maria Sison in the list

126. In its letter, the Council also refers to the decision of the government of the Netherlands published in the Staatscourant August 13, 2002, and to the US decision following the US Executive Order 13224.

127. Both these decisions cannot be considered as "*decision taken by a competent authority in respect of the persons concerned"* in accordance with the Common Position 2001/931. These decisions were adopted by executive bodies and not by a "*judicial or equivalent*" authority, as required by the legal instrument and the case law. {omissis}

128. With regard to the US decision, the Council adds: "*This decision can be reviewed according to American law".* The mere fact that a judicial authority can review the US decision does not make it a "judicial decision." Moreover, the fact that the applicant did not yet challenge this decision in the US is precisely due to his lack of financial means

to do so, which in turn is a direct consequence of his listing by the Council and cannot be interpreted as agreement with the US government decision.

129. In conclusion, it is demonstrated that none of the requirements of art. 1(4) of common position 2001/931 and art. 2(3) of regulation 2580/2001 are met in the present case.

The contested decision thus patently violates these provisions.

4. Violation of the principle of proportionality

130. {omissis}

131. {omissis} The Council does not bring any evidence that can reasonably lead to the conclusion that the applicant could use a single cent for the perpetration of terrorist acts. During the hearing of May 31, 2006 in Case T-47/03, the representative of the Dutch government, in response to questions from this Court, admitted that no suspect transactions had been observed on the applicant's bank account of the applicant **(Annex 44 : Bank statements of the frozen joint account of the applicant and his wife from 3 January 2002 to 10 October 2002).** The expenses recorded by the bank statements, showed that the frozen funds were used only for essential human needs. {omissis}

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6. Plea based on the violation of the general principles of Community law

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139. {omissis} The erroneous inclusion of the applicant in the list of "terrorists" by virtue of the contested decision violates his individual human rights and fundamental freedoms as embodied in the European Convention on the Protection of Human Rights and Fundamental Freedoms.

6.1. Violation of the principle of due process enshrined in art. 6 ECHR

140. {omissis}

6.1.1. Right to an impartial court (Article 6.1. ECHR)

141. The requirements of fairness imposed on member states by Article 6 apply to both civil and criminal litigation. Article 6, taken as a whole, has been held to require a fair trial not only once litigation is under way, but to impose an obligation on states to ensure access to justice (*Golder v United Kingdom* (1979) 1 EHRR 524: The Community legislation recognises the fundamental principle of respect for the rights of defence includes the right to a fair trial (see judgements of the Court of December 17, 1998, Baustahlgewebe / Commission, C-185/95 P, point 21, and of March 28, 2000, Krombach, C-7/98, Rec. p. I-1935, point 26).

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142. {omissis}

143. The inclusion of the applicant in the list through the contested decision is tantamount to an "accusation in a criminal charge" within the meaning of these provisions. Many authors share this point of view (See: Symeon Karagiannis, *Certains comportements récents du conseil de sécurité des Nations Unies en matière de droits de l'homme A propos de la question des « listes noires » du Comité des sanctions* as Annex to D. Marty, « UN Security Council black lists Introductory memorandum", Committee on Legal Affairs and Human Rights of the Council of Europe, 19 March 2007; Iain CAMERON, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report to the Council of Europe, 6 February 2006, p. 10; Thomas BIERSTECKER, Sue ECKERT, *Strengthening Targeted Sanctions Through Clear and Fair Procedures,* White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, Providence (Rhode Island), 30 March 2006, p. 12; Bardo FASSBENDER, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006.) In this respect, it is appropriate to recall that the requirement of jurisdictional control arises from a constitutional tradition common to the Member States and is found in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ruling of 3 December 1992, Oleificio Borelli/Commission, C-97/91, Rec. p. I-6313, point 14, and of 11 January 2001, Kofisa Italia, C-1/99, Rec. p. I-207, point 46, and Siples, C-226/99, Rec. p. I-277).

The eminent place that the right to a fair trial occupies in a democratic society (see in particular ECHR, Airey, October 9, 1979, pp. 12-13, § 24) must result in opting for a "material " design, and not a " formal " one, for the "accusation " pertinent to article 6 § 1. It is a question of looking beyond appearances and of analysing realities of the procedure in litigation (ECHR, Deweer, February 5, 1980).

144. For the European Court of Humans Rights, three criteria determine the existence of a "criminal charge": (i) the legal qualification of the litigious infringement in national law;

(ii) the nature of this charge; and (iii) the nature and degree of severity of the sanctions. These three criteria are met when a decision is taken by the Council to include a person on the list and freeze his assets. There is no doubt that the sphere in which the challenged decision fits, namely the fight against terrorism, forms an integral part of penal matters. The proof of the penal nature of these measures in European law is reinforced by the adoption by the Council of the European Union of the framework decision of June 13, 2002 relating to the fight against terrorism (Official Journal of the E.C. n° L 164 of 22/06/2002 p. 0003 - 0007). This framework decision defines, in a vague manner, the incriminating acts. The nature of the infringement is clear since " *persons, groups or entities are aimed at making or trying to make an act of terrorism, participating in such an act or facilitating its realisation* ". The degree of severity of the sanction is also fulfilled. Indeed, the freezing of the assets is comparable to a total deprivation of access to the basic necessities and right to life for an unspecified duration, as it nullifies the right of listed persons to ownership of any future assets or economic resources.

145. The applicant was registered on the list in a unilateral manner by the Council and is inflicted with the sanctions already mentioned. A penalty is thus being applied without any judicial decision having been taken under the terms of a fair trial. It goes without saying that the Council cannot be compared to an impartial judicial organ. The contested decision inflicts severe damages to the applicant without any judicial oversight and thus, there is a violation of the right to an impartial court recognised by art. 6 ECHR.

6.1.2. Violation of the principle of presumption of innocence (Article 6.2 ECHR)

146. The principle that anyone who is accused of a penal offence shall be considered innocent until proven guilty is established in Article 6 (2) of the {omissis} ECHR {omissis}

147. In this case, the inclusion of the applicant in the list contained in the contested decision can be considered a breach of his right to presumption of innocence. It should be recalled that, at the time of the contested decision, the applicant has not been charged for any specific act of terrorism and neither has he faced any valid charge of criminal offence nor any civil suit. Thus, the statements and pronouncements of representatives of the member states that allegedly form the basis for drawing conclusions about the guilt of the accused person violates the applicant’s right to presumption of innocence.

148. An attack on the presumption of innocence can emanate not only from a judge or a court but also from other public authorities. (ECtHR Allenet of Ribaumont C France, January 23, 1995). The principle of presumption of innocence is considered ignored if a decision concerning the accused reflects the sentiment that he is guilty, even though his culpability has not been previously legally established. It is enough, even in the absence of formal report, as motivation that the authority regards the interested party as culpable (ECtHR, ruling Minelli C Suisse3 of March 25, 1983, series A n° 62, p. 18, par. 37).

149. {omissis} The characterization of the applicant as a "*person[] xxx committing or attempting to commit, participating in or facilitating the commission of any act of terrorism*" is being taken as a fact by a key institution of the European Union which enjoys significant authority and unquestionable prestige. Moreover, this assertion is codified in legislation that immediately has the force of law in all the countries of the Union.

150. According to Amnesty International, "*The case of the Philippine national Mr Jose-Maria Sison illustrates how the decision and procedure to include an individual in the list of terrorist organisations can violate elementary basic rights, including the right to presumption of innocence, the right to due process and the right to defence*". **(Annex 45: Amnesty International Response to the European Commission Green Paper on The Presumption of Innocence, COM(2006) 174 final, June 2006, p 7)**

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6.1.3. Violation of the right of defence and of the right to be heard

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154. As stated by this Court, "*the general principle of observance of the rights of the defence requires, unless this is precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned, as identified in paragraph 173 above, should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, as a rule, be preceded by notification of any new incriminating evidence and a hearing.*" (Case T-47/03, paragraph 184)

155. The Council did well offer to the applicant the opportunity to make known his view by the observations he made in his May 27, 2007 letter. However, this opportunity does not comply at all with the requirements of a fair trial for the following reasons.

6.1.3.1. No incriminating evidence

156. The applicant has received no incriminating evidence from the Council before or after the adoption of the contested decision. The Council merely makes general assertions, namely that the applicant is the present leader of the CPP, he leads the NPA that is perpetrating terrorist attacks, he advocates the use of violence, and he has contacts with terrorist organisations. None of these assertions are based on incriminating evidence.

6.1.3.2. No hearing

157. The Council gave the applicant no opportunity to be heard in any manner, despite his request for a hearing in his May 22, 2007 observations. According to case law and the general principles underlying the rights of defence, the applicant should have been heard by the Council, in person and with the assistance of his counsel, to be able to effectively exercise his right to defense. A full hearing of the Council should afford the applicant the opportunity to know and test the evidence against him, point out errors of fact and law, make submissions on legal analysis and interpretation and make submissions about the applicability of the law to his specific case.

6.1.3.3. The decision was already made by the Council when it communicated its "intention" and motivation to the applicant on April 23, 2007

158. The wording of the Council's April 23, 2007 letter very clearly shows that a decision to maintain the applicant on the list had already been taken. This decision was made before the applicant was able to make his observations as the letter states that:

The Council has established that the reasons why (Jose Maria Sison) is placed on the list … are still valid… The Council is convinced that the reasons for putting Jose Maria Sison on the list …remain valid. On the basis of the above-mentioned fundamental points, the Council has decided that the measures meant in Article 2, paragraphs 1 and 2 of the Regulation (EC) no. 2580/2001 must remain applicable to Jose Maria Sison.

Moreover, the applicant notes that this formulation is identical to the June 29, 2007 decision.

6.1.3.4. The Council had no intention to submit its decision to the least contradiction

159. The applicant submits that the tone of the Council's April 23, 2007 letter appeared that his inclusion on the list was a foregone conclusion. Although the Council stated that he could submit his observations, those observations were totally ignored by the Council. Not a single word of the "motivation" was changed between April and June 2007 to address the applicant's concerns about patent errors or to address any substantive points or evidence noted by the applicant in his observations.

160. The applicant submits that the Council's attitude of dismissal of the rights of the applicant demonstrates that the Council had no intention of submitting its decision to even an elementary form of challenge or contradiction, but merely advised the applicant in a formalistic manner about its decision. In this way the Council merely pretends to comply with the requirements of providing a statement of reason as set forth by this Court in its previous decision. In reality the Council circumvents the substance of the decision of the Court.

161. After judicial decisions ruling the Council's attitude illegal (Case T-228/02 OMPI of December 12, 2006 and Case T-47/03), the Council adopted a very formal mechanism which only gives the appearance of respect for right of defence but does not actually respect the spirit or content of that right.

162. The fact that the Council did not answer at all the applicant's observations is an infringement of its obligation to state reasons and his right of defence.

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PRONOUNCEMENT

By these means,

the applicant requests the honourable Court, to receive this appeal and:

- to partially annul as specified hereafter, on the basis of art. 230 of EC Treaty, Council Decision 2007/445/EC of 28 June 2007implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC and more specifically:
- to annul article 1 point 1.33 of said decision {omissis}
- to annul partially article 1 point 2.7 of said decision insofar it mentions the name of the applicant {omissis}
- {omissis}
- {omissis}
- To require the Council to bear the costs of suit.

Brussels, 7 November 2007.

For the applicant,

His counsel,

Jan FERMON