

ACCESS TO DOCUMENTS EU

Application for annulment (230 EC)

of Council Decision of 27 February 2003 (06/c/01/03): Answer adopted by the council on the 27th February 2003 to the confirmatory application of M. Jan Fermon sent by fax on the 3rd of February 2002 under Article 7 (2) of the Regulation (EC) No 1049/2001, notified to the applicant's counsel on February 28, 2003.

THE APPLICANT IS:

Jose Maria SISON, born 8/2/1939 in Cabugao, Ilocos Sur, Philippines, whose domicile is Rooseveltlaan 778, 3526 BK Utrecht, Netherlands.

Represented by

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THE APPLICATION IS AGAINST:

THE COUNCIL OF THE EUROPEAN UNION

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

In accordance with the Rules of Procedure of the Court, the applicant declares that he accepts notifications in the following address : Jan FERMON, Chaussée de Haecht, 55, 1210 Brussels.

FORM OF ORDER SOUGHT

The applicant respectfully requests the Court:

- to annul, on the basis of Article 230 EC, Council Decision of 27th February 2003 (06/c/01/03): Answer adopted by the council on the 27th February 2003 to the confirmatory application of M. Jan Fermon sent by fax on the 3rd of February 2002 under Article 7 (2) of the Regulation (EC) No 1049/2001, notified to the applicant's counsel on February 28, 2003.
- to order the defendant to pay the costs.

SUMMARY OF PLEAS IN LAW

1. Infringement of the right of access to documents (Article 1 EU second paragraph and Article 6(1) EU, Article 255 EC and, Article 4 , paragraph 1 (a), Article 4 paragraph 6 and Article 9 paragraph 3 of Council Regulation 1049/2001

2. Failure to observe the duty to state reasons (Article 253 EC) , violation of the principle of sound administration.

3. Violation of the general principle of Community law enshrined in art. 6 ECHR and especially of the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation (Article 6.3. ECHR)

FACTUAL BACKGROUND TO THE DISPUTE

1. Background, Personal Circumstances and Present Situation of Prof. JOSE MARIA SISON

1. The applicant, Prof. Jose Maria Sison, is a 63-year old Filipino intellectual and patriot who came from a prominent landlord family in the Northern Luzon Province of Ilocos Sur, Philippines.
2. He came into national prominence as a patriotic and progressive leader in the 1960s as national chairman of Kabataang Makabayan (Patriotic Youth) in 1964, secretary-general of the Workers' Party in 1964 and General Secretary of the Movement for the Advancement of Nationalism. Together with President Marcos and Marcos' arch political rival, Sen. Benigno "Ninoy" Aquino Jr., Prof. Sison was one of the top three newsmakers in Philippine mainstream media from the 1960s to the 1980s, despite his youth and Left politics.
3. The applicant was chairman of the Central Committee of the Communist Party of the Philippines (hereafter CPP) from 26 December 1968 to 10 November 1977, on which 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 10 November 1977, Prof. Sison ceased to be chairman of the Central Committee of the CPP.
4. On 31 August 1986 the applicant left for abroad to start a global lecture tour in universities, first in the Asia-Pacific region from 1 September 1986 to 22 January 1987 and then in Europe from 23 January 1987 to the time that he applied for asylum in 1988.
5. After the Philippine government cancelled his Philippine passport in September 1988, the applicant requested asylum from the Netherlands with the support of Amnesty International in 1990 and the UN Office of the High Commission for Refugees in 1992. In 1992 and 1995, the Council of State of the Netherlands 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 annulled the decision of exclusion taken against him by the Minister of Justice on the basis of art. 1 F of the Geneva Refugee Convention. He enjoys the protection of both the Refugee Convention and art. 3 of the ECHR.
6. Since 1990, the applicant has been the chief political consultant of the National Democratic Front of the Philippines in the peace negotiations with the government. He is as witness a signatory in all the major bilateral agreements since the Joint Declaration of The Hague of 1992. As NDFP chief political consultant, he is covered by the GRP-NDFP Joint Agreement on Safety and Immunity Guarantees (JASIG) as well as related agreements thereto, which provide that the role of consultant on any side in the peace negotiations shall at no time be considered by the other side as a criminal act. In its resolutions in 1997 and 1999, the European Parliament has supported the peace negotiations. The governments of The Netherlands, Belgium and Norway have facilitated these negotiations.
7. Based on the foregoing brief account of his life, Prof. Sison 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 more than 25 long years now, that is: from the date of his arrest and prolonged detention on 10 November 1977 continuously until the present time.
8. The US Secretary of State designated on 9 August 2002 the Communist Party of the Philippines/New People's Army (CPP/NPA) as a "foreign terrorist organisation". The US Treasury Department, particularly its Office of Foreign Assets Control, listed on 12 August 2002 the CPP/NPA and the applicant as terrorists and ordered the freezing of their assets.

9. The Dutch Foreign Minister issued on 13 August 2002 the “sanction regulation against terrorism” listing the NPA/CPP and the applicant as the alleged Armando Liwanag, chairman of the CC of the CPP and as subject to sanctions. The Dutch Finance Minister ordered on 13 August 2002 and subsequently put into effect 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 had received as a client of the pertinent Dutch welfare and refugee agencies. By letter sent on September 10, 2002, the City of Utrecht cut his social allowance, his health insurance, and his third party liability insurance, and ordered him to leave the house, rented by the local authorities.
10. The actions taken against the applicant under the preceding points 18 and 19 have been done without any evidence being put forward and without giving the applicant due notice and the opportunity to be heard.
11. On October 9, 2002, his social allowance and his health and legal responsibility insurance were restored for humanitarian reasons after a decision of the Dutch Finance Minister. The social allowance was limited to 201,93 euros a month. The local authorities however never resumed the payment of the rent.
12. On December 13, 2002, the applicant was informed by the social services of the City of Utrecht that they stopped again paying his social allowance and his insurance.
13. Late January 2003, the Foreign Affairs Secretary of the Philippines, Blas OPLE, said: “Once there is a peace agreement, I will request to the EU, the United States and other countries to delist (the rebels) as terrorists. If they sign, they will no longer be terrorists”.

2. Alleged Bases of Sanction

14. On December 27, 2001, the Council of the European Union adopted Council regulation 2580/2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism (OJ n° L 344 of the 28/12/2001, p. 70-75). This regulation (in Article 2 thereof) imposes sanctions which includes: freezing of funds and prohibiting the rendering of financial services:

« 1. Except as permitted under Articles 5 and 6:

(a) all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included in the list referred to in paragraph 3 shall be frozen;

(b) no funds, other financial assets and economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3.

2. Except as permitted under Articles 5 and 6, it shall be prohibited to provide financial services to, or for the benefit of, a natural or legal person, group or entity included in the list referred to in paragraph 3. »

The sanctions are very serious since Article 1 of the regulation defines the notions of financial assets and economic resources so broadly.

« For the purpose of this Regulation, the following definitions shall apply:

1. ‘Funds, other financial assets and economic resources’ means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal

documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.

2. 'Freezing of funds, other financial assets and economic resources' means the prevention of any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the funds to be used, including portfolio management. »

Under article 2 §3, “ *the Council, ruling unanimously, draws up, revises and modifies the list of persons and entities to which this regulation applies (...) This list mentions:*

"i) natural persons committing or attempting to commit an act of terrorism, participating in or facilitating the commission of any act of terrorism;

ii) legal persons, groups or entities committing or attempting to commit, participating in or facilitating the commission of any act of terrorism;

iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in point i) and ii); or

iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in point i) and ii) ”

The same day, the Council adopts the decision 2001/927/EC (OJ L 344 of the 28/12/2001 p. 0083 - 0084) which draws up a first list under the terms of art. 2 § 3 of Regulation 2580/2001. May 2, 2002, this list is repealed and replaced by decision 2002/334/EC of (OJ L 116 of the 03/05/2002 p. 0033 - 0034). June 17, 2002, the Council adopts a third decision 2002/460/EC (OJ L 160 of the 18/06/2002, p.0026-0027) which repeals the preceding one.

15. October 28, 2002, the Council adopts the decision 2002/848/EC (OJ L 195 of 30 October 2002) by which Mr. Jose Maria SISON as a natural **person (Article 1, 1.9. « SISON, Jose Maria (aka Armando Liwanag, aka Joma, in charge of NPA) born 8.2.1939 in Cagayan, Philippines »)** and the New People's Army (NPA), as a group or entity presumed erroneously to be linked to the applicant (**Article 1, 2. 13. « New Peoples Army (NPA), Philippines, linked to Sison Jose Maria C. (aka Armando Liwanag, aka Joma, in charge of NPA) »**), are included in the list pertinent to art. 2 § 3 of Regulation 2580/2001. This decision draws up the fourth list adopted under the terms of Regulation 2580/2001.
16. December 12, 2002, the Council adopted the decision 2002/974/EC repealing the previous decision 2002/848/EC (OJ L 337 of 13 December 2002, p.85 and 86). The new decision mentions the applicant under art. 1, 1.25 and 2.19 in identical terms as the previous decision. This act has been contested by an Application for annulment lodged on the 6th of February 2003 (Case T-47/03), insofar as it includes Prof. Jose Maria Sison in the list and thereby violates his democratic rights and interests (**Appendix 1: Application for partial annulment of the Council Decision 2002/974/EC**).

3. Procedure for access to documents

17. Immediately after his first listing, the applicant tried to get access to all the documents which were the bases of the Council decision 2002/848/EC. His counsel filed an initial application based on Article 7 of the Regulation (EC) No 1049/2001 of the European Parliament and of

the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31 May 2001, p 43) (**Appendix 2: Application for access to documents to the General Secretary of the Council related to Council Decision 2002/848/EC, October 31, 2002**)

18. On December 11, 2002, the General Secretary of the Council refused to give access to the pertinent documents (**Appendix 3: Letter of the General Secretary of the Council to the applicant's counsel, 11 December 2002**). The applicant was informed that the pertinent elements for him were part of the report of the Coreper of 23 October 2002 (document 13441/02 EXT 1 CRS/CRP 43, classified CONFIDENTIAL EU). The refusal was based on Article 4 (a) first and third point of the aforesaid EC Regulation 1049/2001. According to the Council, the disclosure of the information in possession of the Member States authorities combatting terrorism could give the opportunity to the persons, groups or entities which are the subject of this information, to threaten the efforts of these authorities and would thus undermine the protection of the public interest as regards public security. The applicant was also informed that some documents provided by Member States were already given back to them for security reasons after examination. The decision mentioned also that the disclosure would undermine the public interest as regards international relations because third States authorities were also involved in the fight against terrorism. The possibility to get a partial access was also denied but the General Secretary came to the conclusion that the pertinent information is totally covered by the exceptions of aforesaid Article 4(a).
19. The applicant immediately contested this decision by sending a confirmatory application by fax (**Appendix 4 : Confirmatory application for access to documents to the General Secretary of the Council related to Council Decision 2002/848/EC, 11 December 2002**). In the same letter, the applicant made two other requests. The applicant asked information about which Member States had provided documents mentioned in the contested decision. He also asked to be informed about the rules and criteria applied by the Council concerning sensitive documents which shall be made public following Article 9 point 6 of the aforesaid EC Regulation 1049/2001.
20. On January 17, 2003, the General Secretary of the Council announced that he extended the time-limit by 15 working days as permitted by Article 8, § 2 of the EC Regulation 1049/2001 (**Appendix 5: Letter of the General Secretary of the Council sent by e-mail, 17 January 2003**).
21. On January 22, 2003, the answer to his confirmatory application was sent to the applicant's counsel (**Appendix 6 : Council Decision of 21 January 2003 (41/c/01/02): Answer adopted by the Council on the 21st of January 2003 related to Council Decision 2002/848/EC**). The Council confirmed the total refusal of the General Secretary and reproduced a nearly identical motivation. About the Member States who provided sensitive documents, the Council stated that "the originator authority, after consultation following Article 9 § 3 of the EC Regulation No 1049/2001, is opposed to the disclosure of asked information". About the rules concerning sensitive documents, the Council referred to the Council decision 2001/264/CE adopting the Council's security regulations. This decision was contested by an application for annulment before this Court in the case T-110/03.
22. On January 27, 2003, the applicant's counsel sent an application based on article 7 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31 May 2001, p 43) (**Appendix 7 : Application for access to documents to the General Secretary of the Council related to Council Decision 2002/974/EC, 27 January 2003**). The aim was to get access to all the documents used by the Council to list him again as a terrorist by the adoption of the decision 2002/974/EC repealing the previous decision 2002/848/EC (OJ L 337 of 13 December 2002).

23. By letter of 3 February 2003, the General Secretary of the Council refused to grant the access (**Appendix 8 : Letter of the General Secretary of the Council to the applicant's counsel, 3 February 2003**). He mentioned that the pertinent elements for the applicant were part of the report of the COREPER of 4 December 2002 (document 15191/02 EXT 1 CRS/CRP 51, classified CONFIDENTIAL EU). The General Secretary reproduced exactly the same motivation as in the two previous decisions of 11 December 2002 and 27 January 2003. The applicant was also informed that some documents provided by Member States were already given back to them for security reasons after examination.
24. The applicant immediately contested this new refusal by sending a confirmatory application by fax (**Appendix 9: Confirmatory application for access to documents to the General Secretary of the Council related to Council Decision 2002/974/EC, 3 February 2003**). The applicant also asked to know which Member States had provided documents mentioned in the contested decision.
25. By letter of 24 February 2003, the General Secretary of the Council announced that he extended the time-limit by 15 working days as permitted by Article 8, § 2 of the EC Regulation 1049/2001 (**Appendix 10: Letter of the General Secretary of the Council to the applicant's counsel, 24 February 2003**).
26. On February 27, 2003, the Council confirmed the negative decision of the General Secretary (**Appendix 11: Council Decision of 27 February 2003 (06/c/01/03): Answer adopted by the council on the 27th February 2003 to the confirmatory application related to the Council decision 2002/974/EC**). This is the second contested decision. The Council reproduced exactly the same motivation as in the previous decision of 22 January 2003.

GROUNDS OF THE APPLICATION
AND ARGUMENTS IN SUPPORT THEREOF

1. Infringement of the general principle of transparency and of the right of access to documents (Article 1 EU second paragraph and Article 6(1) EU, Article 255 EC and, Article 4 , paragraph 1 (a), Article 4 paragraph 6 and 9 paragraph 3 of Council Regulation 1049/2001)

1.1. About the two exceptions of public interest alleged by the Council (public security and international relations)

27. In the wake, *inter alia*, of the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 which contains a Declaration (No 17) on the right of access to information, and of several European Council meetings at which the commitment to a more open Community was reaffirmed (see, in that connection, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraphs 1 to 3), there had been a progressive affirmation of individuals' right of access to documents held by public authorities, a right which has been reaffirmed at Community level on various occasions, in particular in the declaration on the right of access to information annexed (as Declaration 17) to the Final Act of the Treaty on European Union, which links that right with the democratic nature of the institutions.

28. Moreover, the importance of that right was confirmed by the developments in the Community legal framework. Thus, first, Article 255(1) EC, which was inserted into the Community legal order by the Treaty of Amsterdam, provides that any “ *citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents* ”. Second, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31 May 2001, p. 43), adopted pursuant to Article 255 EC, lays down the principles and conditions for exercising that right in order to enable citizens to participate more closely in the decision-making process, to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system and to contribute to strengthening the principles of democracy and respect for fundamental rights (Case C-41/00 P, *Interporc v. Commission* of 6 March 2003, point 39).

29. The aim pursued by the EC Treaty and the Regulation 1049/2001, is to provide the public with the widest possible access to documents held by the institutions, so that any exception to that right of access must be interpreted and applied strictly (see Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 27).

30. According to point 3 of the contested decision: “The Council thinks that the disclosure of the aforementioned document and of the information in possession of the member States combatting terrorism, could give the opportunity to the persons, groups or entities which are

the subject of this information, to threaten the efforts of these authorities and would thus undermine the protection of the public interest as regards public security.”¹

31. This short and very general explanation of the Council does not comply with the strict interpretation required. The Council never examined concretely whether disclosure of that information was likely to damage the public security. The applicant must have the right to know the elements which were the base for his listing as a « *natural person committing or attempting to commit an act of terrorism, participating in or facilitating the commission of any act of terrorism* ». This kind of information is not supposed to detail the efforts and strategies of the community and member states authorities to combat terrorism but only provides to the applicant the reasons why he was included on this infamous list. It is thus very clear that this information could not undermine the public security.
32. According to point 4 of the contested decision: “ the disclosure of such information would undermine the public interest as regards international relations because third States authorities are also involved in the actions relied on in order to the fight against terrorism”.²
33. This allegation shows that the Council never examined concretely whether disclosure of that information was likely to damage the international relations. The contested decision is making a very broad interpretation of the concept of protection of international relations. Following the Council, for the mere reason that the activity of the EU institutions includes the participation of third countries, the disclosure of the information related to this activity would undermine the international relations of the Union. Such a broad interpretation would allow the institutions to refuse systematically the access to documents about activities concerning third countries in a vague manner. In this way, the exception would become the general rule and the institutions would work without any democratic control in a very large spectrum of their activities. This interpretation would completely delete the fundamental right to access to documents and cannot be accepted for this reason.
34. The Council had misapplied the two exceptions based on the protection of the public interest as regards public security and international relations. The contested decision constitutes a clear infringement of the general principle of transparency and of the right of access to documents (Article 1 EU second paragraph and Article 6(1) EU, Article 255 EC and, Article 4 (a) and 9 paragraph 3 of Council Regulation 1049/2001).

1.2. About the authorship rule

35. The decision of the General Secretary of the Council of 3 February 2003 mentioned that “some documents provided by Member States were already given back to them for security

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1. “Le Conseil est d'avis que la divulgation du document susmentionné ainsi que des informations en possession des autorités des Etats memores qui luttent contre le terrorisme permettrait aux personnes, groupes et entités faisant l'objet de ces informations de nuire aux activités menées par ces autorités et porterait gravement atteinte à l'intérêt public en ce qui concerne la sécurité publique”.
 2. “La divulgation des informations en question porterait aussi atteinte à la protection de l'intérêt public en ce qui concerne les relations internationales, étant donné que les actions menées dans le cadre de la lutte contre le terrorisme impliquent également des autorités d'Etats tiers”.

reasons after examination”³ (**Appendix 8 : Letter of the General Secretary of the Council to the applicant’s counsel, 3 February 2003**).

36. In the contested decision, the Council justifies also implicitly its refusal for access to certain documents by the authorship rule as provided for by Article 9 paragraph 3 of the Regulation No 1049/2001. 3. According to this Article : « *Sensitive documents shall be recorded in the register or released only with the consent of the originator* ». Point 4 of the contested decision reads as follows : « *About the supplementary information concerned by the first question asked in the confirmatory application: the Council states observed that the originator authority(ies) of this information, after consultation according to Article 9 para 3 of the Regulation No 1049/2001, is (are) opposed to the disclosure of the asked information*”⁴
37. According to the Regulation EC No 1049/2001 (preamble point 10): “ In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. A Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement ». As already written, any exception to the right of access must be interpreted and applied strictly. It follows that the authorship rule must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency (Case T-188/97 Rothmans International v Commission [1999] ECR II-2463, paragraphs 53 to 55 and Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission [2000] ECR I-1, paragraph 27).
38. In that regard, it must be held that, a strict interpretation and application of the authorship rule imply that the Council must verify the origin of the document and inform the applicant of its author so that he can make an application for access to that author (See Case C-41/00 P, *Interporc v. Commission* of 6 March 2003, point 48 and 49). The applicant insisted two times to be informed about the identity of the Member States or which provide documents to the Coreper or the Council before his listing. Two times, the General Secretary and the Council refused to disclose this identity (**Appendix 7: Application for access to documents to the General Secretary of the Council related to Council Decision 2002/974/EC, 27 January 2003 and Appendix 9: Confirmatory application for access to documents to the General Secretary of the Council related to Council Decision 2002/974/EC, 3 February 2003.**)
39. The applicant doesn’t know the authors of these documents and the exact nature of these documents. If the contested decision were to be followed, it would be absolutely impossible for the applicant to make any application for access to the authors of the documents which were the basis for listing him as a terrorist. The result of the contested decision is a total denial of the right of access to documents.

1.3 About the partial access

³ « Pour des raisons de sécurité, certains des documents fournis par les Etats membres ont d’ailleurs été rendus à ceux-ci après leur examen. »

⁴ “En ce qui concerne l’information supplémentaire visée dans la première question posée dans la demande confirmative: le Conseil constate que [la] [les] autorité[s] d’origine des informations en objet, après consultation conformément à l’article 9, paragraphe 3 du règlement n° 1049/2001, est [sont] opposée[s] à la divulgation de l’information demandée”.

40. According to point 6 of the contested decision, « The General Secretary examined the possibility to grant a partial access in accordance with Article 4, paragraph 6 of the Regulation, but came to the conclusion that all the information is covered by the aforesaid exceptions ». ⁵ According to the aforesaid Article 4, paragraph 6: “ If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released ». This must be interpreted in the light of the principle of the right to information and the principle of proportionality. It follows that, before refusing access to a document unconditionally, the Council is obliged to examine concretely whether partial access should be granted, that is to say, access to the information not covered by the exceptions (Case T-14/98, Heidi Hautala v Council, 19 July 1999, E C R 1999 page II-2489).
41. The short and stereotyped explanation of the Council about this point do not comply with the settled case law on this matter. Such phrase could be reproduced systematically in every decision to give an appearance of being in accordance with aforesaid Article 4 paragraph 6. In the present case, the Council never made any serious examination of the partial access of all the pertinent documents as required. For that reason, the contested decision constitutes also an infringement of Article 4 paragraph 6 of the Regulation EC No 1049/2001 and of all Articles contained in this plea in law.

2. Failure to observe the duty to state reasons (Article 253 EC) , violation of the principle of good administration.

42. We must observe that the Council and its General Secretary reproduced exactly the same motivation as in the former decisions concerning the request for access to the documents that were the bases of the Council decision 2002/848/EC.

2.1. About the two exceptions of public interest alleged by the Council (public security and international relations)

43. According to consistent case-law, the obligation to state reasons, laid down in Article 253 EC, means that the reasoning of the Community authority which adopted the contested measure must be shown clearly and unequivocally so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights and the Community judiciary can exercise its power of review.
44. It is also clear from the case-law of the Court of First Instance that the Council is obliged to consider, in the case of each document to which access is sought, whether, in the light of the information available to the Council, disclosure is in fact likely to undermine one of the facets of public interest protected by the first category of exceptions (Case T-174/95 Svenska Journalistförbundet v Council [1998] ECR II-2289, paragraph 112). It follows that in its statement of reasons for its decision the Council must show that it has carried out a concrete assessment of the documents in question. (Case T-188/98, Aldo Kuijter v. Council, 6 April 2000, ECR 2000 Page II-1959, points 37 and 38).

⁵ « Le Secrétariat général a examiné la possibilité de donner un accès partiel tel que prévu à l'article 4 ,paragraphe 6 du règlement, mais est arrivé à la conclusion que les informations en question sont couvertes par les exceptions précitées dans leur intégralité”.

45. As regards a request for access to documents, the Community institution, when it refuses access, must assess in each individual case whether they fall within the exceptions listed in the Regulation (see *Netherlands and Van der Wal v Commission*, cited above, paragraph 24).
46. As stated in the first plea in law, this obligation is not fulfilled by the contested decision. The Council confined itself to giving a short, identical and ritualistic response, and it did not identify the nature of the information contained in each of the documents or examine whether disclosure of that information was likely to damage the public interest.

2.2 About the authorship rule

47. In the contested decision the Council referred implicitly to the authorship rule but it did not even inform the applicant that it should request a copy of the documents in question from the Member States concerned. The applicant was not in a position to know the justification for the contested measure and the Court of First Instance is not in a position to exercise its power to review the legality of that decision, as required by consistent case law. (see for example *Rothmans International v Commission*, cited above, paragraph 37).
48. In his many applications, the applicant tried to get access to all the documents which were the bases of his listing. The Council and its General Secretary referred only to two identified documents: the report of the COREPER of 23 October 2002 (document 13441/02 EXT 1 CRS/CRP 43, classified CONFIDENTIAL EU) and to the report of the COREPER of 4 December 2002 (document 15191/02 EXT 1 CRS/CRP 51, classified CONFIDENTIAL EU). The General Secretary mentioned also “some documents provided by Member States (which) were already given back to them for security reasons after examination”, without giving any other element to allow the applicant and the Court to identify these documents (**Appendix 8 : Letter of the General Secretary of the Council to the applicant’s counsel, 3 February 2003**). In the contested decision, the Council gave no more information about these documents and refused to give the identity of the concerned Member States. Such a laconic response to the applicant constitutes a patent example of infringement of the principle of good administration.
49. The applicant considers that the reasons given in the contested decision do not satisfy the requirements of Article 253 EC.

2.3. About the partial access

50. Following the contested decision: « The General Secretary examined the possibility to grant a partial access in accordance with Article 4, paragraph 6 of the Regulation, but came to the conclusion that all the information is covered by the aforesaid exceptions ». Such a short and laconic explanation do not allow the applicant and the Court to check how the Council came to this conclusion. With the contested decision, the reasoning of the community institution remains totally obscure. The council shows that it has not carried out at all a concrete assessment of the documents in question.

3. **Violation of the general principle of Community law enshrined in Article 6 ECHR and especially of the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation (Article 6 paragraph 3 ECHR)**

51. Article 6 paragraph 3 of the ECHR explicitly provides as follows: *“Everyone charged with a criminal offence has the following minimum rights: to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”*.
52. Under art. 2, § 3 of the Council Regulation No 2580/2001, the list modified by the decision 2002/974/EC mentions:

" i) natural persons committing or attempting to commit an act of terrorism, participating in or facilitating the commission of any act of terrorism;

ii) legal persons, groups or entities committing or attempting to commit, participating in or facilitating the commission of any act of terrorism;

iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in point i) and ii); or

iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in point i) and ii) "

The inclusion of the applicant in the list modified by the Council decision 2002/974/EC is tantamount to an "accusation in a criminal charge" within the meaning of these provisions. In this respect, it is appropriate to recall that the requirement of a 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).

53. 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)

For the European Court of Human Rights, three criteria determine the existence of a "criminal charge": the legal qualification of the litigious infringement in national law, the nature of this charge, and the nature and degree of severity of the sanctions. These three criteria are fulfilled with the registration of the persons as referred to in the list. There is not any doubt that the sphere in which the decision 2002/974/EC fits, namely the fight against terrorism, forms integral part of the penal matter. The proof of this penal nature in European law is reinforced by the adoption by the Council of the European Union of the framework decision of 13 June 2002 relating to the fight against terrorism (OJ L 164 of 22/06/2002 p. 0003 - 0007) which defines, in a vague manner, the incriminating acts. The nature of the infringement does not allow additional hesitation 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". As for the degree of severity of the sanction, it is also fulfilled. Indeed, the freezing of the assets such as it is envisaged is comparable to a total deprivation and for an unspecified duration of the right of ownership of the groupings concerned.

54. The applicant has been registered on the list in a unilateral manner by the Council and the sanctions already mentioned have been imposed on him. At present, the applicant is totally deprived of his social allowance and his health insurance by operation of the Council decision

2002/974/EC (**Appendix 12 : Letter of the “Dienst Maatschappelijke Ontwikkeling” of the City of Utrecht to the applicant, December 13, 2002; Appendix 13: Decision of the Dutch Minister of Finances refusing to grant humanitarian derogation to the applicant, March 7, 2003, 2 p**) A strong penalty is thus being applied to the applicant. Until today, he did not receive any information about the nature and cause of the accusation against him.

55. By refusing him the access to the documents which are the basis of his listing as a terrorist, the Council undoubtedly violated the general principle of community law enshrined in Article 6 paragraph 3 ECHR.
56. The refusal to grant access to the documents that were at the base of the Decision including him in the list in accordance to the Regulation 2580/2001 has in a significant way contributed to the process that has led to the present situation of the applicant who is subjected to very serious sanctions as explained here above and depriving him of any possibility to defend himself against the false accusation that he would be involved in terrorist actions or would facilitate such actions. Refusing access to the documents furthermore brings serious harm to the rights of defence of the applicant in his case for annulment of the Council decision 2002/974/EC (Case T-47/03 pending before this Court) in which the applicant has to bring evidence that he is not involved in terrorist activity, the Council thus is trying to reverse the burden of the evidence. The contested decision therefore contributes significantly to a process which, as a whole, violates the general principle of community law enshrined in Article 6 ECHR.

PRONOUNCEMENT

By these means,

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

- to annul, on the basis of Article 230 EC, Council Decision of 27th February 2003 (06/c/01/03): Answer adopted by the council on the 27th February 2003 to the confirmatory application of M. Jan Fermon sent by fax on the 3rd February 2002 under Article 7 (2) of the Regulation (EC) No 1049/2001, notified to the applicant's counsel on February 28, 2003.
- to order the defendant to pay the costs.

Brussels, 25 April 2003.

For the applicant,

His counsel,

Jan FERMON

Inventory of Appendices

A.1: Council Decision (2002/974/EC) of 12 December 2002 implementing Article 2(3) of and repealing Decision 2002/848/EC (OJ L 337 of 13 December 2002, p.85 and 86), 2 p.

A.2: Council Decision (2002/848/EC) of 28 October 2002 implementing Article 2(3) of and repealing Decision 2002/460/EC (OJ L 195 of 30 October 2002, p 12 and 13), 2 p.

A.3: Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 344 of 28 December 2001, p. 70-75), 6 p.

1: Application for annulment of the Council Decision 2002/974/EC, 54 p (mentioned on p 9)

2: Application for access to documents to the General Secretary of the Council related to Council Decision 2002/848/EC, October 31, 2002, 1 p (mentioned on p 10).

3: Letter of the General Secretary of the Council to the applicant's counsel, 11 December 2002, 2 p (mentioned on p 10)

4 : Confirmatory application for access to documents to the General Secretary of the Council, 11 December 2002, 1 p (mentioned on p 14)

5: Letter of the General Secretary of the Council sent by e-mail, 17 January 2003, 1 p (mentioned on p 11)

6: Council Decision of 21 January 2003 (41/c/01/02): Answer adopted by the Council on the 21st of January 2003, 3 p (mentioned on p 11)

7: Application for access to documents to the General Secretary of the Council related to Council Decision 2002/974/EC, 27 January 2003, 1 p. (mentioned on p 11 and 17)

8: Letter of the General Secretary of the Council to the applicant's counsel, 3 February 2003, 2 p (mentioned on p 11 , 16 and 20)

9: Confirmatory application for access to documents to the General Secretary of the Council related to Council Decision 2002/974/EC, 3 February 2003, 1 p (mentioned on p 12 and 17)

10: Letter of the General Secretary of the Council to the applicant's counsel, 24 February 2003, 1 p (mentioned on p 12)

11: Council Decision of 27 February 2003 (06/c/01/03): Answer adopted by the council on the 27th February 2003 to the confirmatory application related to the Council decision 2002/974/EC (contested decision), 3 p (mentioned on p 12)

12 : Letter of the "Dienst Maatschappelijke Ontwikkeling" of the City of Utrecht to the applicant, December 13, 2002, 1 p (mentioned on p 23)

13: Decision of the Dutch Minister of Finances refusing to grant humanitarian derogation to the applicant, March 7, 2003, 2 p (mentioned on p 23)