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THE ILLEGALITY OF THE EU COUNCIL DECISION 2008/583/EC CONCERNING PMOI

EXPERT OPINION

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1. I have been asked to give an Expert Opinion on the legality of the Decision 2008/583/EC taken on 15 July by the EU Council with regard to the listing of the People's Mujahidin Organization of Iran (PMOI or OMPI) as one of the terrorist groups or organizations to which Council Common Position of 27 December 2001 may apply.

I. The Basic Factual and Legal Ingredients of the Case

2. On 15 July 2008 the Council of the European Union made a decision (2008/583/EC) concerning the People's Mujahidin Organization of Iran. It first took note of the fact that, since 24 June 2008, the "competent authority" 's decision that served as a basis for including the People's Mujahidin Organization of Iran on the list of persons and entities subject to the measures set out in Article 2(1) and (2) in Council Regulation (EC) no 2580/2001 (the List), was no longer in force. The Council then stated that it had decided nevertheless to continue to include the People's Mujahidin Organization of Iran on the List in light of "new information". The "new information" consisted of three decisions of the antiterrorist Prosecutor's office of the Court of first instance of Paris opening a judicial inquiry for terrorism against "alleged members of the People's Mujahidin Organization of Iran".

3. I will show below that this decision is contrary not only to the text of Community law but also to some fundamental human rights laid down in the settled case law of the European Court of Justice.

II. The Council Decision Seriously Breaches the Text of Provisions of Council Common Position 2001/931/CFSP

(A) In That It Targets an Entity other than the Persons Referred to in the French Decisions

4. The Council Common Position provides in Article 1(4) that the Council, in taking decisions concerning the "List of persons or groups" envisaged in the Common Position, must indicate that "a decision has been taken by a competent authority *in respect of the persons, groups and entities concerned*" (emphasis added). A literal and logical construction of this provision clearly shows that, to justify the inclusion of a person or a group on the List, the Council is duty bound to produce decisions of national (judicial) authorities concerning **the specific person or group** that are put on the List. Plainly, the decision may not concern a person or a group *other than* the one specifically indicated on the List.

5. The decision of 15 July 2008 is designed to keep the PMOI on the List, although on grounds other than those previously adduced by the Council. However, the "evidence" this decision gives in the annexed "Statement of Reasons" does not concern at all the PMOI but only a number of individuals that the Statement defines as "alleged members of the People's Mujahidin Organization of Iran (PNMOI)". This is a blatant violation of the clear wording and also of the very logic of the aforementioned Article 1(4). It is also contrary to reason. Why should an organization be held accountable for the actions of persons that are **alleged** to be its members? First of all, it is not sure that those persons do in fact belong to the organization. Secondly, assuming they do, it is not specified what role they play in the organization. It is contrary to any principle of law and in particular of criminal law that mere membership in an association or organization involves the criminal liability of the association or organization for any criminal offence that individual members may have committed. If this was the case, many political parties in Europe enjoying the

legal status of associations should be incriminated on account of the misdeeds of some of their party members!

(B) In That the Council Decision Refers to “Decisions” Taken by French Authorities that Lack Judicial Independence

6. I submit that one should not pass over in silence other deficiencies of the Council decision. One, which could be regarded as minor but nevertheless stands out as a considerable flaw, is as follows.

7. Under Council Common Position 2001/931/CFSP of 27 December 2001 the freezing of assets belonging to a person or a group suspected of terrorism may be made on the basis of a “decision” taken by a national “competent authority”, that is a “judicial authority” or “an equivalent competent authority in that area” (Article 1(4)).

8. Clearly, by “judicial authority” is meant any state body that is independent of the executive power and in addition exhibits the other hallmarks of judicial organs, namely impartiality and respect for due process principles (*audiatur et altera pars*). This is the notion of “tribunal” consistently upheld by the European Court of Human Rights: in *Belilos v. Switzerland* (judgment of 29 April 1988, §64), the Court held that “a ‘tribunal’ is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner ... It must also satisfy a series of further requirements - independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure - several of which appear in the text of Article 6 para. 1 itself”. This notion had already been propounded in, among many other cases, in *Le Compte, Van Leuven and De Meyere v. Belgium* (judgment of 23 June 1981, § 55) and *Sramek v. Austria* (22 October 1984, § 36) as well as in *Lithgow and others v. United Kingdom* (judgment of 8 July 1986, § 201). It was restated in *Demicoli v. Malta* (judgment of 27 August 1991, § 39). Interestingly in *Rolf Gustafson v. Sweden* the Court pointed out that “for the purposes of Article 6 para. 1 a tribunal need not be a court of law integrated within the standard judicial machinery. It may, like the Board at issue, be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system. What is important to ensure compliance with Article 6 para. 1 are the guarantees, both substantive and procedural, which are in place” (judgment of 1 July 1997, § 45). In *van der Hurk v. Netherlands* the Court held that “the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a ‘tribunal’ ” (judgment of 19 April 1994, §45).

9. The expression “equivalent competent authority” clearly must encompass any state body that, even though devoid of some basic judicial features (such as those relating to the mode of appointment of members of the body, the length of their mandate, and so on), shows at a minimum two requirements: (i) the ability to make evaluations independently of the executive power, i.e. without being bound by instructions of the executive; and (ii) respect for due process principles, namely the ability to undertake an appraisal of the factual elements and the relevant evidence concerning the subject-matter in dispute on the basis of a fair and adversarial evaluation of the views of the contending parties (or of all the parties concerned). Thus this notion may embrace, for example, an administrative body of inquiry, or a quasi-judicial monitoring body or any other supervisory institution that is not part of the judiciary. Nevertheless, what matters is that the body should exhibit the two features I have mentioned.

That these two features must be held to be fundamental can also be inferred from the spirit of the Council Common Position 2001/931/CFSP as well the textual and logical construction of the adjective “equivalent” in Article 1(4).

10. Let us now consider whether, in light of the notions just set out, the authority from which the three decisions mentioned by the Council emanated can be considered as “judicial” or as an authority “equivalent” to a judicial body.

11. In its decision of 15 July 2008 the Council refers to “judicial inquiries” opened by the Paris Prosecutor’s Office in 2001 and then in March and November 2007, when “the Paris anti-terrorist prosecutor’s office brought supplementary charges against alleged members of the PMOI”. The decision then infers from all this that a “decision in respect of the People’s Mujahidin Organization of Iran has therefore been taken by a competent authority within the meaning of Article 1(4) of Common Position 2001/931/CFSP”.

12. The discrepancy between what is required by Common Position 2001/931/CFSP and what occurred in Paris is apparent. The Common Position requires that any “decision” including a decision to instigate investigation or prosecution, be taken by a judicial authority. In the case under discussion the Council decision is inconsistent with the Common Position’s legal regulation in three respects.

13. Firstly, a decision was taken by the office of the Prosecutor, which **is not an independent** judicial body, since it is submitted to the power of the Minister of Justice pursuant to Article 30 of the French Code of Criminal Procedure (C.C.P.)¹

Secondly, the Prosecutor’s decision to submit a case to the investigating Judge by itself only means that the Prosecution holds the view that a number of persons have engaged or are engaging in terrorist activities, and bases such view on a set of facts or probative elements that he considers to be convincing. However, this prosecutorial assessment is a unilateral appraisal of facts and circumstances, which is devoid of the hallmarks of independent judicial evaluations. It is also notable and indeed striking that after seven years the Paris prosecutorial office has failed to gather enough information to send the case to court, let alone have any conviction.

Thirdly, the Council Common Position’ provision at issue, as correctly interpreted by the Court, includes among the decisions by a national authority **that are admissible** (for the purposes of the listing) any prosecutorial decision to instigate investigations or prosecution **subject to two conditions**: that (i) the prosecutorial authority must have “serious and credible evidence or clues” (see also *PMOI v. Council*, § 117, 122, 124) and (ii) that the person, group or entity targeted should be in a position “to exercise their right to a fair hearing” (*PMOI v. Council*, § 119). If one of these two requirements is not met (as this is the case with regard to the Council decision of 15 July 2008), the conditions set by the Common Position provisions for considering that the decisions of a national authority warrant the listing cannot be held to be satisfied.

¹ Under Article 30 « *Le ministre de la justice conduit la politique d'action publique déterminée par le Gouvernement. Il veille à la cohérence de son application sur le territoire de la République. A cette fin, il adresse aux magistrats du ministère public des instructions générales d'action publique. Il peut dénoncer au procureur général les infractions à la loi pénale dont il a connaissance et lui enjoindre, par instructions écrites et versées au dossier de la procédure, d'engager ou de faire engager des poursuites ou de saisir la juridiction compétente de telles réquisitions écrites que le ministre juge opportune* ».

III. The Council Decision Seriously Infringes the Rights of the Defence

(A) The Defence Rights under EU Norms and Case law

14. It clearly follows from Article 6(2) of the Treaty instituting the European Union (“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”) that the right to a fair hearing, laid down in Article 6 of the European Convention, is one of the fundamental rights to be respected by all institutions within the European Union.

15. This fundamental right has been recently restated by the European Court of Justice (Grand Chamber) in *Kadi and others v Council of the European Union* (judgment of 3 September 2008). There the Court has authoritatively held that

According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37). (§ 335)

16. In a number of cases the Court of First Instance has lucidly spelled out the fundamental nature of the rights of the defence (see for instance *Fiskano v. Commission*, 1994, §§ 39-40, and *Jose Maria Sison and others v. Council of the EU*, 2007, § 139). As the Court held in the latter case,

According to settled case-law, observance of **the rights of the defence** is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the evidence adduced against him on which the penalty is based. (§ 139; emphasis added).

17. The same dictum can be found in *OMPI v Council of the EU* (§91)., where mention is made in the French text of the “*respect des droits de la défense*” and in English of observance of “the right to a fair hearing”

18. Whatever the terminology used to classify the right, it is undisputed that, according to European Court case law, the fundamental right to the defence is an all-embracing right that is articulated into more specific rights: (i) the right to be informed of the evidence adduced by the relevant EU institution, and to know the reasons and the facts underpinning and justifying any adverse decision; (ii) the right to be afforded the opportunity effectively to make known one’s views on the evidence produced by the EU institution and to set forth one’s views concerning the legality of any adverse decision; (iii) the right to effective judicial protection, that is to challenge an adverse decision before a court of law.

(B) The Council's Breach of the Right to the Defence:

(I) Breach of the Right to a Fair Hearing

19. I submit that in the case at issue the Council breached this fundamental right because

- (i) by deciding on the continuation of a sanction against an entity or organization (OMPI) other than the persons targeted by the French judicial authorities decisions, it failed **to enable that organization** to become apprised of the evidence or information on which the sanction is based,
- (ii) it failed to enable such organization **to set forth its views** on the matters on which the Council decision was based.

20. These two breaches resulted not only from the manifest deviation from the letter and the spirit of Common Position mentioned above, but also from a combination of this deviation with French law. To argue these points I need briefly to remind some general features of French criminal procedure that are germane to our question.

(i) French Law Relevant to the Issue of a Fair Hearing

21. The right to a fair hearing, as set out by the Court of First Instance, cannot be exercised by the People's Mujahidin Organization of Iran **under French law**, on the following grounds.

22. The three decisions issued by the French judicial authorities, on which the Council grounds its decision concerning the PMOI, did not target the organization, but a number of persons that are allegedly members thereof. However, under French law there exist two distinct forms of criminal liability, one for individuals or physical persons, another for associations, organizations or legal entities. Indeed, Article 121-2 (1) of the French criminal Code neatly provides for the criminal liability of legal bodies (*personnes morales*), a liability that, with regard to terrorism, is restated in Article 422-5. This distinct responsibility remains valid even if Article 121-2(3) provides that "the criminal liability of legal persons does not exclude that of the individuals who are perpetrators or accomplices for the same facts" (*la responsabilité pénale des personnes morales n'exclut pas celle des personnes physiques auteurs ou complices des mêmes faits*).

23. I will now show why under French law the PMOI, not having being targeted by the three French prosecutorial decisions mentioned in the Council decision of 15 July 2008, has not been able to exercise the fundamental rights stemming from the EU law.

24. Under French law when a Prosecutor become cognizant of a crime, pursuant to Article 80 of the Code of Criminal Procedure (C.C.P.) he can issue a request for criminal action (*réquisitoire introductif*) addressed to the investigating judge (*juge d'instruction*). The judge after scrutinizing the request, can issue an order (*ordonnance*) either filing the matter (*classement sans suite*) or for the purpose of advising the person accused that an investigation against him is underway (*ordonnance à fin d'informer ou de soit informé*). The judge then can issue a summons to appear (*mandat de comparution*) so that the person targeted in the charges specifically and by name may be interviewed (the person can be assisted by a lawyer). After the interview the judge can among other things decide to officially notify the person that he is under investigation for that particular issue (*mise en examen*) or he may decide to consider the person as *témoin assisté* (with right to a lawyer and to have access to the file). The accused can lodge an appeal against some decisions or orders of the investigating judge.

25. Another point that must be stressed because it is relevant to our discussion relates to the strict obligation to keep the investigation (*instruction*) secret. This obligation is laid down in Article 11 of the C.C.P., and is incumbent upon all those persons that participate in the investigation (prosecutors, judges, investigators, defence counsel) except for some specific categories such as the persons being investigated (*personnes mises en examen*), witnesses, the private petitioners (*parties civiles*), if any, reporters. A person that knowingly receives a document from a person bound by the obligation of secrecy may be guilty of “unlawfully receiving goods” (*recel de choses*, punished under Article 321-1 of the Criminal Code). However, lawyers may hand over copies of documents obtained from the investigating judges to their clients, who however are duty bound not to pass them on to third parties, pursuant to Article 114-1 of the CCP.

26. It is apparent from the above that the persons charged in the three decisions of the French prosecutors were individuals that, whether or not they are members of the PMOI, **are distinct from it**. In addition, they are **legally bound to refrain from handing over to third persons or to organizations such as the PMOI any document they might receive in copy from their lawyers**.

27. Moreover, even if the decisions under discussion were in respect of the PMOI, which they are not, the PMOI did not have the right to challenge them, because in France the decision by a Prosecutor may not be challenged. Therefore, the PMOI rights to effective judicial protection have been violated.

(ii) Conclusion on this Point

28. It should thus be clear that the PMOI was unable to exercise its fundamental right to defence (thereby expressing its views on the “evidence” produced by the Council on 15 July 2008 and contesting its legality) both because the Council decision was at odds with the clear legal prescriptions of Common Position, and on account of the operation of French law.

29. It would seem that therefore one could apply to our case, *mutatis mutandis*, the ruling made by European Court of Justice (Grand Chamber) in *Kadi and others v Council of the European Union* (judgment of 3 September 2008) whereby

Because the Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted, the appellants were not in a position to make their point of view in that respect known to advantage. Therefore, the appellants’ rights of defence, in particular the right to be heard, were not respected. (§ 348)

30. Also in our case the PMOI has not been put in a position to know the evidence against the association as such, nor, as a consequence, has it been put in a position to make known its views on the French prosecutorial decisions.

(II) Breach of the Presumption of Innocence

31. The presumption of innocence, i.e. the right to be considered innocent until found guilty by a court of law, is a fundamental right, enshrined in international treaties (see for example Article 6(2) of the European Convention of Human Rights, Article 14 (2) of the UN Covenant on Civil and Political Rights, Article 8 (2) of the American Convention on Human Rights) in national laws (see

thereon J. Pradel, *Droit pénal comparé*, Dalloz Paris 1995, pp. 379-386) and in international instruments and case law concerning international criminal proceedings (see S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford 2003, pp. 83-100).

32. This presumption is a fundamental shield protecting the rights of suspects and accused. As was rightly stated (M. Chiavario, “Private Parties: the Rights of the Defendant and the Victim”, in M. Delmas-Marty and J. R. Spencer (eds), *European Criminal Procedures*, Cambridge, Cambridge University Press, 2002, p. 553), the presumption of innocence “is in a way related to the ‘right to a judicial process’ as far as the accused is concerned”. The presumption involves (besides the obvious but crucial imposition of the burden of proof on the prosecution and the right of the accused to be protected from publicity in the media) the right of a suspected or accused person to be able to become apprised of what offence he is charged with, and to challenge any decision of the authority. The presumption may be restricted only **exceptionally and under close judicial scrutiny**: for instance, a person awaiting trial may be detained only when some strict conditions (such as the danger of recidivism, or that he may escape or that he may tamper with the evidence) are fulfilled and only if a judge so decides.

33. Should one hold the view that the Council Common Position 2001/931/CFSP, by providing that a “decision” by a national “competent (judicial) authority” simply “instigating investigations” against a person, group or entity may suffice for putting that person, group or entity on the List, has in fact departed, at least implicitly, from the presumption of innocence?

The answer must be a resounding no. As pointed out above, the presumption under discussion is related to, and indeed fleshed out by, **the right to judicial process**. In other words, that presumption is respected among other things any time a person accused or suspected of a criminal offence is put in a position promptly to set forth his views and challenge the charges preferred against him. As I have already underlined above, the Council Common Position’ provision at issue, as correctly interpreted by the Court, requires that (i) the prosecutorial authority must have “serious and credible evidence or clues” (see also *PMOI v. Council*, § 117, 122 and 124) and (ii) that the person, group or entity targeted should be in a position “to exercise their right to a fair hearing” (*PMOI v. Council*, § 119). Hence, as long as these two requirements are met, the presumption of innocence is not breached (at least from the viewpoint under discussion).

34. If instead an association, legally registered in a Member State, is **for long** subjected to administrative sanctions **absent** any judicial assessment of the alleged criminal conduct of the association (or, as in our case, of the alleged criminal conduct of some of its members), nor is it put in a position **to know the charges levelled against it and to challenge** the relevant decisions, the presumption of innocence must perforce be held to have been grossly breached.

IV. The Council Failed to Comply with the Obligation to State Reasons

35. The EU organs’ obligation to state the reasons on which they ground their decisions has been spelled out by Court of First Instance in many cases. The *raison d’être* of this obligation was set out by the Court in *OMPI v Council of the EU*

According to settled case-law, 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 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 Courts and, second, to enable the Community judicature to review the lawfulness of the decision (Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraph 145, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 462). The obligation to state reasons therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons (see Case T-218/02 *Napoli Buzzanca v Commission* [2005] ECR II-0000, paragraph 57, and case-law cited). (§ 138).

In the same case the Court summed up its legal considerations on the matter as follows:

[...] unless precluded by overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, and subject also to what has been set out in paragraph 147 above, 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 116 above and also, where applicable, to the aspects referred to in paragraphs 125 and 126 above, 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. (§ 151).

36. It follows that in the case at issue the PMOI had the right to look into the “ actual and specific reasons” for the Council’s decision to keep it on the List of terrorist organizations. As noted above, the document accompanying the Council’s decision refers instead to prosecutorial action taken in Paris against “alleged members” of the organization. As I have already stressed, the organization as such may not under French law become cognizant of the charges made by the French prosecutors. It follows that the organization is not in a position to have sufficient information available that can make it possible for it to determine whether the Council decision is well founded or instead vitiated by an error invalidating it.

V. The Council Failed to Notify the OMPI *Before* Taking Its Decision to Continue with the Freezing of OMPI’ s Assets.

37. In its case law the Court of First Instance set forth an important principle: when the EU Council does not take an *initial* decision to freeze funds, but simply decides on the *continuation*, whether on the same or other grounds, of the freezing of assets belonging to allegedly terrorist persons or organizations, it must advise the parties concerned of the new evidence **before** taking any decision, and also enable them **to be heard before** the decision. As the Court put it in *OMPI v Council of the EU*:

It must be emphasised, however, that the considerations just mentioned [concerning the need for a surprise effect when deciding on an initial freezing of funds] are not relevant to subsequent decisions to freeze funds adopted by the Council in connection with the re-examination, at regular intervals, at least every six months, of the justification for maintaining the parties concerned in the disputed List, provided for by Article 1(6) of

Common Position 2001/931. At that stage, the funds are already frozen and it is accordingly no longer necessary to ensure a surprise effect in order to guarantee the effectiveness of the sanctions. **Any subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence.**(§ 131; emphasis added; see also § 137).

38. In the case at issue on 17 July 2008 the Council notified to the PMOI its decision of 15 July 2008. It had not given the PMOI any prior notice thus enabling it to set forth its considerations and views before the decision was taken. This amounts to a blatant disregard for the crystal clear case law of the Court.

39. The Council was fully aware of this procedure (namely of its obligation to provide the reasons in advance of adopting the decision) and had acknowledged it in its defence to the application filed by PMOI with the CFI on 23 July 2007 (case T-156, currently stay). Arguing that it had not breached the condition set by the CFI judgment in *OMPI v. Council* of the EU, it said “ the Council therefore considered that, before taking a new decision with regard to the applicant, it would first have to comply with the procedural requirements which the Court laid down in case T – 228/02.” on Thus on 30 January 2007 the Council sent the applicant a statement of reasons, inviting it to submit its observations thereon within one month. The applicant presented its observation to the Council by letter of 27 February 2007. Referring to further communications with the PMOI lawyers, the Council’s defence contends that relevant information was provided to the PMOI and its observations were duly considered before adopting its decision in June 2007.

VI. The Council Decision Circumvents the Judicial Safeguards Provided by French Law

40. The Council decision is also objectionable from another viewpoint: it bypasses a set of judicial guarantees laid down in French law with regard to (i) the rights of persons suspected or accused of crimes, and (ii) economic sanctions that can be taken against individuals or organizations suspected of and being investigated for a range of crimes among which that of terrorism.

41. The preliminary article (*Article préliminaire*) to the French Code of Criminal Procedure, introduced in 2000, lays down a set of fundamental guarantees of the rights of persons suspected or accused of crimes. Those relevant to our discussion are set out in para III (“Every person suspected or prosecuted [...] has **the right to be informed of charges** brought against him and to be legally defended”; emphasis added).² Furthermore, the principle is also laid down that “The coercive measures to which such a person [suspected or prosecuted] may be subjected **are taken by or under the effective control of judicial authority**. They should be strictly limited to what is necessary for the process, proportionate to the gravity of the offence charged and not such as to infringe human dignity”³. The notion of “coercive measures” relates of course not only to detention of the accused but also to the taking of interim measures concerning assets and other goods belonging to the persons concerned.

42. Clearly, the Council decision concerning PMOI, in addition to falling foul of the relevant European law, is also at odds with French law.

² “Elle [toute personne suspectée ou poursuivie] a le droit d’être informée des charges retenues contre elle et d’être assistée d’un défenseur ».

³ “Les mesures de contraintes dont cette personne [suspectée ou poursuivie] peut faire l’objet sont prises sur décision ou sous le contrôle effectif de l’autorité judiciaire. Elles doivent être strictement limitées aux nécessités de la procédure, proportionnées à la gravité de l’infraction reprochée et ne pas porter atteinte à la dignité de la personne. »

43. The Council decision is first of all violative of the aforementioned provisions of French law laying down the fundamental right of every (natural or legal) person to become apprised of the charges levelled against him or it. In the case under discussion the PMOI was never informed of the French prosecutorial decisions (which related to alleged members of the PMOI).

44. With regard to the possibility of taking interim measures concerning assets of a suspected or accused person, it should be recalled that under French law while a person suspected of a crime is being investigated (*mise en examen*) by an investigating judge (*juge d'instruction*), another judge, namely the judge that rules on detention (*juge des libertés et de la détention*) may, at the request of the Prosecutor, take interim measures (*mesures conservatoires*) concerning assets belonging to the person being investigated (Article 706-103 C.C.P.). Thus, in France interim measures (including the freezing of the assets of the person at issue) may only be ordered by an independent judge, who, besides must be a high-ranking and experienced judge (see Article 137-1 (2) C.C.P.; see also *Circulaire* CRIM 00-16 F1 of 20 December 2000). The maintenance of the interims measures is made contingent on the outcome of the investigation or, if there is committal for trial, of the trial proceedings: pursuant to Article 706-103 C.C.P. any conviction entails validation of the interim measures, whereas the investigating judge's decision to dismiss the charges (*non-lieu*), or the trial court's discharge (*relaxe*) or acquittal (*acquittement*) of the accused automatically entail discontinuation of the interim measures (the same holds true for the case where the public prosecution comes to an end on account of one of the reasons provided for in Article 6(1) C.C.P., which include the operation of the statute of limitation and any amnesty).

45. It is apparent from the above that under French law the taking of interim measures (such as the freezing of assets) against a person being investigated is hemmed about by **a set of strict judicial safeguards**. At the EU level, such measures (defined by the Court of First Instance in *Jose Maria Sison and others v. Council of the EU* as "individual economic and financial sanctions", at § 140) are instead taken by a **political body** (the EU Council), based on decisions of a national judicial authority that – according to the EU Council-- can actually embrace a prosecutorial officer.

46. This situation is even worsened when, as in the case under discussion, the legal entity targeted by the freezing of funds is not even able to exercise its rights of defence at the national level.

VII. The French Prosecutorial Action is Glaringly Inconsistent with the Principle of Fair and Expeditious Justice and the Presumption of Innocence

47. Another issue that cannot be glossed over relates to the fact that investigations into alleged terrorist crimes committed by alleged members of the People's Mujahidin Organization of Iran, initiated in 2001, have not yet led to any tangible result. It is indeed striking that the first prosecutorial request (*réquisitoire introductif*) addressed to an investigating judge in Paris was made back in April 2001. Although new charges were made in March 2007 and then in November 2007, to the best of my knowledge so far these investigations have not led to any arrest let alone trial. This is manifestly contrary to one of the fundamental principles of French criminal procedure (see Preliminary Article to the C.C.P., III (4): "The accusation brought against such a person [suspected or prosecuted] shall be brought to final judgment **within a reasonable time**"; emphasis added).⁴ That the notion of "reasonable delay" also applies to the action of the prosecution was

⁴ "Il doit être définitivement statué sur l'accusation dont cette personne [suspectée ou poursuivie] fait l'objet dans un délai raisonnable ».

stated, among other things, by the French *Cour de cassation (section criminelle)*, 10 December 2000 (*pourvoi* no.02-82.540)

48. This circumstance, in itself, renders all the more questionable the renewed freezing of goods that --- let me stress it again-- belong not to the persons being investigated but to an association that is distinct from its members and is legally registered in France. Here the exercise of prosecutorial action and the consequent investigations of the *juge d'instruction*, coupled with the renewal of administrative sanctions taken at the EU level, borders on the arbitrary. What is the **legal and moral justification** of economic sanctions (which are visited at the international level against an association, and are premised on the initiation in France of investigations against some alleged members of the association), **if such investigations have been going on for years without leading to any trial and the consequent establishment of truth?** Could one still claim that the prosecutorial action at the national level warrants the taking of sanctions at the international level?

49. This patent and conspicuous gap between fast-moving international administrative sanctioning and slow national prosecutorial action is all the more regrettable and indeed questionable because it runs counter to and indeed tramples under feet the fundamental **presumption of innocence** -- a right, let it be emphasised, which, being one of the pillars of democracy and of the rule of law in European democratic States, also accrues to associations and other legal bodies (*personnes morales*).

50. In the French legal system the presumption of innocence is elevated to the status of a cardinal principle of any criminal proceeding. As was rightly held by the French Constitutional Council (*Conseil Constitutionnel*) in its decision of 2 February 1996 (no. 95-360), that presumption is proclaimed in Article 9 of the *Déclaration des droits de l'homme et du citoyen*, which is part and parcel of the Constitution. Moreover, pursuant to the Preliminary Article to the C.C.P. (III(1): "Every person suspected or prosecuted is presumed innocent as long as guilt has not been established. Attacks on his presumption of innocence are prevented, compensated and punished under the conditions laid down in statute"⁵.

51. To hold for seven years a person a group or an entity within a legal limbo, with the status of accused, is contrary to the presumption of innocence. For such presumption requires that any prosecuting authority that prefers criminal charges against a person, a group or an entity should expeditiously clarify the matter and therefore either request that the accused be committed for trial or drop the charges. However complex, laborious and cumbersome the investigations for crimes of terrorism may be, such difficulties may not justify that the targeted person, group or entity be labelled as "suspected" or "accused" of terrorist offences **for seven years**. Fundamental human rights principles and in particular the presumption of innocence may not allow such conduct of national authorities.

VIII. The Council Action Amounts to a Patent Misuse of Powers

52. The cumulative effect of all the aforementioned deficiencies of the Council action, combined with the surprising slowness of the French prosecutorial investigations, seems to warrant the conclusion that we are faced here with a clear instance of misuse of powers, in particular of a procedural misuse of power, by the Council.

⁵ "Toute personne suspectée ou poursuivie est présumée innocente tant que sa culpabilité n'a pas été établie. Les atteintes à sa présomption d'innocence sont prévenues, réparées et réprimées dans les conditions prévues par la loi. »

53. According to the case law of the European Court, misuse of powers, as provided for in Art. 230(2), occurs any time a EC organ having the power to take a certain act, performs such act for a purpose other than that envisaged by the relevant community norm that granted the power (see for instance *Henri Maurissen v Court of Auditors of the European Communities*, 21 October 1992 (case T-23/91), at §§ 28-34). A clear illustration of this notion was given in *Franco Giuffrida v. Council of the European Communities*, European Court of Justice, judgment of 29 September 1978, case 105-75. The Council had organized a competition for the appointment of an official “for the sole purpose of remedying an anomalous administrative status of a specific official and of appointing that same official to the post declared vacant” (§ 10). The Court noted that “the pursuit of such a specific objective is contrary to the aims of any recruitment procedure, including the internal competition procedure, and thus constitutes a misuse of powers” (§11).

54. The Court has also stated that misuse of powers can take the shape of a **misuse of procedure**, whenever a certain procedure envisaged by a EC norm is used for a purpose other than that assigned by the relevant norm. A telling illustration of this notion is *Frydendahl Pedersen v Commission of the European Communities* (22 September 1988, case 148/87). The Commission had asked Denmark to withdraw a request for refund of sums paid as import duties on fishing nets, and to re-submit it later. When the request was re-submitted, the Commission stated that the prescribed four-month period had elapsed and the request was therefore unlawful. The Court found that the Commission had misused its procedural powers, for in fact its invitation to re-submit the request was only designed to interrupt the four-month period, at the elapse of which the Commission’s inaction would otherwise have automatically involved acceptance of the request. This is what the Court held on the question:

11[...] it should be noted that the Commission itself acknowledged in its defence that, in order to remedy the "unsatisfactory" legal situation explained above, it had adopted, pursuant to Article 25 (2) of Council Regulation No 1430/79, new rules in Regulation No 3799/86, which took effect on 1 January 1987, extending to six months the four-month period previously applicable. Those new rules provide, in addition, for a further extension "where the Commission has found it necessary to request additional information from the Member State ".

12 However, in the case now before the Court, instead of asking for further information in good time and adopting the decision within the period laid down, the Commission asked the Danish authorities, in a telex message of 7 October 1986, to withdraw their request and to re-submit it at a later date. **It must therefore be assumed that the real purpose of the practice complained of was to avoid the consequences provided for in Article 7 of Regulation No 1575/80 should no decision be taken within the prescribed period. Consequently, it must be held that the Commission thereby committed a misuse of procedure.**

13 In those circumstances and without there being any need to examine the applicant' s other submissions, it must be held that the Commission' s decision of 26 February 1987, which was not adopted within the prescribed four-month period which started to run from the time when the request was submitted by the Danish authorities on 11 June 1986, must be declared void because **it was adopted on the basis of a procedure which was vitiated in its entirety**. The applicant is accordingly entitled to be repaid the import duties forming the subject-matter of that request. (emphasis added).

55. In the case under discussion the following striking circumstances must be emphasised:

- 1) In spite of the Court’s decision of 12 December 2006, the Council has continued to maintain the PMOI on the List;

- 2) The Council was aware that after May 2008 the PMOI could no longer be held on the List because the judgment of 7 May 2008 of the British Court of Appeal had removed the legal basis of the Council's keeping the PMOI on the List.
- 3) The Council knew very well, as acknowledged in its submissions to the Court, that it was obliged to provide PMOI with a fresh statement of reasons and any new evidence prior to adopting any decision; nevertheless it failed to do so.
- 4) The Council was furthermore aware that the Court of First Instance, when pronouncing on the applications for annulment filed by the PMOI on 9 May 2007 and on 16 July 2007, was likely to annul the various Council decisions taken against the PMOI in 2007-2008.
- 5) As soon as the judgment of the Court is out, the Council would have no legal ground any more on which to base its decision to keep the PMOI on the List.

56. The Council also knew that the Court of First instance had set out a clear legal notion in *PMOI v. Council*, where it had ruled that

[...]where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered **a new factor** allowing the applicant to adapt its claims and pleas in law. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a decision contained in an application to the Community judicature, **to amend the contested decision or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending his original pleadings to the later decision or of submitting supplementary pleadings directed against that decision** (Case 14/81 *Alpha Steel v Commission* [1982] ECR 749, paragraph 8; Joined Cases 351/85 and 360/85 *Fabrique de Fer de Charleroi and Dillinger Hüttenwerke v Commission* [1987] ECR 3639, paragraph 11; Case 103/85 *Stahlwerke Peine-Salzgitter v Commission* [1988] ECR 4131, paragraphs 11 and 12; and Joined Cases T-46/98 and T-151/98 *CCRE v Commission* [2000] ECR II-167, paragraph 33).”(§ 28; emphasis added).

57. This however precisely what the Council did when, to salvage its previous decision that was bound to fall apart on account of the British appellate court's judgment, it almost overnight propped up its decision to keep the PMOI on the List by referring to the French prosecutorial decisions.

58. In light of these considerations, it is apparent that the 15 July 2008 decision and its relying upon three French prosecutorial decisions appear as a last-ditch attempt at maintaining the PMOI on the List. It is indeed striking that **only on July 2008 did the Council expressly invoke some French prosecutorial decisions**, to which it might have referred back in 2001 or at least in 2003. In this connection it bears emphasizing that in 2006 the Council was fully aware of the French investigation since it was discussed in a Court hearing on *OMPI v. Council* on 7 February 2006. The following is the relevant part of the minutes of the hearing:

Council [...] In 2003 we saw that the French ----authority at the time had some serious clues that 160 of their members were at least suspected of at least participating in terrorist activities or were planning to do so. So, those are 2elements in the case file to show even if we count say explicitly the acts of terrorism, the national ---- authority spring to, still it does go to show that there were some serious suspicions around certain activities which wanted collected decisions to keep the organisation on the list.

Judge: The actions of the French authorities constituted relevant decisions of competent authorities for the purpose of satisfying conditions in article 1 para4 of the common position and where do we find that in any of the decisions?

Council: Well in referring to the council taking its collective decision my point is that of and beyond the United Kingdom decision there were also other material that led to the decision by the Competent Authority to keep the applicant on the list. (Unofficial transcript of the hearing of 7 February 2006, pp.21-22, emphasis added).

UNITED KINGDOM: the 1st point I wish to make is that although and there is a reference to a Competent Authority indeed **there maybe the case that there is more than one Competent Authority**, and in this case the UNITED KINGDOM was refused suggestion that it was the only Competent Authority where relevant decisions had been taken.

Judge: Sorry, could you specify, **are you suggesting that there were other relevant decisions of competent authorities for the purpose of article1-4 that formed the basis of the council decision in question?**

UNITED KINGDOM: We believe that there were, but I don't have the details of those, ----today so I don't have specific instructions in relation to what the decisions may or not have formed the basis of that listing process. (*ibidem*, pp. 22-23; emphasis added)

59. In another part of the minutes the Council acknowledged that the UK was the only competent authority relied upon (see pp. 22-27).

60. It should be stressed that in the Court hearing of 7 March 2007 the Council held the contrary view, namely that it had always and exclusively relied on the facts and the evidence produced to the PMOI, namely the British evidence. The Judge (Forwood) asked whether the Council had relied on documents other than the decision by the British Secretary of State concerning the PMOI. The Council representative (Bishop) answered as follows:

Bishop: The Council is not [in] this statement of reasons, in fact, relying on evidence which does not appear there, and which has not been disclosed to the Applicants and was the subject of the procedure. In other words, it is not relying before court on other evidence which was not put forward. It is relying on this statement of reasons (Unofficial transcript of the hearing before the Court of First instance, 6 March 2007, Part Two, p.2).

61. The conclusion is warranted that the Council had detailed knowledge of the French prosecutorial decisions but did not hold them to be decisions by a "competent authority."

62. Another conspicuous flaw compounding the whole decision-making process concerning PMOI ought to be stressed. Reportedly the French investigations by the Paris Office of the Prosecutor, which began in 2001, to a large extent relied on the EU List of terrorists and terrorist organizations, which included PMOI. At present the Council, in its turn, to justify its keeping the PMOI on the

List refers back to the French prosecutorial decisions. This is indeed a **circular argument**, a sort of **sinister and ineluctable “Catch-22 situation”**.

63. The underlined features and inherent contradictions of the step taken by the Council on 15 July 2008, coupled with all its major legal flaws stressed above, make it clear that **the Council has abused its procedural powers**. What is the reason why, when considering whether to put or to maintain a person or an organization on the List, the Council was granted the power **and the duty** to rely upon “decisions” of national “judicial authorities”? The need for the Council **to strike a balance between the demands of the fight against terrorism and the requirements of respect for human rights and for the fundamental principle of presumption of innocence**. The need not to proceed on the basis of political assessments or of evaluations made by national administrative organs or bodies acting outside any judicial scrutiny. The need to act instead based on appraisals made by national judicial authorities who must operate on the strength of the “rule of law” so as not recklessly to infringe fundamental human rights of the persons or entities concerned.

64. If the Council has instead recourse to national prosecutorial decisions only for the purpose of somehow justify the maintenance of the PMOI on the List, it clearly misuses its procedural powers. The Council has indeed used the French prosecutorial decisions for a purpose other than that envisaged in Council Common Position 2001/931/CFSP (to combat terrorism while fully respecting the fundamental rights of the persons or groups who may be suspected of engaging in terrorism). The Council has abused its powers because it has taken the French prosecutorial decisions as a **procedural pretext** for its maintaining, probably on political or other inscrutable grounds, the PMOI on the List.

65. Let me add that the case under discussion exhibits **striking similarities** with *Franco Giuffrida v. Council of the European Communities*. As in that case, a procedure (the opening of a formal competition, in that case; resort to and reliance upon national decisions in our case) has been used only **as a formal pretext** for doing something that had already been decided on other grounds: it had already been decided that a certain person would be appointed to the job, and the opening of the competition was only used to give **a semblance of legality** to a decision already made. Similarly, in the PMOI case under discussion a legal and procedural formality (reliance upon French prosecutorial decisions) has been merely used as a means of formally justifying a measure that had already been decided upon for other reasons. As in that case, **a fundamental right of the claimant has been breached** (in *Franco Giuffrida v. Council of the European Communities* the right of Giuffrida to be equally, impartially and fairly considered in the competition for the job announced; in our case the right of the PMOI to its defence and to a fair hearing).

IX. Summing Up and Conclusion

66. It is apparent from the above considerations that the Council has seriously violated both the text and the spirit of Council Common Position 2001/931/CFSP, and a fundamental right laid down in Community law: the right to defence, with its implications and ramifications (the right to be informed of the facts and evidence on which a likely adverse decision will be based; the right to set forth one’s own views and comments on such an adverse decision before it is formally taken; the presumption of innocence).

67. The Council has also undertaken an action that in fact circumvents the judicial safeguards laid down in French law on the matter of seizure or freezing of funds.

68. The many legal flaws of the Council action and the general context of its action towards the PMOI warrant the contention that by taking its decision on 15 July 2008 the Council engaged in serious misuse of powers, one of the grounds for annulment of Community acts by the European Court pursuant to Article 230(2) of the Treaty on the European Community.

Professor Antonio Cassese

A handwritten signature in black ink, appearing to read 'Antonio Cassese', written in a cursive style.

Florence, 10 September 2008

ANNEX

Antonio Cassese

Curriculum vitae et studiorum

- **Professor of international law**, University of *Pisa* (1972-74); 1975-2008 Professor of international law, University of *Florence*; Visiting fellow, All Souls College, *Oxford University* (1979-80); in 1987-93 professor of law at the *European University Institute*
- Member of the **Italian delegation** to the UN Commission on Human Rights (1972-75), the UN General Assembly (1974, 1975, 1978), and the Geneva Diplomatic Conference on International Humanitarian Law (1974-77)
- **Member and Chairman**, Council of Europe Steering Committee on Human Rights (1984-88); **member and President**, Council of Europe Committee against Torture (1989-93)
- **Judge** (1993-2000) and **President** (1993-1997) of the UN International Criminal Tribunal for the former Yugoslavia
- **Chairman** of the UN **International Commission of Inquiry into Genocide in Darfur** (Sudan) (appointed by the UN Secretary Kofi Annan on 7 October 2004). Report delivered on 25 January 2005 online: UN doc. S/2005/60; www.un.org).
- **Independent Expert** appointed by the UN Secretary-General in September 2006, with the task of reviewing the efficiency of the Special Court for Sierra Leone (Report delivered on 12 December 2006, online: <http://www.sc-sl.org/documents/independentexpertreport.pdf>)

Academic activities:

- **Doctor in Law *honoris causa***, Erasmus University of Rotterdam (1998), University of Paris X (1999), University of Geneva (2000); University of Athens (2006)
- **Has lectured** in Paris (Collège de France, Paris-I-Sorbonne, Paris II, Paris XIII), Cambridge (Sir Hersch Lauterpacht Lectures); Oxford (Sir Isahia Berlin Lectures); Gröningen (B.V.A. Röling Lectures), Brussels and Louvain (Henri Rolin Lectures), New York (Columbia University), Boston (Harvard Law School), London (London School of Economics, Chorley Lecture)
- Holder of the **International Research Chair “Blaise Pascal”** (University of Paris-Sorbonne), 2001-2002
- Winner of the **2002 International Prize** granted by the “Académie Universelle des Cultures” presided over by the Nobel Peace Prize Elie Wiesel, “for the exceptional contribution to the protection of human rights in Europe and the world” (“en reconnaissance de l’importance exceptionnelle de votre contribution à la défense des droits de l’homme en Europe et dans le monde” (letter of Elie Wiesel, 13 May 2002)
- **Member** of the *Institut de droit International* (since 1995)
- **Certificate of merit**, American Society of International Law, 1996 (for the book “Self-determination of Peoples – A Legal Reappraisal”)
- **Robert G. Storey Award for Leadership**, South-Western Legal Foundation, Dallas, Texas, 1997
- **Director**, Ethics Project (a three-year project financed by the European Commission and managed by the European University Institute, for high-level training of national judges and prosecutors in international criminal law, with particular reference to the International Criminal Court), 2003-2006
- **Distinguished Global Fellow**, New York University School of Law, 2004
- **Received** in 2005 from the Mr. C.A. Ciampi, President of the Italian Republic the highest honour (“*Cavaliere di Gran Croce*”) for his scientific and professional achievements
- Granted in March 2007 the **Wolfgang Friedmann Award**, Columbia University Law School, New York

- **Co-founder and co-editor** of the *European Journal of International Law* (published by Oxford University Press)
- **Founder and Editor-in-Chief** of the *Journal of International Criminal Justice* (published by Oxford University Press)

Principal publications:

- *Violence and Law in the Modern Age* (Cambridge: Polity Press, 1986); translated into French and Japanese
- *International Law in a Divided World* (Oxford: Oxford University Press, 1986) translated into French and Italian
- *Terrorism, Politics and Law* (Cambridge: Polity Press, 1989)
- *Human Rights in a Changing World* (Cambridge: Polity Press, 1990), translated into Spanish and Indonesian
- *The Tokyo Trial and Beyond* (with B.V.A. Röling) (Cambridge: Polity Press, 1993), translated into Japanese
- *Self-determination of Peoples – A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995)
- *Inhuman States – Imprisonment, Detention and Torture in Europe Today* (Cambridge: Polity Press, 1996)
- *International Law* (Oxford University Press, 2001); second edition published in 2005; translated into Chinese, Portuguese and Persian
- *Crimes internationaux et juridictions internationales* (editor with M.Delmas-Marty), (Paris: Presses Universitaires de France, 2002)
- *Juridictions nationales et crimes internationaux* (editor with M. Delmas-Marty) (Paris: Presses Universitaires de France, 2002)
- *The Rome Statute of the International Criminal Court : A Commentary*, 3 vols. (editor in chief) (Oxford, Oxford University Press, 2002)
- *International Criminal Law* (Oxford University Press, 2003); translated into Persian, Serbo-Croatian, Chinese and Italian
Second edition (2008)
- *The Human Dimension of International Law - Selected Papers*, Oxford, Oxford University Press, 2008
- *Oxford Companion to International Criminal Law and Justice* (editor in chief), Oxford University Press (forthcoming: October 2008)