Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

12 February 2020*

(Common foreign and security policy — Restrictive measures adopted in view of the situation in the Democratic Republic of the Congo — Freezing of funds — Continued inclusion of the applicant's name on the list of persons covered— Obligation to state reasons — Rights of the defence — Obligation on the Council to disclose new evidence justifying the renewal of restrictive measures — Error of law — Manifest error of assessment — Right to property — Proportionality — Presumption of innocence — Plea of illegality)

In Case T-163/18,

Gabriel Amisi Kumba, residing in Kinshasa (Democratic Republic of the Congo), represented by T. Bontinck, P. De Wolf, M. Forgeois and A. Guillerme, lawyers,

applicant,

v

Council of the European Union, represented by J.-P. Hix, H. Marcos Fraile and S. Van Overmeire, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for the annulment of Council Decision (CFSP) 2017/2282 of 11 December 2017 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo (OJ 2017 L 328, p. 19), in so far as it concerns the applicant,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of S. Gervasoni, President, L. Madise, R. da Silva Passos (Rapporteur), K. Kowalik-Bańczyk and C. Mac Eochaidh, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 4 July 2019,

gives the following

* Language of the case: French.

Judgment [1]

Background to the dispute

1 The applicant, Mr Gabriel Amisi Kumba, is a national of the Democratic Republic of the Congo.

2 The present case falls within the context of the restrictive measures imposed by the Council of the European Union with a view to establishing lasting peace in the Democratic Republic of the Congo and applying pressure on persons and entities acting in breach of the arms embargo against that State.

3 On 18 July 2005, the Council adopted, on the basis of Articles 60, 301 and 308 EC, Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo (OJ 2005 L 193, p. 1).

4 On 20 December 2010, the Council adopted, on the basis of Article 29 TEU, Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP (OJ 2010 L 336, p. 30).

5 On 12 December 2016, the Council adopted, on the basis of Article 215 TFEU, Regulation (EU) 2016/2230 amending Regulation No 1183/2005 (OJ 2016 L 336 I, p. 1).

6 On the same date, the Council adopted, on the basis of Article 29 TEU, Decision (CFSP) 2016/2231 amending Decision 2010/788 (OJ 2016 L 336 I, p. 7).

7 Recitals 2 to 4 of Decision 2016/2231 read as follows:

> ‘(2) On 17 October 2016, the Council adopted conclusions expressing deep concern at the political situation in the Democratic Republic of the Congo (DRC). In particular it strongly condemned the acts of extreme violence that took place on 19 and 20 September in Kinshasa, noting that those acts further exacerbated the deadlock in the country due to the failure to call the presidential elections by the constitutional deadline of 20 December 2016.
>
> (3) The Council stressed that, in order to create a climate conducive to dialogue and the holding of elections, the Government of the DRC must clearly commit to ensuring that human rights and the rule of law are respected and must cease all use of the justice system as a political tool. It also called on all stakeholders to reject the use of violence.
>
> (4) The Council also indicated its readiness to use all the means at its disposal, including restrictive measures against those responsible for serious human rights violations, those who promote violence and those who try to obstruct a consensual and peaceful solution to the crisis which respects the aspiration of the people of the DRC to elect their representatives.’

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

8 Article 3(2) of Decision 2010/788, as amended by Decision 2016/2231, provides as follows:

‘Restrictive measures as provided for in Articles 4(1) and 5(1) and (2) shall be imposed against persons and entities:

(a) obstructing a consensual and peaceful solution towards elections in [the Democratic Republic of the Congo], including by acts of violence, repression or inciting violence, or by undermining the rule of law;

(b) involved in planning, directing or committing acts that constitute serious human rights violations or abuses in [the Democratic Republic of the Congo];

(c) associated with those referred to in points (a) and (b);

as listed in Annex II.’

9 Under Article 4(1) of Decision 2010/788, as amended by Decision 2016/2231, ‘Member States shall take the necessary measures to prevent the entry into or transit through their territories of the persons referred to in Article 3’.

10 Article 5(1), (2) and (5) of Decision 2010/788, as amended by Decision 2016/2231, provides as follows:

‘1. All funds, other financial assets and economic resources owned or controlled directly or indirectly by the persons or entities referred to in Article 3 or held by entities owned or controlled directly or indirectly by them or by any persons or entities acting on their behalf or at their direction, as identified in Annex I and II, shall be frozen.

2. No funds, other financial assets or economic resources shall be made available, directly or indirectly, to or for the benefit of the persons or entities referred to in paragraph 1.

…

5. With regard to persons and entities referred to in Article 3(2), the competent authority of a Member State may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as it deems appropriate, after having determined that the funds or economic resources concerned are:

(a) necessary to satisfy the basic needs of the persons and entities and dependent family members of such natural persons, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;

(b) intended exclusively for the payment of reasonable professional fees and the reimbursement of incurred expenses associated with the provision of legal services;

…

(d) necessary for extraordinary expenses, provided that the competent authority has notified the competent authorities of the other Member States and the Commission of the grounds on which it considers that a specific authorisation should be granted, at least two weeks prior to the authorisation.’

11 Article 6(2) of Decision 2010/788, as amended by Decision 2016/2231, provides as follows:

'2. The Council, acting upon a proposal from a Member State or from the High Representative of the Union for Foreign Affairs and Security Policy, shall establish and amend the list in Annex II.'

12 Article 7(2) and (3) of Decision 2010/788, as amended by Decision 2016/2231, provides as follows:

'2. The Council shall communicate the decision referred to in Article 6(2), including the grounds for the listing, to the person or entity concerned, either directly, if the address is known, or through the publication of a notice, providing such person or entity with an opportunity to present observations.

3. Where observations are submitted, or where substantial new evidence is presented, the Council shall review its decision and inform the person or entity concerned accordingly.'

13 Under Article 9(2) of Decision 2010/788, as amended by Decision 2016/2231, 'the measures referred to in Article 3(2) shall apply until 12 December 2017' and 'they shall be renewed, or amended as appropriate, if the Council deems that their objectives have not been met'.

14 As for Regulation No 1183/2005, Article 2b(1) thereof, as amended by Regulation 2016/2230, provides as follows:

'1. Annex Ia shall include the natural or legal persons, entities or bodies designated by the Council on any of the following grounds:

…

(b) planning, directing, or committing acts that constitute serious human rights violations or abuses in [the Democratic Republic of the Congo]'.

15 The applicant's name was added by Decision 2016/2231 to the list of persons and entities set out in Annex II to Decision 2010/788 ('the list at issue') and by Regulation 2016/2230 to the list of persons and entities set out in Annex Ia to Regulation No 1183/2005.

16 In Annex II to Decision 2010/788, as amended by Decision 2016/2231, and in Annex Ia to Regulation No 1183/2005, as amended by Regulation 2016/2230, the Council justified adoption of the restrictive measures against the applicant on the following grounds:

'Commander of the 1st defence zone of Congolese Army (FARDC) whose forces took part in the disproportionate use of force and violent repression, in September 2016 in Kinshasa. In this capacity, Gabriel Amisi Kumba was therefore involved in planning, directing, or committing acts that constitute serious human rights violations in [the Democratic Republic of the Congo].'

17 On 13 December 2016, the Council published in the *Official Journal of the European Union* a notice for the attention of the persons subject to the restrictive measures provided for in Decision 2010/788, as amended by Decision 2016/2231, and in Regulation No 1183/2005, as amended by Regulation 2016/2230, concerning restrictive measures against the Democratic Republic of the Congo (OJ 2016 C 463, p. 2). The notice stated, inter alia, that the persons concerned could submit a request to the Council before 1 October 2017, together with supporting documentation, to have it reconsider the decision to include them on the list at issue and on the list of persons and entities set out in Annex Ia to Regulation No 1183/2005. That notice also stated that any observations received would be taken into account for the purpose of the Council's subsequent review, pursuant to Article 9 of Decision 2010/788.

18 By application lodged at the Court Registry on 6 March 2017, the applicant brought an action for, in essence, annulment of Regulation 2016/2230 in so far as it concerned him. That action was registered as Case T-141/17.

19 On 29 May 2017, the Council adopted, on the basis of Article 31(2) TEU and Article 6(2) of Decision 2010/788, Implementing Decision (CFSP) 2017/905 implementing Decision 2010/788 (OJ 2017 L 138 I, p. 6). On the same date, the Council adopted Implementing Regulation (EU) 2017/904 implementing Article 9(2) of Regulation No 1183/2005 (OJ 2017 L 138 I, p. 1). Those measures added the names of other natural persons to the list at issue and the list set out in Annex Ia to Regulation No 1183/2005, respectively.

20 On 11 December 2017, at the end of the process of reviewing the measures at issue, the Council adopted, on the basis of Article 29 TEU, Decision (CFSP) 2017/2282 amending Decision 2010/788 (OJ 2017 L 328, p. 19; 'the contested decision'). Article 1 of that decision thus replaced the text of Article 9(2) of Decision 2010/788 with the following text:

'The measures referred to in Article 3(2) shall apply until 12 December 2018. They shall be renewed, or amended as appropriate, if the Council deems that their objectives have not been met.'

21 Following the applicant's discontinuance of the action, Case T-141/17, referred to in paragraph 18 above, was removed from the Court's register by order of 7 December 2018.

Procedure and forms of order sought

22 By application lodged at the Court Registry on 8 March 2018, the applicant brought the present action.

23 By decision of 12 October 2018, the President of the Ninth Chamber of the General Court decided to join the present case with Cases T-164/18 *Kampete* v *Council*, T-165/18 *Kahimbi Kasagwe* v *Council*, T-166/18 *Luyoyo* v *Council*, T-167/18 *Kanyama* v *Council*, T-168/18 *Numbi* v *Council* and T-169/18 *Kibelisa Ngambasai* v *Council*, for the purpose of the written part and any oral part of the procedure.

24 Acting upon a proposal of the Judge-Rapporteur, the Court decided to open the oral part of the procedure. On 15 May 2019, the Court assigned the case to the Ninth Chamber sitting in extended composition.

25 At the hearing on 4 July 2019, the parties presented oral argument and replied to oral questions put by the Court.

26 The applicant claims that the Court should:

– annul the contested decision, in so far as it concerns him;

– order the Council to pay the costs.

27 The Council contends that the Court should:

– dismiss the action;

– in the alternative, in the event that the contested decision is annulled, maintain the effects of that decision in relation to the applicant until expiry of the period for bringing an appeal against the judgment of the Court or, if an appeal is brought within that period, until dismissal of that appeal;

– order the applicant to pay the costs.

Law

28 In support of his claims for annulment of the contested decision, the applicant raises four pleas in law, alleging: (i) infringement of the obligation to state reasons and of the right to be heard; (ii) an error of law and a manifest error of assessment; (iii) infringement of the right to respect for private and family life, the right to property and the principle of proportionality; and (iv) that Article 3(2)(b) of Decision 2010/788 and Article 2b(1)(b) of Regulation No 1183/2005 are unlawful.

First plea: infringement of the obligation to state reasons and of the right to be heard

29 The first plea is in two parts: the first alleges infringement of the obligation to state reasons and the second alleges infringement of the right to be heard.

First part of the first plea

30 In the first part of the first plea, the applicant submits that the Council infringed the obligation to state the reasons for an act adversely affecting a person, as laid down in Article 296 TFEU. The applicant argues that the statement of reasons for the contested decision is particularly concise, as the Council does not put forward any specific accusation or point to any particular and identifiable act that would, leaving no real doubt, bear out the complaints made against him in that statement of reasons. According to the applicant, the contested decision is thus based on mere hypothetical assertions which are impossible to verify and place him under an obligation to adduce evidence, proving a negative, as to the non-existence of the general case against him, resulting in a reversal of the burden of proof.

31 The Council disputes those arguments.

32 In that regard, first of all, it should be borne in mind that the purpose of the obligation to state the reasons for an act adversely affecting a person, as laid down in the second paragraph of Article 296 TFEU, 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 Courts of the European Union and, second, to enable those Courts to review the lawfulness of the act. The obligation to state reasons thus laid down constitutes an essential principle of EU law which may be derogated from only for compelling reasons. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Courts of the European Union (judgment of 7 December 2011, *HTTS* v *Council*, T-562/10, EU:T:2011:716, paragraph 32).

33 Next, the statement of reasons must be appropriate to the act at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the act, the nature of the reasons given and the interest which the addressees of the act, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for an act adversely affecting a person are sufficient if that act was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him (judgments of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraph 54, and of 14 October 2009, *Bank Melli Iran* v *Council*, T-390/08, EU:T:2009:401, paragraph 82).

34 The obligation on the Council to state reasons relates to indicating the legal basis of the measure adopted and to the circumstances which enable it to hold that one or other of the listing criteria is satisfied in the case of the parties concerned (judgment of 18 September 2014, *Central Bank of Iran* v *Council*, T-262/12, not published, EU:T:2014:777, paragraph 86).

35 Consequently, it is necessary to examine whether the statement of reasons for the contested act contains explicit references to the listing criterion at issue and whether, if that is the case, the statement of reasons may be regarded as sufficient to enable the applicant to determine whether the contested act is well founded and to state a defence before the General Court, and to enable the latter to exercise its power of review (see, to that effect, judgment of 18 September 2014, *Central Bank of Iran* v *Council*, T-262/12, not published, EU:T:2014:777, paragraph 88).

36 Lastly, the statement of reasons for an act of the Council which imposes a restrictive measure must identify not only the legal basis of that measure but also the actual and specific reasons why the Council considers, in the exercise of its discretion, that that measure must be adopted in respect of the person concerned (judgments of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraph 52, and of 25 March 2015, *Central Bank of Iran* v *Council*, T-563/12, EU:T:2015:187, paragraph 55).

37 In the instant case, it should be noted that the purpose of the contested decision is to ensure the continued inclusion of the applicant's name on the list at issue, while retaining the grounds relied on by the Council in Decision 2016/2231, which amended Decision 2010/788, when his name was initially included on the list.

38 According to the applicant, the grounds relied on are particularly concise, as the Council does not put forward any specific complaint that would bear out the allegations made against him in those grounds.

39 It must be borne in mind that Article 3(2)(b) of Decision 2010/788, which was inserted by Decision 2016/2231, establishes that Annex II is to include persons and entities considered by the Council to be 'involved in planning, directing or committing acts that constitute serious human rights violations or abuses in [the Democratic Republic of the Congo]'.

40 It should also be observed that the statement of reasons adopted by the Council for the inclusion of the applicant' name on the list at issue, reproduced in paragraph 16 above, refers to his capacity as commander of the first defence zone of the armed forces of the Democratic Republic of the Congo (FARDC) and to the involvement of those forces in the disproportionate use of force and the violent repression that were ordered in September 2016 in Kinshasa (Democratic Republic of the Congo).

41 That statement of reasons identifies actual and specific matters, relating both to the professional duties of the applicant and the type of act concerned, and indicates that the applicant was involved in serious human rights violations in the Democratic Republic of the Congo. It makes it possible to ascertain the reasons that led the Council to adopt restrictive measures against the applicant in respect of his alleged responsibility, in the performance of his duties as commander of the first defence zone of the FARDC, for the disproportionate use of force and the violent repression that were ordered in September 2016 in Kinshasa.

42 As the Council rightly submits, the statement of reasons for the inclusion of the applicant's name on the list at issue, renewed by the contested decision, sets out the actual and specific reasons why the listing criteria were applicable to him and, in particular, first, mentions a clearly identified legal basis referring to the listing criteria and, second, is founded on grounds relating to the applicant's activities enabling him to determine the reasons justifying the inclusion of his name on the list at issue. Furthermore, the context in which the contested decision was adopted was known to the applicant,

given that he disputed, in essence, before the Court, the lawfulness of the first listing of his name, as pointed out in paragraphs 18 and 21 above, and the grounds for the listing were not altered by the contested decision.

43 Consequently, the applicant could not reasonably have been unaware that when, by the contested decision, the Council confirmed the grounds for the initial inclusion of his name on the list at issue, decided upon in Decision 2016/2231, it referred to the fact that, in the light of his duties as commander of the first defence zone of the FARDC, he had de facto power to influence directly the conduct of FARDC military personnel, who were said to have been involved in the disproportionate use of force and the violent repression that were ordered in September 2016 in Kinshasa.

44 In the light of the grounds for including his name on the list at issue, the applicant was in a position effectively to challenge the validity of the restrictive measures adopted against him. It was therefore open to him to challenge the truth of the facts on which the contested decision is based, in particular by denying that he held the position of commander within the FARDC or had any responsibility for the disproportionate use of force and violent repression in which the FARDC was involved in September 2016 in Kinshasa, by challenging the existence of such events or by disputing the assertion that he was involved in planning, directing or committing in the Democratic Republic of the Congo acts that constitute serious human rights violations or abuses. That is, moreover, what he has essentially done in the second part of the second plea, alleging a manifest error of assessment.

45 It follows that the statement of reasons for the contested decision was sufficient to enable the applicant to challenge the decision's validity and for the Court to exercise its power of review. The first part of the first plea must therefore be rejected.

Second part of the first plea in law

46 By the second part of his first plea, the applicant contends that the Council infringed his right to be heard. He argues that, although it is true that the surprise effect necessary for a fund freezing measure means that the Council is not required to conduct a hearing prior to the initial inclusion of a person or entity on a list imposing restrictive measures, the fact remains that, in the context, as here, of a review of such an initial listing decision, that effect is no longer needed and the adversarial principle must be complied with as regards both the disclosure of the grounds prior to the decision to maintain the listing and the right to a hearing. He adds that he requested that a hearing take place before the Council but that, on the date when the present action was brought, the Council had not ruled on his request.

47 In the reply, the applicant submits that he was never heard by the United Nations Joint Human Rights Office (UNJHRO) at the time of the preparation of the various reports used by the Council to support the contested decision, a situation which fails to comply with the criteria established in the case-law and demonstrates that he should have been heard prior to the adoption of the contested decision, particularly since he provided the Council, on 21 February 2018, with evidence liable to call into question the validity of the grounds relied on. The applicant also contends in the reply that, as compared with the initial decision to include his name on the list at issue, the Council relied on new evidence against him in order to adopt the contested decision.

48 The Council disputes those arguments, stating that the contested decision is based on the same grounds as those justifying the initial inclusion of the applicant's name on the list at issue, under Decision 2016/2231 and that it follows that it was under no obligation to hear the applicant before adopting the contested decision.

49 In that regard, it should be pointed out that, under Article 41(2)(a) of the Charter of Fundamental Rights of the European Union ('the Charter'), everyone has the right to be heard before any individual measure which would affect him adversely is taken.

50 According to the case-law, in a procedure relating to the adoption of the decision to list or maintain the listing of the name of an individual in an annex to an act containing restrictive measures, respect for the rights of the defence and the right to effective judicial protection requires that the competent EU authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union. In addition, when that disclosure takes place, the competent EU authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him (judgments of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraphs 111 and 112, and of 12 December 2006, *Organisation des Modjahedines du peuple d'Iran* v *Council*, T-228/02, EU:T:2006:384, paragraph 93).

51 In the case of an initial act decision freezing a person's or entity's funds, the Council is not obliged to disclose to the person or entity concerned beforehand the grounds on which it intends to base the first entry of their name on the list of persons and entities whose funds are frozen. So that its effectiveness may not be jeopardised, such a measure must, by its very nature, be able to take advantage of a surprise effect and to apply immediately. In such a case, it is as a rule sufficient if the institution discloses the grounds to the person or entity concerned and affords the latter the right to be heard at the same time as, or immediately after, the decision to freeze funds is adopted (judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 61).

52 By contrast, in the case of a subsequent decision to freeze funds by which the name of a person or entity already appearing on the list of persons and entities whose funds are frozen is retained on the list, that surprise effect is no longer necessary in order to ensure that the measure is effective, with the result that the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by an opportunity for the person or entity concerned to be heard (judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 62).

53 In that regard, the Court has made clear that the element of protection afforded by the requirement of notification of incriminating evidence and the right to make representations before the adoption of acts maintaining a person's or entity's name on a list of persons or entities subject to restrictive measures is fundamental and essential to the rights of the defence. This is all the more the case because the restrictive measures in question have a considerable effect on the rights and freedoms of the persons and groups concerned (judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 64).

54 That right to be heard prior to the adoption of such acts is necessary where, in the decision maintaining a person's name on that list, the Council has included new evidence against him, namely evidence which was not taken into account in the initial decision to include his name on the list (see, to that effect, judgments of 18 June 2015, *Ipatau* v *Council*, C-535/14 P, EU:C:2015:407, paragraph 26 and the case-law cited, and of 7 April 2016, *Central Bank of Iran* v *Council*, C-266/15 P, EU:C:2016:208, paragraph 33).

55 In the instant case, it is true, as the Council points out, that the continued inclusion of the applicant's name on the list at issue, decided upon in the contested decision, is based on the same grounds as those that justified the adoption of the initial act imposing the restrictive measures in question.

56 However, this alone cannot mean that the Council was not required to respect the applicant's rights of defence and, in particular, to give him the opportunity effectively to make known his views on the facts on the basis of which it adopted the contested decision maintaining his name on the list at issue.

57 Indeed, the question of whether there is an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case, including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (see judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 102 and the case-law cited).

58 In that regard, it must be pointed out that restrictive measures are measures of a precautionary and, by definition, provisional nature, the validity of which always depends on whether the factual and legal circumstances which led to their adoption continue to apply and on the need to persist with them in order to achieve their objective (see, to that effect, judgment of 21 March 2014, *Yusef* v *Commission*, T-306/10, EU:T:2014:141, paragraphs 62 and 63). Accordingly, Article 9(2) of Decision 2010/788, as amended by Decision 2016/2231, provides that the restrictive measures against the Democratic Republic of the Congo are to apply until 12 December 2017 and are to 'be renewed, or amended as appropriate, if the Council deems that their objectives have not been met'.

59 It follows that, in the course of its periodic review of those restrictive measures, it is for the Council to conduct an updated assessment of the situation and to appraise the impact of such measures, in order to determine whether they have made it possible to attain the objectives pursued by the initial inclusion of the names of the persons and entities concerned on the list at issue or whether the same conclusion in respect of those persons and entities can still be drawn.

60 In its judgment of 27 September 2018, *Ezz and Others* v *Council* (T-288/15, EU:T:2018:619, paragraph 316 and the case-law cited), the Court held that respect for the rights of the defence meant that the Council was required to disclose to the applicants, before adopting a decision renewing restrictive measures against them, the evidence it had relied on during the periodic review of the measures at issue in order to update the information that had justified the initial inclusion of their names on the list of persons subject to such measures.

61 Thus, in the instant case, in the light of the initial objective pursued by the restrictive measures against the Democratic Republic of the Congo, namely, in essence, to create a climate conducive to the holding of elections and to bring an end to all human rights violations (see paragraph 7 above), the Council was required, during the periodic review of the restrictive measures imposed on the applicant, to disclose to him, as the case may be, the new evidence which it had relied on in order to update the information concerning not only his personal situation, but also the political and security situation in the Democratic Republic of the Congo.

62 It is apparent from the documents in the case that the Council, as it confirmed at the hearing in response to a question put by the Court, adopted the contested decision while taking into account — in addition to the information already available to it when the applicant's name was initially included on the list at issue — the information contained in the internal document of 23 October 2017 bearing the reference COREU CFSP/1492/17. First, that document of 23 October 2017 stated that no electoral timetable had been published as of that date and referred to the announcement by the Independent National Electoral Commission on 11 October 2017 that at least 504 days were needed in order to organise elections. Second, that document also stated that the United Nations Organisation Mission in the Democratic Republic of the Congo (Monusco) had reported a deterioration of the security situation in many parts of the Democratic Republic of the Congo and increased regional instability following the departure of civilians fleeing the conflict zones. Third, that document mentioned that the freedoms of assembly, opinion and expression were still being suppressed, as evidenced by the ban on demonstrations against the failure to publish an electoral timetable and, in August 2017, the blocking of social media following the announcement of a general strike.

63 Similarly, it is apparent from the Council's conclusions of 11 December 2017 that the Council was aware, when it adopted the contested decision, of another updated item of information, namely the announcement of an electoral timetable on 5 November 2017 scheduling presidential elections for 23 December 2018. However, that announcement did not prevent the Council from taking the view that the situation remained unchanged in the Democratic Republic of the Congo.

64 Therefore, although, by means of the contested decision, the Council renewed the restrictive measures against the applicant on grounds identical to those relied on in Decision 2016/2231 for the initial inclusion of his name on the list at issue, the updated information referred to in paragraphs 62 and 63 above amounts to new evidence that was taken into account by the Council when it adopted the contested decision. Consequently, the Council should have sought the applicant's observations on that information before adopting such a decision, in accordance with what has been stated in paragraph 61 above. However, it is common ground that it did not do so.

65 It is irrelevant, first, that the initial inclusion of the applicant's name on the list at issue was followed by the publication in the Official Journal of a notice to the persons concerned by the aforesaid measures, inviting them to submit a request for reconsideration to the Council before 1 October 2017, and second, that the applicant did not avail himself of that opportunity. The Council cannot be relieved of its obligation to respect the rights of the defence on the ground that a person subject to restrictive measures is able to request that such measures cease to be applied to him.

66 Nor is it apparent from the documents in the case that the applicant was able to foresee that the Council would find that the situation in the Democratic Republic of the Congo remained unchanged, taking account of the matters described in paragraphs 62 and 63 above concerning the failure to publish an electoral timetable, the worsening of the security situation and the continued suppression of public freedoms in numerous regions of the country, matters on which the applicant was not given an opportunity to submit observations before the contested decision was adopted. It should be borne in mind in that regard that restrictive measures are provisional in nature (see paragraph 58 above), which is guaranteed by the very provisions of the contested decision (see paragraph 20 above).

67 Accordingly, it must be held that the contested decision was adopted at the end of a procedure during which the applicant's rights of defence were not observed.

68 However, it cannot be inferred from the foregoing that the contested decision should be annulled on account of the Council's failure to disclose to the applicant the new evidence mentioned in the internal document of 23 October 2017, bearing the reference COREU CFSP/1492/17, and in the Council's conclusions of 11 December 2017, and of the fact that the applicant was not given an opportunity to submit observations on that evidence before the Council adopted the contested decision.

69 It is for the Courts of the European Union to verify, where an irregularity affecting the rights of the defence has occurred, whether, in the light of the specific factual and legal circumstances of the case, the procedure at issue could have resulted in a different outcome since the applicant could have been better able to defend himself had there been no irregularity (see, to that effect, judgments of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraphs 81, 88, 92, 94 and 107, and of 27 September 2018, *Ezz and Others* v *Council*, T-288/15, EU:T:2018:619, paragraph 325 and the case-law cited).

70 In the instant case, there is nothing in the file to suggest that, if the new evidence that the Council relied on to update its assessment of the political and security situation in the Democratic Republic of the Congo had been disclosed to the applicant, the restrictive measures concerned might not have been maintained against him.

71 It should be noted that the applicant has not given any specific indication that, if he had been given the opportunity, before the adoption of the contested decision, to submit observations on the new evidence described in paragraphs 62 and 63 above, he would have been able to call into question its content or relevance for the purpose of the continued inclusion of his name on the list at issue.

72 Moreover, in response to a question put by the Court at the hearing, the applicant did not deny that the situation in the Democratic Republic of the Congo in fact remained unchanged between the initial inclusion of his name on the list at issue, decided upon on 13 December 2016, and the adoption of the contested decision maintaining the restrictive measures in question.

73 That being so, it cannot be considered that, even if the evidence mentioned in paragraphs 62 and 63 above had been disclosed to the applicant prior to the adoption of the contested decision, the outcome of the procedure might have been different. Thus, the fact that the Council relied on new evidence when it renewed the restrictive measures against the applicant is not such as to render the contested decision unlawful.

74 Furthermore, in so far as the applicant invokes in support of the second part of the first plea the fact that he was not heard by the UNJHRO when it was preparing reports relied on by the Council in support of the contested decision, suffice it to note that the Courts of the European Union do not have jurisdiction to review whether investigations conducted by bodies of the United Nations (UN) comply with fundamental rights (see, to that effect, judgment of 20 July 2017, *Badica and Kardiam* v *Council*, T-619/15, EU:T:2017:532, paragraph 65).

75 Lastly, the applicant's argument that the Council should have conducted a hearing for him must be rejected, as neither the legislation in question nor the general principle of respect for the rights of the defence gives him the right to a formal hearing (see, by analogy, judgment of 6 September 2013, *Bank Melli Iran* v *Council*, T-35/10 and T-7/11, EU:T:2013:397, paragraph 105 and the case-law cited).

76 In the light of all the foregoing, the second part of the first plea and, therefore, the plea in its entirety must be dismissed as unfounded.

Second plea: error of law and manifest error of assessment

77 By his second plea, the applicant submits that the Council erred in finding that he had been 'involved in planning, directing or committing acts that constitute serious human rights violations in the Democratic Republic of the Congo'.

78 This plea is divided into two parts. In the first part, the applicant submits, in essence, that the Council erred in law by maintaining his name on the list at issue on the basis of conduct which, when the contested decision was adopted, had come to an end. In the second part, the applicant contests the Council's assessment of his functions and duties and the fact that there were sufficiently precise and specific facts to support the continued inclusion of his name on the list at issue.

First part of the second plea in law

79 By the first part of the second plea, the applicant submits that the conduct cited by the Council in the grounds for including his name on the list at issue occurred during a period of time that is now in the past. It is apparent from the use of the present participle in [the French language version of] Article 3(2) of Decision 2010/788, as amended by Decision 2016/2231, that the conduct ascribed to the persons or entities subject to restrictive measures should be ongoing when those measures are renewed. The fact that the applicant was not, at the time the contested decision was adopted, involved in the conduct ascribed to him means that the restrictive measures in question are obsolete.

80 The applicant adds that, by maintaining those measures in respect of past conduct, the Council actually imposed a disguised criminal penalty, even though restrictive measures are solely precautionary in nature, their aim being to prompt the addressees of those measures to alter their conduct.

81 It is to be noted that, as recalled in paragraph 8 above, Article 3(2)(b) of Decision 2010/788, as amended by Decision 2016/2231, provides that restrictive measures are to be imposed on persons and entities 'involved in planning, directing or committing acts that constitute serious human rights violations or abuses in [the Democratic Republic of the Congo]'. That is the basis on which Decision 2016/2231 initially included the applicant's name on the list at issue, on the ground that, as commander of the first defence zone of the FARDC, he was involved in the latter's participation in the disproportionate use of force and the violent repression that were ordered in September 2016 in Kinshasa (see paragraph 16 above). By the contested decision, the Council renewed the restrictive measures against the applicant until 12 December 2018, relying on exactly the same grounds as for the initial inclusion of his name on the list at issue (see paragraph 20 above).

82 First, it cannot be considered that the use, in Article 3(2)(b) of Decision 2010/788, as amended by Decision 2016/2231, of the present participle in the definition of the criteria for inclusion on the list at issue means that the conduct giving rise to the entry of a person's or entity's name on that list must be ongoing when the decision is taken to list or maintain the listing. It has already been held that, as regards inclusion on a list of the names of persons and entities subject to restrictive measures, the present participle refers to the general meaning particular to legal definitions, not to a given period of time (see, to that effect, judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 108).

83 Second, the fact that the grounds for including the applicant's name on the list at issue refer to conduct which occurred before the adoption of the contested decision and which had ended on that date does not necessarily mean that the restrictive measures maintained against him by that decision are obsolete. Clearly, in so far as the Council decided to refer, in the grounds for including the applicant's name on the list at issue, to specific situations involving the armed forces which he commanded, there could be no question of anything other than past conduct. Such a reference cannot therefore be considered to be of no relevance solely because the conduct in question dates from the more or less remote past (see, to that effect, judgment of 22 April 2015, *Tomana and Others* v *Council and Commission*, T-190/12, EU:T:2015:222, paragraph 236).

84 That interpretation is borne out by the second sentence of Article 9(2) of Decision 2010/788, as amended by the contested decision, according to which the restrictive measures at issue are to be renewed, or amended as appropriate, if the Council deems that their objectives have not been met. If that provision is not to be rendered redundant, it must be considered to allow the continued inclusion on the list at issue of the names of persons and entities not having committed any further human rights violations during the period preceding the review, if that continued inclusion is still justified in the light of all the relevant circumstances and, in particular, of the fact that the objectives pursued by the restrictive measures have not been achieved (see, by analogy, judgment of 23 October 2008, *People's Mojahedin Organization of Iran* v *Council*, T-256/07, EU:T:2008:461, paragraph 108).

85 Consequently, contrary to what the applicant submits, the grounds for including his name on the list at issue do not make the restrictive measures to which he was subject, and which were renewed by the contested decision, criminal in nature.

86 Accordingly, the first part of the second plea must be dismissed.

…

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Mr Gabriel Amisi Kumba to pay the costs.

Gervasoni Madise da Silva Passos

Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 12 February 2020.

[Signatures]