Reports of Cases

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

3 October 2012 *

(Access to documents — Regulation (EC) No 1049/2001 — Application for access to the reports of European Union observers present in Croatia from 1 to 31 August 1995 — Refusal of access — Risk of undermining the protection of international relations — Prior disclosure)

In Case T-465/09,

Ivan Jurašinović, residing in Angers (France), represented by M. Jarry and N. Amara-Lebret, lawyers,

applicant,

v

Council of the European Union, represented initially by C. Fekete and K. Zieleśkiewicz, and subsequently by C. Fekete and J. Herrmann, acting as Agents,

defendant,

ACTION principally for the annulment of the Council decision of 21 September 2009 granting access to certain reports drawn up by the European Union observers present in the area of Knin, in Croatia, from 1 to 31 August 1995,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of N.J. Forwood, acting as President, F. Dehousse, M. Prek, J. Schwarcz (Rapporteur) and A. Popescu, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 25 April 2012,

gives the following

Judgment

Background to the dispute

1 By letter of 4 May 2009 to the Secretary-General of the Council of the European Union, the applicant, Mr I. Jurašinović, applied for access, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament,

* Language of the case: French.

Council and Commission documents (OJ 2001, L 145, p. 43), to the reports of the European Community observers present in Croatia, in the area of Knin, from 1 to 31 August 1995 ('the reports') and to documents referenced as 'ECMM RC Knin Log reports'.

2 By letter of 27 May 2009, the Secretary-General of the Council informed the applicant that, because of the very large number of documents potentially covered by his application and their particularly sensitive nature, the period for replying to the application for access would have to be extended in accordance with Article 7(3) of Regulation No 1049/2001.

3 By decision of 17 June 2009, the Secretary-General of the Council rejected the applicant's application by reason of the exception provided for by the third indent of Article 4(1)(a) of Regulation No 1049/2001, protecting the public interest as regards international relations, on the grounds that, first, the documents requested would, if they were disclosed, create further difficulties in the European Union's relations with the different parties to the conflicts which had taken place in the former Yugoslavia and with other countries concerned and, secondly, that the documents formed part of the records which the European Union had placed at the disposal of the Prosecutor and defence counsel in the context of the proceedings against Mr A. Gotovina before the International Criminal Tribunal for the Former Yugoslavia, established by the United Nations ('the ICTY').

4 By letter of 27 June 2009, the applicant submitted a confirmatory application for access to the documents ('the confirmatory application').

5 By letter of 2 July 2009, the Secretary-General of the Council informed the applicant that the confirmatory application would be considered before 1 October 2009. The applicant challenged that date.

6 By decision of 21 September 2009, the Council granted partial access to eight reports and dismissed the remainder of the application for access ('the contested decision').

7 In the contested decision, first, the Council set out the purpose and the scope of the applicant's application for access, and the objective of the European Community Monitoring Mission ('the ECMM') during the conflicts in the former Yugoslavia and the conditions in which the ECMM had carried out its task. Secondly, the Council stated that it had been unable to trace in its possession any document referenced as 'ECMM RC Knin Log reports'. Thirdly, the Council considered that publication of the reports would be detrimental to the European Union's interests by putting at risk its international relations and those of its Member States with that region of Europe, and also public security, particularly the security and physical integrity of observers, witnesses and other sources of information, whose identity and assessments would be revealed by disclosure of the reports. Fourthly, the Council considered that the reports were still highly sensitive despite the fact that 14 years had passed since the events to which they referred. Fifthly, the Council dismissed the particular interest claimed by the applicant in his confirmatory application in establishing the historical truth by bringing judicial proceedings against war criminals in order to obtain compensation for their victims. Sixthly, the Council informed the applicant that it had granted the ICTY access to the reports, in the context of Mr Gotovina's trial, by virtue of the principle of international cooperation with an international tribunal established by the United Nations Security Council. Seventhly, the Council refrained from adducing the argument concerning the efficient conduct of criminal proceedings in progress. In conclusion, the Council granted partial access to eight reports and refused to provide any other report on the ground of the exceptions relating to the protection of public security and international relations, in accordance with the first and third indents of Article 4(1)(a) of Regulation No 1049/2001.

8 In the annex to the contested decision the Council listed the 205 reports prepared by the ECMM between 1 and 31 August 1995 which were the subject of the application for access.

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the General Court on 19 November 2009, the applicant brought the present action.

10 The applicant claims that the Court should:

— annul the contested decision;

— order the Council to pay the applicant the sum of EUR 2 000 excluding tax, that is to say, EUR 2 392, including all taxes, for legal costs, with interest at the European Central Bank rate from the date of registration of the application.

11 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

12 By document lodged at the Court Registry on 21 January 2010, the applicant asked the Court to request, by way of a measure of organisation of procedure, the production of, first, decisions of the Council or the competent European Union (EU) body concerning the passing to the ICTY of documents whose disclosure the latter was requesting in relation to the trial of Mr Gotovina and, secondly, letters from the Council or the competent EU body accompanying the dispatch of those documents.

13 As the applicant did not lodge a reply within the time allowed, the written procedure was closed on 19 April 2010.

14 By way of a measure of organisation of procedure, the Court asked the Council to state which of the 205 reports listed in the annex to the contested decision had been passed to Mr Gotovina's defence counsel in connection with the proceedings against him before the ICTY.

15 By letters of 28 October, 28 November and 19 December 2011, the Council requested an extension, until 6 January and then until 16 February 2012, of the time for replying to the Court's question. The Court having acceded to those requests, the Council replied to the question on 16 February 2012.

16 By letter of 2 December 2011, the applicant presented his observations on the Court's decision to extend until 6 January 2012 the period allowed to the Council for replying to the abovementioned question and produced a decision of Trial Chamber I of the ICTY of 14 April 2011, *The Prosecutor* v *Ante Gotovina, Ivan Čermak and Mladen Markač*. The applicant also requested the exclusion of the Council's agents from the proceedings, in accordance with the second subparagraph of Article 41(1) of the Court's Rules of Procedure. The letter having been placed on the file, the Council presented its observations on 13 January 2012.

17 Although the hearing had been set down for 16 November 2011, it was adjourned on three occasions at the Council's request to 18 December 2011, 18 January and 21 March 2012 and, on one occasion, at the applicant's request, to 25 April 2012.

Law

The merits of the application for annulment of the contested decision

18 To challenge the contested decision, the applicant raises three pleas in law alleging, first, that there is no prejudice to the protection of the public interest as regards international relations, provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001, secondly, that there is no prejudice to the protection of the public interest as regards public security, provided for in the first indent of Article 4(1)(a) of the regulation, and, thirdly, that there was prior disclosure.

19 As a preliminary point, the Court observes that, in refusing to provide the applicant with all 205 of the reports requested, the Council put forward simultaneously the exceptions concerning, first, the protection of the public interest as regards international relations and, secondly, the protection of the public interest as regards public security.

20 Accordingly, in order for the contested decision to be well-founded in law, it is sufficient if one of the two exceptions put forward by the Council to refuse access to the reports was justified.

21 It is therefore necessary to begin by examining the first plea in law, alleging that there is no prejudice to the protection of the public interest as regards international relations, provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001.

The first plea in law, alleging that there is no prejudice to the protection of the public interest as regards international relations, provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001

– Preliminary considerations

22 First of all, it should be recalled that Regulation No 1049/2001 is intended, as is apparent from recital 4 in the preamble thereto and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraph 33).

23 However, that right is none the less subject to certain limitations based on grounds of public or private interest (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 62).

24 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 71).

25 When an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001 (*Sweden and Turco* v *Council*, cited at paragraph 22 above, paragraph 35). In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly (*Sweden and Turco* v *Council*, cited at paragraph 22 above, paragraph 36).

26 However, the Court of Justice has accepted that the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public

would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation (*Sison* v *Council*, cited at paragraph 23 above, paragraph 35).

27 Finally, the criteria set out in Article 4(1)(a) of Regulation No 1049/2001 are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would 'undermine' the protection of the 'public interest' as regards, inter alia, 'international relations' (*Sison* v *Council*, cited at paragraph 23 above, paragraph 36).

28 Consequently, the General Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (*Sison* v *Council*, cited at paragraph 23 above, paragraph 34).

– Findings of the Court

29 In the context of his first plea the applicant submits, first, that the protection of the public interest as regards international relations is not applicable to the reports because they are of an impartial nature which cannot be called into question by the evaluations and assessments which they contain. Moreover, the disclosure of the reports 14 years after the events which they describe would establish the historical truth and the rights of the victims to obtain compensation for the loss or damage suffered. Secondly, since the reports were prepared 14 years ago, their disclosure would not undermine the protection of that public interest, whereas it would provide an opportunity to prosecute for any war crimes. Thirdly, the applicant submits that the reports are not sensitive documents because they have not been classified as such, as is provided for by Article 9 of Regulation No 1049/2001.

30 The Council disputes the applicant's arguments.

31 In the first place, the Court observes that in the contested decision the Council draws attention to the objectives of the ECMM and the conditions in which it was carried out. At point 7 of the contested decision it is stated that '[t]he primary objective of the [ECMM] was to contribute to monitoring political and security developments in the Western Balkans as well as border surveillance, inter-ethnic issues and refugee returns'. On that point the Council added that the reports contained daily reports, special reports, topical reports and weekly assessments formulated by the ECMM observers in the Knin region between 1 and 31 August 1995.

32 Also at point 7 of the contested decision the Council specified the nature of the information in the various reports, which concerned in particular 'monitoring and analysis of troop and police movements and actions including shelling activities, breaches of cease fires, shoot outs as well as other military matters including discussions between the observers and liaison officers and information provided by sources'. According to the Council, the reports also contained 'observations on freedom and restriction of movements, political monitoring, including statements from high-level officials visiting the [Knin] area and municipal officials, interviews with [members of] the police and military and of civil society; monitoring of [the] human rights situation, [namely, information on] abuses against the civilian population and their goods, evacuations, casualties, movements [and] refugee flows, refugee transportation; monitoring of construction or destruction of civilian infrastructure, and information on the impact of shelling'.

33 With regard to the conditions in which the ECMM carried out its activities, the Council noted at point 8 of the contested decision that they were carried out in 'a particularly delicate political, military and human rights situation' and that many of the reports are 'based on interviews with local actors and witnesses, given on the basis of confidentiality', the reports being communicated only to the headquarters and the local operatives of the ECMM.

34 Secondly, in points 9 to 12 of the contested decision the Council set out the reasons why the information in the reports could not as a general rule be disclosed to the applicant. Points 9 and 11 in particular concern the Council's application of the exception relating to the protection of the public interest as regards international relations, and point 10 concerns the exception for the protection of the public interest as regards public security.

35 At point 9 of the contested decision, the Council pointed out that disclosure of the reports 'would put at risk the international relations of the [European Union] and its Member States with the region, which continue to remain delicate, by releasing information revealing in detail comments, appreciations and analyses exchanged among the different operatives of the [ECMM] concerning the political, military and security situation in the area'. According to the Council, disclosure of the content of the reports would 'defeat the purpose of supplying the [European Union] with the most detailed information possible to enable it to formulate a policy towards the Western Balkans'. The Council considered that 'the confidentiality of the reports until today is a key factor in enhancing dialogue and cooperation with the countries of the region'.

36 At points 11 and 12 of the contested decision the Council replied to the applicant's arguments, presented during the administrative procedure, concerning the 14-year period which had elapsed since the events and the fact that publication of the reports, which were impartial in nature, would enable the historical truth to be established and open the way to compensation for the loss and damage suffered by victims. On that point, the Council considered that, first, '14 years after the drawing up of the documents in question, the reports retain an important degree of sensitivity in view of the fact that they contain delicate information relating to a region where the consolidation of stability remains a main concern' and, secondly, that the Council could not 'take into consideration [the applicant's] particular interest in obtaining the [reports]' since the Council would have been obliged, under the relevant legislation, 'to rule on the disclosure to the public of the [reports] on an *erga omnes* basis'.

37 In the second place, as the Council observes in the defence, it is clear from the context in which the ECMM performed its tasks and from the content of the reports, as presented in the contested decision, that the reports are of a particularly sensitive nature. They contain comments, assessments and analyses of the political, military and security situation in the area of Knin in August 1995 after the offensive by Croatian forces known as 'Operation Storm', which aimed to take the Krajina region from the Serb forces which had designated it part of the Republic of Serbian Krajina since 1991.

38 It must be borne in mind, as the Council suggests, that such observations and assessments, together with the analyses based on them, were intended to assist the Council in determining the European Union's policy in relation to the different parties to the conflict at the time when the reports were drawn up. Furthermore, the Council was right, having regard to the general context in which the reports were drawn up and the information which they contain, to find that the various observations and assessments in them were still, at the date of the contested decision, of a sensitive nature, even though the events which had given rise to the reports had taken place 14 years earlier.

39 On that point it must be observed, as the Council does in the contested decision and the defence, that the aim of EU policies in the Western Balkans is to contribute to peace, stability and lasting regional reconciliation in order, in particular, to strengthen the integration of the countries of that region of Europe with regard to the European Union, while the applicant in no way disputes the existence or the relevance of those aims. The disclosure of information or assessments contained in the reports could, at the date of the contested decision, have affected the pursuit of those objectives by disclosing

information capable of giving rise to or increasing resentment and tension among the different communities of the countries which had been parties to the conflicts in the former Yugoslavia or between the countries formed from Yugoslavia, thus weakening the confidence of the Western Balkan States in the process of integration.

40 The Council was therefore right to take the view, in the contested decision, that disclosure of the reports would have undermined the European Union's objectives in that region of Europe and would accordingly have undermined international relations because the ECMM's comments or assessments concerning the political, military and security situation at a decisive stage of the conflict between Croatian and Federal Yugoslav forces would have been disclosed.

41 None of the arguments put forward in support of the first plea can call that conclusion into question and, moreover, the applicant has not submitted that the Council did not carry out an actual, individual examination of the reports.

42 First, with regard to the allegedly impartial nature of the reports, deriving from the fact that the ECMM was not a party to the conflict, that circumstance has no bearing on the question as to whether or not disclosure of the reports was liable to undermine the protection of the public interest as regards international relations.

43 As the Council pointed out in the contested decision, the reports contain comments, assessments and analyses of the political, military and security situation in the area of Knin in August 1995. If that information had been disclosed when it was still, at the date of the contested decision, of a sensitive nature (see paragraphs 37 and 38 above), it would have been liable to undermine the European Union's objectives mentioned at paragraph 39 above, and to create a situation which would have weakened the confidence of the Western Balkan States in the process of integration initiated with regard to the European Union. In addition, such information could have been seen as a value judgment against the different parties to the conflicts taking place in the former Yugoslavia. Consequently the effects which disclosure of the reports could have are unrelated to the impartiality of the ECMM and of the reports.

44 Secondly, with regard to the argument that 14 years had elapsed between the events considered in the reports and the contested decision, that in itself does not show that the Council manifestly erred in its assessment by refusing to disclose all the reports in question. The fact that 14 years is almost one half of the maximum period of 30 years, provided for under Article 4(7) of Regulation No 1049/2001, for the protection of documents to which an exception is applied is not sufficient to show that the exception based on the protection of the public interest as regards international relations was not properly applied.

45 The only event put forward by the applicant to suggest that the situation had returned to normal and that it was thus justified to disclose all the reports is the accession of the Republic of Croatia to the European Union, which is planned for 1 July 2013. However, that is not sufficient to show that disclosure of the reports would not have been liable, at the date of adoption of the contested decision, to undermine the public interest put forward, in the present case, by the Council with regard to the content of the reports and the conditions in which they were drawn up, as described at paragraphs 31 to 33 above, when, at the date of the contested decision, the European Union had not taken a decision concerning Croatia's accession. Finally, that circumstance does not call into question the Council's finding, in the contested decision, that the confidentiality of the reports, which had been maintained up to then, had been a key factor in enhancing dialogue and cooperation with the countries of that region of Europe.

46 Furthermore, as the Council submits in defence, the fact that the reports were considered necessary for the purpose of the investigations and proceedings conducted by the ICTY Prosecutor in connection with Mr Gotovina's trial indicates that it was recognised that the reports remained sensitive, notwithstanding the length of time that had elapsed since they were drawn up.

47 Thirdly, with regard to the argument that the reports would contribute to establishing the historical truth and the victims' rights to compensation, the applicant may be regarded as invoking an overriding public interest in view of which the reports ought to have been disclosed. However, it is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provision made by Article 4(2), in particular, to weigh the requirements connected to the protection of those interests against those which stem from other interests (*Sison* v *Council*, cited at paragraph 23 above, paragraph 46). Therefore that argument can only be rejected.

48 In so far as the applicant claims an interest in the disclosure of the reports on the ground, stated in the application, that they are of 'primary' interest in connection with his work as a lawyer 'known to be engaged publicly in the prosecution of war criminals', that argument must be rejected for the same reasons as those set out at paragraph 47 above.

49 With regard to the argument put forward at the hearing, that the public interest in granting access to relevant documents counterbalances the public interest justifying the exception applied in the present case, it must be observed that Regulation 1049/2001 provides that the exceptions laid down by Article 4 of the regulation do not apply if disclosure of the document in question is justified by an overriding public interest, but only in relation to the exceptions provided for in Article 4(2) and (3) (see paragraph 47 above).

50 Fourthly, the applicant relies on the fact that there is no classification of the reports for the purpose of Article 9 of Regulation No 1049/2001 in order to argue that the Council could not plead the exception for the protection of the public interest as regards international relations. According to the applicant, it was no longer open to the Council to object to disclosure on the ground that the reports were sensitive when it had never classified them as such.

51 Article 9 of Regulation No 1049/2001 lays down specific rules for access to classified documents, particularly with regard to the persons responsible for handling applications for access and the need to obtain the prior consent of the originating authority. In addition, Article 9(4) of the regulation provides that a decision refusing access to a classified document must give the reasons for the decision in a manner which does not harm the interests protected in Article 4. As the Council submits, it does not follow from those provisions that the non-classification of a document prevents an institution from refusing access by reason of the putting at risk of the protection of the public interest as regards international relations, on the ground that the document contains sensitive information. Consequently there was no manifest error of assessment on the Council's part in resisting an application for access to unclassified documents by reason of the exception concerning international relations.

52 Fifthly and finally, during the hearing mention was made of the possibility of granting partial access to the reports by distinguishing between information in the reports which is covered by the protection of the public interest as regards international relations, and information, in particular purely factual information, which could have been of interest to the applicant.

53 However, as the Council pointed out, the precise information in five of the eight reports to which partial access was granted to the applicant is presented under the heading of 'press reports' and consists, according to the Council, of information which had been disclosed to the public. With

regard to the other three reports, they contain neither press reports nor accounts of events and they merely give general information on the situation observed locally. Therefore the premiss on which the argument set out in the previous paragraph is based means that it cannot succeed since the factual information disclosed to the applicant is information which had been made public at the time when each of the reports in question was drawn up.

54 Accordingly, the last argument must be dismissed and, with it, the first plea as a whole. Consequently it is unnecessary to consider the second plea that the protection of the public interest was not undermined in relation to public security because the exception for the protection of the public interest as regards international relations was lawfully applied by the Council in the present case and it is sufficient to justify the refusal of complete access to the reports.

The third plea in law alleging the existence of a prior disclosure

55 The applicant submits that the Council disclosed the reports to the ICTY on the basis of Regulation No 1049/2001 and not by virtue of an alleged principle of international cooperation with an international tribunal established by the United Nations Security Council, as no such principle exists. According to the applicant, the reports were made available to Mr Gotovina, a Union citizen and French national, through his lawyers. Therefore, as the prior disclosure was *erga omnes*, the Council could not oppose disclosure of the reports to the applicant unless it was discriminating on the ground of the applicant's ethnic origin or actual or presumed religious persuasion.

56 The Council disputes the applicant's arguments.

57 First of all, while the applicant submits that the reports could not have been made available to Mr Gotovina on the basis of a principle of international cooperation with the ICTY because such a principle does not exist, the Court finds that that argument cannot call in question the legality of the contested decision because it amounts only to criticising the legal basis by virtue of which the reports were made available to Mr Gotovina in the course of his trial before the ICTY. The present action does not concern the legality of the Council's decision to make the reports available.

58 In the second place, it is clear from the Council's reply of 16 February 2012 to the question which the Court had put to it that only 48 of the 205 reports covered by the application for access to the documents were passed to Mr Gotovina's defence counsel in connection with the case which gave rise to the ICTY judgment of 15 April 2011, *Gotovina et al*. Although the applicant has submitted no observation or comment on that point, either in writing or in the course of the hearing, it must be concluded that the plea concerning prior disclosure can, assuming that it is well-founded, entail the annulment of the contested decision only in so far as access to those 48 reports was refused.

59 In the third place, it is clear from the Council's explanations in the defence and at the hearing that, first, all the records of the ECMM were transmitted to the ICTY in the 1990s to enable the ICTY Prosecutor to institute proceedings against persons suspected of serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.

60 Secondly, the Council claimed that, in the case which gave rise to the ICTY judgment of 15 April 2011, *Gotovina et al*., the ICTY Prosecutor had requested the Council, in a letter to the Secretary-General of the Council, the High Representative for Foreign Affairs and Security Policy, to make available the documents necessary for the purpose of the proceedings including, in particular, the 48 reports (see paragraph 58 above) so that they could be used as evidence of the guilt, or in exoneration, of the accused and could be passed to defence counsel. Indeed, it is clear from Rule 70 (B) of the ICTY Rules of Procedure and Evidence that information which the prosecutor wishes to use for the purpose of generating new evidence cannot be given in evidence without prior disclosure to the accused.

61 Thirdly, it is also clear from the Council's explanations that the ECMM documents which were passed to the ICTY Prosecutor's office for the purpose of the procedure before that tribunal (see paragraph 60 above) were made available on a confidential basis in accordance with the provisions of Rule 70 (B) of the ICTY Rules of Procedure and Evidence, which provide that '[i]f the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information'.

62 However, the Council pointed out that, in connection with the requests from the ICTY Prosecutor for authorisation to use the reports in evidence and to disclose them to defence counsel, the Council had considered the purpose of the requests and had established the conditions under which the reports could be passed to Mr Gotovina's defence counsel, which led the Council to pass to the Prosecutor expurgated versions of the reports which were intended to be passed to the defence and, in accordance with Rule 70 (B) of the ICTY Rules of Procedure and Evidence, to be used in evidence (see paragraph 61 above).

63 Therefore, although the applicant submits that the reports were disclosed to Mr Gotovina pursuant to Regulation No 1049/2001, it must be stated, first, that the applicant does not deny the existence of the procedure for the provision of information used solely for the purpose of generating new evidence by the ICTY Prosecutor in connection with a case judged by that tribunal, as described at paragraphs 59 to 62 above. Furthermore, in the light of the Council's explanations concerning the procedure for the transmission of the reports to Mr Gotovina's defence counsel in connection with the trial before the ICTY, it must also be stated that nothing on the file suggests that the Council passed the 48 reports to Mr Gotovina as the result of an application for access to documents presented by him on the basis of Regulation No 1049/2001. On that point, although the applicant referred, for the first time at the hearing, to an application dated 30 May 2007 in which Mr Gotovina or his lawyers asked the Council, according to the applicant, for access to the reports, it is sufficient to observe that that document, assuming that it exists, has not been produced in the present case.

64 Consequently, the third plea in law must be rejected and, accordingly, the action as a whole must be dismissed, without the need to grant the measure of organisation of procedure sought by the applicant in his letter of 21 January 2010.

65 With regard to the application for the exclusion of Council representatives from the proceedings pursuant to the second subparagraph of Article 41(1) of the Rules of Procedure, it must be observed that the alleged conduct of the agents in question, namely the failure to inform the Court of the decision in *The Prosecutor* v *Ante Gotovina, Ivan Čermak and Mladen Markač* (paragraph 16 above), cannot constitute a reason for exclusion from the proceedings in the present case.

Costs

66 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, he must be ordered to pay the costs in accordance with the form of order sought by the Council.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Mr Ivan Jurašinović to bear his own costs and to pay the costs incurred by the Council of the European Union.

Delivered in open court in Luxembourg on 3 October 2012.

[Signatures]