OPINION OF ADVOCATE GENERAL JACOBS
delivered on 19 November 1996 *

1. The present case is one of four cases referred to the Court concerning the implementation of economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the context of the war in the former Yugoslavia. [1] Those sanctions included a ban on entry by all commercial traffic into the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro). Loten Navigation Company is the owner of the ship *Lido II*; Ebony Maritime is the owner or part owner of the cargo of petroleum products which the ship was carrying at the material time. That ship is suspected of having violated or attempted to violate the above prohibition: it was about to enter the Yugoslav territorial sea when it was intercepted by NATO/WEU forces, which towed it to the Italian port of Brindisi. In proceedings before the competent Italian courts both companies contest the violation of the prohibition.

Legal background

2. In the course of the war in the former Yugoslavia the Security Council of the United Nations adopted a number of resolutions requiring UN member States to take various embargo measures and other sanctions. [2] In Resolution 757 (1992), adopted on 30 May 1992, the Security Council condemned the failure of the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to take effective measures to fulfil the requirements of Resolution 752 (1992) demanding an end to the fighting in Bosnia and Herzegovina. It consequently adopted a trade embargo and a financial embargo.

3. The embargo measures were tightened by Resolution 820 (1993), adopted on 17 April 1993 (hereafter 'the Resolution'). Paragraph 25 of that resolution is of direct relevance for the present case. It provides that:

'all States shall detain pending investigation all vessels, freight vehicles, rolling stock, aircraft and cargoes found in their territories and suspected of having violated or being in violation of resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution, and that, upon a determination that they

* Original language: English.

1 — See Case C-84/95 *Bosphorus* v *Minister for Transport, Energy and Communications, Ireland and the Attorney General*, judgment of 30 July 1996; Case C-124/95 *The Queen* v *H. M. Treasury and Bank of England ex parte Centro-Com* and Case C-162/96 *Racke*, both pending.

2 — See also my Opinion of 30 April 1996 in *Bosphorus*, and my Opinion of 24 September 1996 in *Centro-Com*, both cited in note 1.

have been in violation, such vessels, freight vehicles, rolling stock and aircraft shall be impounded and, where appropriate, they and their cargoes may be forfeit to the detaining State'.

4. Of equal importance is paragraph 28, where the Security Council decided:

'to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) except when authorized on a case-by-case basis by the Committee established by resolution 724 (1991) or in case of *force majeure*'. [3]

5. The Community took various measures aimed at giving effect to the resolutions adopted by the Security Council. The questions referred to the Court in the present case concern Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereafter 'the Regulation'), [4] and Decision 93/235/ECSC of the Representatives of the Governments of the Member States meeting within the Council of 26 April 1993 concerning trade between the European Coal and Steel Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereafter 'the Decision'). [5]

6. By adopting the Regulation the Council sought to give effect to the strengthening of the embargo of the Federal Republic of Yugoslavia (Serbia and Montenegro) provided for by Resolution 820 (1993). The Regulation was based on Article 113 of the Treaty, and replaced and repealed earlier Council regulations concerning the embargo. [6]

3 — See in relation to that Committee paragraphs 11 and 46 of my Opinion in *Bosphorus*, cited in note 1.

4 — OJ 1993 L 102, p. 14. The Regulation has been suspended with effect from 27 February 1996, pursuant to Council Regulation (EC) No 462/96 of 11 March 1996 suspending Regulations (EEC) No 990/93 and (EC) No 2471/94, and repealing Regulations (EC) No 2472/94 and (EC) No 2815/95, concerning the interruption of economic and financial relations with the Federal Republic of Yugoslavia (Serbia and Montenegro), the United Nations Protected Areas in the Republic of Croatia and those areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces, OJ 1996 L 65, p. 1.

5 — OJ 1993 L 102, p. 17. The Decision has been suspended with effect from 27 February 1996, pursuant to Decision 96/201/ECSC of the Representatives of the Governments of the Member States, meeting within the Council, of 11 March 1996 suspending Decision 93/235/ECSC and repealing Decision 95/510/ECSC, concerning the interruption of economic relations with the Federal Republic of Yugoslavia (Serbia and Montenegro), the United Nations Protected Areas in the Republic of Croatia and those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces, OJ 1996 L 65, p. 38.

6 — Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, OJ 1992 L 151, p. 4; Council Regulation (EEC) No 2655/92 of 8 September 1992 restricting use of the procedure for the international transport of goods under cover of TIR carnets (TIR Convention) in the case of consignments travelling between two points situated in the European Economic Community via the territories of the Republics of Serbia and Montenegro, OJ 1992 L 226, p. 26; Council Regulation (EEC) No 2656/92 of 8 September 1992 concerning certain technical modalities in connection with the application of Regulation (EEC) No 1432/92 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, OJ 1992 L 266, p. 27.

7. The preamble refers to the situation in the former Yugoslavia, particularly in Bosnia-Herzegovina; to the role played by the Federal Republic of Yugoslavia (Serbia and Montenegro); and to the various resolutions of the Security Council. It states that:

'the Community and its Member States have agreed to have recourse to a Community instrument, *inter alia*, in order to ensure a uniform implementation throughout the Community of certain of these measures'.

8. Most of the provisions of the Regulation substantially reproduce the various embargo measures contained in the abovementioned Security Council resolutions. Articles 1(1), 9, 10 and 11 are relevant to the present case:

'*Article 1*

1. As from 26 April 1993, the following shall be prohibited:

(a) the introduction into the territory of the Community of all commodities and products originating in, coming from, or having transited through, the Federal Republic of Yugoslavia (Serbia and Montenegro);

(b) the export to, or the transit through, the Federal Republic of Yugoslavia (Serbia and Montenegro) of all commodities and products originating in, coming from, or having transited through the Community;

(c) the entry into the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) by all commercial traffic;

(d) any activity the object or effect of which is, directly or indirectly, to promote the transactions mentioned under (a), (b) or (c);

(e) the provision of non-financial services to any person or body for purposes of any business carried out in the Federal Republic of Yugoslavia (Serbia and Montenegro).

...

Article 9

All vessels, freight vehicles, rolling stock, aircraft and cargoes suspected of having violated, or being in violation of, Regulation (EEC) No 1432/92 or this Regulation shall be detained by the competent authorities of the Member States pending investigations.

Article 10

Each Member State shall determine the sanctions to be imposed where the provisions of this [Regulation] are infringed.

Where it has been ascertained that vessels, freight vehicles, rolling stock, aircraft and cargoes have violated this Regulation, they may be forfeited to the Member State whose competent authorities have impounded or detained them.

Article 11

This Regulation shall apply within the territory of the Community, including its air space and in any aircraft or vessel under the jurisdiction of a Member State, and to any person elsewhere who is a national of a Member State and any body elsewhere which is incorporated or constituted under the law of a Member State.'

9. The ECSC Decision is virtually identical, the only material difference being that it applies, pursuant to Article 1(a), to 'all commodities and products covered by the ECSC Treaty'.

10. The legislation adopted in Italy in implementation of the abovementioned Community provisions is contained essentially, so far as is relevant to the present proceedings, in Article 2(2) and 2(3)(b) of Decree-Law No 144 of 15 May 1993, converted into Law No 230 of 16 July 1993. [7]

11. According to those provisions, means of transport suspected of infringing the embargo may be stopped and inspected for the purpose of inquiries by the customs authorities. Where such inspections disclose a breach of the abovementioned Community provisions, the competent authority is to order confiscation of the goods to which the embargo applies. Where the means of transport is not flying the Italian flag and does not belong to a person of Italian nationality, the competent authority is also to impound the means of transport, giving immediate notice thereof, through the Ministry of Foreign Affairs, to the Consulate for the country concerned so that the latter may take the

7 — *Gazzetta Ufficiale della Repubblica Italiana* No 166 of 17 July 1993.

appropriate action. That is without prejudice to subsequent confiscation of the means of transport in cases where the flag State does not, within a period of 20 days following the notice, arrange for it to be removed after paying the expenses incurred and giving an undertaking to apply the sanctions provided for by Resolution 820 (1993).

The facts and the main proceedings

12. The facts may be summarized as follows. The *Lido II* is a tanker flying the Maltese flag; it is owned by Loten Navigation Company Limited, a Maltese company. It appears that in the course of April 1994 the vessel left the Tunisian port of La Skhira bound for Rijeka, Croatia, with a cargo comprising partly petroleum products (24 434 tonnes of 'dirty gasoil'), intended for the purchaser Monteshell, in Trieste, and partly motor spirit (27 413 tonnes of 'premium mogas'), still awaiting a purchaser, to be found in Gibraltar in accordance with commercial and maritime practice. The cargo was owned, or partly owned, by Ebony Maritime SA, a Liberian company. On entering the Adriatic, the *Lido II* was diverted by NATO/WEU forces to the 'waiting area' in the port of Brindisi in order to be inspected for the purpose of monitoring observance of the embargo. No irregularities having been found, on the afternoon of 30 April 1994 the vessel left Italian waters and resumed its voyage towards Rijeka. However, it changed course sharply off Gargano, towards the Albanian port of Durazzo, purportedly in order to pick up an anchor to replace one that had been lost on an earlier voyage. During the night of 30 April/1 May, the vessel began to take on water in the engine room. The master sent out repeated requests for assistance, stating that he was unable to control the leak, *inter alia* because of the inadequacy of the pumps, and then he made a further change of course towards the Montenegro coast, which was nearer. Before the *Lido II* entered Yugoslav territorial waters, however, and while it was still in international waters a NATO/WEU helicopter landed on its deck and a Dutch military squad took control of the vessel, which was then towed to the port of Brindisi and placed at the disposal of the Italian authorities.

13. Following inspections and checks, examination of the documents and records produced by the shipowner and the cargo-owner and reports from the relevant technical authorities, the Prefetto (Prefect) of Brindisi decided to arrest the vessel and to confiscate its cargo, in implementation of the sanctions laid down by Italian law for breach of the embargo. In its written observations the Italian Government states that the authorities of Montenegro made several representations to the Italian embassy in Belgrade, requesting the release of the *Lido II* and its cargo, said to be of vital interest for Montenegro. At the hearing, however, the

applicants disputed that statement, and said that they had not been given access to the relevant documents.

14. Loten Navigation Company and Ebony Maritime sought the annulment of the Prefetto's decision before the Tribunale Amministrativo Regionale (Regional Administrative Court) of Puglia. In a decision of 6 December 1994 the Tribunale dismissed their application. Both companies presently seek the annulment of the decision of the Tribunale before the Consiglio di Stato (Council of State). The latter, taking the view that the resolution of the dispute before it requires an interpretation of the Regulation and the Decision, has referred to the Court the following questions:

'1) Must Article 1(c) of Decision 93/235/ECSC of the representatives of the governments of the Member States meeting within the Council of 26 April 1993 concerning trade between the European Coal and Steel Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) and Article 1[1](c) of Council Regulation (EEC) No 990/93 of the same date concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) be interpreted as meaning that only actual entry into the territorial waters of the Federal Republic of Yugoslavia by a ship or other means of transport carrying goods intended for commercial traffic in the said territorial waters constitutes a breach of the prohibition laid down therein, or do those legislative provisions also cover conduct occurring in international waters which, because of the specific way in which it is conceived and put into effect, gives good reason to believe that the ship or other means of transport is on course for the said territorial waters for the purposes of commercial traffic?

2) Do Article 1(d) of the Decision and Article 1[1](d) of the Regulation mentioned above, in so far as they prohibit any activity the object or effect of which is, directly or indirectly, to promote the transactions mentioned in Article 1[1](c), include within their scope navigation in international waters by a ship or other means of transport carrying goods presumably intended for commercial traffic in the territorial waters of the Federal Republic of Yugoslavia?

3) Is a domestic provision which expressly prescribes, in the event of breach of any of the prohibitions contained in the abovementioned Article 1 being ascertained, confiscation — either compulsory or discretionary — of the cargo carried by any of the means of transport indicated in the second paragraph of Article 10 of the abovementioned Community Decision and Regulation compatible with Community legislation, in particular the first and second paragraphs of the said Article 10?'

15. Observations have been submitted by the applicants and by Italy, France, the United Kingdom and the Commission, all of which were also represented at the hearing.

Preliminary issues

16. Before addressing the questions raised by the Consiglio di Stato I must consider two preliminary issues.

17. First, as the Commission points out, the Decision does not appear to apply to the facts of the present case. It has not been suggested that the *Lido II* transported any products other than petroleum, and trade in petroleum is covered by the EC Treaty, not by the ECSC Treaty. In what follows I will therefore only consider the Regulation; the Decision is, in any event, identically worded.

18. Secondly, the United Kingdom argues that the Regulation does not apply, and France supported that argument at the hearing. Doubts about the application of the Regulation were also expressed by Italy in its written observations and at the hearing. The United Kingdom's argument is based on Article 11 of the Regulation which provides that the Regulation applies within the territory of the Community and in any aircraft or vessel under the jurisdiction of a Member State, and to any person elsewhere who is a national of a Member State and any body elsewhere which is incorporated or constituted under the law of a Member State. As was established in the main proceedings, both Ebony Maritime and Loten Navigation Company are non-Community companies, and the vessel *Lido II* flies the flag of Malta. At the time when it was taken over by the NATO/WEU forces, moreover, the ship was in international waters, and it has not been suggested by the referring court that any Community nationals or companies were involved in the alleged violation of the Regulation. The United Kingdom argues that the Regulation applies only to the following cases: (i) within the territorial waters of the Member States; (ii) to ships under the jurisdiction of a Member State; (iii) to individuals who are nationals of a Member State; and (iv) to companies incorporated or constituted under the law of a Member State. Accordingly, it does not apply in the circumstances of the present case. In my view, although the order for reference does not raise that issue, it is necessary to consider it in order to assist the referring court to resolve the dispute before it.

19. In its written observations the Commission, although not directly addressing the jurisdiction issue, takes the view that in the present case there is a continuous chain of events, some of which did take place on Community territory. The Commission claims that false declarations were made on

the occasion of the first inspection in the port of Brindisi, in violation of the Regulation; it points out that the cargo was partially destined for a Community company, namely Monteshell in Trieste; and it submits that the alleged violation is covered by Article 1(1)(b) of the Regulation, which prohibits exports to the Federal Republic of Yugoslavia (Serbia and Montenegro) of all commodities and products originating in, coming from, or having transited through the Community. Those observations are however partly based on facts and provisions not referred to in the order for reference. At the hearing the Commission confirmed that, in its view, the Regulation applies.

20. In my view it is clear that the Regulation applies merely by virtue of the fact that the *Lido II* was towed to Brindisi after having been seized by the NATO/WEU forces. The Regulation was adopted so as to give effect to Resolution 820 (1993) of the Security Council. It plainly follows from the objectives and the provisions of that Resolution that it was intended to be applied as broadly as possible. The Resolution, addressed to all the members of the United Nations, aimed at strengthening the embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro). According to paragraph 13 of the Resolution all States must take steps to prevent diversion to the territory of that Republic of commodities and products said to be destined for other places. In paragraph 19 the Security Council:

'*Reminds* States of the importance of strict enforcement of measures imposed under Chapter VII of the Charter, and *calls upon* them to bring proceedings against persons and entities violating the measures imposed by resolutions 713 (1991), 757 (1992), 787 (1992) and the present resolution and to impose appropriate penalties'.

By paragraph 25, cited above, [8] all States were required to detain, among other things, all vessels found in their territories and suspected of having violated the embargo.

21. There is no doubt in my view that the Regulation has to be interpreted in the light of the Security Council resolutions, and in particular Resolution 820 (1993). It follows that the Regulation has to be interpreted in such a way as to make the sanctions fully effective. But that result also clearly follows, in my view, from the very wording of the Regulation.

8 — Paragraph 3.

22. Article 11 provides that the Regulation shall apply 'within the territory of the Community'. In the present case that is precisely how the Regulation is being applied: it is being applied by the Italian authorities within their territory. And again in accordance with Article 11, the Regulation is being applied to a ship 'under the jurisdiction of a Member State'; and there is no suggestion that the ship was improperly brought within the Member State's jurisdiction. The effect of Article 11 is not, therefore, to limit the field of application of the Regulation; it makes the field of application coterminous with the jurisdiction of Member States under international law.

23. The prohibition, on the other hand, whose alleged breach gives rise to the application of the Regulation, applies also outside the territory of the Community, and does so of necessity, since Article 1(1)(c) of the Regulation prohibits entry into the Yugoslav territorial sea, which will normally take place from outside the territory of the Community. That prohibition, moreover, applies to 'all commercial traffic'; it is not limited to ships flying the flag of a Member State.

24. Similarly, Article 9 of the Regulation provides that *all* ships — and not only ships flying the flag of a Member State — suspected of having violated the Regulation shall be detained by the competent authorities of the Member States pending investigation.

25. If the view were taken that Member States could not apply the Regulation in cases such as the present, there is a serious risk that they would be unable to enforce the United Nations sanctions. If Member States determined, as required by Article 10, the penalties to be imposed for infringement of the Regulation, they might be unable to impose those penalties where a ship handed over to their authorities did not fly the flag of a Member State. It does not seem to me that that can be regarded as the intended effect of the Regulation.

26. Independently of those considerations, however, it is clear, as I have suggested, from the terms of the Regulation that it covers not only ships flying the flag of a Member State or ships owned by nationals or companies of a Member State, but also any ship found in the territory of a Member State. That interpretation appears to be confirmed by the Court's judgment in *Bosphorus*,[9] although the jurisdiction issue was not explicitly raised in that case. There the Regulation was held to apply to an aircraft owned by Yugoslav Airlines, leased to a Turkish company, and registered in Turkey, merely by reason of the fact that the aircraft was stationed at Dublin Airport.

9 — Cited in note 1.

27. It cannot be objected that the Regulation is thereby given an interpretation which conflicts with rules or principles of international law, such as the principle of the freedom of the high seas, expressed in Articles 87 and 92 of the Convention on the Law of the Sea. [10] As the French Government points out in its written observations, measures adopted by the Security Council under Chapter VII of the Charter of the United Nations are binding on all UN member States (see Article 25), and Article 103 of the Charter provides:

'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

Since the sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) contained in the resolutions were clearly intended to be applied as broadly as possible, their implementation must prevail over the principle of the freedom of the high seas.

28. I therefore conclude that the Regulation applies in the circumstances of the present case. I would add that, if the Regulation did not apply, this Court would not in my view have jurisdiction to rule on the substantive issues referred, since those issues would in that event arise in a context outside the scope of the Regulation. [11]

The first and second questions

29. In the first and second questions the referring court essentially asks whether Article 1(1)(c) and (d) of the Regulation must be interpreted as meaning that only actual entry into the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) by commercial traffic is prohibited, or, alternatively, as meaning that the prohibition also applies where there is sufficient reason to believe that a ship is on course for that sea for the purposes of commercial traffic.

30. I have already noted that the Regulation must be interpreted in the light of the Security Council resolutions which it aims to implement, in particular Resolution 820 (1993). The text itself of paragraph 28 of that Resolution is of no more assistance than the text of Article 1(1)(c) of the Regulation, because it is similarly worded: 'to prohibit all commercial traffic from entering the territorial sea of the Federal Republic of Yugoslavia

10 — Done at Montego Bay on 10 December 1982, 21 ILM at 1261. The Convention entered into force on 16 November 1994.

11 — See my Opinion of 17 September 1996 in Cases C-28/95 *Leur-Bloem* and C-130/95 *Giloy*, not yet reported.

(Serbia and Montenegro) ...'. From the text and context of those provisions it is none the less clear that the prohibition in issue is not limited to actual entry into the Yugoslav territorial sea.

31. Both the Resolution and the Regulation prohibit the entry of commercial traffic into the Yugoslav territorial sea. That prohibition requires that actual entry does not occur. For the prohibition to be effective, it is therefore necessary to prevent commercial traffic from entering the sea. It follows that, for the purposes of enforcement of the prohibition, the Resolution and the Regulation require the arrest of ships when it is clear that they are heading for the Yugoslav territorial sea. There appears to be no doubt that that was so in the case of the *Lido II*.

32. Ebony Maritime and Loten Navigation Company, however, distinguish between the enforcement of the embargo and the imposition of penalties for actual violations. They take the view that enforcement is possible in all cases where a breach can be prevented, but that penalties may be imposed only in circumstances where a violation is established.

33. I am not convinced that in the present case such a distinction is possible. It seems artificial to distinguish between actual entry into the Yugoslav territorial sea and conduct by a ship which reveals a clear intention to enter the sea. That is particularly true in the light of the objectives of the Resolution and the Regulation. As already noted, the Resolution was intended to be applied as broadly as possible. Its aim was to strengthen the embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro). In my Opinion in *Bosphorus* I have emphasized the strong public interest at stake, and the Court did likewise in its judgment. [12] For the embargo to be effective it was considered indispensable to prevent all commercial traffic from entering the Yugoslav territorial sea. [13] To prevent violations, it must be possible to penalize attempted as well as actual violations. Penalizing only the latter would have far less deterrent effect. It seems obvious that the embargo would be far less effective if penalties could be imposed only on ships which had already entered the Yugoslav territorial sea: once commercial traffic had entered that sea it would become far more difficult and hazardous to enforce the embargo. Although the NATO/WEU forces were given the right of pursuit within those waters, [14] such pursuit was liable to lead to clashes with forces of the Federal Republic of Yugoslavia (Serbia and Montenegro). The prohibition in issue must therefore be interpreted as covering conduct by a ship which reveals a clear intention to enter the Yugoslav territorial sea for the purpose of commercial traffic. As the French Government points out, any other interpretation would deprive the provisions of their effectiveness. I conclude that attempts to violate the embargo

12 — Cited in note 1, paragraph 26 of the judgment.

13 — See M. P. Scharf and J. L. Dorosin, 'Interpreting UN sanctions: the rulings and role of the Yugoslavia Sanctions Committee', *Brooklyn Journal of International Law* (1993), p. 771, at pp. 809 to 810.

14 — See paragraph 29 of Resolution 820 (1993) and paragraph 12 of Resolution 787 (1992).

are prohibited and are subject to penalties just as much as actual violations.

34. That interpretation is reinforced by Article 1(1)(d) of the Regulation, which prohibits any activity the object or effect of which is, directly or indirectly, to promote the transactions mentioned under, among other provisions, Article 1(1)(c). I take the view that on the basis of that provision it would be possible to take action against ships intending to transport goods to the Federal Republic of Yugoslavia (Serbia and Montenegro) even if they were still in a port some distance from the Republic, if it were established that the ship was on course for Yugoslav territorial waters for the purposes of commercial traffic, and hence that there was an attempt to violate the embargo.

35. In the present case Loten Navigation Company and Ebony Maritime argue that the *Lido II* was forced to change its course towards the Montenegro coast because of *force majeure*. Article 2(f) of the Regulation excludes cases of *force majeure* from the prohibition of entry into the Yugoslav territorial sea. However, the Consiglio di Stato appears to take the view that the question of *force majeure* does not arise in the proceedings before it and has referred no questions concerning that provision. There is accordingly no reason to address that issue.

36. I therefore conclude that the appropriate reply to the first and second questions is that Article 1(1)(c) and Article 1(1)(d) of the Regulation not only prohibit actual entry by commercial traffic into the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro), but also apply where there is sufficient reason to believe that a vessel is on course for that sea for the purposes of commercial traffic.

37. The issues raised by the first and second questions are however also related to the third question, to which I now turn.

The third question

38. In its third question the Consiglio di Stato asks whether a domestic provision which prescribes, in the event of breach of any of the provisions contained in Article 1 of the Regulation, confiscation of the cargo carried by any of the means of transport indicated in the second paragraph of Article 10 of the Regulation is compatible

with the Regulation. Article 10 provides, in its first paragraph, [15] that each Member State shall determine the sanctions to be imposed where the provisions of the Regulation are infringed. It further provides, in its second paragraph, that, where it has been ascertained that vessels, freight vehicles, rolling stock, aircraft and cargoes have violated the Regulation, they may be forfeited to the Member State whose competent authorities have impounded or detained them.

39. The third question appears to be partly inspired by what is clearly an error in the Italian version of the Regulation. In contrast with the versions in all the other languages, that version does not mention cargoes in the second paragraph of Article 10. However, the Italian implementing legislation does prescribe, in line with the other versions of the Regulation, and indeed in line with paragraph 25 of the Resolution, confiscation of cargoes which have violated the embargo. Since the Regulation must be interpreted in the light of all the language versions, [16] the answer to the third question is straightforward: confiscation of the cargo is compatible with the Regulation. The principle of legality in penal matters (*nullum crimen, nulla poena sine lege*) is obviously not in issue here, because the Italian implementing legislation expressly provides for confiscation. And since the Resolution, the Regulation and the Italian legislation are similarly worded, it is not necessary to consider, as have some of the governments which have submitted observations, whether the Regulation exhaustively regulates the issue of penal sanctions or, on the contrary, leaves national competence unaffected.

40. It may none the less be helpful to consider whether Community law imposes conditions, other than those expressly mentioned in the Regulation, on confiscation of cargoes.

41. The Court has had occasion to consider the penalty of confiscation of goods in the context of national controls on the export of strategic goods. In *Richardt* [17] the question arose whether non-compliance with a national restriction on the intra-Community transit of goods, aimed at protecting the external security of a Member State, could be sanctioned by confiscation of such goods. The Court drew attention to the principle of proportionality, stating that: [18]

'it is for the national court to determine whether the system established complies with the principle of proportionality, taking account of all the elements of each case, such as the nature of the goods capable of endan-

15 — Cited above, paragraph 8.

16 — See most recently Case C-64/95 *Lubella*, judgment of 17 October 1996, [1996] ECR I-5105, paragraph 17.

17 — Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621.

18 — At paragraph 25 of the judgment.

gering the security of the State, the circumstances in which the breach was committed and whether or not the trader seeking to effect the transit and holding documents for that purpose issued by another Member State was acting in good faith'.

42. In *Leifer and Others*, another case on national export controls, the Court reiterated that the right to impose criminal penalties is a matter falling within the competence of the Member States, but that such penalties may not be disproportionate to the public security aim pursued. [19] The Court again referred to the criteria cited above. [20]

43. There can be no doubt that the principle of proportionality has to be observed in cases such as the present, and that the competent national authorities have to take the above criteria into account. However, in contrast with the above cases, in which the national legislation in issue was enacted by way of derogation from the Community rules, the confiscation decided in the present case is a penalty for infringement of rules of Community law, laid down in the Regulation. In those circumstances there are further principles to be applied, expressed by the Court in *Commission* v *Greece*: [21]

'It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.

For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.'

19 — Case C-83/94 [1995] ECR I-3231, paragraph 39 of the judgment.

20 — At paragraph 40.

21 — Case 68/88 [1989] ECR 2965, paragraphs 23 and 24 of the judgment. See also Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, paragraph 11; Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 55; Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraph 40; Case C-36/94 *Siesse* v *Director da Alfândega de Alcântara* [1995] ECR I-3573, paragraph 20; Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and Others*, judgment of 12 September 1996, [1996] ECR I-4345, paragraph 14 and Case C-341/94 *André Allain and Steel Trading France*, judgment of 26 September 1996, [1996] ECR I-4631, paragraph 24.

44. In the present case those principles should be applied while taking account of the strong public interest in the effective implementation of the embargo against the Federal Republic of Yugoslavia (Serbia and Montenegro). As the Court held in *Bosphorus*, the Regulation pursues an objective of general interest fundamental for the international community, consisting in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina. [22]

45. Ebony Maritime and Loten Navigation Company also refer to respect for fundamental rights, an integral and important part of the general principles of law whose observance the Court ensures. [23] More specifically, they draw attention to the principle *nulla poena sine culpa*. They claim that the Italian legislation imposes sanctions on the owner of the cargo without requiring proof of fault on his part. The system is alleged to be tantamount to one of strict criminal liability.

46. It is not clear from the order for reference whether that account of Italian legislation is correct. In any event, a system of strict criminal liability is not as a matter of principle incompatible with Community law. In *Hansen* [24] the Court accepted that such a system was justified as a means of enforcement of the rules on driving and rest periods contained in Council Regulation (EEC) No 543/69 of 25 March 1969 on the harmonization of certain social legislation relating to road transport. [25] It follows that, in the light of the much stronger public interest at stake, strict criminal liability would also be acceptable in the implementation of the Regulation in issue in the present proceedings.

47. As regards confiscation, the right to property may have to be considered, although it has not been specifically invoked. Here too, however, the test is essentially one of proportionality, which in the present case should take account of the objective of general interest referred to above. [26]

48. It is for the referring court, in the light of those considerations, to decide whether the confiscation of the cargo of the *Lido II* was appropriate. There is clearly however no reason to suppose, in response to the third question, that a provision of national law prescribing confiscation is itself incompatible with the Regulation.

22 — Cited in note 1, paragraph 26 of the judgment.

23 — Opinion 2/94 [1996] ECR I-1759, paragraphs 32 and 33.

24 — Cited in note 21, paragraph 19 of the judgment. See also the Opinion of Advocate General Van Gerven, paragraphs 11 to 15.

25 — OJ, English Special Edition 1969 (I), p. 170.

26 — See my Opinion in *Bosphorus*, cited in note 1, paragraphs 54 to 68.

Conclusion

49. Accordingly the questions referred by the Consiglio di Stato should in my opinion be answered as follows:

(1) Article 1(1)(c) and Article 1(1)(d) of Council Regulation (EEC) No 990/93 not only prohibit actual entry by commercial traffic into the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro), but also apply where there is sufficient reason to believe that a vessel is on course for that sea for the purposes of commercial traffic.

(2) A provision of national law which prescribes, in the event of breach of any of the prohibitions contained in Article 1 of the abovementioned Regulation, confiscation of the cargo carried by any of the means of transport indicated in the second paragraph of Article 10 of that Regulation, is compatible with the Regulation.