OPINION OF ADVOCATE GENERAL JACOBS
delivered on 30 April 1996 *

1. At issue in this case is the effect of sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) and the interpretation of a regulation of the Council of the European Union seeking to give effect to a number of resolutions adopted by the Security Council of the United Nations. The subject of the main proceedings is a decision taken by the Irish Minister for Transport, Energy and Communications (hereafter 'the Minister'), in implementation of the regulation, to impound an aircraft owned by Yugoslav Airlines (hereafter 'JAT') but operated by Bosphorus Hava Yollari Turizm ve Ticaret A. S. (hereafter 'Bosphorus Airways'), a Turkish air charter company. That company had leased the aircraft from JAT, prior to the adoption of the regulation, for a period of four years. The aircraft was stationed at Dublin Airport for the purpose of maintenance operations when the Minister took the contested decision. Before considering the facts in more detail I must set out the legal background of the case.

Legal background

2. In the course of the war in the former Yugoslavia the Security Council of the United Nations, which has primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, adopted a number of resolutions requiring UN member States to adopt various embargo measures and other sanctions. The measures were adopted under Chapter VII of the Charter and were therefore binding on all UN member States.

3. The first such resolution was Resolution 713 (1991), adopted on 25 September 1991, in which the Security Council expressed its deep concern at the fighting in Yugoslavia and decided:

'that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia'. [1]

4. In Resolution 757 (1992), adopted on 30 May 1992, the Security Council condemned the failure of the authorities in the

* Original language: English.

1 — See paragraph 6 of the Resolution.

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. The Security Council took further measures embracing a trade embargo and a financial embargo. It decided among other things: [2]

'that all States shall prevent:

(a) The import into their territories of all commodities and products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) exported therefrom after the date of the present resolution;

(b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or transhipment of any commodities or products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro); and any dealings by their nationals or their flag vessels or aircraft or in their territories in any commodities or products originating in the Federal Republic of Yugoslavia (Serbia and Montenegro) and exported therefrom after the date of the present resolution, including in particular any transfer of funds to the Federal Republic of Yugoslavia (Serbia and Montenegro) for the purposes of such activities or dealings;

(c) The sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, whether or not originating in their territories, but not including supplies intended strictly for medical purposes and foodstuffs notified to the Committee established pursuant to Resolution 724 (1991), to any person or body in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any person or body for the purposes of any business carried on in or operated from the Federal Republic of Yugoslavia (Serbia and Montenegro), and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products'.

5. Of particular relevance in the present case is paragraph 7 of the same resolution, in which the Security Council decided:

'that all States shall:

(a) Deny permission to any aircraft to take off from, land in or overfly their

2 — At paragraph 4 of the Resolution.

territory if it is destined to land in or has taken off from the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro), unless the particular flight has been approved, for humanitarian or other purposes consistent with the relevant resolutions of the Council, by the Committee established by Resolution 724 (1991);

(b) Prohibit, by their nationals or from their territory, the provision of engineering and maintenance servicing of aircraft registered in the Federal Republic of Yugoslavia (Serbia and Montenegro) or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft'.

6. In Resolution 787 (1992), adopted on 16 November 1992, the Security Council decided to prohibit also the transhipment through the Federal Republic of Yugoslavia (Serbia and Montenegro) of a number of economically vital products (see paragraph 9). It further decided in paragraph 10:

'that any vessel in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be considered, for the purposes of implementation of the relevant resolutions of the Security Council, a vessel of the Federal Republic of Yugoslavia (Serbia and Montenegro) regardless of the flag under which the vessel sails'.

7. The embargo measures were further tightened by Resolution 820 (1993), adopted on 17 April 1993, which is directly relevant for the present case. That resolution contains certain provisions on transhipment of commodities and products through the Federal Republic of Yugoslavia (Serbia and Montenegro) on the Danube, the basic rule being that such transhipments 'shall be permitted only if specifically authorized by the Committee established by Resolution 724 (1991)' (see paragraph 15). The resolution further provides for the freezing of funds belonging to or controlled by the authorities or undertakings in the Federal Republic of Yugoslavia (Serbia and Montenegro) (paragraph 21). The Security Council also decided 'to prohibit the transport of all commodities and products across the land borders or to or from the ports of the Federal Republic of Yugoslavia (Serbia and Montenegro)', with very

limited exceptions concerning medical supplies and foodstuffs, essential humanitarian supplies and authorized transhipments (paragraph 22).

8. Paragraph 24 of Resolution 820 (1993) is central to the present case. There the Security Council:

'*Decides* that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) and that these vessels, freight vehicles, rolling stock and aircraft may be forfeit to the seizing State upon a determination that they have been in violation of Resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution.'

9. Closely connected is paragraph 25, where it was decided:

'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 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'.

10. The resolution further deals with the provision of services (paragraph 27) and with commercial maritime traffic (paragraph 28). The latter is in issue in *Ebony Maritime*. [3]

11. The above resolutions frequently refer to the Committee established by Resolution 724 (1991). The general tasks of that Committee were set out in paragraph 5(b) of that resolution, which was adopted on 15 December 1991. There the Security Council:

'*Decides* to establish, in accordance with rule 28 of its Provisional Rules of Procedure, a Committee of the Security Council consist-

3 — Case C-177/95, currently pending.

ing of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

(i) To examine the reports submitted pursuant to subparagraph (a) above [referring to Resolution 713 (1991)];

(ii) To seek from all States further information regarding the action taken by them concerning the effective implementation of the embargo imposed by paragraph 6 of Resolution 713 (1991);

(iii) To consider any information brought to its attention by States concerning violations of the embargo, and in that context to make recommendations to the Council on ways of increasing the effectiveness of the embargo;

(iv) To recommend appropriate measures in response to violations of the general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia and provide information on a regular basis to the Secretary-General for general distribution to Member States'.

12. The Community took various measures aimed at giving effect to the above resolutions. In issue in the present case is 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] By adopting that Regulation the Council sought to give effect to the strengthening of the embargo of the Federal Republic of Yugoslavia (Serbia and Montenegro) decided in Resolution 820 (1993). [5] The Regulation, which was based on Article 113 of the Treaty, replaced and repealed earlier Council regulations concerning the embargo. [6]

13. 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

4 — OJ 1993 L 102, p. 14.

5 — Cited above at paragraph 7.

6 — Council Regulation (EEC) No 1432/92 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 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 266, p. 26); Council Regulation (EEC) No 2656/92 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).

uniform implementation throughout the Community of certain of these measures'.

14. Most of the provisions of the Regulation substantially reproduce the various embargo measures contained in the abovementioned Security Council resolutions. For the purpose of the present case it is sufficient to cite in the first place Articles 8 and 9, which provide:

'*Article 8*

All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States.

Expenses of impounding vessels, freight vehicles, rolling stock and aircraft may be charged to their owners.

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.' [7]

15. Further, Article 11 provides:

'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.'

16. The Regulation entered into force on the day of its publication in the *Official Journal*, which was 28 April 1993.

17. In Ireland the Regulation was implemented by the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations, 1993, adopted by the Minister for

7 — Regulation No 1432/92 is cited above at note 6.

Tourism and Trade. [8] Regulation 5 of those regulations provides, in so far as is material:

'The Minister for Transport, Energy and Communications shall be the competent authority for the purpose of Articles 8 and 9 of the Council Regulation ...'.

18. It may be noted finally that Regulation No 990/93 is suspended with effect from 27 February 1996 pursuant to Council Regulation (EC) No 462/96, [9] Article 1(2) of which provides:

'As long as the Regulations referred to in paragraph 1 [including Regulation No 990/93] remain suspended, all funds and assets previously frozen or impounded pursuant to those Regulations may be released by Member States in accordance with law, provided that any such funds or assets that are subject to any claims, liens, judgments, or encumbrances, or which are the funds or assets of any person, partnership, corporation or other entity found or deemed to be insolvent under the law or the accounting principles prevailing in the relevant Member State, shall remain frozen or impounded until released in accordance with the applicable law.'

The facts and the main proceedings

19. The facts, as set out in the order for reference, may be summarized as follows. Bosphorus Airways is a company which was incorporated in Turkey on 12 March 1992.96% of its share capital is held by a Turkish citizen, Mr Mustafa Illhameddin Ozbay, and the remaining 4% of its share capital is owned by other Turkish citizens. The company was established to carry on a business of air charterers and tour operators.

20. By an agreement dated 17 April 1992 Bosphorus Airways leased two Boeing 737-300 aircraft with the then registration marks YUAN-J and YUAN-H from Yugoslav Airlines (JAT) for a period of 48 months, subject to the payment of a deposit of US $1 million for each aircraft and the payment of a monthly rental of US $150 000 for each. The lease is a so-called 'dry lease', which means that Bosphorus Airways provides the cabin and flight crew for the aircraft from its own employees. Bosphorus Airways has full day-to-day operational control and direction in respect of the aircraft. The lease agreement provides that ownership of the aircraft stays with the

8 — S. I. No 144 of 1993.

9 — 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).

lessor (JAT), but that the lessee has the right to register the aircraft on the Turkish Register of Civil Aviation. The lessee duly registered the aircraft with the Turkish Ministry of Transport and Communications. The certificates of registration identified the owner of the aircraft as 'Yugoslav Airlines (JAT)' and the name of the operator as 'Bosphorus Hava Yollari A. S.'. The certificates were issued pursuant to the relevant provisions of Turkish law and the Chicago Convention on International Civil Aviation, dated 7 December 1944.

21. The lease further provides that Bosphorus Airways shall have an option to purchase the aircraft within six months after the expiry of the lease in the event that the lessor decides to sell.

22. It was established in the main proceedings that there is no implication that Bosphorus Airways was involved in any scheme to use a foreign flag. No suggestion has been made that Bosphorus Airways is in any way seeking to break the UN sanctions. It was also established that the transaction between Bosphorus Airways and JAT was entirely bona fide. There is no question of JAT having any interest, direct or indirect, in Bosphorus Airways or in the management, supervision or direction of the business of that company. From the dates of delivery, the aircraft were used exclusively for the purpose of tour operation by Bosphorus Airways flying between Turkey, on the one hand, and various Member States of the Community and Switzerland, on the other.

23. On 16 April 1993 one of the aircraft (Registration TC-CYO) was flown by Bosphorus Airways to Dublin Airport for the purpose of having an overhaul and maintenance service carried out on it by TEAM Aer Lingus Limited, the aircraft maintenance subsidiary of the Irish national airline, Aer Lingus. The service was completed on 28 May 1993 and the aircraft was about to depart from Dublin Airport when flight clearance for the plane was delayed upon the instructions of the Minister. The aircraft was subsequently impounded on the direction of the Minister, dated 8 June 1993. That direction was made pursuant to Article 8 of the Regulation [10] on the ground that the aircraft was one 'in which a majority or controlling interest' was held by 'a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)'.

24. The Minister refers to a letter of the Chairman of the Security Council Committee established pursuant to Resolution 724 (1991) (hereafter 'the Committee'). [11] That letter was written in reply to a request for guidance and approval for the maintenance work carried out by TEAM Aer Lingus. The request was made by the Irish

10 — Cited above in paragraph 14.
11 — See above at paragraph 11.

Permanent Representative to the United Nations on 26 May 1993, two days prior to the detaining of the aircraft. In the letter, dated 14 June 1993, the Chairman states:

'The Committee considered the matter at its 71st meeting, on 8 June 1993, and was of the view that the provision of any services to an aircraft owned by an undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), except those specifically authorized in advance by the Committee ..., would not be in conformity with the requirements of the relevant Security Council resolutions. The members of the Committee also recalled the provisions of paragraph 24 of Security Council Resolution 820 (1993) regarding such aircraft, under which the aircraft in question should have already [been] impounded by the Irish authorities ... .'

25. The Minister further points out that in a letter to the Turkish Permanent Representative to the United Nations, dated 28 May 1993, the Chairman of the Committee stated, in relation to the two aircraft operated by Bosphorus Airways:

'The Committee was not in agreement with the view of Your Excellency's Government that the aircraft in question may continue to operate, and, in that connection, recalled the provisions of paragraph 24 of Security Council Resolution 820 (1993).'

26. In July 1993 the Turkish Embassy in Ireland requested that the aircraft impounded by the Minister be flown back to Turkey, with a view to being impounded and confiscated there in compliance with the sanctions resolutions. On that issue also the Irish authorities sought the advice of the Committee, and in a letter of 4 August 1993 the chairman of the Committee stated:

'under the terms of the relevant decisions of the Security Council, the Irish authorities are required to withhold all services from the aircraft in question, including services necessary to enable the plane to fly back to Turkey. Accordingly, it was the view of the Committee that the aircraft should remain impounded in Ireland.'

27. It is also worth mentioning that, according to Bosphorus Airways, payments for the lease of the aircraft are made into a blocked account, operated by the Turkish Central Bank in accordance with its national legislation enforcing UN sanctions. Such payments would not therefore appear to reach JAT.

28. Bosphorus Airways applied to the High Court in Dublin for judicial review of the direction of the Minister to impound the aircraft. In its judgment and order of 21 June 1994 the High Court quashed the direction of the Minister, on the grounds that the

aircraft in question was not an aircraft to which Article 8 of the Regulation applies, not being an aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro). [12]

30. At the hearing the Court was informed that the aircraft had been released subsequent to the suspension of the Regulation.

The issue

29. The Minister appealed to the Supreme Court against the judgment and order of the High Court. The Supreme Court took the view that the determination of the issues between the Minister and Bosphorus Airways depended on the interpretation to be given to Article 8 of the Regulation. It therefore decided to refer to the Court the following question:

'Is Article 8 of Regulation 990/93/EEC to be construed as applying to an aircraft which is owned by an undertaking the majority or controlling interest in which is held by an undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro) where such aircraft has been leased by the owner for a term of four years from the 22nd April 1992 to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from the said Federal Republic of Yugoslavia (Serbia and Montenegro)?'

31. While Bosphorus Airways vigorously challenges the lawfulness of the Minister's decision to impound the aircraft, the Austrian and Danish Governments and the Commission support the defendants in submitting that that decision was correct. The latter view is clearly suggested by a reading of Article 8 of the Regulation. The wording of the article, when applied to the facts of the present case, appears to leave little room for doubt. It refers to a 'majority or controlling interest ... held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)'. The term 'interest' is very broad, encompassing all types of property interest, and it was established in the main proceedings that JAT continues to be the exclusive owner of the aircraft. Indeed, the Supreme Court's question is based on that factual finding. It is true that the term 'interest' is also rather vague, but most other language versions of the Regulation refer to the notion of property, instead of interest, which obviously covers JAT's ownership of the aircraft. The notion of ownership is also used in the second sentence of Article 8, which states that expenses

12 — The judgment is reported in [1994] 2 ILRM 551 and in [1994] 3 CMLR 464.

of impounding may be charged to the owners. Further, the preamble to the Regulation 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 ...'.

The requirement of a uniform interpretation of the Regulation therefore seems to be particularly compelling. I note in that respect that in other Member States, where other language versions are applied, the doubts expressed in the order for reference might never surface, because of the clear reference to property in the relevant versions of the Regulation.

32. The fact that JAT has no control over the aircraft during the term of the lease would seem to be irrelevant: the phrase 'majority or controlling interest' in Article 8 suggests that, where there is a majority interest, the question of control does not arise.

33. The issue is therefore whether there are, in the present case, any compelling reasons to interpret the Regulation in a way which appears to depart from its wording. It is established case-law that:

'in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part'. [13]

34. Essential to the context and the objects of the Regulation are the Security Council resolutions which it aims to implement, and I will examine whether those resolutions affect the interpretation to be given to the Regulation. Further, Bosphorus Airways relies on a number of general principles of Community law in support of its view that Article 8 of the Regulation does not apply in the circumstances of the present case.

The Regulation and the resolutions

35. The preamble to the Regulation expressly refers to the resolutions mentioned above, and makes it clear that the Council sought to implement them by adopting the

13 — See Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 22 of the judgment.

Regulation. There can therefore be no doubt that the Regulation has to be interpreted in the light of those resolutions. The question whether the resolutions, as such, are binding on the Community, albeit very interesting, does not fall to be decided here. [14]

36. It is significant that the term 'a majority or controlling interest' in the Regulation is reproduced verbatim from the text of paragraph 24 of Resolution 820 (1993). Moreover substantially the same term is used in all three United Nations languages which are also Community languages (English, French, Spanish): 'a majority or controlling interest', 'un intérêt majoritaire ou prépondérant', 'intereses mayoritorios o de control'.

37. Bosphorus Airways does not seek to rely on the terms of the relevant resolutions in support of its submission that Article 8 of the Regulation does not apply. It does however refer to the reasoning of the High Court, which interpreted the Regulation by taking a teleological approach. The High Court judge, Mr Justice Murphy, took the view that: [15]

'The express purpose of the harsh commercial regime imposed by the regulations is to deter the Federal Republic from engaging in or continuing with activities which will lead to further unacceptable loss of human life and material damage. It is clear, beyond debate, that these regulations are intended to operate as a punishment, deterrent or sanction against the people or government of that troubled Republic. Conversely, it is equally clear that the regulations are not intended to punish or penalise peoples or countries who have not in any way caused or contributed to these tragic events.'

38. The judgment went on to interpret the term 'interest' in the light of those aims: [16]

'In my view, the degree or extent of the interest referred to in the article must have been intended to identify a situation in which the person in or operating from Yugoslavia could exercise a decision-making function in relation to the use on a day-to-day basis of the asset in question. Any other construction would seem to be both unreal and unjust. To impound an asset for the possession and enjoyment of which a wholly innocent party has paid a substantial amount of money simply because another party has a theoretical right to receive a nominal rent in respect thereof must be absurd. Surely the purpose of the regulation is to deprive the guilty party of recourse to the aircraft, vehicle or whatever mode of transport is involved and which could itself be used to transport goods in breach of the embargo imposed by the regulations. In my opinion,

14 — For a discussion see Sebastian Bohr, 'Sanctions by the United Nations Security Council and the European Community', *European Journal of International Law* (1993), 256 at pp. 262 to 265.

15 — Cited above at note 12, paragraph 16 of the judgment.

16 — See paragraph 17.

the "interest" referred to in Article 8 is essentially the interest in possession or the right to enjoy control or regulate the use of the asset rather than an income derived from it. If the concern of the regulations was to deprive Yugoslav nationals or undertakings of an income, that could be done by other means as the present case has already demonstrated. As long as the position is that no citizen of Serbia and Montenegro has any use or control over the aircraft in question or the opportunity to receive any income derived from it, then it would seem to me that the regulations have achieved their purpose fully and the impounding of the aircraft would constitute a wholly unwarranted intervention in the business of Bosphorus Airways.'

39. I could subscribe to that reasoning if it were indeed clear that the purpose of paragraph 24 of Resolution 820 (1993) was to deprive the guilty party of recourse to the aircraft which could be used to transport goods in breach of the embargo. It seems to me, however, that such a narrow construction of the resolution is not compelling. It is not possible to establish, on the basis of the text of the resolutions, that the requirement to impound means of transport was only intended to strengthen the trade embargo. There can of course be no doubt that the Security Council had the strengthening of the trade embargo in mind when it took its decision. That can be deduced from the fact that the second part of paragraph 24 adds that the means of transport mentioned 'may be forfeit to the seizing State upon a determination that they have been in violation of Resolutions 713 (1991), 757 (1992), 787 (1992) or the present resolution'. However, it is by no means excluded that the Security Council intended to go further. It will be remembered that the Security Council also decided to freeze all funds belonging to or destined for authorities or undertakings in the Federal Republic of Yugoslavia (Serbia and Montenegro). [17] The decision to impound means of transport in which undertakings in that Republic have a majority or controlling interest can be construed as a further decision freezing assets abroad, even where there is no immediate risk of their being used to circumvent the trade embargo. As the defendants put it in their written observations, the object may be to deprive the Yugoslav undertaking in a case such as the present one of even the indirect benefit of the fact that a means of transport will continue to operate and continue to be maintained and insured.

40. It is likely in my view to be much more difficult to divine the precise purpose of a Community measure implementing a resolution of the United Nations Security Council than it would normally be to ascertain the purpose of an ordinary Community measure. What is in issue is not the intention of the Community institutions themselves, which can often be gathered from the context and preamble and possibly also from the submissions made by those institutions before the Court, but the purpose of the Security Council, an organ composed of many diverse States acting in highly charged political circumstances. A literal interpretation of the text may therefore carry more weight.

17 — See paragraph 5 of Resolution 757 (1992).

41. The Commission, in its observations to the Court, also considers that it is hazardous to attempt to assess the exact purposes of the Security Council's decision. The Commission suggests however that the High Court has taken too narrow a view of the objectives pursued. According to the Commission, the aim is also to prevent persons or undertakings in the Federal Republic of Yugoslavia (Serbia and Montenegro) from recovering means of transport which are temporarily outside their control. It points out that sanctions are never entirely effective and that it would appear justified to act at the earliest possible moment to impound means of transport which could benefit citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) rather than to rely on all intervening parties to avoid passing control to persons in that Republic.

42. In the case of aircraft that argument is particularly forceful, because as long as an aircraft is airborne there will always be the risk of an unexpected change of course, in this case back to the Federal Republic of Yugoslavia (Serbia and Montenegro); depending on its location at the time, the risk may be far greater in the case of an aircraft than in the case of a ship. Moreover in the case of a lease, the risk cannot be excluded that the lease agreement might be terminated at some stage prior to its expiry, and the aircraft returned to its owner. Therefore, even if paragraph 24 was only intended to strengthen or reinforce the trade embargo, the decision to impound an aircraft temporarily outside the control of its owner would appear to be justified.

43. Nor can a narrow view be justified by the language of the resolutions. As we have seen, the term 'a majority or controlling interest' is used in paragraph 24 of the Resolution as it is in the Regulation. The same conclusion appears to follow: where there is a majority interest, there is no requirement of control. Nor is there any support in the wording of the resolutions for the view that in the case of an aircraft the term 'interest' refers to the country of registration of the aircraft, in the present case Turkey. The Security Council appears to have had in mind the distinction between ownership and registration of aircraft. In paragraph 7(b) of Resolution 757 (1992), [18] on the provision of engineering and maintenance servicing of aircraft, reference is made to 'aircraft registered in the Federal Republic of Yugoslavia (Serbia and Montenegro)'. The fact that paragraph 24 of Resolution 820 (1993) does not use that definition suggests that the country of registration was considered irrelevant.

44. Further, in the case of vessels paragraph 10 of Resolution 787 (1992) makes it clear that the flag under which vessels sail is irrelevant for determining whether there is a majority or controlling interest held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro). It seems to me that, in the absence of any language to the opposite effect, a similar interpretation should prevail

18 — See paragraph 5 above.

in the case of aircraft: in paragraph 24 of Resolution 820 (1993), which contains the instruction to impound, vessels and aircraft are treated identically.

45. At the hearing counsel for Bosphorus Airways pointed out that the flagging out of vessels is a widespread practice, which does not occur in the domain of civil aviation, where registration of an aircraft in a particular State is only possible under circumstances where the aviation authorities of that State are confident that they are able to supervise the operations of the aircraft, in particular as regards safety requirements. In my view that may explain why the resolutions contain no provision on aircraft comparable to the provision on the flagging of vessels. It does not however demonstrate that in the case of aircraft the term 'interest' refers only to the interest of the undertaking which registered the aircraft in a particular State.

46. Since neither the aims nor the text of the resolutions suggest that the Minister was mistaken in his interpretation of the Regulation it is not in my view necessary to examine fully the effect of the opinion expressed by the Committee established by Resolution 724 (1991), which also took the view that the aircraft had to be impounded. Clearly, due regard should be given to the opinion of the Committee; it consists of representatives of States which are members of the Security Council, and their views must carry considerable weight. The Committee has developed into an important standing body for the day-to-day supervision of the enforcement of the sanctions and can promote the consistent interpretation and application of the resolutions by the international community. [19] However, it seems questionable whether in the present case the Committee's opinion could be regarded as binding if only because such an effect is not provided for by the relevant provisions of the resolutions. As we have seen, the approval of the Committee had to be obtained in some instances, [20] but the decision to impound means of transport is not among them, and the general powers of the Committee do not include decision-making powers. [21] Moreover the opinion expressed by the Committee contains little or no reasoning which could be of any assistance. It does not for example give guidance on the interpretation of the term 'interest' or of any other terms of paragraph 24 of Resolution 820 (1993).

47. However, even without treating the opinion of the Committee as decisive — indeed even if the opinion is not taken into account — it can be concluded in my view that the Security Council resolutions do not require an interpretation departing from the clear wording of Article 8 of the Regulation.

19 — 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), pp. 771 to 827.

20 — See e. g. paragraph 15 of Resolution 820 (1993).

21 — See paragraph 5b of Resolution 724 (1991), cited above in paragraph 11; see Pieter-Jan Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau (ed), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martinus Nijhoff 1993), 387 at 397, where he discusses the point in relation to sanctions against Iraq, where a similar Committee exists.

Principles of legal certainty, proportionality and respect for fundamental rights

48. Finally, Bosphorus Airways relies on certain general principles of Community law: legal certainty, proportionality and respect for fundamental rights. As regards legal certainty, Bosphorus Airways' submission is that the effect of a legal provision must be clear and predictable to the person subject to it. That is so in particular where, as Bosphorus Airways claims, the provision is penal in effect, is draconian in its severity, and is applied to an innocent party.

49. The question of the effects of the Regulation can I think best be considered in connection with the principles of proportionality and respect for fundamental rights. I have taken the view that the text of the provision in issue is clear. To that extent, there is no infringement of the principle of legal certainty, and Bosphorus Airways has not suggested any other way in which that principle has been infringed. The question then is whether there is an infringement of the principle of proportionality or of the principle of respect for fundamental rights. These two points can conveniently be taken together.

50. This part of Bosphorus Airways' claim raises an important issue and I will therefore examine in some detail the question whether the Minister's action has infringed any fundamental rights of Bosphorus Airways and whether in that context the action infringed the principle of proportionality.

51. It is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights the Court takes account of the constitutional traditions of the Member States and of international agreements, notably the Convention for the Protection of Human Rights and Fundamental Freedoms, generally known as the European Convention on Human Rights, which has special significance in that respect. [22]

52. Article F(2) of the Treaty on European Union, which provides that the Union shall respect fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law, gives Treaty expression to the Court's case-law. Article F(2) appears in Title I of the Treaty, and therefore does not fall within the jurisdiction of the Court in so far as it extends to the Union Treaty as a whole. [23] In relation to the EC Treaty, it

22 — See most recently Opinion 2/94 of 28 March 1996, paragraphs 32 and 33.

23 — See Article L of the Treaty.

confirms and consolidates the Court's case-law, underlining the paramount importance of respect for fundamental rights.

53. Respect for fundamental rights is thus a condition of the lawfulness of Community acts [24] — in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. [25] All Member States are in any event parties to the European Convention on Human Rights, even though it does not have the status of domestic law in all of them. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention [26] and of the Treaty, [27] and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in this Court and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention.

54. Bosphorus Airways specifically refers to the right to peaceful enjoyment of property, protected by the Convention, as well as the right to pursue a commercial activity, which has also been recognized as a fundamental right by the case-law of this Court. It argues that the interpretation of the Regulation adopted by the Minister leads to a violation of those rights, because that interpretation would, as Bosphorus Airways puts it, effectively destroy and obliterate Bosphorus Airways. It also submits that the Regulation would be void, in whole or in part, if it had the consequence of destroying the property of a wholly innocent undertaking in the circumstances of Bosphorus Airways.

55. The right to property is defined in Article 1 of the First Protocol to the European Convention on Human Rights as follows:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the

24 — Opinion 2/94, paragraph 34.

25 — Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19 of the judgment; Case C-351/92 *Graff* v *Hauptzollamt Köln-Rheinau* [1994] ECR I-3361, paragraph 17.

26 — Under Article 59(1) of the Convention, only member States of the Council of Europe can become parties to the Convention.

27 — See Opinion 2/94, cited at note 22.

payment of taxes or other contributions or penalties.'

56. By virtue of Article 5 of the Protocol the provisions of Article 1 are to be regarded, as between the High Contracting Parties, as additional provisions of the Convention.

57. In a line of cases starting with *Sporrong and Lönnroth* [28] the European Court of Human Rights has held that Article 1 of the First Protocol comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognizes that the contracting States are entitled to control the use of property in accordance with the general interest. The three rules are not distinct in the sense of being unconnected; the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

58. The case-law of the European Court of Human Rights establishes that Article 1 covers the type of interest which Bosphorus Airways has in the impounded aircraft: a broad interpretation is given to the term possessions, which includes interests under leases. [29] However, in recognizing that States are entitled to control the use of property in accordance with the general interest, Article 1 requires that an appropriate balance be struck. In *Sporrong and Lönnroth* the European Court of Human Rights described its own function as follows:

'... the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.

59. The question then is how that test is to be applied. While there appear to be no decisions of the European Court of Human Rights dealing specifically with the impounding of assets in implementation of international sanctions, nevertheless assistance can be derived from that Court's general approach. Thus for example in *AGOSI* v *UK*, [30] where gold Krugerrands (bullion coins) belonging to the applicants had been confiscated by the United Kingdom customs authorities after third parties had tried

28 — Judgment of 23 September 1982, paragraph 69.

29 — *Mellacher* v *Austria*, judgment of 19 December 1989, paragraph 43.

30 — Judgment of 24 October 1986.

unlawfully to import them into the country, the Court applied the 'fair balance' test to the issue whether confiscation was justified as a measure of enforcement against an innocent owner. According to the Court, the 'fault' or otherwise of the owner was only one of the factors to be taken into account; another factor was the procedure available to the owner to put his case to the administrative authorities before seizure of the goods was confirmed, and the availability of judicial review to challenge the administrative decision. The Court found that in the light of the procedures available no violation had occurred. The Court adopted a similar approach in *Air Canada* v *UK*. [31] In that case an aircraft owned and operated by Air Canada which was found on landing at Heathrow Airport to be carrying a very substantial quantity of prohibited drugs was seized by the United Kingdom customs authorities but released later the same day on payment by the airline of a penalty of £50 000. The European Court of Human Rights found that the measures taken conformed to the general interest in combating drug trafficking and were not disproportionate to the aim pursued.

60. A similar approach has been adopted by the Court of Justice in cases where the right to property or the right to pursue a commercial activity is in issue. Thus in *Germany* v *Council*, [32] concerning the common market organization for bananas, the Court recalled its consistent case-law.

'Both the right to property and the freedom to pursue a trade or business form part of the general principles of Community law. However, those principles are not absolute, but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.'

61. That statement was based on the more trenchant analysis of the right to property which the Court performed in *Hauer* v *Land Rheinland-Pfalz*, [33] drawing inspiration from Article 1 of the First Protocol and from the constitutional rules and practices of the Member States. That case concerned a temporary prohibition on the planting of vines, and the Court, following the Opinion of Advocate General Capotorti, considered that

31 — Judgment of 5 May 1995.

32 — Case C-280/93 [1994] ECR I-4973, paragraph 78 of the judgment.

33 — Case 44/79 [1979] ECR 3727, paragraphs 17 to 30 (see in particular paragraph 23).

prohibition from the angle of a restriction on the use of property. After referring to the principle restated in the subsequent case-law cited above, the Court in that case held: [34]

'It is therefore necessary to identify the aim pursued by the disputed regulation and to determine whether there exists a reasonable relationship between the measures provided for by the regulation and the aim pursued by the Community in this case.'

62. That statement also demonstrates that in the present case the principle of proportionality, although presented as a separate head of argument by Bosphorus Airways, is an essential part of the test to be applied when reviewing the claim of a violation of Bosphorus Airways' right to property. Indeed, the essential question is whether the obvious interference with Bosphorus Airways' possession of the aircraft is a proportionate measure in the light of the aims of general interest which the Regulation seeks to achieve.

63. There seems no doubt that Bosphorus Airways' fundamental rights are in issue in the circumstances of the present case. I have already mentioned that the European Court of Human Rights regards interests under leases as falling within the scope of Article 1. Similarly, this Court was satisfied in *Wachauf* [35] that a lessee could rely on fundamental rights, and although in that judgment it did not refer explicitly to the right to property, it did refer to the judgment in *Hauer*, which concerned property rights. It is obvious moreover that the impounding of the aircraft was a severe restriction on the exercise by Bosphorus Airways of its property rights, a restriction difficult to distinguish, in its effects, from a temporary deprivation.

64. On the other hand it is also obvious that there is a particularly strong public interest in enforcing embargo measures decided by the United Nations Security Council. Indeed it is difficult to think of any stronger type of public interest than that of stopping a civil war as devastating as the one which engulfed the former Yugoslavia, and in particular Bosnia-Herzegovina. The international community took the view that, in order to stop that war, it was necessary to put pressure on the Federal Republic of Yugoslavia (Serbia and Montenegro) because of the role played by that Republic in the Bosnian conflict. Accordingly, the Security Council decided to adopt, and subsequently strengthen, economic sanctions, which were implemented by the Community. Unavoidably, such sanctions affect property rights, including those of innocent economic operators. In that respect Bosphorus Airways is in no way in a

34 — See paragraph 23.

35 — Cited at note 25.

unique position. Many others, including all those who had significant interests in trade with the Federal Republic of Yugoslavia (Serbia and Montenegro), are likely to have suffered severe losses from the embargo measures. Such losses are inevitable if the sanctions are to be effective.

65. That does not of course mean that in such circumstances any type of interference with the right to property should be tolerated. If it were demonstrated that such interference was wholly unreasonable in the light of the aims which the competent authorities sought to achieve, then it would be necessary for this Court to intervene. In that regard it may be necessary to consider whether, in the light of any information which may have subsequently come to light and after further consideration of the circumstances, the competent authorities were justified in maintaining a measure taken as a matter of urgency. However in the present case, as I have suggested above, [36] the decision to impound the aircraft on the ground that it was owned by an undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot be regarded as unreasonable either at the moment when it was taken or subsequently, even though the aircraft was not actually controlled by such an undertaking at the time of impounding. Thus the sanction measures do in my view justify the contested decision.

66. Bosphorus Airways has emphasized what it considers the drastic financial and commercial effects of the decision. I am not convinced that those effects can be given the weight which Bosphorus Airways suggests. The financial consequences may vary — in other situations, a lessee might simply be able to cancel the agreement and lease another aircraft. In any case I do not think it is possible to set aside a general measure of this kind simply because of the financial consequences which it may have in a particular case. The relevant question seems to me to be whether the impounding of an aircraft is in accordance with the measure in circumstances where the owner, but not the lessee, is an undertaking from the territory against which the sanctions are directed. But even if it were relevant to take account of the losses allegedly incurred by Bosphorus Airways, I do not think that the principle of proportionality would be infringed, in view of the importance of the public interest involved.

67. I therefore reach the conclusion that the contested decision did not, to apply the test of the European Court of Human Rights, strike an unfair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. That conclusion seems consistent with the case-law of that Court in general. Nor indeed has Bosphorus Airways suggested that there is any case-law under the European Convention on Human Rights supporting its own conclusion.

36 — See paragraphs 39 to 42.

68. The position seems to be no different if one refers to the fundamental rights as they result from 'the constitutional traditions common to the Member States', referred to in the case-law of this Court and in Article F(2) of the Treaty on European Union. In *Hauer* [37] the Court pointed out (at paragraph 20), referring specifically to the German Grundgesetz, the Irish constitution and the Italian constitution, that the constitutional rules and practices of the Member States permit the legislature to control the use of private property in accordance with the general interest. Again it has not been suggested that there is any case-law supporting the view that the contested decision infringed fundamental rights. The decision of the Irish High Court was based, as we have seen, on different grounds.

69. I have suggested that the principle of proportionality can be considered together with the principle of respect for fundamental rights. If the principle of proportionality were to be considered independently, a very similar approach would be necessary: it would be necessary to balance the interference with Bosphorus Airways' interests against the general interest. The same conclusion must in my view follow. The general interest is plainly of exceptional importance.

Conclusion

70. Accordingly the question referred by the Irish Supreme Court should in my opinion be answered as follows:

Article 8 of Council Regulation (EEC) No 990/93 must be interpreted as applying to an aircraft the majority or controlling interest in which is held by an undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro) even where that aircraft has been leased by the owner for a term of four years to an undertaking which is not an undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro).

37 — Cited at note 33.