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Bosphorus Case: The Balancing of Property Rights in the European Community and the Public Interest in Ending the War in Bosnia

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Erik Drewniak

Abstract

This Comment argues that the European Court of Justice ("ECJ") should choose not to follow its holding that Regulation 990/93 applied to the aircraft that Bosphorus leased from Yugoslavian National Airline ("JAT"), because it is not clear that the language of Resolution 820 and Regulation 990/93 provides for the impounding of aircrafts whose Yugoslavian owner leased them to non-Yugoslavian businesses in which no Yugoslavian entity has a majority or controlling interest. This Comment further argues that in so holding, the ECJ violated Bosphorus' fundamental right to property because the impounding of the aircraft was disproportionate to the concrete purpose of preventing Yugoslavia and Yugoslavian nationals from having recourse to aircrafts that they could use to violate the embargo. Part I discusses the structure of the European Community and sources of fundamental rights in Community law, specifically property rights, including important ECJ and European Court of Human Rights property rights cases. Part I also presents the background of the *Bosphorus* case, including the historical background of the war in Bosnia, the U.N. Security Council Resolutions instituting the embargo on Yugoslavia, and the EC Council regulations implementing those resolutions. Part II discusses the procedural history and facts of the *Bosphorus* case, including an analysis of the decisions of the Irish High Court (the "High Court"), the Advocate General of the ECJ, and the ECJ. Part III advocates a more narrow and concrete interpretation of Regulation 990/93, affording greater weight to Bosphorus' property rights. This Comment concludes that the ECJ should adopt a more narrow and concrete interpretation of Regulation 990/93 and should refrain from following its holding that Regulation 990/93 did not apply to Bosphorus's aircraft, thereby further strengthening and clarifying the European Community's commitment to the protection of property rights.

COMMENT

THE BOSPHORUS CASE: THE BALANCING OF PROPERTY RIGHTS IN THE EUROPEAN COMMUNITY AND THE PUBLIC INTEREST IN ENDING THE WAR IN BOSNIA

*Erik Drawniak**

INTRODUCTION

One of the international community's reactions to the war raging in Bosnia-Herzegovina¹ ("Bosnia") since 1991 has been the imposition of an embargo² on the Republic of Yugoslavia ("Yugoslavia").³ Between 1991 and 1993, the U.N. Security Council⁴ passed a series of sanctions against Yugoslavia designed

* J.D. Candidate, 1998, Fordham University. This Comment is dedicated to Svetla, for her love and patience.

1. LEONARD J. COHEN, *BROKEN BONDS* 236 (1994). Bosnia-Herzegovina ("Bosnia") is a region in southeastern Europe populated mainly by Serbs, Croats, and Muslims. *See id.* (discussing Bosnia's ethnic makeup). Tensions between the three ethnicities in Bosnia worsened to the point where, in 1992, war broke out between Serb and Muslim forces. *See id.* at 236-39 (describing political and ethnic situation in Bosnia at time when war erupted).

2. *See* PAUL MOJZES, *YUGOSLAVIAN INFERNO* 172-85 (1994) (characterizing reactions of Europe and United States to war in Bosnia as indecisive, uninspired, and cautious, while arguing that most consistent action of United Nations and European Community has been its application of arms embargo).

3. BOGDAN DENITCH, *ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA* 22 (1994). Yugoslavia first came into existence as an independent state after World War I. *Id.* That state was the product of the unification of the independent kingdoms of Serbia and Montenegro with the South Slavic provinces, which had long been under Austro-Hungarian rule. *Id.* After World War II and under Josip Broz Tito, Yugoslavia became a Socialist federation consisting of six republics of equal status. *See* FRED SINGLETON, *A SHORT HISTORY OF THE YUGOSLAV PEOPLES* 207-09 (1985) (recounting early days of post-World War II transition to Socialism). After the death of Tito, the Socialist system in Yugoslavia disintegrated and gave way to disunity based in ethnic conflict. *See* MOJZES, *supra* note 2, at 76-77 (discussing revival of ethnic strife after Tito's death). During the 1980s and early 1990s, ethnic tensions erupted into skirmishes among ethnicities in Croatia and the Kosovo region of Serbia, and then actual war in Slovenia, Croatia, and Bosnia-Herzegovina. *See id.* at 95-107 (detailing progression of violent clashes among ethnic groups in 1980s and 1990s Yugoslavia). The main ethnic groups of Yugoslavia are Serbs, Croats, Slavic Muslims, and Montenegrins, but the population also consists of Slovenes, Albanians, Macedonians, and Hungarians. DENITCH, *supra*, at 28-29.

4. U.N. CHARTER art. 23. The United Nations is an international organization of states that fifty states formed to create and supervise some order in the world, to "de-

to foster peace.⁵ These measures included an arms embargo⁶ and trade sanctions,⁷ along with provisions for the freezing of funds owned by or destined for Yugoslavian authorities or undertakings.⁸ In addition to the U.N. sanctions, the European Com-

velop friendly relations among nations," and "to maintain international peace and security . . ." *Id.* art. 1(1), 1(2). In San Francisco in April, 1945, representatives of those fifty states drew up the U.N. Charter which consists of rules for an organization of states and for the limits of action that their governments may take. PETER R. BAEHR & LEON GORDENKER, *THE UNITED NATIONS IN THE 1990s* 1-3 (2nd ed. 1994). These rules take the form of legal obligations which are binding on states and accepted as such by their governments. U.N. CHARTER art. 2(2). The U.N. Security Council is a body within the United Nations that has both permanent and non-permanent members. *Id.* art. 23(1). Of all the various U.N. organs, the Security Council has primary responsibility for "the maintenance of international peace and security . . ." *Id.* art. 24(1). The Security Council has conciliatory and coercive powers. BAEHR & GORDENKER, *supra*, at 24. The Security Council must exercise its powers only after the parties in a dispute have attempted to arrive at their own solution. U.N. CHARTER art. 37. If the Security Council concludes that a situation constitutes a direct threat or breach of the peace, it can immediately call on member governments to apply diplomatic and economic sanctions. *Id.* arts. 39, 41. The member governments on whom the Security Council calls to carry out its decisions then have a legal obligation to act in accordance with the Security Council's demand. *Id.* art. 48; BAEHR & GORDENKER, *supra*, at 25. Chapter VII of the U.N. Charter authorizes the Security Council to impose diplomatic and economic sanctions. U.N. CHARTER art. 41.

5. *See, e.g.*, S.C. Res. 713, U.N. SCOR, 3009th Mtg., at 3, ¶ 6, U.N. Doc. S/RES/713 (1991) [hereinafter Resolution 713] (imposing total arms embargo on Yugoslavia); S.C. Res. 757, U.N. SCOR, 3082nd Mtg., at 3-4, ¶ 4, U.N. Doc. S/RES/757 (1992) [hereinafter Resolution 757] (imposing total trade embargo on Yugoslavia); S.C. Res. 787, U.N. SCOR, 3137th Mtg., at 3, ¶ 9, U.N. Doc. S/RES/787 (1992) [hereinafter Resolution 787] (prohibiting transshipment through Yugoslavia of certain essential products and defining Yugoslavian vessel for purposes of implementing relevant U.N. Security Council Resolutions); S.C. Res. 820, U.N. SCOR, 3200th Mtg., at 4-6, ¶¶ 13, 22, 24, U.N. Doc. S/RES/820 (1993) [hereinafter Resolution 820] (strengthening U.N. embargo on Yugoslavia by prohibiting transport of all commodities across Yugoslavian border and by providing for impounding of various types of vehicles in which Yugoslavian entity holds majority or controlling interest); Sebastian Bohr, *Sanctions by the United Nations Security Council and the European Community*, 4 *EUR. J. INT'L L.* 256, 260-62 (1993) (discussing several major U.N. Security Council resolutions passed from 1991 to 1992 in response to war in Bosnia); Lori Fisler Damrosch, *ASIL Insight: Recent Security Council Conflicts: Economic Sanctions*, *AM. SOCIETY INT'L L. NEWSL.*, Jan., 1994, available in LEXIS, International Law Library, American Society of International Law Newsletter File, at 3-4 (discussing Security Council's adoption in 1993 of sanctions aimed specifically at Bosnian Serbs).

6. *See* Resolution 713, *supra* note 5, at 3, ¶ 6 (instituting complete arms embargo on Yugoslavia).

7. *See* Resolution 757, *supra* note 5, at 3-4, ¶ 4 (instituting total embargo on trade with Yugoslavia).

8. *See id.* at 4, ¶ 5 (providing exception for "payments exclusively for strictly medical or humanitarian purposes and foodstuffs . . .").

munity⁹ passed, during approximately the same period, several regulations¹⁰ to implement the U.N. embargo.¹¹ The sanctions caused the states bordering Yugoslavia to suffer economic loss,¹²

9. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union* [hereinafter TEU], Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Br. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by Single European Act* [hereinafter SEA], O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). As of the signing of the TEU, the term European Community replaces the term European Economic Community. TEU, *supra*, art. G, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728; P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 4 (1995). In addition to the European Economic Community ("EEC"), there is the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"). *Id.* The EEC has, for all practical purposes, absorbed the ECSC and Euratom, which is why the singular form of the term Community has become prevalent. *Id.* The TEU established the European Union, which functions as a new chapter in the task of uniting the people of Europe more closely. *Id.* at 3-4. The EEC, ECSC, and Euratom comprise the first of three pillars that form the European Union, while the second and third pillars are, respectively, a Common Foreign and Security Policy and Co-operation in the areas of Justice and Home Affairs. *Id.* at 4. The 12 Member States that signed the TEU were Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. TEU, *supra*, pmb., O.J. C 224/1, at 1 (1992), [1992] 1 C.M.L.R. at 719. In 1995, Austria, Finland, and Sweden's acceded to the European Union. Roger J. Goebel, *The European Union Grows: the Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1093 (1995).

10. PENELOPE KENT, EUROPEAN COMMUNITY LAW 24 (1992). A regulation sets out general rules which apply uniformly throughout the European Community. *Id.* The European Community's Council, Commission, and Parliament make regulations "[i]n order to carry out their task and in accordance with the provisions of [the EC Treaty] . . ." EC Treaty, *supra* note 9, art. 189, [1992] 1 C.M.L.R. at 693. A regulation "shall have general application . . . [and] shall be binding in its entirety and directly applicable in all [EC] Member States." *Id.*

11. See Council Regulation No. 1432/92, art. 1, O.J. L 151/4 at 4 (1992), *amended by* O.J. L 358/16 (1992) (subsequent citations will be to full text, English version, at O.J. L 151/4 (1992)) (imposing trade embargo on Serbia and Montenegro); *see also* Council Regulation No. 990/93, arts. 1-5, O.J. L 102/14 (1993), *amended by* O.J. L 1919/138 (1995) (subsequent citations will be to full text, English version, at O.J. L 102/14 (1992)) (strengthening trade embargo on Serbia and Montenegro); Bohr, *supra* note 5, at 261-62 (tracking European Community's various measures concerning war in Bosnia in 1991 and 1992 following U.N. Security Council Resolutions).

12. See Ian Black, *Yugoslav Sanctions Bite Despite Loopholes; Disagreement over whether to Reward Milosevic as Neighbours Suffer*, GUARDIAN, May 20, 1993, at 10 (stating that sanctions against Yugoslavia were creating "mounting economic difficulties for neighboring states [of Yugoslavia] . . ."). The sanctions, and especially the embargo, caused the economies of Bulgaria, Romania, Macedonia, Greece, Hungary, and Albania to suffer severe economic loss. See *Official Estimate of Losses from New UN Sanctions on Yugoslavia*, BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS, May 6, 1993,

and commentators have expressed doubt as to whether these sanctions advanced the goal of peace.¹³

The U.N. Security Council passed Resolution¹⁴ 820¹⁵ in

available in LEXIS, Nexis Library, World News File (reporting Bulgarian Government's forecast that losses resulting from enforcement of sanctions against Yugoslavia would exceed US\$1.88 billion from May to December of 1993, and that sanctions had already cost Bulgaria more than US\$1.8 billion since their imposition); *see also* Slav Danev, *Crushing Losses*, *MACLEAN'S*, February 14, 1994, at 4 (estimating, as Bulgarian Ambassador to Canada, that Bulgaria's losses from sanctions against Yugoslavia to have been more than US\$4 billion); *Foreign Relations; Daskalov Addresses UN, Puts Forward Proposals for Peace-keeping Operations*, *BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS*, Oct. 3, 1994, *available in* LEXIS, Nexis Library, World News File (reporting Bulgarian Foreign Minister Stanislav Daskalov's statement that sanctions had had a great impact on Bulgaria's economy and that "[t]he burden of sanctions has gone beyond the mark of reasonable economic and social tolerance in Bulgaria . . ."); *Romania, Serbia Call for End of Sanctions Against Yugoslavia*, *XINHUA NEWS AGENCY*, Apr. 5, 1994, *available in* LEXIS, Nexis Library, World News File (reporting Romanian President Ion Iliescu's statement that Romania had suffered more than US\$8 billion in losses from sanctions and that sanctions had "had disastrous effects on Romanian efforts to carry out economic reforms and industrial restructuring . . ."); *Effects of UN Sanctions on Yugoslavia Threat of Bankruptcy for Solventul*, *BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS*, Sept. 10, 1992, *available in* LEXIS, Nexis Library, World News File (stating that Romanian petrochemical company Solventul had lost US\$7.5 million and was facing bankruptcy due to sanctions, and that it dismissed approximately 2000 employees when its Yugoslav partner enterprise suspended supply of chemical raw materials); Black, *supra*, at 4 (stating that Macedonia had "exported 80 percent of production to former Yugoslavia and transports all its goods through Serbia," and reporting that Macedonia had "warned that its very economic survival may be at stake" due to effects of sanctions); *Greek and Bulgarian Deputy Foreign Ministers Hold Talks in Athens*, *BRITISH BROADCASTING CORPORATION SUMMARY OF WORLD BROADCASTS*, Sept. 27, 1993, *available in* LEXIS, Nexis Library, World News File (reporting that Greece's economy had sustained damaging losses because of sanctions); Justin Burke, *Who's Bit by Serbia's Sanctions*, *CHRISTIAN SCI. MONITOR*, May 18, 1994, at 24 (stating that Hungary's loss of Yugoslavia as an export market because of sanctions cost it billions of dollars in lost trade); *Diplomats Urge U.N. for Sanctions Compensations*, *REUTERS LIBRARY REP.*, Aug. 12, 1993, *available in* LEXIS, Nexis Library, World News File (discussing losses to Albanian economy due to embargo of Yugoslavia).

13. *See* MOJZES, *supra* note 2, at 182-85 (arguing that, for most part, U.N. sanctions have failed to weaken authoritarian regime in Yugoslavia); *see also* MIHAILO CRNOBRNJA, *THE YUGOSLAV DRAMA* 212 (arguing that more than one year after United Nations imposed sanctions on Yugoslavia, they had not brought situation in Bosnia any closer to solution). Scholars have argued that the sanctions have actually helped those in power, for they can blame the country's economic problems on the international community which instituted the sanctions. MOJZES, *supra* note 2, at 182-83; *see* CRNOBRNJA, *supra*, at 212 (stating that "there are strong arguments for [the position] that sanctions have strengthened the hand of aggressive nationalists, and thus the drama on the ground"). Yet, one scholar points out that the sanctions have only harmed innocent Serbian civilians who have participated neither in the war nor in the black market which has become the main supplier of many basic goods. MOJZES, *supra* note 2, at 176-82.

14. JORGE CASTANEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* 1 (1969). In the general context of international organizations, resolutions are "expressions of

1993, providing for the impounding of aircrafts in which a Yugoslavian entity has a majority or controlling interest.¹⁶ The European Community followed soon thereafter with Council Regulation 990/93¹⁷ ("Regulation 990/93"), seeking to implement particular measures set forth in the U.N. embargo.¹⁸ Regulation 990/93 expresses the desire of the European Community and its Member States to implement several of the U.N. embargo Resolutions, including Resolution 820, in the European Community by means of an EC measure.¹⁹ Regulation 990/93 also authorizes impoundings identical to those set forth in Resolution 820.²⁰

The lack of explicit mention of fundamental rights²¹ in the

collective judgments" as well as the "normal vehicles for realizing the objectives of international bodies . . ." *Id.* Resolutions are the result of these organizations' decision-making processes. *Id.* The question of the legal effects of the resolutions of U.N. bodies is complex. *Id.* at 4. U.N. resolutions that directly relate to the maintenance of international peace and security produce legal effect that are binding on the members of the United Nations. *Id.* at 71. Certain resolutions of the U.N. Security Council fall into this category of resolutions. *Id.* Among these Security Council resolutions are decisions, which have binding force because their authority derives from the U.N. Charter. *Id.*

15. Resolution 820, *supra* note 5.

16. *Id.* at 6, ¶ 24. Resolution 820 also provides for the impounding of "all vessels, freight vehicles [and] rolling stock" in which a Yugoslavian entity has such interest. *Id.*

17. Council Regulation 990/93, *supra* note 11.

18. *Id.*, pmbl., O.J. L 102/14, at 14 (1993). The preamble to Regulation 990/93 does not explicitly state which of the U.N. Security Council Resolutions it is meant to implement, although it expressly refers to Resolutions 713 (1991), 757 (1992), 787 (1992), and 820 (1993). *Id.* The preamble to Regulation 990/93 states, "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," having referred to the resolutions in question two clauses above this one. *Id.*

19. *Id.*

20. *Id.*, art. 8, O.J. L 102/14, at 16 (1993) (providing for impounding of "aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from [Yugoslavia] . . .").

21. See Lars Bondo Krogsgaard, *Fundamental Rights in the European Community After Maastricht*, in 1 LEGAL ISSUES EUR. INTEGRATION 99, 100-01 (1993) (noting failure of three founding treaties, including EEC Treaty, to mention any fundamental rights). In general, fundamental rights are "all those legal rights and situations which must not be violated by any action of the public authorities, whether by the legislature, the executive or the judiciary . . ." M. Hilf, *The Protection of Fundamental Rights in the Community*, in EUROPEAN LAW AND THE INDIVIDUAL 145, 145 (F.G. Jacobs ed., 1976). In the European Community, the European Court of Justice ("ECJ") considers a right fundamental because of its "being necessary to achieve Community objectives." Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order*, 37 HARV. INT'L L.J. 307, 341. (1996).

three founding Community treaties²² has forced the European Court of Justice²³ ("ECJ") to base the recognition and protection of fundamental rights on sources other than those treaties.²⁴ The principles that the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁵ ("European Human Rights Convention" or "Convention") articulates and the constitutional provisions and traditions of the EC Member States have functioned as those sources.²⁶ The ECJ includes

Thus, "the rights which the Court expressly designate[s] as fundamental Community rights are available only subject to the objectives of Community law." Maurice Mendelson, *The European Court of Justice and Human Rights*, 1 Y.B. EUR. L. 125, 159 (1981). When interpreting the foundational provisions of the EC Treaty, the ECJ applies a form of the principle of teleological utilitarianism, according to which a right is fundamental if it helps to maximize a good. Ball, *supra*, at 341. In the case of the European Community, the good that the ECJ seeks to maximize is the "attainment and preservation of a fully integrated free market economy." *Id.*

22. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty], as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 140 [hereinafter Euratom Treaty], as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987); EEC Treaty, *supra* note 9.

23. EC Treaty, *supra* note 9, art. 164 [1992] 1 C.M.L.R. at 684. The function of the ECJ is to "ensure that in the interpretation and application of the law is observed." *Id.* The ECJ provides a forum for the resolution of disputes between EC member states and the European Community and between the institutions themselves, and also protects individual rights. KENT, *supra* note 10, at 18. The ECJ has "jurisdiction to give preliminary rulings concerning: (a) the interpretation of [the EC Treaty]; (b) the validity and interpretation of acts of the institutions of the Community . . . [and] (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide." EC Treaty, *supra* note 9, art. 177 [1992] 1 C.M.L.R. at 689. Where one of these three kinds of questions "is raised before any court or tribunal of a Member State, that court or tribunal may . . . request the Court of Justice to give a ruling thereon." *Id.* The ECJ consists of 15 judges. *Id.*, art. 165 [1992] 1 C.M.L.R. at 684.

24. See Krogsgaard, *supra* note 21, at 100-01 (discussing evolution of fundamental rights in ECJ case law). The ECJ has recognized the fundamental right to manifest one's religion or beliefs. See Vivien Prais v. Council, Case 130/75, [1976] E.C.R. 1589, 1597-98, ¶¶ 10-19 [1976] C.M.L.R. 708, 719-20 (acknowledging freedom of religion in Community law). The ECJ has also recognized the right to property. See Liselotte Hauer v. Land Rheinland-Pfalz, Case 44/79, [1979] E.C.R. 3727, 3744-45, ¶¶ 17-20, [1980] 3 C.M.L.R. 42, 64-65 (articulating right to property guaranteed in Community law). Another right that the ECJ has protected is the right to form and join trade unions. See Henri Maurissen v. European Public Service Union, Cases C-193/87 and C-194/87, [1990] E.C.R. I-95, I-118, ¶¶ 13-15 (spelling out freedom of trade union activity in Community law).

25. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Human Rights Convention].

26. Hauer, [1979] E.C.R. at 3744, ¶ 17, [1980] 3 C.M.L.R. at 64; see TEU, *supra* note 9, art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728 (providing that

property rights²⁷ among the fundamental rights protected in its case law.²⁸

The ECJ considered the application of Regulation 990/93 in a recent property rights case.²⁹ In *Bosphorus v. Minister*, the ECJ considered whether Regulation 990/93 applied to an aircraft that Bosphorus Hava Yollari Turizm ve Ticaret AS ("Bosphorus"), a Turkish airline, leased from the Yugoslavian National Airline ("JAT").³⁰ The ECJ concluded that Bosphorus' aircraft did fall under the scope of Article 8 of Regulation 990/93³¹ providing for the impounding of aircrafts in which a Yugoslavian entity holds a majority or controlling interest.³²

This Comment argues that the ECJ should choose not to follow its holding that Regulation 990/93 applied to the aircraft that Bosphorus leased from JAT, because it is not clear that the language of Resolution 820 and Regulation 990/93 provides for the impounding of aircrafts whose Yugoslavian owner leased

"[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of common law.").

27. *Hauer*, [1979] E.C.R. at 3749, ¶ 29, [1980] 3 C.M.L.R. at 68. The ECJ protects property rights in the European Community by rendering judgments that interpret Community measures so as to ensure that the measures do not violate property rights. *See id.* (concluding that Council Regulation prohibiting new plantings of vines did "not entail any undue limitation upon the exercise of the right to property.").

28. *See id.*, [1979] E.C.R. at 3744, ¶ 17, [1980] 3 C.M.L.R. at 64 (asserting that right to property is guaranteed in European Community).

29. *See Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and Another*, Case C-84/95, [1996] E.C.R. I-3953, ¶ 27, [1996] 3 C.M.L.R. 257, 296 [hereinafter *Bosphorus*] (holding that Regulation 990/93 applied to aircraft that its Yugoslav owner had leased to non-Yugoslav undertaking in which no Yugoslav entity had majority or controlling interest).

30. *Id.* at I-3980, ¶¶ 1-3, [1996] C.M.L.R. at 291-92.

31. Council Regulation No. 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 14 (1993). Article 8 of Regulation 990/93 states:

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.

Id.

32. *Bosphorus*, [1996] E.C.R. at I-3987, ¶ 27, [1996] 3 C.M.L.R. at 296. Article 8 of Council Regulation 990/93 provides for the impounding of aircrafts in which a Yugoslavian entity holds a "majority or controlling interest." Council Regulation No. 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 14 (1993).

them to non-Yugoslavian businesses in which no Yugoslavian entity has a majority or controlling interest. This Comment further argues that in so holding, the ECJ violated Bosphorus' fundamental right to property because the impounding of the aircraft was disproportionate to the concrete purpose of preventing Yugoslavia and Yugoslavian nationals from having recourse to aircrafts that they could use to violate the embargo. Part I discusses the structure of the European Community and sources of fundamental rights in Community law, specifically property rights, including important ECJ and European Court of Human Rights³³ property rights cases. Part I also presents the background of the *Bosphorus* case, including the historical background of the war in Bosnia, the U.N. Security Council Resolutions instituting the embargo on Yugoslavia, and the EC Council regulations implementing those resolutions. Part II discusses the procedural history and facts of the *Bosphorus* case, including an analysis of the decisions of the Irish High Court³⁴ (the "High Court"), the Advocate General of the ECJ,³⁵ and the ECJ. Part III advocates a

33. See European Human Rights Convention, *supra* note 25, art. 19, 213 U.N.T.S. at 234 (providing for creation of European Court of Human Rights). The European Court of Human Rights ("CHR") issues decisions on issues concerning CHR jurisdiction and the interpretation and application of the Convention's substantive provisions. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 8-9 (1993).

34. HENRY MURDOCH, *A DICTIONARY OF IRISH LAW* 235 (1988). The Irish High Court is the court in the Irish legal system that hears appeals from the Circuit Court, which hears appeals from the District Court, the lowest court in the Irish legal hierarchy. *Id.* at 90, 166. The High Court "is invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." *Id.* at 235. Appeals from the High Court are to the Irish Supreme Court. *Id.* *Bosphorus* applied to the High Court for judicial review of the impounding of its aircraft. See *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications, Ireland and Attorney General and TEAM Aer Lingus Ltd*, [1994] 2 I.L.R.M. 551, 553, [1994] 3 C.M.L.R. 464, 465 (High Court of Ireland, Murphy, J.) (stating issue in *Bosphorus* case). The High Court held that the Irish official who had impounded the aircraft had acted beyond his authorized powers. *Id.* at 560, [1994] 3 C.M.L.R. at 472.

35. EC Treaty, *supra* note 9, art. 166, [1992] 1 C.M.L.R. at 685. Nine Advocates General currently assist the ECJ by making, "in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it [under the EC Treaty]." *Id.* The Irish Minister who had impounded Bosphorus' aircraft appealed the Irish High Court's judgment to the Supreme Court of Ireland, which referred to the ECJ for a preliminary ruling, a question concerning the interpretation of Regulation 990/93. See *Bosphorus*, [1996] E.C.R. at I-3981, ¶ 6, [1996] 3 C.M.L.R. at 292 (quoting question that Supreme Court of Ireland referred to ECJ for preliminary ruling). Advocate General Jacobs issued an opin-

more narrow and concrete interpretation of Regulation 990/93, affording greater weight to Bosphorus' property rights. This Comment concludes that the ECJ should adopt a more narrow and concrete interpretation of Regulation 990/93 and should refrain from following its holding that Regulation 990/93 did not apply to Bosphorus's aircraft, thereby further strengthening and clarifying the European Community's commitment to the protection of property rights.

I. THE EUROPEAN COMMUNITY'S STRUCTURE, SOURCES OF FUNDAMENTAL RIGHTS, AND INTERNATIONAL REACTIONS TO THE WAR IN YUGOSLAVIA

The general principles of Community law ensure the observance of fundamental rights.³⁶ The right to property³⁷ is among the fundamental rights that the EC legal order, including the ECJ, protects.³⁸ The war taking place in Yugoslavia in the early 1990s occasioned response from various international organizations, including the United Nations and the European Community.³⁹

A. Structure of the European Community

The European Community is a product of the 1957 Treaty

ion on the referred question to the ECJ. Opinion of Advocate General Jacobs, *Bosphorus Hava Yollari Turizm ve Ticaret v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, Case C-84/95, [1996] E.C.R. I-3956, I-3977, ¶ 70, [1996] 3 C.M.L.R. 272, 291.

36. *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491, 506, ¶ 13, [1974] 2 C.M.L.R. 338, 354.

37. Fiona Campbell-White, *Property Rights: A Forgotten Issue Under the Union*, in *THE EUROPEAN UNION AND HUMAN RIGHTS* 249, 251-59 (Nanette A. Neuwahl & Allan Rosas eds., 1995). Intellectual property, exclusive rights of undertakings, timeshares, and real property are among the types of property that the ECJ has protected in its case law. *Id.* The EC Treaty states, "[t]his Treaty shall in no way prejudice rules in Member States governing the system of property ownership." EC Treaty, *supra* note 9, art. 222, [1992] 1 C.M.L.R. at 711. The ECJ has minimized the impact of Article 222, however, by subordinating property rights to other EC Treaty objectives. *See* Campbell-White, *supra*, at 249, 251-60 (arguing, in general, that ECJ has given less priority to property rights than to other EC Treaty objectives, and arguing that ECJ protection of exclusive rights granted to undertakings, intellectual property, and timeshares has been insufficient).

38. *Hauer*, [1979] E.C.R. at 3744, ¶ 17, [1980] 3 C.M.L.R. at 64.

39. *See* Bohr, *supra* note 5, at 260-62 (recounting NATO, U.N., and EC reactions in 1991 and 1992 to war in Yugoslavia).

Establishing the European Economic Community⁴⁰ ("EEC Treaty").⁴¹ The various amendments that the Single European Act⁴² ("SEA") and the Treaty on European Union⁴³ ("TEU") made to the EEC Treaty have determined the form in which the European Community exists today.⁴⁴ The European Community contains five institutions, which are the Council of Ministers⁴⁵ (the "Council"), the Commission,⁴⁶ the ECJ,⁴⁷ the European Parliament⁴⁸ ("Parliament"), and the Court of Auditors.⁴⁹

1. Treaties

The EEC Treaty, which Belgium, France, Germany, Italy, Luxembourg, and the Netherlands signed in Rome on March 25, 1957,⁵⁰ established a Community with legal personality.⁵¹ The SEA, which became effective on July 1, 1987, added to and modified the EEC Treaty.⁵² In addition, the TEU, whose amendments the 1995 Treaty Establishing the European Community ("EC Treaty") incorporate,⁵³ modified the EEC Treaty.⁵⁴ The EC Treaty lists the promotion in the European Community of economic balance and harmony, non-inflationary growth that respects the environment, high levels of employment, increased

40. EEC Treaty, *supra* note 9. The EEC Treaty also bears the name Treaty of Rome. MATHIJSEN, *supra* note 9, at 4.

41. See MATHIJSEN, *supra* note 9, at 4 (outlining evolution from European Economic Community to current European Community).

42. SEA, *supra* note 9.

43. TEU, *supra* note 9.

44. See GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 14-19 (1993) [hereinafter EUROPEAN COMMUNITY LAW] (discussing changes that SEA and TEU made to EEC Treaty).

45. See EC Treaty, *supra* note 9, arts. 145-54, [1992] 1 C.M.L.R. at 679-82 (setting forth functions and composition of Council).

46. See *id.*, arts. 155-63, [1992] 1 C.M.L.R. at 682-84 (stating duties and composition of Commission).

47. See *id.*, arts. 164-88, [1992] 1 C.M.L.R. at 684-91 (setting forth duties, composition, and procedures of ECJ).

48. See *id.*, arts. 137-44, [1992] 1 C.M.L.R. at 676-79 (describing duties, role, and composition of Parliament).

49. See *id.*, arts. 188a-88c, [1992] 1 C.M.L.R. at 691-93 (describing function and composition of Court of Auditors).

50. Goebel, *supra* note 9, at 1094.

51. DAVID A.O. EDWARD & ROBERT C. LANE, EUROPEAN COMMUNITY LAW 4 (1991).

52. EUROPEAN COMMUNITY LAW, *supra* note 44, at 15.

53. GEORGE A. BERMAN ET AL., 1995 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 2 (1995) [hereinafter SUPPLEMENT TO EUROPEAN COMMUNITY LAW].

54. MATHIJSEN, *supra* note 9, at 4.

standards of living and quality of life, and economic and social cooperation and unity among the EC Member States as among the Community's tasks.⁵⁵ The EC Treaty demands that the European Community achieve the tasks that it lists by creating a common market⁵⁶ and an economic and monetary union.⁵⁷

2. European Community Institutions

The Council, the Commission, the ECJ, the Parliament, and the Court of Auditors are the five EC institutions.⁵⁸ The Council functions as a legislative body.⁵⁹ The Commission, which presents drafts of EC legislation to the Council, is the Community's policy engine.⁶⁰ The ECJ functions as the EC chief judicial body,⁶¹ ensuring that EC institutions and Member States observe the law in their interpretation and application of the EC

55. EC Treaty, *supra* note 9, art. 2, [1992] 1 C.M.L.R. at 588.

56. *Id.* The common market "seeks to promote the free exchange of goods, services and capital between the Member States in the material interests of their inhabitants." DERRICK WYATT & ALAN DASHWOOD, *THE SUBSTANTIVE LAW OF THE EEC* 13 (1987). The European Community achieves the common market in various economic fields in part by abolishing customs duties and quantitative restrictions on trade, phasing in a common external tariff, and prohibiting state monopolies commercial in nature, government subsidies, and agreements that restrain trade. *Id.* at 21.

57. EC Treaty, *supra* note 9, art. 2, [1992] 1 C.M.L.R. at 588. The economic union that the EC Treaty mandates involves the "coordination of the economic policies of the Member States." MATHIJSEN, *supra* note 9, at 299. The attainment of a monetary union will involve:

[T]he irrevocable fixing of exchange rates leading to the introduction of a single currency, the ECU, and the definition and conduct of a single monetary policy and exchange rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition.

EC Treaty, *supra* note 9, art. 3a, [1992] 1 C.M.L.R. at 589.

58. MATHIJSEN, *supra* note 9, at 23.

59. EUROPEAN COMMUNITY LAW, *supra* note 44, at 51.

60. A. LEWIS, EUROPEAN COMMUNITY LAW 17 (1992).

61. EUROPEAN COMMUNITY LAW, *supra* note 44, at 50. The European Community's other legal body is the Court of First Instance upon which the Council has conferred jurisdiction to hear "all direct actions brought by natural or legal persons, whether for annulment or damages." SUPPLEMENT TO EUROPEAN COMMUNITY LAW, *supra* note 53, at 25. The Court of First Instance also has the authority to hear all anti-dumping and anti-subsidy cases. *Id.* The motivation behind the creation of the Court of First Instance was to relieve the ECJ of the burdens and delays resulting from the ECJ's large caseload. EUROPEAN COMMUNITY LAW, *supra* note 44, at 72. The Court of First Instance is attached to the ECJ, and a party can appeal the Court of First Instance's decision concerning a point of law to the ECJ. EC Treaty, *supra* note 9, art. 168a(1), [1992] 1 C.M.L.R. at 685-86.

Treaty.⁶² The Parliament participates in the legislative process and has powers over the Community's budget.⁶³ The Court of Auditors acts as the Community's accountant, determining whether the management of the Community's finances is sound.⁶⁴

a. The Council

The Council serves as one of the EC legislative bodies.⁶⁵ The Council's function is to make sure that the European Community attains the objectives that the EC Treaty sets forth.⁶⁶ The Council's members are representatives of Member State governments who vote as their States instruct them.⁶⁷ The Member States' representation in the Council and, thus, their voting power, is weighted according to the Member States' relative populations.⁶⁸ The Council is not a permanent body and, therefore, the Committee of Permanent Representatives⁶⁹ does much of the Council's work.⁷⁰ The Council acts by a majority of its members, unless the EC Treaty provides otherwise.⁷¹ In certain areas, EC Treaty provisions provide for either unanimity voting or qualified majority voting, which requires sixty-two out of eighty-seven votes to pass an act.⁷²

b. The Commission

The Commission is the Community's executive body.⁷³ The Commission consists of twenty members, among whom there must be at least one member, but no more than two, from each

62. EC Treaty, *supra* note 9, art. 164, [1992] 1 C.M.L.R. at 684.

63. MATHIJSEN, *supra* note 9, at 28.

64. EDWARD & LANE, *supra* note 51, at 28.

65. EUROPEAN COMMUNITY LAW, *supra* note 44, at 51. The Council "exercises primary legislative power within the Community." *Id.*

66. EC Treaty, *supra* note 9, art. 145, [1992] 1 C.M.L.R. at 679.

67. MATHIJSEN, *supra* note 9, at 50.

68. EUROPEAN COMMUNITY LAW, *supra* note 44, at 51.

69. EC Treaty, *supra* note 9, art. 151(1), [1992] 1 C.M.L.R. at 681. The EC Treaty provides, "[a] committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council." *Id.*

70. LEWIS, *supra* note 60, at 13.

71. EC Treaty, *supra* note 9, art. 148(1), [1992] 1 C.M.L.R. at 680.

72. *Id.* art. 148(2), [1992] 1 C.M.L.R. at 680.

73. EUROPEAN COMMUNITY LAW, *supra* note 44, at 57.

Member State.⁷⁴ The design of a legislative program for the European Community, the initiation of the legislative process by drafting legislation, and the overseeing and enforcing of compliance with Community law are among the Commission's duties.⁷⁵ The Commission's authority to initiate legislation is exclusive, so that the Council cannot consider any legislative measure until the Commission has proposed the measure.⁷⁶ Other Commission tasks include the drafting of the Community's initial annual budget, which the Council and the Parliament review and may adopt, and the administering of the Community's finances.⁷⁷ The Commission also makes decisions,⁷⁸ in which it gives rulings on issues concerning such topics as competition law and state aid.⁷⁹

c. The ECJ

The ECJ's function is to ensure that the actions of EC Member States and institutions that apply and interpret the EC Treaty are consistent with rules and principles of law.⁸⁰ The ECJ's power to give binding interpretations of Community law is exclusive.⁸¹ In interpreting EC measures, the ECJ gives weight to the measures' wording⁸² while employing a method that is contextual⁸³ and teleological.⁸⁴ The ECJ, which consists of fifteen

74. EC Treaty, *supra* note 9, art. 157(1), [1992] 1 C.M.L.R. at 682.

75. EUROPEAN COMMUNITY LAW, *supra* note 44, at 57.

76. *Id.* at 51.

77. *Id.* at 59.

78. EC Treaty, *supra* note 9, art. 155, [1992] 1 C.M.L.R. at 682. Commission decisions are "taken by a majority of its members and when at least nine members are present." MATHIJSEN, *supra* note 9, at 74.

79. EUROPEAN COMMUNITY LAW, *supra* note 44, at 59.

80. EC Treaty, *supra* note 9, art. 164, [1992] 1 C.M.L.R. at 684.

81. Carl Otto Lenz, *The Role and Mechanism of the Preliminary Ruling Procedure*, 18 FORDHAM INT'L L.J. 388, 392 (1994).

82. WYATT & DASHWOOD, *supra* note 56, at 91.

83. *Bosphorus*, [1996] E.C.R. at I-3983, ¶ 11, [1996] 3 C.M.L.R. at 293. "As the Court has stated in its caselaw, in interpreting a provision of Community law, it is necessary to consider its wording, its context and its aims." *Id.* A contextual method of interpretation takes into account "the place of the provision within the scheme of the instrument to which it belongs, and of that instrument in the Community order." WYATT & DASHWOOD, *supra* note 56, at 91-92.

84. WYATT & DASHWOOD, *supra* note 56, at 92; EUROPEAN COMMUNITY LAW, *supra* note 44, at 144. The teleological method involves interpreting a text by focusing on the purpose that the Community attempted to achieve by passing the measure. *Id.*; WYATT & DASHWOOD, *supra* note 56, at 92; *see* Erich Stauder v. City of Ulm, Sozialamt, Case 29/69, [1969] E.C.R. 419, 424, ¶ 3, [1970] C.M.L.R. 112, 118 (propounding method of

judges,⁸⁵ carries out its duties under the EC Treaty by hearing original actions⁸⁶ against EC institutions⁸⁷ and Member States.⁸⁸ In addition, the ECJ has jurisdiction to give preliminary rulings on the interpretation and legitimacy of Community acts.⁸⁹ Advocates General help the ECJ perform its functions by providing reasoned submissions on ECJ cases.⁹⁰ One of the principles the ECJ invokes in its decisions is the principle of proportionality,⁹¹ according to which governmental measures must not establish restrictions that extend beyond what is appropriate and necessary to achieve the restriction's purpose.⁹²

i. Preliminary Rulings

Article 177 of the EC Treaty authorizes the ECJ to render preliminary rulings on the interpretation of the EC Treaty, the validity and interpretation of EC institutions' actions, and the interpretation of the laws of bodies that Council acts bring into being.⁹³ Only a Member State court or tribunal may request a preliminary ruling.⁹⁴ A Member State court or tribunal of last resort must refer a question to the ECJ for a preliminary ruling if

interpretation based on intentions of measure's author and aim author sought to achieve). The ECJ occasionally emphasizes a provision's ambiguity, especially as it results from a divergence among the various linguistic versions of the measure, in justifying its use of the teleological method. Nial Fennelly, *Legal Interpretation at the Court of Justice*, 20 FORDHAM INT'L L.J. 657, 661-63 (1997). In order to ascertain the EC purposes in passing a particular measure, the ECJ relies on the EC Treaty, declarations by EC Member States or institutions, the measure's legislative history, and even, occasionally, "legislative texts not in force at the time [but] material to the case" and EC Commission legislative proposals that the European Community has not yet adopted. *Id.* at 673-80.

85. EC Treaty, *supra* note 9, art. 165, [1992] 1 C.M.L.R. at 684.

86. EUROPEAN COMMUNITY LAW, *supra* note 44, at 69.

87. EC Treaty, *supra* note 9, arts. 173, 175, 178, 184, [1992] 1 C.M.L.R. at 687-90.

88. *Id.*, arts. 169, 170, [1992] 1 C.M.L.R. at 686-87.

89. EUROPEAN COMMUNITY LAW, *supra* note 44, at 69.

90. EC Treaty, *supra* note 9, art. 166, [1992] 1 C.M.L.R. at 685. The EC Treaty states, "[t]he Judges [of the ECJ] and Advocates General shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurists of recognised competence." *Id.*, art. 167, [1992] 1 C.M.L.R. at 685.

91. WYATT & DASHWOOD, *supra* note 56, at 60.

92. KENT, *supra* note 10, at 56.

93. EC Treaty, *supra* note 9, art. 177, [1992] 1 C.M.L.R. at 689. The Court of First Instance is among the bodies that the Council has established. EUROPEAN COMMUNITY LAW, *supra* note 44, at 72. The EC Treaty explicitly deprives the Court of First Instance of jurisdiction to hear requests for a preliminary ruling under Article 177. EC Treaty, *supra* note 9, art. 168a(1), [1992] 1 C.M.L.R. at 685-86.

94. MATHIJSEN, *supra* note 9, at 99.

the court or tribunal believes that it needs a ruling on a question in order to render judgment.⁹⁵ Any other Member State court or tribunal may, however, exercise its discretion in determining whether to refer a question for a preliminary ruling.⁹⁶

A Member State court or tribunal can make a reference to the ECJ for a preliminary ruling either by judgment or by order.⁹⁷ An ECJ judgment on a reference for a preliminary ruling is binding on the court or tribunal that referred the question and on any other court that rules on the same issue in the future.⁹⁸ In addition, the ECJ's judgment functions as precedent that the ECJ will abide by in future similar matters.⁹⁹

ii. The Role of the Advocate General

The Advocate General's duty is to present in open court reasoned submissions on ECJ cases to assist the ECJ in the performance of the ECJ's duties under the EC Treaty.¹⁰⁰ Advocates General must analyze the case in an impartial and independent manner.¹⁰¹ In their submissions, Advocates General present their personal opinions on the case and can examine questions related to the case, even those that the parties have not raised.¹⁰² After the Advocate General, whom the First Advocate General assigned to a case, has delivered his or her Opinion, he or she has no role in the case.¹⁰³ ECJ judges do not have, however, an obligation either to follow the Advocate General's Opinion or to let it influence their decisions.¹⁰⁴

95. EC Treaty, *supra* note 9, art. 177, [1992] 1 C.M.L.R. at 689. A Member State court or tribunal of last resort need not refer a question to the ECJ for a preliminary ruling if the court or tribunal has concluded that "the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for reasonable doubt." Srl C.I.L.F.I.T. v. Minister of Health, Case 283/81, [1982] E.C.R. 3415, 3431, ¶ 21, [1983] 1 C.M.L.R. 472, 491.

96. EC Treaty, *supra* note 9, art. 177, [1992] 1 C.M.L.R. at 689.

97. Lenz, *supra* note 81, at 399.

98. *Id.* at 403.

99. *Id.*

100. EC Treaty, *supra* note 9, art. 166, [1992] 1 C.M.L.R. at 685.

101. *Id.* Advocates General's submissions "are objective and do not represent the views of either party." KENT, *supra* note 10, at 18.

102. MATHIJSEN, *supra* note 9, at 85-86.

103. Lenz, *supra* note 81, at 402.

104. EUROPEAN COMMUNITY LAW, *supra* note 44, at 72. "Traditionally, however, the [Advocate General's] opinion carries great weight in the [ECJ's] deliberations and

iii. The Principle of Proportionality

The principle of proportionality is a general principle of law that the ECJ has developed in its case law.¹⁰⁵ The ECJ has employed proportionality as a principle of judicial review of EC acts.¹⁰⁶ Proportionality requires that every EC measure hold a reasonable relationship to the measure's objective.¹⁰⁷ In addition, the measure must be the least burdensome or restrictive of all the possible means of achieving the objective.¹⁰⁸ The ECJ has stated that an EC measure cannot impose on commercial operators charges that are greater than the measure's aim requires.¹⁰⁹ The ECJ has also applied the principle of proportionality in holding that an EC measure may provide for the forfeiture of a security for failure to perform a contractual obligation only if the measure makes the forfeiture commensurate with the degree

often the [ECJ] will reach the same conclusion, though perhaps on different grounds." *Id.*

105. WYATT & DASHWOOD, *supra* note 56, at 60. The ECJ "largely derived [the principle of proportionality] from continental principles of constitutional and administrative law . . ." George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 386 (1994). Germany is one of the states from whose constitutional jurisprudence the ECJ has derived the principle of proportionality. KENT, *supra* note 10, at 56. In German law, proportionality has the status of a right underlying the German Constitution. *Id.* The TEU has explicitly adopted the principle of proportionality, stating that "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." TEU, *supra* note 9, art. 3(b), O.J. C 224/1, at 8 (1992), [1992] 1 C.M.L.R. at 590.

106. *See Hauer*, [1979] E.C.R. at 3747, ¶ 23, [1980] 3 C.M.L.R. at 66 (applying principle of proportionality in case concerning EC regulation restricting planting of vines); Bermann, *supra* note 105, at 387.

107. *Id.* at 386. The concept of proportionality requires that there be a reasonable relationship between the measure's means and its ends. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 155 (1994). The reasonable relationship requirement "implies both that the means must be reasonably likely to bring about the objective, and that the detriment to those adversely affected must not be disproportionate to the benefit of the public." *Id.*

108. Bermann, *supra* note 105, at 386; *see Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, 1136, ¶ 16, [1972] C.M.L.R. 255, 285 (comparing burden of licensing requirement with measure's objective). In finding valid a Council regulation conditioning the issue of export and import licenses upon the payment of a deposit, the ECJ stated, "[t]he costs involved in the deposit do not constitute an amount disproportionate to the total value of the goods in question and of the other trading costs," and "the burdens resulting from the system of deposits are not excessive and are the normal consequence of a system of organization of the markets conceived to meet the requirements of the general interest . . ." *Id.*

109. *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, Case 5/73, [1973] E.C.R. 1091, 1111-112, ¶ 22.

of the failure or with the seriousness of the breach.¹¹⁰

d. The European Parliament and the Court of Auditors

The European Parliament ("Parliament") consists of representatives of the peoples of the EC Member States.¹¹¹ The people of Member States directly elect Members of Parliament, whose duty is to represent the people rather than a Member State government.¹¹² In most areas of Community law, the Council must consult with the Parliament before passing legislation.¹¹³ In addition to the consultation procedure,¹¹⁴ the cooperation procedure provides that the Council needs a unanimous vote to override the Parliament's rejection of proposed legislation,¹¹⁵ and the co-decision procedure provides that an absolute majority of Parliament can reject a measure that the Council has approved.¹¹⁶ The EC Treaty grants Parliament the right to amend the draft budget, propose modifications of the budget to the Council, and, if it has important reasons for doing so, to reject the budget after the Council has considered its amendments and proposed modifications.¹¹⁷

The Court of Auditors assists the Parliament and the Council in the exercise of their controls over the budget.¹¹⁸ The Court of Auditors' duty involves the examination of the accounts of all of the EC revenue and expenditures in order to ensure that management has been sound.¹¹⁹ The members of the Court of Auditors must perform their duties in an independent manner, seeking and taking instructions from no government.¹²⁰

110. *Atalanta Amsterdam B.V. v. Produktschap voor Vee en Vlees*, Case 240/78, [1979] E.C.R. 2187, 2150-51, ¶ 15.

111. EC Treaty, *supra* note 9, art. 137, [1992] 1 C.M.L.R. at 676.

112. EUROPEAN COMMUNITY LAW, *supra* note 44, at 65.

113. *Id.* at 80. Exceptions to the rule that legislation requires the consultation of Parliament include "directives on the free movement of capital with third states [EC Treaty art. 73c]" and most measures to be taken . . . in creating the [European Monetary Union]." *Id.*

114. EC Treaty, *supra* note 9, art. 189a, [1992] 1 C.M.L.R. at 694; see MATHIJSEN, *supra* note 9, at 29-31 (discussing consultation procedure).

115. EC Treaty, *supra* note 9, art. 189c, [1992] 1 C.M.L.R. at 696-97; see EUROPEAN COMMUNITY LAW, *supra* note 44, at 84-85 (describing cooperation procedure).

116. EC Treaty, *supra* note 9, art. 189b, [1992] 1 C.M.L.R. at 694-95; see EUROPEAN COMMUNITY LAW, *supra* note 44, at 89-90 (describing co-decision procedure).

117. EC Treaty, *supra* note 9, art. 203(4), [1992] 1 C.M.L.R. at 703.

118. *Id.*, art. 188c(4), [1992] 1 C.M.L.R. at 693.

119. *Id.*, art. 188c(1)-(2), [1992] 1 C.M.L.R. at 692.

120. *Id.*, art. 188b(4), [1992] 1 C.M.L.R. at 691-92.

B. Sources of Fundamental Rights in the European Community

The general principles of Community law include respect for fundamental rights.¹²¹ The ECJ has applied the European Human Rights Convention's human rights provisions in its case law.¹²² Article F(2) of the TEU requires the European Union to respect fundamental rights that the European Human Rights Convention guarantees or that originate in the Member States' common constitutional traditions.¹²³ The class of fundamental rights principles that the ECJ will apply in its case law is not limited, however,¹²⁴ which leaves room for the ECJ to apply theories including those of natural law philosophy.¹²⁵

1. The European Convention for the Protection of Human Rights and Fundamental Freedoms

Members of the Council of Europe¹²⁶ originally signed the European Human Rights Convention in 1950, and other nations

121. *Nold*, [1974] E.C.R. at 506, ¶ 13, [1974] 2 C.M.L.R. at 354; Manfred A. Dauses, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR. L. REV. 398, 400 (1985); Henry G. Schermers, *The European Communities Bound by Fundamental Rights*, 27 COMMON MKT. L. REV. 249, 249 (1990). Some of the fundamental rights that the ECJ recognizes are the freedom of expression, the freedom to manifest one's religion or beliefs, the inviolability of the home, the right to property, and the right not to be discriminated against on grounds of gender. See Krogsgaard, *supra* note 21, at 100, n.4 (listing fundamental rights that ECJ has asserted).

122. See *Hauer*, [1979] E.C.R. at 3745-46, ¶¶ 17-19, [1980] 3 C.M.L.R. at 64-65 (discussing and invoking European Human Rights Convention's property rights provision in holding that EC regulation limiting planting of vines did not effect property rights violation) see Krogsgaard, *supra* note 21, at 107-08 (discussing role which European Human Rights Convention has played in ECJ's case law on fundamental rights).

123. TEU, *supra* note 9, art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. Article F(2) provides, "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law." *Id.*

124. See WYATT & DASHWOOD, *supra* note 56, at 70-71 (stating that categories of principles ECJ will apply are seemingly not closed and discussing cases where ECJ has introduced new principles into its jurisprudence).

125. See OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY* 95-114 (Ernest Barker trans., 1960) (discussing natural law philosophy's conception of relationship between individuals and society).

126. EUROPEAN COMMUNITY LAW, *supra* note 44, at 3. The Council of Europe is an intergovernmental organization of 26 European states lead by a Committee of Ministers and by national parliamentary representatives who sit as a Consultative Assembly that has produced, among other international agreements, the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at 3-4. The Council of Europe "has helped sustain the idea of a common European identity." *Id.* at 4.

later acceded to it.¹²⁷ The Convention requires its signatories to secure a number of rights and freedoms, among which are the right not to be subjected to torture,¹²⁸ the right not to be held in slavery,¹²⁹ the right to liberty and security of person,¹³⁰ the right to respect for one's private life and home,¹³¹ the right to freedom of thought and religion,¹³² and the right to freedom of expression.¹³³ The European Community is not a signatory to the Convention.¹³⁴

The European Human Rights Convention provides for the creation of a European Court of Human Rights¹³⁵ ("CHR") and a European Commission of Human Rights¹³⁶ ("Human Rights Commission"), to ensure that signatories abide by the provisions of the Convention.¹³⁷ The CHR's function is to ensure that the signatories to the Convention observe the provisions to which they agreed.¹³⁸ The CHR carries out this function by interpret-

127. GEORGE A. BERMAN ET AL., *EUROPEAN COMMUNITY LAW: SELECTED DOCUMENTS* 204 n.1 (1998) (hereinafter *EUROPEAN COMMUNITY SELECTED DOCUMENTS*). The original signatories to the European Human Rights Convention were Belgium, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, the Saar, Sweden, Turkey, and the United Kingdom. *Id.* Austria (1958), Cyprus (1962), Malta (1967), Switzerland (1974), Portugal (1978), Spain (1979), Liechtenstein (1982), and San Marino (1989) subsequently acceded to the Convention. *Id.*

128. European Human Rights Convention, *supra* note 25, art. 3, 213 U.N.T.S. at 224.

129. *Id.*, art. 4, 213 U.N.T.S. at 224.

130. *Id.*, art. 5, 213 U.N.T.S. at 226.

131. *Id.*, art. 8, 213 U.N.T.S. at 230.

132. *Id.*, art. 9, 213 U.N.T.S. at 230.

133. European Human Rights Convention, *supra* note 25, art. 10, 213 U.N.T.S. at 230.

134. *EUROPEAN COMMUNITY LAW*, *supra* note 44, at 146.

135. European Human Rights Convention, *supra* note 25, art. 19, 213 U.N.T.S. at 234. The CHR consists of a number of judges equal to the number of Member States of the Council of Europe. MERRILLS, *supra* note 33, at 6. The CHR issues decisions on issues concerning CHR jurisdiction and the interpretation and application of the Convention's substantive provisions. *Id.* at 8-9.

136. European Human Rights Convention, *supra* note 25, art. 19, 213 U.N.T.S. at 234. The number of members of the Human Rights Commission is equal to the number of parties to the Convention. TOM ZWART, *THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS* 23 (1994). The Council of Europe's Committee of Ministers elects Human Rights Commission members who serve for a six-year period. *Id.*

137. European Human Rights Convention, *supra* note 25, art. 19, 213 U.N.T.S. at 234.

138. P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 20 (2nd ed. 1990).

ing and applying the Convention's substantive provisions.¹³⁹ The CHR's decisions are binding on the parties to the Convention.¹⁴⁰ A state that the CHR has found in violation of the Convention must take steps, including the enactment of legislation, to cure the state's human rights deficiency.¹⁴¹

The Human Rights Commission's task is to determine the admissibility of applications to the CHR and to attempt to arrive at a settlement of the parties' dispute.¹⁴² In addition, in its report declaring an application admissible, the Human Rights Commission identifies the case's subject-matter and issues for purposes of applying the Convention.¹⁴³ Furthermore, the Human Rights Commission has the responsibility of establishing the case's facts.¹⁴⁴

In its decision, the CHR does not have to follow the conclusions of the Human Rights Commission.¹⁴⁵ Even if the CHR and the Human Rights Commission reach the same conclusion, they may apply different reasoning.¹⁴⁶ When the CHR has decided an issue, the Human Rights Commission will adopt the CHR's approach in future similar cases.¹⁴⁷ The Human Rights Commission, which hears more cases than the CHR, will often develop its own reasoning and opinions on an issue, with the CHR applying that reasoning upon its first opportunity to decide that issue.¹⁴⁸

The European Human Rights Convention functions as a source of fundamental rights in the European Community.¹⁴⁹ The ECJ has applied in its case law principles that the Conven-

139. MERRILLS, *supra* note 33, at 9.

140. VAN DIJK & VAN HOOF, *supra* note 138, at 133.

141. MERRILLS, *supra* note 33, at 12.

142. VAN DIJK & VAN HOOF, *supra* note 138, at 61. The Human Rights Commission may reject any petition if the applicant has not exhausted domestic remedies, and the Human Rights Commission may reject petitions from applicants other than states if they are anonymous or blatantly lack a foundation for their claims, and on various other grounds. MERRILLS, *supra* note 33, at 2.

143. MERRILLS, *supra* note 33, at 3-4.

144. A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE* 274 (3rd ed. 1998).

145. MERRILLS, *supra* note 33, at 15.

146. *Id.*

147. *Id.* at 15-16.

148. *Id.* at 16.

149. *Hauer*, [1979] E.C.R. at 3743-44, ¶ 15, [1980] 3 C.M.L.R. at 64.

tion's provisions articulate.¹⁵⁰ In addition, the TEU demands that the European Union respect fundamental rights that the European Human Rights Convention protects.¹⁵¹

2. Constitutional Traditions Common to Member States

In *Stauder v. City of Ulm*,¹⁵² the ECJ stated that the general principles of Community law contain fundamental rights and that the ECJ protects these rights.¹⁵³ One year later, the ECJ expanded this principle in *Internationale Handelsgesellschaft v. Einfuhr*¹⁵⁴ ("IHG"), asserting that the constitutional traditions common to the EC Member States inspire the protection of fundamental rights in the European Community.¹⁵⁵ In 1992, the TEU codified IHG's statement in Article F(2), which mandates that the European Union respect fundamental rights resulting from the Member States' common constitutional traditions.¹⁵⁶

Article F(2) does not specify how the ECJ is to derive these fundamental rights from Member State traditions.¹⁵⁷ The ECJ has stated that measures inconsistent with the fundamental rights that Member State constitutions recognize are unacceptable in the European Community.¹⁵⁸ Neither this ECJ proposition nor TEU Article F(2) indicates, however, whether the ECJ must respect all the rights that the Member States constitutions protect.¹⁵⁹ One way of reformulating this question is to ask whether the ECJ must give the protection provided by the Member State constitution providing the greatest amount of protec-

150. *See id.* at 3744-45, ¶¶ 17-19, [1980] 3 C.M.L.R. at 64-65 (discussing Article 1 of Protocol I to Convention in context of property rights issue).

151. TEU, *supra* note 9, art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. Article F(2) provides, "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . as general principles of common law." *Id.*

152. *Erich Stauder v. City of Ulm, Sozialamt*, Case 29/69, [1969] E.C.R. 419, [1970] C.M.L.R. 112.

153. *Id.* at 425, ¶ 7, [1970] C.M.L.R. at 119.

154. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, [1972] C.M.L.R. 255.

155. *Id.* at 1183, ¶ 4, [1972] C.M.L.R. at 283.

156. TEU, *supra* note 9, art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. Article F(2) provides, "[t]he Union shall respect fundamental rights, as they result from the constitutional traditions common to Member States, as general principles of common law." *Id.*

157. *Krogsgaard*, *supra* note 21, at 107.

158. *Hauer*, [1979] E.C.R. at 3744, ¶ 15, [1980] 3 C.M.L.R. at 64.

159. *Krogsgaard*, *supra* note 21, at 105.

tion in the case at hand.¹⁶⁰ The ECJ has, however, rejected such a maximalist approach.¹⁶¹

3. Treaties

Article F(2) of the Treaty on European Union commands the European Union to respect fundamental rights by making reference to the European Human Rights Convention and the constitutional traditions of Member States.¹⁶² Article F(2), however, is not one of the TEU's articles that fall within the ECJ's jurisdiction¹⁶³ because the provisions of the ECSC,¹⁶⁴

160. *Id.*

161. See *Hoechst AG v. Commission*, Case 227/88, [1989] E.C.R. 2859, 2924, ¶ 18, [1991] 4 C.M.L.R. 410, 481 (holding that, although some Member State constitutions extended right of inviolability of home to both natural and legal persons, this principle was not acceptable in Community law, which extended right only to natural persons); Krogsgaard, *supra* note 21, at 106; Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1128 (1986). The ECJ itself has now without a doubt rejected the maximalist approach. Krogsgaard, *supra* note 21, at 106. In arguing that the ECJ has rejected the maximalist approach, one scholar states that the ECJ's adoption of the maximal standard prevailing among the Member States would effectively subject the European Community to the different Member States' constitutional dictates and, thus, is an impossible policy. Weiler, *supra*, at 1128. The ECJ does not concern itself with investigating what precise answer a particular national court or transnational tribunal would give to a question. *Id.* at 1132. Rather, the ECJ simply wants to establish the overall principles and the direction that constitutional review will take in Member States. *Id.* The ECJ would be content in the case of conflicting constitutional traditions to adopt the one most suited, in its view, to the EC situation. *Id.* The fundamental rights that the Member States' constitutions recognize are only principles, general rules and guidance for the ECJ. *Id.* at 1133. *But see* Daus, *supra* note 121, at 408 (arguing that ECJ has mainly applied maximalist approach).

162. TEU, *supra* note 9, art F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. Article F(2) provides, "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of common law." *Id.* Whereas the ECJ applies the Member States' constitutional provisions according to its discretion, the drafters of the TEU seem to have intended to bind the ECJ to the standards of the European Human Rights Convention. Krogsgaard, *supra* note 21, at 108. The reference in Article F(2) of the TEU to the European Human Rights Convention is a codification of the ECJ's application of the Convention as a source of fundamental rights, and in the future the European Community will have a legal obligation to observe the standards of the Convention. *Id.*

163. TEU, *supra* note 9, art L, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 738 (stating that ECJ's powers which EC Treaty, ECSC Treaty, and Euratom Treaty granted it shall apply to specified TEU provisions and articles, of which Article F(2) is not one); *see also* Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3971-72, ¶ 52,

Euratom,¹⁶⁵ and EEC Treaty¹⁶⁶ that concern the ECJ do not apply to Article F(2) of the TEU.¹⁶⁷ Although the EC Treaty¹⁶⁸ lacks express reference to fundamental rights,¹⁶⁹ some of the goals the EC Treaty lists suggest a need for a commitment by the European Community to human rights in order to achieve those goals.¹⁷⁰

4. Natural Law

The ECJ's jurisprudence allows for the possibility of an expansion of the ECJ's catalogue of general principles.¹⁷¹ Concerning property rights, one such possibility is the Lockean theory of natural law.¹⁷² John Locke¹⁷³ argued that God gave

[1996] 3 C.M.L.R. at 286 (explaining why ECJ does not have jurisdiction over TEU Article F(2)).

164. ECSC Treaty, *supra* note 22.

165. Euratom Treaty, *supra* note 22.

166. EEC Treaty, *supra* note 9.

167. TEU, *supra* note 9, art. L, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 738. TEU Article L states:

The provisions of the [EC Treaty], the [ECSC Treaty] and the [Euratom Treaty] concerning the powers of the [ECJ] and the exercise of those powers shall apply only to the following provisions of this Treaty: (a) provisions amending the [EEC Treaty], the [ECSC Treaty] and the [Euratom Treaty]; (b) third subparagraph of Article K.3(2)(c); (c) Articles L to S.

Id.

168. EC Treaty, *supra* note 9.

169. See Krogsgaard, *supra* note 21, at 100 (noting failure of three founding treaties, including EEC Treaty, to mention fundamental rights).

170. See EC Treaty, *supra* note 9, art. 2, [1992] 1 C.M.L.R. at 588 (stating that EC goals are promotion in European Community of "harmonious and balanced development of economic activities, . . . high level of employment and social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."). Other EC Treaty provisions that suggest a need for a human rights jurisprudence are those calling for the strengthening of competitiveness of EC industry, the promotion of research and technological development, and a contribution to the attainment of a high level of health protection. See *id.*, art. 3(m-o), [1992] 1 C.M.L.R. at 589 (listing EC activities).

171. See WYATT & DASHWOOD, *supra* note 56, at 70-71 (stating that categories of principles ECJ will apply are seemingly not closed and discussing cases where ECJ has introduced new principles into its jurisprudence).

172. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 18-30 (C.B. Macpherson ed. 1980) (basing conception of right to property on natural law theory of human relationship to God and Earth).

173. 5 FREDERICK COPPLESTON, S.J., A HISTORY OF PHILOSOPHY 67-69. (1959). John Locke was a British empiricist philosopher who wrote several influential works on political philosophy and the philosophy of knowledge in the 17th century. *Id.*

humans the world and, along with it, the right to property.¹⁷⁴ For Locke, this right has its basis in the law of natural reason, according to which humans have a right to preserve themselves.¹⁷⁵ Locke argued, however, that in order for a property right to vest, one must labor on that which one wants to own.¹⁷⁶

For Locke, the right to property derives from a natural law that governs humans independently of states and state laws.¹⁷⁷ Locke's conception of the right to property exemplifies the natural law principle that the individual's rights have inherent priority over those of society.¹⁷⁸ Natural law theory, thus, would support the idea that society must give adequate justification for the confiscation of property, rather than individuals having to justify keeping property that they already own.¹⁷⁹

C. Sources Of Property Rights In The European Community

The ECJ is committed to the protection of the right to property.¹⁸⁰ The ECJ has developed its property rights jurisprudence by making use of property rights principles resulting from the European Human Rights Convention.¹⁸¹ In addition, the ECJ ensures property rights in its case law by drawing inspiration from the constitutional traditions of the EU Member States.¹⁸²

174. See LOCKE, *supra* note 172, at 18-19 (setting forth foundations of philosophy of property).

175. See *id.* at 18 (discussing human right to preservation as preface to discussion of property).

176. *Id.* at 19.

177. COPPLESTON, *supra* note 173, at 129; see LOCKE, *supra* note 172, at 71 (stating that human-made laws merely add penalties to natural law that precedes civil society).

178. See GIERKE, *supra* note 125 (discussing natural law theory's principle that individuals are prior to communities); see also LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 80-81 (1987) (discussing Locke's theory that individuals' natural rights and obligations precede civil society and remain in force after one has left state of nature); LOCKE, *supra* note 172, at 65-67 (explaining that one of reasons humans entered into civil society was to preserve their possessions and that governments' right to exist is based in humans' voluntary surrender of their right in state of nature to punish thieves as they wish).

179. *Id.* at 103; see Locke, *supra* note 172, at 73 (theorizing that government has no right to take away people's property without their consent because humans entered into society in order to preserve their property).

180. *Hauer*, [1979] E.C.R. at 3744, ¶ 17, [1980] 3 C.M.L.R. at 64.

181. See *id.* at 3744-45, ¶¶ 17-19, [1980] 3 C.M.L.R. at 64-65 (quoting and analyzing Article 1 of Protocol I to the European Human Rights Convention); see also Krogsgaard, *supra* note 21, at 100-02 (noting ECJ's reference to European Human Rights Convention and Member States' constitutional traditions as sources of fundamental rights).

182. *Hauer*, [1979] E.C.R. at 3744, ¶ 17, [1980] 3 C.M.L.R. at 64.

1. Property Rights as Defined by the European Human Rights Convention

Article 1 of the first Protocol ("Protocol I") to the European Human Rights Convention asserts all humans' entitlement to the peaceful enjoyment of their possessions.¹⁸³ Article 1 of Protocol I prohibits governments from depriving individuals of their possessions except when deprivation would advance the public interest.¹⁸⁴ In addition, Article I of Protocol I permits states to control the use of property as society's general interest dictates.¹⁸⁵ The CHR has applied the provisions of Article 1 of Protocol I to cases involving property rights issues.¹⁸⁶

a. Article One of Protocol I to the European Human Rights Convention and the Right of Property

In 1952, all of the original signatories to the European Human Rights Convention¹⁸⁷ signed Protocol I to the Convention.¹⁸⁸ Article 5 of Protocol I states that the Protocol's provisions constitute additional provisions of the Convention.¹⁸⁹ Article 1 of Protocol I asserts the rights of persons to the peaceful enjoyment of their possessions.¹⁹⁰ Article 1 also limits deprivation of possessions to that which the public interest necessitates and to the conditions that national laws and principles of international law specify.¹⁹¹ Further, Article 1 authorizes a state to

183. Protocol to Convention for Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Protocol I].

184. *Id.*

185. *Id.*

186. *See, e.g.,* *Sporrong v. Sweden*, 5 E.H.R.R. 35, 50-55, ¶¶ 60-74 (1983) (invoking property rights provisions of Article 1 of Protocol I in holding that City of Stockholm's expropriation permits and prohibitions on construction had violated property owners' right to property).

187. EUROPEAN COMMUNITY SELECTED DOCUMENTS, *supra* note 127, at 209 n.2.

188. Protocol I, *supra* note 183, art. 1, 213 U.N.T.S. at 262.

189. *Id.*, art. 5, 213 U.N.T.S. at 264.

190. *Id.*, art. 1, 213 U.N.T.S. at 262. The CHR has interpreted the concept of possessions broadly, and "possessions" do not have to be concrete items of property for the CHR to protect the peaceful enjoyment of them. ROBERTSON & MERRILLS, *supra* note 144, at 213. In addition, the Human Rights Commission has interpreted "possessions" as covering any property right or interest that the domestic law of Convention signatories recognizes. J.E.S. FAWCETT, APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 407 (2nd ed. 1987).

191. Protocol I, *supra* note 183, art. 1, 213 U.N.T.S. at 262. Specifically, Protocol I's first paragraph states, "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the

restrict uses of property by law in ways consistent with general societal interests.¹⁹² The ECJ has interpreted Article 1 as accepting the legitimacy of limitations on the use of private property, but requiring such limitations to extend only so far as a state considers necessary for the protection of the general societal interest.¹⁹³

b. The European Community and the European Court of Human Rights

The ECJ has applied the Convention's human rights provisions in its case law addressing the right to property.¹⁹⁴ The Convention functions as a source of guidance for the ECJ.¹⁹⁵ The question of whether the ECJ will interpret the Convention or will apply the Human Rights Commission and CHR's interpretations could create a jurisdictional conflict between the European Community and the Convention's respective systems of law.¹⁹⁶ The ECJ has responded to this dilemma by following the Human Rights Commission and the CHR's interpretations of the Convention.¹⁹⁷ In *Sporrong v. Sweden*,¹⁹⁸ the CHR and the

public interest and subject to conditions provided for by law and by the general principles of international law." *Id.* The deprivation of possessions in the public interest under Article 1 of Protocol I includes taxation, customs duties, the imposition of fines, orders for attachment of unlawful property, the redistribution of land in clearance projects, and compulsory contributions to social security programs. FAWCETT, *supra* note 190, at 407-08.

192. Protocol I, *supra* note 183, art. 1, 213 U.N.T.S. at 262. Specifically, Protocol I provides for "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 payment of taxes or other contributions or penalties." *Id.*

193. *Hauer*, [1979] E.C.R. at 3745, ¶ 19, [1980] 3 C.M.L.R. at 65.

194. *See id.* at 3745-46, ¶¶ 17-19, [1980] 3 C.M.L.R. at 64-65 (invoking property rights provisions of Protocol I to Convention in context of case concerning legality of Council regulation temporarily prohibiting new planting of vines).

195. Dausen, *supra* note 121, at 411; *see* Krogsgaard, *supra* note 21, at 107 (discussing Convention's role in development of European Community's fundamental rights jurisprudence). Not only do the Convention's provisions guide the ECJ, but also "there are strong indications that the Court is now accepting the [Convention] as a direct source of Community law - that is totally to circumvent the question as to whether the [Convention's] provisions can be considered part of the Community legal order" *Id.*

196. Krogsgaard, *supra* note 21, at 109.

197. *See* Orkem SA v. Commission, [1989] E.C.R. 3283, 3350, ¶ 30, [1991] 4 C.M.L.R. 502, 577 (deferring to CHR decisions in determining correct interpretation of Article 6 of Convention concerning right not to give evidence against oneself); *see also* Hoechst, [1989] E.C.R. at 2924, ¶ 18, [1991] 4 C.M.L.R. at 418 (noting lack of CHR case law on Convention article ECJ had just interpreted); Krogsgaard, *supra* note 21, at

Human Rights Commission addressed issues concerning governmental interference with property rights.¹⁹⁹ In *Air Canada v. United Kingdom*,²⁰⁰ the CHR and the Human Rights Commission, in separate opinions, dealt specifically with a seizure of property.²⁰¹

i. *Sporrong v. Sweden*

The *Sporrong* case concerned the effects of expropriation permits and prohibitions on construction on the respective properties of two Stockholm residents.²⁰² In 1954 and 1968, a Stockholm city agency prohibited construction on properties respectively owned by applicant Sporrong Estate²⁰³ and applicant Mrs. I. M. Lonnroth.²⁰⁴ The Swedish Government had issued to the Stockholm City Council in 1956 and 1971 zonal expropriation permits, respectively, covering the applicants' properties that the prohibitions on construction covered.²⁰⁵ The zonal expropriation permits authorized the city to buy land needed to carry out redevelopment of a heavily populated district for town planning or public transportation purposes.²⁰⁶ Stockholm obtained from the Government three extensions of the time within which the city had to begin proceedings for the fixing of compensation to the estate, so that the permit was in effect for a total of twenty-three years.²⁰⁷ As to Mrs. Lonnroth, the Government granted the city ten years for the institution of a compensation

109 (stating that ECJ allows Human Rights Commission and Court of Human Rights to determine questions concerning interpretation of European Human Rights Convention); Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3973, ¶¶ 57-59, [1996] 3 C.M.L.R. at 287-88 (referencing and applying test developed in CHR property rights cases regarding interpretation of Article 1 of Protocol I). *But see* Weiler, *supra* note 161, at 1126 (stating that ECJ insists on interpreting European Human Rights Convention itself).

198. *Sporrong v. Sweden*, 5 E.H.R.R. 35 (1983).

199. *Id.* at 48, ¶¶ 53, 56.

200. *Air Canada v. United Kingdom*, 20 E.H.R.R. 150 (1995).

201. Decision of CHR, *Air Canada v. United Kingdom*, 20 E.H.R.R. 150, 171, ¶ 27; Opinion of Human Rights Commission, *Air Canada v. United Kingdom*, 20 E.H.R.R. 150, 159, ¶ 27.

202. *Sporrong*, 5 E.H.R.R. at 37, ¶ 9.

203. *Id.* at 37, 38, ¶¶ 10, 16.

204. *Id.* at 38, 39, ¶¶ 19, 23.

205. *Id.* at 37, 39, ¶¶ 11, 20.

206. *Id.* at 42, ¶ 38.

207. *Sporrong*, 5 E.H.R.R. at 37-38, ¶¶ 11-14.

proceeding.²⁰⁸

The applicants challenged the expropriation permits and the construction prohibitions on the grounds that they unjustifiably interfered with their right to the peaceful enjoyment of their possessions under Article 1.²⁰⁹ The applicants complained that the expropriation permits and prohibitions on construction had been in effect for too lengthy a time and rendered impossible the selling of their properties at market prices.²¹⁰ They also argued that the expropriation permits and prohibitions on construction made the spending of money to improve or change the properties too risky, especially considering that they would not have been reimbursed in the event of expropriation for the properties' resulting capital appreciations.²¹¹ Finally, they claimed that the permits and the prohibitions created likely difficulties in obtaining mortgages.²¹²

The CHR held that the expropriation permits violated the applicants' right to the peaceful enjoyment of their possessions as Article 1 of Protocol I guaranteed.²¹³ In so holding, the CHR noted that the prohibitions on construction, which the City had imposed in approximate conjunction with the expropriation permits, had contributed to the expropriation permits' negative effects.²¹⁴ After agreeing that the permits and the prohibitions had interfered with the applicants' property rights by rendering the rights uncertain and capable of termination,²¹⁵ the CHR considered whether this interference was justified in light of the provisions of Article 1 of Protocol I.²¹⁶ The CHR interpreted

208. *Id.* at 39, ¶ 20.

209. *Id.* at 48, ¶ 53.

210. *Id.* at 49, ¶ 58.

211. *Id.*

212. *Sporrong*, 5 E.H.R.R. at 49, ¶ 58.

213. *Id.* at 54, ¶ 74. The CHR concluded that "[t]he permits in question, whose consequences were aggravated by the prohibitions on construction, therefore violated Article 1, as regards both applicants." *Id.*

214. *Id.*

215. *Id.* at 50, ¶ 60. The CHR found that the expropriation permits had rendered the applicants' property right "precarious and defeasible." *Id.* The CHR argued, "[a]lthough the expropriation permits left intact in law the owners' right to use and dispose of their possessions, they nevertheless in practice significantly reduced the possibility of its exercise." *Id.* The CHR added that the expropriation permits "also affected the very substance of ownership in that they recognised before the event that any expropriation would be lawful and authorised the city of Stockholm to expropriate whenever it found it expedient to do so." *Id.*

216. *Id.* at 50-51, ¶ 61.

Article 1 as comprising three separate rules.²¹⁷ The first rule sets forth the right to the peaceful enjoyment of property.²¹⁸ The second rule subjects the deprivation of property to conditions for which the law and general principles of international law provide.²¹⁹ That the applicants' property was never actually expropriated rendered the second rule irrelevant.²²⁰ The third rule acknowledges a state's right to enforce laws restricting the use of property in manners consistent with the general interest.²²¹ The fact that the purpose of the expropriation permits was not to restrict or control the applicants' use of the property, rendered the third rule irrelevant.²²²

In contrast to the second and third rules, the first rule of Article 1 of Protocol I is general in nature and asserts the right to the peaceful enjoyment of property.²²³ In examining the first rule, the CHR stated that whether there had been a violation of

217. *Sporrong*, 5 E.H.R.R. at 50, ¶ 61.

218. *Id.* at 50-51, ¶ 61.

219. *Id.*; see Protocol I, *supra* note 183, art. 1, 213 U.N.T.S. at 262 (stating, "[e]very 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 conditions provided for by law and by the general principles of international law.").

220. *Sporrong*, 5 E.H.R.R. at 51, ¶ 63. The CHR noted that, "although the right in question lost some of its substance, it did not disappear . . . [and] [t]he effects of the measures involved are not such that they can be assimilated to a deprivation of possessions." *Id.*

221. *Id.* at 50-51, ¶ 61. In deciding whether legislation controlling uses of property has respected the right to property, the CHR and the Human Rights Commission ask whether the operation of the legislation, and the control thereby exercised, is proportionate to the legitimate aim the state is pursuing through the legislation. DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 319 (1996). The main criterion for establishing whether a measure has struck a fair balance in the control of the use of property is the use that the individual owner intended for the property. *Id.* The CHR has granted states much discretion in depriving owners of property in the public interest or controlling property in the general interest. See ROBERTSON & MERRILLS, *supra* note 144, at 214-16 (discussing concepts of public interest and control of property in context of Article 1 of Protocol I).

222. *Sporrong*, 5 E.H.R.R. at 51, ¶ 65. The CHR observed, "[T]he expropriation permits were not intended to limit or control [use of the applicants' property]." *Id.* It thus concluded that "[s]ince [the expropriation permits] were an initial step in a procedure leading to deprivation of possessions, they did not fall within the ambit of the [third rule]." *Id.*

223. *Id.* at 50-51, ¶ 61. The term "peaceful enjoyment" of possessions "implies that Article 1 may . . . have been violated when a person has not been affected as to his property or possessions per se, but is not accorded an opportunity to use that property." GOMIEN ET AL., *supra* note 221, at 319. The Human Rights Commission has not spent much time interpreting the phrase "peaceful enjoyment," but has said that Article 1

the applicants' right to the peaceful enjoyment of their property depended on whether a fair balance between the requirements of the community's general interest and those of the individual's fundamental property right had been struck.²²⁴ Despite Stockholm's interest in expropriating properties so as to carry out its plans, the CHR found that Swedish law should have provided for the possibility of re-assessing the City's and the owners' respective interests at reasonable intervals during the substantial periods of the permits' maintenance in force.²²⁵ The applicants' burden would have been justified and, thus, a balance reached only if the law had allowed them the opportunity to seek compensation or a reduction of the permits' length.²²⁶ Due to the absence of that opportunity, the permits and prohibitions constituted a violation of their property right under Article 1.²²⁷

Eight of the nine dissenting judges issued a joint dissenting opinion on the Article 1 issue.²²⁸ They stressed the social function of property ownership and the rights of states to regulate such ownership.²²⁹ These dissenting judges further argued that

essentially functions in opposition to the arbitrary confiscation of property. FAWCETT, *supra* note 190, at 407.

224. *Sporrong*, 5 E.H.R.R. at 52-53, ¶ 69. "For purposes of the [first rule], the [CHR] 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." *Id.* The CHR also stated, "[t]he search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1." *Id.*

225. *Id.* at 53, ¶ 70. Earlier in its decision, the CHR had pointed out, "[t]he [relevant Swedish act] did not contain any provisions either on the length of the time-limit during which the expropriation authority had to institute judicial proceedings for the fixing of compensation for expropriation, or on the extension of the validity of permits." *Id.* at 51, ¶ 67. In concluding that the permits and prohibitions had upset the requisite fair balance, the CHR stated, "the *Sporrong* Estate and Mrs. Lonnroth bore an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation." *Id.* at 54, ¶ 73.

226. *Id.* at 54, ¶ 73. The CHR pointed out that the relevant Swedish law, both during the periods of the permits and prohibitions' effect and at the time of the CHR decision, did not allow the applicants to seek compensation or a reduction of the permits' length. *Id.* The CHR commented that it "does not see why the Swedish legislation should have excluded the possibility of re-assessing, at reasonable intervals during the lengthy periods for which each of the permits was granted and maintained in force, the interests of the city and the interests of the owners." *Id.* at 53, ¶ 70.

227. *Id.* at 54, ¶¶ 73-74.

228. *Id.* at 59, ¶ 1 (dissenting opinion).

229. *Sporrong*, 5 E.H.R.R. at 60-62, ¶ 3 (dissenting opinion). The dissenting CHR judges argued that "modern states are obliged, in the interest of the community, to

the permits were not in effect for an unreasonable period of time, given the complex nature of modern urban planning.²³⁰ Finally, they found that the applicants' retention of ownership and their rights to dispose of the property and to apply for permission to reconstruct and improve the properties compelled the conclusion that the City's measures were within the legitimate purposes for which Article I permitted governments to restrict the use of property.²³¹

ii. *Air Canada v. United Kingdom*

In *Air Canada v. United Kingdom*,²³² both the CHR and the Human Rights Commission held in separate opinions that U.K. customs officials' seizure of an Air Canada²³³ aircraft did not constitute a violation of the right to property asserted in Article 1 of Protocol I.²³⁴ Authorities had discovered in the aircraft's cargo a container holding 331 kilograms of cannabis resin.²³⁵ The seizure followed a series of security lapses at London's Heathrow Airport involving Air Canada, including the smuggling of drugs with the assistance of Air Canada staff.²³⁶ On the same day of the seizure, officials returned the aircraft to the company upon payment of a £50,000 penalty.²³⁷

In its decision, the CHR applied *Sporrong's* tri-partite inter-

regulate the use of private property in many respects" and that "[t]here are always social needs and responsibilities relevant to its ownership and use." *Id.* at 60, ¶ 3.

230. *Id.* at 61-62, ¶ 3 (dissenting opinion). "Modern town planning requires, especially in big urban areas, most difficult considerations and evaluations, and its implementation often needs considerable time." *Id.* At 61, ¶ 3 (dissenting opinion).

231. *Id.* at 62, ¶ 3 (dissenting opinion).

232. *Air Canada v. United Kingdom*, 20 E.H.R.R. 150 (1995).

233. NAWAL K. TANEJA, *THE INTERNATIONAL AIRLINE INDUSTRY* 15 (1988). Air Canada is Canada's largest airline. *Id.*

234. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 176, ¶ 48; Opinion of Human Rights Commission, *Air Canada*, 20 E.H.R.R. at 163-64, ¶ 44.

235. *Air Canada*, 20 E.H.R.R. at 154, ¶ 7. Cannabis is the scientifically correct term for marijuana and means "hemp" in Latin. ALBERT GOLDMAN, *GRASS ROOTS* 33 (1979).

236. *Air Canada*, 20 E.H.R.R. at 153-54, ¶ 6. Customs officials had responded to each of these incidents with progressively sterner measures, ranging from letters of concern to deductions from Air Canada's bond. *Id.*

237. *Id.* at 154, ¶ 9. The seizure of the Air Canada's airplane and Air Canada's payment of the fine both occurred on May 1, 1987. *Id.* at 154, ¶¶ 8-9. On May 1, 1987, £50,000 equaled approximately US\$83,700. See *WALL STREET JOURNAL*, May 4, 1987, at 31 (showing one British pound to be equal to US\$1.674 on May 1, 1987). The impounded aircraft was worth more than £60 million. *Air Canada*, 20 E.H.R.R. at 154, ¶ 7. On May 1, 1987, £60 million equaled approximately US\$100,440,000. See *WALL ST. J., supra*, (showing one British pound to be equal to US\$1.674 on May 1, 1987).

pretation²³⁸ of Article 1 of Protocol I.²³⁹ The CHR in *Sporrong* had interpreted the second rule of Article I as subjecting the deprivation of property to conditions that the law and general principles of international law provide for, and the third rule as asserting a state's rights to control the use of property in conformity with the public interest.²⁴⁰ In *Air Canada*, the CHR stated that the construction of the second and third rules should be guided by the general right to property that the first rule articulates because the second and third rules concern particular instances of the right to property.²⁴¹ The CHR concluded that the third rule applied to the instant case.²⁴² It found that the seizure amounted to a control, rather than a deprivation, because there was never a transfer of ownership and because the aircraft had been seized and then released in furtherance of an anti-drug policy.²⁴³

The CHR then stated that it would be necessary to determine whether the restriction here, the *Air Canada* seizure, conformed to the third rule set forth in Article 1.²⁴⁴ The CHR stated that a control would achieve such conformity only if it struck a fair balance between the community's general interest and the protections that individuals' fundamental rights required.²⁴⁵ Such a balance would involve a reasonable relationship of proportionality between the restriction and the purpose behind its enactment.²⁴⁶

238. See *Sporrong*, 5 E.H.R.R. at 50-51, ¶ 61 (describing each of three rules that CHR found comprised Article 1 of Protocol I). In *Sporrong*, the CHR stated that Article I of Protocol I to the Convention comprised three rules, the first of which set forth the principle of peaceful enjoyment of property, the second of which covered the deprivation of possessions, and the third of which recognized that states have the right to control the use of property in accordance with the general interest. *Id.*

239. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 172, ¶ 29.

240. *Sporrong*, 5 E.H.R.R. at 50-51, ¶ 61.

241. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 172, ¶ 30. The Human Rights Commission also applied *Sporrong's* interpretation of Article 1 of Protocol I and employed the same rule of construction as the CHR did. Opinion of Human Rights Commission, *Air Canada*, 20 E.H.R.R. at 160, ¶ 29.

242. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 172, ¶ 34.

243. *Id.* at 172, ¶¶ 33-34.

244. *Id.* at 172-73, ¶ 35. The Human Rights Commission also concluded that the third rule applied to the instant case and that it had to determine whether the seizure was consistent with the third rule. Opinion of Human Rights Commission, *Air Canada*, 20 E.H.R.R. at 162, ¶ 37.

245. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 173, ¶ 36.

246. *Id.* The Human Rights Commission articulated the issue as requiring first a

The CHR held that there had been no violation of Air Canada's property right protected under Article 1 of Protocol I,²⁴⁷ finding the £50,000 to be proportionate to the aim of preventing the importation into the United Kingdom of illegal drugs.²⁴⁸ The CHR defended its conclusion by referring to Air Canada's history of security lapses and the U.K. responses to these lapses and by expressing certainty that the United Kingdom had resorted to seizure in order to compel Air Canada to improve its security procedures.²⁴⁹ In arriving at its conclusion, the CHR also took into account the large amount and street value of cannabis in the container, as well as the value of the seized aircraft.²⁵⁰ Finally, the CHR stated that it kept in mind the state's margin of discretion in the handling of issues concerning illegal drugs.²⁵¹ Two dissenting CHR judges argued, however, that the section of the third rule recognizing states' rights to enforce laws to secure the payment of penalties should have been applied here.²⁵² They based their argument on their belief that the seizure of an aircraft should not be seen as a control of the use of cannabis, but rather as a seizure of possessions.²⁵³

determination as to the seizure's compatibility with the third rule. Opinion of Human Rights Commission, *Air Canada*, 20 E.H.R.R. at 162, ¶ 37. If the Human Rights Commission found such compatibility, it would have to apply a proportionality test. *Id.* The Human Rights Commission phrased this proportionality test as the question "whether there existed a reasonable relationship of proportionality between the means employed and the aim sought to be realised." *Id.*

247. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 176, ¶ 48.

248. *Id.* at 175-76, ¶ 47.

249. *Id.* at 174, ¶ 41. The CHR wrote, "the seizure of the applicant's aircraft and its release subject to payment were undoubtedly exceptional measures which were resorted to in order to bring about an improvement in the company's security procedures." *Id.*

250. *Id.* at 175-76, ¶ 47.

251. *Id.* at 176, ¶ 48. The Human Rights Commission also found that the United Kingdom had not deprived the airline of its property for any significant time, but rather had controlled its property in a way consistent with promotion of the public interest and, thus, in compliance with Article 1 of Protocol I. Opinion of Human Rights Commission, *Air Canada*, 20 E.H.R.R. at 162, ¶ 39. The Human Rights Commission decided the proportionality issue by noting that the third rule allows governments a measure of discretion, finding that the airline's payment of £50,000 for the aircraft's return was proportionate to the goal of controlling aircrafts which are used to import drugs. *Id.* at 163-64, ¶ 44. The Human Rights Commission justified its own focus on Air Canada's past security inadequacies by stating that the proportionality determination required them to examine the entire context of the case. *Id.* at 163, ¶ 40.

252. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 181-82, ¶ 2.

253. *Id.*

2. ECJ Property Rights Case Law

The ECJ has developed a commitment to the protection of the right to property.²⁵⁴ The ECJ's insistence on the potential for restriction in favor of EC interests tempers this right's force.²⁵⁵ In *Nold v. Commission*,²⁵⁶ the ECJ stated that property rights may be subject to restrictions that basic EC objectives justify, without disturbing the substance of the rights.²⁵⁷ The ECJ in *Hauer v. Land Rheinland-Pfalz*²⁵⁸ expanded upon *Nold's* property rights discussion by applying Article 1 of Protocol I, several Member States' constitutional laws regarding or addressing property rights, and the principle of proportionality.²⁵⁹ In *Wachauf v. State*,²⁶⁰ the ECJ applied the analysis used in *Hauer* to an agricultural leasing case involving the right to compensation for the voluntary abandonment of milk production.²⁶¹

a. *Nold v. Commission*

Nold v. Commission involved a claim by Nold, a company engaged in the business of coal-wholesaling, that the new trade rules a Commission Decision²⁶² ("Decision") authorized violated Nold's rights to property and to freely pursue a business activity.²⁶³ The rules authorized a coal-selling agency to require any entity desiring to be a direct wholesaler of coal to enter into fixed two-year contracts for the purchase of a minimum amount of coal for sale to domestic and small consumers.²⁶⁴ Nold's sales

254. *Germany v. Council*, Case C-280/93, [1994] E.C.R. I-4973, 5065, ¶ 78; *Hauer*, [1979] E.C.R. at 3745, ¶ 17, [1980] 3 C.M.L.R. at 64; see *Nold*, [1974] E.C.R. at 507, ¶ 14, [1974] 2 C.M.L.R. at 354 (discussing right of ownership in Community law).

255. See *Nold*, [1974] E.C.R. at 507, ¶ 14, [1974] 2 C.M.L.R. at 354 (articulating ECJ's conception of right to property).

256. *Nold v. Commission*, Case 4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338.

257. *Id.* at 508, ¶ 14, [1974] C.M.L.R. at 354-55.

258. *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

259. *Id.* at 3745-47, ¶¶ 17-23, [1980] 3 C.M.L.R. at 64-66.

260. *Wachauf v. State*, Case 5/88, [1989] E.C.R. 2609, [1991] 1 C.M.L.R. 328.

261. See *id.* at 2634-35, ¶ 2, [1991] 1 C.M.L.R. at 345 (applying *Hauer's* discussion of fundamental rights in European Community to case at hand).

262. Commission Decision No. 21/72, art. 1, O.J. L 120/14, at 16 (1972).

263. *Nold*, [1974] E.C.R. at 507, ¶ 12, [1974] 2 C.M.L.R. at 354.

264. See Commission Decision No. 21/72, *supra* note 262, par. I(1), O.J. L 120/14, at 14 (1972) (stating terms of business that coal-selling agency Ruhrkohle AG had submitted for authorization to Commission). Commission Decision 21/72 authorized Ruhrkohle AG to require the conclusion by coal-wholesalers of "a two-year contract for a fixed amount of not less than 6,000 metric tons a year of products for the domestic

in these sectors were well below the contracts' required minimum, and Nold, therefore, claimed that the decision in effect stripped it of its status as a coal wholesaler.²⁶⁵ Nold argued that these rules violated its rights to property and to freely pursue a business activity because, in precluding its acquisition of direct supplies from producers, the rules endangered the business' existence by endangering its profitability and the unfettered development of its business.²⁶⁶

The ECJ prefaced its treatment of the issues by noting that in protecting fundamental rights it must draw inspiration from constitutional traditions common to EC Member States.²⁶⁷ In addition, it observed that international treaties that safeguard property rights and to which Member States are signatories supply the ECJ with guidelines that it should follow.²⁶⁸ The ECJ's analysis stressed the social function of property rights.²⁶⁹ The ECJ explained that, just as protection of property rights by the Member States is always subject to restrictions that the public interest dictates, those rights in the European Community should also be subject to limitations based on EC objectives.²⁷⁰ The ECJ must not permit these limitations to infringe, however, upon the substance of the property right affected.²⁷¹ In response to Nold's argument that the Commission Decision had in effect taken away its status as a coal wholesaler, the ECJ con-

and small-consumer sector, on a regional basis" as a condition of being able to buy coal direct from Ruhrkohle AG for sale to domestic and small consumers. *Id.*

265. *Nold*, [1974] E.C.R. at 503, ¶ 1, [1974] 2 C.M.L.R. at 351-52.

266. *Id.* at 507, ¶ 12, [1974] 2 C.M.L.R. at 354.

267. *Id.* at 506, ¶ 13, [1974] 2 C.M.L.R. at 354. "In safeguarding [fundamental] rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States . . ." *Id.*

268. *Id.* The ECJ wrote, "[s]imilarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law." *Id.*

269. *Id.* at 508, ¶ 14, [1974] 2 C.M.L.R. at 354-55.

270. *Nold*, [1974] E.C.R. at 508, ¶ 14, [1974] 2 C.M.L.R. at 354-55. "If rights of ownership are protected by the constitutional laws of all the Member States . . . the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in light of the social function of the property and activities protected thereunder." *Id.* The ECJ further stated, "[f]or this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest." *Id.* "Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives of the Community, on condition that the substance of these rights is left untouched." *Id.*

271. *Id.*

cluded that the property rights protected in the Community legal order did not extend to mere commercial interests or opportunities, all of which possess inherent uncertainties.²⁷² In contrast, the ECJ stated that the harms Nold claimed actually stemmed from changes in economic circumstances rather than the Decision's rules.²⁷³

b. *Hauer v. Land Rheinland-Pfalz*

In *Hauer v. Land Rheinland-Pfalz*, German administrative authorities rejected the plaintiff-landowner's application for authorization to plant vines.²⁷⁴ The authorities based their rejection on Council Regulation 1162/76²⁷⁵ which prohibited Member States from authorizing any new planting of vines from the effective date of the Regulation.²⁷⁶ The Regulation's purpose was to bring about a simultaneous common organization and structural improvement of the wine market.²⁷⁷ The Regulation sought to eliminate the Community's surplus in wine production²⁷⁸ in order to effect a short-term and long-term quantitative balance²⁷⁹ and to achieve a qualitative improvement by ensuring

272. *Id.* at 508, ¶ 14, [1974] 2 C.M.L.R. at 354-55. "As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity." *Id.*

273. *Id.* at 508, ¶ 15, [1974] 2 C.M.L.R. at 355.

274. *Hauer*, [1979] E.C.R. at 3740, ¶ 2, [1980] 3 C.M.L.R. at 60-61.

275. Council Regulation No. 1162/76, O.J. L 135/32 (1976), *amended by* Council Regulation No. 2776/78, O.J. L 333/1 (1978) (subsequent citations will be to full text English version at O.J. L 135/32 (1976)).

276. *Hauer*, [1979] E.C.R. at 3740, ¶ 7, [1980] 3 C.M.L.R. at 62; *see* Council Regulation No. 1162/76, *supra* note 275, art. 2, O.J. L 135/32, at 33 (setting forth terms of prohibition on new planting). Council Regulation 1162/76 stated:

All new planting of vine varieties classified as wine grape varieties for the administrative unit concerned shall be prohibited during the period from 1 December 1976 to 30 November 1978. As from the date on which this Regulation enters into force, Member States shall no longer grant authorizations for new planting.

Id.

277. *Hauer*, [1979] E.C.R. at 3747, ¶ 25, [1980] 3 C.M.L.R. at 66.

278. Council Regulation No. 1162/76, *supra* note 275, art. 2, O.J. L 135/32, at 32. The preamble to Council Regulation 1162/76 noted, "there will, on the average, be a tendency in the next few years for production to exceed foreseeable needs." *Id.*

279. *Id.* In reference to potential surpluses in the wine production market, Council Regulation 1162/76 stated, "this situation calls for new guidelines aimed at putting a brake on production and re-establishing the balance of the market in both the short and the long term." *Id.*

that surpluses did not form.²⁸⁰ The Council originally intended the Regulation's prohibition to remain in effect for two years, but Regulation 2776/78²⁸¹ extended it for an additional year.²⁸² The plaintiff argued that the prohibition on the planting of vines did not apply to her because she had submitted her application before the Regulation went into force.²⁸³ The plaintiff further argued that even if the Regulation applied to the plaintiff, the ECJ should not enforce it because it violated her right to property and to pursue a trade or profession that the German Constitution guaranteed.²⁸⁴

The German administrative authority that heard the case asked the ECJ for a preliminary ruling on whether the prohibition on new planting set forth in Regulation 1162/76 should apply retroactively and, if so, whether the prohibition covered all land, regardless of its suitability for wine-growing.²⁸⁵ In its response to each of these questions, the ECJ looked at the purpose of the prohibition and interpreted the Regulation's relevant language literally.²⁸⁶ The ECJ concluded that the Regulation prohibited all new plantings regardless of when the application was filed and cited the Regulation's specification that the prohibition was to begin on the Regulation's effective date.²⁸⁷ Citing the Regulation's unconditional language, the ECJ further concluded that the prohibition applied to lands of all types and classifications, regardless of their suitability for wine-growing.²⁸⁸

280. *Hauer*, [1979] E.C.R. at 3742-43, 3748, ¶¶ 8, 11, 25, [1980] 3 C.M.L.R. at 62.

281. Council Regulation No. 2776/78, O.J. L 333/1 (1978).

282. Opinion of Advocate General Capotorti, *Hauer*, [1979] E.C.R. at 3752, ¶ 2, [1980] 3 C.M.L.R. at 47-48.

283. *Hauer*, [1979] E.C.R. at 3741, ¶ 4, [1980] 3 C.M.L.R. at 61.

284. *Id.*

285. *Id.* at 3741-42, ¶ 5, [1980] 3 C.M.L.R. at 61-62. In its order making the reference for a preliminary ruling, the German administrative authority stated that if the ECJ interpreted Regulation 1162/76 as setting forth a prohibition so general as to include even land suitable for wine growing, that prohibition might be inapplicable in Germany due to incompatibility with the fundamental rights to property and to pursue trade and professional activities that the German Constitution, guarantees. *Id.* at 3744, ¶ 13, [1980] 3 C.M.L.R. at 63-64. The ECJ responded to this statement by pointing out the rule that the ECJ will determine the question of a Community measure's possible infringement of a fundamental right only by applying Community law. *Id.* at 3744, ¶ 14, [1980] 3 C.M.L.R. at 64.

286. *See id.* at 3742-44, ¶¶ 7-12, [1980] 3 C.M.L.R. at 62-63 (quoting Regulation in process of determining purpose behind prohibition).

287. *Id.* at 3742-43, ¶¶ 7-9, [1980] 3 C.M.L.R. at 62-63.

288. *Id.* at 3743-44, ¶¶ 10-12, [1980] 3 C.M.L.R. at 63.

The ECJ began its analysis of the property rights issue by examining Article 1 of Protocol I.²⁸⁹ The ECJ found the articulation of a qualified right to the peaceful enjoyment of property in Article 1 to be insufficient to answer the property rights question.²⁹⁰ After proceeding to examine several Member States' constitutional provisions concerning property rights, the ECJ concluded that the Regulation imposed a lawful restriction, whether in similar or identical form, found in all the Member States' constitutional systems.²⁹¹

In addition to determining the EC right to control planting for the purposes the Regulation stated, the ECJ determined that it was necessary to decide whether the Regulation's restrictions were disproportionate to these purposes.²⁹² In order to ensure that the prohibition did not impinge upon the right's substance, the ECJ applied the principle of proportionality, which requires that restrictions be reasonably related to the European Community's goal and means used.²⁹³ The ECJ found that because the Regulation's aims of effecting a common organization and structural improvement of the wine market justified the planting restrictions imposed, the prohibition did not constitute a property rights violation.²⁹⁴ The ECJ emphasized the Regulation's temporary nature and stated that the European Community felt that it

289. *Hauer*, [1979] E.C.R. at 3745, ¶ 17, [1980] 3 C.M.L.R. at 64.

290. *Id.* at 3746, ¶ 19, [1980] 3 C.M.L.R. at 65.

291. *Id.* at 3747, ¶ 22, [1980] 3 C.M.L.R. at 66.

292. *Id.* at 3747, ¶ 23, [1980] 3 C.M.L.R. at 66. The ECJ stated:

Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property in the context of a common organization of the market and for the purposes of a structural policy, it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property.

Id.

293. *Id.* "It is . . . 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." *Id.* The principle of proportionality's reasonable relationship requirement mandates both that the means be reasonably likely to achieve the purpose, and that the detriment to those adversely affected not be disproportionate to the public's benefit. HARTLEY, *supra* note 107, at 155.

294. *Hauer*, [1979] E.C.R. at 3749, ¶¶ 29-30, [1980] 3 C.M.L.R. at 68. The ECJ concluded that, "the [restriction on planting] is justified by the objectives of general interest pursued by the Community and does not infringe the substance of the right to

had to act immediately to rectify the problems in the wine market.²⁹⁵ The ECJ further pointed out that allowing new plantings would result in greater surpluses and would make the implementation of structural reform more difficult in the future.²⁹⁶

c. *Wachauf v. State*

In *Wachauf v. State*, Hubert Wachauf, a dairy farmer, applied to Germany's Federal Office for Food and Forestry for compensation pursuant to a German law based on a Council Regulation²⁹⁷ allowing milk producers that cease milk production permanently to apply for compensation for their discontinuance of milk production.²⁹⁸ The German law required applicants who are tenant farmers to submit their landlord's written consent to their discontinuance along with their applications for compensation.²⁹⁹ The German Federal Office for Food and Forestry denied Wachauf's request on the ground that the landlord of the farm he had been leasing for milk production had withdrawn written consent to Wachauf's discontinuance.³⁰⁰

The ECJ found that the farm Wachauf had leased qualified as a holding³⁰¹ under the Regulation despite the farm's lack of dairy cattle and milk production facilities and that the surrender

property in the form in which it is recognized and protected in the Community legal order." *Id.* at 3749, ¶ 30, [1980] 3 C.M.L.R. at 68.

295. *Id.* at 3749, ¶ 28, [1980] 3 C.M.L.R. at 67-68. "It should be noted that, as regards its sweeping scope, [Council Regulation 1162/76] is of a temporary nature. It is designed to deal immediately with a conjectural situation characterized by surpluses, whilst at the same time preparing permanent structural measures." *Id.*

296. *Id.* at 3749, ¶ 29, [1980] 3 C.M.L.R. at 68. The ECJ also found that the Regulation did not infringe her right to pursue wine-production trade, citing *Nold* on that right's social function and observing that the Regulation did not limit one's access to that trade or one's freedom to practice wine-growing on land already devoted to it. *Id.* at 3750, ¶ 32, [1980] 3 C.M.L.R. at 68 (citing *Nold*, [1974] E.C.R. at 508, ¶ 14, [1974] 2 C.M.L.R. at 354-55).

297. Council Regulation No. 857/84, art. 4(1)(a), O.J. L 90/13, at 14 (1984). Council Regulation 857/84 states, "[i]n order to complete the restructuring of milk production at national or regional level or at the level of the collecting areas, the Member States may . . . grant to [milk] producers undertaking to discontinue production definitively compensation paid in one or more annual payments." *Id.*

298. *Wachauf*, [1989] E.C.R. at 2634-35, ¶ 2, [1991] 1 C.M.L.R. at 345.

299. *Id.*

300. *Id.* at 2635, ¶ 3, [1991] 1 C.M.L.R. at 345.

301. Council Regulation No. 857/84, *supra* note 297, art. 12(d), O.J. L 90/13, at 16. Council Regulation 857/84 defines a holding as "all the production units operated by the [milk] producer and located within the geographical territory of the Community" *Id.*

of such a farm upon the lease's expiration was a case having comparable legal effects under a related Commission Regulation.³⁰² In coming to the second conclusion, the ECJ considered the issue of whether finding such a surrender not to have comparable legal effects would infringe Wachauf's fundamental rights by denying him compensation for giving up a production quantity entitlement that he had worked to acquire.³⁰³ The ECJ referred to statements in *Hauer* that the Member States' constitutions inspire the ECJ's safeguarding of fundamental rights and that restrictions on the exercise of fundamental rights must be proportionate to the restriction's purpose and must not impair the rights' substance.³⁰⁴ The ECJ then proceeded to apply the principle of proportionality.³⁰⁵ It concluded that the language of the regulations in question allowed Member State authorities to interpret the regulations' rules so as to protect fundamental rights.³⁰⁶ In the instant case, such protection could mean allowing tenant farmers in Wachauf's situation to keep all or part of the entitlement if they chose to continue milk production or compensating them if they gave up milk production permanently.³⁰⁷

302. *Wachauf*, [1989] E.C.R. at 2635-36, ¶¶ 4-5, [1991] 1 C.M.L.R. at 345-46. Commission Regulation 1371/84 states that certain rules that it set forth concerning the application of Council Regulation 857/84 would "be applicable in other cases of transfer [of a milk producer's production quantity] which, under the various national rules, have comparable legal effects as far as producers are concerned." Commission Regulation 1371/84, art. 5(3), O.J. L 132/11, at 13 (1984).

303. *Wachauf*, [1989] E.C.R. at 2639, ¶ 16, [1991] 1 C.M.L.R. at 348.

304. *Id.* at 2639, ¶¶ 17-18, [1991] 1 C.M.L.R. at 348-49. The ECJ noted:

Restrictions may be imposed on the exercise of [fundamental] rights, in particular 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, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

Id.

305. *Id.* at 2639-40, ¶¶ 19-22, [1991] 1 C.M.L.R. at 349-50.

306. *Id.* at 2640, ¶ 22, [1991] 1 C.M.L.R. at 349-50. Council Regulation 857/84 and Commission Regulation 1371/84 "accordingly leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply [those Regulations' rules] in a manner consistent with the requirements of the protection of fundamental rights . . ." *Id.*

307. *Wachauf*, [1989] E.C.R. at 2640, ¶ 22, [1991] 1 C.M.L.R. at 349-50.

D. *The War in Yugoslavia and International Responses*

The war in Yugoslavia was the result of the conflicts and power struggles³⁰⁸ that erupted after the death of Josip Broz Tito,³⁰⁹ Yugoslavia's former leader.³¹⁰ The U.N. Security Council reacted to the Yugoslavian conflict by passing a series of Resolutions imposing an embargo against Serbia and Montenegro.³¹¹ Subsequent to the U.N. Security Council embargo, the European Community established its own embargo against Serbia and Montenegro.³¹²

1. History of the War in Yugoslavia

The death of Josip Broz Tito in 1980 left a power vacuum in Yugoslavia that allowed national conflicts to surface.³¹³ During Tito's reign, no national or ethnic conflicts had erupted in the judicial, legislative, or executive branches of the Government because the Communist Party made all important decisions, with Tito himself handling the most important issues.³¹⁴ Tito's policy

308. See MOJZES, *supra* note 2, at 76-80 (discussing leadership vacuum which followed Tito's death and problems in Kosovo arising therefrom).

309. SINGLETON, *supra* note 3, at 190, 271. Josip Broz Tito was the half-Croat, half-Slovene Communist ruler of Yugoslavia from 1945 until his death in 1980. *Id.*

310. See DENITCH, *supra* note 3, at 59-61 (discussing changes in Yugoslavia's political climate from death of Tito to beginning of civil war).

311. See Bohr, *supra* note 5, at 260-62 (discussing U.N. Security Council's embargo Resolutions).

312. See *id.* at 261 (describing European Community's embargo against Serbia and Montenegro).

313. MOJZES, *supra* note 2, at 76-77. After the Axis powers' invasion of Yugoslavia during World War II, they divided control over the various regions of Yugoslavia amongst themselves. See SINGLETON, *supra* note 3, at 175-76 (describing partitioning of Yugoslavia). In general, Croats and Muslims were allied with the Nazis. MOJZES, *supra* note 2, at 75. Nazi Germany created the Independent State of Croatia (the "NDH"), ruled by Nazi puppet Ante Pavelic, a Mussolini-backed Croat. SINGLETON, *supra* note 3, at 175-76. The NDH included most of Croatia and Bosnia-Herzegovina. *Id.* In addition to Croats, more than a million Serbs and three-quarters of a million Muslims lived in the NDH, and during the war, Pavelic's militant group Ustasha attempted to exterminate the Serbs, sometimes with the help of Muslims. *Id.* at 177. At the close of the war, there had been an estimated 350,000 to 750,000 Serb deaths. *Id.* The Ustasha also carried out forced conversions of Orthodox Serbs to Catholicism. *Id.* at 180. In Serbia, a Serbian nationalist group called Chemiks and Communist-led Partisans rebelled against the Nazis. *Id.* The Partisans, with the help of the Soviet army, eventually took power, transforming Yugoslavia into a Communist state. See *id.* at 203-04 (discussing Partisans' road to victory in 1944 and 1945); see also DENITCH, *supra* note 3, at 34 (discussing Partisans' resistance against Nazis as simultaneously one for "power and a new social order . . .").

314. MOJZES, *supra* note 2, at 76.

concerning national strife had been to balance all national claims and conflicts, punishing each side involved equally no matter who was to blame so that no side could argue that it had been discriminated against.³¹⁵ After Tito's death, the Communist Party elite of the six Yugoslavian republics created nationalistic programs with clashing conceptions of how its members should rule Yugoslavia.³¹⁶ By the end of the 1980s, the Communist Party fragmented into separate national Communist parties, most of which adopted nationalist agendas.³¹⁷ Some Communist leaders dropped the title Communist in order to increase their chances of being elected in the impending elections.³¹⁸

Tensions between Serbs and Albanians in the Yugoslavian province of Kosovo had escalated during last years of Tito's rule.³¹⁹ The minority Serbs suffered under the Albanian Communist elite in Kosovo and felt threatened by the Albanians' high birthrate.³²⁰ Slobodan Milosevic, who became the leader of the Serbian Communist Party after Tito's death,³²¹ used the Kosovo problem to promote an increase in the power of a Serbia that, according to him and his supporters, the federal structure of Yugoslavia had oppressed.³²² By pointing to Albanians' past persecution of Serbs in Kosovo and vilifying Serb Communists who opposed Serbia's regaining of rights and power, Milosevic became the unrivaled leader of Yugoslavia and brought into his

315. *Id.*

316. See COHEN, *supra* note 1, at 50-51 (1993) (discussing increased ethnic politics of Communists in 1980s in Yugoslavia); see also MOJZES, *supra* note 2, at 77-78 (describing effects of Tito's death on political situation in Yugoslavia, particularly reactions of Communist Party leaders).

317. See MOJZES, *supra* note 2, at 81-82 (describing destruction of unified Communist Party); see also CRNOBRNJA, *supra* note 13, at 90-92 (discussing Communist Party's transformation after Tito's death).

318. MOJZES, *supra* note 2, at 81.

319. See *id.* at 78-80 (discussing history and nature of ethnic conflict in Kosovo). Kosovo is an autonomous region established within Serbia. *Id.* at 21. Kosovo is of historical importance to Serbs and is now 90% ethnically Albanian. *Id.* at 79. Since World War II, Serbs and Albanians living there have clashed. *Id.* at 79. The Albanians have pushed for either the annexation of Kosovo to Albania or the creation of a republic of Kosovo within Yugoslavia. *Id.* at 79.

320. See MOJZES, *supra* note 2, at 78-79 (describing nature of dispute between Serbs and Albanians living in Kosovo).

321. *Id.* at 78.

322. See COHEN, *supra* note 1, at 51-53 (describing Serbian President Milosevic's politically-motivated appeal to Serbs' negative feelings toward Albanians in Kosovo); see also MOJZES, *supra* note 2, at 78-80 (discussing Serbian President Milosevic's strategy for attaining power in Serbia).

administration Serbs from Bosnia, Herzegovina, Montenegro, and Kosovo.³²³

In the late 1980s, Milosevic began endorsing the notion of a Greater Serbia that would necessitate the annexation of all territories in which Serbs currently, or even in the past, lived in significant numbers.³²⁴ Beginning in 1989, the Yugoslavian Army agreed with this notion and supported Serbian ideas of what was best for Yugoslavia.³²⁵ In 1991, the Serb minorities in the Krajina region of Croatia staged a revolt against the regional Government that soon escalated into a war involving the Yugoslavian Army.³²⁶ At first, the Army claimed only to be serving as a mediator, but it was in reality assisting the Serbs.³²⁷ Fueling the revolt were Krajina Serbs' hostility toward the idea of rule by an independent Croatian Government and their desire that Yugoslavia not break up into a number of fragments.³²⁸ The Serb-Croat war ended in 1992 with an agreement to cease fighting, and the United Nations brought in peacekeeping soldiers to deter the resumption of hostilities.³²⁹

After the Bosnian multiparty elections in late 1990 in which each of the nationalist parties swept its own ethnic constituency,³³⁰ Serb minorities in Bosnia seceded from the Bosnian Government and established their own republic, the *Republika Srpska*.³³¹ In April 1992, the Yugoslavian Army began waging war in Bosnia against the Bosnian Government.³³² At first, the Army wanted to prevent Bosnia's secession from Yugoslavia, but when international recognition of Bosnia made that goal appear im-

323. See MOJZES, *supra* note 2, at 80-81 (describing Milosevic's rise to power in Serbia).

324. *Id.* at 69.

325. *Id.* at 68-69.

326. DENITCH, *supra* note 3, at 180.

327. See MOJZES, *supra* note 2, at 100-01 (describing Yugoslavian Army's pro-Serb activities in Croatia). The Serbian Government in Belgrade actively supported the Serbs in Croatia, and one theory is that Milosevic and his supporters in the Serbian Government and the Yugoslavian Army instigated and then directed the conflict. See *id.* at 100 (arguing that such scenario is most likely).

328. COHEN, *supra* note 1, at 225.

329. MOJZES, *supra* note 2, at 105.

330. See COHEN, *supra* note 1, at 146-47 (discussing Bosnian elections of 1990).

331. MOJZES, *supra* note 2, at 107. *Republika Srpska* literally means "Republic Serbian" in Serbo-Croatian. *Id.* Bosnian Serbs named the city of Banja Luka as the capital of Republika Srpska. CRNOBRNJA, *supra* note 13, at 185.

332. MOJZES, *supra* note 2, at 107.

possible, the Yugoslavian Army began supporting the Bosnian Serbs, who claimed to want to separate from Bosnia so as to remain united with other Serbs.³³³ In addition, the Yugoslavian Government aided the Bosnian Serbs in their fight against allied Croat and Muslim forces with military, financial, medical, diplomatic, transportation, and other forms of assistance.³³⁴ This support quickly resulted in the Bosnian Serbs' seizure of seventy percent of Bosnian territory.³³⁵ In addition to Serbs fighting Muslims and, to a lesser extent, Croats, there were hostilities between Muslims and Croats, who were trying to seize their own piece of Bosnia.³³⁶

2. The U.N. Security Council Resolutions Instituting the Embargo Against Yugoslavia

From 1991 until 1992, the U.N. Security Council passed a series of Resolutions in response to the situation in Yugoslavia out of concern for the conflict's potential threat to world peace and security.³³⁷ Among these Resolutions was Resolution 713, which imposed a total arms embargo on Yugoslavia.³³⁸ In addition, Resolution 757 imposed a total trade embargo on Yugoslavia and provided for the freezing of funds owned by or destined for Yugoslavian authorities or undertakings.³³⁹ Resolution 787 prohibited the transshipment through Yugoslavia of certain essential products and defined a Yugoslavian vessel for the pur-

333. *Id.*

334. *Id.* at 108; see COHEN, *supra* note 1, at 240 (describing Belgrade's assistance of Serbs fighting in Bosnia).

335. MOJZES, *supra* note 2, at 108. *But see* CRNOBRNJA, *supra* note 13, at 187 (arguing that Serb gains in Bosnia amounted to much less than 70%). By 1993, the Muslim-Croat alliance had collapsed and fighting broke out between those groups as well. MOJZES, *supra* note 2, at 109.

336. CRNOBRNJA, *supra* note 13, at 183.

337. *See, e.g.*, Resolution 713, *supra* note 5, at 3, ¶ 6 (imposing total arms embargo on Yugoslavia); Resolution 757, *supra* note 5, at 3-4, ¶ 4 (imposing total trade embargo on Yugoslavia); Resolution 787, *supra* note 5, at 3, ¶ 9 (prohibiting transshipment through Yugoslavia of certain essential products and defining Yugoslavian vessel for purposes of implementing relevant U.N. Security Council Resolutions); Resolution 820, *supra* note 5, at 4-6, ¶¶ 13, 22, 24 (strengthening U.N. embargo on Yugoslavia by prohibiting transport of all commodities across Yugoslavian border and by providing for impounding of various types of vehicles in which Yugoslavian entity holds majority or controlling interest); Bohr, *supra* note 5, at 260-62 (discussing U.N. Security Council's actions concerning conflict in Yugoslavia).

338. Resolution 713, *supra* note 5, at 3, ¶ 6.

339. Resolution 757, *supra* note 5, at 3-4, ¶¶ 4, 5.

poses of implementing relevant resolutions.³⁴⁰ Resolution 820 strengthened the U.N. embargo by prohibiting the transport of all commodities across the Yugoslavian border, with certain exceptions, and by providing for the impounding of various types of vehicles in which a Yugoslavian entity holds a majority or controlling interest.³⁴¹

a. Resolution 713 (1991)

In Resolution 713 of September 25, 1991, the Security Council began by noting its concern about the fighting taking place in Yugoslavia, as well as the consequences this fighting could have for other countries in the Balkans region and for international peace and security in general.³⁴² After urging all the warring parties to obey earlier cease-fire agreements and to try to arrive at a peaceful resolution of their disputes through negotiation at the Conference on Security and Co-operation in Europe,³⁴³ the Security Council declared in Resolution 713 that all

340. Resolution 787, *supra* note 5, at 3-4, ¶¶ 9, 10.

341. Resolution 820, *supra* note 5, at 5-6, ¶¶ 22, 24.

342. Resolution 713, *supra* note 5, at 1, pmb. In Resolution 713, the Security Council stated that it was "[d]eeply concerned by the fighting in Yugoslavia which is causing a heavy loss of human life and material damage, and by the consequences for the countries of the region, in particular in the border areas of neighboring countries." *Id.* It also expressed its concern "that the continuation of this situation constitutes a threat to international peace and security." *Id.*

343. VOJTECH MASTNY, HELSINKI, HUMAN RIGHTS, AND EUROPEAN SECURITY 32 (1986). The Conference on Security and Co-operation in Europe ("CSCE") is an international conference of all North American and European states in which the participants address at length various security concerns in Europe. *Id.* The first meeting of the CSCE began in Helsinki on July 3, 1973, continued in Geneva from September 18, 1975, and concluded in Helsinki on August 1, 1975. 1975 Final Act of the Conference on Security and Co-operation in Europe, in FROM HELSINKI TO VIENNA: BASIC DOCUMENTS OF THE HELSINKI PROCESS 43 (Arie Bloed ed., 1990). Representatives of Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the U.S.S.R., the United Kingdom, the United States, and the former Yugoslavia participated in the Conference. *Id.* The participating states signed the Final Act of the Conference on Security and Co-operation in Europe ("Final Act"), in which they articulated a number of principles and made various affirmations concerning security matters and international relations. *Id.* at 43-54. The Final Act also contained a number of agreements by the states to co-operate in the future in various fields, including technology, science, the environment, commercial exchanges, industry, trade, tourism, humanitarian fields, information, culture, and education. *Id.* at 54-98. The Final Act concluded with the states' resolution to "continue the multilateral process initiated

states should, in order to establish peace and stability in Yugoslavia, immediately carry out a general and total embargo on the delivery of weapons and military equipment to Yugoslavia.³⁴⁴ Finally, the Security Council decided to maintain involvement with the conflict in Yugoslavia until the achievement of a peaceful resolution.³⁴⁵

b. Resolution 757 (1992)

In Resolution 757 of May 30, 1992, the Security Council imposed a trade embargo on Yugoslavia.³⁴⁶ The Security Council began Resolution 757 of May 30, 1992 by reaffirming previous resolutions concerning the war in Yugoslavia.³⁴⁷ The Security Council further stated that it deplored that the parties involved in the war had not complied with the demands the Security Council had made in Resolution 752³⁴⁸ of 1992.³⁴⁹ Resolution 752 had demanded that the fighting in Bosnia stop immediately, that all types of interference from outside Bosnia and Herzegovina, including interference by the Yugoslavian Army and by Croatian Army forces, end immediately, and that all non-army units in Bosnia and Herzegovina be broken up and disarmed.³⁵⁰

by the Conference" by organizing meetings among their representatives. *Id.* at 99. The most recent meeting of the CSCE took place in December 1994, in Budapest. *See Europe's Post-post-cold-war Defences Wobble into Action*, *ECONOMIST*, Dec. 10, 1994, at 45-46 (discussing December, 1994, meeting of CSCE).

344. Resolution 713, *supra* note 5, at 3, ¶ 6. The Security Council 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 . . ." *Id.* On November 22, 1995, the U.N. Security Council decided to end the arms embargo on Yugoslavia, with the termination to take place in stages. S.C. Res. 1021, U.N. SCOR, 3595th Mtg., at 1-2, ¶ 1, U.N. Doc. S/RES/1021 (1995). The termination of the arms embargo became complete in June 1996. *Security Council Permanently Lifts Sanctions*, *AGENCE FRANCE PRESSE*, Oct. 1, 1996, available in LEXIS, Nexis library, World News file.

345. Resolution 713, *supra* note 5, at 3, ¶ 8.

346. *See* Resolution 757, *supra* note 5, at 3-4, ¶¶ 4(b), 4(c) (setting forth details of trade embargo on Yugoslavia). On October 1, 1996, the U.N. Security Council terminated the trade embargo on Yugoslavia, although it stated that it would consider reimposing sanctions on Yugoslavia if it did not abide by the peace agreement it had signed in late 1995. S.C. Res. 1074, U.N. SCOR, 3700th Mtg., at 1, ¶ 2, U.N. Doc. S/RES/1074 (1996).

347. Resolution 757, *supra* note 5, at 1, pmbl. (listing prior Resolutions addressing Yugoslavian conflict).

348. S.C. Res. 752, U.N. SCOR, 3075th Mtg., U.N. Doc. S/RES/752 (1992) [hereinafter Resolution 752].

349. Resolution 757, *supra* note 5, at 1-2, pmbl.

350. Resolution 752, *supra* note 346, at 2, ¶¶ 1, 3, 5.

The Security Council then declared that all states must prevent the import into their territories of all commodities and products that are exported from the Federal Republic of Yugoslavia.³⁵¹ It also decided that all states should prevent any activities by their own nationals or activities in or from their territories that carry out or promote trade with or involving any Yugoslavian entity.³⁵²

In addition, the Security Council concluded that no state should allow any funds or other economic resources to become available to Yugoslavian authorities or to any commercial entity, industrial entity, or public utility located in Yugoslavia, or allow the transfer of such funds or resources to these Yugoslavian entities, with an exception for payments for medical and humanitarian purposes and food.³⁵³ Resolution 757 added, however, that the trade and financial embargo would not extend to the transshipment through Yugoslavia of commodities and products that originated outside of Yugoslavia and were temporarily present there only for the purpose of transshipment.³⁵⁴ In Resolution 757, the Security Council also called on all states to deny all aircraft intending to land in or having taken off from Yugoslavia, permission to take off from, land in, or fly over their territory, unless the Committee of the Security Council (the "Committee") that Resolution 724 established³⁵⁵ approved the flight for humanitarian or other purposes.³⁵⁶ Finally, Resolution 757 required states to prohibit the servicing of aircraft registered in Yugoslavia and the provision of parts and airworthiness certification for such aircraft.³⁵⁷

351. Resolution 757, *supra* note 5, at 3, ¶ 4(a). The Security Council decided, "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 . . ." *Id.*

352. *See id.* at 3-4, ¶¶ 4(b), 4(c) (outlining details of prohibitions required of States, including exception for food and medical supplies).

353. *Id.* at 4, ¶ 5.

354. *Id.* at 4, ¶ 6.

355. *See* S.C. Res. 724, U.N. SCOR, 3023rd Mtg., U.N. Doc. S/RES/724 (1991), at 1-2, ¶ 5(b) (deciding to establish Committee of Security Council). Among the Committee's functions would be "[t]o consider any information brought to its attention by States concerning violations of the embargo," to recommend to the Security Council ways in which the embargo could be made more effective, and "[t]o recommend appropriate measures in response to violations of the . . . [arms] embargo." *Id.* at 2, ¶¶ 5(b)(iii), 5(b)(iv).

356. Resolution 757, *supra* note 5, at 4, ¶ 7(a).

357. *Id.* at 4, ¶ 7(b).

c. Resolution 787 (1992)

In Resolution 787 of November 16, 1992, the U.N. Security Council prohibited the transshipment through Yugoslavia of certain essential products and defined a Yugoslavian vessel for the purposes of implementing relevant Security Council resolutions.³⁵⁸ Resolution 787 reaffirmed Resolution 713 and subsequent resolutions relevant to the war in Yugoslavia and expressed concern about information the Security Council had received concerning continued violations of the arms and trade embargo.³⁵⁹ Resolution 787 went on to condemn acts that deliberately impeded the transport of medical and food supplies to civilians in Bosnia.³⁶⁰ In Resolution 787, the Security Council further prohibited the transshipment of a number of important products, including crude oil, coal, energy-related equipment, aircraft, and motors of all types, unless the Committee were to specifically authorize such a transshipment on a case-by-case basis.³⁶¹ The Security Council made this decision so as to guarantee that no one could succeed in diverting in violation of Resolution 757 commodities and products shipped through Yugoslavia.³⁶² Finally, the Security Council deemed, for purposes of carrying out the embargo, all vessels in which a Yugoslavian entity held a majority or controlling interest to be a vessel of Yugoslavia, without regard to the flag under which it sailed.³⁶³

d. Resolution 820 (1993)

In Resolution 820 of April 17, 1993, the Security Council once again addressed the conflict in Yugoslavia.³⁶⁴ The preamble of Resolution 820 included a condemnation of all violations

358. Resolution 787, *supra* note 5, at 3-4, ¶¶ 9, 10.

359. *Id.* at 1-2, pmbl.

360. *Id.* at 3, ¶ 7.

361. *Id.* at 3-4, ¶ 9.

362. *Id.*

363. Resolution 787, *supra* note 5, at 4, ¶ 10. The Security Council decided: [A]ny 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 purpose 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

Id.

364. Resolution 820, *supra* note 5, at 1, pmbl.

of Resolutions 757 and 787 occurring between the territory of Yugoslavia and Serb-controlled regions of Croatia and Bosnia.³⁶⁵ The body of Resolution 820 referred specifically to the Bosnian Serbs in several places,³⁶⁶ and it stated that the provisions of Resolution 820 would come into force only if the Bosnian Serbs either continued to refrain from signing the peace plan that the Bosnian Croats and Bosnian Muslims had signed or resumed military activities after the signing of the peace plan.³⁶⁷ Among the provisions of Resolution 820 was a prohibition of all transshipments of products and commodities through Yugoslavia on the Danube River unless the Committee specifically authorized the transshipments.³⁶⁸

Resolution 820 contained a provision requiring states to freeze funds that Yugoslavian authorities, businesses, and public utilities owned or controlled indirectly or directly and that any persons or entities within the states held.³⁶⁹ Resolution 820 also expanded the transshipment prohibition in Resolution 787 to apply to the transport of any commodities or products across Yugoslavia's land borders or to or from its ports.³⁷⁰ Resolution 820 further required all states to impound certain classes of vehicles, including aircrafts, within their territories, in which a Yugoslavian entity held a majority or controlling interest.³⁷¹ According to Resolution 820, the entities holding these possessions could have to forfeit them to the state seizing them upon the conclusion

365. *Id.*

366. *See id.* at 2, ¶¶ 3, 5 (expressing concern at Bosnian Serbs' refusal to accept all of peace plan, and demanding that all parties in Bosnia, in particular Bosnian Serbs, cooperate with and ensure safety of personnel of U.N. Protective Force and humanitarian agencies).

367. *Id.* at 3, ¶¶ 10-11.

368. *Id.* at 4, ¶ 15.

369. Resolution 820, *supra* note 5, at 5, ¶ 21.

370. *Id.* at 5, ¶¶ 22(a)-(c). Resolution 820 included exceptions for food, medical and other humanitarian supplies, and any other goods which the Committee authorized on an exceptional basis. *Id.*

371. *Id.* at 6, ¶ 24. The Security Council decided:

[A]ll 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

Id.

that the possessions have been in violation of Resolutions 713, 757, 787, or 820.³⁷² Related to this forfeiture and impoundment provision is the requirement in Resolution 820 that states detain pending investigation all vehicles and cargoes of certain classes within their territories that authorities suspect of violating the same four resolutions.³⁷³ Upon a conclusion that the vehicles and cargoes under suspicion have violated any of those resolutions, Resolution 820 provides for their impounding and, if appropriate, forfeiture to the state detaining them.³⁷⁴

3. EC Council Regulations Establishing the Embargo on Yugoslavia

The European Community responded to the U.N. Security Council resolutions establishing an embargo on Yugoslavia by passing regulations imposing a similar embargo.³⁷⁵ After referring to U.N. Security Council Resolutions 752 and 757, Council Regulation 1432/92 of June 1, 1992,³⁷⁶ imposed a total trade embargo on the republics of Serbia and Montenegro.³⁷⁷ In addition, Regulation 1432/92 prohibited the provision to legal and

372. *Id.* Specifically, paragraph 24 states that the Security Council: [D]ecides 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 [Yugoslavia] and that these [properties] may be forfeit to the seizing State upon a determination that they have been in violation of [the four embargo resolutions].

Id.

373. Resolution 820, *supra* note 5, at 6, ¶ 25.

374. *Id.*

375. *See* Bohr, *supra* note 5, at 260-62 (discussing initial cautious EC reaction to conflict in Yugoslavia and measures it adopted in 1992); *see also* Council Regulation No. 1432/92, *supra* note 11, pmb., art. 1, O.J. L 151/4, at 4 (1992) (referring to U.N. Security Council's embargo resolutions and setting forth terms of EC embargo on Republics of Serbia and Montenegro); Council Regulation 990/93, *supra* note 11, pmb., O.J. L 102/14, at 14 (1993) (referring to U.N. Security resolutions imposing embargo on Yugoslavia in strengthening embargo it had previously established).

376. Council Regulation No. 1432/92, *supra* note 11, pmb., O.J. L 151/4 at 4 (1992).

377. *Id.* arts. 1(a), 1(b), O.J. L 151/4, at 4 (1992). Council Regulation 1432/92 stated:

As of 31 May 1992, the following shall be prohibited:

(a) the introduction into the territory of the Community of all commodities and products originating in or coming from the Republics of Serbia and Montenegro; (b) the export to [those Republics] of all commodities and products originating in or coming from the Community . . .

Id.

natural persons in the republics of Serbia and Montenegro of non-financial services whose purpose or effect was to benefit indirectly or directly the economy of those republics.³⁷⁸ Regulation 1432/92 also prohibited such non-financial services to all organizations that exercised an economic activity and that residents or organizations of the republics of Serbia and Montenegro controlled.³⁷⁹ Finally, Regulation 1432/92 prohibited in particular the provision of non-financial services in order to benefit any economic activity undertaken in or from the republics of Serbia and Montenegro.³⁸⁰ The Regulation created exceptions for the export of medical supplies and foodstuffs and for activities promoting their export to those republics.³⁸¹

An Annex to Regulation 1432/92³⁸² provided the terms of the prohibition on air transport services.³⁸³ The Annex mandated the denial of permission to any aircraft to take off from, land in, or fly over EC Member State territory if it was traveling to or from Serbian or Montenegrin territory, unless the Committee that U.N. Security Council Resolution 724 created approved the flight.³⁸⁴ Regulation 3534/92 of December 7, 1992,³⁸⁵ amended Regulation 1432/92 by inserting a prohibition on the transshipment of products nearly identical to that of Resolution 787³⁸⁶ and by adding Annex II defining a vessel of the republics of Serbia and Montenegro for the purpose of carrying out Regu-

378. *Id.* art. 1(d)(i)-(ii), O.J L 151/4, at 4 (1992). Council Regulation 1432/92 prohibited "the provision of non-financial services whose object or effect it is, directly or indirectly, to promote the economy of the Republics of Serbia and Montenegro" *Id.* art. 1(d), O.J L 151/4, at 4 (1992).

379. *Id.* art. 1(d)(ii), O.J L 151/4, at 4 (1992).

380. *Id.* art. 1(d)(i), O.J L 151/4, at 4 (1992).

381. Council Regulation No. 1432/92, *supra* note 11, arts. 2(a), 2(c), O.J L 151/4, at 5 (1992).

382. *Id.* annex, O.J L 151/4, at 6 (1992).

383. *Id.*

384. *Id.* The Annex stated:

Permission shall be denied to any aircraft to take off from, land in or overfly the territory of the Community if it is destined to land in or has taken off from the territory of the Republics of Serbia and Montenegro, unless the particular flight has been approved . . . by the Committee established by Security Council Resolution 724 (1991).

Id.

385. Council Regulation No. 3534/92, O.J L 358/16 (1992).

386. *See id.* art. 2, O.J L 358/16, at 16 (1992) (prohibiting transshipment of "crude oil, petroleum products, omission energy-related equipment, metals, chemicals, rubber, tyres, vehicles, aircraft and motors of all types . . .").

lation 1432/92 and related legislation.³⁸⁷

Council Regulation 2656/92³⁸⁸ expressed the Community's concern that the EC embargo on Yugoslavia might not be effectively applied.³⁸⁹ The European Community also expressed its belief that in order to ensure the effectiveness of the embargo it was necessary to control exports from the European Community.³⁹⁰ In furtherance of this goal, the Conference on Security and Co-operation in Europe established Sanctions Assistance Missions³⁹¹ in the Republic of Croatia and the territory of the former Yugoslavian Republic of Macedonia, but not in the Republic of Bosnia-Herzegovina.³⁹² The Sanction Assistance Missions enabled Croatian and Macedonian authorities to control the exports from or through their territory to the republics of Serbia and Montenegro.³⁹³

Council Regulation 40/93, the amended version of Regulation 2656/92, subjected all exports of products or commodities to the Republic of Bosnia-Herzegovina originating in or coming from the European Community to prior Member State authorization.³⁹⁴ Regulation 40/93 conditioned the issuance of such prior export authorization on the Republic of Bosnia-Herzegovina's issuance of an import license.³⁹⁵ Council Regulation 40/93 also required that Bosnian authorities confirm the authorized goods' arrival.³⁹⁶

387. Council Regulation No. 3534/92, *supra* note 385, art. 3, O.J. L 358/16, at 16 (1992).

388. Council Regulation No. 2656/92, O.J. L 266/27 (1992), *amended by* O.J. L 7/1 (1993) (subsequent citations will be to full text, English version, at O.J. L 7/1 (1993), unless otherwise indicated).

389. *Id.* pmb., O.J. L 266/27, at 27 (1992).

390. *Id.*

391. Council Regulation No. 40/93, pmb., O.J. L 7/1, at 1 (1993). The "system of Sanctions Assistance Missions enables the competent authorities of the Republic of Croatia and of the territory of the former Yugoslav Republic of Macedonia to control effectively the exports from or through its territory to the Republics of Serbia and Montenegro." *Id.* The Sanctions Assistance Mission in Macedonia operates under the "joint aegis of the European Union and the . . . Conference on Security and Co-operation in Europe." *Beating the Sanctions on Serbia*, *ECONOMIST*, July 2, 1994, at 49.

392. Council Regulation No. 40/93, *supra* note 391, pmb., O.J. L 7/1, at 1.

393. *Id.*

394. *Id.* art. 1, O.J. L 7/1, at 1 (1993).

395. *Id.* art. 2, O.J. L 7/1, at 1 (1993).

396. *Id.*

4. EC Council Regulation 990/93 Strengthening the Embargo

In Council Regulation 990/93 of April 26, 1993, the European Community expressed a need to strengthen the embargo that Council Regulations 1432/92 and 2656/92 established.³⁹⁷ A number of observations set forth in Regulation 990/93 concerning the tragedy in Yugoslavia propelled the European Community to adopt this Regulation.³⁹⁸ Among these observations were that Serbia and Montenegro's extended direct and indirect activities in and concerning Bosnia-Herzegovina were the major cause of the problems there and that the continuation of those activities would bring about additional deaths and property damage and further disrupt international peace and security in that region.³⁹⁹ The European Community also observed in Regulation 990/93 that the Bosnian Serb party had not yet accepted the International Conference on Yugoslavia's peace plan in full, that additional violations of the existing embargo on Yugoslavia had to be prevented, and that the U.N. Security Council had adopted Resolution 820 for the purpose of strengthening the embargo of Yugoslavia that Resolutions 713, 757, and 787 established.⁴⁰⁰ Regulation 990/93 further stated that the European Community and its Member States had agreed to avail themselves, if necessary, of an EC act so as to ensure consistent imple-

397. Council Regulation No. 990/93, *supra* note 11, pmb., O.J. L 102/14, at 14 (1993).

398. *See id.* pmb., O.J. L 102/14, at 14 (1993) (setting forth EC understanding of Yugoslavian situation).

399. *Id.*

400. *Id.* Council Regulation 990/93 noted:

[F]urther violations of the existing embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro), in particular by their transit through this Republic and by activities carried out between this Republic and the Serb-controlled areas of Bosnia-Herzegovina and the United Nations Protected Areas in the Republic of Croatia have to be prevented; [and that] the United Nations Security Council . . . has adopted Resolution 820 (1993), in order to strengthen the embargo of the Federal Republic of Yugoslavia (Serbia and Montenegro), decided upon in Resolutions 713 (1991), 757 (1992) and 787 (1992); [and that] under these conditions, the Community has to strengthen the embargo of [Yugoslavia] as established by Council Regulations (EEC) No 1432/92 and (EEC) No 2656/92

Id. The Council also stated that the European Community and the Member States had decided "that measures [had] to be taken to dissuade the Republics of Serbia and Montenegro from further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to cooperate in the restoration of peace in this Republic" *Id.*

mentation of particular U.N. Resolutions and EC Regulations.⁴⁰¹

Most of the provisions of Regulation 990/93 reproduced, to a great extent, embargo measures that U.N. Security Council resolutions had imposed.⁴⁰² Article 8 required that competent Member State authorities impound certain classes of vehicles, including aircrafts, in which a Yugoslavian entity held a majority or controlling interest.⁴⁰³ Article 9 mandated that all competent Member State authorities detain pending investigation vehicles that Article 8 covered as well as cargo that authorities suspected to have violated Regulation 1432/92 or Regulation 990/93.⁴⁰⁴ Regulation 990/93 defined the scope of its application as all EC Member State territory, including Member State air space and any aircraft or vessel under a Member State's jurisdiction, as well as all Member State nationals and any entity incorporated or constituted under a Member State's law.⁴⁰⁵

Council Regulation 462/96 suspended Regulation 990/

401. *Id.* Regulation 990/93 did not specify which resolutions or regulations it was referring to, vaguely stating that the European 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." *Id.*

402. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3961, ¶ 14, [1996] 3 C.M.L.R. at 276.

403. Council Regulation No. 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993). Article 8's exact language is:

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.

Id. Article 24 of Resolution 820 (1993) contains language very similar to that of Regulation 990/93's Article 8. See Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3959, I-3961, ¶¶ 8, 14, [1996] 3 C.M.L.R. at 275, 276 (quoting Article 24 of Resolution 820 and Article 8 of Regulation 990/93).

404. Council Regulation No. 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993). Article 25 of Resolution 820 (1993) contains language very similar to that of Article 9 of Regulation 990/93. See Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3959, I-3961, ¶¶ 9, 14, [1996] 3 C.M.L.R. at 275, 276 (quoting Article 25 of Resolution 820 and Article 9 of Regulation 990/93).

405. Council Regulation No. 990/93, *supra* note 11, art. 11, O.J. L 102/14, at 16 (1993). Article 8 of Council Regulation 990/93 provided:

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.

Id.

93.⁴⁰⁶ The suspension took effect on February 27, 1996.⁴⁰⁷ Regulation 462/96 provided for the release of any funds or assets that Member States had frozen or impounded under any of the EC embargo regulations.⁴⁰⁸

II. THE BOSPHORUS CASE

In the *Bosphorus* decision, the ECJ held that Council Regulation 990/93 applied to an aircraft owned by the Yugoslavian National Airline and leased to a Turkish airline in which no Yugoslavian entity held a majority or controlling interest.⁴⁰⁹ The Irish High Court had held that the regulation did not apply,⁴¹⁰ and on appeal, the Supreme Court of Ireland⁴¹¹ made a reference to the ECJ for a preliminary ruling regarding the question whether Article 8 of Regulation 990/93 applied to a Yugoslavian-owned aircraft leased to a non-Yugoslavian entity.⁴¹² In coming to their respective conclusions on this question, the Advocate General and the ECJ interpreted Regulation 990/93 with respect to its language, its context, and its purpose.⁴¹³ In addition, they employed the principle of proportionality in finding that the impounding in question did not violate the airline's right to property as protected in Community law.⁴¹⁴

406. Council Regulation No. 426/96, art. 1(1), O.J. L 65/1 at 1 (1996).

407. *Id.* art. 2, O.J. L 65/1 at 1 (1996).

408. *Id.* art. 1(2), O.J. L 65/1 at 1 (1996).

409. *Bosphorus*, [1996] E.C.R. at I-3987, ¶ 27, [1996] 3 C.M.L.R. at 296.

410. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications, Ireland and Attorney General and TEAM Aer Lingus Ltd*, [1994] 2 I.L.R.M. 551, 560, [1994] 3 C.M.L.R. 464, 472 (High Court of Ireland, Murphy, J.).

411. MURDOCH, *supra* note 34, at 489. The Supreme Court of Ireland is the court of final appeal in Ireland. *Id.* One of the Supreme Court's functions is to hear appeals from the Irish High Court. *Id.*

412. *Bosphorus*, [1996] E.C.R. at I-3981, ¶ 6, [1996] 3 C.M.L.R. at 292.

413. See Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3966-70, ¶¶ 33-47, [1996] 3 C.M.L.R. at 281-85 (stating rule concerning interpretation of Community law provisions and interpreting Regulation 990/93 in accordance therewith); see also *Bosphorus*, [1996] E.C.R. at I-3983-84, ¶¶ 11-18, [1996] 3 C.M.L.R. at 293-94 (stating rule concerning interpretation of Community law provisions and interpreting Regulation 990/93 in accordance therewith).

414. See Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3971-77, ¶¶ 48-69, [1996] 3 C.M.L.R. at 285-91 (applying principle of proportionality to impounding in context of property rights issue); see also *Bosphorus*, [1996] E.C.R. at I-3985-87, ¶¶ 19-26, [1996] 3 C.M.L.R. at 294-96 (explaining EC conception of right to property and applying it to impounding in question using principle of proportionality).

A. *Background of the Bosphorus Case*

Bosphorus Hava Yollari Turizm ve Ticaret AS ("Bosphorus") is an airline incorporated in Turkey and owned by Turkish citizens.⁴¹⁵ Mustafa Ozbay, a Turkish citizen who managed Bosphorus, owned ninety-six per-cent of Bosphorus' shares.⁴¹⁶ Bosphorus signed a lease agreement with the national airline of Yugoslavia ("JAT") on April 17, 1992,⁴¹⁷ under which Bosphorus leased two Boeing 737-300 aircrafts from JAT for a period of forty-eight months.⁴¹⁸ The lease was a dry lease, which meant that Bosphorus had to provide its own cabin and flight crew for the aircrafts.⁴¹⁹ Bosphorus retained complete day-to-day direction and operational control of the aircrafts.⁴²⁰ The lease provided that JAT retained ownership of the aircrafts but that Bosphorus had the right to register them in Turkey, which it did.⁴²¹ The Turkish certificates of registration for the aircrafts identified their owner as JAT and their operator as Bosphorus.⁴²² Bosphorus paid a deposit of US\$1,000,000 for each aircraft, and the lease provided for a monthly rental payment of US\$150,000 for each aircraft.⁴²³

After the aircrafts' delivery, Bosphorus exercised complete control over them.⁴²⁴ The cabin and flight crews were Bosphorus employees.⁴²⁵ Bosphorus alone determined the two aircrafts' destination, and Bosphorus used them exclusively to run its tour operations.⁴²⁶ From the time of their delivery, the aircrafts never returned to Yugoslavia or any states of the former Yugosla-

415. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3962, ¶ 19, [1996] 3 C.M.L.R. at 277.

416. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport and Others* (Jan. 22, 1996) (High Court of Ireland), available in LEXIS, International Law Library, All Commonwealth Cases/Summaries File, at *4 [hereinafter *Bosphorus High Court 1996 Decision*].

417. *Bosphorus*, [1996] E.C.R. at I-3980, ¶ 2, [1996] 3 C.M.L.R. at 291.

418. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3962-63, ¶ 20, [1996] 3 C.M.L.R. at 277.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Bosphorus*, [1994] 2 I.L.R.M. at 554-555, [1994] 3 C.M.L.R. at 466-67.

424. *Id.* at 555, [1994] 3 C.M.L.R. at 467.

425. *Id.*

426. *Id.*

via, traveling among Turkey, most of the EU Member States,⁴²⁷ and Switzerland.⁴²⁸ JAT never had any direct or indirect interest in Bosphorus or in the management, supervision, or direction of its business.⁴²⁹ JAT's only interest during the term of the lease was its right to receive the monthly rental payments and its right to due performance by Bosphorus of the other conditions of the lease.⁴³⁰ These conditions included that Bosphorus would be responsible for the aircrafts' maintenance and pay for the running costs of the aircrafts except for insurance, which JAT would pay.⁴³¹ Shortly after delivery of the planes, the Council enacted Regulation 1432/92 which prohibited Bosphorus' payment of the monthly rentals.⁴³² Thereafter, Bosphorus paid the rental amounts into a blocked account with the Turkish Central Bank from which JAT could not remove funds without the Bank's approval.⁴³³ JAT became unable to pay the aircrafts' insurance premiums, as required by the lease, and, thus, Mustafa Ozbay arranged for insurance in London.⁴³⁴

On April 16, 1993, Bosphorus flew one of the aircrafts to Dublin, Ireland to have Team Aer Lingus Limited ("Team Aer Lingus"), the aircraft maintenance subsidiary of Aer Lingus, conduct an overhaul and maintenance service of the aircrafts.⁴³⁵ Team Aer Lingus completed the service on May 28, 1993, but as the aircraft was about to depart from Dublin Airport, the Irish Minister for Transport, Energy and Communications⁴³⁶ delayed

427. *Id.*

428. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3963, ¶ 22, [1996] 3 C.M.L.R. at 278.

429. *Id.*

430. *Bosphorus*, [1994] 2 I.L.R.M. at 555, [1994] 3 C.M.L.R. at 467-68.

431. Bosphorus High Court 1996 Decision, *supra* note 416, at *7.

432. *Id.* at *8.

433. *Id.* Advocate General Jacobs, however, states in his Opinion that the Turkish Central Bank operated the blocked account "in accordance with its national legislation enforcing U.N. sanctions [against Yugoslavia]." Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3964, ¶ 27, [1996] 3 C.M.L.R. at 279.

434. Bosphorus High Court 1996 Decision, at *8.

435. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3963, ¶ 23, [1996] 3 C.M.L.R. at 278.

436. Telephone interview with Noelle Gleason, Office of the Consulate General of Ireland, New York, N.Y. (Feb. 13, 1997). The Irish Minister for Transport, Energy and Communications is responsible for the formulation of national policies connected with aviation, rail, and road transport, the supply and use of energy in all its forms, the exploration and development of mineral and petroleum, and postal, radio, and telecommunications matters. *Id.*

its flight clearance.⁴³⁷ Team Aer Lingus' Secretary wrote Ozbay a letter the next day explaining that Team Aer Lingus had sought an opinion from the U.N. Sanctions Committee⁴³⁸ through the Irish Government as to whether Bosphorus' use of the aircraft was in violation of the U.N. embargo.⁴³⁹ Subsequent to that letter, on June 4, 1993, the Irish Minister for Tourism and Trade⁴⁴⁰ passed regulations giving full effect to EC Council Regulation 990/93.⁴⁴¹ On June 8, 1993, the Minister for Transport, Energy and Communications ordered the aircraft impounded pursuant to Article 8 of Regulation 990/93 on the ground that a Yugoslavian entity held a majority or controlling interest in the aircraft.⁴⁴² The U.N. Sanctions Committee provided its opinion on the matter in a letter dated June 14, 1993, stating that the provision of services to the aircraft would have violated relevant U.N. embargo resolutions and that the Irish authorities should have already impounded the aircraft under Article 24 of U.N. Security Council Resolution 820.⁴⁴³

As a consequence of the Minister's impounding of the aircraft, Turkish authorities in Istanbul impounded Bosphorus' other aircraft under the JAT lease on the ground that Turkish law⁴⁴⁴ required an airline to have at least two aircraft in operation in order to carry on its business.⁴⁴⁵ As of January 22, 1996, the aircraft remained detained at the airport and was incurring

437. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3963, ¶ 23, [1996] 3 C.M.L.R. at 278.

438. *Bosphorus*, [1994] 2 I.L.R.M. at 556, [1994] 3 C.M.L.R. at 468. The U.N. Sanctions Committee was created pursuant to U.N. Security Council Resolution 724 (1991). Resolution 724, *supra* note 353, at 1-2, ¶ 5(b).

439. *Bosphorus*, [1994] 2 I.L.R.M. at 556, [1994] 3 C.M.L.R. at 468.

440. Telephone interview with Noelle Gleason, Office of the Consulate General of Ireland, New York, N.Y. (Feb. 3, 1997). The Irish Minister for Tourism and Trade is responsible for the formulation of national policy connected with tourism and trade matters. *Id.*

441. *Bosphorus*, [1994] 2 I.L.R.M. at 556, [1994] 3 C.M.L.R. at 468.

442. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3963, ¶ 23, [1996] 3 C.M.L.R. at 278.

443. *Id.* at I-3963-64, ¶ 24, [1996] 3 C.M.L.R. at 278-79.

444. Telephone interview with John Doyle, attorney with Dillon Eustace, the Dublin law firm that has represented and still represents Bosphorus, New York, N.Y. (Feb. 6, 1997). Mr. Doyle believes that the Turkish law requiring airlines to have at least two aircraft in operation in order to carry on its business is in fact a regulation of the Turkish Civil Aviation Authority. *Id.*

445. *Bosphorus* High Court 1996 Decision, *supra* note 416, at *9.

parking fees.⁴⁴⁶ Bosphorus had no other aircraft and was, thus, put out of business as an airline.⁴⁴⁷ In addition, Bosphorus paid for the costs of the aircrafts' insurance, the maintenance performed by Team Aer Lingus on the first aircraft, and the detention of the second aircraft in Istanbul with money from the JAT blocked account.⁴⁴⁸ The result of these payments was that as of January 22, 1996, there were virtually no funds remaining in that account.⁴⁴⁹

B. *Proceedings Prior to the ECJ*

Bosphorus filed a suit in the Irish High Court in Dublin seeking judicial review of the Minister for Transport, Energy and Communications' direction to impound the aircraft.⁴⁵⁰ In its judgment, the Irish High Court held that the Minister did not have authority to impound Bosphorus' aircraft because Regulation 990/93 did not cover the aircraft.⁴⁵¹ Upon the Minister's appeal of the High Court's judgment, the Irish Supreme Court asked the ECJ for a preliminary ruling as to whether Regulation 990/93 applied to Bosphorus' aircraft.⁴⁵²

1. The Irish High Court Judgment

In its judgment of June 21, 1994, the Irish High Court found that the Minister for Transport, Energy and Communications lacked authority to impound Bosphorus' aircraft.⁴⁵³ The High Court justified its holding by arguing that Regulation 990/93 did not apply to the aircraft in question because Bosphorus, which was not a Yugoslavian person or undertaking, held the majority or controlling interest in the aircraft.⁴⁵⁴ In its judgment, the High Court focused on how it should interpret Regulation

446. *Id.* The Irish High Court's 1996 decision in *Bosphorus* is dated January 22, 1996. *Id.* at *1.

447. *Id.* at *9.

448. *Id.*

449. *Id.*

450. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3964-65, ¶ 28, [1996] 3 C.M.L.R. at 279.

451. *Bosphorus*, [1994] 2 I.L.R.M. at 560, [1994] 3 C.M.L.R. at 472.

452. *Bosphorus*, [1996] E.C.R. at I-3984, ¶ 16, [1996] 3 C.M.L.R. at 261-62.

453. *Bosphorus*, [1994] 2 I.L.R.M. at 560, [1994] 3 C.M.L.R. at 472.

454. *Id.*

990/93 and the U.N. resolutions referred to therein.⁴⁵⁵

In considering the interpretational issue, the Irish High Court applied the teleological approach to interpretation,⁴⁵⁶ according to which judges interpret regulations by seeking to identify the purpose or end that legislators or administrators intended the regulations to achieve.⁴⁵⁷ The High Court concluded that the purpose of the embargo regulations was to deter Yugoslavia from acting or continuing to act in ways that would lead to more deaths and material damage and also to punish, deter, and sanction the people and leaders of Yugoslavia.⁴⁵⁸ The High Court further concluded that the intention behind the regulations was not to punish or penalize people or countries who have neither caused nor contributed to the tragic events in Yugoslavia.⁴⁵⁹ Acknowledging that innocent parties are sometimes unavoidably harmed by sanction regulations, the High Court stated that such harm would be justified only if the harm necessarily accompanied the sanction and was not disproportionate to the sanction that the European Community sought to impose on guilty parties.⁴⁶⁰ The High Court specifically argued that the purpose of Article 8 of Regulation 990/93 was to deprive guilty parties of recourse to aircraft or vehicles that one could use to transport goods in violation of the embargo.⁴⁶¹

In its discussion of Article 8 of Regulation 990/93, the High Court concentrated on the meaning of the term interest.⁴⁶² The High Court argued that it should not construe the use of the phrase majority or controlling interest in Article 8 solely in terms of percentages, but rather with regard also to the nature of the interest held by a party in question.⁴⁶³ In particular, the High

455. *See id.* at 558-60, [1994] 3 C.M.L.R. at 470-72 (interpreting Regulation 990/93, in particular Article 8, and U.N. resolutions to which it refers).

456. *See id.* (basing interpretation of Regulation 990/93 and U.N. embargo resolutions on purpose behind their enactment).

457. *See* WYATT & DASHWOOD, *supra* note 56, at 92 (stating that teleological method involves interpreting texts by concentrating on purpose that Community attempted to achieve by passing measure); *see supra* note 84 and accompanying text (discussing teleological approach to interpretation).

458. *Bosphorus*, [1994] 2 I.L.R.M. at 558, [1994] 3 C.M.L.R. at 470.

459. *Id.*

460. *Id.*

461. *Id.* at 559, [1994] 3 C.M.L.R. at 471.

462. *See Bosphorus*, [1994] I.L.R.M. at 559-60, [1994] 3 C.M.L.R. at 471-72 (interpreting term "interest" under Article 8).

463. *See id.* at 559, [1994] 3 C.M.L.R. at 471 (pointing out potential injustice of

Court noted that Article 8 of Regulation 990/93 specifies the degree of interest⁴⁶⁴ that a Yugoslavian entity must have in an aircraft in order for the aircraft to be subject to impounding, but not the nature of the interest.⁴⁶⁵ The High Court then concluded that the interest contemplated in Article 8 must have been an interest in possession or the right to enjoy, control, or regulate the property's use, rather than the right to income derived from the property.⁴⁶⁶ The High Court justified this interpretation as consistent with the intention expressed in Article 8 to cover situations where a Yugoslavian entity could exercise decision-making functions concerning the property's use on a daily basis.⁴⁶⁷

Under this interpretation, as long as no Yugoslavian entity had use of or control over an aircraft, or the opportunity to obtain income derived from it, then the Regulation would not cover the aircraft, and the aircraft's impounding would be unjustified.⁴⁶⁸ Applying its interpretation of interest, the High Court

construction of phrase "majority or controlling interest" based solely on percentages, without regard to nature of interest held).

464. See Council Regulation No. 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993) (referring to "aircraft in which a majority or controlling interest is held by a" Yugoslav entity).

465. *Bosphorus*, [1994] I.L.R.M. at 559, [1994] 3 C.M.L.R at 471. To illustrate the potential implications of conceiving of the interest under Article 8 as one of "absolute ownership and the immediate right to possession," the High Court pointed out that if such an interest "was shared between a Yugoslav national and a Turkish national as to 45% for the Yugoslav and 55% for the Turkish citizen that notwithstanding the very substantial involvement of the Yugoslav national, [Article 8] would have no application." *Id.* On the other hand, applying the same concept of the nature of the requisite interest:

[W]here an aircraft (or freight vehicle or rolling stock) is the subject matter of a lease perhaps for a long period of years granted in consideration of a very substantial payment and a nominal annual rent by a Yugoslav citizen to a citizen of [an EC Member State], that aircraft would be captured by the article with the result that the [Member State citizen] would be gravely prejudiced with virtually no detriment to the lessor's absolute but nominal right in reversion.

Id.

466. *Id.* at 559, [1994] 3 C.M.L.R at 471-72. "[T]he '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." *Id.*

467. *Id.* at 559, [1994] 3 C.M.L.R at 471. "[T]he degree or extent of the interest referred to in [Article 8] 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." *Id.*

468. *Id.* at 560, [1994] 3 C.M.L.R at 472.

found that only Bosphorus held the majority and controlling interest in the aircraft in question.⁴⁶⁹ The High Court held accordingly that Regulation 990/93 had not empowered the Minister for Transport, Energy and Communications to impound Bosphorus' aircraft.⁴⁷⁰

After the High Court decision, the Minister for Transport, Energy and Communications detained the aircraft under Article 9 of Regulation 990/93 pending his investigation into the issue of whether the provision of maintenance services and insurance to the aircraft constituted non-financial services for purposes of any business conducted in Yugoslavia under Article 1.1(e) of that Regulation.⁴⁷¹ Bosphorus applied to the High Court for relief from this detention, and the High Court ordered the aircraft returned to Bosphorus.⁴⁷² The High Court, describing Bosphorus as an innocent party, held that the Minister had not investigated the Article 1.1(e) issue within a reasonable time of the aircraft's detention and had failed to exercise proper regard for the rights of Bosphorus in his determination of the propriety of detention or forfeiture under the EC embargo regulations.⁴⁷³

2. Irish Supreme Court

The Minister for Transport, Energy and Communications appealed the High Court's order to the Irish Supreme Court.⁴⁷⁴ The Irish Supreme Court concluded that the determination of the issues in the case depended on the correct interpretation of Article 8 of Regulation 990/93.⁴⁷⁵ The Irish Supreme Court

469. *Bosphorus*, [1994] I.L.R.M. at 560, [1994] 3 C.M.L.R. at 472. The Irish High Court wrote:

The duty [that Article 8] imposed on the responsible authority was to act if and only if a particular state of affairs existed, namely, where a majority or controlling interest in an aircraft was held by an undertaking in or operating from the Federal Republic [of Yugoslavia], and in my view that is not the position in the present. In my opinion, the majority and controlling interest in the aircraft in question is and was held by Bosphorus Airways and by no other person.

Id.

470. *Id.*

471. *Bosphorus* High Court 1996 Decision, *supra* note 416, at *11.

472. *Id.* at *25.

473. *Id.*

474. *Bosphorus*, [1996] E.C.R. at I-3981, ¶ 6, [1996] 3 C.M.L.R. at 292.

475. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3965, ¶ 29, [1996] 3 C.M.L.R. at 279.

therefore referred to the ECJ the question of whether Article 8 applied to an aircraft such as the one that Bosphorus leased.⁴⁷⁶

C. The ECJ

In the *Bosphorus* decision, the ECJ found that Regulation 990/93 did apply to the aircraft that JAT had leased to Bosphorus.⁴⁷⁷ Advocate General Jacobs' Opinion argued in favor of this conclusion and treated the issues of interpretation, infringement of fundamental property rights, and proportionality.⁴⁷⁸ The ECJ came to the same conclusion as Advocate General Jacobs, stressing EC interests as justifications for the restriction of a property right and the importance of the objective of Regulation 990/93, which the ECJ interpreted to be the ending of the war in Bosnia.⁴⁷⁹

1. Advocate General Jacobs' Opinion

Advocate General Jacobs supported the conclusion that Regulation 990/93 applied to the Bosphorus aircraft,⁴⁸⁰ and that the decision to impound the aircraft did not violate Bosphorus' fundamental right to property.⁴⁸¹ Concerning the issue of the Regulation's application to the aircraft, he stated that because the Regulation's preamble clarifies that the Council intended the Regulation to implement Resolutions 713, 757, 787, and 820, there was no doubt that the Regulation had to be interpreted in light of the Resolutions.⁴⁸² To Advocate General Jacobs, the real

476. *Bosphorus*, [1996] E.C.R. at I-3981, ¶ 6, [1996] 3 C.M.L.R. at 292. In the question that the Supreme Court of Ireland referred to the ECJ, the Supreme Court asked: Is Article 8 of Regulation 990/93 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 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)?

Id.

477. *See id.* at I-3982, ¶ 8, [1996] 3 C.M.L.R. at 292-93 (summarizing Bosphorus' argument that Regulation 990/93 did not apply to Bosphorus' aircraft).

478. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3970, I-3977, ¶¶ 47, 69, [1996] 3 C.M.L.R. at 285, 291.

479. *Bosphorus*, [1996] E.C.R. at I-3987, ¶ 26, [1996] 3 C.M.L.R. at 295-96.

480. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3970, ¶¶ 46-47, [1996] 3 C.M.L.R. at 284-85.

481. *Id.* at I-3976, ¶ 67, [1996] 3 C.M.L.R. at 290.

482. *Id.* at I-3966-67, ¶ 35, [1996] 3 C.M.L.R. at 281.

issue was not the EC intention in enacting the Regulation, but rather the Security Council's purpose in passing the underlying Resolutions.⁴⁸³

After quoting the Irish High Court judgment at length,⁴⁸⁴ Advocate General Jacobs disagreed with what he characterized as that court's narrow construction of Resolution 820 with respect to its purpose.⁴⁸⁵ Advocate General Jacobs argued that one could construe the Security Council's goal in passing Resolution 820 as to deprive Yugoslavian entities of any benefit they could derive from the fact that a party was continuing to operate, maintain, and insure a means of transport that these entities owned, rather than the mere strengthening of the trade embargo by depriving these entities of recourse to aircrafts they could use to violate the embargo.⁴⁸⁶ According to Advocate General Jacobs, such a construction would view the impounding provision in Resolution 820 as extending Resolution 757's provisions for the freezing of Yugoslavian assets abroad to possessions presenting no immediate risk of being used to circumvent the trade embargo.⁴⁸⁷

483. *Id.* at I-3968-69, ¶ 40, [1996] 3 C.M.L.R. at 283. Advocate General Jacobs wrote:

What is in issue is not the intention of the Community institutions themselves, which can often be gathered from the context and preamble and possible 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.

Id.

484. *Id.* at I-3967-68, ¶¶ 37-38, [1996] 3 C.M.L.R. at 281-82.

485. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3968, ¶ 39, [1996] 3 C.M.L.R. at 282-83.

486. *Id.* Advocate General Jacobs wrote that the object of the Security Council's decision "to impound means of transport in which undertakings in [Yugoslavia] have a majority or controlling interest . . . 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." *Id.*

487. *Id.* Advocate General Jacobs wrote:

It will be remembered that the Security Council [in Resolution 757] also decided to freeze all funds belonging to or destined for authorities or undertakings in the Federal Republic of Yugoslavia (Serbia and Montenegro). 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.

Id. at I-3968, ¶ 39, [1996] 3 C.M.L.R. at 282.

In support of his interpretation, Advocate General Jacobs cited the EC Commission's position that the Security Council's aim included preventing Yugoslavian persons and undertakings from being able to recover means of transport temporarily outside their control.⁴⁸⁸ The Commission had supported this stance by pointing out that sanctions are never entirely effective.⁴⁸⁹ It had thus supported the authorization of the earliest possible actions rather than simply hoping that no party coming into possession of the property would pass control of it to Yugoslavian entities or persons.⁴⁹⁰ The Advocate General stated that he found this argument to be particularly forceful as it applied to aircrafts because so long as an aircraft is airborne, it can change course and return to Yugoslavia.⁴⁹¹ The Advocate General further argued that when a situation involved a mere lease, there was always the risk that one or all of the parties to the lease might terminate the lease before the end of its full term with the aircraft, thus, returning to the owner.⁴⁹² Advocate General Jacobs then claimed that this last argument would have justified the impounding even if the ECJ were to accept the Irish High Court's narrow interpretation of paragraph 24 of Resolution 820.⁴⁹³

In further support of his interpretation of Resolutions 713, 757, 787, and 820, Advocate General Jacobs turned to their language.⁴⁹⁴ He first pointed out that both the resolutions and the Regulation employed the phrase majority or controlling interest.⁴⁹⁵ Advocate General Jacobs also argued against the notion that the term interest referred to an aircraft's country of registration, which in Bosphorus' case was Turkey.⁴⁹⁶ Advocate General Jacobs pointed out that Resolution 757 referred specifically to

488. *Id.* at I-3969, ¶ 41, [1996] 3 C.M.L.R. at 283.

489. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3969, ¶ 41, [1996] 3 C.M.L.R. at 283.

490. *Id.*

491. *Id.* at I-3969, ¶ 42, [1996] 3 C.M.L.R. at 283. "[A]s long as an aircraft is airborne there will always be the risk of an unexpected change of course, in this case back to [Yugoslavia]; 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." *Id.*

492. *Id.*

493. *Id.*

494. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3969, ¶ 43, [1996] 3 C.M.L.R. at 283-84.

495. *Id.*

496. *Id.*

aircrafts registered in Yugoslavia while Resolution 820 did not use the term register at all.⁴⁹⁷

The Advocate General then proceeded to evaluate Bosphorus' argument that the impounding had violated both its fundamental right to property and the principle of proportionality.⁴⁹⁸ After setting forth various sources of fundamental rights in the European Community,⁴⁹⁹ he cited *Hauer*⁵⁰⁰ as establishing the rule that the principle of proportionality forms an essential aspect of the test for determining whether there has been a property rights violation.⁵⁰¹ Advocate General Jacobs thus saw the essential question concerning the property rights issue to be whether the impounding was proportionate in light of the Regulation's aims concerning the general interest.⁵⁰²

Advocate General Jacobs began his proportionality and property rights analysis by conceding that the impounding constituted a severe restriction of Bosphorus' rights that amounted to a temporary deprivation.⁵⁰³ Advocate General Jacobs then proceeded to stress the greatness of the public interest in enforcing the U.N. embargo, characterizing that interest as the ending of the war in Bosnia.⁵⁰⁴ Advocate General Jacobs also observed

497. *Id.*

498. *Id.* at I-3971, ¶ 49, [1996] 3 C.M.L.R. at 285.

499. See Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3971-75, ¶¶ 51-61, [1996] 3 C.M.L.R. at 285-89 (discussing Article F(2) of TEU, Article 1 of Protocol I to European Human Rights Convention, and CHR and ECJ property rights case law).

500. *Hauer*, [1979] E.C.R. at 3749, ¶ 30, [1980] 3 C.M.L.R. at 68; see *supra* notes 274-96 and accompanying text (discussing ECJ's holding in *Hauer* that EC regulation temporarily forbidding planting of vines was not disproportionate and, thus, did not infringe right to property).

501. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3974-75, ¶¶ 61-62, [1996] 3 C.M.L.R. at 288-89.

502. *Id.* at I-3975, ¶ 62, [1996] 3 C.M.L.R. at 289. "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." *Id.*

503. *Id.* at I-3975, ¶ 63, [1996] 3 C.M.L.R. at 289.

504. *Id.* at I-3975-76, ¶ 64, [1996] 3 C.M.L.R. at 289. Advocate General Jacobs wrote:

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 war as devastating as that which engulfed the former Yugoslavia, and in particular Bosnia-Herzegovina.

Id.

that Bosphorus was not alone in suffering economic loss from the imposition and enforcement of the embargo.⁵⁰⁵ He concluded that the impounding was not unreasonable because, applying the European Court of Human Rights' test in *Sporrong*,⁵⁰⁶ it did not strike an unfair balance between the general interest's demands and requirements of the protection of the fundamental right to property.⁵⁰⁷

Throughout his treatment of the proportionality and property rights issue, Advocate General Jacobs focused on the importance of the public interest involved.⁵⁰⁸ Advocate General Jacobs argued that the severity of the financial and commercial impact that the impounding had on Bosphorus' particular business was irrelevant to the issue of whether the impounding was proportionate.⁵⁰⁹ Advocate General Jacobs further stated that even if the impact were relevant, the public interest was so important that the impounding of Bosphorus' aircraft still would not have infringed the proportionality principle.⁵¹⁰ Similarly, he argued that even if one considered the proportionality issue independently of the property rights issue, the extreme importance of the general interest served would require the same conclusion.⁵¹¹

505. *Id.*

506. See *Sporrong*, 5 E.H.R.R. at 52-53, ¶ 69 (stating that in order to determine whether there has been violation of applicant's right to peaceful enjoyment of property, it is necessary to determine whether "fair balance was struck between the demands of the general interest . . . and the requirements of the protection of the individual's fundamental rights."); see *supra* notes 224-27 and accompanying text (discussing CHR's application in *Sporrong* of fair balance test as method for determining whether Stockholm expropriation permits had violated property rights).

507. Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3976, ¶¶ 65, 67, [1996] 3 C.M.L.R. at 289-90. Advocate General Jacobs was of the opinion, "the decision to impound the aircraft on the ground that it was owned by an undertaking in [Yugoslavia] 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 the impounding." *Id.* at I-3976, ¶ 65, [1996] 3 C.M.L.R. at 290.

508. See *id.* at I-3975-77, ¶¶ 64-69, [1996] 3 C.M.L.R. at 289-91 (commenting on importance of public interest Regulation 990/93 served).

509. *Id.* at I-3976, ¶ 66, [1996] 3 C.M.L.R. at 290.

510. *Id.* Advocate General argued, "[b]ut even if it were relevant to take account of the losses 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." *Id.*

511. *Id.* at I-3977, ¶ 69, [1996] 3 C.M.L.R. at 291.

2. The ECJ Decision

The Supreme Court of Ireland referred a question to the ECJ, asking whether Article 8 of Regulation 990/93 applied to an aircraft whose owner, in which a Yugoslavian business holds the majority or controlling interest, has leased it for four years to a business in which no Yugoslavian entity holds the majority or controlling interest.⁵¹² In answering the question in the affirmative, the ECJ considered issues concerning the interpretation of the Regulation.⁵¹³ The ECJ also considered the fundamental right to property and the principle of proportionality in reaching its conclusion.⁵¹⁴

a. The ECJ's Interpretation of Regulation 990/93

The ECJ held that Regulation 990/93 applied to an aircraft whose owner, a Yugoslavian business that holds the majority or controlling interest, leased it for four years to a business in which no Yugoslavian entity holds the majority or controlling interest.⁵¹⁵ Bosphorus had argued that Regulation 990/93 did not apply to a Yugoslavian-owned aircraft operated on a daily basis by a non-Yugoslavian undertaking under a lease, because the sanctions of Regulation 990/93 were only meant to extend to Yugoslavia and its nationals, rather than also to innocent parties operating from a state neighboring the European Community and with which the European Community had friendly relations.⁵¹⁶ The ECJ did not accept this argument.⁵¹⁷ The ECJ, citing the rule that it is necessary in interpreting a provision of Community law to consider its language, context, and purposes,⁵¹⁸ countered that the language of Article 8 did not distinguish between ownership of an aircraft and its day-to-day control and operation.⁵¹⁹

512. *Bosphorus*, [1996] E.C.R. at I-3981, ¶ 6, [1996] 3 C.M.L.R. at 292.

513. *See id.* at I-3982, ¶¶ 8-9, [1996] 3 C.M.L.R. at 292-93 (summarizing Bosphorus' argument that Regulation did not apply to its aircraft).

514. *See id.* at I-3985, ¶¶ 19-20, [1996] 3 C.M.L.R. at 294-95 (summarizing Bosphorus' argument that Regulation, if found to apply to its aircraft, would infringe its right to property and principle of proportionality).

515. *Id.* at I-3987, ¶ 27, [1996] 3 C.M.L.R. at 296.

516. *Id.* at I-3982, ¶ 9, [1996] 3 C.M.L.R. at 293.

517. *Bosphorus*, [1996] E.C.R. at I-3982, ¶ 10, [1996] 3 C.M.L.R. at 293.

518. *Id.* at I-3983, ¶ 11, [1996] 3 C.M.L.R. at 293. The ECJ stated, "[i]n interpreting a provision of Community law it is necessary to consider its wording, its context and its aims." *Id.*

519. *Id.* at I-3983, ¶ 12, [1996] 3 C.M.L.R. at 293. The ECJ wrote, "[n]othing in

The ECJ further pointed out that the Regulation's language nowhere exempted a Yugoslavian-owned aircraft whose owner did not have continuous operation and control of it.⁵²⁰

Concerning the Regulation's context and aims, the ECJ first noted that by passing Regulation 990/93 the Council was giving effect to the EC desire to have recourse to an instrument to implement certain aspects of the U.N. resolutions' sanctions against Yugoslavia.⁵²¹ The ECJ then argued that it must consider the text and purpose of those resolutions, especially of Resolution 820, whose use of the term interest could not exclude ownership as a criterion for determining whether or not to impound.⁵²² The ECJ reinforced this last point by claiming that the word majority, which Paragraph 24 of Resolution 820 used in conjunction with the term interest, unambiguously implies the idea of ownership and by observing that most of the language versions of Article 8 employ words having explicit connotations of ownership.⁵²³ Finally, the ECJ argued that interpreting the Regulation so as not to uphold the impounding of Yugoslavian-owned aircraft that a non-Yugoslavian entity controlled on a day-to-day basis would result in less pressure on Yugoslavia and would in general jeopardize the effectiveness of the intended strengthening of the sanctions.⁵²⁴

the wording of the first paragraph of Article 8 of Regulation 990/93 suggests that it is based on a distinction between ownership of an aircraft on the one hand and its day-to-day operation and control on the other." *Id.*

520. *Id.* "Nor is it anywhere stated in [Article 8] that it is not applicable to an aircraft owned by a person or undertaking based in or operating from the Federal Republic of Yugoslavia if that person or undertaking does not have day-to-day control and operation of the aircraft." *Id.*

521. *Id.* at I-3983, ¶ 13, [1996] 3 C.M.L.R. at 293. The ECJ stated:

As to context and aims, it should be noted that by Regulation 990/93 the Council gave effect to the decision of the Community and its Member States . . . to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations, which . . . adopted Resolutions 713 (1991), 752 (1992) and 787 (1992) and strengthened those sanctions by Resolution 820 (1993).

Id.

522. *Bosphorus*, [1996] E.C.R. at I-3984, ¶ 15, [1996] 3 C.M.L.R. at 293-94. "The word 'interest' in Paragraph 24 [of Resolution 820] cannot, on any view, exclude ownership as a determining criterion for impounding." *Id.*

523. *Id.* at I-3984, ¶¶ 15-16, [1996] 3 C.M.L.R. at 293-94.

524. *Id.* at I-3984-85, ¶¶ 17-18, [1996] 3 C.M.L.R. at 294. The ECJ argued that the impounding of aircraft that a Yugoslav entity owns and of which an entity like Bosphorus has day-to-day control "contributes to restricting the exercise by the Federal Republic

b. The ECJ's Property Rights and Proportionality Analysis

The ECJ then turned to Bosphorus' argument that interpreting Article 8 as covering its impounded aircraft would infringe its fundamental right to peaceful enjoyment of its property and the principle of proportionality.⁵²⁵ The ECJ first stated the rule that the right to property as recognized in the ECJ's case law is not absolute and that the European Community may restrict the exercise of that right in accordance with goals of general interest that the European Community pursues.⁵²⁶ In support of these propositions, the ECJ cited *Hauer* and *Wachauf*.⁵²⁷ The ECJ then noted that all sanction measures have, by their nature, negative effects on the right to property of parties not responsible for the conditions that brought about the sanctions' adoption and that the aims of Regulation 990/93 were sufficiently important to justify even significant negative consequences for some parties.⁵²⁸

The ECJ recited some of the observations found in the preamble of Regulation 990/93 concerning the situation in Bosnia,

lic of Yugoslavia and its nationals of their property rights and is thus consistent with the aim of the sanctions, namely to put pressure on that republic." *Id.* at I-3984, ¶ 17, [1996] 3 C.M.L.R. at 294. The ECJ continued:

By contrast, the use of day-to-day operation and control, rather than ownership, as the decisive criterion for applying the measures prescribed by the first paragraph of Article 8 of Regulation 990/93 would jeopardise the effectiveness of the strengthening of the sanctions, which consist in impounding all means of transport of the Federal Republic of Yugoslavia and its nationals, including aircraft, in order to further to increase the pressure on that Republic. The mere transfer of day-to-day operation and control of means of transport, by a lease or other method, without transferring ownership would allow that Republic or its nationals to evade application of those sanctions.

Id.

525. *Id.* at I-3985, ¶¶ 19-20, [1996] 3 C.M.L.R. at 294-95.

526. *Id.* at I-3985, ¶ 21, [1996] 3 C.M.L.R. at 295. "It is settled case law that the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community [citations omitted]." *Id.*

527. See *Bosphorus*, [1996] E.C.R. at I-3985, ¶ 21, [1996] 3 C.M.L.R. at 295 (citing *Hauer*, [1979] E.C.R. at 3749, ¶ 30, [1980] 3 C.M.L.R. at 68, and *Wachauf*, [1989] E.C.R. at 2640, ¶ 22, [1991] 1 C.M.L.R. at 349-50). In *Hauer*, the ECJ held that an EC Council Regulation temporarily prohibiting the planting vines did not violate property rights. *Hauer*, [1979] E.C.R. at 3749, ¶ 30, [1980] 3 C.M.L.R. at 68. In *Wachauf*, the ECJ held that two EC regulations providing for compensation to dairy farmers who ceased milk production permanently did not conflict with fundamental rights that the EC protected. *Wachauf*, [1989] E.C.R. at 2640, ¶ 22, [1991] 1 C.M.L.R. at 349-50.

528. *Bosphorus*, [1996] E.C.R. at I-3986, ¶¶ 22-23, [1996] 3 C.M.L.R. at 295.

Yugoslavia's actions in relation to that situation, and the sanctions' goal of inducing Yugoslavia and the Bosnian Serbs to cease their war-like activities and work toward peace there.⁵²⁹ The ECJ then concluded that the impounding of the aircraft was not disproportionate in comparison to the Regulation's purpose.⁵³⁰ The ECJ based this conclusion on the fact that the Regulation's purpose, which was to bring about an end to the war in Bosnia and the numerous human rights violations and transgressions against humanitarian international law, concerned a fundamental general interest of the international community.⁵³¹

III. IN FINDING REGULATION 990/93 TO APPLY TO
BOSPHORUS' AIRCRAFT, THE ECJ MISINTERPRETED
THE REGULATION AND VIOLATED
BOSPHORUS' PROPERTY RIGHT

The ECJ should refrain from following its *Bosphorus* decision in the future in order to preserve property rights as an important representation of states' recognition that governmental interference in individuals' lives requires a legitimate justification. The impounding of Bosphorus' aircraft was disproportionate to the concrete EC objective in passing Regulation 990/93 and did not represent the least intrusive means for the attainment of that objective. In addition, it was not clear from the wording of Article 8 of Regulation 990/93 that the operative phrase majority and controlling interest covers a Yugoslavian-owned aircraft that a

529. *Id.* at I-3986-87, ¶¶ 24-25, [1996] 3 C.M.L.R. at 295. The ECJ pointed specifically to the observations in the preamble to Regulation 990/93 that Serbia and Montenegro's extended direct and indirect activities in and concerning Bosnia-Herzegovina were the major cause of the problems there, and that the continuation of those activities would bring about additional deaths and property damage and further disrupt international peace and security in that region. *Id.* The ECJ also cited the Council's claim in Regulation 990/93 that the Bosnian Serb party had not yet accepted the International Conference on Yugoslavia's peace plan in full. *Id.* at I-3986, ¶ 24, [1996] 3 C.M.L.R. at 295.

530. *Id.* at I-3987, ¶ 26, [1996] 3 C.M.L.R. at 295-96.

531. *Id.* The ECJ wrote:

As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.

Id.

non-Yugoslavian business has leased.⁵³²

A. *The Impounding of Bosphorus' Aircraft Pursuant to Regulation 990/93 Violated Bosphorus' Property Right Because it was not Proportionate to the Regulation's Concretely Conceived Purpose*

Proportionality is one of the general principles at work in Community law and, therefore, the ECJ should not adhere to decisions that violate the principle of proportionality.⁵³³ The impounding of Bosphorus' aircraft pursuant to Article 8 of Regulation 990/93 was not reasonably related to the Regulation's goal of ensuring that Yugoslavian parties do not have access to aircrafts so as to violate the embargo against Yugoslavia.⁵³⁴ Furthermore, the impounding was disproportionate to the Regulation's goal because less intrusive means existed for achieving this goal.

1. A Reasonable Relationship did not Exist between the Impounding and the Aim of Regulation 990/93 as Concretely Conceived

Properly defining the aim of Regulation 990/93 as the prevention of Yugoslavia and any Yugoslavian entities participating in the war from having recourse to their aircraft for the violation of the embargo,⁵³⁵ rather than as the ending of the war,⁵³⁶ would result in a conclusion that the impounding of Bosphorus' aircraft was disproportionate and, thus, violated Bosphorus' property right. In *Bosphorus*, the ECJ employed the contextual and teleological methods of interpretation,⁵³⁷ according to which the ECJ interprets Community acts by examining their place within the context of their passage and the aims the Community sought

532. See Opinion of Advocate General Jacobs, *Bosphorus*, [1996] E.C.R. at I-3968, ¶¶ 38-39, [1996] 3 C.M.L.R. at 282-83 (quoting and then explaining basis for his disagreement with Irish High Court's interpretation of meaning of "interest" in Article 8 of Regulation 990/93).

533. WYATT & DASHWOOD, *supra* note 56, at 60; see *supra* notes 105-10 (discussing ECJ's application of principle of proportionality).

534. See *Bosphorus*, [1994] 2 I.L.R.M. at 559, [1994] 3 C.M.L.R. at 471 (finding purpose of Regulation 990/93 to be to deprive guilty parties in Yugoslavia of recourse to aircrafts that they could use to violate embargo).

535. *Id.*

536. *Bosphorus*, [1996] E.C.R. at I-3987, ¶ 26, [1996] 3 C.M.L.R. at 295.

537. See *id.* at I-3983-85, ¶¶ 11-18, [1996] 3 C.M.L.R. at 293-94 (applying contextual and teleological methods of interpretation to Regulation 990/93).

to achieve by their passage.⁵³⁸ In general, the more abstract the conception of the aim of the EC embargo measures, and in particular the aim of Regulation 990/93, the more difficult it is to argue that an impounding was disproportionate to the Regulation's aims because an abstractly conceived aim could plausibly be shown to cover more cases and situations than a more concretely conceived aim. The ECJ found the impounding of Bosphorus' aircraft to be proportionate based on its framing of the aim of Regulation 990/93 in such abstract terms⁵³⁹ that one could find virtually any measure to be reasonably related to that aim. The ending of a war is an aim so abstract that the question of what types of measures would not be reasonably likely to further it is so amorphous as to be virtually meaningless.

The text of Regulation 990/93 does not clearly indicate the EC goal in passing that Regulation.⁵⁴⁰ In the Preamble to Regulation 990/93, the European Community makes a number of observations concerning the war in Bosnia.⁵⁴¹ The Preamble states that Serbia and Montenegro's extended direct and indirect activities in and concerning Bosnia were the major cause of the violence there and that the continuation of those activities would bring about additional deaths and property damage and further disrupt international peace and security in the region of the former Yugoslavia.⁵⁴² The European Community also observed in Regulation 990/93 that the Bosnian Serb party had not yet fully accepted the International Conference on Yugoslavia's peace plan, that further violation of the existing embargo on Yugoslavia had to be prevented, and that the U.N. Security Council had adopted Resolution 820 for the purpose of strengthening the embargo of Yugoslavia that Resolutions 713, 757, and 787 estab-

538. See *supra* notes 83-84 and accompanying text (discussing contextual and teleological approaches to interpretation).

539. See *Bosphorus*, [1996] E.C.R. at I-3986-87, ¶¶ 24-26, [1996] 3 C.M.L.R. at 295-96 (characterizing aim of Regulation 990/93 as ending war in Yugoslavia and its attendant human rights violations).

540. See *supra* notes 397-401 and accompanying text (discussing language of Regulation 990/93 regarding its purpose).

541. Council Regulation No. 990/93, *supra* note 11, pmb., O.J. L 102/14, at 14 (1993) (presenting observations on conflict in Bosnia); see *supra* notes 397-401 and accompanying text (discussing language of preamble to Regulation 990/93 concerning Regulation's purpose).

542. Council Regulation No. 990/93, *supra* note 11, pmb., O.J. L 102/14, at 14 (1993).

lished.⁵⁴³ In addition, Regulation 990/93 noted that the European Community and its Member States had previously decided that action was necessary to dissuade Serbia and Montenegro from further violating the integrity and security of Bosnia and to secure the Bosnian Serbs' cooperation in achieving peace in Bosnia.⁵⁴⁴ Finally, Regulation 990/93 stated that the European Community and its Member States had agreed to avail themselves, if necessary, of an EC measure so as to ensure consistent implementation of particular U.N. resolutions and EC regulations.⁵⁴⁵ The European Community thus expressed the aim of Regulation 990/93 in varying degrees of abstraction without indicating exactly what it hoped to achieve with this measure.

The abstract language concerning the EC desire to bring about peace makes more sense when viewed as describing that which the Community hoped would eventually occur as a result of an implementation of the Regulation's concrete and specific provisions, such as Article 8. In its decision, the ECJ considered the relationship between the impounding of a leased aircraft and the purpose which it broadly found to be behind Regulation 990/93.⁵⁴⁶ The ECJ described the aim of Regulation 990/93 as

543. *Id.* Council Regulation 990/93 noted:

[F]urther violations of the existing embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro), in particular by their transit through this Republic and by activities carried out between this Republic and the Serb-controlled areas of Bosnia-Herzegovina and the United Nations Protected Areas in the Republic of Croatia have to be prevented; [and that] the United Nations Security Council . . . has adopted Resolution 820 (1993), in order to strengthen the embargo of the Federal Republic of Yugoslavia (Serbia and Montenegro), decided upon in Resolutions 713 (1991), 757 (1992) and 787 (1992); [and that] under these conditions, the Community has to strengthen the embargo of [Yugoslavia] as established by Council Regulations (EEC) No 1432/92 and (EEC) No 2656/92

Id.

544. *Id.* The Council stated that the European Community and the Member States had decided "that measures [had] to be taken to dissuade the Republics of Serbia and Montenegro from further violating the integrity and security of the Republic of Bosnia-Herzegovina and to induce the Bosnian Serb party to cooperate in the restoration of peace in this Republic . . ." *Id.*

545. *Id.* Regulation 990/93 did not specify which resolutions or regulations it was referring to, vaguely stating that the European 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." *Id.*

546. See *Bosphorus*, [1996] E.C.R. at I-3985-87, ¶¶ 20-26, [1996] 3 C.M.L.R. at 294-96 (applying proportionality analysis to impounding of Bosphorus' aircraft under Regulation 990/93).

the ending of the war in Bosnia and the war's attendant human rights violations and the restoration of humanitarian international law.⁵⁴⁷ There is, however, a legitimate alternative to the ECJ's understanding of the aim of Regulation 990/93. In considering the question of the purpose of the U.N. Security Council resolutions, the Irish High Court concluded that the intention behind the sanctions was to deter, punish, or sanction the Yugoslavian people or Government.⁵⁴⁸ The Irish High Court interpreted the purpose of Article 8 of Regulation 990/93 as being to deprive guilty parties in Yugoslavia of recourse to aircrafts that they could use to breach the embargo.⁵⁴⁹

The aim of Regulation 990/93 is more accurately described in terms of the concrete effects it would have if it were enforced successfully. Among the many such effects that the Council must have intended the Regulation to have was to ensure that Yugoslavia and any Yugoslavian participants in the war could not have recourse to any of their aircraft for use in the violation of the embargo.⁵⁵⁰ This particular aim was the domain of Article 8 of the Regulation.⁵⁵¹

There was no reasonable relationship between the impounding of Bosphorus' aircraft and the Regulation's aim when the latter is concretely conceived as the prevention of Yugoslavia and Yugoslavian entities' obtaining aircraft for use in circumventing the embargo. Accordingly, the *Bosphorus* decision violates the principle of proportionality in Community law, which requires that there be a reasonable relationship between a mea-

547. *Id.* at I-3987, ¶ 26, [1996] 3 C.M.L.R. at 295-96.

548. *Bosphorus*, [1994] I.L.R.M. at 558, [1994] 3 C.M.L.R. at 470. The Irish High Court wrote:

The express purpose of the [sanctions] imposed by the regulations is to deter the Federal Republic [of Yugoslavia] 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.

Id.

549. *Id.* at 559, [1994] 3 C.M.L.R. at 471.

550. *Id.*

551. *See* Council Regulation 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993) (providing for impounding of aircrafts in which Yugoslavian entity holds majority or controlling interest). Article 8 stated, "[a]ll 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." *Id.*

sure that a regulation provides for and the aim the European Community is pursuing by means of the regulation.⁵⁵² Bosphorus neither was based in nor operated from Yugoslavia, and no person or business based in or operating from Yugoslavia had any interest in it.⁵⁵³ Bosphorus was using the aircraft exclusively for the running of tour operations in countries that did not include Yugoslavia, and, therefore, Bosphorus's use of the aircraft in no way threatened to provide any Yugoslavian persons or groups with access to aircrafts in violation of the Regulation's goal of preventing circumvention of the embargo.⁵⁵⁴ Finally, the absence of evidence in the opinions and decisions in the *Bosphorus* case of any connection between Bosphorus shareholders or employees and Yugoslavian governmental or military officials shows the absence of a connection between Bosphorus' actions and the goal of preventing circumvention of the embargo by denying Yugoslavia access to aircrafts.

The ECJ's holding that the impounding of Bosphorus' aircraft was proportionate is in conflict with other CHR and ECJ property rights cases. In *Sporrong*,⁵⁵⁵ the CHR held that the City of Stockholm's expropriation permits and prohibitions on construction which covered the applicants' properties violated the applicants' right to property that Article 1 of Protocol I to the European Human Rights Convention guaranteed.⁵⁵⁶ The CHR

552. *Internationale Handelsgesellschaft mbH*, [1970] E.C.R. at 1135, ¶ 16, [1972] C.M.L.R. at 285; Bermann, *supra* note 105, at 386; *see supra* notes 105-10 and accompanying text (discussing principle of proportionality in Community law). The ECJ has held that a Council regulation conditioning the issue of an export and import license upon a payment of deposit did not violate the principle of proportionality. *Internationale Handelsgesellschaft mbH*, [1970] E.C.R. at 1135, ¶ 16, [1972] C.M.L.R. at 285. The ECJ reasoned that the costs that the deposit involved were not disproportionate to the total value of goods and trading costs in question. *Id.* The ECJ also concluded that the burdens that the system of deposits caused were not excessive and were a normal consequence of a system of organization whose aim was to ensure both an adequate standard of living for farmers and reasonable prices for consumers. *Id.*

553. *See supra* notes 415-16, 429-30 and accompanying text (discussing incorporation in Turkey and Turk citizens' ownership of impounded aircraft in *Bosphorus*).

554. *Bosphorus*, [1994] 2 I.L.R.M. at 555, [1994] 3 C.M.L.R. at 467; *see supra* notes 418-28 and accompanying text (discussing facts concerning Bosphorus' use of leased aircraft in *Bosphorus*).

555. *Sporrong v. Sweden*, 5 E.H.R.R. 35 (1983).

556. *Sporrong*, ¶ 74, 5 E.H.R.R. at 54; *see supra* notes 202-31 and accompanying text (discussing CHR's holding in *Sporrong* that Stockholm expropriation permits and prohibitions on construction violated applicants' right to property because they did not strike requisite balance between community interests and right to property).

argued that the permits and prohibitions had failed to strike a fair balance between the City's interests and the applicants' right to property because Swedish law had provided neither for the applicants' compensation nor for the possibility of reassessing the applicants' and the City's respective interests at intervals during the periods the measures were in effect.⁵⁵⁷

Applying the reasoning in *Sporrong* to the Bosphorus case, Regulation 990/93 should have provided for possible compensation for parties whose aircrafts authorities had impounded or for assessments of such parties' and the EC respective interests concerning an impounded aircraft. This especially regards parties like Bosphorus for whom the impounding wreaked economic havoc.⁵⁵⁸ The CHR's holding in *Air Canada*⁵⁵⁹ is not inconsistent with its holding in *Sporrong* because Air Canada's £50,000 fine was quite small, considering the company's size and the value of the aircraft,⁵⁶⁰ and U.K. authorities only held Air Canada's aircraft for less than a day.⁵⁶¹ Accordingly, the ECJ's *Bosphorus* decision conflicts with the CHR's jurisprudence, a result that the ECJ has consistently and properly sought to avoid in the past.⁵⁶²

Similarly, the ECJ's holding in *Hauer*⁵⁶³ does not provide support for its holding in *Bosphorus* because the restriction on vine plantings in *Hauer* was for a definite, temporary period and the restriction was reasonably and directly related to the goal of

557. *Sporrong*, ¶ 73, 5 E.H.R.R. at 54.

558. See *supra* notes 444-49 and accompanying text (discussing economic effects of impounding on Bosphorus).

559. Decision of CHR, *Air Canada*, 20 E.H.R.R. at 176, ¶ 48; see *supra* notes 232-53 and accompanying text (discussing CHR's holding in *Air Canada* that seizure of commercial aircraft on which authorities found cannabis resin, and immediate imposition of fine, did not violate airline's property rights).

560. See *supra* notes 235-37 and accompanying text (discussing seizure of aircraft in *Air Canada*).

561. See *supra* notes 235-37 and accompanying text (discussing facts surrounding holding of aircraft in *Air Canada*).

562. See *supra* notes 196-97 and accompanying text (discussing potential jurisdictional conflict between European Community and Convention's respective systems of law and ECJ's response of following CHR and Human Rights Commission interpretations of Convention).

563. See *supra* notes 274-96 and accompanying text (discussing ECJ's holding in *Hauer* that EC regulation temporarily restricting planting of vines did not violate right to property).

restructuring the wine market.⁵⁶⁴ War and international politics are indefinite by nature. In *Bosphorus*, the length of the application of Regulation 990/93, although presumably temporary, was for all purposes indefinite because the goal of the Regulation was inextricably tied to the existence of the conflict in Bosnia.⁵⁶⁵ Further, the impounding measure was not reasonably related to the aim of Regulation 990/93, concretely conceived to deny Yugoslavian entities recourse to aircrafts that they could use in the war. As the Irish High Court held in its judgment,⁵⁶⁶ the impounding of the aircraft was not reasonably related to the Regulation's aim.

2. Less Intrusive Means

In addition to requiring a measure to be reasonably related to its objective,⁵⁶⁷ the principle of proportionality also states that a measure must be the least intrusive way to accomplish the desired objective⁵⁶⁸ and, therefore, the existence of less intrusive alternatives to impounding in the *Bosphorus* case violates proportionality. When the Council passed Regulation 990/93 in 1993, the Annex to Council Regulation 1432/92 was already in force, providing for the denial of permission to any aircraft to take off from, land in, or fly over EC territory if it was bound for or had taken off from Yugoslavia.⁵⁶⁹ The possibility that *Bosphorus* could return the aircraft to JAT due to the lease's termination or for any other reason, thus, was covered by EC legislation in force

564. See *supra* notes 275-80 and accompanying text (discussing restrictions on planting in *Hauer*).

565. See *supra* notes 398-400 and accompanying text (discussing connection of purpose of Regulation 990/93 with war in Bosnia).

566. See *Bosphorus*, [1994] I.L.R.M. at 560, [1994] 3 C.M.L.R at 472 (holding that impounding of *Bosphorus'* aircraft was disproportionate and, thus, unauthorized).

567. Bermann, *supra* note 105, at 386.

568. See *supra* notes 105-10 and accompanying text (discussing principle of proportionality in Community law).

569. Council Regulation 1432/92, *supra* note 11, Annex, O.J L 151/4, at 6 (1992). The Annex to Council Regulation 1432/92 provided:

Permission shall be denied to any aircraft to take off from, land in or overfly the territory of the Community if it is destined to land in or has taken off from the territory of the Republics of Serbia and Montenegro, unless the particular flight has been approved . . . by the Committee established by Security Council Resolution 724 (1991).

Id.

at the time of the enactment of Regulation 990/93.⁵⁷⁰ Simply noting or strengthening the Annex's provision could have prevented Yugoslavian entities from obtaining recourse to aircraft outside of Yugoslavia less intrusively than the impounding provision of Article 8.

B. The Language of Regulation 990/93 was not Sufficiently Clear to Justify Interpreting Regulation 990/93 as Applying to the Bosphorus Aircraft

The language of Regulation 990/93 was not sufficiently clear to justify the conclusion that it was meant to apply to Bosphorus' aircraft. It is unclear whether the use in Article 8 of the phrase majority or controlling interest refers to an ownership interest or a leasehold.⁵⁷¹ Given this ambiguity, the ECJ should have given Bosphorus' interests priority over those of the European Community, as natural law theory would support requiring states to have clear textual authority in order to confiscate individuals' property.

1. The Language of Regulation 990/93 Lacked Sufficient Clarity to Justify the Impounding of Bosphorus' Aircraft

In *Bosphorus*, the ECJ incorrectly concluded that Article 8 of Regulation 990/93 applied to Bosphorus's aircraft merely because Article 8 did not expressly exclude the aircraft from its scope. The ECJ interpreted Article 8 of Regulation 990/93 by analyzing its language.⁵⁷² In support of its analysis, the ECJ referred to Paragraph 24 of U.N. Security Council Resolution 820 of 1993.⁵⁷³ The ECJ's basic approach in interpreting Article 8 was to attempt to prove that nothing in the language of Article 8 precluded the conclusion that it covered Bosphorus' aircraft. The ECJ, thus, concluded that Bosphorus' aircraft fell under

570. *See id.* (setting forth details of restrictions on air travel concerning EC territory and Yugoslavia).

571. *See* Council Regulation 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993) (providing for impounding of aircrafts "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) . . .").

572. *See Bosphorus*, [1996] E.C.R. at I-3983-85, ¶¶ 11-18, [1996] 3 C.M.L.R. at 293-94 (focusing on wording of Article 8 of Regulation 990/93).

573. *See id.* (interpreting Article 8 of Regulation 990/93 by analyzing Paragraph 24 of Resolution 820).

that impounding provision.⁵⁷⁴

In its decision, the ECJ was not able to identify anything in the language of Article 8 or Paragraph 24 that was definite and clear enough to establish an intention that Article 8 cover Bosphorus' aircraft. Article 8 of Regulation 990/93 provided for the impounding of any aircraft in which a Yugoslavian entity held a majority or controlling interest.⁵⁷⁵ JAT owned the aircraft that Bosphorus, a Turkish company, was leasing at the time of the impounding.⁵⁷⁶ The ECJ pointed out that nothing in Article 8 of Regulation 990/93 endorsed a distinction between ownership and day-to-day control and operation.⁵⁷⁷ The lack of such an express distinction in Article 8 does not further the ECJ's position, however, for the actual language at issue is the phrase majority or controlling interest,⁵⁷⁸ which in itself suggests day-to-day control and operation as much as it does ownership. The same problem plagues the ECJ's observation that nothing in the language of Article 8 stated that the Regulation did not apply to an aircraft in the situation of Bosphorus'.⁵⁷⁹ That the wording of Article 8 does not rule out the application of Article 8 to Bosphorus' aircraft does not justify the conclusion that the Regulation applies to it.

Similarly, the ECJ's argument that the term interest does

574. *Id.* at I-3987, ¶ 27, at 296.

575. Council Regulation 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993). Article 8 stated, "[a]ll 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." *Id.*

576. See *supra* notes 415-23 and accompanying text (discussing facts concerning lease between Bosphorus and JAT).

577. *Bosphorus*, [1996] E.C.R. at I-3983, ¶ 12, [1996] 3 C.M.L.R. at 293. "Nothing in the wording of the first paragraph of Article 8 of Regulation 990/93 suggests that it is based on a distinction between ownership of an aircraft on the one hand and its day-to-day operation and control on the other." *Id.*

578. Council Regulation No. 990/93, *supra* note 11, art. 8, O.J. L 102/14, at 16 (1993). Article 8 states:

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.

579. *Bosphorus*, [1996] E.C.R. at I-3983, ¶ 12, [1996] 3 C.M.L.R. at 293. The ECJ wrote, "[n]or is it anywhere stated in [Article 8] that it is not applicable to an aircraft owned by a person or undertaking based in or operating from the Federal Republic of Yugoslavia if that person or undertaking does not have day-to-day operation and control of the aircraft." *Id.*

not exclude ownership as a determining criterion for impounding⁵⁸⁰ merely shows that the ECJ's position is not rendered illegitimate by the Regulation's language. In addition, the ECJ claimed that the word majority, which Paragraph 24 of Resolution 820 employs in conjunction with the term interest, unambiguously implies the notion of ownership.⁵⁸¹ The ECJ does not provide the support or argument that its crucial application of this conception of the term majority warrants.

2. In Light of the Lack of Clarity of Article 8 of Regulation 990/93, the ECJ should have given Bosphorus' Interest Priority over that of the European Community

Interpretation of measures bearing on property rights should begin with a narrow construction and justify each increase in range as it proceeds, for only then will these rights receive the protection they deserve. The ECJ's approach to the interpretation of Article 8 is the reverse of the just approach, however, for the ECJ began by arguing against a narrow construction of Article 8 and then proceeded to find outer limits to its meaning that were merely plausible. For example, the ECJ argued that the wording of Article 8 and Paragraph 24 did not rule out the conclusion that Article 8 covered Bosphorus' aircraft.⁵⁸² In addition, the ECJ offered in support of its conclusion the observation that most of the language versions of Article 8 employ terms clearly connoting ownership and that Article 8 provides that owners of impounded aircrafts must bear the expenses of impounding.⁵⁸³ In contrast to the ECJ's method of interpretation, a conservative approach to interpreting acts that limit a right as important as the right to property is consistent with the natural law principle that individuals' interests have priority over those of states.⁵⁸⁴ No matter how important the public

580. *Id.* at I-3984, ¶ 15, [1996] 3 C.M.L.R. at 294. The ECJ argued, "[t]he word 'interest' in Paragraph 24 cannot, on any view, exclude ownership as a determining criterion impounding." *Id.*

581. *Id.* "Moreover, [the word 'interest'] is used in that paragraph in conjunction with the word 'majority', which clearly implies the concept of ownership." *Id.*

582. *See id.* at I-3983-84, ¶¶ 12-16, [1996] 3 C.M.L.R. at 293-94 (analyzing language of Paragraph 24 of Resolution 820 and Article 8 of Regulation 990/93).

583. *Id.* at I-3984, ¶ 16, [1996] 3 C.M.L.R. at 294.

584. *See supra* notes 177-79 and accompanying text (discussing in property rights context, natural law principle that individuals have inherent priority over states).

interest, states should only impound an item of property if the measures providing for impoundings clearly refer to the type of property in question. Otherwise, states could extend their power to types of property that the measures did not intend to be subject to impounding.

CONCLUSION

The importance of the abstract goal of the U.N. and EC embargoes on Yugoslavia did not justify the ECJ's disregard of the property rights of innocent persons or businesses that had no connection to Yugoslavia or the war in Bosnia except for their lease of property owned by a Yugoslavian entity. In the *Bosphorus* case, the ECJ conceived the general interest driving the enactment of Regulation 990/93 so abstractly that one could find virtually any measure to be reasonably related to the goal of promoting that interest, thus, ensuring that its upholding of the impounding of Bosphorus's aircraft satisfied the reasonableness requirement of the principle of proportionality. In addition, the ECJ's holding ignored the lack of clear textual basis for the impounding and that EC law already contained less intrusive means of preventing Yugoslavian circumvention of the embargo. The ECJ thus neglected to recognize the property rights violation that the impounding had effected, and, therefore, the ECJ should refrain from following its *Bosphorus* decision in the future.