
COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

**CASE OF BOSPHORUS HAVA YOLLARI TURİZM VE TİCARET ANONİM ŞİRKETİ v. IRELAND**

*(Application no. 45036/98)*

JUDGMENT

STRASBOURG

30 June 2005

**In the case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr I. CABRAL BARRETO,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr V. ZAGREBELSKY,
Mr L. GARLICKI,
Mrs A. GYULUMYAN, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 29 September 2004 and 11 May 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

# PROCEDURE

1. The case originated in an application (no. 45036/98) against Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a company incorporated in Turkey, Bosphorus Hava Yolları Turizm ("the applicant company"), on 25 March 1997.

2. The applicant company was represented by Mr J. Doyle, a lawyer practising in Dublin, instructed by Mr M.I. Özbay, the company's managing director and majority shareholder. The Irish Government ("the Government") were represented by two successive Agents, Ms P. O'Brien and Mr J. Kingston, and by a co-Agent, Ms D. McQuade, all of the Department of Foreign Affairs.

3. The applicant company alleged that the impounding of its leased aircraft by the respondent State had breached its rights under Article 1 of Protocol No. 1.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. Following the communication of the case to the respondent Government, the Turkish Government confirmed that it did not intend to make submissions in the case (Rule 44 of the Rules of Court).

6. On 13 September 2001, following a hearing on the admissibility and merits, the application was declared admissible by a Chamber composed of Mr G. Ress, President, Mr I. Cabral Barreto, Mr V. Butkevych, Mrs N. Vajić, Mr J. Hedigan, Mr M. Pellonpää, Mrs S. Botoucharova, judges, and Mr V. Berger, Section Registrar.

7. On 30 January 2004 that Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant company and the Government each filed observations on the merits, to which each replied at the oral hearing (Rule 44 § 5). Written comments were also received from the Italian and United Kingdom Governments, and from the European Commission and the *Institut de formation en droits de l'homme du barreau de Paris*, which were given leave by the President to intervene (Article 36 § 2 of the Convention and Rule 44 § 2). The European Commission also obtained leave to participate in the oral hearing.

10. The hearing took place in public in the Human Rights Building, Strasbourg, on 29 September 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

| | | |
|---|---|---|
| Mr | J. KINGSTON, | *Agent*, |
| Ms | D. MCQUADE, | *Co-Agent*, |
| Mr | G. HOGAN, Senior Counsel, | |
| Mr | R. O'HANLON, Senior Counsel, | *Counsel*, |
| Mr | P. MOONEY, | *Adviser*; |

(b) *for the applicant company*

| | | |
|---|---|---|
| Mr | J. O'REILLY, Senior Counsel, | |
| Mr | T. EICKE, Barrister-at-Law, | *Counsel*, |
| Mr | J. DOYLE, | *Solicitor*. |

Mr M.I. Özbay, managing director of the applicant company, also attended.

(c) *for the European Commission*
Mr G. MARENCO,
Ms S. FRIES,
Mr C. LADENBURGER, *Agents*.

The Court heard addresses by Mr O'Reilly, Mr Hogan and Mr Marenco.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### A. The lease agreement between JAT and the applicant company

11. The applicant company is an airline charter company incorporated in Turkey in March 1992.

12. By an agreement dated 17 April 1992, the applicant company leased two Boeing 737-300 aircraft from Yugoslav Airlines (JAT), the national airline of the former Yugoslavia. These were, at all material times, the only two aircraft operated by the applicant company. The lease agreement was a "dry lease without crew" for a period of forty-eight months from the dates of delivery of the two aircraft (22 April and 6 May 1992). According to the terms of the lease, the crew were to be the applicant company's employees and the applicant company was to control the destination of the aircraft. While ownership of the aircraft remained with JAT, the applicant company could enter the aircraft on the Turkish Civil Aviation Register provided it noted JAT's ownership.

13. The applicant company paid a lump sum of 1,000,000 United States dollars (USD) per aircraft on delivery. The monthly rental was 150,000 USD per aircraft. On 11 and 29 May 1992 the two aircraft were registered in Turkey as provided for in the lease. On 14 May 1992 the applicant company obtained its airline licence.

### B. Prior to the aircraft's arrival in Ireland

14. From 1991 onwards the United Nations adopted, and the European Community implemented, a series of sanctions against the Federal Republic

of Yugoslavia (Serbia and Montenegro) – "the FRY" – designed to address the armed conflict and human rights violations taking place there.

15. In January 1993 the applicant company began discussions with TEAM Aer Lingus ("TEAM") with a view to having maintenance work ("C-Check") done on one of its leased aircraft. TEAM was a limited liability company whose principal business was aircraft maintenance. It was a subsidiary of two Irish airline companies wholly owned by the Irish State. Memoranda dated 8 and 18 January 1993 showed that TEAM considered, on the basis of information obtained, that the applicant company was not in breach of the sanctions regime, noting that it was doing business with many companies, including Boeing, Sabena and SNECMA (a French aero-engine company). By a letter of 2 March 1993, TEAM requested the opinion of the Department of Transport, Energy and Communications ("the Department of Transport") and included copies of its memoranda of January 1993. On 3 March 1993 the Department of Transport forwarded the request to the Department of Foreign Affairs.

16. On 17 April 1993 the United Nations Security Council adopted Resolution 820 (1993), which provided that States should impound, *inter alia*, all aircraft in their territories "in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY]". That resolution was implemented by Regulation (EEC) no. 990/93, which came into force on 28 April 1993 (see paragraph 65 below).

17. On 5 May 1993 the Department of Foreign Affairs decided to refer the matter to the United Nations Sanctions Committee.

18. By a letter of 6 May 1993, the Turkish Foreign Ministry indicated to the Turkish Ministry of Transport that it considered that the leased aircraft were not in breach of the sanctions regime and requested flight clearance pending the Sanctions Committee's decision. On 12 May 1993 Turkey sought the opinion of the Sanctions Committee.

### C. The impounding of the aircraft

19. On 17 May 1993 one of the applicant company's leased aircraft arrived in Dublin. A contract with TEAM was signed for the completion of C-Check.

20. On 18 May 1993 the Irish Permanent Mission to the United Nations indicated by facsimile to the Department of Transport that informal advice from the Secretary to the Sanctions Committee was to the effect that there was no problem with TEAM carrying out the work, but that an "informal opinion" from the "legal people in the Secretariat" had been requested. On 19 May 1993 the Department of Transport explained this to TEAM by telephone.

21. On 21 May 1993 the Irish Permanent Mission confirmed to the Department of Foreign Affairs that the "informal legal advice" obtained

from the "United Nations legal office" was to the effect that TEAM should seek the "guidance and approval" of the Sanctions Committee before signing any contract with the applicant company. It was recommended that TEAM submit an application to the Committee with relevant transaction details; if the applicant company was to pay for the maintenance, it was unlikely that the Committee would have a problem with the transaction. On 24 May 1993 the Department of Transport received a copy of that facsimile and sent a copy to TEAM, who were also informed by telephone. By a letter dated 26 May 1993, the Irish Permanent Mission provided the Sanctions Committee with the required details and requested the latter's "guidance and approval".

22. On 21 May 1993 the Sanctions Committee disagreed with the Turkish government's view that the aircraft could continue to operate, referring to Resolution 820 (1993) of the United Nations Security Council. The Turkish Permanent Mission to the United Nations was informed of that opinion by a letter dated 28 May 1993.

23. At noon on 28 May 1993 the applicant company was informed by TEAM that C-Check had been completed and that, on payment of USD 250,000, the aircraft would be released. Later that day payment was received and the aircraft was released. While awaiting air traffic control clearance to take off, the aircraft was stopped. In his report, the duty manager of Dublin Airport noted that TEAM had informed him that it had been advised by the Department of Transport that it would be "in breach of sanctions" for the aircraft to leave. He also stated that the aircraft had been scheduled to depart during that shift and that the airport police had been advised. TEAM informed the applicant company accordingly. The Department of Transport later confirmed by a letter (of 16 June 1993) its instructions of 28 May 1993:

> "... [TEAM] were advised by this Department that, in the circumstances, TEAM should not release the [aircraft] ... Furthermore, it was pointed out that if TEAM were to release the aircraft TEAM itself might be in serious breach of the UN resolutions (as implemented by Council Regulation (EEC) no. 990/93) ... and the matter was under investigation. At the same time directions were given to Air Traffic Control, whose clearance is necessary for departure of aircraft, not to clear this aircraft for take-off."

24. By letters dated 29 May 1993 to the applicant company, TEAM noted that it was waiting for the opinion of the Sanctions Committee and that it had been advised by the authorities that release of the aircraft before receipt of that opinion would be in violation of the United Nations sanctions regime.

### D. Prior to judicial review proceedings

25. By a memorandum dated 29 May 1993, the Turkish embassy in Dublin requested the release of the detained aircraft to Turkey, given the latter's commitment to the sanctions regime

26. By a letter dated 2 June 1993, the Irish Permanent Mission informed the Sanctions Committee that the maintenance work had in fact already been carried out, that the government regretted the failure to abide by the procedure it had initiated and that the matter had been taken up with TEAM. The aircraft was being detained pending the Committee's decision.

27. On 3 June 1993 the Irish government learned of the Sanctions Committee's reply to the Turkish government and that the chairman of the Committee had indicated that it would be likely to favour impounding. The Committee would not meet until 8 June 1993.

28. On 4 June 1993 the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (Statutory Instrument no. 144 of 1993) were adopted. By a letter dated 8 June 1993, the Minister for Transport (Energy and Communications) informed the Dublin Airport managers that he had authorised the impounding, until further notice, of the aircraft pursuant to that statutory instrument.

29. Shortly afterwards the applicant company's second aircraft was grounded in Istanbul, although the parties disagreed as to precisely why.

30. By a letter of 14 June 1993, the Sanctions Committee informed the Irish Permanent Mission of the findings of its meeting of 8 June 1993:

> "... the provision of any services to an aircraft owned by an undertaking in the [FRY], except those specifically authorised in advance by the Committee ..., would not be in conformity with the requirements of the relevant Security Council resolutions. The members of the Committee also recalled the provisions of paragraph 24 of [Resolution 820 (1993) of the United Nations Security Council] regarding such aircraft, under which the aircraft in question should have already been impounded by the Irish authorities. The Committee, therefore, would be extremely grateful for being apprised of any action on behalf of Your Excellency's Government to that effect."

By a letter dated 18 June 1993, the Irish Permanent Mission informed the Sanctions Committee that the aircraft had been detained on 28 May 1993 and formally impounded on 8 June 1993.

31. In a letter of 16 June 1993 to the Department of Transport, the applicant company challenged the impoundment, arguing that the purpose of Regulation (EEC) no. 990/93 was not to deal simply with legal ownership, but rather with operational control. On 24 June 1993 the Department replied:

> "The Minister is advised that the intention and effect of the UN resolution as implemented through [Regulation (EEC) no. 990/93] is to impose sanctions by impounding the types of commercial asset mentioned in Article 8, including aircraft, in any case where a person or undertaking in or operating from the [FRY] has any ownership interest of the kind mentioned. As this view of the scope and effect of the

> original resolution has been confirmed by the [Sanctions Committee], the Minister does not feel entitled to apply [Regulation (EEC) no. 990/93] in a manner which would depart from that approach. ... the aircraft must remain impounded. ... the Minister appreciates the difficulty that [the applicant company] finds itself in and would be anxious to find any solution that was available to him under [Regulation (EEC) no. 990/93] which would permit the release of the aircraft."

32. By a letter dated 5 July 1993, the Turkish embassy in Dublin repeated its request for the release of the aircraft, stating that the Turkish government would ensure impoundment in accordance with the sanctions. The Irish government indicated to the Sanctions Committee, by a letter of 6 July 1993, that it would be favourably disposed to grant that request. On 4 August 1993 the Sanctions Committee ruled that the aircraft had to remain in Ireland, since the relevant resolutions required the Irish State to withhold all services from the aircraft, including services that would enable it to fly.

### E. The first judicial review proceedings: the High Court

33. In November 1993 the applicant company applied for leave to seek judicial review of the Minister's decision to impound the aircraft. Amended grounds were later lodged taking issue with TEAM's role in the impoundment. On 15 April 1994 the High Court struck out TEAM as a respondent in the proceedings, the applicant company's dispute with TEAM being a private-law matter.

34. On 15 June 1994 the applicant company's managing director explained in evidence that rental payments due to JAT had been set off against the deposits initially paid to JAT and that future rental payments were to be paid into a blocked bank account supervised by the Turkish Central Bank.

35. On 21 June 1994 Mr Justice Murphy delivered the judgment of the High Court. The issue before him could, he believed, be simply defined as the question of whether the Minister for Transport was bound by Article 8 of Regulation (EEC) no. 990/93 to impound the applicant company's aircraft. He considered the Department of Transport's letter of 24 June 1993 to the applicant company to be the most helpful explanation of the Minister's reasoning. He found that:

> "... it is common case that the transaction between JAT and [the applicant company] was entirely bona fide. There is no question of JAT having any interest direct or indirect in [the applicant company] or in the management, supervision or direction of the business of that company. ...
>
> It is, however, common case that [resolutions of the United Nations Security Council] do not form part of Irish domestic law and, accordingly, would not of themselves justify the Minister in impounding the aircraft. The real significance of the [resolutions of the United Nations Security Council], in so far as they relate to the present proceedings, is that [Resolution 820 (1993) of the United Nations Security Council] ... provided the genesis for Article 8 of [Regulation (EEC) no. 990/93]. ..."

36. In interpreting Regulation (EEC) no. 990/93, Mr Justice Murphy had regard to its purpose. He found the aircraft not to be one to which Article 8 applied, as it was not an aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the former FRY, and that the decision of the Minister to impound was therefore *ultra vires*. However, the aircraft was, at that stage, the subject of an injunction obtained (in March 1994) by a creditor of JAT (SNECMA) preventing it from leaving the country. That injunction was later discharged on 11 April 1995.

### F. The second judicial review proceedings: the High Court

37. Having indicated to the applicant company that the Minister for Transport was investigating a further impoundment based on Article 1.1(e) of Regulation (EEC) no. 990/93, the Department of Transport informed the applicant company by a letter of 5 August 1994 of the following:

> "The Minister has now considered the continuing position of the aircraft in the light of the recent ruling of the High Court and the provisions of the Council regulations referred to.
>
> Arising out of the Minister's consideration, I am now directed to inform you that the Minister has ... directed that the aircraft ... be detained pursuant to Article 9 of [Regulation (EEC) no. 990/93] as an aircraft which is suspected of having violated the provisions of that regulation and particularly Article 1.1(e) and [Regulation (EEC) no.] 1432/92. The aircraft will remain detained pending completion of the Minister's investigation of the suspected violation as required under Article 9 and Article 10 of Regulation [(EEC) no.] 990/93."

Although not noted in that letter, the Minister's concern related to the applicant company's setting off of JAT's financial obligations (certain insurance, maintenance and other liabilities) under the lease against the rental monies already paid by it into the blocked bank account.

38. On 23 September 1994 the United Nations Security Council adopted Resolution 943 (1994). Although it temporarily suspended the sanctions as peace negotiations had begun, it did not apply to aircraft already impounded. It was implemented by Regulation (EC) no. 2472/94 on 10 October 1994.

39. In March 1995 the applicant company was given leave to apply for judicial review of the Minister's decision to re-impound the aircraft. By a judgment of 22 January 1996, the High Court quashed the Minister's decision to redetain the aircraft. It noted that almost all of the monies which had been paid into the blocked account by the applicant company had by then been used up (with the consent of the holding bank in Turkey) in order to discharge JAT's liabilities under the lease. The crucial question before the High Court was the Minister's delay in raising Article 9 of Regulation (EEC) no. 990/93 given that the applicant company was an "innocent" party

suffering heavy daily losses. The High Court found that the Minister had failed in his duty to investigate and decide such matters within a reasonable period of time, to conduct the investigations in accordance with fair procedures and to have proper regard for the rights of the applicant company.

40. On 7 February 1996 the Irish government appealed to the Supreme Court and applied for a stay on the High Court's order. On 9 February 1996 the Supreme Court refused the Minister's application for a stay. The overriding consideration in deciding to grant the stay or not was to find a balance which did not deny justice to either party. Noting the significant delay of the Minister in raising Article 1.1(e) and the potentially minor damage to the State (monies owed for the maintenance and parking in Dublin Airport) compared to the applicant company's huge losses, the justice of the case was overwhelmingly in the latter's favour.

41. The aircraft was therefore free to leave. By letters dated 12 and 14 March 1996, the applicant company, JAT and TEAM were informed that the Minister considered that he no longer had any legal responsibility for the aircraft.

## G. The first judicial review proceedings: the European Court of Justice (ECJ)

42. On 8 August 1994 the Minister for Transport lodged an appeal in the Supreme Court against the High Court judgment of 21 June 1994. He took issue with the High Court's interpretation of Regulation (EEC) no. 990/93 and requested a preliminary reference to the ECJ (Article 177, now Article 234, of the Treaty establishing the European Community – "the EC Treaty").

43. By an order dated 12 February 1995, the Supreme Court referred the following question to the ECJ and adjourned the proceedings before it:

> "Is Article 8 of [Regulation (EEC) no. 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 [the FRY] where such aircraft has been leased by the owner for a term of four years from 22 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 [FRY]?"

44. The parties made submissions to the ECJ. The applicant company noted that it was ironic that, following Resolution 943 (1994) of the United Nations Security Council, JAT aircraft could fly whereas its own remained grounded.

45. On 30 April 1996 Advocate General Jacobs delivered his opinion. Given the majority interest of JAT in the aircraft, Article 8 of Regulation (EEC) no. 990/93 applied to it. The Advocate General disagreed with the Irish High Court, considering that neither the aims nor the texts of the relevant resolutions of the United Nations Security Council provided any

reason to depart from what he considered to be the clear wording of Article 8 of Regulation (EEC) no. 990/93.

46. As to the question of the respect shown in that regulation for fundamental rights and proportionality, the Advocate General pointed out:

> "It is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights, the [ECJ] takes account of the constitutional traditions of the Member States and of international agreements, notably [the Convention], which has a special significance in that respect.
>
> Article F(2) of the Treaty on European Union ... gives Treaty expression to the [ECJ's] case-law. ... In relation to the EC Treaty, it confirms and consolidates the [ECJ's] case-law underlining the paramount importance of respect for fundamental rights.
>
> Respect for fundamental rights is thus a condition of the lawfulness of Community acts – in this case, the Regulation. Fundamental rights must also, of course, be respected by Member States when they implement Community measures. All Member States are in any event parties to the [Convention], even though it does not have the status of domestic law in all of them. Although the Community itself is not a party to the Convention, and cannot become a party without amendment both of the Convention and of the Treaty, and although the Convention may not be formally binding upon the Community, nevertheless for practical purposes the Convention can be regarded as part of Community law and can be invoked as such both in the [ECJ] and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention."

47. The Advocate General noted that the applicant company had relied on the right to peaceful enjoyment of property, protected by the Convention, and the right to pursue a commercial activity, recognised as a fundamental right by the ECJ. Having considered *Sporrong and Lönnroth v. Sweden* (judgment of 23 September 1982, Series A no. 52), he defined the essential question as being whether the interference with the applicant company's possession of the aircraft was a proportionate measure in the light of the aims of general interest Regulation (EEC) no. 990/93 sought to achieve. He had regard to the application of this test in *AGOSI v. the United Kingdom* (judgment of 24 October 1986, Series A no. 108) and *Air Canada v. the United Kingdom* (judgment of 5 May 1995, Series A no. 316-A) and to a "similar approach" adopted by the ECJ in cases concerning the right to property or the right to pursue a commercial activity (including *Hauer v. Land Rheinland-Pfalz*, Case 44/79 [1979] European Court Reports (ECR) 3727, §§ 17-30).

48. While there had been a severe interference with the applicant company's interest in the lease, it was difficult to identify a stronger type of public interest than that of stopping a devastating civil war. While some property loss was inevitable for any sanctions to be effective, if it were demonstrated that the interference in question was wholly unreasonable in

the light of the aims sought to be achieved, then the ECJ would intervene. However, the Advocate General felt that neither the initial decision to impound nor the continued retention of the aircraft could be regarded as unreasonable.

49. Whether or not the financial impact of the sanctions were as outlined by the applicant company, a general measure of the kind in question could not be set aside simply because of the financial consequences the measure might have in a particular case. Given the strength of the public interest involved, the proportionality principle would not be infringed by any such losses.

50. The Advocate General concluded that the contested decision did not

> "... strike an unfair balance between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. That conclusion seems consistent with the case-law of [this Court] in general. Nor has [the applicant company] suggested that there is any case-law under [the Convention] supporting its own conclusion.
>
> The position seems to be no different if one refers to the fundamental rights as they result from 'the constitutional traditions common to the Member States' referred to in the case-law of [the ECJ] and in Article F(2) of the Treaty on European Union. In the [above-cited *Hauer* case, the ECJ] pointed out ..., referring specifically to the German *Grundgesetz*, the Irish Constitution and the Italian Constitution, that the constitutional rules and practices of the Member States permit the legislature to control the use of private property in accordance with the general interest. Again it has not been suggested that there is any case-law supporting the view that the contested decision infringed fundamental rights. The decision of the Irish High Court was based, as we have seen, on different grounds."

51. By a letter of 19 July 1996, TEAM informed JAT that the aircraft was free to leave provided that debts owed to TEAM were discharged.

52. On 30 July 1996 the ECJ ruled that Regulation (EEC) no. 990/93 applied to the type of aircraft referred to in the Supreme Court's question to it. The ECJ noted that the domestic proceedings showed that the aircraft lease had been entered into "in complete good faith" and was not intended to circumvent the sanctions against the FRY.

53. It did not accept the applicant company's first argument that Regulation (EEC) no. 990/93 did not apply because of the control on a daily basis of the aircraft by an innocent non-FRY party. Having considered the wording of Regulation (EEC) no. 990/93, its context and aims (including the text and aims of the United Nations Security Council resolutions it implemented), it found nothing to support the distinction made by the applicant company. Indeed, the use of day-to-day operation and control as opposed to ownership as a criterion for applying the regulation would jeopardise the effectiveness of the sanctions.

54. The applicant company's second argument was that the application of Regulation (EEC) no. 990/93 would infringe its right to peaceful enjoyment of its possessions and its freedom to pursue a commercial

activity because it would destroy and obliterate the business of a wholly innocent party when the FRY owners had already been punished by having their bank accounts blocked. The ECJ did not find this persuasive:

> "It is settled case-law that the fundamental rights invoked by [the applicant company] are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community (see [the above-cited *Hauer* case]; Case 5/88, *Wachauf v. Bundesamt fuer Ernaehrung und Forstwirtschaft* [1989] ECR 2609; and Case C-280/93, *Germany v. Council* [1994] ECR I-4973).
>
> Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.
>
> Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.
>
> The provisions of [Regulation (EEC) no. 990/93] contribute in particular to the implementation at Community level of the sanctions against the [FRY] adopted, and later strengthened, by several resolutions of the Security Council of the United Nations. ...
>
> It is in the light of those circumstances that the aim pursued by the sanctions assumes a special importance, which is, in particular, in terms of [Regulation (EEC) no. 990/93] and more especially the eighth recital in the preamble thereto, to dissuade the [FRY] 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'.
>
> 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 international 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 [FRY], cannot be regarded as inappropriate or disproportionate."

55. The answer to the Supreme Court's question was therefore:

> "Article 8 of Council Regulation (EEC) no. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the [FRY] applies to an aircraft which is owned by an undertaking based in or operating from the [FRY], even though the owner has leased it for four years to another undertaking, neither based in nor operating from [the FRY] and in which no person or undertaking based in or operating from [the FRY] has a majority or controlling interest."

56. On 6 August 1996 the Minister reinstated the impounding of the aircraft under Article 8 of Regulation (EEC) no. 990/93.

## H. The first and second judicial review proceedings: judgments of the Supreme Court

57. By a notice of motion dated 29 October 1996, the applicant company applied to the Supreme Court for, *inter alia*, an order determining the action "in the light of the decision of the [ECJ]" and for an order providing for the costs of the Supreme Court and ECJ proceedings. The grounding affidavit of the applicant company of the same date stressed its bona fides, the benefit of having had the ECJ examine the regulation for the first time, the fact that ultimate responsibility for its predicament lay with the FRY authorities and that its operations had been destroyed by the impoundment. It referred to Regulation (EC) no. 2815/95, noting that it did not allow aircraft already impounded to fly whereas those not previously impounded could do so. Since its aircraft was the only one impounded under the sanctions regime, no other lessee could have initiated the action it had in order to clarify the meaning of the relevant regulation.

58. On 29 November 1996 the Supreme Court delivered its judgment allowing the appeal of the Minister for Transport from the order of the High Court of 21 June 1994. It noted that the sole issue in the case was whether the Minister had been bound by Article 8 of Regulation (EEC) no. 990/93 to impound the aircraft. Having noted the answer of the ECJ, the Supreme Court simply stated that it was bound by that decision and the Minister's appeal was allowed.

59. In May 1998 the Supreme Court allowed the appeal from the order of the High Court of 22 January 1996. Given the intervening rulings of the ECJ and of the Supreme Court (of July and November 1996, respectively), the appeal was moot since, from the date of the initial order of impoundment, the aircraft had been lawfully detained under Article 8 of Regulation (EEC) no. 990/93. There was no order as to costs.

## I. The return of the aircraft to JAT

60. The applicant company's leases on both aircraft had expired by May 1996 (see paragraph 12 above). Further to the judgment of the Supreme Court of November 1996 (see paragraph 58 above) and given the relaxation of the sanctions regime (see paragraphs 67-71 below), JAT and the Minister for Transport reached an agreement in July 1997 concerning the latter's costs. JAT deposited 389,609.95 Irish pounds into a blocked account in the joint names of the Chief State Solicitor and its solicitors to cover all parking, maintenance, insurance and legal costs of the Minister for Transport associated with the impoundment. On 30 July 1997 the aircraft was returned to JAT.

# II. THE SANCTIONS REGIME: THE RELEVANT PROVISIONS

## A. Setting up the sanctions regime

61. In September 1991 the United Nations Security Council (UNSC) adopted a Resolution (Resolution 713 (1991)) under Chapter VII of its Charter by which it expressed concern about the conflict in the former Yugoslavia and implemented a weapons and military embargo. UNSC Resolution 724 (1991), adopted in December 1991, established a Sanctions Committee to administer the relevant resolutions of the United Nations Security Council.

62. The relevant parts of UNSC Resolution 757 (1992), adopted on 30 May 1992, provided as follows:

> "5. *Decides further* that no State shall make available to the authorities in the [FRY] or to any commercial, industrial or public utility undertaking in the [FRY], any funds, or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the [FRY], except payments exclusively for strictly medical or humanitarian purposes and foodstuffs;
>
> ...
>
> 7. *Decides* that all States shall:
>
> (a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of the [FRY], unless the particular flight has been approved, for humanitarian or other purposes consistent with the relevant resolutions of the Council, by the [Sanctions Committee];
>
> (b) Prohibit, by their nationals or from their territory, the provision of engineering or maintenance servicing of aircraft registered in the [FRY] or operated by or on behalf of entities in the [FRY] or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft;
>
> ...
>
> 9. *Decides further* that all States, and the authorities in the [FRY], shall take the necessary measures to ensure that no claim shall lie at the instance of the authorities in the [FRY], or of any person or body in the [FRY], or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures imposed by the present resolution and related resolutions;"

The resolution was implemented in the European Community by a Council regulation of June 1992 (Regulation (EEC) no. 1432/92), which

was in turn implemented in Ireland by statutory instrument: the European Communities (Prohibition of Trade with the Republics of Serbia and Montenegro) Regulations 1992 (Statutory Instrument no. 157 of 1992) made it an offence under Irish law from 25 June 1992 to act in breach of Regulation (EEC) no. 1432/92.

63. UNSC Resolution 787 (1992), adopted in November 1992, further tightened the economic sanctions against the FRY. This resolution was implemented by Regulation (EEC) no. 3534/92, adopted in December 1992.

64**.** UNSC Resolution 820 (1993), adopted on 17 April 1993, provided, *inter alia*, as follows:

> "24. *Decides* that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] 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;"

65. This resolution was implemented by Regulation (EEC) no. 990/93, which came into force on 28 April 1993, once published in the Official Journal (L 102/14 (1993)) of that date (as specified in Article 13 of the regulation) pursuant to Article 191(2) (now Article 254(2)) of the Treaty establishing the European Community ("the EC Treaty").

Articles 1.1(e) and 8 to 10 of that regulation provided as follows:

**Article 1**

> "1. As from 26 April 1993, the following shall be prohibited:
>
> ...
>
> (e) the provision of non-financial services to any person or body for purposes of any business carried out in the Republics of Serbia and Montenegro."

**Article 8**

> "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] shall be impounded by the competent authorities of the Member States.
>
> Expenses of impounding vessels, freight vehicles, rolling stock and aircraft may be charged to their owners."

**Article 9**

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

**Article 10**

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

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

66. On 4 June 1993 the Irish Minister for Tourism and Trade adopted the European Communities (Prohibition of Trade with the Federal Republic of Yugoslavia (Serbia and Montenegro)) Regulations 1993 (Statutory Instrument no. 144 of 1993), the relevant part of which provided as follows:

"3. A person shall not contravene a provision of [Regulation (EEC) no. 990/93].

4. A person who, on or after the 4th day of June, 1993, contravenes Regulation 3 of these Regulations shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or to both.

5. The Minister for Transport, Energy and Communications shall be the competent authority for the purpose of Articles 8 and 9 of [Regulation (EEC) no. 990/93] except in so far as the said Article 8 relates to vessels and the said Article 9 relates to cargoes.

6. (1) The powers conferred on the Minister for Transport, Energy and Communications by Articles 8 and 9 of [Regulation (EEC) no. 990/93] as the competent authority for the purposes of those Articles may be exercised by –

(a) members of the Garda Síochána,

(b) officers of customs and excise,

(c) Airport Police, Fire Services Officers of Aer Rianta, ...

(d) Officers of the Minister for Transport ... duly authorised in writing by the Minister for Transport, Energy and Communications in that behalf.

...

(3) A person shall not obstruct or interfere with a person specified in sub-paragraph (a), (b) or (c) of paragraph (1) of this Regulation, or a person authorised as aforesaid, in the exercise by him of any power aforesaid.

(4) A person who, on or after the 4th day of June, 1993, contravenes sub-paragraph (3) of this Regulation shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 3 months or to both.

7. Where an offence under Regulation 4 or 6 of these Regulations is committed by a body corporate and is proved to have been so committed with the consent, connivance or approval of or to have been attributable to any neglect on the part of any person, being a director, manager, secretary or other officer of the body corporate

or a person who was purporting to act in any such capacity, that person as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he were guilty of the first-mentioned offence."

## B. Lifting the sanctions regime

67. UNSC Resolution 943 (1994), adopted on 23 September 1994, provided, *inter alia*, as follows:

> "(i) the restrictions imposed by paragraph 7 of Resolution 757 (1992), paragraph 24 of Resolution 820 (1993) with regard to aircraft which are not impounded at the date of adoption of this Resolution, ...
>
> shall be suspended for an initial period of 100 days from the day following the receipt ... of a report from the Secretary-General ..."

This resolution was implemented by Regulation (EC) no. 2472/94 of 10 October 1994, Article 5 of which suspended the operation of Article 8 of Regulation (EEC) no. 990/93 "with regard to aircraft ... which had not been impounded at 23 September 1994".

68. The suspension of UNSC Resolution 820 (1993) was extended further by periods of 100 days on numerous occasions in 1995, and these resolutions were each implemented by Community regulations.

69. UNSC Resolution 820 (1993) was suspended indefinitely in 1995 by Resolution 1022 (1995). It was implemented in the Community by Regulation (EC) no. 2815/95 of 4 December 1995 which provided, *inter alia*, as follows:

> "1. [Regulation (EEC) no. 990/93] is hereby suspended with regard to the [FRY].
>
> 2. As long as [Regulation (EEC) no. 990/93] remains suspended, all assets previously impounded pursuant to that Regulation may be released by Member States in accordance with the law, provided that any such assets that are subject to any claims, liens, judgments, or encumbrances, or which are the assets of any person, partnership, corporation or other entity found or deemed to be insolvent under the law or the accounting principles prevailing in the relevant Member State, shall remain impounded until released in accordance with the applicable law."

70. UNSC Resolution 820 (1993) was later definitively suspended. That suspension was implemented by Regulation (EC) no. 462/96 of 27 February 1996, the relevant part of which provided as follows:

> "As long as the Regulations [*inter alia*, Regulation (EEC) no. 990/93] remain suspended, all funds and assets previously frozen or impounded pursuant to those Regulations may be released by Member States in accordance with law, provided that any such funds or assets that are subject to any claims, liens, judgments or encumbrances, ... shall remain frozen or impounded until released in accordance with the applicable law."

71. On 9 December 1996 Regulation (EC) no. 2382/96 repealed, *inter alia*, Regulation (EEC) no. 990/93. On 2 March 2000 the European

Communities (Revocation of Trade Sanctions concerning the Federal Republic of Yugoslavia (Serbia and Montenegro) and Certain Areas of the Republics of Croatia and Bosnia-Herzegovina) Regulations 2000 (Statutory Instrument no. 60 of 2000) repealed Statutory Instrument no. 144 of 1993.

## III. RELEVANT COMMUNITY LAW AND PRACTICE

72. This judgment is concerned with the provisions of Community law of the "first pillar" of the European Union.

### A. Fundamental rights: case-law of the ECJ[1]

73. While the founding treaties of the European Communities did not contain express provisions for the protection of human rights, the ECJ held as early as 1969 that fundamental rights were enshrined in the general principles of Community law protected by the ECJ[2]. By the early 1970s the ECJ had confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the member States[3] and by the guidelines supplied by international human rights treaties on which the member States had collaborated or to which they were signatories[4]. The Convention's provisions were first explicitly referred to in 1975[5], and by 1979 its special significance amongst international treaties on the protection of human rights had been recognised by the ECJ[6]. Thereafter the ECJ began to refer extensively to Convention provisions (sometimes where the Community legislation under its consideration had referred to the Convention)[7] and

1. Reference to the ECJ includes, as appropriate, the Court of First Instance.
2. See *Stauder v. City of Ulm*, Case 29/69 [1969] ECR 419.
3. See *Internationale Handelsgesellschaft*, Case 11/70 [1970] ECR 1125.
4. See *Nold v. Commission of the European Communities*, Case 4/73 [1974] 491.
5. See *Rutili v. Minister of the Interior*, Case 36/75 [1975] ECR 1219; see also paragraph 10 of Opinion no. 256/2003 of the European Commission for Democracy through Law (Venice Commission) on the implications of a legally binding EU Charter of Fundamental Rights on human rights protection in Europe.
6. See *Hauer v. Land Rheinland-Pfalz*, Case 44/79 [1979] ECR 3727.
7. See, for example, *Hauer*, cited above, § 17 (Article 1 of Protocol No. 1); *Regina v. Kent Kirk*, Case 63/83 [1984] ECR 2689, § 22 (Article 7); *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84 [1986] ECR 1651, § 18 (Articles 6 and 13); *Hoechst AG v. Commission of the European Communities*, Joined Cases 46/87 and 227/88 [1989] ECR 2859, § 18 (Article 8); *Commission of the European Communities v. the Federal Republic of Germany*, Case 249/86 [1989] ECR 1263, § 10 (Article 8); *ERT v. DEP*, Case C-260/89 [1991] ECR I-2925, § 45 (Article 10); *Union royale belge des sociétés de football and Others v. Bosman and Others*, Case C-415/93 [1995] ECR I-4921, § 79 (Article 11); *Philip Morris International, Inc. and Others v. Commission of the European Communities*, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 [2003] ECR II-1, § 121 (Articles 6 and 13); and *Bodil Lindqvist*, Case C-101/01 [2003] ECR I-12971, § 90 (Article 10).

latterly to this Court's jurisprudence[1], the more recent ECJ judgments not prefacing such Convention references with an explanation of their relevance to Community law.

74. In a judgment of 1991, the ECJ was able to describe the role of the Convention in Community law in the following terms[2]:

> "41. ... as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories ... The [Convention] has special significance in that respect ... It follows that ... the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed.
>
> 42. As the Court has held ... it has no power to examine the compatibility with the [Convention] of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the [Convention]."

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1. See, for example, *Criminal proceedings against X*, Joined Cases C-74/95 and C-129/95 [1996] ECR I-6609, § 25 (Article 7); *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case C-368/95 [1997] ECR I-3689, §§ 25-26 (Article 10); *Lisa Jacqueline Grant v. South-West Trains Ltd*, Case C-249/96 [1998] ECR I-621, §§ 33-34 (Articles 8, 12 and 14); *Baustahlgewebe GmbH v. Commission of the European Communities*, Case C-185/95 P [1998] ECR I-8417, §§ 20 and 29 (Article 6); *Dieter Krombach v. André Bamberski*, Case C-7/98 [2000] ECR I-1935, §§ 39-40 (Article 6); *Mannesmannröhren-Werke AG v. Commission of the European Communities*, Case T-112/98 [2001] ECR II-729, §§ 59 and 77 (Article 6); *Connolly v. Commission of the European Communities*, Case C-274/99 [2001] ECR I-1611, § 39 (Article 10); *Mary Carpenter v. Secretary of State for the Home Department*, Case C-60/00 [2002] ECR I-6279, §§ 41-42 (Article 8); *Joachim Steffensen*, Case C-276/01 [2003] ECR I-3735, §§ 72 and 75-77 (Article 6); *Rechnungshof and Others*, Joined Cases C-465/00, C-138/01 and C-139/01 [2003] ECR I-4989, §§ 73-77 and 83 (Article 8); *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v. Commission of the European Communities*, Case T-224/00 [2003] ECR II-2597, §§ 39, 85 and 91 (Article 7); *Secretary of State for the Home Department v. Hacene Akrich*, Case C-109/01 [2003] ECR I-9607, §§ 58-60 (Article 8); *K.B. v. National Health Service Pensions Agency and Secretary of State for Health*, Case C-117/01 [2004] ECR I-541, §§ 33-35 (Article 12); *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case C-71/02 [2004] ECR I-3025, §§ 50-51 (Article 10); *Orfanopoulos and Oliveri v. Land Baden-Württemberg*, Joined Cases C-482/01 and C-493/01 [2004] ECR I-5257, §§ 98-99 (Article 8); and *JFE Engineering Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd v. Commission of the European Communities*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 [2004] ECR II-2501, § 178 (Article 6).

2. *ERT v. DEP*, cited above.

75. This statement has often been repeated by the ECJ, as, notably, in its opinion on accession by the Community to the Convention[1], in which it opined, in particular, that respect for human rights was "a condition of the lawfulness of Community acts".

76. In *Kondova*[2], relied on by the applicant company, the ECJ ruled on the refusal by the United Kingdom of an establishment request of a Bulgarian national on the basis of a provision in an association agreement between the European Community and Bulgaria:

> "... Moreover, such measures [of the British immigration authorities] must be adopted without prejudice to the obligation to respect that national's fundamental rights, such as the right to respect for his family life and the right to respect for his property, which follow, for the Member State concerned, from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or from other international instruments to which that State may have acceded."

## B. Relevant treaty provisions[3]

### *1. Concerning fundamental rights*

77. The case-law developments noted above were reflected in certain treaty amendments. In the preamble to the Single European Act of 1986, the Contracting Parties expressed their determination

> "to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms ...".

78. Article 6 (formerly Article F) of the Treaty on European Union of 1992 reads as follows:

> "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
>
> 3. The Union shall respect the national identities of its Member States.

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1. *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Opinion 2/94 [1996] ECR I-1759.
2. *The Queen v. Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova*, Case C-235/99 [2001] ECR I-6427.
3. Given the period covered by the facts of the case, the former numbering of Articles of the EC Treaty is used (followed, where appropriate, by the present numbering).

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

79. The Treaty of Amsterdam of 1997 required the ECJ, in so far as it had jurisdiction, to apply human rights standards to acts of Community institutions and gave the European Union the power to act against a member State that had seriously and persistently violated the principles of Article 6(1) of the Treaty on European Union, cited above.

80. The Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (not fully binding), states in its preamble that it

"reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights".

Article 52 § 3 of the Charter provides:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

81. The Treaty establishing a Constitution for Europe, signed on 29 October 2004 (not in force), provides in its Article I-9 entitled "Fundamental Rights":

"1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

3. 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, shall constitute general principles of the Union's law."

The Charter of Fundamental Rights cited above has been incorporated as Part II of this constitutional treaty.

*2. Other relevant provisions of the EC Treaty*

82. Article 5 (now Article 10) provides:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from

action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

83. The relevant part of Article 189 (now Article 249) reads as follows:

"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. ..."

The description of a regulation as being "binding in its entirety" and "directly applicable" in all member States means that it takes effect[1] in the internal legal orders of member States without the need for domestic implementation.

84. Article 234 (now Article 307) reads as follows:

"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

## C. The European Community control mechanisms

85. As regards the control exercised by the ECJ and national courts, the ECJ has stated as follows:

"39. Individuals are ... entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ...

1. Regulations come into force on the date specified therein or, where no such date is specified, twenty days after publication in the Official Journal (Article 191(2), now 254(2)).

40. By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts ... Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid ..., to make a reference to the Court of Justice for a preliminary ruling on validity.

41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.

42. In that context, in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act."[1]

### *1. Direct actions before the ECJ*

#### (a) Actions against Community institutions

86. Article 173 (now Article 230) provides member States, the European Parliament, the Council and the Commission with a right to apply to the ECJ for judicial review of a Community act ("annulment action"). Applications from the Court of Auditors and the European Central Bank are more restricted and, while subject to even greater restrictions, an individual (a natural or legal person) can also challenge "a decision addressed to that person or ... a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former" (Article 173(4), now Article 230(4)).

87. According to Article 175 (now Article 232) member States and the Community institutions can also call, among others, the Council, the Commission and the European Parliament to account before the ECJ for a failure to perform their Treaty obligations. Article 184 (now Article 241) allows a plea of illegality of a regulation (adopted jointly by the European Parliament and the Council, by the Council, by the Commission or by the European Central Bank) to be made during proceedings already pending before the ECJ on the basis of another Article: a successful challenge will result in the ECJ declaring its inapplicability *inter partes*, but not the annulment of the relevant provision.

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1. *Unión de Pequeños Agricultores v. Council of the European Union*, Case C-50/00 P ECR [2002] I-6677.

88. Having legal personality of its own, the European Community can be sued for damages in tort, described as its non-contractual liability. Its institutions will be considered liable for wrongful (illegal or invalid) acts or omissions by the institution (*fautes de service*) or its servants (*fautes personnelles*) which have caused damage to the claimant (Articles 178 and 215, now Articles 235 and 288). Unlike actions under Articles 173, 175 and 184 (now Articles 230, 232 and 241), and subject to the various inherent limitations imposed by the elements of the action to be established, there are no personal or *locus standi* limitations on the right to bring such an action. It can therefore provide an independent cause of action[1] before the ECJ to review the legality of an act or failure to act to those (including individuals) who do not have *locus standi* under Articles 173 or 175 but who have suffered damage.

**(b) Actions against member States**

89. Under Article 169 (now Article 226) and Article 170 (now Article 227), both the Commission (in fulfilment of its role as "guardian of the Treaties") and a member State are accorded, notably, the right to take proceedings against a member State considered to have failed to fulfil its Treaty obligations. If the ECJ finds that a member State has so failed, the State shall be required to take the necessary measures to comply with the judgment of the ECJ (Article 171, now Article 228). The Commission can also take proceedings against a member State in other specific areas of Community regulation (such as State aids – Article 93, now Article 88).

**(c) Actions against individuals**

90. There is no provision in the EC Treaty for a direct action before the ECJ against individuals. Individuals may, however, be fined under certain provisions of Community law; such fines may, in turn, be challenged before the ECJ.

*2. Indirect actions before the national courts*

91. Where individuals seek to assert their Community rights before national courts or tribunals, they may do so in the context of any proceedings of national law, public or private, in which Community rights are relevant, in pursuit of any remedy, final or interim, under national law.

**(a) Direct effects**

92. The "direct effect" of a provision of Community law means that it confers upon individuals rights and obligations they can rely on before the national courts. A provision with direct effect must not only be applied by

1. See *Aktien-Zuckerfabrik Schöppenstedt v. Council of the European Communities*, Case 5/71 [1971] ECR 975.

the domestic courts, but it will take precedence over conflicting domestic law pursuant to the principle of supremacy of Community law[1]. The conditions for acquiring direct effect are that the provision

> "contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of the States which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between States and their subjects" [2].

93. Certain EC Treaty provisions are considered to have direct effect, whether they impose a negative or positive obligation and certain have been found to have, as well as "vertical" effect (between the State and the individual), a horizontal effect (between individuals). Given the text of Article 189 (now Article 249), the provisions of regulations are normally considered to have direct effect, both vertically and horizontally. Directives and decisions can, in certain circumstances, have vertical direct effect, though recommendations and opinions, having no binding force, cannot generally be relied on by individuals before national courts.

**(b) The principles of indirect effect and State liability**

94. The rights an individual may claim under Community law are no longer confined to those under directly effective Community provisions: they now include rights based on the principles of indirect effect and State liability developed by the ECJ. According to the principle of "indirect effect" ("*interprétation conforme*"), a member State's obligations under Article 5 (now Article 10) require its authorities (including the judiciary) to interpret as far as possible national legislation in the light of the wording and purpose of the relevant directive[3].

95. The principle of State liability was first developed in *Francovich*[4]. The ECJ found that, where a State had failed to implement a directive (whether or not directly effective), it would be obliged to compensate individuals for resulting damage if three conditions were met: the directive conferred a right on individuals; the content of the right was clear from the provisions of the directive itself; and there was a causal link between the State's failure to fulfil its obligation and the damage suffered by the person affected. In 1996 the ECJ extended the notion of State liability to all

1. See *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70 [1970] ECR 1125.
2. Laid down in *Van Gend en Loos v. Nederlandse Administratie des Belastingen*, Case 26/62 [1963] ECR 1.
3. See *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83 [1984] ECR 1891, and *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, Case C-106/89 [1990] ECR I-4135.
4. *Francovich and Others v. Italian Republic*, Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357.

domestic acts and omissions (legislative, executive and judicial) in breach of Community law provided the conditions for liability were fulfilled[1].

**(c) Preliminary reference procedure**

96. In order to assist national courts in correctly implementing Community law and maintaining its uniform application[2], Article 177 (now Article 234) provides national courts with the opportunity to consult the ECJ. In particular, Article 177 reads as follows:

> "The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of this Treaty;
>
> (b) the validity and interpretation of acts of the institutions of the Community ...;
>
> ...
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."

97. The ECJ described the nature of this preliminary reference procedure as follows[3]:

> "30. ... the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts by means of which the former provides the latter with interpretation of such Community law as is necessary for them to give judgment in cases upon which they are called to adjudicate ...
>
> 31. In the context of that cooperation, it is for the national court seised of the dispute, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling ... "

1. See *Brasserie du Pêcheur S.A. v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029; see also *Gerhard Köbler v. Republik Österreich*, Case C-224/01 [2003] ECR I-10239.
2. *Commission of the European Communities v. Portuguese Republic*, Case C-55/02 [2004] ECR I-9387, § 45.
3. See *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case C-112/00 [2003] ECR I-5659.

98. Article 177 distinguishes between domestic courts which have a discretion to refer and those courts of last instance for which referral is mandatory. However, according to the *CILFIT*[1] judgment, both categories of court must first determine whether an ECJ ruling on the Community law matter is "necessary to enable it to give judgment", even if the literal meaning of Article 177 would suggest otherwise:

> "It follows from the relationship between the second and the third paragraphs of Article 177 that the courts ... referred to in the third paragraph have the same discretion as any other national court ... to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment."

In *CILFIT* the ECJ indicated that a court of final instance would not be obliged to make a reference to the ECJ if: the question of Community law was not relevant (namely, if the answer to the question of Community law, regardless of what it may be, could in no way affect the outcome of the case); the provision had already been interpreted by the ECJ, even though the questions in issue were not strictly identical; and the correct application of Community law was so obvious as to leave no scope for reasonable doubt, not only to the national court but also to the courts of the other member States and to the ECJ. This matter was to be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gave rise and the risk of divergences in judicial decisions within the Community.

99. Once the reference is made, the ECJ will rule on the question put to it and that ruling is binding on the national court. The ECJ has no power to decide the issue before the national court and cannot therefore apply the provision of Community law to the facts of the particular case in question[2]. The domestic court will decide on the appropriate remedy.

## IV. OTHER RELEVANT LEGAL PROVISIONS

### A. The Vienna Convention on the Law of Treaties of 1969

100. Article 31 § 1, entitled "General rule of interpretation", provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31 § 3 further provides that, as well as the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation

1. *S.r.l. CILFIT and Lanificio di Gavardo S.p.a. v. Ministry of Health*, Case 283/81 [1982] ECR 3415.
2. See *Jacob Adlerblum v. Caisse nationale d'assurance vieillesse des travailleurs salariés*, Case 93-75 [1975] ECR 2147.

together with any relevant rules of international law applicable in the relations between the parties shall be taken into account.

### B. The Irish Constitution

101. The relevant part of Article 29 of the Irish Constitution reads as follows:

> "1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.
>
> ...
>
> 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.
>
> 4. 1° ...
>
> 10° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

## THE LAW

### I. PRELIMINARY OBJECTIONS

102. The Government maintained that the applicant company had failed to exhaust domestic remedies because it had not brought an action for damages (in contract or tort) against TEAM or initiated a constitutional action against Ireland. In any event, the application should have been introduced within six months of the ECJ ruling (since the Supreme Court had no choice but to implement that ruling) and was an abuse of the right of petition (given that the applicant company was not an "innocent" party, attempting as it did to mislead the domestic courts and this Court in a number of material respects). The European Commission added that the Supreme Court did not refer a question concerning Regulation (EC) no. 2472/94 to the ECJ because the applicant company had not relied on the regulation in the domestic proceedings. Other than referring to the Chamber's admissibility decision, the applicant company did not comment.

The Chamber considered, for reasons outlined in its decision, that it would have been unreasonable to require the applicant company to have

taken proceedings in tort, contract or under the Constitution instead of, or during, its action in judicial review. It had not, moreover, been demonstrated that such proceedings offered any real prospects of success thereafter. The final decision, for the purposes of Article 35 § 1 of the Convention and the six-month time-limit, was that of the Supreme Court of November 1996 which applied the ECJ's ruling. Finally, the Chamber found that the parties' submissions about the applicant company's bona fides made under Article 35 § 3 of the Convention and under Article 1 of Protocol No. 1 were the same and, further, that the bona fides issue was so closely bound up with the merits of the complaint under the latter Article that it was appropriate to join it to the merits.

103. The Grand Chamber is not precluded from deciding admissibility questions at the merits stage: the Court can dismiss applications it considers inadmissible "at any stage of the proceedings", so that even at the merits stage (and subject to Rule 55 of the Rules of Court) it may reconsider an admissibility decision where it concludes that the application should have been declared inadmissible for one of the reasons listed in Article 35 of the Convention (see *Pisano v. Italy* (striking out) [GC], no. 36732/97, § 34, 24 October 2002, and *Odièvre v. France* [GC], no. 42326/98, §§ 21-23, ECHR 2003-III).

104. However, the Grand Chamber observes that the present preliminary objections are precisely the same as those raised before the Chamber, and dismissed by the latter in its admissibility decision, and it sees no reason to depart from the Chamber's conclusions in those respects. In particular, the Government have made no new legal submissions to the Grand Chamber as regards their exhaustion of domestic remedies and time-limit objections. While they have made additional factual submissions as regards the applicant company's bona fides upon which their abuse of process claim is based, this does not affect in any respect the Chamber's view that the bona fides issue would fall to be examined, if at all, as part of the merits of the complaint under Article 1 of Protocol No. 1.

105. Without prejudice to the question of whether it is open to a third party admitted to a case following its admissibility to make a preliminary objection, the Grand Chamber does not consider that the above-noted comment of the European Commission warrants a conclusion that the applicant company failed to exhaust domestic remedies. Regulation (EC) no. 2472/94 expressly excluded from its provisions aircraft already impounded under Regulation (EEC) no. 990/93 and the applicant company had already challenged, in the very domestic proceedings to which the European Commission referred, the lawfulness of the original impoundment under Regulation (EEC) no. 990/93.

106. The Court therefore dismisses all preliminary objections before it.

## II. SUBMISSIONS CONCERNING ARTICLE 1 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1

107. The applicant company maintained that the manner in which Ireland had implemented the sanctions regime to impound its aircraft was a reviewable exercise of discretion within the meaning of Article 1 of the Convention and a violation of Article 1 of Protocol No. 1. The Government disagreed, as did the third parties with the exception (in part) of the *Institut de formation en droits de l'homme du barreau de Paris*. The Court considers it clearer to set out the submissions made to it in the order followed below.

### A. The Government

#### *1. Article 1 of the Convention*

108. The Convention must be interpreted in such a manner as to allow States Parties to comply with international obligations so as not to thwart the current trend towards extending and strengthening international cooperation (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 72, ECHR 1999-I, and *Beer and Regan v. Germany* [GC], no. 28934/95, § 62, 18 February 1999). It is not therefore contrary to the Convention to join international organisations and undertake other obligations where such organisations offer human rights protection equivalent to the Convention. This principle was first outlined in *M. & Co. v. the Federal Republic of Germany* (no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports (DR) 64, p. 138) and was then endorsed in *Heinz v. the Contracting Parties also parties to the European Patent Convention* (no. 21090/92, Commission decision of 10 January 1994, DR 76-A, p. 125).

109. The critical point of distinction for the Government was whether the impugned State act amounted to an obligation or the exercise of a discretion. If, on the one hand, the State had been obliged as a result of its membership of an international organisation to act in a particular manner, the only matter requiring assessment was the equivalence of the human rights protection in the relevant organisation (the "*M. & Co.* doctrine" described above). If, on the other hand, the State could as a matter of law exercise independent discretion, this Court was competent. Contrary to the applicant company's submission, *Matthews v. the United Kingdom* ([GC], no. 24833/94, ECHR 1999-I), *Cantoni v. France* (judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V) and *Hornsby v. Greece* (judgment of 19 March 1997, *Reports* 1997-II), had no application to the present case, as they were concerned with discretionary decisions available to, and taken by, States.

110. Moreover, the Government considered that Ireland had acted out of obligation and that the European Community and the United Nations provided human rights protection equivalent to that of the Convention.

As to the international obligations of the Irish State, the Government argued that it had complied with mandatory obligations derived from UNSC Resolution 820 (1993) and Regulation (EEC) no. 990/93. As a matter of Community law, a regulation left no room for the independent exercise of discretion by the State. The direct effectiveness of Regulation (EEC) no. 990/93 meant that Statutory Instrument no. 144 of 1993 had no bearing on the State's legal obligation to impound. The ECJ later conclusively confirmed the applicability of Article 8 of Regulation (EEC) no. 990/93 and, thereby, the lawful basis for the impoundment. Even if the jurisdiction of the ECJ in a reference case could be considered limited, it had authoritatively resolved the present domestic action.

For the State to have done anything other than apply the ECJ ruling, even with a view to its Convention compliance, would have been contrary to its obligation of "loyal cooperation" (Article 5, now Article 10, of the EC Treaty – see paragraph 82 above) and undermined the special judicial cooperation between the national court and the ECJ envisaged by Article 177 (now Article 234) of the EC Treaty (see paragraphs 96-99 above). As to the applicant company's suggestion that the Supreme Court should have awarded compensation while applying the ECJ ruling, the Government considered that it was implicit in the opinion of the Advocate General in the ruling of the ECJ and in the second sentence of Article 8 of Regulation (EEC) no. 990/93 that that regulation did not envisage the payment of compensation. If the scheme envisaged was one of detention without compensation, it would be contrary to the principle of uniform application and supremacy of Community law for member States nevertheless to consider making an award.

Finally, the Government found unconvincing the applicant company's suggestion that the Supreme Court had exercised discretion in not taking account of the intervening relaxation of the sanctions regime. If the initial impoundment was lawful (under Article 8 of Regulation (EEC) no. 990/93 as confirmed by the ECJ), by definition, the partial relaxation of the sanctions regime in October 1994 did not apply to the applicant company's aircraft as it had already been lawfully impounded. The terms of Regulation (EC) no. 2472/94 were as mandatory and clear as those of Regulation (EEC) no. 990/93. It was, indeed, for this reason that a second reference to the ECJ raising Regulation (EC) no. 2472/94 would have been possible but pointless.

111. As to the equivalence of the European Community human rights protection, the Government pointed to, *inter alia*, Article 6 of the Treaty on European Union, the judicial remedies offered by the ECJ and the national courts, the reliance on Convention provisions and jurisprudence by the ECJ

and the declarations of certain Community institutions. Moreover, the applicant company had had the opportunity, unlike in *Matthews*, fully to ventilate its claim that its fundamental rights had been breached and the decision of the ECJ had been based on a consideration of its property rights. As to the United Nations, the Government pointed to Articles 1 § 3 and 55 of the United Nations Charter, together with the Universal Declaration of Human Rights of 1948 and the International Covenants on Civil and Political Rights and on Economic and Social and Cultural Rights of 1966.

*2. Article 1 of Protocol No. 1*

112. The Government's primary argument was that Ireland's compliance with its international obligations constituted in itself sufficient justification for any interference with the applicant company's property rights.

113. In the alternative, the impounding of the aircraft amounted to a lawful and proportionate control of use of the applicant company's possessions in the public interest (see *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, pp. 17-18, § 51, and *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A no. 316-A, p. 16, § 34). The margin of appreciation was broad, given the strength of the two public-interest objectives pursued: the principles of public international law, including *pacta sunt servanda*, pursuant to which the State discharged clear mandatory international obligations following the decisions of the relevant United Nations and European Community bodies (the Sanctions Committee and the ECJ), and participation in an international effort to end a conflict.

114. The Government relied on their submissions in the context of Article 1 of the Convention in order to argue that Article 1 of Protocol No. 1 did not require compensation or account to have been taken of the relaxation of the sanctions regime in October 1994. They also made detailed submissions challenging the applicant company's bona fides, although they maintained that its innocence would not have rendered the impoundment inconsistent with Article 1 of Protocol No. 1. Finally, they replied to the applicant company's detailed allegations concerning the position of TEAM and, in particular, explained that proceedings had not been issued against TEAM because that would have amounted to applying retrospectively the criminal liability for which Statutory Instrument no. 144 of 1993 had provided.

## B. The applicant company

### *1. Article 1 of the Convention*

115. The applicant company considered that the terms of Regulation (EEC) no. 990/93 and the preliminary reference procedure admitted of State discretion for which Ireland was responsible under the Convention.

It agreed that if the substance of its grievance had resulted solely from Ireland's international obligations, this Court would have had no competence. In *M. & Co.* (and other cases relied on by the Government), the complaint had been directed against acts of international organisations over the elaboration of which the member State had no influence and in the execution of which the State had no discretion. Since the applicant company was not challenging the provisions of Regulation (EEC) no. 990/93 or the sanctions regime *per se*, the "equivalent protection" principle of *M. & Co.* was not relevant. On the contrary, the Irish State had been intimately involved in the adoption and application of Regulation (EEC) no. 990/93 and had, at all material times, a real and reviewable discretion as to the means by which the result required by that regulation could be achieved.

116. In particular, the applicant company considered that the State had impounded the aircraft as a preventive measure without a clear United Nations or European Community obligation to do so, and that it had not been obliged to appeal from the High Court judgment of June 1994. The Supreme Court was not required to refer a question to the ECJ (see *CILFIT*, cited above, and this Court's decision in *Moosbrugger v. Austria* (dec.), no. 44861/98, 25 January 2000). Subsequently, in referring the question it did to the ECJ, and since, under the terms of Article 177 (now Article 234), the ECJ could only reply to the interpretative (or validity) question raised, the Supreme Court had effectively chosen to exclude certain matters from the examination of the ECJ. Moreover, given the terms of Article 234 (now Article 307), the Supreme Court should have implemented the ECJ ruling in a manner compatible with the Convention, whereas it had simply "rubber-stamped" that ruling: it should have considered, and made a further reference to the ECJ if necessary, certain additional matters prior to implementing the ruling of the ECJ. The matters thereby not considered by the Supreme Court and not put before the ECJ concerned, *inter alia*, whether impoundment expenses should be charged, whether compensation should be paid, and the effect of Regulation (EC) no. 2472/94 and the relaxation of the sanctions regime (see paragraphs 67-71 above). The applicant company noted that certain relevant matters were raised in an affidavit filed on its behalf in the Supreme Court following the ECJ ruling (see paragraph 57 above) but that the Supreme Court ignored those points.

117. The applicant company considered its position to be consistent with Convention case-law. More generally, while the Convention did not exclude the transfer of competences to international organisations, the State had to continue to secure Convention rights (see *T.I. v. the United Kingdom* (dec.), no. 43844/98, ECHR 2000-III, and *M. & Co.*, cited above). The Convention institutions had on numerous occasions examined the compatibility with the Convention of the discretion exercised by a State in applying Community law (see, *inter alia*, *Van de Hurk v. the Netherlands*, judgment of 19 April 1994, Series A no. 288; *Procola v. Luxembourg*, judgment of 28 September 1995, Series A no. 326; *Cantoni* and *Hornsby*, both cited above; *Pafitis and Others v. Greece*, judgment of 26 February 1998, *Reports* 1998-I; *Matthews*, cited above; *S.A. Dangeville v. France*, no. 36677/97, ECHR 2002-III; and *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III). The case-law of the ECJ itself supported the applicant company's position (see *Kondova*, cited above, § 90), that case being the first in which, according to the applicant company, the ECJ recognised that it could not claim to be the final arbiter of questions of human rights as member States remained answerable to this Court. The applicant company also relied on *Pellegrini v. Italy* (no. 30882/96, ECHR 2001-VIII), where the Court found a violation of Article 6 because the Italian courts did not satisfy themselves as to the fairness of proceedings before the ecclesiastical courts of the Rome Vicariate before enforcing a decision of those tribunals.

If the Court were to follow the Government's reliance on *M. & Co.*, *Waite and Kennedy* and *Beer and Regan*, then any member State of the European Community could, according to the applicant company, escape its Convention responsibility once its courts had referred a question to the ECJ and implemented its ruling. The percentage of domestic law sourced in the European Community is significant and growing and the matters now covered by Community law are increasingly broad and sensitive: to accept that all State acts implementing a Community obligation fall outside its Convention responsibility would create an unacceptable lacuna of human rights protection in Europe.

118. In any event, the applicant company argued that the European Community did not offer "equivalent protection". The limited role of the ECJ under Article 177 (now Article 234) has been outlined above: there was no inherent jurisdiction in the ECJ to consider whether matters such as the absence of compensation and discriminatory treatment of the applicant company amounted to a breach of its property rights. Proceedings against a member State for an act or omission allegedly in violation of Community law could only be initiated before the ECJ by the European Commission or another member State; individuals had to bring proceedings in the national courts. A party to such domestic proceedings had no right to make an Article 177 (now Article 234) reference, that being a matter for the domestic court. As indicated in *Kondova*, cited above, if a Community provision was

considered to infringe the Convention, the national courts and this Court, rather than the ECJ, would be the final arbiters.

119. For these reasons, the applicant company maintained that the exercise of discretion by the Irish authorities as described above regarding the impoundment of its aircraft should be reviewed by this Court for its compatibility with the Convention.

*2. Article 1 of Protocol No. 1*

120. The applicant company maintained that the interference with its possessions (the impoundment) amounted to a deprivation which could not be described as "temporary" given its impact. It was also unlawful, since the Government had not produced any documentary evidence of the legal basis for the interference and since implementing Statutory Instrument no. 144 of 1993, indicating which authority was competent to impound, was not adopted until after the impoundment.

121. Moreover, such an interference was unjustified because it was not in accordance with the "general principles of international law" within the meaning of Article 1 of Protocol No. 1 and because it left an innocent party to bear an individual and excessive burden, as the Government had failed to strike a fair balance between the general interest (the international community's interest in putting an end to a war and the associated significant human rights violations and breaches of humanitarian law) and the individual damage (the significant economic loss of an innocent party).

In particular, the applicant company considered that certain factors distinguished its case from *AGOSI* and *Air Canada* (both cited above). It also considered unjustifiable the situation which obtained after the adoption of Regulation (EC) no. 2472/94 (its aircraft remained grounded while those of JAT could fly). Compensation was an important element in the overall justification and its absence in a *de facto* deprivation situation generally amounted to a disproportionate interference. This was especially so in the present case, as the aim of the sanctions regime could have been achieved while paying it compensation. Finally, the applicant company made a number of allegations concerning the State's relationship with TEAM and argued, notably, that the Government's failure to prosecute TEAM (when, *inter alia*, the Sanctions Committee had recognised that TEAM had broken the sanctions regime) highlighted the unjustifiable nature of the applicant company's position, a foreign company innocent of any wrongdoing. In this latter respect, the applicant company reaffirmed its bona fides, replied in detail to the Government's allegations of bad faith and pointed out that all the courts before which the case was examined had confirmed its innocence.

## C. The third-party submissions

### *1. The European Commission ("the Commission")*

#### (a) Article 1 of the Convention

122. The Commission considered that the application concerned in substance a State's responsibility for Community acts: while a State retained some Convention responsibility after it had ceded powers to an international organisation, that responsibility was fulfilled where there was proper provision in that organisation's structure for effective protection of fundamental rights at a level at least "equivalent" to that of the Convention. The Commission therefore supported the approach adopted in *M. & Co.* (cited above) and urged the Court to adopt this solution pending accession to the Convention by the European Union. Thereafter, any Convention responsibility, over and above the need to establish equivalent protection, would only arise when the State exercised a discretion accorded to it by the international organisations.

123. The Commission considered this approach to be consistent with the recent case-law of this Court. The reference in *Matthews* (cited above) to a State's Convention responsibility continuing after a transfer of competence to the European Community and to the Convention responsibility of the United Kingdom was consistent with the *M. & Co.* approach, given the differing impugned measures in issue in both cases. *Waite and Kennedy* and *Beer and Regan* (both cited above) fully confirmed the Commission's position. *Cantoni* was clearly distinguishable, as this Court had reviewed the discretion exercised by the French authorities to create criminal sanctions in implementing a Community directive.

124. The reason for initially adopting this "equivalent protection" approach (facilitating State cooperation through international organisations) was equally, if not more, pertinent today. It was an approach which was especially important for the European Community given its distinctive features of supranationality and the nature of Community law: to require a State to review for Convention compliance an act of the European Community before implementing it (with the unilateral action and non-observance of Community law that would potentially entail) would pose an incalculable threat to the very foundations of the Community, a result not envisaged by the drafters of the Convention, supportive as they were of European cooperation and integration. Moreover, subjecting individual Community acts to Convention scrutiny would amount to making it a respondent in Convention proceedings without any of the procedural rights and safeguards of a Contracting State to the Convention. In short, the *M. &*

*Co.* approach allowed the Convention to be applied in a manner which took account of the needs and realities of international relations and the unique features of the Community system.

125. In the opinion of the Commission, the respondent State had no discretion under Community law. When a case involved an Article 177 (now Article 234) reference, this Court should distinguish between the respective roles of the national courts and the ECJ, so that if the impugned act was a direct result of the ECJ's ruling this Court should refrain from scrutinising it.

In the Commission's view, Ireland was obliged (especially given the opinion of the Sanctions Committee) on account of its duty of loyal cooperation (Article 5, now Article 10, of the EC Treaty) to appeal the judgment of Mr Justice Murphy of the High Court to the Supreme Court in order to ensure effective implementation of Regulation (EEC) no. 990/93. The Supreme Court, as the last-instance court, was obliged under Article 177 (now Article 234) of the EC Treaty to make a reference to the ECJ since there was no doubt that the government's appeal before it raised a serious and central question of interpretation of Community law. The Supreme Court asked the ECJ whether Article 8 of Regulation (EEC) no. 990/93 applied to an aircraft such as that leased by the applicant company and the ECJ ruled that it did, having reviewed the fundamental rights aspects of the case so that, although the ECJ could not examine the particular facts of cases, the impoundment in question was conclusively assessed and decided by the ECJ. The ruling of the ECJ was binding on the Supreme Court.

In those circumstances, the Supreme Court had no discretion to exercise and, consequently, its implementation of the ECJ ruling could not be reviewed by this Court.

126. Moreover, the Commission considered that "equivalent protection" was to be found in Community law and structures. It outlined the developing recognition of the Convention provisions as a significant source of general principles of Community law, which governed the activities of the Community institutions and States and was implemented by the Community's judicial machinery, and noted the relevant Treaty amendments reinforcing these case-law developments.

127. Finally, the Commission considered that the ruling in *Kondova* (cited above) clearly supported its position that discretionary acts of the State remained fully subject to the Convention. The applicant company's reliance on Article 234 (now Article 307) of the EC Treaty was erroneous and the conclusions drawn therefrom inappropriate: in expressing international law principles such as *pacta sunt servanda*, the said Article simply confirmed the starting-point of the relevant Convention analysis, namely, that a State cannot avoid its Convention responsibilities by ceding power to an international organisation.

**(b) Article 1 of Protocol No. 1**

128. The Commission considered it indisputable that Regulation (EEC) no. 990/93 constituted the legal basis for the impoundment. It rejected the applicant company's suggestion that the impoundment was unlawful pending national secondary legislation and agreed with the Government that the implementing statutory instrument contained administrative competence and procedural provisions which had no bearing on the directly applicable nature of Regulation (EEC) no. 990/93. For the reasons set out in the Advocate General's opinion and the ECJ's ruling, the Commission argued that the impoundment until October 1994 was proportionate and it did not find persuasive the applicant company's argument that it was unjustified thereafter.

*2. The Italian Government*

129. As regards Article 1 of the Convention, the Italian Government considered that the case amounted to a challenge to the provisions of the relevant UNSC resolution and European Community regulation and fell, as such, outside the Court's jurisdiction. The Irish State was obliged to implement these instruments, it was obliged to address the relevant organs (the Sanctions Committee and the ECJ) and to comply with the rulings obtained: this warranted a conclusion of incompatibility *ratione personae*. As to the original handing over of sovereign power to the United Nations and European Community, the Italian Government also relied on *M. & Co.*, arguing that both the United Nations and the European Community provided "equivalent protection": this warranted a conclusion of incompatibility *ratione materiae* or *personae*. Finally, any imposition of an obligation on a State to review its United Nations and European Community obligations for Convention compatibility would undermine the legal systems of international organisations and, consequently, the international response to serious international crises.

130. On the merits of Article 1 of Protocol No. 1, they underlined the importance of the public-interest objective pursued by the impoundment.

*3. The United Kingdom Government*

131. The United Kingdom Government considered that, since the complaint was against the European Community, it was incompatible with the Convention provisions. To make one member State responsible for Community acts would not only be contrary to Convention jurisprudence, but would also subvert fundamental principles of international law (including the separate legal personality of international organisations) and be inconsistent with the obligations of member States of the European

Community. They relied on *M. & Co.*, cited above, noting that human rights safeguards within the Community legal order had been further strengthened since the adoption of the decision in that case.

132. On the merits of the complaint under Article 1 of Protocol No. 1, the United Kingdom Government underlined the importance of the public interest at stake, considered that the margin of appreciation was therefore wide, and argued that, even if the applicant company was an innocent party, this would not render the interference with its property rights disproportionate (see *AGOSI* and *Air Canada*, both cited above).

*4. The* Institut de formation en droits de l'homme du barreau de Paris *("the* Institut*")*

133. The *Institut* considered the case compatible with the provisions of the Convention. However, it was equally of the view that this would not prevent member States from complying with their Community obligations or mean that the Court would have jurisdiction to examine Community provisions in the light of the Convention. The application was compatible *ratione personae*, since the object of the case was not to challenge United Nations or European Community provisions but rather Ireland's implementation of them. It was compatible *ratione materiae* because Article 1 of the Convention did not exclude a particular type of measure or any part of a member State's jurisdiction from scrutiny. The *Institut* pointed, by way of illustration, to the matters assessed by the Court in a number of cases including those of *Cantoni*, *Matthews*, and *Waite and Kennedy* (all cited above). Since neither the United Nations nor the European Community provided equivalent human rights protection (especially when seen from the point of view of individual access to that protection and the limitations of the preliminary reference procedure), the complaint had to be found compatible with the provisions of the Convention.

134. As to the merits of the complaint under Article 1 of Protocol No. 1, the *Institut* considered the initial impoundment of the aircraft to be entirely justified but left open the justifiability of the retention of the aircraft after October 1994.

## III. THE COURT'S ASSESSMENT

### A. Article 1 of the Convention

135. The parties and third parties made substantial submissions under Article 1 of the Convention about the Irish State's Convention responsibility for the impoundment given its Community obligations. This Article provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

136. The text of Article 1 requires States Parties to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction" (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII). The notion of "jurisdiction" reflects the term's meaning in public international law (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99, and 48209/99, § 20, 14 May 2002; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; and *Assanidze v. Georgia*, no. 71503/01, § 137, ECHR 2004-II), so that a State's jurisdictional competence is considered primarily territorial (see *Banković and Others*, § 59), a jurisdiction presumed to be exercised throughout the State's territory (see *Ilaşcu and Others*, § 312).

137. In the present case it is not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the "jurisdiction" of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci*, *personae* and *materiae* with the provisions of the Convention.

138. The Court is further of the view that the submissions referred to in paragraph 135 above concerning the scope of the responsibility of the respondent State go to the merits of the complaint under Article 1 of Protocol No. 1 and are therefore examined below.

## B. Article 1 of Protocol No. 1

139. Article 1 of Protocol No. 1 reads as follows:

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

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

140. It was not disputed that there was an "interference" (the detention of the aircraft) with the applicant company's "possessions" (the benefit of its lease of the aircraft) and the Court does not see any reason to conclude otherwise (see, for example, *Stretch v. the United Kingdom*, no. 44277/98, §§ 32-35, 24 June 2003).

*1. The applicable rule*

141. The parties did not, however, agree on whether that interference amounted to a deprivation of property (first paragraph of Article 1 of Protocol No. 1) or a control of the use of property (second paragraph). The Court reiterates that, in guaranteeing the right of property, this Article comprises "three distinct rules": the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see *AGOSI*, cited above, p. 17, § 48).

142. The Court considers that the sanctions regime amounted to a control of the use of property considered to benefit the former FRY and that the impugned detention of the aircraft was a measure to enforce that regime. While the applicant company lost the benefit of approximately three years of a four-year lease, that loss formed a constituent element of the above-mentioned control on the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is applicable in the present case (see *AGOSI*, cited above, pp. 17-18, §§ 50-51, and *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February 1995, Series A no. 306-B, pp. 47-48, § 59), the "general principles of international law" within the particular meaning of the first paragraph of Article 1 of Protocol No. 1 (and relied on by the applicant company) not therefore requiring separate examination (see *Gasus Dosier- und Fördertechnik GmbH*, pp. 51-53, §§ 66-74).

*2. The legal basis for the impugned interference*

143. The parties strongly disagreed as to whether the impoundment was at all times based on legal obligations on the Irish State flowing from Article 8 of Regulation (EEC) no. 990/93.

For the purposes of its examination of this question, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community's judicial organs are better placed to interpret and apply Community law. In each instance, the Court's role is confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see, *mutatis mutandis*, *Waite and*

*Kennedy*, cited above, § 54, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II).

144. While the applicant company alluded briefly to the Irish State's role in the Council of the European Communities (see paragraph 115 above), the Court notes that its essential standpoint was that it was not challenging the provisions of the regulation itself but rather their implementation.

145. Once adopted, Regulation (EEC) no. 990/93 was "generally applicable" and "binding in its entirety" (pursuant to Article 189, now Article 249, of the EC Treaty), so that it applied to all member States, none of which could lawfully depart from any of its provisions. In addition, its "direct applicability" was not, and in the Court's view could not be, disputed. The regulation became part of domestic law with effect from 28 April 1993 when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation (see, in general, paragraphs 65 and 83 above).

The later adoption of Statutory Instrument no. 144 of 1993 did not, as suggested by the applicant company, have any bearing on the lawfulness of the impoundment; it simply regulated certain administrative matters (the identity of the competent authority and the sanction to be imposed for a breach of the regulation) as foreseen by Articles 9 and 10 of the EEC regulation. While the applicant company queried which body was competent for the purposes of the regulation (see paragraph 120 above), the Court considers it entirely foreseeable that the Minister for Transport would implement the impoundment powers contained in Article 8 of Regulation (EEC) no. 990/93.

It is true that Regulation (EEC) no. 990/93 originated in a UNSC resolution adopted under Chapter VII of the United Nations Charter (a point developed in some detail by the Government and certain third parties). While the resolution was pertinent to the interpretation of the regulation (see the opinion of the Advocate General and the ruling of the ECJ – paragraphs 45-50 and 52-55 above), the resolution did not form part of Irish domestic law (Mr Justice Murphy – paragraph 35 above) and could not therefore have constituted a legal basis for the impoundment of the aircraft by the Minister for Transport.

Accordingly, the Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of Regulation (EEC) no. 990/93 applied. Their decision that it did so apply was later confirmed, in particular, by the ECJ (see paragraphs 54-55 above).

146. The Court finds persuasive the European Commission's submission that the State's duty of loyal cooperation (Article 5, now Article 10, of the EC Treaty) required it to appeal the High Court judgment of June 1994 to the Supreme Court in order to clarify the interpretation of Regulation (EEC) no. 990/93. This was the first time that regulation had been applied, and the High Court's interpretation differed from that of the Sanctions Committee, a

body appointed by the United Nations to interpret the UNSC resolution implemented by the regulation in question.

147. The Court would also agree with the Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ, for the reasons set out below.

In the first place, there being no domestic judicial remedy against its decisions, the Supreme Court had to make the preliminary reference it did having regard to the terms of Article 177 (now Article 234) of the EC Treaty and the judgment of the ECJ in *CILFIT* (see paragraph 98 above): the answer to the interpretative question put to the ECJ was not obvious (the conclusions of the Sanctions Committee and the Minister for Transport conflicted with those of the High Court); the question was of central importance to the case (see the High Court's description of the essential question in the case and its consequential judgment from which the Minister appealed to the Supreme Court – paragraphs 35-36 above); and there was no previous ruling by the ECJ on the point. This finding is not affected by the observation in the Court's decision in *Moosbrugger* (cited and relied on by the applicant company – see paragraph 116 above) that an individual does not *per se* have a right to a referral.

Secondly, the ECJ ruling was binding on the Supreme Court (see paragraph 99 above).

Thirdly, the ruling of the ECJ effectively determined the domestic proceedings in the present case. Given the Supreme Court's question and the answer of the ECJ, the only conclusion open to the former was that Regulation (EEC) no. 990/93 applied to the applicant company's aircraft. It is moreover erroneous to suggest, as the applicant company did, that the Supreme Court could have made certain orders additional to the ECJ ruling (including a second "clarifying" reference to the ECJ) as regards impoundment expenses, compensation and the intervening relaxation of the sanctions regime. The applicant company's motion and affidavit of October 1996 filed with the Supreme Court did not develop these matters in any detail or request that court to make such supplemental orders. In any event, the applicant company was not required to discharge the impoundment expenses.

The fact that Regulation (EEC) no. 990/93 did not admit of an award of compensation was implicit in the findings of the Advocate General and the ECJ (each considered the application of the regulation to be justified despite the hardship it implied) and in the expenses provisions of the second sentence of Article 8 of the regulation. Consequently, the notions of uniform application and supremacy of Community law (see paragraphs 92 and 96 above) prevented the Supreme Court from making such an award. As noted in paragraph 105 above, Regulation (EC) no. 2472/94 relaxing the sanctions regime as implemented in the European Community from October 1994

expressly excluded from its ambit aircraft already lawfully impounded, and neither the ECJ nor the Supreme Court referred to this point in their respective ruling (of July 1996) and judgment (of November 1996).

148. For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93.

*3. Whether the impoundment was justified*

**(a) The general approach to be adopted**

149. Since the second paragraph of Article 1 of Protocol No. 1 is to be construed in the light of the general principle enunciated in the opening sentence of that Article, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued (see *AGOSI*, cited above, p. 18, § 52).

150. The Court considers it evident from its finding in paragraphs 145 to 148 above that the general interest pursued by the impugned measure was compliance with legal obligations flowing from the Irish State's membership of the European Community.

It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations (see *Waite and Kennedy*, §§ 63 and 72, and *Al-Adsani*, § 54, both cited above; see also Article 234 (now Article 307) of the EC Treaty). Such considerations are critical for a supranational organisation such as the European Community[1]. This Court has accordingly accepted that compliance with Community law by a Contracting Party constitutes a legitimate general-interest objective within the meaning of Article 1 of

1. See *Costa v. Ente Nazionale Energia Elettrica* (ENEL), Case 6/64 [1964] ECR 585.

Protocol No. 1 (see, *mutatis mutandis*, *S.A. Dangeville*, cited above, §§ 47 and 55).

151. The question is therefore whether, and if so to what extent, that important general interest of compliance with Community obligations can justify the impugned interference by the Irish State with the applicant company's property rights.

152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity (see *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *Confédération française démocratique du travail v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989, unreported; and *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, pp. 17-18, § 29).

154. In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (see *M. & Co*., p. 145, and *Waite and Kennedy*, § 67, both cited above). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *mutatis mutandis*, *Matthews*, cited above, §§ 29 and 32-34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is

considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 27-28, § 75).

157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant company in paragraph 117 above confirm this. Each case (in particular, *Cantoni*, p. 1626, § 26) concerned a review by this Court of the exercise of State discretion for which Community law provided. *Pellegrini* is distinguishable: the State responsibility issue raised by the enforcement of a judgment not of a Contracting Party to the Convention (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, pp. 34-35, § 110) is not comparable to compliance with a legal obligation emanating from an international organisation to which Contracting Parties have transferred part of their sovereignty. *Matthews* can also be distinguished: the acts for which the United Kingdom was found responsible were "international instruments which were freely entered into" by it (see paragraph 33 of that judgment). *Kondova* (see paragraph 76 above), also relied on by the applicant company, is consistent with a State's Convention responsibility for acts not required by international legal obligations.

158. Since the impugned measure constituted solely compliance by Ireland with its legal obligations flowing from membership of the European Community (see paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with the requirements of

the Convention in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

**(b) Whether there was a presumption of Convention compliance at the relevant time**

159. The Court has described above (see paragraphs 73-81) the fundamental rights guarantees of the European Community which apply to member States, Community institutions and natural and legal persons ("individuals").

While the founding treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it, and that the Convention had a "special significance" as a source of such rights. Respect for fundamental rights has become "a condition of the legality of Community acts" (see paragraphs 73-75 above, together with the opinion of the Advocate General in the present case, paragraphs 45-50 above) and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments (notably those aspects of the Single European Act of 1986 and of the Treaty on European Union referred to in paragraphs 77-78 above).

This evolution has continued. The Treaty of Amsterdam of 1997 is referred to in paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe (not in force) provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention (see paragraphs 80-81 above).

160. However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance.

161. The Court has referred (see paragraphs 86-90 above) to the jurisdiction of the ECJ in, *inter alia*, annulment actions (Article 173, now Article 230, of the EC Treaty), in actions against Community institutions for failure to perform Treaty obligations (Article 175, now Article 232), to hear related pleas of illegality under Article 184 (now Article 241) and in cases against member States for failure to fulfil Treaty obligations (Articles 169, 170 and 171, now Articles 226, 227 and 228).

162. It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is,

consequently, their right under Article 184; and they have no right to bring an action against another individual.

163. It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a member State constitute important control of compliance with Community norms to the indirect benefit of individuals. Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions (see paragraph 88 above).

164. Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for a breach of Community law (see paragraphs 85 and 91 above). Certain EC Treaty provisions envisaged a complementary role for the national courts in the Community control mechanisms from the outset, notably Article 189 (the notion of direct applicability, now Article 249) and Article 177 (the preliminary reference procedure, now Article 234). It was the development by the ECJ of important notions such as the supremacy of Community law, direct effect, indirect effect and State liability (see paragraphs 92-95 above) which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights guarantees.

The ECJ maintains its control on the application by national courts of Community law, including its fundamental rights guarantees, through the procedure for which Article 177 of the EC Treaty provides in the manner described in paragraphs 96 to 99 above. While the ECJ's role is limited to replying to the interpretative or validity question referred by the domestic court, the reply will often be determinative of the domestic proceedings (as, indeed, it was in the present case – see paragraph 147 above) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the EC Treaty provision and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process. It is further noted that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees.

165. In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community (see paragraph 156 above).

**(c) Whether the presumption in question has been rebutted in the present case**

166. The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime

and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.

In the Court's view, therefore, it cannot be said that the protection of the applicant company's Convention rights was manifestly deficient, with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.

*4. Conclusion under Article 1 of Protocol No. 1*

167. It follows that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the preliminary objections;

2. *Holds* that there has been no violation of Article 1 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 June 2005.

Christos ROZAKIS
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mr Rozakis, Mrs Tulkens, Mr Traja, Mrs Botoucharova, Mr Zagrebelsky and Mr Garlicki;

(b) concurring opinion of Mr Ress.

C.L.R.
P.J.M.

# JOINT CONCURRING OPINION OF JUDGES ROZAKIS, TULKENS, TRAJA, BOTOUCHAROVA, ZAGREBELSKY AND GARLICKI

*(Translation)*

While we are in agreement with the operative provisions of the judgment, namely that there has been no violation of Article 1 of Protocol No. 1 in the instant case, we do not agree with all the steps in the reasoning followed by the majority, nor all aspects of its analysis. Accordingly, we wish to clarify certain points we consider important.

1. In examining Article 1 of the Convention, the judgment rightly points out, on the basis of the Court's case-law, that it follows from the wording of that provision that the States Parties must answer for any infringement of the rights and freedoms protected by the Convention committed against persons placed under their "jurisdiction" (see paragraph 136). It concludes that the applicant company's complaint is compatible not only *ratione loci* (which was not contested) and *ratione personae* (which was not in issue) but also *ratione materiae* with the provisions of the Convention (see paragraph 137). Thus, the Court clearly acknowledges its jurisdiction to review the compatibility with the Convention of a domestic measure adopted on the basis of a Community regulation and, in so doing, departs from the decision of the European Commission of Human Rights of 9 February 1990 in *M. & Co. v. the Federal Republic of Germany* (no. 13258/87, Decisions and Reports 64, p. 138).

It has now been accepted and confirmed that the principle that Article 1 of the Convention makes "no distinction as to the type of rule or measure concerned" and does "not exclude any part of the member States' 'jurisdiction' from scrutiny under the Convention" (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 17-18, § 29) also applies to Community law. It follows that the member States are responsible, under Article 1 of the Convention, for all acts and omissions of their organs, whether these arise from domestic law or from the need to fulfil international legal obligations.

2. In examining the alleged violation of Article 1 of Protocol No. 1, and having determined the applicable rule and the legal basis for the impugned interference, the Court's task was to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved and, consequently, to determine if a fair balance had been struck between the demands of the general interest

and the interest of the applicant company. By its nature, such a review of proportionality can only be carried out *in concreto*.

In the instant case, the judgment adopts a general approach based on the concept of presumption: "If such [comparable] equivalent protection [of fundamental rights] is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient" (see paragraph 156).

3. Even supposing that such "equivalent protection" exists – a finding which, moreover, as the judgment correctly observes, could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection (see paragraph 155) – we are not entirely convinced by the approach that was adopted in order to establish that such protection existed in the instant case.

The majority engages in a general abstract review of the Community system (see paragraphs 159-64 of the judgment) – a review to which all the Contracting Parties to the European Convention on Human Rights could in a way lay claim – and concludes that the protection of fundamental rights by Community law can be considered to be "equivalent" to that of the Convention system, thereby enabling the concept of presumption to be brought into play (see paragraph 165).

Needless to say, we do not wish to question that finding. We are fully convinced of the growing role of fundamental rights and their far-reaching integration into the Community system, and of the major changes in the case-law taking place in this field. However, it remains the case that the Union has not yet acceded to the European Convention on Human Rights and that full protection does not yet exist at European level.

Moreover, as the judgment rightly emphasises, "the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure observance of such rights" (see paragraph 160). From this procedural perspective, the judgment minimises or ignores certain factors which establish a genuine difference and make it unreasonable to conclude that "equivalent protection" exists in every case.

On the one hand, we have a reference for a preliminary ruling to the European Court of Justice, made not by the applicant company but by the Supreme Court of Ireland. Such a reference does not constitute an appeal but a request for interpretation (Article 234 of the EC Treaty). Although the interpretation of Community law given by the European Court of Justice is binding on the court which made the referral, the latter retains full discretion in deciding how to apply that ruling *in concreto* when resolving the dispute before it. Equally, in its general review of "equivalent protection", the

judgment should probably have explored further those situations which, admittedly, do not concern the instant case but in which the European Court of Justice allows national courts a certain discretion in implementing its judgment and which could become the subject matter of an application to the European Court of Human Rights. However, it is clear from paragraph 157 of the judgment and the reference to *Cantoni v. France* (judgment of 15 November 1996, *Reports* 1996-V) that the use of discretion in implementing a preliminary ruling by the European Court of Justice is not covered by the presumption of "equivalent protection".

On the other hand, as the judgment itself acknowledges, individuals' access to the Community court is "limited" (see paragraph 162). Yet, as the Court reiterated in *Mamatkulov and Askarov v. Turkey* ([GC], nos. 46827/99 and 46951/99, ECHR 2005-I), the right of individual application "is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention" (see paragraph 122 of that judgment). Admittedly, judicial protection under Community law is based on a plurality of appeals, among which the reference to the Court of Justice for a preliminary ruling has an important role. However, it remains the case that, despite its value, a reference for a preliminary ruling entails an internal, *a priori* review. It is not of the same nature and does not replace the external, *a posteriori* supervision of the European Court of Human Rights, carried out following an individual application.

The right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the European Communities. For the Court to leave to the Community's judicial system the task of ensuring "equivalent protection", without retaining a means of verifying on a case-by-case basis that that protection is indeed "equivalent", would be tantamount to consenting tacitly to substitution, in the field of Community law, of Convention standards by a Community standard which might be inspired by Convention standards but whose equivalence with the latter would no longer be subject to authorised scrutiny.

4. Admittedly, the judgment states that such *in concreto* review would remain possible, since the presumption could be rebutted if, in the circumstances of a particular case, the Court considered that "the protection of Convention rights was manifestly deficient" (see paragraph 156).

In spite of its relatively undefined nature, the criterion "manifestly deficient" appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under the European Convention on Human Rights. Since the Convention establishes a minimum level of protection (Article 53), any equivalence between it and the Community's protection can only ever be in terms of the means, not of the result. Moreover, it seems all the more difficult to accept that Community law could be authorised, in the name of "equivalent protection", to apply standards that are less stringent than those of the European Convention on Human Rights when we consider that the latter were formally drawn on in the Charter of Fundamental Rights of the European Union, itself an integral part of the Union's Treaty establishing a Constitution for Europe. Although these texts have not (yet) come into force, Article II-112(3) of the Treaty contains a rule whose moral weight would already appear to be binding on any future legislative or judicial developments in European Union law: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

Thus, in order to avoid any danger of double standards, it is necessary to remain vigilant. If it were to materialise, such a danger would in turn create different obligations for the Contracting Parties to the European Convention on Human Rights, divided into those which had acceded to international conventions and those which had not. In another context, that of reservations, the Court has raised the possibility of inequality between Contracting States and reiterated that this would "run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights" (*Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, p. 28, § 77).

# CONCURRING OPINION OF JUDGE RESS

1. This judgment demonstrates how important it will be for the European Union to accede to the European Convention of Human Rights in order to make the control mechanism of the Convention complete, even if this judgment has left the so-called *M. & Co*. approach far behind (no. 13258/87, Commission decision of 9 February 1990, Decisions and Reports 64). It has accepted the Court's jurisdiction *ratione loci*, *personae* and *materiae* under Article 1 of the Convention, clearly departing from an approach which would declare the European Communities immune, even indirectly, from any supervision by this Court. On the examination of the merits of the complaint, the question is whether there exists a reasonable relationship of proportionality between the interference with the applicant company's property, on the one hand, and the general interest, on the other. On the basis of its case-law, the Court developed, in particular in *Waite and Kennedy v. Germany* ([GC], no. 26083/94, ECHR 1999-I), a special *ratio decidendi* regarding the extent of its scrutiny in cases concerning international and supranational organisations. I can agree with the result in this case that there was no violation of Article 1 of Protocol No. 1 and that the interference with the use of the applicant company's property – in the general interest of safeguarding the sanctions regime of the United Nations and the European Community – did not go beyond the limits any trading company must be prepared to accept in the light of that general interest. One could argue that to come to this conclusion the whole concept of presumed Convention compliance by international organisations, and in particular by the European Community, was unnecessary and even dangerous for the future protection of human rights in the Contracting States when they transfer parts of their sovereign power to an international organisation.

2. The judgment should not be seen as a step towards the creation of a double standard. The concept of a presumption of Convention compliance should not be interpreted as excluding a case-by-case review by this Court of whether there really has been a breach of the Convention. I subscribe to the finding of the Court that there exists within the European Community an effective protection of fundamental rights and freedoms including those guaranteed by the Convention even if the access of individuals to the ECJ is rather limited, as the Court has recognised, if not criticised, in paragraph 162 of the judgment. The Court has not addressed the question of whether this limited access is really in accordance with Article 6 § 1 of the Convention and whether the provisions, in particular, of former Article 173 of the EC Treaty should not be interpreted more extensively in the light of Article 6 § 1 of the Convention, a point that was in issue before both the Court of First Instance and the ECJ in *Jégo-Quéré & Cie S.A. v. Commission of the European Communities* (Case T-177/01 [2002]

ECR II-2365 (Court of First Instance) and Case C-263/02 P [2004] ECR I-3425 (ECJ)). See also the ECJ's judgment in *Unión de Pequeños Agricultores v. Council of the European* Union (Case C-50/00 P [2002] ECR I-6677). One should not infer from paragraph 162 of the judgment in the present case that the Court accepts that Article 6 § 1 does not call for a more extensive interpretation. Since the guarantees of the Convention only establish obligations "of result", without specifying the means to be used, it seems possible to conclude that the protection of fundamental rights, including those of the Convention, by Community law can be considered to have been "equivalent" (see paragraph 165 of the judgment), even if the protection of the Convention by the ECJ is not a direct one but rather an indirect one through different sources of law, namely the general principles of Community law. The criticism has sometimes been made that these general principles of Community law do not, as interpreted by the case-law of the ECJ, fulfil the required standard of protection, as they are limited by considerations of the general public interest of the European Community. This reasoning makes it rather difficult for the ECJ to find violations of these general principles of Community law. The Court's analysis of the "equivalence" of the protection is a rather formal one, and relates only to the procedures of protection and not to the jurisprudence of the ECJ in relation to the various substantive Convention guarantees: a major part of the jurisprudence of the ECJ on the level and intensity of the protection of property rights and the application of Article 1 of Protocol No. 1 is missing. But it is to be expected in future cases that the presumption of Convention compliance should and will be enriched by considerations about the level and intensity of protection of a specific fundamental right guaranteed by the Convention. In my view, one cannot say once and for all that, in relation to all Convention rights, there is already such a presumption of Convention compliance because of the mere formal system of protection by the ECJ. It may be expected that the provisions of the Charter of Fundamental Rights of the European Union, if it comes into force, may enhance and clarify this level of control for the future.

3. The Court decided that the presumption can only be rebutted if, in the circumstances of a particular case, it is considered that the protection of the Convention rights was *manifestly deficient*. The protection was manifestly deficient when there has, in procedural terms, been no adequate review in the particular case such as: when the ECJ lacks competence (as in *Segi and Gestoras Pro-Amnistía and Others v. Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the United Kingdom and Sweden* (dec.), nos. 6422/02 and 9916/02, ECHR 2002-V); when the ECJ has been too restrictive in its interpretation of individual access to it; or indeed where there has been an obvious misinterpretation or misapplication by the ECJ of the guarantees of the Convention right. Even if the level of protection must

only be "comparable" and not "identical", the *result* of the protection of the Convention rights should be the same. It is undisputed that the level of control extends to both procedural and substantive violations of the Convention guarantees. Article 35 § 3 of the Convention refers to applications which are manifestly ill-founded and the new Article 28 § 1 (b) as inserted by Protocol No. 14 gives Committees the power to declare applications which are manifestly well-founded admissible and render at the same time a judgment on the merits, that is, in the wording of that new Article, if the underlying question in the case concerns an interpretation or application of the Convention (or its Protocols) which is already the subject of well-established case-law of the Court. One would conclude that the protection of the Convention right would be manifestly deficient if, in deciding the key question in a case, the ECJ were to depart from the interpretation or the application of the Convention or the Protocols that had already been the subject of well-established ECHR case-law. In all such cases, the protection would have to be considered to be manifestly deficient. In other cases concerning new questions of interpretation or application of a Convention right, it may be that the ECJ would decide in a way the ECHR would not be prepared to follow in future cases, but in such cases it would be difficult to say that the deficiency was already manifest. But even that result should not be excluded *ab initio*. Accordingly, and relying on the wording of the Convention and its Protocols, I do not see the "manifestly deficient" level to be a major step in the establishment of a double standard. Since the ECJ would, in a future case, be under an obligation to consider whether there was already an interpretation or an application of the Convention which was the subject of well-established ECHR case-law, I am convinced that it is only in exceptional cases that the protection will be found to have been manifestly deficient. In the light of this interpretation of the judgment which confirms the ECJ's obligation to follow the "well-established case-law of the ECHR" I have agreed to the maxim in paragraph 156.

4. It would probably have been possible to elaborate on the various points made in paragraph 166 of the judgment. The very brief reference to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime, and to the ECJ's ruling (in the light of the opinion of the Advocate General) should not be seen as an open door through which any future cases where State authorities apply Community law can pass without any further scrutiny. The Court has referred to the fact that there was no dysfunction of the mechanism of control and of the observance of Convention rights. A dysfunction of the observance of Convention rights would arise precisely in those cases where the protection was manifestly deficient in the sense I have tried to explain. It would probably have been useful to explain this in more detail to avoid the impression that member States of the European Community live under a

different and more lenient system as regards the protection of human rights and fundamental freedoms of the Convention. In fact, the intensity of control and supervision by the ECHR will not be too different between these States and others (such as Russia or Ukraine) which are not members of the European Community.

5. A general remark is necessary on paragraph 150 of the judgment as regards the interpretation of the Convention "in the light of any relevant rules and principles of international law", which principles include that of *pacta sunt servanda*. This cannot be interpreted as giving treaties concluded between the Contracting Parties precedence over the Convention. On the contrary, as the Court recognised in *Matthews v. the United Kingdom* ([GC], no. 24833/94, ECHR 1999-I), international treaties between the Contracting Parties have to be consistent with the provisions of the Convention. The same is true of treaties establishing international organisations. The importance of international cooperation and the need to secure the proper functioning of international organisations cannot justify Contracting Parties creating and entering into international organisations which are not in conformity with the Convention. Furthermore, international treaties like the Convention may depart from rules and principles of international law normally applicable to relations between the Contracting Parties. Therefore, in *Al-Adsani v. the United Kingdom* ([GC], no. 35763/97, ECHR 2001-XI, which the Court cited in this connection in its judgment in the present case), the Court's approach to the relationship between different sources of public international law was not the right one. The correct question should have been whether, and to what extent, the Convention guarantees individual access to tribunals in the sense of Article 6 § 1 and whether the Parties could and should have been seen as nevertheless reserving the rule on State immunity. Since the Contracting Parties could have waived their right to rely on State immunity by agreeing to Article 6 § 1 of the Convention, the starting-point should have been the interpretation of Article 6 § 1 alone. Unfortunately this question was never raised. In the present case, the correct approach should have been to examine whether, and to what extent, the Contracting Parties could and should be presumed to have reserved a special position in relation to the Convention for international treaties establishing an international organisation. The Court seems to proceed on the assumption that the Contracting States agreed *inherently* that the value of international cooperation through international organisations is such that it may prevail to a certain extent over the Convention. I could agree to this conclusion, in principle, if all Contracting Parties to the Convention were also parties to the international organisation in question. However, as Switzerland and Norway show, even from the very beginning of European integration, this has never been the case.