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THE BOSPHERUS CASE: A CRITICAL ANALYSIS OF THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS DECISIONS

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Özet

(Bosphorus Davası: Avrupa Adalet Divanı ve Avrupa İnsan Hakları Mahkemesi Kararlarının Değerlendirilmesi) Uluslararası hukukta yeknesaklaşmış bir kurallar bütünün bulunmayışı, buna ek olarak uluslararası divan ve mahkemeler arasında hiyerarşik bir ilişki bulunmaması ve bunların yargı yetkilerinin zaman zaman çakışması, uluslararası kurumların güvenilirliği ile temel hak ve özgürlüklerin korunması bakımından olumsuz sonuçlara yol açmaktadır. Avrupa Adalet Divanı ve Avrupa İnsan Hakları Mahkemesi'nin kamu yararı ile kişilerin temel hak ve özgürlükleri arasında denge kurmaya çalıştığı Bosphorus davası, Yugoslavya Federal Cumhuriyeti döneminde ortaya çıkmış ve döneme damgasını vurmuştur. Bu makale, her iki mahkeme kararının özet ve değerlendirmesini içermektedir. Bu değerlendirmede özellikle Avrupa İnsan Hakları Mahkemesi'nin, Avrupa Topluluğu bünyesindeki insan hakları koruması bakımından Avrupa Adalet Divanı'nın yaptığı değerlendirme ile çatışmaktan kaçınan bir yaklaşım sergilemiş olmasına dikkat çekilmektedir.

Anahtar Kelimeler: Bosphorus Havayolları, Yugoslavya Federal Cumhuriyeti, Avrupa Adalet Divanı, Avrupa İnsan Hakları Mahkemesi, malvarlığının korunması, kamu yararı, eşdeğer koruma doktrini, aksi ispatlanabilir (adi) uygunluk karinesi, aşikar yetersizlik.

ABSTRACT

The lack of a unified set of rules in international law, backed with the lack of hierarchy between the international courts and tribunals, as well as their overlapping jurisdictions create serious obstacles at the expense of the credibility of international institutions and the fundamental rights of private persons and entities. "Bosphorus" constitutes one of the landmark cases handled in the face of the war in the Federal Republic of Former Yugoslavia, where the ECJ and the ECtHR come to a position to choose between two crucial conflicting interests, namely the public interest pursued by the international rules, and the fundamental rights and freedoms of individuals suffering from the application of these rules. This essay initially articulates the facts of "Bosphorus" including the analysis of the ECJ's preliminary ruling, and the elaboration of the ECtHR decision. Subsequently, a critical analysis of the ECHR judgment will be made. Here, the focus will be on the ECtHR's assessment regarding the EC's protection of fundamental rights, with a rather compromising approach avoiding to tamper with the ECJ's analysis and evaluation.

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Keywords: *Bosphorus Airlines, Former Federal Republic of Yugoslavia, European Court of Justice, European Court of Human Rights, protection of property, public interest, equivalent protection doctrine, rebuttable presumption of compliance, manifest deficiency test.*

Abbreviations

AG.	: Advocate General
App.	: Application
Art.	: Article
C.M.L.R.	: Common Market Law Reports
EC	: European Community
ECJ	: European Court of Justice
ECHR	: European Convention on Human Rights
ECmHR	: European Commission of Human Rights
ECtHR	: European Court of Human Rights
E.C.R.	: European Court Reports
Ed.	: Edition
ed.	: Editor
et seq.	: et sequens
EU	: European Union
fn.	: footnote
ibid.	: ibidem
I.L.R.M.	: Irish Law Reports Monthly
No.	: Number
O.J.	: Official Journal
O.U.P.	: Oxford University Press
p. (P)	: page
para.	: paragraph
paras.	: Paragraphs
pp. (PP)	: pages
RES	: Resolution
SC	: Security Council
TEU	: Treaty of the European Union.
v.	: versus
Vol.	: Volume

Introduction

Fragmentation of international law and the problematic of complex dynamics between its actors have been elaborated by various scholars in a vast amount of works, with the rise of the legislative, adjudicative, as well as administrative activities initiated within the mechanisms of the so called intergovernmental or supranational international organizations. The lack of a unified set of rules and the multiplicity of international fora, backed with the lack of hierarchy between the international courts and tribunals creates

serious obstacles at the expense of the credibility of international institutions, and more dramatically, the fundamental rights of private persons and entities, who are destined to be the weaker party, still with a rather limited access to the international judicial mechanisms.

There are several cases where one can easily observe the complexities and discrepancies in interpreting the set of rules enacted by different international bodies and deciding on an issue, deriving from the overlapping jurisdictions of different international judicial or quasi-judicial mechanisms. Those discrepancies become mostly apparent when international courts come to a position to choose between two crucial conflicting interests, namely the public interest pursued by the international rules and the fundamental rights and freedoms of individuals suffering from the application of those rules, as the case in the European Court of Justice (ECJ), as well as the European Court of Human Rights (ECtHR) judgments of *Bosphorus*.

*Bosphorus*¹ constitutes one of the landmark cases handled in the face of the war in the Federal Republic of Former Yugoslavia, pointing to the complexity of the fundamental rights regime in Europe, with its multidimensional character comprising the decisions of a national court, as well as the ECJ and ECtHR, as stated above. The case not only reveals the challenges in the way of finding a fair balance between fundamental rights of individuals and public interests arising in the context of a war regime, but also shows up the effect of different international law actors on each other. The decision of the ECJ upholding the impoundment of an aircraft it deems to fall under the scope of an EC Regulation enacted to give effect to a United Nations (UN) Security Council (SC) Resolution and the ECtHR, finding no violation of the property right entrusted to individuals under Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR)², has been analyzed and criticized by both European Law and Human Rights Law scholars with various respects, all emphasizing the deficiency in providing the fundamental rights protection enshrined in the ECHR. It is important to note that the concurring judges in the ECtHR's decision also criticized the finding of the Court's fundamental rights protection on an abstract level, with a lack of concrete proportionality review, leading to double standards in fundamental rights protection in terms of the member states of the EC and the non-members.

With this view, this essay initially articulates the facts of *Bosphorus* including a brief background of the case, as well the analysis of the ECJ's

¹ In fact, *Bosphorus* refers to two different judgments, the ones of the ECJ and the ECtHR: Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others* (*Bosphorus I*), Reference for a preliminary ruling: Supreme Court – Ireland, July 30 1996, European Court Reports (E.C.R.) 1996 P. I-03953; App. No. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (*Bosphorus II*), ECtHR, June 30, 2005.

² Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952. Article 1 of Protocol 1 is titled "Protection of property" and states: "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."

preliminary ruling. After elaborating the analysis of the ECtHR by focusing on concepts such as the “equivalent protection doctrine” and the “rebuttable presumption approach” discussed therein, a critical analysis of the judgment comprising the meaning given to these concepts in the context of fundamental rights protection will be made. Here, the focus will be on the ECtHR’s assessment regarding the EC’s protection of fundamental rights, with a rather compromising approach avoiding to tamper with the ECJ’s analysis and evaluation.

The Bosphorus Case

Background

An airline incorporated in Turkey and owned by Turkish citizens, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airlines), which was established in March 1992 to run charter flights³, signed a lease agreement with the national airline of Yugoslavia (JAT Airlines) in April 1992 for a period of forty eight months, which stipulated that two aircrafts would be controlled by Bosphorus Airlines with its own crew⁴, followed by a license for operation and registry in Turkey, provided the notice of JAT’s ownership⁵.

At the time Bosphorus Airlines was established and started its operations, the mass atrocities and human rights violations in Yugoslavia had already erupted, being responded by the whole international community, including the UN and the EC with condemnation, including a series of SC resolutions and regulations enacted based on those resolutions within the framework of the EC law. Among the resolutions enacted by the SC with the aim of ending the warfare in the region within the context of a sanctions regime, Resolution 713, dated September 15, 1991, was the one anticipating a total embargo on the delivery of weapons and military equipment to Yugoslavia relying on the SC’s Chapter VII powers⁶, pursuing peace and stability in the region⁷. Through this resolution, the SC manifested its determination of being involved in the conflict until a peaceful solution would be reached. This resolution was followed by others imposing

³ *Bosphorus II*, para. 11.

⁴ *Ibid.*, para. 12.

⁵ *Ibid.*, para 13.

⁶ *S/RES/713* (1991), 25 Sept. 1991, para 6. The Security Council is given the primary responsibility for the maintenance of international peace and security under Article 24 of the UN Charter, and the only express limits to the power of the Security Council while fulfilling its role are the purposes and principles of the UN, which are stated under Article 1 of the Charter. Pursuant to the same article, the Member States agree that the Security Council acts on their behalf, meaning that the Council is competent to take binding decisions on behalf of its member states. Chapter VII powers of the SC regarding action based on threats to peace, breaches of peace, and acts of aggression have great significance in terms of situations where belligerencies and human rights violations occur or are about to take place. Once the Council decides that the situation constitutes a threat to peace under Article 39, it may decide either to impose non-military enforcement measures under Article 41, or military measures under Article 42. The Security Council may also authorize a Member State to take military action under this provision if it deems necessary. See Österdahl, Inger, *Threat to the peace: the interpretation by the Security Council of Article 39 of the UN Charter*, Studies in international law (Stockholm, Sweden), v. 13. Uppsala: Iustus Forlag, 1998, p. 28.

⁷ *S/RES/713* (1991), 25 Sept. 1991, para 8.

further sanctions reinforcing the embargo, calling on states to deny the permission of all aircrafts intending to land in or having taken off from Yugoslavia⁸, prohibiting the transshipment through Yugoslavia of various products such as petroleum products, energy-related equipment, metals, chemicals, vehicles, aircraft and motors of all types⁹ and defining all vessels in which a Yugoslavian entity held a majority or controlling interest as a Yugoslavian vessel, regardless of the flag under which it sailed¹⁰. Finally, Resolution 820 dated April 17 1993, which holds significance with regard to the instant case, calling for the impounding of Yugoslavian aircrafts was enacted. Pursuant to paragraph 24 of Resolution 820, the SC stated, “all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) and that these vessels, freight vehicles, rolling stock and aircraft may be forfeit to the seizing¹¹.”

Before explicating the events leading to the suit Bosphorus Airlines filed in the Irish Courts, it is substantial to mention the EC regulations giving effect to the SC resolutions by imposing economic sanctions¹², which are relevant to the instant case. On June 1, 1992, right after the delivery of the aircrafts to Bosphorus Airlines, the EC passed Regulation 1432/92, giving effect to Resolution 757 of the SC¹³, which proclaimed a total embargo on the republics of Serbia and Montenegro, accompanied with postulating measures preventing activities that might benefit the economies of these republics¹⁴. This Regulation constituted the ground for the payment of Bosphorus’ monthly rentals to a frozen account¹⁵, which did not let JAT remove any funds without the Turkish Central Bank’s approval¹⁶. More importantly, Council Regulation 990/93 dated April, 26, 1993, whose genesis was the SC Resolution 820¹⁷, strengthening the

⁸ S/RES/757 (1992), 30 May 1992, para. 7.

⁹ S/RES/787 (1992), 16 Nov. 1992, para. 9.

¹⁰ *Ibid.*, para. 10.

¹¹ S/RES/820 (1993), 17 Apr. 1993, para. 24.

¹² For further information regarding the implementation of economic sanctions on the EC level relying on Art. 113 EC, starting in early 1980s with European Political Cooperation, see Piet Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, New York: Oxford University Press (O.U.P.), 2005, pp. 424 et seq.; see also *The Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community*, Official Journal (O.J.) C 321E, 29.12.2006. Art. 228A EC as introduced by the Treaty of the European Union (TEU) provided for the first time Community instruments for foreign policy objectives.

¹³ Council Regulation No. 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, 1992 O.J. (L 151) 4, preamble.

¹⁴ See *ibid.*, Art. 1.

¹⁵ Bosphorus II, para. 62.

¹⁶ Advocate General Jacobs asserts in his Opinion that the Turkish Central Bank operated the blocked account “in accordance with its national legislation enforcing UN sanctions”. *Bosphorus I*, Opinion of AG, 1996, E.C.R. at I-3964, P. 27, 1996, 3, Common Market Law Reports (C.M.L.R.), p. 279.

¹⁷ Council Regulation No. 990/93 of 26 April 1993 Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), 1993 O.J. (L 102) 14, preamble.

embargo imposed by Resolutions 713, 757 and 787, augmented the economic sanctions established by the Regulations 1432/92, and 2656/92¹⁸. In order to conceive the purpose of Article 8 of Regulation 990/93, which constituted the legal basis for the cease of the aircraft leased by Bosphorus, the preamble of the Regulation serves as an indicator, which should be mentioned of, since the purpose constituted one of the discussions handled in *Bosphorus*¹⁹.

The preamble of Regulation 990/93 expressed European Community's concern of the violations of the embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro), enunciating that the direct and indirect activities of the Federal Republic of Yugoslavia (Serbia and Montenegro) constituted the main reason for the tragedy in the Republics of Bosnia-Herzegovina to persist, leading to "unacceptable loss of human life and material damage". It also stressed the need for measures to be taken within the framework of political cooperation, in order to preclude the Republics of Serbia and Montenegro from further harming Republic of Bosnia-Herzegovina's integrity and security²⁰. With this respect, Article 8 of Regulation 990/93 stipulated: "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States."

Facts and Proceedings Before the Irish Courts

One of the aircrafts leased by Bosphorus Airlines from JAT landed to the airport in Dublin, Ireland on April 16 1993, in order to have a maintenance service provided by Team Aer Lingus Limited (Aer Lingus), which was completed on May 28 1993. After the completion of the service, the aircraft was withheld by an order of the Irish Minister for Transport, Energy and Communications²¹, followed by a letter handed to the manager of the Bosphorus Airlines by Aer Lingus, explaining that it had to wait for the opinion of the Sanctions Committee as to whether the use of the aircraft violated the UN embargo²². Eventually, the aircraft was impounded by the Minister for Transport, Energy and Communications on June 8 1993, four days later than the entering into force of the Council Regulation 990/93. The impounding was based on Article 8 of Regulation 990/93, with an evaluation that a Yugoslavian entity, namely JAT, held a majority or controlling interest in the aircraft. The opinion of the UN Sanctions Committee, dated June 14 1993, also favored the impoundment, claiming that the aircraft should have been captured even before, pursuant to Article 24 of the SC Resolution 820²³. Consequent to this

¹⁸ Council Regulation No 2656/92 of 8 September 1992 concerning certain technical modalities in connection with the application of Regulation No 1432/92 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, 1993 O.J. (L 7) 1.

¹⁹ *Bosphorus I*, paras. 12-18.

²⁰ Council Regulation 990/93, preamble.

²¹ *Bosphorus II*, para. 23.

²² See *ibid.*, paras. 17-20.

²³ For detailed information pertaining to the process leading to the impounding of the aircraft, see *Bosphorus II*, para. 19 et seq.

seizure, Bosphorus Airlines was put out of business, since an airline company must operate at least two aircrafts under Turkish law²⁴.

As a result of the seizure in Dublin, Bosphorus Airlines filed a suit against the Minister for Transport, Energy and Communications in the Irish High Court, alleging that the Minister's decision to impound the aircraft constituted an infringement of its right of property and the Minister acted beyond the scope of his authority by authorizing such a seizure, since the aircraft was controlled by Bosphorus Airlines and thus, Regulation 990/93 did not apply to it²⁵. As to construing the expression of "majority or controlling interest", the High Court underscored that Article 8 merely indicated the degree of interest, instead of the nature of interest that a Yugoslavian entity must have on an aircraft, in order for it to be impounded, meaning that the wording of Article 8 must be in referral to the *de facto* control of the property's use on a daily basis, instead of the right to gain an amount of income from its use²⁶.

Justice Murphy, writing for the Court, pointed that Bosphorus Airlines was a wholly innocent party, and found no adequate relation between the purpose or end aimed to be reached by the legislators and the impounding of the aircraft, applying a teleological approach²⁷. In so deciding, the High Court emphasized that the purpose of the regulations imposing economic sanctions on Yugoslavia was to stop its acts that might cause more deaths and material damage, as well as to punish, deter, and sanction the people of Yugoslavia, not to punish persons that had nothing to do with the events occurring in the region²⁸. More specifically, the Court asserted that the purpose of Regulation 990/93 was to preclude the transport of goods in violation of the embargo by the guilty parties²⁹. Moreover, according to the High Court, the fact that innocent parties might be negatively affected by sanction regulations could be justified only in case this effect was necessarily accompanied by the relevant sanction and was proportionate to the sanction attempted to be imposed on guilty parties, which did not hold true for the instant case³⁰.

Besides, the Court acknowledged that SC Resolution 820 constituted the basis for Regulation 990/93, and therefore it should take into account any judicial or academic commentary for the purposes of interpretation, even though the UN Resolutions were not a part of the Irish domestic law. With this respect, the High Court declared that neither the conclusion of the UN

²⁴ After the impounding, the other leased aircraft was detained by the Turkish authorities at the airport, whereas the parking fees, as well as the costs of the aircrafts' insurance, the service provided by Aer Lingus and the detention of the other aircraft in Istanbul was paid from the blocked JAT account, emptying the funds in the account as of January 2006. Justice Murphy delivered the judgment of the High Court on 21 June 1994. *Bosphorus II*, para. 35.

²⁵ *Bosphorus II*, para. 31.

²⁶ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Minister for Transport, Energy and Communications, Ireland and Attorney General and TEAM Aer Lingus Ltd* (Bosphorus Irish High Court Decision), (1994) 2 Irish Law Reports Monthly (I.L.R.M.) at 559-60, (1994) 3 C.M.L.R. pp. 471-72.

²⁷ *Ibid.*, at 558-60, 3 C.M.L.R. pp. 470-472.

²⁸ *Ibid.*, at 558, 3 C.M.L.R. p. 470.

²⁹ *Ibid.*, at 559, 3 C.M.L.R. p. 471.

³⁰ *Ibid.*, at 558, 3 C.M.L.R. p. 470.

Sanctions Committee short of reasoning would have an effect on the Court's decision, nor there existed any such commentary to rely on. Therefore, the High Court annulled the seizure, stating that the Minister acted *ultra vires* by impounding the aircraft, on which no Yugoslavian entity held a majority or controlling interest³¹.

Subsequently, the Minister for Transport, Energy and Communications appealed the judgment to the Irish Supreme Court on August 8 1994, claiming that the High Court misinterpreted the Regulation 990/93, requesting a preliminary reference to the ECJ³². Thus, the Irish Supreme Court asked the ECJ for a preliminary ruling, questioning whether "Article 8 is to be construed as applying to an aircraft which is owned by an undertaking the majority or controlling interest in which is held by Yugoslavs where such aircraft has been leased to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from Yugoslavia"³³.

Advocate General Jacobs' Opinion and the ECJ Ruling

Prior to contemplating the ECJ's ruling, it is important to articulate the Advocate General's opinion³⁴, which was followed with a parallel reasoning of the ECJ. In this section, Advocate General's arguments leading to his conclusion that Regulation 990/93 did apply to Bosphorus Airlines and no violation of Bosphorus Airlines' fundamental rights was present will be elaborated, followed by the ECJ's opinion and both opinions' analysis.

Advocate General's Opinion

Advocate General Jacobs gave priority to a literal interpretation method rather than pursuing a teleological one, and asserted that the Irish High Court misinterpreted the Regulation at hand with a too narrow construction³⁵. He underlined the importance of turning to the genesis of Regulation 990/93 and explained the proper perception of Resolution 820 as depriving any Yugoslavian entity of a benefit it could obtain because of a party making use of a means of transport owned by that Yugoslavian entity³⁶. He claimed that Resolution 820 constituted a reinforcement of the sanction of freezing Yugoslavian assets stipulated under Resolution 757, by extending it to possessions presenting no immediate risk of being used to circumvent the embargo³⁷. Furthermore, he pointed to the temporary nature of a lease and the risk that the possession of the aircraft could be transferred back to JAT³⁸. Keeping this risk in mind, even

³¹ *Ibid.*, at 558, C.M.L.R. pp. 464.

³² As a final court, the Irish Supreme Court is under an obligation to refer the case to the ECJ for a preliminary ruling, pursuant to Article 234 EC. Also, Irish Supreme Court's subsequent judgment must be in conformity with the preliminary ruling. *Bosphorus I*, para. 1.

³³ *Bosphorus I*, para. 6.

³⁴ Opinion of Advocate General Jacobs, *Bosphorus II*, E.C.R. I-3956, I-3977, P 70, (1996) 3 C.M.L.R. pp. 272, 291.

³⁵ *Ibid.*, at I-3968, P 39, 3 C.M.L.R. pp. 282-283.

³⁶ *Ibid.*

³⁷ *Ibid.*, at I-3969, P 42, 3 C.M.L.R. p. 283.

³⁸ *Ibid.*

the narrow construction of the High Court as to the Regulation's purpose should have led to the conclusion that it should be applied to the aircraft.

As to the connotation of the phrase "majority or controlling interest", the Advocate General indicated that there was "little room for doubt", relying on the language of the relevant article³⁹. By referring to the next paragraph of Article 8 of Regulation 990/93, he drew attention to the wording, "Expenses of...aircraft...may be charged to its owners" and claimed that such a wording signified the "majority or controlling interest" to be deemed as the ownership rather than the daily control of the aircraft. He also pointed to the difference of the language of Resolution 820 from the one of 757, namely, the elimination of the word "registered" in Resolution 820⁴⁰.

After deciding that Regulation 990/93 applied to the aircraft leased by Bosphorus Airlines, Jacobs proceeded with his proportionality analysis, proclaiming that Bosphorus Airlines' right to property was not violated. While dealing with the proportionality aspect, Jacobs cited previous EC case law, namely *Hauer*⁴¹, in order to show the importance of making an assessment pertaining to proportionality for evaluating whether there has been a violation of the right to property. Advocate General deemed the seizure of the aircraft "a temporary deprivation"⁴² of Bosphorus Airlines' property rights, which was trumped by the greater public interest, namely, ending the war in Bosnia⁴³. Jacobs found a fair balance between the pursuit of public interest and the

³⁹ *Ibid.*, at I-3969, P 43, 3 C.M.L.R. pp. 283-284

⁴⁰ *S/RES/757* (1992), May 30 1992, para. 7 b. Para. 7 b of the Resolution states: "The Security Council... decides all States shall... prohibit, by their nationals or from their territory, the provision of engineering and maintenance servicing of aircraft registered in the Federal Republic of Yugoslavia (Serbia and Montenegro) or operated by or on behalf of entities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or components for such aircraft, the certification of airworthiness for such aircraft, and the payment of new claims against existing insurance contracts and the provision of new direct insurance for such aircraft..."

⁴¹ *Bosphorus I*, Opinion of AG, at I-3974-75, PP 61-62, (1996) 3 C.M.L.R. pp. 288-289. See Case 44/79 *Hauer v. Land Rheinland-Pfalz* (1979) E.C.R. at 3747, P 25, (1980) 3 C.M.L.R. p. 66. In *Hauer*, the plaintiff challenged the German authorities' rejection of her application for authorization to plant vines as a landowner, which relied on Council Regulation 1162/76 (*Council Regulation No. 1162/76*, 1976 O.J. (L 135) 32.) enacted to eliminate the EC's surplus in wine production. The plaintiff's argument that this rejection violated her right to property articulated in the German Constitution was rejected by the ECJ by stating *inter alia* that the restrictions enumerated in the relevant regulation was reasonably related to the EC's Community goal and means used. In elaborating the principle of proportionality, the Court stated: "It is... necessary to identify the aims pursued by the disputed regulation and to determine whether there exists a reasonable relationship between the measures provided for by the regulation and the aim pursued by the Community in this case." Additionally, the fact that the regulation would be in force for a definite amount of time was a constructive aspect in deciding that its application to the plaintiff did not amount to a violation of her property rights.

⁴² *Bosphorus I*, Opinion of AG, at I-3975, P 63, [1996] 3 C.M.L.R. at 289.

⁴³ *Ibid.*, at I-3975-76, P 64, [1996] 3 C.M.L.R. p. 289.

imperatives of the property rights protection, referring to ECtHR's case law, namely, *Sporrong v. Sweden*⁴⁴.

The ECJ Ruling

In its judgment, the ECJ reiterated Advocate General's opinion to a wide extent, by applying a similar path of analysis and reasoning. As pursued by the Irish High Court and Advocate General Jacobs, the ECJ followed a twofold analysis while rendering its preliminary ruling, first assessing whether Regulation 990/93 applied to Bosphorus Airlines, then determining whether the applicant's right to property was violated via referring to the principle of proportionality⁴⁵.

In order to decide whether the relevant regulation applied to the impounded aircraft, the ECJ mentioned the necessity of interpreting Article 8 of the Regulation through a literal, contextual and purposive approach⁴⁶. As to the literal approach, the Court argued that the term "interest" in article 8 of Regulation 990/93 referred to a broad concept and there was no reason for it not to include the ownership aspect of interest⁴⁷. In other words, the ECJ stated that the wording of the Regulation did not suggest that it made a distinction between ownership and control of a property⁴⁸, meaning that an aircraft owned by a Yugoslavian whose operation or control in any sense was not enjoyed by this entity was nevertheless not freed from the application of Regulation 990/93.

As to the context and purpose of Regulation 990/93, the ECJ found appropriate to refer to Resolution 820, since the EC sanctions regulations themselves were designed to give effect to the sanctions imposed by the SC through a series of resolutions⁴⁹. According to the Court, the fact that the word "majority" under Article 24 of Resolution 820 was used in conjunction with the word "interest" unambiguously signified that the concept of interest must entail the ownership of a property⁵⁰. The Court also claimed that most of the language versions of Article 8 of Regulation 990/93 contained explicit connotations of ownership, by adopting Jacobs' plurilingual approach⁵¹. Another argument made by the ECJ in favor of the application of the regulation to the aircraft was that the contrary would lessen the pressure on Yugoslavia, endangering the effectiveness of the sanctions⁵².

⁴⁴ See *Sporrong v. Sweden*, 5 E.H.R.R. 35, 50-55, PP 60-74 (1983). The ECtHR renders its judgment in favor of the plaintiffs, deciding that the probation of Stockholm's city agency of the construction on the properties of the plaintiffs constituted a violation of their property rights under Article 1 Protocol 1 of the ECHR, stating that such a restriction could be justified only if they were given the opportunity to seek compensation for their burden. Id. at 54, P 73.

⁴⁵ *Bosphorus I*, paras. 11-26.

⁴⁶ *Ibid.*, para. 11.

⁴⁷ *Ibid.*, paras. 12-15.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Bosphorus I*, para. 15.

⁵¹ *Ibid.*, para. 16.

⁵² *Ibid.*, paras. 17, 18.

Having found that Regulation 990/93 applied to the impounded aircraft, the ECJ turned to the question whether the seizure violated Bosphorus Airlines' right to peaceful enjoyment of its property as stipulated under Article 1 Protocol 1 of the ECHR, inquiring whether an infringement of the principle of proportionality existed. As to whether the principle of proportionality was properly applied, the Court first contemplated by citing various case law⁵³, that the fundamental rights of Bosphorus Airlines, which it argued to have been violated, were not absolute, meaning that the objectives of general interest pursued by the EC might justify their restriction⁵⁴. It explained that the economic sanctions might by their nature affect private entities negatively, inevitably infringing their right to property and the freedom to pursue a trade or business, although they had no relation whatsoever with the situation leading to the sanctions regime⁵⁵. The Court found the aims pursued by the regulation so important that its negative effects would be justified, even if they were substantial⁵⁶. In order to establish the attributed importance firmly, the Court observed the text of the preamble of Regulation 990/93, and cited its eighth recital as a referral to its aim: "To dissuade the Federal Republic of Yugoslavia 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 Republic⁵⁷". Therefore, after making an assessment of the objective pursued by the Regulation as comprising a general interest highly essential to the international community, namely "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 Court concluded that the impounding of an aircraft owned by a Yugoslavian entity could not be deemed inappropriate or disproportionate⁵⁸.

Evaluation of the Advocate General's Opinion and the ECJ Ruling

Before stepping into a critical analysis of the discussions in the Advocate General's opinion and the ECJ's decision, it should be pointed out that *Bosphorus* laid down a set of important principles, which were critically handled by various academics⁵⁹, for carrying the significance of being the first

⁵³ See *Hauer*, Case 5/88, *Wachauf v. State*, (1989) E.C.R. 2609, (1991) 1 C.M.L.R.; Case C-280/93 *Germany v. Council*, (1994) E.C.R. I-4973, 5065, P 78.

⁵⁴ *Bosphorus I*, para. 20, 21. Bosphorus Airways argued that the owner of the aircraft had already been panelized, since the rent was paid to a blocked account, therefore making the impounding of the aircraft a manifestly unnecessary penalty, disproportionate with respect to a wholly innocent party.

⁵⁵ *Ibid.*, para 22.

⁵⁶ *Ibid.*, para 23.

⁵⁷ *Id.* para 25.

⁵⁸ *Id.* para 26.

⁵⁹ Kathrin Kuhnert, *Bosphorus – Double standards in European human rights protection?*, Utrecht Law Review, Vol. 2, Issue 2 (December) 2006, pp. 177-189; Steve Peers, *Limited Responsibility of European Union member states for actions within the scope of Community law*, Judgment of June 2005, *Bosphorus v. Ireland*, Application No. 45036/98, European Constitutional Law Review 2, 2006, pp. 443-455; Erik Drewniak, *Comment: The Bosphorus Case: The Balancing Of Property Rights In The European Community And The Public Interest In Ending The War In Bosnia*, 20 Fordham International Law Journal, March 1997, pp. 1007-1088; Joseph Phelps, *Comment:*

case in which the ECJ engaged in the interpretation of an EC sanctions regulation⁶⁰, as well as being unique for the fact that the ECJ was to judicially review a SC resolution, in order to determine whether the sanction at hand infringed Bosphorus Airways' fundamental property rights in an inappropriate and disproportionate way⁶¹. The Court attributed substantial importance to literal interpretation, meaning not only that the EC Sanctions Regulation's wording should be given due regard, but also that the text of the UN Sanctions Resolution constituting the genesis of the relevant Regulation should be taken into account. The Court also emphasized the predominance of a uniform interpretation as regards sanctions regulations over giving deference to the judgments of the national courts of the member states, with an implication of the priority given to the EC integration including the uniform interpretation and application of the EC legislations⁶². It can also be observed from both Advocate General Jacobs' and the ECJ's opinions that the SC resolutions and the opinion of the Sanctions Committees might play a significant role in making case law, although they do not constitute a part of the EC law⁶³.

First of all, a number of issues entailing discrepancy in Advocate General's arguments, as well as the ECJ ruling pertaining to the discussion of the connotation of "ownership", and the method of interpretation applied should be articulated. Advocate General Jacobs' assertion that the wording of the

Reflections on Bosphorus and Human Rights in Europe, 81 Tulane Law Review, November 1996, pp. 251-278; Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, Human Rights Law Review 6 (2006), pp. 87-130 are some examples.

⁶⁰ Piet Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford, New York, O.U.P. 2005, p. 426. See also, Iris Canor, "Can Two Walk Together, Except They Be Agreed?" *The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community through the Perspective of the European Court of Justice* ("Can Two Walk Together, Except They Be Agreed?"), C.M.L.R., Vol. 35, 1, 1998, 137-187, pp. 137, 138. The author points that the ECJ seldom deals with the interpretation of a UN resolution since those resolutions encompass security and foreign affairs, which in principle fall outside the scope of competence of the EC, whose priority is economic integration. He asserts that sanctions are economic measures which by their nature shatter the boundaries between economic and foreign issues.

⁶¹ Canor, "Can Two Walk Together, Except They Be Agreed?", p. 161.

⁶² *Bosphorus I*, Opinion of AG at I-3969, P 43, (1996) 3 C.M.L.R. pp. 283-284.

⁶³ Eeckhout, p. 428. The UN Charter is an international treaty, to which the EC is not a contracting party. It cannot be derived from the Charter's language that it can be binding upon the non-contracting parties, thus implying that the EC is not bound by it on the basis of international law, *prima facie*. Nevertheless, Art. 11 (1) TEU stipulates that the Common Foreign and Security Policy of the EU has an objective of safeguarding the common values 'in conformity with the principles of the UN Charter'. It also provides that the preservation of peace and the strengthening of international security will be pursued 'in accordance with the principles of the UN Charter'. Also, Art. 302 of the EC Treaty states that 'the Commission is to ensure the maintenance of all appropriate relations with the organs of the UN and of its specialized agencies'. For further information regarding the legal status of the UN Security Council Resolutions within the EU legal order, see Eeckhout, pp. 436-444.

regulation leaves “little room for doubt”⁶⁴ can be regarded as somewhat pretentious and far-fetched, if for nothing, for the mere fact that ownership is mentioned neither in the wording of the relevant Regulation, nor in the one of Resolution 820. Jacob argument that the word “owners” is used in the second paragraph of Article 8 of Regulation 990/93 signified that ownership is implied with the word “interest” is erroneous. In fact, this articulation tends to take the reader to an opposite conclusion, creating the doubt that the word “ownership” was intentionally hesitated to be used in the first paragraph of the Article⁶⁵. Moreover, it is inconsistent that the Advocate General merely looked into the different language versions of the Regulation in his interpretation, instead of searching for the ones of the relevant SC Resolution, although Jacobs stated to acknowledge the requirement of analyzing the wording of the Resolution, as it constituted the ground for Regulation 990/93⁶⁶. It is also hard to understand why the Advocate General omitted the teleological approach in his interpretation, although the ECJ case law referred to this approach previously⁶⁷. Here, it should also be noted that the ECJ generally uses all the four methods of interpretation, namely, literal, systematic, historical, and teleological interpretation methods in its case law, as indicated in Articles 31 and 32 of the Vienna Convention, though, without pursuing a systematic method of applying different interpretations by putting them into a hierarchical order⁶⁸. Therefore, it should be added that the referral of the ECJ in interpreting a provision of Community law according to its wording, context and aims as an established EC rule of interpretation does not seem to be the proper way of assessing the interpretation aspect of the issue⁶⁹. It should also be kept in mind that the methods of interpretation of international law should have been used properly, instead of pursuing methods of interpretation of domestic legislation, since the genesis of the Regulation is a SC Resolution, as pointed out both by the Advocate General and the ECJ⁷⁰.

Turning to the arguments in the ECJ ruling regarding the interpretation of Article 8, it should be stated that the above mentioned claim of the Court regarding interpretation is unfortunately not in conformity with its assessment that the connotation of the wording of Article 8 embraces the aspect of ownership, derived from the fact that nothing to the contrary is mentioned in the text of the Article. This explanation shows that the Court failed to apply teleological interpretation properly, not amplifying the aim of the Article while looking into its text⁷¹. Moreover, the fact that there is nothing in a text implying

⁶⁴ AG Jacobs implied the importance of interpretation stating that the determination of the issues in the case depended on the correct interpretation of Article 8 of Regulation 990/93. *Bosphorus I*, Opinion of AG, at I-3965, P 29, (1996) 3 C.M.L.R. p. 279.

⁶⁵ Phelps, p. 4; Canor, “*Can Two Walk Together, Except They Be Agreed?*”, p. 153.

⁶⁶ *Ibid.*, p. 151.

⁶⁷ See Case C-29/69, *Stauder v. City of Ulm, Sozialamt*, 1969 E.C.R. 419, pp. 424, 425. Here it is stated that different methods of interpretation should be used to make a proper evaluation and the use of teleological interpretation was given due regard. The Court wrote that the interpretation is to be “on the basis of both the real intention of its author and the aim he seeks to achieve.”

⁶⁸ Canor, “*Can Two Walk Together, Except They Be Agreed?*”, pp. 142, 143.

⁶⁹ *Ibid.*, p. 142.

⁷⁰ For the discussion of the methods of interpretation of domestic legislation and of international law, see *ibid.* pp. 142-156.

⁷¹ Phelps, p. 4.

that a situation is not relevant to its meaning does not show that it is necessarily relevant. As another weak-construed point of the ruling, the Court's argument claiming that the use of the term "interest" in conjunction with the word "majority" implies ownership rather than control can be shown. The Court itself uses the term "reversionary interest", aiming to distinguish between the ownership interest of JAT and Bosphorus Airlines' interest as a leaseholder⁷². This wording conveys that the word "interest" in conjunction with "majority" does not necessarily have an implication of ownership⁷³. It should also be noted that the Court failed to look at the different language versions of the UN Resolution itself, although it intended to interpret the Resolution itself, not the Regulation⁷⁴. Furthermore, when the Court's former case law with regard to resolving the divergences in the texts of the different language versions of a regulation is considered⁷⁵, it can be seen that the Court aimed to select the meaning or language version which allows the most liberal solution. Thus, even after assessing that most language versions of the Regulation at hand had an explicit referral to ownership, the most liberal solution should have been attached to the lingual version which did not stipulate the need to deprive third parties from their fundamental rights without being able to assist in raising the pressure on Yugoslavia⁷⁶.

Furthermore, the conclusion that the Court reached after assessing the aim of the Resolution lacks the details supporting this conclusion, namely, evaluating the relevance of the factual case to reach the aim by explaining how the lease of such an aircraft could benefit Yugoslavia and had a detrimental effect on the application of the sanctions⁷⁷. In other words, it is not clarified in the judgment how the impounding of an aircraft, which a Yugoslavian entity neither had any use or control over, nor benefited from on a monetary basis could elevate the purpose of the sanctions⁷⁸.

Turning to the Court's property rights and proportionality analysis⁷⁹, it will be useful first to denote that it constituted the real issue on which the ECJ's opinion differed from the one of the Irish High Court's. Whereas the High Court had ruled: "It could hardly be suggested that the purpose of the regulations was to cause hardship to innocent parties save in so far as such hardship was necessary concomitant of the sanction imposed on the target country and that the penalty suffered by the 'innocent' party was not

⁷² *Bosphorus I*, para. 8.

⁷³ Phelps, p. 4.

⁷⁴ See *Bosphorus I*, paras. 14-16. The Court's intention of looking at the wording of the Resolution is stated in para. 14 of the judgment. However, in para. 16 it states that it took the various language versions of the Regulation into account, instead of the Resolution itself.

⁷⁵ See *Stauder* (1969), E.C.R., p. 419.

⁷⁶ Canor, "Can Two Walk Together, Except They Be Agreed?", p. 152.

⁷⁷ *Ibid.*, pp. 159-160.

⁷⁸ For further discussion pertaining to the relevance of the impounding to the realization of the aim pursued by the sanctions, see *ibid.*

⁷⁹ For an explanation of the perception of the principle of proportionality under the EC legal order, see C.W.A. Timmermans, Chapter III, The Basic Principles, ed. P.J.G. Kapteyn, A.M. McDonnell, K.J.M. Mortelmans, C.W.A. Timmermans, *The Law of the European Union and the European Communities*, Fourth Revised Edition, Kluwer Law International BV, 2008, pp. 144-147; Drewniak p. 4.

disproportionate to the sanction sought to be imposed on the 'guilty' one⁸⁰, the ECJ did not regard such a measure disproportionate, pointing to the nature of the general interest pursued as being fundamental for the international community⁸¹. The fact that the ECJ found the aim of the Regulation so important as to justify its negative effects including the ones of a "substantial nature, for some operators"⁸², was criticized by scholars, claiming that no serious balancing test was applied by the Court⁸³. *Canor* averred that the Council and the Commission should not be given *carte blanche* to infringe individual rights by invoking foreign affairs needs and argued that the powers of the Community institutions were extremely broad⁸⁴. She also indicated the significance attributed to the protection of human rights by the Member States in the field of Common Foreign and Security Policy, referring to Article 6 (2)⁸⁵ (former Article F (2)) of the TEU⁸⁶.

The arguments for the criticism of the ECJ's proportionality analysis can be enumerated as the lack of a reasonable relation between the impounding and the objective of the Regulation⁸⁷, the assessments that the specific measure of impounding was not necessary to achieve the aim of the Regulation⁸⁸, that less intrusive means could have been used to promote the realization of this aim⁸⁹, and that the breach of fundamental rights of an innocent party as a result of the impounding was disproportionate when weighed against the gain provided by this specific measure in the way of achieving the aim, even if it was accepted that the above mentioned grounds for criticism did not exist.

The interpretation issue discussed above is closely related to the proportionality analysis, since the aim of the Regulation was the determinant factor in assessing whether the impounding was properly related to it.

⁸⁰ *Bosphorus Irish Court Decision* at 558, (1994) 3 C.M.L.R p. 470.

⁸¹ *Bosphorus I*, para. 26.

⁸² *Ibid.*, para. 23.

⁸³ Phelps, p. 5; *Canor*, "Can Two Walk Together, Except They Be Agreed?", p. 162.

⁸⁴ *Ibid.*, p. 162.

⁸⁵ Article 6 (2) of TEU reads as follows: "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."

⁸⁶ See *ibid.* pp. 163-165. The author further states that the fact that Article L excludes the Common Foreign and Security Policy from the apprehension of the ECJ does not mean that the Court should give priority to the political activity instead of the protection of human rights once it decides it has jurisdiction over a case. Also, "the margin of appreciation doctrine" which refers to the autonomy granted to the member state officials by the ECJ to a certain extent should not hinder the Court from applying its supervision, in particular while looking whether there is proportionality between the infringement of a right and its justification. See Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, ed. Helen Keller and Alec Stone Sweet, A Europe of Rights, The Impact of the ECHR on National Legal Systems, O.U.P. 2008, pp. 82-84.

⁸⁷ Drewniak, p. 20.

⁸⁸ Phelps, p. 5.

⁸⁹ Drewniak, p. 22.

Regarding this issue, *Drewniak* argued that the more abstract the aim of the Regulation was deemed, the harder it would be to find a specific measure disproportionate to this aim. Thus “the concretely conceived aim of the Regulation”, namely precluding a Yugoslavian entity from obtaining an aircraft enabling it to circumvent the embargo, should be taken into account while deciding on the presence of a reasonable relationship⁹⁰. Moreover, even if an abstract aim of ending the war in Yugoslavia was conceived, it could be argued that the measure of impounding the aircraft was not necessary to reach this aim, since Bosphorus Airlines was paying the rent to blocked accounts and JAT did not hold control over the aircraft. Even if the aircraft was returned to JAT with the termination of the lease, the Annex to Council Regulation 1432/92 denying the permission of an aircraft to take off from, land in, or fly over the territory of any member state of the EC if it was bound for or had taken off from Yugoslavia was in force at the time Regulation 990/93 was enacted, which points to a less intrusive means to advance the purpose of the Regulation⁹¹. Furthermore, even in the case that the impounding was appropriate to reach the aim of the Regulation, it can be contended that the aim of pursuing international peace was disproportionate to the violation of Bosphorus Airlines’ property rights, since the temporary deprivation of its rights turned into a permanent infringement when it was eventually put out of business. Moreover, the enhancement provided by the impounding was trivial since the losses of Bosphorus Airlines still increased to a great extent at the time the fighting parties initiated negotiations⁹².

Canor’s perspective of evaluating the Court’s proportionality analysis is essential to perceive the instant attitude of the Court. The author cited former case law of the ECJ in order to sustain her opposition to the Court’s conclusion regarding the application of the principle of proportionality. First, she construed an analogy between *Bosphorus* and *Richardt*⁹³ in the way it handled a member state’s confiscation of goods on the ground of security policy, which carried a political aspect situating the judicial organs as less appropriate to evaluate the measures adopted by the competent authorities, as it is the case in *Bosphorus*. *Canor* underlined the decision’s finding that it should be given due regard whether the applicant was acting in good faith, as well as the circumstances which led to the breach of the aim pursued⁹⁴, and asserted that the Court would have come up with a parallel conclusion if it had followed the same reasoning; it would namely have decided that the impoundment was a manifestly unnecessary penalty and a fully unjust intervention in Bosphorus

⁹⁰ *Ibid.*, p. 21.

⁹¹ *Drewniak*, p. 22.

⁹² Phelps, p. 5. For an evaluation advocating the impounding of the aircraft see Eeckhout, p. 447. The assessment of Eeckhout finding the specific measure of impounding reasonable so as to promote the achievement of the Regulation’s objective lacks the thorough analysis applied by *Canor*, *Drewniak* and Phelps. See also *Drewniak*, p. 22, showing former case law to sustain that the Regulation should have entailed a provision enabling Bosphorus Airlines to claim compensation for its loss. With regard to the natural law argument providing that the individual’s rights have inherent priority over those of the society, see *Drewniak*, p. 6.

⁹³ Case C-367/89. *Criminal Proceedings against Richardt and Les Accessoires Scientifiques SNC*, 1991, E.C.R. at 4621.

⁹⁴ *Ibid.* para. 25.

Airlines' business, since the sanctions were not substantially advanced by the violation of the fundamental rights of Bosphorus Airlines, and which were aimed to be imposed on the guilty party. In order to eliminate the opposition to such an analogy with an argument that the aim pursued in *Bosphorus* was different, and more important to the international community, the author cited the *Centro-Com*⁹⁵ case, where the sanctions on Yugoslavia were at stake, and England's legislation aiming to enhance those were found by the Court to have violated the freedom of export, by stating that the United Kingdom could have maintained the protection of the interest pursued by the sanctions with measures less restrictive to the right to export⁹⁶.

It is noteworthy to compare and contrast the steps taken by the Court in its proportionality analysis in the two cases. In *Centro-Com*, all three steps of a proportionality analysis were followed⁹⁷. To mention briefly, it was first considered whether the measure was appropriate and effective so as to achieve its legitimate aim⁹⁸. Second, the Court examined if the measure was necessary to reach this aim and whether there were no less intrusive means to enable reaching such an aim⁹⁹. As the last stage, the Court checked if the negative effect of the measure on the rights of individuals was disproportionate when compared to the aim pursued by the measure, regardless of the first two stages being satisfied. However, the Court in *Bosphorus* only fulfilled going through the first step, whose conclusion was erroneous according to *Canor* as stated above, since the purpose of the Regulation did not entail affecting innocent parties adversely, although such an effect would not advance the realization of the justified objective¹⁰⁰.

As to the reason for the ECJ to have a different attitude in *Bosphorus* despite its similarities with *Centro-Com*, the deference given to the Community objectives holds importance. To be more concrete, if one attempts to distinguish *Centro-Com* from *Bosphorus*, he or she may argue that in the latter a fundamental human right was at stake, whereas a Community individual right was infringed in the latter, which discloses that the principle of proportionality was used by the ECJ in an instrumental manner to advance Community rights and interests instead of protecting human rights¹⁰¹. The other difference of the *Centro-Com* case, namely the measure at hand being one implemented by a member state with derogation from the EC rules supports this argument. Even though the justifications put forward by the state and the Community in both cases were similar in terms of their prerogatives, the Court acted more submissive with regard to the Community measures than the ones of a member

⁹⁵ Case C-124/95, *The Queen, ex parte Centro-Com Srl. v. HM Treasury and Bank of England*, 1997, E.C.R. I-81.

⁹⁶ *Ibid.* paras. 51-52.

⁹⁷ For the application of the principle of proportionality under the EC law, see Drewniak fn. 67 and the comment on p. 17.

⁹⁸ *Ibid.*, paras. 44 et seq.

⁹⁹ *Ibid.*, paras 57 et seq.

¹⁰⁰ *Ibid.*, para. 59. Canor, "Can Two Walk Together Except They Be Agreed?", fn. 145 on pp. 181-182.

¹⁰¹ *Ibid.*, p. 180.

state in finding the measure proportionate¹⁰². The distinctive conclusion reached by the Court also shows that the Court was interested more in promoting the objectives of the EC rather than protecting fundamental rights.

Furthermore, *Canor* illustrated the dilemma faced by the ECJ in cases like the one at hand, when a UN resolution is incorporated to the EC law by reiteration of its text word by word, causing the risk of a violation of the standard of human rights protection developed by the Court¹⁰³. This, according to the author, compelled the Court to remain “on the safe side” by corroborating the resolution with the expense of neglecting an innocent party’s fundamental rights and making it suffer an unnecessary damage, thus lowering its legitimacy¹⁰⁴. According to *Canor*, the Court should assume a brave attitude in such cases by declaring a regulation implementing a UN resolution void and giving due protection to the individual’s rights¹⁰⁵. As a last remark, it should be added that the protection of human rights is to be attributed substantial weight in the interpretation of a regulation, as constituting a fundamental principle absorbed both by international and Community law, thus paving the way to the annulment of the specific measure at hand without declaring the Regulation void¹⁰⁶.

The Bosphorus Case Before the European Court of Human Rights

In this section, the judgment of *Bosphorus* decided by the ECtHR on 30 June 2005 will be examined and analyzed, after looking over the relationship between the European Union and the European Court of Human Rights. Such an elucidation will help explain the Court’s stance with regard to the case at hand. Subsequent to the evaluation of the ECtHR decision, the stance of the ECtHR with regard to the legal status of the UN SC resolutions will also be briefly looked into.

¹⁰² Here, the author compares the steps taken by the Court in the assessment of proportionality. In *Centro-Com*, all three steps of a proportionality analysis were followed. It was first considered whether the measure was appropriate and effective so as to achieve its legitimate aim. Second, the Court examined if the measure was necessary to reach this aim and whether there was no less intrusive means to reach such an aim. As the last stage, the Court looked if the negative effect of the measure on the rights of individuals was disproportionate when compared to the aim pursued by the measure, even if the first two stages were satisfied. However, the Court in *Bosphorus* only fulfilled the first step, whose conclusion was erroneous according to the author.

¹⁰³ *Ibid.* p. 168.

¹⁰⁴ *Ibid.* p. 169.

¹⁰⁵ *Ibid.* p. 170. Here the author does not overlook the stipulation of the Vienna Convention in Art. 27 which disclaims the excuse of a party invoking the provisions of its internal law as a justification for not applying the international agreement properly. She claims that the approbation of this provision makes sense only with the ascertainment of a certain level of human rights protection. For the discussion regarding whether a member state could still implement a resolution into its domestic laws after it was declared void by the ECJ, see *ibid.* 172 et seq.

¹⁰⁶ *Ibid.*, p. 184. Here, the author emphasized that the Irish High Court’s decision rightly adopted this view.

The EU and the ECHR

The EU is not a party to the ECHR and thus not formally bound by the Convention¹⁰⁷. Nonetheless, the ECJ declared around four decades ago that the Convention should be regarded as a source of general principles of Community law, referring to international treaties for the protection of human rights collaborated upon by the member states of the EU¹⁰⁸. The preponderance of the ECHR among the sources of general principles of Community law has been enunciated by the ECJ since 1986, starting with the *Johnston* judgment¹⁰⁹. Furthermore, the Court has made reference to the ECtHR case law and the European Commission of Human Rights¹¹⁰ (ECmHR) frequently, notwithstanding the fact that the EC was not found competent to become a party to the ECHR itself¹¹¹.

¹⁰⁷ For further comment between the Convention system and European Community Law see Clare Ovey and Robin C. A. White, *The European Convention On Human Rights*, 4th Ed., O.U.P., New York, 2006, Chapter 26, Results and Prospects, pp. 507 et seq.

¹⁰⁸ Case 4/73, *Nold v. Commission* (1974), E.C.R. 491, para. 13. In the paragraph the Court states: "...fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law." For the review related to the application of international human rights norms, see Francis G. Jacobs, *The Right of Access to Court in European Law, with Special Reference to Article 6 (1) of the European Convention on Human Rights and to European Community Law, Developing Human Rights Jurisprudence*, Vol. 7, Seventh Judicial Colloquium on The Domestic Application of International Human Rights Norms, Interights and Commonwealth Secretariat, 1998, pp. 198-199. Also see Christian Walter, *History and Development of European Fundamental Rights and Fundamental Freedoms*, European Fundamental Rights and Freedoms, ed. Dirk Ehlers, De Gruyter Rechtswissenschaften Verlags-GmbH, 2007, pp. 1-24 for the development and legal foundation of Human Rights of the EC/EU starting in 1960s with the *Stauder* case when the ECJ abandoned its perspective of restrictive jurisprudence.

¹⁰⁹ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, 15 May 1986, E.C.R. 1651. Para. 18 of the judgment was as follows: "As the European Parliament, Council and Commission recognized in their joint declaration of 5 April 1977 (O.J. C 103, P. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law."

¹¹⁰ The European Commission of Human Rights established in 1954 under the ECHR regime as a quasi-judicial mechanism scrutinizing the files to be brought to the ECtHR according to Protocol 11 of the ECHR was abolished in 1998.

¹¹¹ See Case C-13/94, *P v. S and Cornwall County Council* (1995), E.C.R. I-2159 as the first judgment of such a reference. It should here be noted that the Treaty of Lisbon entered into force on 1 December 2009. It amended Art. 6 of the Treaty on European Union providing for the recognition of the Charter, which was proclaimed by EU institutions at the Nice Inter-Governmental Conference in December 2000. Whereas the text of the Charter has not been incorporated into the Treaty, Article 6 stipulates that it will have the same legal value as EU treaties. The Protocol of the Lisbon Treaty Relating To Article 6 (2) Of The Treaty On European Union On The Accession Of The Union To The European Convention On The Protection Of Human Rights And

In *Bosphorus*, Advocate General Jacobs reiterated the significance attributed to the respect to fundamental rights, putting the emphasis on the ECHR. Jacobs confirmed his statement by indicating TEU Article F (2) as a signification of this respect. The Advocate General suggested that this Article, although not being within the scope of the Court's jurisdiction in so far as it extends to the Union Treaty as a whole, holds importance in the way it supports and invigorates the ECJ case law, highlighting the importance of respect for human rights. Jacobs continued to point to the importance of fundamental rights within the EC by depicting it as a precondition for the lawfulness of Community acts and underscoring that the member states as well are urged to respect those rights while implementing a Community legislation, since they are a party to the ECHR, although it has not required the status of domestic law in all EC members¹¹². It is relevant for the analysis of the ECtHR's *Bosphorus* ruling to quote the Advocate General's opinion with respect to the place of the ECHR within the Community legal order and the obligations of member states to abide by the provisions therein: "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 this Court and in national courts where Community law is in issue. That is so particularly where, as in this case, it is the implementation of Community law by Member States which is in issue. Community law cannot release Member States from their obligations under the Convention¹¹³."

Prior to the elaboration of the ECtHR judgment, former case law dealing with the jurisdiction of the ECmHR and ECtHR *ratione materie* should be articulated in order to perceive the point of origin of and the mentality entailed in the introduction of the concept of 'equal protection'. It is substantial to comprehend this doctrine in order to understand the dilemma of states due to being subject to different coinciding legal regimes, namely the responsibility of the member states of the EU, which are dictated to pursue the objectives of this legal order while showing their dedication to the protection of fundamental

Fundamental Freedoms also enables the accession of the EU to the ECHR. See *Treaty of Lisbon*, O.J. C 306, 17.12.2007. See also, *A Guide to the Treaty of Lisbon, European Union insight*, sponsored by Allen and Overy, Addleshaw Goddard, Berwin Leighton Paisner, Hugh Mercer, Philippa Watson and Tim Eicke (Essex Court Chambers), Kingsley Napley, Mayer Brown, The Law Society, January 2008, pp. 17, 18 for the consequences of the binding character of the Charter of Fundamental Rights and accession to the ECHR of the EU. It should be kept in mind that the text of the ECHR should also be compatible with the accession of an international organization to the Convention, which can be enabled with the ratification of the 14th Protocol by the parties to the Convention. As of now, it is only Russia that is awaited for ratification. The Russian Duma ratified the Protocol on 15 January 2010 and the Federation Council as the other branch of the legislative has to sign it for it to enter into force. See *ECHR Blog*, 15 January 2010, available at <http://echrblog.blogspot.com>. Since this prospective condition is out of the scope of this paper, it suffices to mention that the EU enabled itself to become a party to the ECHR with the entering into force of the Treaty of Lisbon.

¹¹² *Bosphorus I*, Opinion of the AG, paras. 51-3.

¹¹³ *Ibid.*

rights within the legal framework of the ECHR, as this is the case in *Bosphorus*. With this respect, two cases will be briefly mentioned herein, both of which pertain to the ECtHR's jurisdiction over the member states of the EC within the context of EC law implementation.

The 'equivalent protection' doctrine developed by the ECmHR, was demonstrated by *M. & Co. v. Federal Republic of Germany*¹¹⁴. In *M. & Co.* the applicant import-export company which was ordered to levy a fine by the European Commission for violating competition law¹¹⁵, challenged this fine in the ECJ, by which the levy was upheld¹¹⁶. After the German national court judge filed a writ of execution for the payment of this fine, the company first made a plea in the German courts with the allegation of the violation of its fundamental rights¹¹⁷. This claim was however overturned by the national courts, and was eventually followed by the company's claim made to the ECmHR¹¹⁸. Here, the ECmHR emphasized that the transfer of powers from a member state to the EC did not necessarily refer to the dispense of the state's responsibility under the ECHR as regards the exercise of the transferred powers, since a contrary assessment could harm the peremptory character of the guarantees stipulated in the Convention, with the risk of damaging the effectiveness of the Convention as a safeguard for the protection of individual human beings¹¹⁹. After making this explanation, the ECmHR expressed that the transfer of powers to an organization of a state party to the Convention would be compatible with it only if it was assured that the fundamental rights would be provided 'equal protection' within that organization¹²⁰. In other words, according to the judgment, even though the states would be held responsible due to a violation of their Convention obligations regardless of having transferred power to an international organization with that regard, the complaint for such a violation would be inadmissible by the ECmHR in case this organization could provide an equivalent fundamental rights protection. It can be derived from this judgment that the equivalent protection doctrine encouraged the ECJ to comply with the standards of fundamental rights protection of the ECHR, while giving deference to the autonomy of the EU legal order¹²¹.

The more recent case of *Matthews v. United Kingdom*¹²² signifies the alteration of the ECtHR's view with regard to admissibility, in which an EC law

¹¹⁴ Application No. 13258/87, *M.&Co. v. Federal Republic of Germany*, 64 ECmHR Decisions & Reports 138 (1990). The equal protection doctrine is therefore also mentioned with the name of this case, as "M. & Co. doctrine". See *Bosphorus II*, para. 108, 109. Also see Phelps, p. 8.

¹¹⁵ *Ibid.*, p. 139.

¹¹⁶ *Ibid.*, pp. 139-141.

¹¹⁷ *Ibid.*, pp. 141-143.

¹¹⁸ *Ibid.*, p. 143.

¹¹⁹ *Ibid.*, p. 145.

¹²⁰ *Ibid.*

¹²¹ Costello, p. 91.

¹²² Application No. 24833/94, *Denise Matthews v. United Kingdom*, 1999-I Eur. C. H.R., February 18 1999, p. 251. For information regarding the shift in the ECtHR jurisprudence towards a stronger scrutiny regarding the national responsibility for Community acts, see Robert Harmsen, *National Responsibility for European Community Acts Under the European Convention on Human Rights: Recasting the*

measure was subjected to explicit review for the first time by the Court, clarifying the ECtHR's jurisdiction *ratione materie*. The case concerned the alleged breach of the right to free parliamentary elections by the UK, which was stipulated under Article 3 of the First ECHR Protocol¹²³. According to the challenged UK act, a resident of Gibraltar, as a British citizen, did not have access to vote in the elections to the European Parliament, pursuant to an explicit exclusion indicated therein¹²⁴. Deciding whether the UK was to 'secure' elections to the European Parliament despite the Community character of those elections¹²⁵, the Court emphasized that the responsibility of member states under the ECHR continued even after the transfer of competences to international organizations¹²⁶. The Court indicated that the challenged UK Act as well as the Maastricht Treaty were international instruments freely entered into by the United Kingdom¹²⁷. Hence, it did not make any distinction between European and domestic legislation with regard to the UK's responsibility to abide by the rules of the ECHR¹²⁸, deciding that it was responsible *ratione materie* for its duties under the Convention¹²⁹.

Both *M. & Co.* and *Matthews* carry significance with regard to the discussion in *Bosphorus*, since in both cases it was conceded that a member state to the EU could not be excluded from its Convention duties by transferring sovereignty to the Community. Matthews further implied that the equal protection would not be established if the ECJ could not pursue an effective judicial review of the alleged fundamental rights violation¹³⁰.

The ECtHR Judgment

Bosphorus Airlines made its application to the Strasbourg organs on March 25, 1997¹³¹, which was found admissible by the Court on 13 September 2001, followed by the transfer of the case from one chamber to the Grand Chamber¹³². Prior to making assessments pursuant to the parties' claims, the Court allocated a major part of the judgment to the articulation of relevant EC law and practice¹³³, including the fundamental rights case law¹³⁴ and the

Accession Debate, European Public Law, Vol. 7. Issue 4, Kluwer Law International, 2001, pp. 625-649.

¹²³ *Ibid.*, para. 20.

¹²⁴ See *ibid.*, paras. 18 and 33.

¹²⁵ *Ibid.*, para. 31.

¹²⁶ *Ibid.*, para. 32.

¹²⁷ *Ibid.*, para. 33.

¹²⁸ *Ibid.*, para. 34.

¹²⁹ *Ibid.*, para. 35. For comments on the Matthews case see Iris Canor, *Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?*, European Law Review, Vol. 25, Issue 3, 2000. It is also important that Gibraltar was added to the constituency including Cornwall for the 2004 elections of the European Parliament. See Ovey and White, p. 30.

¹³⁰ For further case law regarding the ECtHR's EU scrutiny until *Bosphorus*, see Phelps, p. 6; Kuhnert, pp. 179 et seq.; Costello, pp. 90-96.

¹³¹ *Bosphorus II*, para 1.

¹³² *Ibid.*, para 7.

¹³³ *Ibid.*, paras. 72 et seq.

¹³⁴ *Ibid.*, paras 72-76.

relevant EC Treaty provisions¹³⁵. While deciding on the case, the Court considered the arguments of Ireland¹³⁶ and Bosphorus Airlines¹³⁷, as well as the submissions of the Friends of the Court¹³⁸, all of which consisted of two distinctive issues with the following titles: Article 1 of the Convention¹³⁹ and Article 1 of the First Protocol¹⁴⁰.

Arguments of the Parties

Ireland addressed the importance of the enhancement of international co-operation, and thus stated that the ECHR should be interpreted giving due regard to the state parties' obligations as members of the EC¹⁴¹. Supported by this claim, Ireland argued that the challenged measure of impounding stemmed solely from the state's obligations to apply the Regulation¹⁴². Ireland reiterated the M. & Co. doctrine, postulating that the ECtHR had competence only to assess whether the Community provided equal protection with the Convention's regime as regards fundamental rights, if the situation was that the government's actions were based on its international obligations¹⁴³. In other words, if only it was retained by the Court that Ireland acted on its own discretion while implementing and applying the Regulation, then it would have competence to decide on the particular act.

Near Ireland's argument that it acted out of its obligation and that the EC and the UN provided such equivalent protection¹⁴⁴, it asserted as another primary argument that even the mere justification of compliance with international legal obligations was sufficient for the interference with Bosphorus Airlines'

¹³⁵ *Ibid.*, paras 77-85.

¹³⁶ *Ibid.*, 108-114.

¹³⁷ *Ibid.*, 115-121.

¹³⁸ *Ibid.*, 122-134. Third party submissions comprised the ones of the European Commission, the Italian Government, the Government of the United Kingdom and The *Institut de formation en droits de l'homme du barreau de Paris*.

¹³⁹ Article 1 of the ECHR states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Therefore, it should be considered by the Court, if those rights have been secured in the instant case.

¹⁴⁰ See fn. 1 on p. 2.

¹⁴¹ *Bosphorus II*, para. 108. See also, para. 110: "For the state to look behind the ECJ ruling, even with a view to its convention compliance, would be contrary to its obligation of 'loyal co-operation' (art. 5, now art. 10 of the EC Treaty-see para. 82 above) and would undermine the special judicial co-operation between the national court and the ECJ envisaged by art. 177 (now art. 234) of the EC Treaty...".

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, para. 109.

¹⁴⁴ *Ibid.*, para. 110. See also, para. 111 for the elements the governments indicated sustaining the equivalence of the EC human rights protection. Here, the government points to the difference of the instant case from *Matthews*, in the way the applicant enjoys the opportunity to 'fully ventilate his claim that its fundamental rights had been breached and the decision of the ECJ was based on a consideration of its property rights'. In *Matthews*, the United Kingdom was held responsible because of the character of the Act, having been freely entered into by the state as a treaty within the Community legal order, which therefore could not be challenged by the ECJ. See *Matthews*, para. 33.

property rights¹⁴⁵. Additionally, the Irish government labeled the impounding of the aircraft as a “lawful and proportionate ‘control of use’ (emphasis added) of the applicant’s possessions in the public interest”. The objective of abiding by the international obligations of following the decisions of the relevant UN bodies and the ECJ, added up to the objective of ending a conflict, according to the government, did amount to a proportionate interference with the applicant’s rights¹⁴⁶.

Bosphorus Airlines contravened to both arguments of the Irish government¹⁴⁷. As to the acting of the state out of its international obligations without any discretionary power, the applicant maintained that the M. & Co. doctrine was not relevant for the instant case, since the challenge here was not directed to the legislation itself, namely ‘to the provisions of Council Regulation 990/93 or the sanctions regime *per se*’¹⁴⁸, but to the application of the Regulation, on which the government possessed a ‘real and reviewable discretion’ at all times, meaning that it could decide on the means to achieve the result pursued by the Regulation¹⁴⁹. The applicant added that even in the case of absence of discretion, it was not true that the EC provided an equivalent protection in terms of fundamental rights¹⁵⁰. The applicant pointed to the restrictive access to the ECJ, with regard to both its subject matter jurisdiction¹⁵¹ and an individual’s standing before the Court¹⁵².

As regards the interference of Bosphorus Airlines’ Convention rights under Article 1 of the First Protocol, the applicant first argued that the impounding was unlawful and could not be regarded as a temporary deprivation when its impact was considered¹⁵³. Furthermore, such an interference could not be justified in the way it was disproportionate for having caused an innocent party to suffer an excessive burden. Others said, the significant economic loss of an innocent party¹⁵⁴ constituted a violation so massive that it could not be justified with the general interest pursued¹⁵⁵.

¹⁴⁵ *Bosphorus II*, para. 112.

¹⁴⁶ *Ibid.*, para. 113.

¹⁴⁷ See *ibid.*, paras 115-121.

¹⁴⁸ *Ibid.*, para. 115.

¹⁴⁹ *Ibid.* The applicant supported its argument relying on previous ECtHR case law regarding the examination of the compatibility with the convention of the discretion exercised by a state in applying EC law. See *Ibid.*, para. 177. Also, the applicant pointed to the ‘unacceptable lacuna of human rights protection’ that would be created when the member state escaped its Convention responsibility by referring a question to the ECJ and implementing its ruling. See *Ibid.*, para. 117.

¹⁵⁰ *Ibid.*, para. 118.

¹⁵¹ The ECJ could not consider the claim of compensation or the whether the discriminatory treatment to the applicant constituted a breach of its fundamental rights. See *ibid.*

¹⁵² The applicant stated that for an action or inaction of a member state alleged to be in breach of the Community law, either the Commission or another member state had standing to bring a claim to the Court, art. 177 (now 234) reference did not apply to the individual harmed by the breach. See *ibid.*

¹⁵³ *Ibid.*, para. 120.

¹⁵⁴ The applicant emphasized that its *bona fides* and innocence was confirmed by all the courts before which the case was examined. See *ibid.*, para. 121.

¹⁵⁵ The general interest being, “the international community’s interest in putting an end to a war and the associated significant human rights violations and breaches of humanitarian law”; see *ibid.*

The Third Party Submissions

Both the UK and Italy intervened as third parties in support of the Irish government's arguments. Both states put the emphasis on the incompatibility of the case, reiterating the requirements stemming from fulfilling international obligations and the equivalent fundamental rights protection of the EC. They also underlined the importance of the public interest, which they argued, should outweigh the interference of the applicant's rights¹⁵⁶.

The intervening of the European Commission as a third party holds importance as its arguments as regards state responsibility differed from the ones of the Irish government, although being in favor of Ireland in the instant case¹⁵⁷. While Ireland's arguments suggested a wider scope of state immunity in the way the government conceived that merely the ground of acting out of an international obligation sufficed for its responsibility to be waived, the Commission claimed that the specific circumstances of the instant case absolved Ireland's responsibility¹⁵⁸. Therefore, the Commission's arguments implies, it asserted that the case actually pertained to the challenge of the EC Regulation, not the Irish action¹⁵⁹.

It was only the Institut de Formation en Droits de l'Homme du Barreau de Paris (Institut), which came up with arguments in support of the applicant¹⁶⁰. It agreed with the applicant's claims that not the Regulation *per se*, but the specific action of impounding the aircraft was being challenged, thus finding the case compatible¹⁶¹. Moreover, it disagreed with the Commission with regard to the equivalent protection of fundamental rights provided by the EC¹⁶². However, in terms of the interference of Bosphorus Airlines rights, the Institut found that the initial deprivation of the aircraft was fully justifiable, not mentioning whether the continuing retention after October 1994 could be justified in the same way¹⁶³.

The Assessment of the ECtHR and Its Analysis

Relying on the claims and arguments of the parties, the Court pursued a twofold analysis, beginning with the inquiry of Ireland's responsibility under the ECHR by determining whether the impounding was based solely upon an obligation of the state to the EC, or Ireland had discretion as to how to implement and apply the Regulation¹⁶⁴. Subsequent to determining that Ireland had no discretion pertaining to the specific action of impounding¹⁶⁵,

¹⁵⁶ For the arguments of the Italian government, see *ibid.*, paras. 129, 130; for the arguments of the government of the United Kingdom, see *ibid.*, paras. 131, 132.

¹⁵⁷ For the European Commission's arguments, see *ibid.*, paras. 122-128.

¹⁵⁸ The Commission laid down the specific circumstances of the case, leaving Ireland no room for discretion. See *ibid.*, para. 125. For the emphasis of this difference in Ireland's and the Commission's arguments, see Costello, pp. 99-100.

¹⁵⁹ See Costello, p. 100.

¹⁶⁰ See *Bosphorus II*, paras. 133, 134.

¹⁶¹ *Ibid.*, para. 133.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, 134.

¹⁶⁴ *Ibid.*, paras 143-150.

¹⁶⁵ *Ibid.*, para. 148.

the Court dealt with the interference with the right to property, with an interrogation of whether this interference could be justified¹⁶⁶. Hence, it referred to the equivalent protection doctrine¹⁶⁷, and adhered to it a 'rebuttable presumption'¹⁶⁸ that the fundamental rights were secured by the EC¹⁶⁹; meaning, in case it was maintained that there existed an equivalent protection of the rights of the applicant, a presumption would occur that the Convention rights were properly secured. While deciding whether this presumption could be rebutted, the Court applied a 'manifest deficiency' test¹⁷⁰, assessing whether the securing of the Convention rights was manifestly deficient in the specific circumstances of the instant case. Having decided on the contrary, the Court established that a presumption of compliance was present in the case¹⁷¹, thus ruling that the impoundment of the aircraft did not give rise to the violation of Article 1 of the First Protocol of ECHR¹⁷².

Having mapped the quite convoluted path followed by the Court in deciding on the case, the issues handled will now be elaborated and analyzed, including the concurring decisions, supporting the criticism directed to the Court's assessment.

'Strict International Legal Obligation' or 'Reviewable Exercise of Discretion'?

As to whether Ireland's actions did occur as required under EC law¹⁷³, or Ireland exercised discretion while applying the Regulation¹⁷⁴, the Court pursued a threefold reasoning. First, it confirmed that the Regulation required the Irish authorities to act in the manner they did¹⁷⁵. Second, the Court stated that the duty of loyal cooperation dictated Ireland under Article 10 EC to appeal the High Court's ruling to the Supreme Court of Ireland¹⁷⁶; and last, that the Supreme Court was under an obligation to refer the case to the ECJ and to apply its ruling, pursuant to Article 234 EC¹⁷⁷. Thus, Ireland had no

¹⁶⁶ *Ibid.*, paras 151 et seq.

¹⁶⁷ See *ibid.*, paras 155, 156, 165 for the ECJ's assessment regarding equal protection; *ibid.*, paras. 2 et seq. of the Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, for the concurrence's opinion as regards equal protection. See also the arguments regarding Art. 1 of the ECHR and equivalent protection in particular at *Ibid.*, para 108, 110 for the Irish government; *ibid.*, paras. 115, 118 for Bosphorus Airlines and *ibid.*, paras. 122, 126, 129, 133 for third parties.

¹⁶⁸ See *ibid.*, para. 156.

¹⁶⁹ See Phelps, p. 6. The author states: "The ECtHR generally follows *M. & Co.*, but repackages it to account for the concerns expressed in *Matthews* by using a rebuttable presumption that the Community protects fundamental rights."

¹⁷⁰ *Ibid.*, para. 156.

¹⁷¹ *Ibid.*, para. 166.

¹⁷² *Ibid.*, para. 167.

¹⁷³ *Ibid.*, para. 157.

¹⁷⁴ *Ibid.*, para. 107.

¹⁷⁵ *Ibid.*, para. 145.

¹⁷⁶ *Ibid.*, para. 146.

¹⁷⁷ *Ibid.*, para. 147.

other option but to apply Article 8 of Regulation 990/93 to the aircraft of Bosphorus Airlines¹⁷⁸. Importantly, the Court underscored that Ireland would be fully responsible under the ECHR for all acts falling outside its strict international legal obligations, citing its previous rulings regarding state responsibility in the course of EC law implementation¹⁷⁹. In this respect, the applicant's argument claiming that Ireland had a "reviewable discretion as to the means by which the result required by the EC Regulation could be achieved"¹⁸⁰ may seem to be a weak one, with similar facts to *M. & Co.*¹⁸¹. It can also be claimed that the instant case is distinguishable from cases such as *Matthews*, in the sense it does not pertain to a primary legislation of the EC, freely entered into by the member states¹⁸². However, then the question arises, how it can be assured that the Convention rights are secured in spite of the transfer of sovereignty, if neither the EC can be sued as a contracting party to the ECHR, nor the member state can be held liable for the secondary acts of the EC¹⁸³. Besides, Peers argued that the *Matthews* case was not as easily distinguishable from *Bosphorus* as the ECtHR asserted¹⁸⁴, since all Community obligations stem from the European Community's primary law and an act derived from an obligation outside the direct control of a member state of the EC could be based upon the ECJ's interpretation of EC primary legislation¹⁸⁵. Nonetheless, the danger of an "unacceptable lacuna"¹⁸⁶ with regard to the review of acts deriving from Community legislation could be argued to vanish, in case the Community provided an equivalent human rights protection¹⁸⁷. With this regard, the equal protection doctrine should now be refined, analyzing the ECtHR's rebuttable presumption approach in conjunction with the manifest deficiency test pursued by the Court.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, para. 107.

¹⁸¹ For this argument, see Phelps, p. 6.

¹⁸² The Court gave other case law as examples apart from *Matthews* in para. 157 of the judgment.

¹⁸³ See Peers, p. 446.

¹⁸⁴ See *ibid.*, para. 157.

¹⁸⁵ Peers, p. 453. The author also objects to some other case law stated by the ECtHR as counter-examples with reasoning. Also, Costello warns that "the most troublesome aspect of the ruling as regards determination that Ireland lacked discretion concerns the ECtHR's treatment of Ireland's decision to appeal the first High Court ruling to the Supreme Court." The author points to the ECJ's statement referring to the broad discretion of national authorities when acting under Art. 10 EC. She suggests that where the obligations of the member states devolve from Art. 10, they should be deemed to exercise discretion. See Costello, pp. 109-110.

¹⁸⁶ *Bosphorus II*, para. 117.

¹⁸⁷ For this argument, see Phelps, p. 6. The legitimate interest indicated by ECtHR differs from the one put forward by the ECJ, which was ending the war in the former Yugoslavia. See *Bosphorus I*, para. 23.

The Equivalent Protection Doctrine, Rebuttable Presumption of Compliance and the Manifest Deficiency Test

After establishing that Ireland acted out of its obligations under the EC law, the Court turned to consider whether the specific measure of impounding was justified, which it evaluated by construing a balance between the general interest and the applicant's rights¹⁸⁸. In fact, the Court deemed Ireland's acting pursuant to its obligations a "legitimate interest of considerable weight"¹⁸⁹ itself, as a justification for the infringement of property rights. This evaluation was grounded upon the principles of *pacta sunt servanda* and the significance of international cooperation¹⁹⁰, implying the importance attributed to the proper functioning of international organizations, when the supranational character of the EU is considered in particular¹⁹¹.

The equivalent protection doctrine is invoked by the Court in balancing the legitimate interest, making sure that the parties to the ECHR do not get rid of their Convention obligations. In other words, "the doctrine aims to reconcile the responsibility of States for all their actions under Article 1, ECHR in light of the 'peremptory character' and 'practical and effective nature' of ECHR guarantees and a State's duties to comply with other international and EU obligations¹⁹²." It is important to perceive the functioning of the equivalent protection doctrine, serving both as a conditional immunity and a justification for the acts of a member state, as analyzed by Costello¹⁹³. Accordingly, a state's action which would be in breach of the Convention is justified if it is conducted based on its other international obligations. As to the other aspect, the equivalent protection doctrine grants immunity to the member states, as long as it is assured that the relevant organization complies with the ECHR's human rights protection. The ECtHR required with this respect, that the EC protected 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"¹⁹⁴. The Court denoted herein that the equivalent protection referred to a comparable one rather than identical, since such a requirement carried the risk of contradicting with the interest of international co-operation¹⁹⁵.

¹⁸⁸ *Bosphorus II*, para. 150.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ See Costello, p. 101. For more information regarding the normative conflicts between international and supranational obligations of the EU member states, see Magdalena Lickova, *European Exceptionalism in International Law*, European Journal of International Law, 2008, 19 (463), O.U.P. 2008, p. 4 et seq.

¹⁹² Costello, p. 101; *Bosphorus II*, para. 154.

¹⁹³ See Costello, p. 101.

¹⁹⁴ *Bosphorus II*, p. 155. Here, the Court adds the procedural guarantees aspect to the substantive guarantees, which was lacked in *Matthews*. Therefore, it clarified the doctrine enunciated in *M. & Co.*

¹⁹⁵ Costello, p. 101; Iris Canor, *Exercise in Constitutional Tolerance? When Public International Law Meets Private International Law: Bosphorus Revisited* (Bosphorus Revisited), The Shifting Allocation of Authority in International Law, Considering Sovereignty, Supremacy and Subsidiary, Essays in honor of Professor Ruth Lapidoth,

Consequently, a presumption arises that a state's act is justified, when the equivalent protection of the relevant organization is established, which can be rebutted in cases that the protection of Convention rights are "manifestly deficient"¹⁹⁶. In the way of eliciting that the presumption was not rebutted in the instant case, the Court first touched upon the ECJ's substantial human rights protection¹⁹⁷. Noting that the founding treaty of the Community did not explicitly include the protection embedded in the ECHR, the Court referred to the ECJ's recognition that the legality of the Community acts was contingent upon fundamental rights protection¹⁹⁸, adding that the ECJ has relied on the ECHR jurisprudence while interpreting the Community legislation¹⁹⁹. The ECtHR also pointed to the relevant provisions of the Draft Constitution and the Charter of Rights to indicate the eagerness of the Community to protect fundamental rights²⁰⁰. Next, the ECtHR turned to the issue of procedural guarantees²⁰¹, first admitting that the access of individuals to the ECJ was limited. Nevertheless, the Court found that the suits initiated by the Commission as well as the member states were to the indirect benefit of individuals and constituted an important control of compliance with Community norms²⁰². Propounding that the individual's rights before national courts and the preliminary reference procedure were endowed ways of challenging the alleged fundamental rights violations²⁰³, the ECtHR concluded that the presumption that Ireland acted in conformity with the requirements of the Convention was substantiated²⁰⁴. Subsequent to the abovementioned assessments, the Court shortly declared that the presumption of compliance was not rebutted in the instant case, asserting that "there was no dysfunction of the mechanisms of control of the observance of convention rights²⁰⁵".

The above stated assessment of the ECtHR has been criticized by the concurring judges for having set a too high threshold for the rebuttal of the presumption²⁰⁶, putting the emphasis on the "undefined nature" of the criterion of 'manifestly deficient'. They noted that the ECHR suggested a minimum level of protection under Article 53, and it might not always be the case that the protection of the EC was equivalent to the one of the Convention regime as to the result, although the means might be deemed equivalent. Such a low threshold, according to the concurrences, could create the risk that the Community would apply less stringent standards than the ECHR, being saved by the anticipation of an equivalent protection. The concurrences thus

ed. Tomer Broude, Yuval Shany, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 250.

¹⁹⁶ *Bosphorus II*, para. 156.

¹⁹⁷ *Ibid.*, para. 159.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, paras. 160-164.

²⁰² *Ibid.*, paras. 162, 163.

²⁰³ *Ibid.*, para. 165.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, para. 166.

²⁰⁶ See *Bosphorus II*, Decision-1 by Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki (Joint Concurring Opinion).

apprehended that unless the ECtHR pursued a case-by-case inquiry including a scrutiny regarding the proportionality review “in concreto”²⁰⁷ instead of employing presumption with a general abstract view²⁰⁸, there would be a danger of double standards in the human rights protection. Judge Ross, in his separate opinion, mentioned the importance of accession to the ECHR²⁰⁹ and also took the attention to the risk of the emergence of double standards through the assumption of equivalent protection²¹⁰. Indeed, it can be observed from the Court’s opinion that it avoided to scrutinize the particular findings of the ECJ in the *Bosphorus* ruling, although it can be regarded as more activist in the *Bosphorus* case, by taking a step forward from the judgment of *M. & Co.*, which had found the mere existence of judicial mechanisms sufficient for an equivalent protection²¹¹. Here, the distinction of the ECJ’s fundamental rights review from the one of the ECtHR should be noted. It is evident from the ECJ jurisprudence pertaining to fundamental rights that it gives priority to the primacy of Community law and the fostering of the EC’s economic agenda²¹². It is pointed by Kuhnert in this sense, that the ECJ upheld an extensive interpretation of the term ‘common welfare’, which in her view is unlikely be trumped by the ‘individual welfare’, which gives the alarm of a less stringent standard of protection, since the manifest deficiency test sets up a relatively low threshold for the EU, in contrast to ECtHR’s supervision of other member states of the Council of Europe²¹³.

Not only the lack of adequate scrutiny as regards the proportionality review of the ECJ with regard to the specific measure and the vagueness of the concept of manifest deficiency, but also the Court’s assessment as regards procedural guarantees was criticized by the concurrences²¹⁴. With this respect, limited access to the ECJ due to the stricter standing rules and the functions of the Court when compared to the ECtHR was referred to. In the joint concurrent opinion it was noted that a reference to a preliminary ruling constituted an internal, a priori view, in contrast to the external and a posteriori supervision of the ECtHR²¹⁵, initiated with an individual application. In fact, apart from the instant situation, the role of national courts in the context of the preliminary ruling procedure creates doubts as regards providing sufficient compensatory protection, due to the gaps of legal protection in highly sensitive areas such as “Visas, Asylum and Immigration” (Title IV of the EC Treaty) and “Police and Judicial Cooperation in Criminal Matters (Title VI of the EU Treaty)²¹⁶. The

²⁰⁷ *Ibid.*, para. 2.

²⁰⁸ *Ibid.*, para. 3.

²⁰⁹ *Bosphorus II*, Decision-2, Judge Ress, para. 1.

²¹⁰ *Ibid.*, para. 2.

²¹¹ Costello, p. 103. For the evaluation of the European Commission’s arguments in favor of the limited application of the equivalent doctrine pointing to the supranational character of the Community and the comparison of the *Solange* doctrine with the application in *Bosphorus*, see Costello, pp. 103-105.

²¹² See Phelps, p. 9 for the ECJ case law supporting this view.

²¹³ Kuhnert, p. 187.

²¹⁴ *Bosphorus II*, Joint Concurring Opinion, para. 3.

²¹⁵ *Ibid.*

²¹⁶ Kuhnert, p. 187. For further information regarding restrictions on preliminary references as lack of equivalent protection due to the absence of judicial control, see Costello, pp. 116-118.

argument that the differences between the third pillar and the EC legal order are so substantial as to preclude any state to benefit from a presumption of compliance with the ECHR in this area²¹⁷ takes the attention to the hazardousness of double standards.

Nevertheless, the ECtHR judgment of *Bosphorus* was welcomed by supporters of the superior position of the ECHR regime, and a robust scrutiny of member state acts deriving out of EC obligations as regards fundamental rights protection of the EC, in the way it carried out an inquiry with regard to the equivalent protection of these rights, notwithstanding the discrepancies stated above²¹⁸. Indeed, the approach in the instant case regards the member state responsibility as a default position. However, this stance creates the concern that the EU itself would avoid its own fundamental rights obligations. Therefore, *Costello* advises that the member state responsibility should not be emphasized at the expense of Community responsibility²¹⁹. Pleasantly, Judge Wildhaber recently announced the importance attributed to the ECtHR jurisprudence and the Convention by the ECJ in its judgments, pointing to the harmony between the Luxemburg and Strasburg jurisprudence. He stated, "hardly any conflicts between the two European courts have occurred in the past."²²⁰

As a last concern, the problematic of overlapping jurisdictions should be briefly mentioned. Despite the comity institutionalized between the ECJ and the ECtHR²²¹, two issues remain intact, namely the issue of delay and the interpretative challenge for the national courts. Indeed, the overlapping jurisdiction of the two Courts causes considerable delays to occur disfavoring the litigants, with regard to the issues of fundamental rights. Furthermore, national courts face with two different sources of interpretative guidance on the Convention guarantees, with the risk of creating a dichotomy in the application of individual cases²²².

The Legal Accountability of the Security Council

Having mentioned the problematic of overlapping jurisdictions, a very important implication of the *Bosphorus* case as regards the fragmentation of

²¹⁷ Peers, p. 454.

²¹⁸ Canor further states that the decision has been perceived by many as an attempt of the ECtHR to re-establish its superiority over the ECJ. The author suggests, on the contrary, that the *Bosphorus* judgment could be regarded more as an acknowledgement of the ECJ's ruling. See, Canor, *Bosphorus Revisited*, p. 264.

²¹⁹ Costello, p. 121.

²²⁰ See Luzius Wildhaber, "The Coordination of the Protection of Fundamental Rights in Europe", 3rd Convention of European Lawyers, Geneva, 8 September 2005. In his speech, Wildhaber dealt with the EU-ECHR relationship in depth. It should be added that the EU has been moving toward a more positive role for fundamental rights on a non-judicial basis. The monitoring mechanism of the Network of Independent Experts on Fundamental Rights initiated by the European Commission upon request of the European Parliament is an important development in this sense.

²²¹ For the comments regarding the application of comity in the context of overlapping jurisdictions, see Canor, *Bosphorus Revisited*, pp.240-251.

²²² For comments regarding the overlapping jurisdictions problematic, see Costello, pp. 119-120.

international law should also be touched upon, namely the legal status of the UN Security Council Resolutions, a question the ECtHR avoided to answer in the instant case. While admitting that the challenged Regulation was based upon the UN SC Resolution adopted under Chapter of the UN Charter, the Court indicated that it did not constitute the legal basis for the impoundment of the aircraft, and confined itself to state that the Resolution did not form a part of the Irish domestic law²²³.

The fact that the ECtHR decision did not even slightly touch upon the responsibility of the Security Council leaves the question open as to how it would react to a challenge directed to the actions based upon the SC Resolutions, in case the state party whose act was challenged was not a member state of the EU²²⁴.

Indeed, the SC is surrounded with an almost unlimited power in terms of acting under its Chapter VII powers, raising questions as to the legality and legitimacy of its decisions²²⁵. The absence of accountability mechanisms of those decisions is expectant to create serious harms on individuals, when a decision directly affecting an individual's fundamental rights is implemented by a state²²⁶. The joint cases of *Yusuf and Kadi*²²⁷ are worth mentioning with this respect, in the sense it shows the activism of the ECJ in reviewing the UN SC Resolutions, in favor of individuals' fundamental rights. The opinion of Advocate General Maduro in the *Kadi* case carries significance in the sense the arguments therein resembles the application of the equivalent protection doctrine in *Bosphorus*. Maduro stated: "Had been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order²²⁸." The ECJ decision has been praised in

²²³ *Bosphorus II*, para. 143.

²²⁴ Costello points to this question, referring to Ireland's oral argument that the consideration of the UN system would have been unavoidable if the impoundment had been initiated by a non-member state. Moreover, the author notes the UK submission to the case, mentioning the overriding effect of the states' Charter obligations under Articles 25 and 103 of the UN Charter.

²²⁵ Österdahl, p. 28.

²²⁶ With regard to the problematic of judicial review of the UN SC Resolutions by national courts and the related case law, see Vera Gowlland Debbas and Liva Djacoba Tehindrazanarivelo, *National Implementation of United Nations Sanctions: A Comparative Study*, Brill Academic Publishers, Leiden, 2004, pp. 59 et seq.

²²⁷ Joined Cases C-402/05 and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 3 September 2008. The case concerned the annulment of the Council Regulations grounded upon SC resolutions, causing the applicants' assets to be frozen, in the way of overcoming terrorist activities in Afghanistan. Overriding the judgment of the Court of First Instance, the ECJ annulled the Council Regulation, deciding that the adoption of the Resolution violated the applicants' fundamental rights.

²²⁸ Case C-402/05 P, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Opinion Of Advocate General Poiares Maduro, 16 January 2008, para. 54.

terms of the significance it attributed to fundamental rights²²⁹, thus “construing a clear-cut choice between a fully developed legal system for the protection of individual rights, and an embryonic system ill-equipped to deal with instances of direct individual grievances²³⁰.”

Conclusion

In the face of a new era witnessing the allocation of international legal regimes with overlapping areas of jurisdiction, *Bosphorus* carries significance in the sense it illustrates the interplay among the autonomous legal regimes whose rules apply to the same factual situation.

With this respect, this paper elaborated and analyzed the rulings of two international courts established by two different legal systems with competence of deciding on the same subject matter. It was emphasized that the ECJ preliminary ruling holds paramount importance in the way it dealt with an EC sanctions regulation, thus embracing the indirect review of a SC Resolution. The ruling also signifies the predominance of the general public interest trumping the individual's fundamental rights in certain circumstances, pointing that these rights are not absolute. Followed by a comparison of the instant ruling with former ECJ case law regarding individual's rights, it was indicated that the Community objectives come into prominence as a determinant factor in upholding the EC legislation. Besides, the dilemma experienced by the ECJ in the case of the incorporation of a UN Resolution to the EC law was reflected, arguing that this predicament directed the Court to uphold the Regulation, choosing to remain on the safe side.

Subsequent to the analysis of the ECJ ruling, the decision of the ECtHR on the same issue was laid down. Here, it was indicated that the Court deemed itself to be competent to review the Community acts indirectly through dealing with the implementation measures initiated at the member state level. The novelty of the judgment was presented, in the sense it pursued an inquiry as to whether the protection of fundamental rights could be regarded as equivalent to the one of the ECHR regime's, applying a presumption of compliance approach.

As a concluding remark, it should be reiterated that both decisions were confronted with criticism in terms of various aspects as discussed above, all pointing to the sacrifice of individuals' fundamental rights with an attempt of reaching a compromising solution in a world of intertwined pluralistic legal regimes. It should however be kept in mind that acting brave enough to render

²²⁹ For further comments on the cases, see Joris Larik, *Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case*, EU Diplomacy Papers, 3/2009. Here, the author argues that the ECJ made the right choice in terms the interaction of the international and EU legal orders. See also, Albert Posh, *The Kadi Case: Rethinking The Relationship Between EU Law And International Law?*, 15 Columbia Journal of European Law 1/2009. The author argues that the ECJ did not establish a new hierarchical structure regarding the relation of international and European law, but that it underlined the primacy of obligations under the UN Charter.

²³⁰ Christian Tomuschat, *Case Law: European Court of First Instance, Judgment of 21 September 2005*, Common Market Law Review, Vol. 43, No. 2, 2006, pp. 537-551, p. 544.

contradicting decisions on the same subject matter is neither easy, nor can always be the ideal solution considering the principle of comity, since we are not yet dwelling in an 'ideal' world with a universal constitutional regime and no formal hierarchy is yet present among the distinctive international legal systems. It is nonetheless hoped that the entering into force of the Lisbon Treaty will pave the way to a more unified application of the protection of fundamental rights, providing a higher level of legitimacy and legal certainty for individuals. The abandonment of the second pillar, which implies an extended subject matter of the ECJ scrutiny and the prospective accession of the EU to the ECHR leads to optimism in this sense.

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