OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 8 November 2006 [1]

I — Introduction

1. 'The ... War was a prolonged struggle, during the course of which an unparalleled number of misfortunes befell Hellas. Never had so many cities been taken and laid desolate ... never had there so much banishing and slaughter ...'. That was how Thucydides described the Peloponnesian War in the fifth century BC, [2] graphically depicting the catastrophes of any conflict, which affect both losers and winners alike.

2. The harmful effects of war have been portrayed in all styles of art. *The Disasters of War*, the well-known series of 82 prints which Goya created between 1810 and 1820, shows the miseries wreaked on individuals by the fighting, the crimes and the torture, and by their consequences; the prints are bitter testimonies infused with pessimism which form a social chronicle with a powerful pacifist impact. Similarly, *The Third of May 1808: the Execution of the Defenders of Madrid*, also by Goya, and *Guernica*, by Picasso, depict the feelings which the wars concerned, with their toll of annihilation and extermination, aroused in those brilliant painters.

3. Some years later, in 1859, the Swiss philanthropist Henry Dunant crossed Lombardy, which at that time had been ruthlessly razed to the ground, reached Solferino on the evening of a bloody battle, and found to his horror that thousands of soldiers lay mutilated, abandoned, and neglected, condemned to certain death. From that dreadful sight the inspiration to found the Red Cross was born.

4. The terrible effects of armed conflict have also been felt in the legal sphere. In the case before the Court, a number of Greek citizens have lodged a claim before a Greek court, seeking compensation from Germany for the damage and loss caused by the German army during a tragic episode in the Second World War.

1 — Original language: Spanish.

2 — Thucydides, *The History of the Peloponnesian War*, I-23.

5. The Efetio Patron (Court of Appeal, Patras) (Greece) has asked the Court whether, in the light of its subject-matter, that dispute falls within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[3] known as the Brussels Convention, and also whether the privilege of State immunity from legal proceedings is compatible with the system of that Convention.

6. Those questions have been referred incorrectly under Article 234 EC, since the jurisdiction of the Court to interpret the Brussels Convention is derived not from that provision but from the Protocol of 3 June 1971.[4] However, that error is not important because, as the German Government points out, Article 2 of the Protocol provides that the Efetio may seek preliminary rulings on the interpretation of the Brussels Convention.

II — The legal framework

7. The 'scope' of the Brussels Convention is defined in Title I, consisting of Article 1, which provides:

'This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration.'

8. Title II, which governs jurisdiction, enshrines, in the first paragraph of Article 2, the general principle that 'persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State', subject to the exceptions laid down in the Convention.

3 — OJ 1978 L 304, p. 1; consolidated version in OJ 1998 C 27, p. 1.

4 — Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1975 L 204, p. 28; consolidated version in OJ 1998 C 27, p. 28).

9. Those exceptions include the cases of special jurisdiction referred to in Article 5, which provides:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

...'

10. The remaining provisions are contained in Title III ('Recognition and Enforcement'), Title IV ('Authentic Instruments and Court Settlements'), Title V ('General Provisions'), Title VI ('Transitional Provisions'), Title VII ('Relationship to Other Conventions'), and Title VIII ('Final Provisions').

11. It should be noted that Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [5] has replaced the Brussels Convention and that there is a marked similarity between the provisions of the two instruments. However, the new legislation is not applicable to the case before the Court.

III — The facts, the main proceedings and the questions referred for a preliminary ruling

12. Ms Lechouritou and a number of other individuals brought an action against Germany before the Polimeles Protodikio (Court of First Instance), Kalavrita, (Greece) seeking compensation for the physical damage, non-material loss and mental anguish which they suffered as a result of the massacre carried out by Wehrmacht soldiers on 13 December 1943 in Kalavrita, when Greece had been invaded during the Second World War. [6]

5 — OJ 2001 L 12, p. 1.

6 — In relation to similar events which occurred in Distomo on 10 June 1944, 257 Greek citizens brought an action against Germany which was upheld by the Court of First Instance, Livadia, in a decision of 30 October 1997. That decision was upheld by the Greek Supreme Court by a judgment dated 4 May 2000, but this judgment was not enforced because no prior authorisation was given by the Ministry of Justice in accordance with Article 923 of the Code of Civil Procedure. The plaintiffs then brought the case before the European Court of Human Rights which, in *Kalogeropoulou and Others v. Greece and Germany* (dec.), no. 59021/00, ECHR 2002-X, analysed the relationship between State immunity and the European Convention for the Protection of Human Rights and Fundamental Freedoms and ruled that the restrictions laid down in the Greek legislation were proportionate. The observations submitted by the German Government on the present reference for a preliminary ruling give an account of the diplomatic crisis which arose at the time.

13. The Polimeles Protodikio ruled in Judgment No 70/1998 that, in accordance with Article 3(1) of the Code of Civil Procedure, it lacked jurisdiction to settle the dispute because the defendant State enjoyed the privilege of immunity from legal proceedings.

14. The plaintiffs appealed to the Efetio Patron which, on 12 January 2001, first decided to stay the proceedings pending a decision of the Anotato Eidiko Dikastirio (Superior Special Court) (Greece) on whether Article 11 of the European Convention on State Immunity, concluded in Basle on 16 May 1972 [7] — to which Greece is not a signatory and which excludes from immunity sovereign acts occasioning injury or damage carried out in the territory of the State of the forum when the perpetrator was on that territory — is a generally recognised rule of international law and whether that exception covers, in accordance with international custom, claims to redress injury or damage caused by armed conflicts which affect a specific group of persons from a particular place who have no connection with the hostilities or with the military operations.

15. In Judgment No 6/2002 of 17 September 2002, the Anotato Eidiko Dikastirio held that 'as international law currently stands, a generally recognised rule of international law continues to exist, according to which it is not permitted that a State be sued in a court of another State for compensation in respect of a tort or delict of any kind which took place in the territory of the forum and in which armed forces of the State being sued are involved in any way, whether in wartime or peacetime'.

16. The Efetio Patron, which, like all other Greek courts, is bound by the judgment of the Anotato Eidiko Dikastirio, [8] identified a point of connection with Community law and stayed the proceedings while it referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for acts or omissions of its armed forces fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof, where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile

7 — A Convention adopted in the framework of the Council of Europe, which has been in force since 11 June 1976 and which binds Germany, Austria, Belgium, Cyprus, Luxembourg, the Netherlands, the United Kingdom and Switzerland. An Additional Protocol was opened for signature on the same date and entered into force on 22 May 1985; it applies to Austria, Belgium, Cyprus, Luxembourg, the Netherlands and Switzerland. The text and the ratifications may be viewed on the Council of Europe website at http://www.conventions.coe.int/Treaty/en/Treaties/Html/074.htm.

8 — Article 100(4) of the Greek Constitution, in conjunction with Article 54(1) of the Code on the Anotato Eidiko Dikastirio, which was ratified by Article 1 of Law No 345/1976 (FEK A 141).

following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity?

(2) Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-1944?'

IV — The procedure before the Court

17. Written observations were submitted, within the period prescribed by Article 23 of the Statute of the Court of Justice, by the plaintiffs in the main proceedings, the Netherlands, Polish, German and Italian Governments, and the Commission.

18. At the hearing, held on 28 September 2006, oral argument was presented by the representatives of the plaintiffs, of the German Government and of the Commission.

V — Analysis of the first question

19. The Efetio Patron asks, in short, whether the Brussels Convention, which, pursuant to Article 1 thereof, is restricted to 'civil and commercial matters', applies to actions for compensation brought by individuals against a Contracting State in respect of loss and damage caused by occupying forces during an armed conflict.

A — *The concept of 'civil and commercial matters'*

20. Adhering to the custom prevailing in other international treaties, [9] and with a view

9 — In the Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 1), P. Jenard states that the committee of experts responsible for drafting the Convention followed the practice of existing Conventions in that regard. In academic legal writing, the same point is made in Droz, G.A.L., *Compétence judiciaire et effets des jugements dans le marché commun (Étude de la Convention de Bruxelles du 27 septembre 1968)*, Librairie Dalloz, Paris, 1972, p. 33. See, likewise, Advocate General Darmon at point 19 of the Opinion in *Sonntag*, to which I will refer below. At point 20 of that Opinion, the Advocate General states that 'it is rare in a bilateral context to draw up an exhaustive list of matters coming under civil or commercial law'.

to avoiding the pitfalls of setting out a list of matters covered, [10] the Convention does not provide a definition of 'civil and commercial matters'; instead, it merely includes a negative stipulation to the effect that 'the nature of the court or tribunal' is immaterial. [11] However, according to case-law, the term (1) is an independent concept and (2) excludes acts *iure imperii.*

1. An independent concept

21. In the Opinion in *Rich,* [12] Advocate General Darmon stated that the interpretation of the Convention gives rise to many difficulties because, in addition to the complexity inherent in the field, the Convention uses terms which, while well-defined in national legal systems, frequently have different meanings, leading the Court to propose independent definitions.

22. The foregoing happened in relation to the term 'civil matters', [13] which the Court described in *LTU* [14] as an independent concept that must be interpreted by reference not only to the objectives and the scheme of the Convention but also to the general principles which stem from the corpus of the national legal systems, stating that a reference to the internal law of one or other of the States concerned is not appropriate because the delimitation of the scope *ratione materiae* of the Convention seeks 'to ensure ... that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform' (paragraph 3). [15]

23. That characterisation was followed in other judgments, such as *Bavaria Fluggesellschaft and Germanair,* [16] paragraph 4; *Gourdain,* [17] paragraph 3; *Rüffer,* [18] paragraphs 7 and 8; *Sonntag,* [19] paragraph 18;

10 — Desantes Real, M., *La competencia judicial en la Comunidad Europea,* Bosch, Barcelona, 1986, pp. 79 and 80.

11 — The Brussels Convention followed trends in international law: in *Conférence de La Haye de Droit international privé, Actes et Documents de la quatrième session (mai-juin 1904),* at p. 84, it is stated that the term 'civil and commercial matters' is very broad and does not encompass only cases in which civil or commercial courts have jurisdiction, particularly in countries where there is an administrative jurisdiction.

12 — C-190/89 [1991] ECR I-3855.

13 — Other concepts have also been given an independent scope, such as the term 'matters relating to a contract' which is referred to in Article 5(1) of the Brussels Convention (Case 34/82 *Peters* [1983] ECR 987, paragraphs 9 and 10; Case 9/87 *Arcado* [1988] ECR 1539, paragraphs 10 and 11; Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 10; Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 15; and Case C-334/00 *Tacconi* [2002] ECR I-7357, paragraph 35).

14 — Case 29/76 [1976] ECR 1541.

15 — In point 2 of the Opinion in that case, Advocate General Reischl asserted that there was very little agreement on the question because analyses of the academic writing and case-law of the Member States revealed different approaches. However, he challenged the view that the concept concerned must be treated as independent, describing it as highly attractive but open to many very serious objections, and proposed that the solution should be left to the law of the State in which the judgment to be enforced originated.

16 — Joined Cases 9/77 and 10/77 [1977] ECR 1517.

17 — Case 133/78 [1979] ECR 733.

18 — Case 814/79 [1980] ECR 3807.

19 — Case C-172/91 [1993] ECR I-1963.

Baten, [20] paragraph 28; and *Préservatrice foncière TIARD*, [21] paragraph 20.

2. The exclusion of acts *iure imperii*

25. In *LTU*, the Court held that the Convention applies to disputes between a public authority and a private individual, where the former has not acted in the exercise of its public powers (paragraphs 4 and 5). [23]

24. The Schlosser report on the Association Convention of 1978 [22] argues that it is necessary to provide an independent definition of the terms used in Article 1, and points out that the distinction between civil and commercial matters, on the one hand, and matters of public law, on the other, is well recognised in the legal systems of the original Member States. Despite some important differences, the distinction is normally based on similar criteria, which is why the individuals who drafted the original text of the Convention and the Jenard report did not include a definition of civil and commercial matters and merely specified that the decisions of administrative and criminal courts fall within the scope of the Convention, provided that those decisions are given in a civil or commercial matter. The Schlosser report also notes that the aforesaid distinction between public law and private law — which is common in the legal systems of the original Member States — is hardly known in the United Kingdom and Ireland (point 23).

26. Although the Court was referring to the provisions governing the recognition of judgments (Title III), the same approach applies to the provisions on jurisdiction (Title II), [24] because Article 1 defines the scope of both sets of provisions.

27. The judgment in *LTU* led to the amendment of the Brussels Convention so as expressly to exclude 'revenue, customs or administrative matters' when the Community was expanded for the first time. [25]

20 — Case C-271/00 [2002] ECR I-10489.

21 — Case C-266/01 [2003] ECR I-4867.

22 — Report on the Convention on the Association of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its interpretation by the Court of Justice, by Professor P. Schlosser (OJ 1979 C 59, p. 71).

23 — That case-law was confirmed in *Rüffer*, paragraph 8; *Sonntag*, paragraph 20; *Baten*, paragraph 30; *Préservatrice foncière TIARD*, paragraph 22; and Case C-167/00 *Henkel* [2002] ECR I-8111, paragraph 26.

24 — In point 21 of the Opinion in *Henkel*, Advocate General Jacobs put forward the same view, which was implicitly adopted by the Court in the judgment.

25 — The sentence concerned was added by Article 3 of the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended version — p. 77).

28. However, public authorities' activities are not exhausted with those fields, although they deal with them frequently; in addition, the terms 'revenue', 'customs' and 'administrative' have the same conceptual autonomy as 'civil' and 'commercial', owing to identical requirements of uniformity and legal certainty. [26]

29. Those who have submitted written observations in these proceedings all agree that acts *iure imperii* do not fall within the scope of the Brussels Convention. [27] However, disagreements arise in relation to the definition of such acts and to whether they cover the conduct of the armed forces of one State in the territory of another.

30. It is therefore necessary to consider (a) the reasons for the exclusion of acts *iure imperii* and (b) the criteria on which the exclusion is based in each case.

(a) The reasons for the exclusion of acts *iure imperii*

31. In *LTU*, when considering the independence of the concept of civil and commercial matters and the need to interpret it in accordance with the criteria set out, the Court cited certain reasons which relate to the nature of the legal relationship between the parties to an action or the subject-matter thereof as justification for excluding such an action from the scope of the Brussels Convention, drawing a distinction between situations where a public authority acts in the exercise of its powers and those where it acts in the same way as an ordinary individual (paragraph 4). [28]

32. There are also other, stronger, general reasons in support of the view that acts *iure imperii* — unlike acts *iure gestionis* [29] — are not covered by the Brussels Convention.

33. The Schlosser report observes that, '[i]n the legal systems of the original Member States, the State itself and corporations exercising public functions such as local authorities may become involved in legal transactions in two ways', depending on

26 — Article 2(1) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15) adopts that approach by providing: 'This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ("*acta iure imperii*")'. Article 2(1) of the Amended proposal for a Regulation of the European Parliament and of the Council creating a European order for payment procedure (COM(2006) 57 final) is similarly worded.

27 — Proposals for future Community legislation also exclude acts *iure imperii*. Thus, Article 1(1)(g) of the Amended proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ('Rome II') (COM(2006) 83 final) excludes 'non-contractual obligations arising in connection with the liability of the State for acts done in the exercise of public authority ("*acta iure imperii*")'.

28 — In the Opinion in *LTU*, Advocate General Reischl cited superiority and subordination as elements of relationships governed by public law.

29 — Desantes Real, M., op. cit., p. 84.

whether they are governed by provisions of public law or of private law, and acts carried out under public law are deemed to be sovereign acts.

34. Turning to a different line of reasoning, in the Opinion in *Préservatrice foncière TIARD,* Advocate General Léger examined the exclusions laid down in the second paragraph of Article 1 of the Convention relating to 'matters which lie outside the independent will of the parties and concern public policy' (point 53), from which he deduced that, 'in those matters, the draftsmen of the Brussels Convention intended the exclusive legislative competence of a Member State to be matched by the competence of the administrative and judicial authorities of the same State. When those matters constitute the principal subject-matter of the dispute, it is the courts of that State which are regarded as best placed to settle them. The effective protection of legal positions, which is one of the objectives of the Brussels Convention, is therefore guaranteed by the designation of a national system competent in its entirety ...' (point 54). Advocate General Léger stated that, in his view, that reasoning should also apply to 'public-law matters, in which the State exercises its rights and powers of public authority' (point 55).

35. In short, the Brussels Convention does not apply to situations in which the State exercises its powers and is not subject to private law, either because those situations entail sovereign acts or because there is more effective legal protection. [30]

36. As Advocate General Jacobs pointed out in the Opinion in *Henkel,* the difficulty is that 'it may not always be easy to distinguish between instances in which the State and its independent organs act in a private law capacity and those in which they act in a public law capacity' (point 22), in particular if it is borne in mind that countries which have common law systems are not familiar with the distinction between public and private law, in the sense that civil law covers all matters which are not part of criminal law. [31] Accordingly, although the legal systems of the Contracting States provide some guidance in this connection, the definition of a situation governed by public law may not be found in those systems, which in many instances are divergent and imprecise. [32]

30 — The private law/public law dichotomy in relation to delimiting the scope of the Brussels Convention is clearly expressed in the Jenard report where it explains the reasons for excluding social security: '[i]n some countries, such as the Federal Republic of Germany, social security is a matter of public law, and in others it falls in the borderline area between private law and public law'. The Evrigenis and Kerameus report on the accession of the Hellenic Republic to the Convention (OJ 1986 C 298, p. 1) distinguishes civil and commercial matters from matters governed by public law, which do not fall within the scope of the Convention. The report states that, in the view of the Court of Justice, it would appear that they can be distinguished on the basis of a traditional feature of public law in continental jurisprudence, namely the exercise of sovereign powers (point 28). In academic legal writing, see Desantes Real, M., op. cit., pp. 79 to 81.

31 — James, P.S., *Introduction to English Law,* 10th ed., Butterworths, London, 1979, p. 4 et seq.; Knoepfler, F., *La House of Lords et la définition de la matière civile et commerciale,* Mélanges Grossen, Neuchatel, 1992, p. 9.

32 — Tirado Robles, C., *La competencia judicial en la Unión Europea (Comentarios al Convenio de Bruselas),* Bosch, Barcelona, 1995, p. 14.

(b) The criteria on which the exclusion is based

37. In view of the fact that the concepts concerned are independent, and having regard to the reasons why acts *iure imperii* do not fall within the scope of the Brussels Convention, an examination of case-law will help to identify the criteria on which the exclusion of such acts is based.

38. In *LTU*, the Court considered the payment of certain charges owed by an entity governed by private law to an organisation governed by public law for the obligatory and exclusive use of its equipment and services, and held that the Convention did not apply. The Court stated that the scope ratione materiae of the Convention is essentially defined either by 'the legal relationships between the parties to the action or ... the subject-matter of the action' (paragraph 4).

39. The Court set out the same reasoning in *Rüffer*, which concerned an action for redress brought by the Netherlands State against a riverboat operator who owned a German vessel that collided with another vessel, for compensation for the costs of removing the wreck, since that cleaning operation was part of the river-police functions which were the responsibility of the Netherlands under an international treaty. The Court regarded 'the fact that in recovering those costs the administering agent acts pursuant to a debt which arises from an act of public authority' (paragraph 15) as decisive, because it is not the nature of the action or the proceedings which is important but rather the nature of the law on which that action is based.

40. In *Sonntag*, a judgment concerning criminal proceedings which were brought as a result of the death of a pupil from a German state school during a trip to Italy and in the framework of which a civil action for damages was also brought against the accompanying teacher, the Court held that the Brussels Convention applied on the ground that the claim for financial compensation '[was] civil in nature' (paragraph 19) because: (a) even where a teacher has the status of civil servant and acts in that capacity, 'a civil servant does not always exercise public powers' (paragraph 21); (b) in the majority of the legal systems of the Contracting States, the supervision of school pupils does not entail the exercise of any powers going beyond those existing in relations between private individuals (paragraph 22);[33] (c) in such situations, teachers in state schools and teachers in private schools assume 'the same functions' (paragraph 23); (d) the Court had already held[34] that the awarding of marks and participation in the decisions on whether pupils should move to a higher class do not entail the exercise of public powers (paragraph 24); and (e) the characterisation of the dispute under

33 — In the Opinion in that case, Advocate General Darmon explained the nature of a civil action resulting from a criminal offence in the legal systems of the Contracting States, differentiating between the common law countries (point 28) and the continental countries, citing as examples of the latter Denmark, Spain, Belgium, Italy, Portugal, the Netherlands, France, Luxembourg, Germany and Greece (points 30 to 39).

34 — Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 28.

the law of the State of origin of the teacher was irrelevant (paragraph 25), as is the fact that the accident concerned is covered by a social insurance scheme (paragraphs 27 and 28).

41. In *Henkel*, the Court referred again to one of the arguments it had used in *Sonntag* and held that an action brought by a private consumer protection organisation to prohibit the use of unfair terms in contracts did not entail 'an exercise of public powers, since those proceedings [did] not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals' (paragraph 30).

42. In *Baten*, the Court ruled that the concept of 'civil matters' encompasses an action under a right of recourse whereby 'a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance ... provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law'. The Court added that, where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters' (paragraph 37). [35]

43. *Préservatrice foncière TIARD* concerned a claim for payment of a customs debt, made by the Netherlands against the guarantor of the principal obligation. The Court held that the Brussels Convention applies to a claim by which a Contracting State seeks to enforce against a private individual a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that State, although the Court added the condition, required by the paucity of information in the order for reference, that that is the case 'in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private individuals' (paragraph 36).

44. Similarly, the Court held in *Blijdenstein* [36] that an action brought by a public authority to recover sums paid under public law by way of an education grant to a young maintenance creditor, where that authority is subrogated to the rights of the creditor under provisions of civil law, falls within the scope of the Convention (paragraph 21).

45. Finally, in *Frahuil*, [37] the Court held that a claim brought by a guarantor who had paid

35 — In the Opinion in that case, Advocate General Tizzano stated that, in the circumstances, the municipality could not exercise public powers to determine the parties from whom it would seek repayment of expenditure incurred or to specify the extent of the benefit payable, nor did it have any power in regard to recovery of the cost of assistance because it was entitled only to request payment from a third party (point 35). Accordingly, he stated, the legal relationship between the two parties was no different from the normal relations under the law of obligations existing between parties on the same footing, as is the case in relationships governed by civil law (point 36).

36 — Case C-433/01 [2004] ECR I-981.

37 — Case C-265/02 [2004] ECR I-1543.

certain customs duties pursuant to a contract concluded with a third party who had assumed responsibility for those duties on behalf of the importer '[did] not amount to the exercise of powers falling outside the scope of the rules applicable to relationships between private individuals' (paragraph 21).

46. It may be deduced from the case-law cited that, in order to determine whether an act is an act *iure imperii* and, therefore, not subject to the Brussels Convention, regard must be had, first, to whether any of the parties to the legal relationship are a public authority, and, second, to the origin and the basis of the action brought, specifically to whether a public authority has exercised powers going beyond those existing, or which have no equivalent, in relationships between private individuals. The 'private' criterion refers to a formal aspect, [38] while the 'subordination' criterion relates to the basis and nature of the action and to the detailed rules for exercise of the right of action. [39]

B — *Consideration of the case before the Court*

1. A preliminary point

47. The assessment of the exercise of public powers takes account of the circumstances of each case, which has led academic legal writers to discuss the role assumed by the Court in the judgments which it has given. [40]

48. One of the criticisms made relates to the fact that the Court has not restricted itself to supplying the criteria for an independent classification of the concept referred to in Article 1 of the Brussels Convention and to applying those criteria to disputes between public authorities and private individuals, but has instead imposed solutions which are sometimes controversial.

38 — That entails the inclusion within the scope of the Brussels Convention of cases which concern a relationship that has arisen between private individuals even if it results from a rule of public law; Gothot, P. and Holleaux, D., *La Convención de Bruselas de 27 septiembre 1968 (Competencia judicial y efectos de las decisiones en el marco de la CEE)*, La Ley, Madrid, 1986, p. 9; Palomo Herrero, Y., *Reconocimiento y exequátur de resoluciones judiciales según el Convenio de Bruselas de 27-09-68*, Colex, Madrid, 2000, p. 61. The criterion reflects the continental conception of public law, which requires that there must be a public authority for a public law relationship to exist (García de Enterría, E. and Fernández, T.R., *Curso de Derecho Administrativo*, volume I, 9th ed., Civitas, Madrid, 1999, p. 42 et seq.). I feel it is also important to point out that, in the light of the difficulties inherent in delimiting the scope of public law in an ever-expanding Union, there is a need for the private criterion to be qualified at Community level, either by minimising its importance or by giving a broad interpretation to what is meant by a party governed by public law as opposed to a party governed by private law (Dashwood, A., Hacon, R., White, R., *A Guide to the Civil Jurisdiction and Judgement Convention*, Kluwer, Deventer/Antwerp/London/Frankfurt/Boston/New York, 1987, p. 10; Donzallaz, Y., *La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale*, vol. I, Staempfli, Berne, 1996, pp. 336 and 337).

39 — Gaudemet-Tallon, H., observes in *Les Conventions de Bruxelles et de Lugano (Compétence internationale, reconnaissance et exécution des jugements en Europe)*, LGDJ, Paris, 1993, at pp. 20 and 21, that although the criterion has some logic and is used in international law, it does not remove the obstacles to delimiting the boundary between public law and private law.

40 — For example, Schlosser, P., 'Der EuGH und das Europäische Gerichtsstands- und Vollstreckungsübereinkommen', *Neue Juristische Wochenschrift*, 1977, p. 457 et seq.; also, commenting on the judgment in *LTU*, Huet, A., *Journal du droit international*, 1977, p. 707 et seq., and Droz, G.A.L., *Revue critique de droit international prive*, 1977, p. 776 et seq.

49. However, the preliminary ruling procedure was created with a temporal framework which is composed of three successive stages: the initial stage, in which the national court identifies the issue of Community law; the intermediate stage, in which the Court of Justice analyses the issue; and the final stage, in which the national court settles the main proceedings in the light of the guidance provided. [41] Difficulties arise if the equilibrium which prevails in the dialogue between the courts is ruptured [42] where one of the courts [43] goes beyond [44] the proper exercise of its functions.

50. By abstracting the facts and seeking to resolve the question of interpretation referred in a manner which will assist all national courts faced with similar situations, it will be possible for the Court to avoid the risk of exceeding its jurisdiction in this case. Moreover, the questions referred should be approached from a strictly legal perspective, leaving aside sentiments which, although perfectly understandable, will only impede reasoning.

41 — Pescatore, P., 'Las cuestiones prejudiciales', in Rodríguez Iglesias, G.C., and Liñán Nogueras, D., *El Derecho comunitario europeo y su aplicación judicial,* Civitas, Madrid, 1993, p. 546.

42 — Peláez Marón, J.M., 'Funciones y disfunciones del control jurisdiccional en el marco de la Comunidad Europea', *Gaceta Jurídica de la CEE*, No 52, Series D-9, 1988, pp. 233 to 259.

43 — Kakouris, K.N., 'La mission de la Cour de Justice des Communautés européennes et l'ethos du juge', *Revue des affaires européennes*, No 4, 1994, pp. 35 to 41, refers to the ethos both of the Court and of each of its judges, which consists of conscience, honesty and morality.

44 — In point 35 of my Opinion in Case C-30/02 *Recheio-Cash & Carry* [2004] ECR I-6051, I express my inability to understand why, in the judgment in Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, the Court stipulated, in the field of taxation, the minimum period deemed adequate to ensure the effective exercise of actions based on Community law, thereby encroaching upon the sovereign jurisdiction of the national court to resolve the main proceedings. In footnote 44 to that Opinion I complain about the same error in other judgments.

51. The Efetio Patron has performed its task competently. Nevertheless, in order to furnish that court with a helpful response, it is necessary to take the generalisation of the facts a stage further by using as a point of reference loss and damage caused to individuals by soldiers of one Member State in the territory of another during a war, and leaving aside the specific elements which characterise the present claim for compensation, including the temporal element. [45]

2. The conduct of armed forces in wartime

52. In view of the fact that the proceedings have been brought against a State, it is not necessary to consider the first criterion referred to — that is, whether one of the parties is a public authority — and I will therefore focus my analysis on the second criterion, namely, whether powers going beyond the general law have been exercised.

(a) The view proposed

53. Regardless of the fact that, since ancient times, guidelines have been drawn up,

45 — In that connection, the Polish Government has provided a perceptive analysis in its observations, albeit in relation to the second question, noting that the referring court cites acts and omissions which took place before the entry into force of the Brussels Convention, 'to be specific, between 1941 and 1944', but pointing out that that court has not submitted a question of interpretation which may be resolved in accordance with Article 54 of the Convention, pursuant to which regard must be had to the time when proceedings are instituted.

warnings issued and legislation adopted concerning the conduct of opponents in armed conflict,[46] war has not lost its status as an exceptional phenomenon.

54. Leaving aside operations carried out by lone groups, which give rise to different concerns, the Netherlands Government rightly describes acts of war as typical expressions of State power.

55. That assertion is supported by a number of arguments:

— Armies are part of the structure of the State. Soldiers are subject to strict discipline and must obey their superiors[47] within a hierarchical organisation at whose head are the highest authorities of the nation.[48]

— Armies are governed by principles which are solemnly proclaimed in the highest-ranking laws of each country, and those laws also set the limits, the objectives and the conditions of military activity with increasing precision as they descend the chain of command.

— Armies exercise powers which are not held by other people, who are required to obey the orders of soldiers and must pay harsh penalties for disobedience.

56. The European Court of Human Rights,[49] virtually all the States which have

46 — In the Bible, Deuteronomy conceals a veritable catalogue of recommendations under the heading 'Captured towns', such as the requirement that an offer of peace be made to all besieged cities (*The New Jerusalem Bible*, Deuteronomy 20:10, Darton, Longman & Todd, London, 1985). Today, there is widespread acceptance of 'international humanitarian law', which was developed in the Geneva Conventions of 12 August 1949 relative to the Treatment of Prisoners of War (the Third Convention) and to the Protection of Civilian Persons in Time of War (the Fourth Convention), and in the Additional Protocols, adopted on 8 June 1977, relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II). The texts of those instruments appear, in a number of languages, in the international law section of the website of the Office of the United Nations High Commissioner for Human Rights at http://www.ohchr.org.

47 — At the hearing, the plaintiffs in the main proceedings confirmed that the soldiers committed the acts under orders from their superiors.

48 — Baroja, P., in his novel *Miserias de la Guerra*, Caro Raggio, Madrid, 2006, published only recently because it fell foul of Francoist censorship, refers to the role played by the anarchist Durruti in the Spanish Civil War and concedes that 'he got it right as a soldier but not as an anarchist' because 'war can be waged only with strict, firm discipline. It would be total madness to want to go to war on the side of anarchists who will attempt to dispute the orders of their superiors' (p. 192).

49 — In *McElhinney v. Ireland* [GC] no. 31253/96, § 38, ECHR 2001-XI (extracts), the European Court of Human Rights stated: 'Further, it appears from the materials referred to above ... that the trend may primarily refer to "insurable" personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty, such as the acts of a soldier on foreign territory, which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security'.

submitted observations in the present proceedings and the Commission regard acts carried out by armed forces as the exercise of State sovereignty.

57. Accordingly, redress for loss or damage caused in wartime by the troops of one side is not encompassed by 'civil matters' within the meaning of Article 1 of the Brussels Convention, which is therefore not applicable. [50]

(b) The objections raised

58. A number of the observations submitted in these proceedings dispute the classification of acts carried out by an army as acts *iure imperii*, on the basis of arguments relating to: (i) international State responsibility, (ii) the fact that the conduct is wrongful, (iii) the territorial nature of the exercise of public authority, and (iv) the provisions of the Brussels Convention. I must point out straightaway that, in my opinion, none of those arguments casts doubt on the views which I have set out above.

50 — A number of other high-ranking courts of the Member States have arrived at the same conclusion without referring a question for a preliminary ruling, such as the Corte di Cassazione (Court of Cassation), Italy, in a judgment of 12 January 2003, and the Bundesgerichtshof (Federal Court of Justice), Germany, in a judgment of 26 June 2003.

(i) State responsibility under international law

59. The observations concerned refer frequently to the international dimension of the questions submitted, an aspect which the plaintiffs in the main proceedings link to the responsibility which may be attributed to States for wrongful acts.

60. That international dimension is of considerable interest. The International Law Commission, created within the framework of the United Nations Organisation during its first session in 1949, considered it a field suitable for codification. In 2001, during the 53rd session, the United Nations adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts. [51] In addition, it is closely linked to the concept of State immunity from legal proceedings, which underwent changes in the second half of the last century in the form of a reduction in its importance and in its limitation to acts *iure imperii*. Moreover, there is also evidence of a tendency to lift State immunity in respect of acts *iure imperii* in cases where human rights are breached. [52]

51 — The text and commentaries drafted by the International Law Commission may be found at http://untreaty.un.org/ilc/reports/2001/english/chp4.pdf.

52 — Bröhmer, J., *State Immunity and the Violation of Human Rights*, Kluwer Law International, The Hague, 1997, p. 143 et seq., describes how the legislative development of human rights entails a restriction of State immunity, even if the infringing State was acting *iure imperii*. Gaudreau, J., *Immunité de l'État et violations des droits de la personne: une approche jurisprudentielle*, HEI publications-Institut Universitaire de Hautes Études Internationales, Geneva, 2005, examines how the practice of national and international courts has evolved with regard to the field concerned.

61. This form of responsibility is governed by specific rules, both customary and written, which refer to the infringement of an international obligation. It does not, therefore, fall within the scope of private law; nor does it come under 'civil matters' within the meaning of Article 1 of the Brussels Convention, but rather under 'international matters'.

62. In that connection, in reply to a question I posed at the hearing, the plaintiffs in the main proceedings submitted that their claim is founded on Article 3 of the Fourth Hague Convention. [53]

(ii) The fact that the acts are wrongful

63. The plaintiffs in the main proceedings and the Polish Government have contended that the concept of acts *iure imperii* does not include wrongful acts, and assert that military operations which are in breach of the law do not fall within that category. This view reminds me of the maxim 'the King can do no wrong', which was considerably watered down a long time ago. [54]

64. I do not agree with this objection. The fact that conduct may be wrongful does not affect its classification but rather its consequences, in so far as it is a condition for the creation of liability or, where applicable, for the restriction of liability.

65. To conclude otherwise would mean that the authorities exercise public powers only when they do so in an irreproachable manner and would ignore the fact that, on occasions, they may not act in that way. That approach would also lead to difficulties when it comes to identifying who is liable because, if the acts concerned were not *iure imperii* or, by definition, *iure gestionis*, it would only be possible to attribute liability to the persons who actually caused the damage rather than to the authorities to which they belong. As the German Government is careful to point out, in the main proceedings the claim has been brought against the State and not against the individual soldiers concerned.

66. Accordingly, the fact that the acts are wrongful does not cast doubt on the view I have put forward, whatever the degree of wrongfulness, including where such acts constitute crimes against humanity.

(iii) The territorial nature of the exercise of public authority

67. The Polish Government argues that public authority is exercised within the

53 — I believe that they intended to cite Article 3 of the Fourth Geneva Convention, to which I have referred in footnote 46. They also invoked, albeit as a subsidiary point, Articles 913, 914 and 932 of the Greek Civil Code.

54 — In English law, after a gradual process of amendment that principle was finally abolished by the Crown Proceedings Act 1947.

territorial boundaries of a State, from which it follows that operations carried out by the armed forces of a State outside its boundaries may not be regarded as the exercise of such authority.

68. That objection cannot be accepted either. Territory delimits the sphere of application of sovereignty; State acts which are carried out beyond those boundaries lack effectiveness. However, at least two special cases may be identified: when an invasion takes place, and when the army of one country intervenes in another country without actually occupying it. The second situation, which is not applicable to the main proceedings, gives rise to particular difficulties of great relevance today, which call for solutions involving the possible consent of the attacked State and the fulfilment of a mandate of the international community.

69. In the first special situation, there is a temporary or definitive seizure which, although reprehensible, entails an extension of the invader's territory. It is important not to ignore those facts and accept the fiction that once the attacking forces have crossed the border they are acting beyond their command, because those forces remain under the direction and control of the State to which they belong, and the hierarchical chain of command is unbroken. [55]

55 — In international humanitarian law, the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War applies to 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance' (second paragraph of Article 2).

(iv) The provisions of the Brussels Convention

70. A number of the arguments advocate interpretation of the Convention on the basis of its system, both directly, as in the case of the Italian Government which expressly rejects the view that the claim put forward is to be regarded as a 'civil matter', and indirectly, as in the case of the order for reference when it cites Article 5(3).

71. Reference to that article is irrelevant because in order for its provisions to operate the Convention itself must be applicable, a matter which is determined by Article 1.

72. The Brussels Convention distinguishes the system which it establishes — made up of provisions governing jurisdiction and the recognition and enforcement of judgments — and the territorial, temporal and factual criteria on which the applicability of that system depends and which are prerequisites for the system's operation. If, as in the present case, those prerequisites are not satisfied, any further analysis is superfluous.

73. In *Kalfelis*, [56] the Court held that the term 'matters relating to tort, delict or quasi-

56 — Case 189/87 [1988] ECR 5565.

delict' in Article 5(3) of the Brussels Convention covers all actions to establish liability which are not related to a 'contract' within the meaning of Article 5(1) (paragraph 18). [57] However, the exercise of public powers, as a matter which is excluded from the scope ratione materiae of the Convention, does not depend on the action brought but rather on the action's basis, its nature and the detailed rules for bringing it; any other solution would jeopardise the independence of the concepts referred to in Article 1. Moreover, the rules governing redress for damage caused by the functioning of public authorities vary substantially from one Contracting State to another, owing to the differences between common-law and continental systems, and to the differences prevailing between the latter systems themselves. [58]

VI — Analysis of the second question

74. The referring court also asks the Court of Justice whether the privilege of State immunity from legal proceedings is compatible with the system of the Brussels Convention and, should the answer be in the affirmative, whether that privilege excludes the application of the Convention.

75. In the light of the answer which I propose to the first question, no consideration of the second question is required.

76. However, should the Court decide to address the second question, it must consider the fact that State immunity is created as a procedural bar [59] which prevents the courts of one State from giving judgment on the liability of another, since, as the Italian Government points out in its observations, *par in parem non habet imperium* ('an equal has no authority over an equal'), at least with regard to acts *iure imperii*, from which it follows that proceedings are barred.

57 — See, to the same effect, *Réunion européenne and Others*, paragraph 22; *Henkel*, paragraph 36; Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 16; and Case C-96/00 *Gabriel* [2002] ECR I-6367, paragraph 33.

58 — Those differences are illustrated by the following: in Germany, Article 839 of the Civil Code in conjunction with Article 34 of the Basic Law; in Austria, Article 23 of the Federal Constitution and the Federal Law of 18 December 1948 on the liability of the federal State, provinces, districts, municipalities and other bodies and agencies governed by public law for harm resulting from the application of laws; in Belgium, Article 1382 et seq. of the Civil Code; in Cyprus, Articles 146 and 172 of the Constitution; in Spain, Articles 9 and 106 of the Constitution and Article 139 et seq. of Law 30/1992 of 26 November 1992 on the legal rules applicable to the public administrations and the common administrative procedure; in Estonia, Article 25 of the Constitution and the Law of 2 May 2001 on State responsibility; in Finland, Article 118 of the Constitution and Law 412/1974 on civil liability; in Greece, Article 105 of the Law introducing the Civil Code; in Hungary, Article 349 of the Civil Code; in Italy, the rules on Aquilian liability laid down in the Civil Code; in the Netherlands, Article 6:162 of the Civil Code; in Poland, Article 77 of the Constitution and Article 417 et seq. of the Civil Code; in Slovenia, Article 26 of the Constitution and Article 63 of the Law on administrative proceedings; in Sweden, the Law of 2 June 1972 on damages; and in the Czech Republic, Article 36 of the Charter of rights and fundamental freedoms. That list demonstrates the divergence in that there are States where the principle is enshrined at the highest legislative level, States which have specific provisions, and States which refer to private law, as well as States, which I have not mentioned, where the principle is a construct of case-law.

59 — The European Court of Human Rights described State immunity thus in *Al-Adsani v. United Kingdom* [GC], no. 35763/97, § 48, ECHR 2001-XI; *McElhinney v. Ireland*, § 25; and *Fogarty v. United Kingdom*, no. 37112/97, § 26, ECHR 2001-XI (extracts).

77. Competence presupposes jurisdiction, which it delimits in order to determine which out of all the courts and tribunals in a territory must settle a particular dispute. Although the two concepts overlap one another to a great extent, they are not incompatible or contradictory.

78. Accordingly, the issue of State immunity from legal proceedings must be settled before considering the Brussels Convention since, if proceedings cannot be brought, the determination of which court can hear the action is immaterial. In addition, it is not within the powers of the Court of Justice to examine whether there is State immunity in the present case and its implications with regard to human rights.

VII — Conclusion

79. In the light of the foregoing considerations, I propose that the Court of Justice reply to the questions referred for a preliminary ruling by the Efetio Patron by ruling:

Actions for compensation which are brought by natural persons of a Contracting State party to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, seeking redress for loss or damage caused by the armed forces of another Contracting State when it invaded the first State in a military conflict, do not fall within the scope ratione materiae of that Convention even if the acts concerned amount to crimes against humanity.