DEVELOPMENTS

The Brussels Convention and Reparations – Remarks on the Judgment of the European Court of Justice in *Lechouritou and others* v. *the State of the Federal Republic of Germany*

By Veronika Gärtner[*]

A. Introduction

On 15 February 2007, the European Court of Justice[1] delivered its judgment in the case *Lechouritou and others v. the State of the Federal Republic of Germany*.[2] The case concerned the question whether compensation for acts perpetrated by armed forces in the course of warfare can be asserted on the basis of the jurisdictional rules provided for by the Brussels Convention.[3] The Court held that such an action did not fall within the scope of the Convention since it could, due to its origin in sovereign acts, not be regarded as a civil matter in terms of Art. 1 Brussels Convention.[4] Thus, jurisdiction for claims directed at the compensation for

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[1] Hereafter "the Court."

[2] Case C-292/05, *Lechouritou and others v. the State of the Federal Republic of Germany*, OJ C 243, 1 October 2005 (*Lechouritou*).

[3] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1978 L 304, 36, as amended by 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, 1, 77, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, OJ 1982 L 388, 1, and by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic, OJ 1989 L 285, 1.

[4] Brussels Convention, Art. 1 reads as follows: "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: the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; social security; arbitration."

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damages resulting from the exercise of public power cannot be based on the Brussels Convention. The analysis of the Court's ruling will proceed as follows: First, the history of the case as well as the essence of the judgment will be presented (*infra* B) before giving a review on the Court's previous case law on the concept of "civil matters" (*infra* C). This outline will be followed by an analysis and a classification of the ruling in the Court's jurisprudence (*infra* D), before eventually the results will be summarized (*infra* E).

B. The Facts of the Case and the Court's Ruling

I. Background of the Case[5]

The origin of the case dates back more than 60 years and touches upon a dark side of German history: on 13 December 1943 German soldiers carried out a massacre in Greece where 676 inhabitants of the municipality of Kalavrita were victims. Nearly 50 years later, in 1995, descendents of these victims brought an action based on the Brussels Convention, in particular Art. 5 (3) and (4), in the *Polimeles Protodikio Kalavriton* (Court of First Instance, Kalavrita), claiming compensation for financial loss, non-material damage and mental anguish from the Federal Republic of Germany. In 1998, the *Polimeles Protodikio Kalavriton* dismissed the claim on the grounds that the defendant, the Federal Republic of Germany, enjoyed the privilege of immunity granted by the Greek Code of Civil Procedure. The defendants, however, appealed in 1999 to the *Efetio Patron* (Court of Appeal, Patras) which stayed the proceedings two years later to wait for a ruling then pending at the *Anotato Eidiko Dikastirio* (Superior Special Court) concerning the interpretation of international rules on immunity of sovereign States. The *Anotato Eidiko Dikastirio*, the decisions of which the Greek Constitution holds as binding for all other Greek courts, was decided in 2002. It held that the rules of international law did not make possible suing a State for compensation in respect of torts committed by armed forces of the respective State within the territory of the *forum*. Thus, a sued State enjoyed immunity in this regard. Consequently, the *Efetio Patron* saw itself in the position to stay the proceedings and to refer two questions to the European 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

[5] For the history of the case *see*: *Lechouritou,* note 2, paras. 9-16 as well the opinion of *AG Ruiz-Jarabo Colomer*, paras. 12-16.

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with Art. 1 thereof where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile 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 1941-44?"[6]

II. The Court's Ruling

The European Court of Justice held with regard to the applicability of the Brussels Convention, following the opinion of Advocate General Ruiz-Jarabo Colomer[7] and in reference to its previous case law on the concept of "civil matters," that "…'civil matters' within the meaning of [Art. 1 Brussels Convention] does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State."[8]

The ruling was founded on the classification of the acts perpetrated by the German soldiers as "characteristic emanations of State sovereignty"[9] and thus as *acta iure imperii*, which are—according to the Court's case law—excluded from the scope of the Convention.[10] Since the first question was answered in the negative, the Court did not take a stand on the second question concerning State immunity.

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[6] *Lechouritou*, note 2, 8.

[7] *Id.* (opinion of *AG Ruiz-Jarabo Colomer).*

[8] *Id.*, para. 48.

[9] *Id.,* para. 37.

[10] *Id.,* para. 31-39.

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C. The Point of Departure – The Court's Previous Case Law on the Concept of "Civil Matters" in the Brussels Convention

Interpreting the concept of "civil and commercial matters," particularly the distinction between private and public law matters, has been an issue in nine[11] decisions of the European Court of Justice so far.[12] Thus, the Court had a rich collection of case law to draw on when asked for a preliminary ruling by the *Efetio Patron*.

In a nutshell, the following established principles were available to the Court as a basis for its considerations in *Lechouritou*. Analysis begins with the fact that the Brussels Convention does not provide for a definition of the concept of "civil matters."[13] As pointed out by the Advocate General in his opinion in *Lechouritou*, one reason for the lack of a definition of "civil matters" in the Convention is that the distinction between civil and public law has been well known in the (then) Contracting States of the Convention. An explicit exclusion of matters of public law was not regarded necessary when drafting the original text.[14]

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[11] Case 29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol,* 1976 E.C.R. 1541 (*Eurocontrol*); Cases 9/77 and 10/77, *Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarfsluftfahrt GmbH & Co. KG v. Eurocontrol*, 1977 E.C.R. 1517; Case 814/79, *Netherlands State v. Reinhold Rüffer,* 1980 E.C.R. 3807 (*Rüffer*); Case C-172/91, *Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann,* 1993 E.C.R. I-1963 (*Sonntag*); Case C-167/00, *Verein für Konsumenteninformation v. Karl Heinz Henkel,* 2002 E.C.R. I-8111 (*Henkel)*; Case C-271/00, *Gemeente Steenbergen v. Luc Baten,* 2002 E.C.R. I-10489 (*Luc Baten)*; Case C-266/01, *Préservatrice foncière TIARD SA v. Staat der Nederlanden,* 2003 E.C.R. I-4867 (*Préservatrice)*; Case C-433/01, *Freistaat Bayern v. Jan Blijdenstein,* 2004 E.C.R. I-981 (*Blijdenstein)*; Case C-265/02, *Frahuil SA v. Assitalia SpA,* 2004 E.C.R. I-1543 (*Frahuil).*

[12] A clear review of the Court's case law on civil matters is given by Alexander Layton & Hugh Mercer, *Art. 1 (1): Applicability of the Brussels-Lugano Regime*, in EUROPEAN CIVIL PRACTICE Vol. 1 (2nd ed., 2004), para. 12.011-12.021.

[13] *See supra*, note 2, para. 28; Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968, OJ 1979 C 59/9.

[14] *See supra*, note 2, para. 24 (opinion of *AG Ruiz-Jarabo Colomer)* with reference to the Schlosser 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, signed at Luxembourg, 9 October 1978 (*see also* OJ 1978 C 59/82). For further reference see also Peter Schlosser, *Art. 1 EuGVVO*, in EU-ZIVILPROZESSRECHT (2nd ed., 2003), para. 3. This situation however had changed with the accession of the United Kingdom and Ireland since these (common law) countries do not know the traditional civil law distinction between public and private law to the extent as civil law countries, which led to the insertion of Art. 1 s. 2 of the Convention, expressly excluding revenue, customs and administrative matters (*see* Schlosser Report, OJ 1979 C 59/82).

Despite the lack of a positive definition of civil matters within the Convention itself, the Court has, over the years, established rather clear guidelines with regard to the interpretation as well as the substance of the concept of "civil and commercial matters." In its first decision dealing with the interpretation of "civil matters," *LTU v. Eurocontrol,* the Court first elaborated the method which should be applied by holding that "civil matters" had to be regarded as an independent concept which had to be interpreted "[…] by reference, first, to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems."[15]

Second, the Court went on by giving the relevant criteria for excluding public matters, *i.e.* "[…] either by reason of the legal relationships between the parties to the action or of the subject-matter of the action."[16] Thus, the Court developed a definition of civil and commercial matters by means of a negative delimitation from public law matters.[17] The court applied this definition in stating that "[a]lthough certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the convention, this is not so where the public authority acts in the exercise of its powers."[18] This ruling has, at least with regard to the principle statement that "civil and commercial matters" had to be interpreted autonomously, been accepted positively by legal writers.[19]

The criterion of "exercise of public power" was advanced in *Sonntag v. Waidmann*, where the Court held that actions are only excluded from the Convention, if the public authority has exercised powers "[…] going beyond those existing under the

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[15] *Eurocontrol*, note 11, para. 3. *See also* the assenting case note by Reinhold Geimer, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 492 (1977).

[16] *Eurocontrol*, note 11, para. 4. These criteria will be reverted to later, *see infra* D. I.

[17] *See further* ULRICH SOLTÉSZ, DER BEGRIFF DER ZIVILSACHE IM EUROPÄISCHEN ZIVILPROZESSRECHT 41 (1998).

[18] *Eurocontrol*, note 11, para. 4.

[19] For instance, *see* Geimer, note 15, 492. However, with regard to its reasoning it is regarded as insufficient, in particular since it does not contain any comparative remarks describing the situation in the different Member States which however would have been necessary for an independent interpretation. *See further* Peter Schlosser, *Zum Begriff „Zivil- und Handelssachen" in Art. 1 Abs. 1 EuGVÜ,* PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS (IPRAX) 154, 155 (1981); Peter Schlosser, *Der EuGH und das Europäische Gerichtsstands- und Vollstreckungsübereinkommen*, NJW 457, 461 (1977). This criticism is reminiscent also in the case note by Hartmut Linke, RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 43, 45 (1977).

rules applicable to relations between private individuals."[20] Hence, with the *Sonntag* decision, the Court drew an explicit line between cases where the State acts in the same way as a private person in relations governed by private law (*acta iure gestionis*), which are included in the Convention, and acts conducted in the exercise of sovereign authority (*acta iure imperii*), which do not fall within the scope of application.[21]

To summarize the case law on the concept of "civil matters" preceding *Lechouritou* shortly, these are the following major conclusions that can be drawn from these rulings. First, the concept of "civil and commercial matters" has to be interpreted independently. Second, the mere fact that the action concerns a public authority and a person governed by private law does not necessarily lead to the exclusion of the action from the scope of the Convention. Rather, an *act iure imperii*, which is excluded from the scope of the Convention, can only be assumed if the public authority exercises powers going beyond those existing between private individuals. These are the main premises the Court had to start from when being confronted with the reference for a preliminary ruling by the *Efetio Partron*.

D. Analysis of the Court's Reasoning and Classification of the Judgment in the Previous Case Law

The following analysis will focus on issues raised in the case whereby the Court's as well as the Advocate General's reasoning will be examined critically. Further, it will be discussed how the ruling can be classified in the sequence of the Court's previous case law. In particular two main issues will be addressed: first, the standard applied by the Court in examining whether the legal action brought by the Greek plaintiffs falls within the ambit of "civil and commercial matters" in terms of the Brussels Convention (*infra I.*) and second the classification of the acts perpetrated by the German armed forces as *acta iure imperii* (*infra II.*). In this regard, several questions will be touched upon such as the prerequisite of the exercise of public powers going beyond those existing between private individuals, as well as

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[20] *Sonntag*, note 11, para. 22.

[21] *See* Thomas Rauscher & Steffen Pabst, *Art. 2 EG-VollstrTitelVO*, in EUROPÄISCHES ZIVILPROZESSRECHT Vol. II (Thomas Rauscher ed., 2nd ed., 2006), para. 5 (fn. 9). With the demarcation between these two type of acts, the Court had followed the settled case law with regard to immunity. In the context of State immunity it had already been affirmed before that States could only plead immunity if they had acted in the exercise of public powers (i.e. with regard to *acta iure imperii*), not however with regard to *acta iure gestionis*. For further reference, *see* Burkhard Hess, *Amtshaftung als "Zivilsache" im Sinne von Art.1 Abs.1 EuGVÜ*, IPRAX 10, 12 (1994).

the question, whether the existence of an *act iure imperii* could have been refused in the present case, in particular due to the wrongfulness of the acts perpetrated.

I. The Concept of "Civil and Commercial Matters" and the Criteria for its Definition

One of the objections raised against the exclusion of the present action from the scope of the Convention is the objection of the civil nature of the proceedings. This objection raises questions with regard to the method of interpretation applied by the Court in determining whether the action at issue is excluded.

It was argued that the action brought by the plaintiffs before the Greek courts was of a civil nature since it was directed at the payment of compensation, and would therefore fall within the scope of the Convention.[22] In this respect, the Court of Justice held that the nature of the proceedings was irrelevant regarding the question whether legal actions are excluded from the scope of the Convention, if the claim arises from an act in the exercise of public powers.[23]

The fact that the Court based its argumentation on the acts underlying the claim for compensation, and thus on the acts perpetrated by the German soldiers is already apparent at another place in the judgment where the Court set forth that "[…] acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them before the Greek courts must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated."[24]

A glance at the preceding case law on the concept of civil matters in terms of the Brussels Convention shows that the approach followed by the Court can be regarded as a continuation of its previous jurisprudence.

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[22] *Lechouritou,* note 2, para. 40.

[23] *Lechouritou,* note 2, para. 41: "First of all, the Court has already held that the fact that the plaintiff acts on the basis of a claim which arises from an act in the exercise of public powers is sufficient for his action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the scope of the Brussels Convention [...]. The fact that the proceedings brought before the referring court are presented as being of a civil nature in so far as they seek financial compensation for the material loss and non-material damage caused to the plaintiffs in the main proceedings is consequently entirely irrelevant."

[24] *Lechouritou,* note 2, para. 38.

In its first ruling on the term "civil matters" the Court established, as described above,[25] the basic standard to be applied for excluding public matters by holding that a decision could be excluded from the scope of application of the Convention *either*[26] by reason of the legal relationship between the parties or by reason of the subject-matter of the action.[27] Thus, it can be deduced from this rule that there are two different levels the exclusion of a certain action can be based on,[28] which are applied alternatively.[29]

With regard to the distinction of these two levels, the opinion of Advocate General Léger in *Préservatrice foncière TIARD SA*[30] is rather instructive since here the two levels of criteria have been distinguished thoroughly.[31] As pointed out by the Advocate General, it has to be differentiated between the "subject matter of the action" and the "cause of the action."[32] The concept of subject matter of the action is described as lying in the purpose of the action, while the cause of action is described as the legal relationship on which the action is based.[33] If applied to the present case, *Lechouritou*, the subject matter of the action can be regarded as the payment of reparations, while the cause of the action can be described as the acts

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[25] *See supra* C.

[26] Emphasis added.

[27] *Eurocontrol,* note 11, para. 4.

[28] *See* for an analysis of this case law: Robert Freitag, *Anwendung von EuGVÜ, EuGVO und LugÜ auf öffentlich-rechtliche Forderungen?* IPRAX 305, 307 (2004).

[29] Each of these two conditions is regarded as self-sufficient, *i.e.* it is sufficient for the exclusion of the action from the scope of the Convention if either the subject matter or the nature of the legal relationship between the parties is qualified as a public matter (*see Préservatrice*, note 11, para. 42 (opinion of *AG Léger*). However, as the existing case law shows, the Court has, so far, based the exclusion of an action from the scope of the Convention only on the public nature of the underlying relationship (e.g., *Rüffer* and *Sonntag*), not however on the public nature of the subject matter in a case where the underlying relationship has been classified as being of a civil nature (in contrast to the Advocate General in *Préservatrice*). It might be – but this only as a passing comment – doubted whether such a constellation is conceivable at all.

[30] *Préservatrice,* note 11. It will be reverted to this case later on.

[31] However, the Court (rightly) did not follow his assessment on the merits (*see infra*).

[32] *Supra*, note 11, para. 22-24 (opinion of *AG Léger*). *See* with regard to the distinction between "subject matter" and "cause of action" in a different context *also* Case 144/86, *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, 1987 E.C.R. 4861, paras. 14, 15 and Case C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"*, 1994 E.C.R., I-5439. For more on this approach, *see also* SOLTÉSZ, note 17, 51.

[33] *Supra*, note 11, para. 23 (opinion of *AG Léger*).

forming the origin of the proceedings, *i.e.* the massacre perpetrated by the German armed forces.

As it has been pointed out above, in the present case the Court, as well as the Advocate General, linked the argumentation to the cause of action, according to the categories described above. This is in line with the *Eurocontrol* decision, which shows that it is sufficient for the exclusion of the action from the scope of the Convention if "[…] the public authority acts in the exercise of its power."[34]

In particular the *Rüffer*[35] decision illustrates that it is sufficient for the exclusion of the action from the scope of the Convention if the legal relationship between the parties is qualified as a public matter.[36] This becomes clear with a view to the explanations of the Court when stipulating that it was sufficient if the act underlying the action, *i.e.* in this case the removal of the wreck, was carried out in the exercise of public powers – irrespective of "[…] the nature of the proceedings afforded by national law for that purpose […]."[37]

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[34] *Eurocontrol*, note 11, para. 4. The Court referred, in order to ascertain whether *Eurocontrol* had exercised powers deriving from its status as a public authority to the fact that the rate of charges as well as the place of performance of the obligation had been fixed unilaterally and thus was in a different position than a private party.

[35] *Rüffer*, note 11. This case concerned an action brought by the Netherlands State against a German, Mr. Rüffer, for the recovery of costs which had arisen from the removal of a motor vessel belonging to Mr. Rüffer which had sunk in a public waterway for the administration of which the Netherlands were responsible.

[36] *Préservatrice*, note 11, para. 42 (opinion of *AG Léger)*. Advocate General Léger apparently regarded the situation in *Préservatrice* to be just inverse to the situation in *Rüffer* when stating at para. 51 "[…] that the fact that the action for payment of customs debts is brought on the basis of a private-law guarantee contract cannot affect the exclusion of that action from the scope of the Brussels Convention on account of its subject matter."

[37] *Supra*, note 11, para. 15. In order to ascertain whether the public authority had exercised public powers, the Court referred in *Rüffer* to national, *i.e.* in this case Dutch, law (para. 10) and concluded that "[…] the Netherlands State acted in the instant case in the exercise of public authority [and that therefore] the action brought by the Netherlands State before the national court must be regarded as outside the ambit of the Brussels Convention […]" (para. 12). This approach has been compared to the German "*Kehrseitentheorie*" in administrative law. *See also* SOLTÉSZ, note 17, 51-53.

This decision has raised some skepticism based on two different lines of argument: Partly it has been argued that the fact that it has not been distinguished clearly enough between the claim for redress and the removal of the wreck led to some uncertainty (SOLTÉSZ, note 17, 51). Further it has been criticized that the Court did refer, in order to ascertain the legal nature of the wreck's removal, to national law and not to the comparative analysis prepared by the Advocate General with regard to the claim for redress (Schlosser, note 19, 155). This has been regarded as a breach of the principle of independent interpretation (Schlosser, *id.)*.

The same approach can be found in the *Sonntag* decision where the Court first examined[38] whether the subject matter of the case was of a civil nature (which has been affirmed in this case), before asking[39] whether the public authority had exercised public powers (which has been answered in the negative here). The Court held that "[…] a civil action for compensation for injury to an individual resulting from a criminal offence is civil in nature […] [and] falls outside the scope of the Convention only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers."[40] The same line of argumentation is also reflected in the judgment succeeding *Sonntag*, *Henkel*.[41] While the approach applied by the Court was rather clear in those earlier cases since only two parties were concerned, the judgments in the aftermath of *Rüffer* and *Sonntag* concerned legal relationships involving several persons,[42] which entail certain consequences discussed below.

Two of these cases concerned claims by public authorities for recovery of sums paid respectively by way of social assistance—*Luc Baten*[43]—and an education grant—*Blijdenstein*.[44] Here the Court concentrated, with regard to its examination whether a civil matter could be assumed, only on the relationship of the parties to the

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However, is appears that both levels have been considered in the ruling: The subject matter as well as the cause of action. Only, the Court regarded it – as it had been already indicated in *Eurocontrol* – sufficient for the exclusion of the action from the scope of the Convention, if the underlying act is qualified as being carried out by a public authority in exercise of sovereign powers, "[…] whatever the nature of the proceedings […]." (*Rüffer,* note 11, para. 15).

[38] *Sonntag*, note 11, para. 19.

[39] *Id.*, para. 20.

[40] *Id.*, paras. 19, 20.

[41] *Henkel*, note 11. Here, the Court set forth (para. 30) that "[…] the subject-matter of the main proceedings is not an exercise of public powers, since those proceedings do not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals." Here the Court regarded the claimant in the main proceedings, a consumer protection organization, as a private body (para. 30) with the result that two private parties (the defendant, Mr. Henkel, was a trader, the consumer protection organization was seeking an injunction against) were opposing each other. Thus, the applicability of the Convention was rather suggesting – even though not self-evident (see further the remarks on *Frahuil*). However, the qualification of the consumer protection organization as a private body is doubted by Chrisoula Michailidou, *Internationale Zuständigkeit bei vorbeugenden Verbandsklagen*, IPRAX 223 (2003).

[42] *Luc Baten,* note 11; *Préservatrice,* note 11; *Blijdenstein,* note 11; *Frahuil,* note 11.

[43] *Luc Baten,* note 11.

[44] *Blijdenstei,* note 11.

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dispute[45]—and not on the relationship constituting the origin of these actions, *i.e.* the payment of an education grant and social assistance by the public authority to the initial recipient of the benefit.[46] Advocate General Tizzano's statement in *Luc Baten*is rather explicit: "[…] it is evident that the definition of a social assistance allowance has no effect on the reply to be given to the questions referred by the national court. In fact, that benefit and the legal relationship underlying is not the subject-matter of the dispute but merely a factor in it which led to the decision of the Netherlands court […]."[47]

The Court rather concentrated on the relationship between the State and the defendant and—within this relationship—on the two criteria established in *Eurocontrol*: since the subject matter of the action was regarded as a civil matter,[48] the Court turned then to the legal relationship.[49] With regard to this aspect the Court held that "the legal situation of the public body *vis-à-vis* the person liable for maintenance is comparable to that of an individual who, having paid on whatever ground another's debt, is subrogated to the rights of the original creditor"[50] and thus classified the action for recovery as a civil matter. In *Blijdenstein*,[51] it was decided equally.

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[45] *See* the case note by Dieter Martiny, *Unterhaltsrückgriff durch öffentliche Träger im europäischen internationalen Privat- und Verfahrensrecht,* IPRAX 195, 200 (2004) who points out that only the claim for recovery constitutes the subject matter of the litigation.

[46] The relationship between the recipient of the social services and the State will usually be of a public nature, *see* Martiny, note 45, 200. However, as pointed out by Martiny, this relationship is not referred to.

[47] *Luc Baten*, note 11, para. 33, (opinion of *AG Tizzano*).

[48] The Court referred in its reasoning to the rules governing the bringing of the action (paras. 31, 32), the fact that the action in the present case had to be brought before the civil courts and was governed by the rules of civil procedure (para. 33). The fact however, that the case had to be brought before the civil courts cannot be regarded as a relevant criteria which shows already the wording of Art. 1 Brussels Convention ("This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal"). Thus, it was also stressed by Martiny, note 45, 200 that this cannot be the decisive argument.

[49] Approvingly referring to this case: Advocate Léger in his opinion in *Préservatrice,* note 11, para. 48-50.

[50] *Luc Baten,* note 11, para. 34.

[51] Following the Court's ruling – with regard to the applicability (in principle) of the Lugano Convention as well as the non-applicability of Art. 5 (2) in respect to an action for recovery brought by a public body: *See Oberlandesgericht* (*OLG* – Higher Regional Court) Dresden, 28 September 2006, NJW 446 (2007) (here, the applicability of the Lugano Convention has obviously not been discussed, but has been assumed in view of *Blijdenstein*).

With regard to the aforementioned rulings, it might be questioned whether the approach applied by the Court in these cases could be regarded as a contradiction to the *Rüffer* ruling, since the fact that the public authority had acted initially (*e.g.* when granting social services) in the exercise of public authority is disregarded. This might appear as a departure from the established rule according to which the origin of the claim had to be analyzed as to whether public power had been exercised. However, it has to be taken into consideration that the initial act of the public authority, *e.g.* the granting of social assistance or an education grant, took place within a different relationship—namely between the public authority and the recipient of the social services—and not between the public authority and the defendant of the recovery claim. Thus, it seems plausible to focus entirely on the relationship between the parties to the dispute.

Nevertheless, two cases might not be exactly clear with regard to the interpretation of "civil matters." First, the decision directly preceding *Lechouritou* in the line of rulings on the concept of civil matters, *Frahuil*, might give rise to doubts with respect to the disregarding of the initial relationship. This case concerned an action by an Italian company against a French company in order to obtain reimbursement of customs duties paid by the Italian company as a guarantor. Concerns might be raised particularly in respect to whether the Court had sufficiently considered that the action was based on the subrogation to the rights of the customs authorities when regarding the action as falling within the scope of the Convention.[52] Nevertheless, despite these reservations, it can be stated that the Court referred also in this case to both of the criteria developed for the demarcation of public and civil matters and thus based the application of the Convention on its assessment that the subject matter was of civil nature and that no public powers had been exercised. [53]

The second case which might be considered as a derogation from the previous case law is *Préservatrice foncière*,[54] since here, with a view to the Advocate General's opinion, the impression could be given that the Court focused only on the legal relationship between the parties—and thus disregarded one of the criteria established by *Eurocontrol*. The Advocate General held "[…] that proceedings which are brought by a Member State, on the basis of a private-law guarantee contract,

[52] *Frahuil,* note 11, para. 21. *See* with regard to the raised concerns: Freitag, note 28, 305, 307.

[53] *Frauil, id.*, para. 20.

[54] *Préservatrice*, note 11. The case concerned the question of whether an action brought by the Netherlands State against a private party seeking the enforcement of a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by the Netherlands State, falls within the scope of the Brussels Convention. *See* regarding this case: Reinhold Geimer, *Öfffentlich-rechtliche Streitgegenstände*, IPRAX 512 (2003).

and which have as their subject-matter an order against the defendant for payment of customs debts, constitute a customs matter"[55] [and were therefore excluded from the scope of application] and regarded "[…] the fact that the Netherlands State has brought its action against PFA on the basis of a private-law guarantee contract [as] irrelevant."[56] The Court, however, held that "[…] a claim by which a contracting State seeks to enforce against a person governed by private law 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, 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"[57] was covered by Art. 1 Brussels Convention.

If the subject matter of the action had to be classified—as suggested by the Advocate General—as a public matter, this would have led, in view of the previous case law, to the exclusion of the action from the Convention, if—as the Advocate General insists—each of the two criteria is regarded as self-sufficient.[58] However, the diverging assessments of the Court and the Advocate General originate in different premises. While the Advocate General regarded an order against the private party for payment of custom debts as the subject matter of the action,[59] the Court pointed out that the proceedings were not brought against the defendant as a joint debtor (of these custom debts), but rather against the defendant in its capacity as guarantor[60] and stressed the fact that the guarantee contract had created a new obligation.[61] Consequently, the Court did not assume that the subject matter of the case was governed by public law, which in turn leads to the result that this ruling cannot be regarded as a derogation from the previous case law.

It can be deduced from the cited case law that the Court has consistently followed its principles established in *Eurocontrol* with regard to the interpretation of "civil

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[55] *Préservatrice,* note 11, para. 61, (opinion of *AG Léger*).

[56] Thus, he regarded the cause of the action as immaterial.

[57] *Préservatrice,* note 11, para. 36.

[58] *Id*., para. 42 (opinion of *AG Léger*).

[59] *Id*., para. 22 (opinion of *AG Léger)*. Thus, the subject matter is classified as a "manifestation of the exercise of public powers," para. 40.

[60] *Id*., para. 26. *See* with regard to this aspect Freitag note 28, 307 who points out the differences to the *Frahuil* decision.

[61] *Préservatrice*, note 11, para 28. *See also* Geimer, note 54, 514.

matters" by examining the subject matter of the case as well as the legal relationship as to the exclusion of the action from the scope of the Convention. It follows from this approach—with particular relevance for the present case—that the question whether the proceedings might be of a civil nature is irrelevant if the act underlying the action has been carried out in the exercise of public powers. Thus, this jurisprudence leads to the result that the crucial question in *Lechouritou* was whether the actions brought by the plaintiffs resulted from an exercise of public powers "falling outside the scope of the ordinary legal rules applicable to relationships between private individuals"[62] on the part of the State concerned, *i.e.* Germany—and thus from *acta iure imperii*. Since the court answered this question affirmatively, the fact that the plaintiffs claimed for compensation and thus asserted the claim was governed by private law could not change the outcome.

II. Acts Conducted by Armed Forces as Excluded Acta Iure Imperii

However, the Court's classification of the acts perpetrated by the German soldiers as *acta iure imperii*—and therefore the exclusion of the action from the scope of the Brussels Convention—has been challenged by the plaintiffs. The following will explore in more detail whether the Court was right to qualify the perpetrated acts as *acta iure imperii.*

1. The Exercise of Public Powers going beyond those existing in Relations between Private Individuals

Taking the Court's jurisprudence as a basis, an *act iure imperii* excluded from the scope of the Convention—in contrast to an included *act iure gestionis*—can only be assumed if public powers had been exercised by the German soldiers going beyond the powers existing in relations between private individuals.[63]

This requirement, specifiying the criterion of exercising public powers, has been established explicitly for the first time in the *Sonntag* decision[64] where the Court had held with regard to a State school teacher who caused the death of one of his pupils by reason of an unlawful breach of his official duties that "[…] the conduct of a teacher in a State school, in his function as a person in charge of pupils during a

[62] *Lechouritou*, note 2, para. 34.

[63] *Id.*, para. 34 as well as the opinion of *AG Ruiz-Jarabo Colomer*, para. 52.

[64] Hess, note 21, 10.

school trip, does not constitute an exercise of public powers, since such conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals."[65]

Thus, *Lechouritou* can—in this respect—be regarded as a kind of a counterpart to the *Sonntag* ruling: While in the latter case, it was held that the relationship between a teacher in a State school and his pupil did not differ from the duties of a teacher in a private school,[66] this was judged differently in the present case, where it was held "[…] that operations conducted by armed forces are one of the characteristic emanations of State sovereignty […]"[67] and thus entailed powers which go—in terms of the principles established by the Court—beyond powers existing under rules applicable to relationships between private individuals. In particular the remarks of the Advocate General on the nature of acts of war[68] illustrate that acts of soldiers concern the "core area of State sovereignty"[69] and thus constitute *acta iure imperii*.[70]

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[65] *Sonntag*, note 11, para. 22.

[66] *Sonntag*, note 11, para. 23; Hess, note 21, 12.

[67] *Lechouritou,* note 2, para. 37.

[68] *Lechouritou*, note 2, paras. 54-55 (opinion of *AG Ruiz-Jarabo Colomer)* where the Advocate General points out, with reference to the Netherlands Government that acts of war were typical expressions of State power.

[69] Eur. Court H.R., *McElhinney v. Ireland*, Judgment of 21 November 2001, Reports of Judgments and Decisions 2001-XI, 763, para. 38: "[…] matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory […]."

[70] *See also Bundesgerichtshof* (*BGH* – Federal Supreme Court), judgment of 26 June 2003, BGHZ 155, 279, 281 in the "*Distomo* case" where the *Bundesgerichtshof* regarded operations conducted by armed forces as emanations of State sovereignty and thus not included in the scope of the Brussels Convention as well. The court refused in this decision to recognize a judgment of the Regional Court Livadeia (Greece) ordering the Federal Republic of Germany to pay compensation to victims of the so called "*Distomo* massacre" on the basis that this judgment infringed the principle of State immunity (*see* with regard to this aspect *infra* note 93). *See* for an affirmative case note Reinhold Geimer, *Völkerrechtliche Staatenimmunität gegenüber Amtshaftungsansprüchen ausländischer Opfer von Kriegsexzessen,* LMK 215, 216 (2003). *See also* Peter Mankowski, *Entwicklungen im Internationalen Privat- und Prozessrecht 2003/2004 (Teil 2),* RIW 587, 595 (2004); Sabine Pittrof, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case*, 5 GERMAN LAW JOURNAL 15 (2004), available at: http://www.germanlawjournal.com/Art. .php?id=359. This judgment has been upheld by the *Bundesverfassungsgericht* (*BVerfG* – Federal Constitutional Court), 2 BvR 1476/03 (15 February 2006), available at: http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html. *See* with regard to the latter decision the case note by Markus Rau, *State Liability for Violations of International Humanitarian Law – The Distomo Case before the German Federal Constitutional Court*, 7 GERMAN LAW JOURNAL 701 (2006), available at: http://www.germanlawjournal.com/Art. .php?id=743.

a) Territorial Nature of Public Authority?

One objection to the classification of the acts in question as *acta iure imperii* was brought forward by the Polish government, which contested the exercise of public authority on the grounds that an *act iure imperii* could not be assumed if—as in the present case—the relevant acts have been perpetrated outside the boundaries of the State in question, *i.e.* here Germany.[71] Thus, the Polish government proceeds from the assumption of a territorial nature of public authority.

This assertion was rejected by the Advocate General. Even State acts carried out beyond the own borders lacked in principle effectiveness—and were therefore "territorial"[72]—the Advocate General pointed towards the exceptional situation in the present case, namely the fact that an invasion in another State, Greece, had taken place. Regarding this situation, the Advocate General set forth in his opinion that such seizure entailed "an extension of the invader's territory" and pointed out that even then the armed forces were still under the direction of their State. Thus,

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See regarding the classification of military acts as the emanation of State authority furthermore: Lord Millet in *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (no. 3),* [2000] 1 A.C. 147, 269. In this context the judgment of the International Court of Justice (ICJ) of 26 February 2007 in the case *Bosnia and Herzegovina v. Serbia and Montenegro,* available at: http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm, is very instructive: The ICJ had to deal in this case with the massacre of Srebrenica, where about 8000 Bosnians, mainly men an boys, have been killed. The ICJ held that Serbia had violated its obligation under the Genocide Convention to prevent genocide in Srebrenica, but was, however, not responsible for the genocide. The ICJ's reasoning in this respect is very illustrative with regard to the present case since it elucidates the differences between both cases: So the ICJ explained first the basic rules of customary law with regard to State responsibility and set forth "that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State" (para. 385). The term "State organ" is described by the Court by reference to customary international law as well as Art. 4 of the International Law Commission's (ILC) Articles on State Responsibility according to which this term refers to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (para. 388). With regard to the pertinent case the ICJ held that there was no evidence that the genocide "committed in Srebrenica was perpetrated by 'persons or entities' having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force" (para. 386). As reasons for this holding the ICJ cites *inter alia* the fact that it has not been shown that the army of the Federal Republic of Yugoslavia took part in the massacres (para. 386). This clearly illustrates the difference to *Lechouritou* since here the massacre has been perpetrated by soldiers belonging to the German army and thus, in the sense of the ruling of the ICJ, by a State organ.

[71] *See* with regard to this argumentation: *Lechouritou,* note 2, para. 67 (opinion of *AG Ruiz-Jarabo Colomer*).

[72] This is the general rule under public international law, *see* Eur. Court H.R., *Kalogeropoulou and others v. Greece and Germany*, 12 December 2002, NJW 273, 275 (2004) (*Kalogeropoulou).*

acts perpetrated by armed forces constituted, also beyond the borders, *acta iure imperii*.[73]

This point of view submitted by the Advocate General conforms with well established principles in public international law as well as the case law of the European Court of Human Rights.[74] Further, this issue has been judged in the same way by the *Bundesgerichtshof* in the "*Distimo massacre*" decision.[75] Thus, the fact that the massacre was, in the present case, perpetrated on Greek territory by German soldiers, does not make any difference with regard to its qualification as an emanation of public authority.

b) "Acta Iure Imperii" – Limited to Lawful Acts?

One of the main arguments contesting the character of the acts perpetrated by the German soldiers as *acta iure imperii*, and thus as being excluded from the scope of the Convention, is the assertion that wrongful acts fell not within the definition of "*acta iure imperii*."[76] This line of argumentation proceeds as following: serious violations of human rights, such as the massacre carried out in Kalavrita in the present case, cannot be regarded as *acta iure imperii*, but rather as *acta iure gestionis* and fall therefore within the scope of the Brussels Convention.

aa) The Restriction of State Immunity[77]

This argument reflects, and is linked to, a development taking place with regard to State immunity. According to the predominant restrictive doctrine of State

[73] *Lechouritou,* note 2, para. 69 (opinion of *AG Ruiz-Jarabo Colomer*).

[74] *Kalogeropoulou*, note 72, with reference to further case law.

[75] *BGH*, judgment of 26 June 2003, BGHZ 155, 279 (in particular 293). *See also Oberster Gerichtshof* (*OGH* – Austrian Federal Supreme Court) decision of 11 April 1995, IPRAX 41. (1996) with case note by Ignaz Seidl-Hohenveldern, *Staatenimmunität bei Kriegshandlungen*, IPRAX 52 (1996).

[76] *Lechouritou,* note 2, para. 40.

[77] It should be noted here, that in the following it is *not* examined as to whether there is State immunity in the present case. This question is – as pointed out by the Advocate General in his opinion (para. 78) – not within the powers of the Court. Rather, the opinions held in the context of immunity are referred to in order to determine whether the existence of *acta iure imperii*, and thus the exclusion of the action from the scope of the Convention, could be rejected due to the wrongfulness of the acts.

immunity,[78] States are entitled to rely on immunity with regard to acts in exercise of State authority (*acta iure imperii*), not however with regard to acts in relation to non-sovereign action (*acta iure gestionis*).[79] Here a tendency can be observed to further restrict the possibility to plead immunity—in particular in view of serious human rights violations.[80]

With regard to this restriction of immunity, different approaches are suggested:[81] While partly it is argued, a grave violation of human rights would entail an implied waiver of immunity,[82] other opinions base the further restriction on the forfeiture of immunity in case of serious human right violations,[83] or deduce from the fact that human rights violations are prohibited by mandatory rules of international law (*ius cogens*) that States cannot rely on immunity in case of a violation of *ius cogens*.[84]

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[78] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 323 (6th ed. 2003); Kay Hailbronner, *Der Staat und der Einzelne als Völkerrechtssubjekte, in* VÖLKERRECHT, Vol. III 94 (Wolfgang Graf Vitzthum ed., 2nd ed. 2001). Initially, the plea of immunity constituted an absolute bar. This however, has changed with the increasing participation of States in trade which led to the distinction between *acta iure imperii* and *acta iure gestionis*. *See further* HAZEL FOX QC, The Law of State Immunity 21, 272 (2002).

[79] *BVerfG*, 30 April 1963, BVERFGE 16, 27 (61 f.); *OGH*, 11 April 1995, IPRAX 41 (1996); Michael Bothe, *Die strafrechtliche Immunität fremder Staatsorgane*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 246, 257 (1971); Wolfram Cremer, *Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit*, 41 ARCHIV DES VÖLKERRECHTS 137, 140 (2003); Oliver Dörr, *Staatenimmunität als Anerkennungs- und Vollstreckungshindernis in* VÖLKERRECHT UND IPR 175, 180 (Stefan Leible & Matthias Ruffert eds., 2006); FOX QC, note 78, 22; BURKHARD HESS, STAATENIMMUNITÄT BEI DISTANZDELIKTEN 39 (1998); Hess, note 21, 12; Burkhard Hess, *Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht*, *in* ENTSCHÄDIGUNG NACH BEWAFFNETEN KONFLIKTE 107, 127 (Wolfgang Heintschel von Heinegg *et al.* ed., 2003).

[80] The approach to (further) restrict immunity is not really new, but has already been advocated with regard to the Nuremberg Trials in the aftermath of World War II (Bothe, 79, 252): Bothe describes the Nuremberg Trial as the "Markstein" of the further restriction of the Act of State-Doctrine where restrictions of immunity have been – based on the increasing interest in human rights – discussed and also been accepted: The Charter of the International Military Tribunal had excluded the objection of immunity in its Art. 7.

[81] *See* for an overview of these approaches: Cremer, note 79, 137.

[82] *See further* with regard to this approach, Cremer, note 79, 143. *See* with regard to alleged waivers for human rights violations, FOX QC, note 78, 268. This argument has, however, been rejected by US courts which require that the respective foreign government has indicated its amenability to suit.

[83] Juliane Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG, FESTSCHRIFT FÜR RUDOLF BERNHARDT 135, 148 (Ulrich Beyerlin *et al*. eds., 1995).

[84] *See for instance* the dissenting opinion of the judges Rozakis and Calfisch in Eur. Court H.R., *Al-Adsani v. The United Kingdom,* Judgment of 21 November 2001, Reports of Judgments and Decisions 2001-XI, 761

Another approach to restrict immunity, which might be referred to here in order to challenge the exclusion of the pertinent action from the scope of the Convention—and which has apparently also been referred to by the plaintiffs—is to refuse the existence of an *act iure imperii* in cases of serious human rights violations *per se*, *i.e.* to start at the earliest possible level and to regard acts violating human rights as *acta iure gestionis*.

This approach is not new, but has, with regard to the law of immunity, already been supported, for instance, in 1958 by Dahm, who arguably suggests denying acts which infringe public international law the status of "*acta iure imperii*" (and thus to deny the right to plead immunity in such cases).[85]

Further, this opinion has also been held by the Regional Court Livadeia with regard to a parallel case, the so called "*Distomo* case."[86] Here the Greek Regional Court had refused the classification of the war crimes as *acta iure imperii* on the basis of the seriousness of the unlawfulness.[87]

Also the House of Lords has adopted this point of view in its first "Pinochet decision," which concerned the question whether the former Chilean president Augusto Pinochet Ugarte could plead immunity. Here it has been held by Lord Steyn that "[…] the concept of an individual acting in his capacity as head of state involves a rule of law […]" and that "[…] it seems […] difficult to maintain that the commission of such high crimes [in the pertinent case torture] may amount to acts performed in the exercise of functions of a head of state."[88] However, the argument

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who state that "[t]he prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere." Further, the same approach can be found by Lord Millett in *Regina v. Bow Street Metropolitan Stipendiary Magistrate And Others, Ex Parte Pinochet Ugarte (No. 3),* [2000] 1 A.C. 147, 275-276.

[85] "Kein Widerspruch zum Völkerrecht kann sich aber daraus ergeben, dass die örtliche Jurisdiktion dem grob *völkerrechtswidrigen* Handeln fremder Organe die Anerkennung als einem amtlichen Handeln versagt. Denn die Zuordnung des Hoheitsaktes zu dem Staat, um dessen Organ es sich handelt, setzt eine entsprechende Rechtsnorm voraus. Wenn aber die Norm, auf der die Beziehung beruht, dem Völkerrecht grob widerspricht, so sind jedenfalls ausländische Staaten nicht völkerrechtlich verpflichtet, sie als Rechtsnorm gelten zu lassen und damit das Handeln des Organs statt ihm persönlich, dem Staat zuzurechnen, auf dessen Befehl oder mit dessen Ermächtigung das Organ seine Tätigkeit ausgeübt hat." *See further*, Georg Dahm, *Völkerrechtliche Grenzen der inländischen Gerichtsbarkeit gegenüber ausländischen Staaten*, in FESTSCHRİFT FÜR ARTHUR NİKİSCH 153, 170 (1958).

[86] Regional Court Livadeia, Judgment of 30 October 1997.

[87] *See further* BGHZ 155, 279 (283). *See* with regard to the "*Distomo* case" Dörr, note 79, 182.

[88] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* [2000] 1 A.C. 61, 115 (Lord Steyn). However, the third Pinochet decision (House of Lords, Judgment of 24 March 1999 in *Regina v. Bow Street Metropolitan Stpendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 3),* [2000]

that the acts at issue did not constitute *acta iure imperii* and the action was therefore not excluded from the Convention can be rejected on two different levels.

First, the assumption, wrongful acts did not constitute *acta iure imperii*, can be refused *per se*. This was done by the Advocate General[89] when stating that deciding according to the plaintiffs' point of view entailed that public powers would only be exercised when the authorities acted in a lawful manner. This would lead to considerable difficulties with regard to liability since only the individuals who actually committed the act could be held liable and not the authorities—in this case, the State.[90]

Further, an exclusion of wrongful acts from the term "*act iure imperii*" is rejected[91] by the predominant opinion[92] as well as courts in several European countries,

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1 A.C. 147) differs in its approach (*see, supra,* note 84). Even though immunity was refused – as in the first decision – the reasoning is different: Here it was held that torture as an international crime was prohibited by *ius cogens*. Since the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted on 10 December 1984 had created a universal criminal jurisdiction for acts of torture by public officials, it was held that it was not intended by the State parties that an immunity for former heads of State for official acts of torture would continue to exist. *See for instance* Lord Hutton (at 262): "The alleged acts of torture by Senator Pinochet were carried out under colour of his position as head of state, but they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture […]." *See further* on this judgment: FOX QC, note 78, 444. However, it has to be taken into consideration that the Pinochet decisions concern immunity from criminal proceedings, which has – as pointed out by Lord Millet – to be distinguished from immunity in civil proceedings. He has, arguably, pronounced against the application of this jurisprudence with regard to immunity in civil proceedings. *See also Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147, 278. *See further* with regard to the Pinochet judgments given by the House of Lords: Burkhard Hess, *Staatenimmunität bei Menschenrechtsverletzungen*, in WEGE ZUR GLOBALISIERUNG DES RECHTS – FESTSCHRIFT FÜR ROLF A. SCHÜTZE ZUM 65. GEBURTSTAG 269, 278 (Reinhold Geimer ed., 1999).

[89] In contrast to the Advocate General, the Court did not state its position explicitly on the question whether also wrongful acts constitute *acta iure imperii*, but rather pointed out, *inter alia*, that accepting this argument "would be such as to raise preliminary questions of substance even before the scope of the Brussels Convention can be determined with certainty." This would lead to legal uncertainty, which was incompatible with the objective of the Convention. *See further Lechouritou*, note 2, para. 44.

[90] *Lechouritou,* note 2, para. 65 (opinion of *AG Ruiz-Jarabo Colomer). See also* Bothe, note 79, 255.

[91] The cited authorities do not all affirm the existence of an *act iure imperii* in case of a human rights violation explicitly. However, from the fact that immunity has been assumed, it can be deduced, that the respective acts have been classified as *acta iure imperii*.

[92] As stated by Bothe, note 79, 262, the damnability of the respective act should not have any influence on its classification as an *act iure imperii*. In contrast, this approach would lead to the undesirable and illogical result of acquitting the State from the liability for particular cruel acts, Bothe, note 79, 269. *See also* Cremer, note 79, 157 for classification of human rights violations perpetrated or ordered by holders of a public office as *acta iure imperii*. *See further*, Dörr, note 79, 183; Burkhard Hess, note 88, 281, 285;

which assumed immunity in comparable cases[93]—and consequently classified the respective acts as *acta iure imperii*. Also the European Court of Human Rights (ECHR) accepted the plea of sovereign immunity even in cases where there has been a violation of human rights, as in its judgment in *Al-Adsani v. The United Kingdom* where the ECHR did not find it established "[…] that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State."[94] The *Bundesverfassungsgericht* also held in its *Distomo* ruling that the acts perpetrated by the German soldiers had to be regarded as *acta iure imperii*—irrespective of their qualification as wrongful under international law.[95]

In addition, even if a different attitude was adopted with regard to the classification of wrongful acts in the context of immunity and the status of *acta iure imperii* would be denied in these cases, it could at least be doubted whether this assessment could have any influence on the question whether such acts fall within the scope of the Brussels Convention, *i.e.* whether the valuations made with regard to the law of immunity could be transferred to European procedural law.[96] Concerns might be

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ARNDT SCHEFFLER, DIE BEWÄLTIGUNG HOHEITLICH BEGANGENEN UNRECHTS DURCH FREMDE ZIVILGERICHTE 311 (1997).

[93] *See further* for Germany: *BVerfG*, 2 BvR 1476/03, 15 February 2006, http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html, para. 18; *BGH*, Judgment of 26 June 2003, BGHZ 155, 279 (283), where this point of view is rejected; *see also* with regard to Austria the judgment of the *OGH* of 11 April 1995, IPRAX 41 (1996) with annotation by Seidl-Hohenveldern, note 75, 52. For further cases where the plea of sovereign immunity has succeeded see the cases referred to in the Report of the Working Group on International Immunitites of States and Their Property, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1999, Vol. II, Part Two, 172 (fn. 143). Further, also the *Anotato Eidiko Dikastirio* held in its judgment No. 6/2002 of 17 September 2002 that States can rely on the principle of immunity even in cases of a breach of *ius cogens* (*see also* the annotation to the judgment of the *BGH* of 26 June 2003 by Geimer, note 70, 216. *See also* Lord Lloyd of Berwick, House of Lords, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, [2000] 1 A.C. 61, 101, 102, who affirmed an *act iure imperii* in this case (however, the House of Lords had rejected the plea of immunity by a majority three to two, *see* regarding this case *supra,* note 88).

[94] *See further* Eur. Court H.R., *Al-Adsani v. The United Kingdom*, Judgment of 21 November, Reports of Judgments and Decisions 2001-XI, 761, para. 66, where the plea of sovereign immunity has succeeded (at para. 23); and Eur. Court H.R., *Kalogeropoulou,* note 72.

[95] "Da die am Geschehen in *Distomo* beteiligte SS-Einheit den Streitkräften des Deutschen Reiches eingegliedert war, sind die Übergriffe, unabhängig von der Frage ihrer Völkerrechtswidrigkeit, als Hoheitsakte einzuordnen". (*BVerfG*, 2 BvR 1476/03, 15 February 2006, para. 18; available at: http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html). Affirmed byGeimer, note 54, 514.

[96] In principle, the Community is bound by public international law (*see* Dörr, note 79, 189; Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-3655, para. 45), thus European

raised with a view to the different rationales underlying the further restriction of immunity on the one side and the exclusion of *acta iure imperii* from the scope of the Convention on the other side. While classification of wrongful acts as *acta iure gestionis*[97] constitutes one method to further restrict immunity which is guided by the goal of an improved protection of human rights[98] as well as the insight that immunity is not justified in case of grave violations of human rights, the exclusion of *acta iure imperii* from the scope of the Brussels Convention is based on different considerations. Here, the exclusion of *acta iure imperii* can be deduced from the nature of the Brussels Convention as an instrument enhancing the internal market by facilitating legal relations in civil matters by means of establishing common rules on jurisdiction, recognition and enforcement of judgments,[99] which is not designed to govern public matters following a different mechanism.[100] In this context, the distinction between wrongful and lawful acts is, however, irrelevant. Thus, it seems to be problematic whether, even if a different point of view was adopted in respect to the classification of wrongful acts, conclusions could be drawn with regard to the scope of the Convention.[101] Consequently, the argument brought forward by the plaintiffs could be rejected at a second level as well.

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procedural law has to be consistent with public international law. *See* with regard to the intertwining between these two areas of law, *infra,* note 115.

[97] And thus not as *acta iure imperii* in case of the existence of which immunity can be pleaded.

[98] *See* with regard to the increasing protection of human rights be international criminal law and its influence on the restriction of immunity: Kai Ambos, *Der Fall Pinochet und das anwendbare Recht*, JURISTENZEITUNG (JZ) 16, especially 20-23 (1999); *see further* Bothe, note 79, 256. This development is illustrated for instance by the adoption of the Draft Articles on Responsibility for Internationally Wrongful Acts (available at: http://untreaty.un.org/ilc/reports/2001/english/chp4.pdf).

[99] *See Jenard Report*, OJ 1979, C 59/3.

[100] *See* regarding the differences between public and private matters (with regard to the Brussels I Regulation): Peter Mankowsi, *Art. 1 Brüssel I-VO*, *in* EUROPÄISCHES ZIVILPROZESSRECHT, Vol. I; (Thomas Rauscher ed., 2nd ed., 2006), para. 2a.

[101] These thoughts outlined above might have been, arguably, underlying one of the arguments stated by the Court when rejecting the objection, wrongful acts did not constitute *acta iure imperii*: "Finally, the question as to whether or not the acts carried out in the exercise of public powers that constitute the basis for the main proceedings are lawful, concerns the nature of those acts, but not the field within they fall." (*Lechouritou,* note 2, para. 43).

bb) The Reference to European Secondary Legislation

In order to substantiate its reasoning, the Court turned to European legal instruments in the field of judicial cooperation in civil matters recently entered into force—the Regulation creating a European Enforcement Order for uncontested claims[102] as well as the Regulation creating a European order for payment procedure[103]—which contain both, in their Art. 2 (1) respectively, an explicit exclusion of *acta iure imperii*.[104] This is regarded by the Court as another indication that acts perpetrated by a public authority are excluded from the scope of the Brussels Convention.[105]

This approach is not new—the Court of Justice has referred to European secondary legislation in order to interpret the Brussels Convention also in previous rulings.[106] For instance, in. *Luc Baten*, the Court consulted Art. 4 of Regulation (EC) No 1408/71 in order to clarify the concept of "social security" in terms of Art. 1 Brussels Convention.[107] Here the court stressed—with reference to its earlier rulings in *Mund & Fester*[108] and *Krombach*[109]—the "link between the Brussels Convention

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[102] 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.

[103] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for payment procedure.

[104] The aforementioned provision in the Regulation creating a European Enforcement Order for uncontested claims traces back to the German delegation in the European Council who wished to clarify that titles on the liability of the Federal Republic of Germany for war crimes committed during World War II should not be certified as a European Enforcement Order (Jan Kropholler, *Art. 2 EuVTVO*, in EUROPÄISCHES ZIVILPROZESSRECHT (Jan Kropholler ed., 8th ed., 2005), para. 2; Rauscher & Pabst, note 21 para. 5). *See further* Rat der Europäischen Union, Vermerk der deutschen Delegation, 11813/03, JUSTCIV 122; Rat der Europäischen Union, Vermerk des Vorsitzes, 10660/03, JUSTCIV 92.

[105] *Lechouritou,* note 2, para. 45. The Advocate General referred in his opinion in addition to 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 which also excludes *acta iure imperii* (for more, *see Lechouritou* case, note 27 (opinion of *AG Ruiz-Jarabo Colomer*)). Whether, and to which extent, the reference to preparatory acts is possible is judged differently. In favour of a consideration: BURKHARD HESS, INTERTEMPORALES RECHT 498 (1998); critical: Karl Riesenhuber, *Die Auslegung, in* EUROPÄISCHE METHODENLEHRE, Vol. 2, 197 (Karl Riesenhuber ed., 2004) (however, in the result, both approaches do not differ significantly).

[106] And in particular, with regard to the interpretation of Community measures enacted on the basis of Art. 65 EC to parallel measures. As Hess points out, these legal instruments are coordinated. *See further* Burkhard Hess, *Methoden der Rechtsfindung im Europäischen Zivilprozessrecht,* IPRAX 348, 355 (2006).

[107] *Luc Baten*, note 11, para. 42.

[108] Case C-398/92, *Mund & Fester v. Hatrex International Transport*, 1994 E.C.R., I-467, and approved by Martiny, note 45, 202.

and Community law,"[110] which was used in this case as the reason for the uniform interpretation of the concept of social security.

The reference to the aforementioned Regulations illustrates that the Court regards the Brussels Convention—despite its qualification as an international treaty—as part of Community Law[111] and reflects the goal of the Court to enhance a coherent system of Community measures.[112] However, even though the approach of the Court is approved[113] and has to be agreed with, it would have been preferable if the Court had given reasons for its conclusions.[114]

In addition, the conclusiveness of the argument derived from the fact that *acta iure imperii* are excluded in the mentioned Regulations might be questioned. The

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[109] Case C-7/98, *Dieter Krombach v. André Bamberski*, 2000 E.C.R. I-1935.

[110] *Luc Baten*, note 11, para. 43.

[111] *See further* Hess, note 106, 351.

[112] *Id.*, 353.

[113] *See* regarding the specific methods of interpretation of Community law used by the Court, Rüdiger Stotz, *Die Rechtsprechung des EuGH,* in EUROPÄISCHE METHODENLEHRE, Vol. 2, 409, 414 (Karl Riesenhuber ed., 2006) and in particular with regard to the method of interpretation aiming to enhance integration Hess, note 106, 358.

[114] This would have been in particular desirable since it is, at least by applying the four "classical" methods of interpretation – and not taking account of the methods of interpretation developed by the Court specially-tailored for the interpretation of Community law – not self-evident that conclusions can be drawn from European Regulations with regard to the interpretation of the Brussels Convention. Here some concerns shall only be outlined briefly: For instance with respect to the historical-genetical interpretation it seems to be difficult to refer to the legislative intent since the instruments have not been enacted by the same legislator: While the Brussels Convention is an international treaty concluded by the (then) Member States, the consulted instruments constitute European Regulations enacted by the European Parliament and the Council on a different legal basis than the Brussels Convention, which has not been "enacted" at all, but rather concluded by the (then) Member States on the basis of Art. 220 EC. Further, the classification of the Brussels Convention as a Community measure itself has been doubted (*see further*, Francesco Capotorti, *The Task of the Court of Justice and the System of the Brussels Convention,* in CIVIL JURISDICTION AND JUDGMENTS IN EUROPE, 13, 15 (Harry Duintjer Tebbens, consultant ed., 1992), which might be supported for instance in view of the fact that the Court does not, when interpreting the Brussels Convention, act as an institution of the European Community, but rather as a court constituted by the Contracting States under international law (*see further* Reinhold Geimer, *Einl. EuGVVO*, in EUROPÄISCHES ZIVILVERFAHRENSRECHT (Reinhold Geimer/Rolf A. Schütze eds., 2nd ed., 2004, para. 177) since its jurisdiction to give preliminary rulings on the Convention has not been established by Art. 177 EC, but rather by the Protocol of 3 June 1971 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. Thus, there seems to be at least some evidence which might impede the argumentation, the Convention was a part of Community law – which might complicate also a systematical interpretation.

relevant provisions in those Regulations only state that *if* a certain act is qualified as an *act iure imperii*, the liability of the respective State for this act shall not fall within the scope of the Regulation, but does not provide a definition of the term of "*acta iure imperii*." Rather, a definition is obviously presumed. Thus, the question whether wrongful acts constitute *acta iure imperii* at all, has to be answered one step before, *i.e.* at a different level.[115] Even though it is apparent that the aim, when drafting the Regulations, was to exclude the liability for sovereign acts irrespectively of their wrongfulness,[116] it would have been also in this respect preferable if the Court had been more detailed.

2. Interim Findings

Summing up, it can be stated that the arguments brought forward against the qualification of the acts at issue as *acta iure imperii* are unconvincing and that it has to be agreed with the Court's approach to regard the acts perpetrated by the German armed forces—independently from their unlawfulness – as resulting from the exercise of public powers and thus as excluded from the scope of the Convention.

III. Classification of the Judgment in the Previous Case Law and Prospects

With its ruling in *Lechouritou*, the Court resumed its precedents with regard to the interpretation of civil matters in terms of the Brussels Convention by applying the standards developed in *Eurocontrol* and subsequent rulings. By examining whether

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[115] If the definition of *acta iure imperii* is regarded as corresponding to the law of immunity and here *acta iure imperii* would *per se* be defined as sovereign acts to the exclusion of serious violations of human rights, this could arguably lead to the result that such acts would not fall under the term *acta iure imperii* in the Regulation. *See* Dörr, note 79, 190, where it is argued that Art. 2 of the Regulation creating a European Enforcement Order was linked to the law of State immunity – which in turn suggests that the definition of *acta iure imperii* can be applied.

[116] Even though this has not been stated explicitly in the recitals of the Regulations as well as preparatory acts – here it has only been stated that "Article 2 has been amended to clarify that the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*) does not constitute a civil and commercial matter and does therefore not fall within the scope of this Regulation." (*see* COM/2004/0090 final) – this suggests that the exclusion should be as extensive as possible (and thus not restricted to lawful acts). Further, conclusions can be drawn from the fact that the scope of application of these Regulations follows the one of the Brussels Regulation/Convention and the case law on these instruments – also with regard to the demarcation between public and private law matters. (*See* with regard to the European Enforcement Order Regulation: Kropholler, note 104, para. 2; Rauscher & Pabst, note 21, para. 5).

the action derives its origin from acts resulting from the exercise of public powers, the Court followed in particular the road of *Rüffer* and *Sonntag*.
In view of potential future cases, the judgment can be appreciated for clarifying—after the recent rulings on "civil matters" which were, arguably, not all particularly clear in this respect—the standards to be applied with regard to the distinction between civil and public matters. Further, the Court's ruling is—due to the same scope of application of both instruments—transferable to the Brussels Regulation.

E. Final Remarks

Certainly, the judgment is disappointing for the plaintiffs, descendents of victims of a cruel massacre, who may have a moral, political and perhaps a legal (under public law) right to compensation. However, as the Court of Justice has explained in its ruling, the Brussels Convention, as a measure facilitating the internal market by the mutual recognition and enforcement of judgments in civil and commercial matters,[117] is not the right instrument for the assertion of compensation claims based on acts perpetrated by armed forces in the course of warfare. The consequences of war and occupation can, as Geimer[118] and Hess[119] have pointed out, only be dealt with at a public law level.

[117] *See further Jenard Report*, OJ 1979 C 59/3.

[118] Geimer, note 70, 216.

[119] Hess, note 88, 285.