The European Legal Forum
Forum iuris communis Europae

Requejo, Marta

Transnational human rights claims against a State in the European Area of Freedom, Justice and Security – A view on ECJ Judgment, 15 February 2007 – C 292/05 – Lechouritou, and some recent Regulations

The European Legal Forum (E) 5-2007, 206 - 211

count" to determine the applicable law, as accounts are legal relationships and do not have a physical location. It is conceivable, but highly unlikely, that the UK court would determine that the term services used in Article 5(1) covered financial services, including securities transactions, but then create an additional standard for measuring where services were provided respecting securities transactions based on where the securities account was maintained.[30] The creation of an additional category within the term "financial services" as used in the second indent of Article 5 (1)(b) is unnecessary and defeats the policy underlying the provision.

Account: Illusory or Not

The argument that an "account" does not have a physical location is predicated on the view that it is a legal relationship between two parties having no physical location. In theory, there appears to be a consensus on this point. However, in reality, commercial practice provides a basis to re-open the issue. A confluence of factors, notably obligations of financial institutions to comply with anti-money laundering and anti-terrorism laws, not to mention tax legislation, often makes the opening of an "account" definitively tied to a physical place and comprises several formalities.[31] There are measurable and quantifiable events in the opening of an account, for example, (1) legalisation of documents, (2) production of documents identifying the real beneficial owner of the account, (3) signature on a card for authenticity and authorisation purposes, and (4) a signed paper agreement. Banking law generally favours the principle of location of the branch office where the account was opened as determinative of the law applicable to a dispute regarding the liability of the bank, that is, whether the bank has incurred a liability to pay the owner of the account.[32] Therefore, an account opened at the Bank of America in the City of New York is deemed located in the State of New York, even though the Bank of America conducts business worldwide and the "account" in New York in terms of debits and credits may actually exist on a server located in North Dakota. The "account" approach is a fiction. The question remains: is the PRIMA approach any less a fiction than the "account" approach often used in banking law. All indications suggest that both are fictions.[33] As securities exchanges become more integrated and denationalised, central depositories increasingly cross-border, and investment firms outsource their services to firms located in different jurisdictions, there will be no more meaningful physical attributes to a PRIMA than to an account. Both will be equally arbitrary.

A "consequentialist" or pragmatic view favours the arbitrary rule yielding the most efficient and predictable results for commercial transactions in securities. The important decision from a policy-making perspective is to select a workable rule based upon one of the fictitious choices streaming across the range of possibilities. The factors that should matter are: clarity, predictability, and uniformity, the hallmarks of commercial law. Efforts to establish a choice of law rule or a choice of jurisdiction rule based on links to "real location" in the context of the intermediated securities system is doomed from the start. A comprehensive Treaty or Convention, like the Convention of the International Sales of Goods, to cover transactions in the indirect holding system for securities is needed as a substantive law convention obviates private international law. Authorities maintain that an agreement on a treaty is politically impossible because jurisdictions take a different view on what is the nature of a right in a security: (1) a property right, (2) contractual right, or (3) bundle of rights or "security entitlement." Admittedly, this is a serious political debate among countries and legal professionals. However, the disagreement reminds one of the memorable quotations in the movie "My Cousin Vinny" that takes place in a dialogue between Mona Lisa Vito and Vinny Gambini concerning the pants he should wear on a deer hunt.[34]

An analogous argument may be made about whether the relationship between the issuer and investor is denominated a property, contract, or securities entitlement right. The victims of this debate in terms of having to rely upon uncertain legal principles would yield to the pragmatic conclusion: it does not matter. The same analogy would apply to where the relevant securities intermediary is located. Policy makers must strive to break the deadlock of provincial differences and create a rule, arbitrary or not, that achieves the well-accepted principles of commercial law.

Conclusion

Commercial developments in the securities industry have outpaced legal rules designed to provide certainty to securities transactions. Many legal rules remain predicated on a commercial infrastructure that no longer exists. In the context of jurisdiction, an application of Brussels I to a cross-border transaction in securities does not produce uniform and predictable results, unless, in the absence of a contractual forum clause, the Article 2 default rule applies. It is doubtful whether the revision of the Brussels Convention that led to Brussels I and the Article 5 amendment contemplated the effects of the term "service" in the financial services sector. Without legislative clarification, courts confronted with questions of jurisdictional choice likely will resort to artificial legal constructs to produce a judgment. Given differences of judicial temperament and philosophy, this lacuna in the law likely will lead to non-uniform decisions.

---

30 The "account approach" is used by the Settlement Finality Directive [98/26/EC] and Collateral Directive [2002/47/EC] but was rejected by the drafters of the Hague Securities Convention.

31 E.g., Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2006 on the prevention of the use of the financial system fort the purposes of money laundering and terrorist financing [requring financial instiutions, when opening an account, to carry out „customer due diligence" including verification of identity of customer and disclsoure of benefical owner of account] (OJ 2006, L 309 at 15).

32 Joseph H. Sommer, *Where is a Bank Account*, 57 Md. L. Rev. 1, 4 (1998) [sketching a strong argument for localising bank liabilities based on the law of money, and providing an interpretive method to salvage statutes related to bank liability from incoherence].

33 The "qualifying office" requirement found in Article 4(1) comprises criteria that arguably are equally applicable to identify a bank account thereby conferring no superior benefit.

34 See, http://www.imdb.com/title/tt010495/quotes, last visited 22 October 2007.

Transnational human rights claims against a State in the European Area of Freedom, Justice and Security

– A view on ECJ Judgment, 15 February 2007 – C 292/05 – *Lechouritou*,[1] and some recent Regulations –

*Marta Requejo**

I. Introduction

The right of victims of serious violations of international human rights and humanitarian law, to present appeals and obtain compensation, is unquestionable. The issue of implementing this right into practice, however, is more complicated. The defence of human rights in transnational cases has traditionally been considered to pertain to Public International Law and inter-State relations. Nevertheless, the continuous violation of Human Rights and Humanitarian Law, and the lack of satisfaction for the victims inevitably lead us to question the adequacy of this approach. In this context, domestic jurisdiction (civil courts), where individuals can sue for damages resulting from actions contrary to International Law, is seen as an additional possibility, or even an alternative, to classic mechanisms. Well-known examples are to be found not only in the U.S. but also in Europe; they are typically cases involving events associated to the Second World War, in which individuals take legal action against States (especially Germany) or the firms which collaborated with them.

The above mentioned cases have met considerable hostility on our continent, the immunity of jurisdiction of the defendant being the usual argument for rejection. In 2000 and 2004, nonetheless, two claims against Germany were able to overcome these legal obstacles and the claimants won their cases. The first before the Greek courts, known as *Distomo*;[2] the second before the Italian courts, *Ferrini.*[3] These decisions are famous, particularly because of the treatment given to the defendant's immunity of jurisdiction,[4] but they raise other issues of interest; we will consider those related to International Private Law. Italy and Greece are two European Union members; the objective of the claims before their courts was compensation for damages: the question inevitably arose of whether or not the Community international civil procedural law, at the time the Brussels Convention on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 27 September 1968 (hereafter, the Brussels Convention), was applicable. In neither of the lawsuits, however, the need was found for a preliminary ruling by the ECJ. It was a few years later, in 2005, when an action similar to *Distomo* (and again a Greek one) did give rise to a question concerning the interpretation of the Convention, with specific reference to art. 1: it was C 292/05, *Lechouritou*, resolved on 15 February 2007.[5] In this essay we will briefly analyse and evaluate the response of the ECJ.

II. The "external" context of the ECJ Judgment (I): the American example; the European domestic point of view (authors and case law)

1. Brief reference to the American example: violations of human rights as civil wrongs

It is easy to understand why the nature of a petition such as that underlying the aff. C 292/05 leads to doubts: the claim is certainly a hybrid one. The rules of International Law related to human rights are not accompanied by others establishing liability to the plaintiff in cases of violation. At the end of last century, the idea of a "mixed" model of action arose with a view at overcoming this problem: International Law would determine whether a given conduct is illegal, but those involved in such conduct (the State, its agents) would be sued in domestic civil courts, under national legislative provisions providing the necessary *cause of action.*[6] This combination of Domestic Law and Public International Law, in which complaints related to Human Rights are privatised, has been particularly successful in the U.S.[7] Their legal system has provided a legal basis for individuals wishing to sue for compensation, including punitive damages, for damage caused by conduct prohibited by International Law, inasmuch as it is contrary to fundamental human rights; it even admits complaints presented by foreign agents against alien defendants related to illegal events occurring outside the U.S.[8] The text of reference for transnational human rights claims in the Federal Justice System is the Alien Torts Claim Act, ATCA;[9] adopted

* *Prof. Dr. Marta Requejo, Professor at the University of Santiago de Compostela (Spain).*

1 ECJ, 15 February 2007 – C 292/05 – *Lechouritou,* not yet published in the ECR = [2007] EuLF I-91.

2 The decision of the first instance is dated 30 October 1997; it is summarised in English by *I. Bantekas*, I., 92 A.J.I.L 765. The decision pertaining to *Areios Pagos*, Supreme Court, of 4 May 2000, is summarised by *M. Gavouneli, I. Bantekas,* 95 A.J.I.L. 198.

3 Corte di Cassazione, 11 May 2004, Riv. Dir. Int., 2004, pp. 539-551.

4 On this aspect of the *Distomo* case, briefly *infra* III.2.

5 OJ [2007] C 82 of 14 April 2007 p. 5. The grounds for the decision can also be found in [2007] EuLF, I-91.

6 *B. Hess*, Staatenimmunität bei Menschenrechtsverletzungen, in: Wege zur Globalisierung des Rechts, Festschrift für R.A. Schütze, Munich, 1999, pp. 269-285, p. 283, alludes to these legislative provisions as "Transformationsvorschrift".

7 The interest of other countries of Anglo-Saxon influence is clear in publications such as "Torture as tort. Comparative perspectives on the development of transnational human rights litigation", *C. Scott ed.*, Hart Pub., Oxford, 2001, with many studies focusing on Canada. Along the same lines, *C. Davidson*, Tort au canadien: a proposal for Canadian Tort Legislation on gross violations of international human rights and humanitarian law, 38 Vand. J. Transnat'l L. 1403.

8 Described as "orphan actions", claims by individuals for whom their national State no longer provides protection, for many reasons, by *H. Muir Watt*, Une perspective *internationaliste-privatiste*, in Le droit international des immunités: contestation ou consolidation, LGDJ, 2004, pp. 265-274, p. 269.

9 In relation to States, see section 354.6 of the Civil Code of California, about the actions of individuals forced to provide hard labour or work as slaves in the Second World War. The rule was declared unconstitutional. *M. Gebauer, G. Schulze*, Kalifornische Holocaust-Gesetze zugunsten von NS-Zwangsarbeitern und geschädigten Versicherungsnehmern und die Urteilsanerkennung in Deutschland, IPRax, 1999, pp. 478-484.

in 1789 and subsequently practically ignored, it was brought back to life in 1980 by human rights defenders. In 1991 the Act received support from the legislative body with the adoption of the Torture Victims Protection Act of 1992 (TVPA).

Famous cases have been heard before the courts of the Second and Ninth Circuits in the form of civil claims based on the aforementioned legislation.[10] The success of these cases, however, is largely public (human rights organisation, singular activists) and doctrinal.[11] In practice, there are more cases dismissed statistically (for substantive reasons, e.g. failure to convince the court that the action constitutes a human rights violation, for objective reasons, e.g. the defendant's immunity, or for procedural reasons, e.g. application of the *forum non conveniens* doctrine) than otherwise. The scope of the ATCA, on the other hand, has been considerably reduced by the interpretation given by the Supreme Court in 2004, in the *Sosa v. Alvarez Machain* case.[12]

2. Authors and domestic case law

As on the other side of the Atlantic, some doctrinal voices can also be heard in favour of so-called human right claims, before civil courts in Europe.[13] Some authors expressly provide an affirmative response to the issue of main interest here – i.e., the qualification of a matter as civil or commercial for the purposes of the Brussels Convention.[14]

National case law also provides some information about the issue; but several positions are represented.[15] In *Ferrini,*[16] the Italian Court of Appeal ruled out the application of the Brussels Convention, indicating that the claim for damages was supported by "acts committed by the public authorities in exercise of their own sovereign immunity". In *Dístomo*[17], important data are to be found in the context of the requests for recognition of the Greek decision of 30 October 1997: on June 26, 2003 the German BGH ruled out the applicability of the Brussels Convention for reasons pertaining to material scope;[18] on the other hand, the Court of the First Instance of Brussels, with reference to the same intent, rejected it applying art. 27(1) of the Convention.[19] It is worth adding the somewhat different example of the Sentence of the French *Cour de Cassation* dated 2 June 2004, related to the claim of a French citizen deported to Dachau in World War II, against Germany and the BMW company:[20] whilst the applicability of the Brussels Convention is affirmed with regards to the relationship between the claimant and BMW, the French Court denies the private nature of the claim against the State, concerning the "work" performed under State coercion within the framework of an economy of war.

III. The "internal" context of the ECJ (I). Case Law of the ECJ relating to art. 1 of the Brussels Convention; scope *ratione materiae* of other Community Regulations

1. Jurisprudence of the ECJ on art. 1 Brussels Convention: mere continuity?

The first part of the question formulated in June, 2005 by the Efeteio (Court of Appeal) of Patras (GR) to the ECJ states: "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 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?"

The ECJ answered according to the proposal of Advocate General Ruiz-Járabo Colomer, of 8 November 2006: a claim in the described terms does not fall within the concept of "civil and commercial matters" of art. 1(1) of the Brussels Convention. To justify this response, the ECJ chose an interpretation which enables it to construct an autonomous concept of "civil and commercial matter". Since the Sentence of 14 October 1976, 29/76, *LTU*, the ECJ holds to an interpretation method that follows two lines: the objective and system of the Convention, on the one hand, and the general principles stemming from the corpus of all the national legal systems on the other. In C 292/05, para. 30, the ECJ points out that, in relation to art. 1(1) of the Brussels Convention, this approach leads to the exclusion of certain actions or resolutions within its scope by reason of the nature of the legal relationship between the parties, or the object of the proceedings. In *Lechouritou* the first element (nature of the legal relationship *inter partes)* is identified with the exercise of public power by one of the parties; and the response of the ECJ is only based upon this criterion. The opposite result would have arisen from considering the object of the claim: but it is expressly discarded (para. 41).

---

10 Especially, *Filartiga v. Peña Irala,* 630 F.2d 876; or, to mention another: *In re Estate of Marcos Human Rights Litigation,* 978 F.2d 493, *cert. denied*, 508 US 972.

11 Among many other authors, see *B. Stephens*, Conceptualizing violence under international law: do tort remedies fit the crime?, 60 Alb. L Rev. 579; *id.,* Translating *Filartiga*: a comparative analysis of domestic remedies for international human rights violation, 27 Yale J. Int'l L. 1; *B. van Schaack*, In defence of civil redress: the domestic enforcement of human rights norms in the context of the proposed Hague Judgments Convention, 42 Harv. Int'l L. J. 141; *D.F. Donovan*, *A. Roberts*, "The emerging recognition of universal civil jurisdiction", 2006 A.J.I.L. 142.

12 *Sosa v. Alvarez-Machain,* 542 U.S 692.

13 *G. Fischer*, Schadensersatzansprüche wegen Menschenrechtsverletzungen im Internationalen Privat- und Prozessrecht, in Festschrift für W. Remmers, Heymann, Colonia, 1995, pp. 447-464; *C. Kessedjian*, Les actions civiles pour violation des droits de l'homme. Aspects de Droit International Privé, Trav. Com. Fr. Dr. Int. Pr., 2002-2004, pp. 151-184; *A. Halfmeier*, Menschenrechte und internationales Privatrecht im Kontext der Globalisierung, RabelsZ, 2004, pp. 653-686.

14 *Kessedjian* (*supra* note 13), p. 159, p. 162.

15 There are few examples. We have to remember that the issue of international judicial competence is a secondary one and have received little or no attention from the Courts: the special condition of the defendant (the State or its agents or representatives) directs attention to immunity of jurisdiction, a procedural obstacle leaving all other issues out of the limelight.

16 *Ferrini (supra* note 3).

17 *Dístomo (supra* note 2).

18 NJW, 2003, p. 3448.

19 News of this decision, which we have not been able to consult, is given in [2007] EuLF, I-91.

20 *Cour de Cassation, 2* June 2004, Rev. crit. d.i.p., 2005, pp. 80-89. The agent actually adopted a strategy separating his action from those we are discussing, by presenting a claim for unpaid salaries for his (hard) labour from 1944 to 1945.

Some authors feel that the *Lechouritou* decision represents the continuity of previous casuistics;[21] and the grounds presented by the ECJ are certainly, in its own words, recourse to precedents (*vid.* para. 30). It is nonetheless dubious that C 292/05 is no more than a sequence of such (and therefore, that a mere reference to previous ECJ doctrine is explanatory enough). The double axis –nature of the legal relations between the parties, or the object of the proceedings- on which the ECJ bases its interpretation of art. 1 of the Brussels Convention had indeed appeared in previous sentences.[22] What is more uncertain, is whether just *one* of these aspects (the nature of the relations between the parties *or* the object of the case) is sufficient to exclude a dispute from the scope of the Convention. This was the opinion of Advocate General Philip Léger in his conclusions related to the *Préservatrice Foncière* case,[23] but the ECJ did not accept the proposal; it has also been criticised by other authors.[24] In this respect, the decision of 15 February 2007 is a step forward and not only ratification of the status quo.

On the other hand, in its prior decisions the ECJ has been conscious of the complexity of the criterion "nature of legal relations": aware of the diversity of circumstances covered by it, the ECJ has made a selection in order to facilitate the definition of "civil and commercial matters". Should one of the parties be a public authority, the ECJ has ruled out contemplating the nature (criminal, civil, administrative, labour-related) of the domestic Tribunal to which the issue is presented; she also refuses to retain the defendant's formal status of "public servant".[25] Conversely, the ECJ has indicated that it has to be determined whether public powers have been exercised.[26] She mentions several aspects to be jointly considered: whether the conduct of the public agent responds to the exercise of exorbitant faculties, in contrast with the rules which would be applicable between two private subjects; whether the conduct/function of the State agency involved could have been performed by a private agent.[27] Finally, an analysis of the ground for and modalities of the action (laws supporting the action and procedure involved) helps to establish whether the authority acted in exercise of its public powers).[28]

In case C 295/02 there is no overall evaluation; some of the aforementioned aspects are not even mentioned: the modality of and grounds for the action, or whether a private agent would be in a position to behave like a public servant. This leads us, again, to question whether the *Lechouritou* decision could be representative of a change from prior ECJ jurisprudence.

2. The European (Community) legislative framework

a) Consistence with Community regulations for civil judicial cooperation in Europe

In our opinion, the most important reason for the response to C 292/05 lies in seeking internal consistency in the Community system - to be more precise, international civil procedural law and private international law in a Community setting. The ECJ calls for such consistency in the penultimate number of the grounds (para. 45), although only to ratify the irrelevance of the legality or illegality of the act for which compensation is claimed from the State. As we shall now see, we have reasons to believe that the argument is worth more than the ECJ would have us understand.

The Amsterdam Treaty, in force since 1 May 1999, represented the start of a new era in Community private international law. In a procedural setting, the key is the will to promote mutual recognition of judicial resolutions in civil and commercial matters, starting with the abolition of the *exequatur*. Regulation (EC) No. 805/2004 of 21 April 2004, creating a European Enforcement Order for uncontested claims, represents the first step in this direction: it suppresses the declaration of enforceability procedure, thus likewise eliminating the typical controls in this phase, including that of public order.

The material scope of Regulation (EC) No. 805/04, expressed in art. 2 ibid., is consistent with that of Regulation (EC) No. 44/2001 of 22 December 2000 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (art. 1), which in turn is the same as that of its immediate precedent, the Brussels Convention (art. 1). There is, however, a change in the way the text is drafted, of fundamental interest in this study: art. 2 of the Regulation on the Enforcement Order expressly excludes "the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)". The new formulation is repeated in recently approved Regulation (EC) No. 1896/2006 of 12 December 2006 creating a European Order for payment procedures[29] and in Regulation (EC) No. 864/2004 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[30]

b) Prefecture of Voiotia vs Federal Republic of Germany and the European enforcement order for uncontested claims

What does the new text mean? To go by the working papers

---

21 *V. Gärtner*, 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*, German Law Journal, vol. 8, 1 April 2007.

22 ECJ 14 October 1976 – 29/76 – *LTU* [1976] ECR 1541, retaken in other subsequent cases: *inter alia*, ECJ 16 December 1980 – 814/79 – *Rüffer* [1980] ECR 3807; ECJ 14 November 2002 – C 271/00 – *Baten* [2002] I-10489 = [2003] EuLF (E) 90; ECJ 15 May 2003 – C 266/01 – *Préservatrice foncière TIARD* [2003] ECR I-4867 = [2003] EuLF (E) 172.

23 From 5 December 2002, they can be found in http://curia.europa.eu. *Vid.* su para. 42.

24 In Spain, *J.A. García López*, El concepto de materia civil y mercantil en el Convenio de Bruselas y su formulación en la reciente jurisprudencia del TJCE, La Ley, issue 5883, Friday, 31 October 2003 (http://www.laley.es). It suggests a different explanation from this difference of opinion between the ECJ and Advocate *V. Gärtner* (*supra* note 21).

25 ECJ 21 April 1993 – C 172/91 – *Sonntag* [1993] ECR I-1963, para. 21.

26 *LTU* (*supra* note 22); *Rüffer* (*supra* note 22).

27 *Sonntag* (*supra* note 25), para. 22, 23; para. 26, about taking into consideration all the elements together; ECJ 5 February 2004 – C 265/02 – *Frahuil* [2004] ECR I-1543 = [2004] EuLF (E) 40, para. 21.

28 *Baten* (*supra* note 22), para. 31; *Préservatrice Foncière TIARD SA* (*supra* note 22), para. 23.

29 OJ L 399 of 30 December 2006.

30 OJ L 199 of 31 July 2007.

prior to Regulation (EC) No. 805/04[31], other prior instruments[32] or the text's commentators, the reference to claims of State liability in art. 2 is merely for clarification: it is narrative.[33] However, there is also unofficial information, available to us through the doctrine,[34] showing that the amendment to article 1 of the Brussels Convention when drafting the Regulation on the enforcement order was not quite so innocent. To understand not only this but also the importance of this information for our study, we must return to *Prefecture of Voiotia vs Federal Republic of Germany,* or *Distomo.*[35]

In *Prefecture of Voiotia vs Federal Republic of Germany,* the heirs of the inhabitants of Distomo who were massacred by German troops during the Second World War presented a civil liability claim. The military act appeared from every angle to be an act of sovereignty; indeed, Germany did not appear in court as it was sure that it benefited from immunity. The Greek Court of First Instance, however, refused to qualify the acts of the German troops against the civilian population as *iure imperii*; subsequently, upon appeal, the actions of the soldiers were classified by the *Areios Pagos* as murders which were objectively unnecessary to continue to occupy the area or subjugate the rebels. There had been abuse of sovereign power, involving an implicit waiver of immunity. Germany was judged and found guilty.

The claimants attempted to obtain recognition and enforcement of the Greek judgment in Germany, but the BGH denied the petition, alleging that Greece had no jurisdiction in the case.[36] The BGH admitted that the law does not expressly mention this requirement (jurisdiction) among the circumstances preventing the possibility of recognition, but concluded that it was a condition derived from the judicial competence of the originating Judge and from a public order perspective.[37]

Would the BGH also have been able to deny the exequatur petition if Regulation (EC) No. 805/04 had been in force? The answer would have been "no" in the hypothesis that the Regulation was applicable *ratione materiae*. As we mentioned earlier, Germany was conversant with the claim but did not appear in court. Under the Regulation, this would lead the claim to be "uncontested", meaning that the claimants would have been able to apply for and obtain a European enforcement order in Greece. With the declaration of enforceability phase eliminated in Germany, there would be no control, not even in relation to public order, over the foreign decision. The best way to guarantee that this does not occur is to prevent the application of Community instruments for the recognition of decisions like *Distomo*. To make sure that this is clear, the expression now ending art. 2(1) of Regulation (EC) No. 805/04 was added.

In view of the above, the only fitting response to C 292/05 is that provided by the ECJ.

IV. Evaluation

What is our view of the ECJ sentence? Or, more globally, what is our view of the exclusion of the *acta iure imperii* from the scope of the Brussels Convention, from its successor, Regulation (EC) No. 44/01, presumably also from the Lugano Convention of September 16, 1988, on jurisdiction and the enforcement of judgments in civil and commercial matters and, in general, from all the instruments in place to facilitate private property-related relationships in the European Area of Justice?[38]

Unlike other preliminary rulings, the Court of Appeal of Patras did not awake the doctrine's curiosity; neither did the Advocate General's conclusions; and there have been few reactions to the response of the ECJ. This lack of interest fits in with the Court's refusal for the Grand Chamber to consider the issue (*vid.* numbers 17 to 26). It appears to us, however, that this is no anodyne decision. We referred earlier to the possible contributions of the *Lechouritou* case to ECJ jurisprudence on art. 1 of the Brussels Convention, especially in relation to the order and relative value of the steps taken by the ECJ when deciding whether a matter is civil or commercial, when a public law persona is involved in the relationship. This apart, there are still two perspectives from which to express an opinion.

1. New doubts concerning the substantive scope of the Community texts

The first perspective is the delimitation (scope *ratione materiae*) of the Community texts. There are two aspects worth mentioning. One is the recourse made in all Regulations (EC), from No. 805/04 on, to the expression "*acta iure imperii*", also used in the ECJ sentence (although it does not appear in the operative part of the judgment, it is included in the grounds: *vid.* para. 45). In this respect, we can only describe the for-

[31] The words added to art. 1 of the Brussels Convention were not present in the Commission's Proposal for the Regulation on the European enforcement order or in the CES decision or in the documents related to its processing before Parliament COM(2002)159 final, OJ C 203E of 27 August 2002. The new sentence appears for the first time in Common Position (CE) number 19/2004, of 6 February 2004, approved by the Council. The Commission's Communication to Parliament of 9 February 2004 [COM (2004) 90 final] simply states 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".

[32] Regarding the "Rome II" Regulation, *vid.* Common Position of the Council, of 25 September 2006, OJ C 289E of 28 November 2006: "In comparison with the original Commission proposal, the scope of the instrument has been clarified and further elaborated. Civil and commercial matters do not cover liability of the State for acts or omissions in the exercise of State authority (*acta iure imperii*)".

[33] *R Wagner*, Die neue EG-Verordnung zum Europäischen Vollstreckungstitel, IPRax, 2005, pp. 189-200, *esp.* p. 191; *F.J. Garcimartín Alférez*, El título ejecutivo europeo, Civitas, 2006, pp. 50-51. Other authors, however, emphasise that the inclusion of the reference could lead to opposing interpretations *E. Consalvi*, La proposta di Regolamento (CE) che istituisce il titolo esecutivo europeo in materia de crediti non contestati, http://www.judicium.it. Along the same lines: *infra*, IV.1.

[34] *Garcimartín Alférez*, (*supra* note 33), pp. 50-51, footnote 9.

[35] *Distomo* (*supra* note 2).

[36] *Supra* note 33.

[37] *J. Von Hein*, The law applicable to governmental liability for violations of human rights in World War II, Y.P.I.L., 2001, pp. 185-221, *esp.* p. 220, says that the demand for such a condition, although it is not found in the texts. is generally accepted in the doctrine. *R. Geimer*, *Internationales Zivilprozessrecht*, Verlag Dr. Otto Schmidt, Köln, 5ª ed, para. 2894, presents it as a requirement similar to that foreseen in para. 328 I.1 ZPO.

[38] Which is like asking an opinion on the exclusion of these acts from the European space of cooperation itself.

mula as unfortunate, as it is not clear when an act of a State is *iure imperii*. The definition of this category is usually associated to immunity of jurisdiction, an advantage that the opposite category, *acta iure gestionis*, do not enjoy: but between the Union's member States (and occasionally within individual States) there is no consensus on the criterion for distinguishing between the two types of act.[39] This plurality will probably generate legal insecurity.

Our second remark is related to another uncertainty: whether cases similar to *Ferrini*, *Distomo* or *Lechouritou*, but different in that the defendant is not a State, are to be understood as included in the Regulations. In examples from transnational human rights litigation in the U.S. it is common for the defendant to be a public servant; legal action is also starting to proliferate against firms, multinational corporations headquartered in one country and operating in underdeveloped countries with a reduced democratic culture, where they benefit from the lack of protection afforded to their workers, with the blessing or direct support of Governments only interested in attracting investment. Do Community instruments cover liability claims against them for human rights violations? In our opinion, it seems clear that the fact that texts such as art. 2 of Regulation (EC) No. 805/44 make a literal reference to State does not mean that claims against other agents are automatically classified as civil or commercial; they will simply be affected by ECJ jurisprudence related to art. 1. We believe that claims against a State agent[40] will be excluded from the Brussels Convention and other instruments whenever the actions in question can be seen as an exercise in public power, with prerogatives not available to mere individuals; in this respect it has to be recalled that the ECJ itself has denied the relevance of formal public servant status.[41] As for corporations, the fact of being nationalised or public would help to decide whether human rights claims against them are to be considered "civil or commercial matters". Qualifying a claim against private enterprises will be more complicated: should they be considered as public entities when they get *de facto* support from governments, or maintain "unofficial" complicity with the authorities?[42, 43]

2. Bad news for human rights defenders

The second perspective for an evaluation of the state of things in the European Union is the human rights protection point of view. Both the amendment to art. 1 of the Brussels Convention in art. 2 of the enforcement order Regulation and the ECJ decision in C 292/05, are bad news for such rights.[44] Certainly, the result of qualifying a matter as "civil or commercial" as the ECJ does in *Lechouritou* and is denoted in the legal texts is *only* that they do not apply to the issue of whether a domestic Court has international jurisdiction. Civil liability claims have not been expelled from civil law and confined to public international law and relationships between States, as some authors have written;[45] the ultimate decision is up to the judges in each State, who can still decide whether they are or not competent to decide on a case by applying their autonomous legislations. However, their resolutions will not benefit from the recognition system foreseen in the Community: they will not circulate freely.[46]

We are aware of how easy it is to disregard this criticism. We know that it is highly unlikely that civil sentences will be issued in a Community member State against another State for the damages resulting from killing, deporting or imposing forced labour on an individual... or making him disappear. This is so, on the one hand, because the act of the defendant State will be classified as *iure imperii* (rather, will have *already* been classified as such: this is precisely why the national judge will have not applied the Brussels Convention when deciding on his international jurisdiction). On the other hand (although closely related to that classification of *iure imperii*), immunity of jurisdiction will prevent the proceedings from going forward.

The argument is a fair one. We would nevertheless like to end this study by joining our voice with those who are currently demanding an exception to immunity of jurisdiction, in cases involving human rights violations;[47] an exception unrelated to whether the act is *iure imperii* or *gestionis,* with its own authority and specific grounds. For instance, the violation of *ius cogens*.[48]

---

39 *H. Fox*, *The Law of State Immunity*, Oxford University Press, 2002, p. 127, alludes to a clear tendence in favor of restrictive immunity; but she also points out the differences among States, leading to a an enormous complexity and diversity in emerging rules. For *P. Lagarde*, en *Droit des immunités et exigences du procès équitable*, ed. A. Pedone, París, 2004, pp. 148-160, pp. 150-152, each State accomodates the immunity of jurisdiction exception to their own purposes and particular interests.

40 *R. Geimer*, Öffentlich-rechtliche Streitgegenstände, IPRax, 2003, pp. 512-515, *esp.* p. 514. Also *Von Hein (supra* note 37), p. 220; *O. Dörr*, Staatenimmunität als Anerkennungs- und Vollstreckungshindernis, in *S. Leible, M. Ruffert*, (dir.), Völkerrecht und IPR, JWV, 2006, pp. 175-191, p. 190.

41 *Supra,* note 24.

42 The scope and qualification of company-authority relations will also often be configured as a substantive issue prior to whether the Brussels Convention is applicable or not. The ECJ refuses to grapple with this kind of questions); in its own words, acting diversely would generate difficulties incompatible with the internal logic and purpose of the Convention, *vid.* C 292/05, para. 44.

43 With regards to multinational corporations, *O. De Schutter*, The Accountability of Multinationals for Human Rights Violations in European Law, in *Ph. Alston*. (ed.), Non-State Actors and Human Rights, Oxford University Press, 2005, pp. 226-314, refers to Regulation (EC) No. 44/01, successor of the Brussels Convention, as the European ATCA.

44 Assuming that all formulas conceived to protect human rights are intrinsically good in view of their purpose, we can nevertheless question the appropriateness of the civil claim mechanism for numerous reasons we are unable to discuss further here.

45 *Gärtner (supra* note 21); in Spain, *M.P. Andrés Sáenz de Santamaría*, Reparaciones de guerra, actos *iure imperii* y Convenio de Bruselas (in relation to ECJ sentence of 15 February 2007 in *Lechouritou and others vs Federal Republic of Germany*), La Ley, issue 6746, 29 June 2007 (http://www.laley.es/). Recently, in Italy, *O. Feraci*, La sentenza Lechouritou e l'ambito di applicazione ratione materiae della convenzione di Bruxelles del 27 settembre 1968, Riv. dir. int. pr. pr., 2007, pp. 657-674.

46 In this respect, the Community option is separate from that which was once assumed by the Hague Conference in the World Convention on Exequatur Project, art. 18.3 (see, however, *B Hess*., Die Anerkennung eines Class Action settlement in Deutschland, JZ, 2000, pp. 373-382, expressing doubts concerning the relationship between decisions based on art. 18.3 and art. 25 of the Project, related to recognition).

47 In the doctrine, to mention one of many, *K. Reece Thomas, J., Small*, Human rights and state immunity: is there immunity from civil liability for torture?, N.I.L.R., 2003, pp. 1-30. See the case of ECHR *Kalogeropoulou and others,* of 12 December 2002 (C 59021/00).

48 *Kessedjian* (*supra* note 13), p. 156; in Spain, *A.G. Chueca Sancho*, Sentencia del TS alemán, de 26 de junio de 2003, en el caso de la masacre de Distomo (ciudadanos griegos contra la RFA), *REDI,* 2004 (1), pp. 508-511, p. 509. In C 292/05, para. 43-45, the ECJ expressly rejects the relevance of the legality or illegality of the State action or omission in its civil or commercial qualification. We believe that the future will show that this attitude is a mistake.