The persistence of memory: the Lechouritou case and history before the European Court of Justice.

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Carole Lyons (*University of Dundee*).

Abstract

Comments on the European Court of Justice ruling in Lechouritou v Dimosio tis Omospondiakis Dimokratias tis Germanias (C-292/05) on whether actions for compensation brought against Germany for the massacre by its armed forces of Greek civilians during the Second World War were governed by the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968, which prevented a signatory state from claiming immunity for acts occurring during armed conflict. Reviews the position of other intervening Member States, criticises the judgment's failure to refer to human rights issues and suggests how the court might have responded to the action.

Main text

"*How strange it is, to be standing leaning against the current of time*"[1]

In Case C-292/05 Lechouritou v Germany,[2] the European Court of Justice was required to deal with claims made under the Brussels Convention emanating in events which took place in Greece in December 1943. On a formal level, the case turns on the interpretation and definition of what constitutes a "civil or commercial matter" under Art.1 of the Convention. Over and above this formality, this case is also the first time the European Court of Justice has been faced so directly with claims rooted in the traumas of the Second World War. As such, this very sensitive case brings to light difficult matters which are frequently ignored or institutionally eclipsed in the European Union. This article analyses the judgment in Lechouritou in the context of the veiled history of the EU and its continuing impact.

[1] W.G. Sebald, Vertigo (London: The Harvill Press, 2000), at p.46. The title refers to La persistencia de la memoria (1931) or The Persistence of Memory by Salvador Dali (displayed at the Museum of Modern Art, New York, since 1934).

[2] Judgment of the European Court of Justice of February 15, 2007 (reference for a preliminary ruling from the Efetio Patron, Greece), in Case C-292/05, Lechouritou, Karkoulias, Pavlopoulos, Bratsikas, Sotiropoulos and Dimopoulos v Dimosio tis Omospondiakis Dimokratias tis Germanias (the State of the Federal Republic of Germany) [2007] O.J. C82/5 and http://www.curia.europa.eu/en/transitpage.htm.

Introduction

It may be common place that the past is present in the daily life and functioning of the European Union but to what extent does the Union really focus on its own history? This piece looks at one instance in which the judicial branch of the EU was faced directly with a narrative from the Union's past. This year, as the EU loudly celebrates 50 years of integration,[3] the histories of the people and states of Europe may seem to be sidelined. However, to sustain further integration the EU now more than ever needs to identify its core values, which are of necessity deeply rooted in its past.[4] Despite that, there is an absence of recognition of the past in the integration discourse with its "fast-forward" button constantly pressed. The judgment, which is the focus of this article, is not one that faces up to the still lingering realities of the schisms which the war wrought amongst the countries and people of Europe. If anything, it helps to perpetuate an impression of the Union as cleansed somehow of the memories of wartime Europe. Here we find no "bitter experiences"[5] but rather an anodyne and technical treatment of some of the consequences of Europe's tragic history.[6]

The "essential" question?

In the unusual case of Lechouritou v Germany,[7] decided on February 15, 2007, the reality of the Second World War and its enduring effects for the people and states of the European Union are brought to the courtrooms of Luxembourg.

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[3] EU leaders met in Berlin on March 24 and 25, 2007 to celebrate the EU's 50th birthday, where a political declaration setting out Europe's values and ambitions for the future was issued (http://europa.eu/50/news/article/070326_b_en.htm) and for the text of the Berlin Declaration see http://www.europa.eu/50/docs/berlin_declaration_en.pdf.

[4] "'European Union' may be a response to history but it can never be a substitute", T. Judt, Postwar (Pimlico, London, 2007), at p.831. On a more concrete level, as regards the legacy of the EU's past: a proposal for a Council Framework Decision on combating racism and xenophobia has been stalled in the Council since 2005 (having been introduced in 2001) (COM (2001) 0664 final). On March 20, 2007, at the European Parliament, the German Presidency of the EU "pledged to revive [the] stalled European "Framework Decision' on racism and xenophobia. One of the Presidency's proposals is to make denial of the Jewish holocaust a crime - a move that has prompted a fierce debate." http://www.europarl.europa.eu/news/public/story_page/017-4262-078-03-12-902-20070314STO04225-2007-19-03-2007/default_en.htm. On April 19, 2007, agreement was reached on the Framework Decision. See http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/93739.pdf.

[5] The Preamble of the Treaty Establishing a Constitution for Europe of 2004 (http://europa.eu/constitution/index_en.htm) reads as follows: "Believing that Europe, reunited after bitter experiences, intends to continue along the path of civilization, progress and prosperity…'. The words 'bitter experiences' are drawn from the Preamble of the Polish Constitution of 1997: "Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland…". See further, C. Joerges, "Working Through 'Bitter Experiences' Towards a Purified European Identity: a Critique on the Disregard for History in European Constitutional Theory and Practice" in Law and Democracy in the Post-National Union (E. Oddvar, C. Joerges and F. Rödl eds, ARENA Report No.1,2006), at p.335, (www.arena.uio.no/publications/reports/index.xml) and generally the extensive work of C. Joerges and others which focuses on the history of the EU, including C. Joerges and N. Singh Ghaleigh eds, Darker Legacies of Law in Europe (Oxford: Hart, 2003).

[6] "The old sinful continent…" L. Trilling. Introduction to H. James, The Princess Casamassima (New York: Macmillan, 1948).

[7] Reference for a preliminary ruling from the Efetio Patron by order of that court of June 8, 2005 in Case C-292/05, Lekhoritou, Karkoulias, Pavlopoulos, Bratsikas, Sotiropoulos and Dimopoulos v Federal Republic of Germany.

The plaintiff's story

On December 13, 1943 a mass execution took place in the remote mountain village of Kalavrita in the Peloponnesian region of Greece.[8] The German army occupation force, in retaliation for an attack by resistance fighters, executed between 700 and 1,000 men and boys (accounts vary as to the numbers killed), and burned the village to the ground.[9] Irini Lechouritou and other descendants of some of the victims of the executions are seeking compensation from Germany before the Greek courts for financial loss, non-material damage and mental anguish.[10] Their claims for compensation began in 1995.[11]

Case law background

The general case law background to the Lechouritou claim is complex and far-reaching. Many wartime-based compensation claims have been instigated in Greece against Germany. Events (similar to those at the root of Lechouritou) which occurred in Distomo in Greece in June 1944[12] have been the subject of judicial proceedings before the European Court of Human Rights,[13] the Federal Constitutional Court of Germany as well as the Greek Supreme Court. In 1995, the Distomo relatives and survivors began a claim for damages before the District Court of Livadia in Greece.[14] The proceedings resulted, in October 1997, in a judgment against Germany. This ruling was subsequently upheld by the Greek Supreme Court in a judgment of May 4, 2000,[15] where that Court held that Germany could not claim state immunity for the killings of civilians in Distomo.[16] The Greek Supreme Court found that the organs of the Third Reich had misused their sovereignty and violated the *jus cogens* rules, with the result that Germany had tacitly waived its right to state immunity.

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[8] Allegedly, Dr Kurt Waldheim, a former Secretary General of the UN, was present in Kalavrita as a German army staff officer when the massacre was carried out. See http://www.bbc.co.uk/ww2peopleswar/stories/37/a3206837.shtml.

[9] See the website of the Kalavrita region for more details about the executions: http://kalavrita.gr/DynSITE/index.php?contentID=29&cMode=vMode&AID=368.

[10] See further www.guardian.co.uk/worldlatest/story/0,,-6418245,00.html

[11] In 2000, the then German President Johannes Rau visited Kalavrita and issued an apology. He also said there was "no possibility" for Germany to pay compensation on legal grounds, but added that he would encourage a "symbolic contribution" in response to Greek reparation demands.

[12] In relation to events which took place on June 10, 1944 (when 218 people were executed in the village of Distomo, see: http://www.distomo.gr/history/massacre.htm) 257 Greek citizens brought an action against Germany before the Greek courts in 1995. Their claims were upheld by the Greek Supreme Court in 2000 but the judgment was never enforced. This non-enforcement was subsequently the subject of an application against Greece and Germany before the European Court of Human Rights.

[13] Inadmissibility Decision of the European Court of Human Rights in App. No. 59021/00, Kalogeropoulou v Greece and Germany.

[14] Case No.137/1997, Prefecture of Voiotia v Federal Republic of Germany, October 30, 1997, Court of First Instance of Livadeia. English translation (excerpts) reproduced in: (1997) 50 Revue hellénique de droit international 595 (with note by M. Gavouneli). For an analysis of the decision, see I. Bantekas, "Case Report: Prefecture of Voiotia v Federal Republic of Germany" (1998) 92 American Journal of International Law 765.

[15] Case No.111/2000, Prefecture of Voiotia v Federal Republic of Germany, May 4, 2000, Hellenic Supreme Court (Areios Pagos); for a comment see M. Gavouneli and I. Bantekas, "Case Report: Prefecture of Voiotia v Federal Republic of Germany" (2001) 95 American Journal of International Law 198.

[16] The Greek Supreme Court judgment foreshadows that of the Italian Supreme Court in Ferrini v Germany in 2003 where the Italian Court found that Germany was not entitled to sovereign immunity for serious violations of human rights carried out by German occupying forces during the Second World War: Corte di Cassazione (Sezioni Unite), judgment No.5044 of November 6, 2003, registered March 11, 2004, (2004) 87 Rivista diritto internazionale 539. For a commentary see P. De Sena and F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case" (2005) 16 European Journal of International Law.

This highly contested issue of the relevance of the state immunity principle to executions by occupying armed forces was raised by the plaintiffs in Lechouritou, but not addressed by the European Court of Justice. The set of facts stemming from the Distomo massacre was also the basis of a European Court of Human Rights application (in a decision on admissibility rendered in the negative) where the Strasbourg court analysed, *inter alia*, the relationship between state immunity and the European Convention on Human Rights.[17] Subsequently, that same series of events, based on the 1944 Distomo executions,[18] also found their way to the German Federal Constitutional Court where a decision issued on the February 15, 2006,[19] from the First Chamber of the Second Senate of Court.[20] This decision was not based on the merits but on admissibility and the Federal Constitutional Court declined to hear the case.[21] This claim had originated at Regional (Landgericht) court level in 1995, but eventually - on appeal - the Federal Court of Justice (the Bundesgerichtshof) stated in June 2003[22] that the Distomo executions were to be seen as an act of the German State, for which it has immunity under international law, referring to Art.3 of the Fourth Hague Convention.[23] Compensation was thus held to be a matter between the German and Greek States and not subject to individual claims. The Federal Constitutional Court (Bundesverfassungsgericht) subsequently

[17] Referring to the judgment of the Greek Supreme Court in 2000, the applicants asserted that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. However, the ECtHR did not find it established that there is acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages brought against them in another state for crimes against humanity. The Greek Government could not therefore be required to override the rule of state immunity against their will. The ECtHR referred to its own case law in Al-Adsani v United Kingdom (2002) 34 E.H.R.R. 11, at [52] and concluded, finding against the Distomo plaintiffs, stating "This is true at least as regards the current rule of public international law, as the Court found in the aforementioned case of Al-Adsani, but does not preclude a development in customary international law in the future." This ECtHR application taken against Germany and Greece was based on the Greek Justice Ministry's non-enforcement of the 2000 Greek Supreme Court decision in favour of the Distomo applicants. The ECtHR found that "Germany's responsibility cannot be engaged in respect of the situation of which the applicants complain, namely the Minister of Justice's refusal to allow them to institute enforcement proceedings and the confirmation of that decision by the judgments of the Greek courts." App No. 59021/00, Kalogeropoulou v Greece and Germany. http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=11879000&skin=hudoc-en&action=request

[18] "On 10 June 1944, SS forces integrated into the German occupying troops in Greece shot some 200-300 of the inhabitants of the mountain village of Distomo, near Delphi in central Greece, in retaliation for an attack by Greek partisans. The victims of the massacre, among them the plaintiffs' parents, were mainly elderly persons, women and children who had not been involved in the partisan activities. The plaintiffs, children at the time of the incident, only survived the massacre because a German soldier warned them and urged them to hide. As a consequence of the incident, the plaintiffs suffered, *inter alia*, [psychological] damage as well as disadvantages regarding their personal and professional advancement." M. Rau, "State Liability for Violations of International Humanitarian Law - The Distomo Case Before the German Federal Constitutional Court" (2006) 7 German Law Journal http://www.germanlawjournal.com/article.php?id=743

[19] 2 BvR 1476/03 of February 15, 2006 (exactly one year to the day before judgment in Case C-292/05) - see judgment (in German) at: http://www.bundesverfassungsgericht.de/en/decisions/rk20060215_2bvr147603.html

[20] I am very grateful to my colleague Gerald Schaefer for assistance as regards this case.

[21] In 1995, the Greek claimants lodged a claim for compensation but were unsuccessful at the Regional Court, the Regional Appeal Court and finally the Federal Court of Justice. In parallel proceedings at a court in Greece, the decision of the Greek court was that there was a right to compensation (see discussion above). However, the Federal Court of Justice stated in its decision on June 26, 2003, Case III ZR 245/98, that it was not bound by that decision because the Distomo executions were to be seen as an act of the German State for which it has immunity under international law, Art.3 of the Fourth Hague Convention.

[22] Case III ZR 245/98.

[23] "The decision is of special interest because, for the first time, the BVerfG was confronted, *inter alia*, with the question of applying the domestic rules of Staatshaftungsrecht (state liability law) to damage resulting from armed conflict. Yet, as will be addressed in more detail below, the Court deliberately circumvented part of the problem, thus leaving the issue open for further discussion." M. Rau, cited above.

accepted that view of the Federal Court of Justice as correct. As regards compensation for the Distomo victims and relatives, the Bundesverfassungsgericht stated that Germany was entitled to reserve individual compensation for victims of special Nazi crimes[24] and leave compensation for all other crimes to ordinary proceedings, i.e. compensation or reparation between Germany and other states and not their individual citizens.[25] Finally, that Court also found there was no violation of the basic rights of the Greek claimants which could give rise to proceedings.[26] The same set of facts therefore had resulted in opposite conclusions in the highest level of court in Greece and Germany as to the applicability or relevance of state immunity. The outright dismissal of the Distomo claimants' case in Germany was to foreshadow events at the European Court of Justice in Lechouritou one year later.

The questions referred to the European Court of Justice in Lechouritou

A reference for a preliminary ruling was made[27] by the Efetio Patron (the Court of Appeal of Patras, Greece) to the European Court of Justice (based on the Protocol of June 3, 1971).[28] Lechouritou and her co-claimants began their claim at first instance level in 1995 seeking compensation for physical damage, non-material loss and mental anguish which they suffered as a result of the massacre in Kalavrita. On appeal, the matter was suspended pending a decision from the Superior Special Court (the Anotato Idiko Dikastirio) in a parallel case which, in 2002, upheld the right of Germany to state immunity. Subsequently, however, the claimants pleaded on the basis of Art.5(3) and (4) of the Brussels Convention before the Efetio which referred the questions to the European Court of Justice. The reference concerned, primarily, the issue of whether an action for compensation brought by individuals against Germany, before the referring Court, fell within the scope *ratione materiae* of the Brussels Convention of 1968[29] (the Convention). The referring Court, in its first

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[24] There are special provisions within German law for compensation for victims of so called "nationalsocialist" crimes, meaning those crimes which are not "normal" war crimes but crimes like the Holocaust, genocide, slave labour and other crimes rooted directly in specific Nazi ideology. Killing civilians in violation of general international law was found not to come within that compensatory framework.

[25] See M. Rau (2006) cited above.

[26] The statutory provision for this is § 93a Abs. 2 BVerfGG (s.93a(2) of the Law on the Federal Constitutional Court). The 1st Chamber of the Federal Constitutional Court, which has the task of filtering claims and only allows those to proceed to the Senate which fulfill the requirements for proceedings in front of that Court, agreed that the right to protection of private property - Art.14(1) Basic Law (GrundGesetz) - was not violated, that Art.3 of the Fourth Hague Convention does not give rise to individual claims, that the general laws on official liability only concern normal administrative acts, and that Art.103 I Basic Law - right to a trial/hearing - was not breached because three levels of German courts had dealt with the case. Finally the Chamber stated that the right to equal treatment was not breached.

[27] The referring Greek Court made the preliminary reference based on Art.234 EC but, as the Advocate General pointed out in his Opinion, "Those questions were referred incorrectly under Article 234 EC, since the jurisdiction of the Court to interpret the Brussels Convention is derived not from that provision but from the Protocol of 3 June 1971. However, that error is not important because, as the German Government points out, Article 2 of the Protocol provides that the [referring court] may seek preliminary rulings on the interpretation of the Brussels Convention". At [6] of the Opinion, http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

[28] Protocol on the interpretation by the Court of Justice of the Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, [1975] O.J. L204/28 http://eur-lex.europa.eu/en/index.htm.

[29] Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (known as the Brussels Convention) [1998] O.J. 1998 C27/1 (consolidated version), available at http://eur-lex.europa.eu/en/index.htm. Article 54 of the Convention states that "The provisions of the Convention shall apply only to legal proceedings instituted and to

question to the European Court of Justice, requested a resolution of whether Germany (as a Brussels Convention contracting state) could be liable under civil law for acts or omissions of its armed forces where those acts or omissions occurred during a military occupation of Greece:

> "*following a war of aggression on the part of Germany, [and which acts were] manifestly contrary to the law of war and [could] also be considered to be crimes against humanity?*"

Secondly, the referring Court also asked:

> "*is it compatible with the system of the Convention for [Germany] 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 Germany's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-44?*"

The language of law

The referring Greek court's questions are framed in a very direct and contentious register. In a sense, the words in those two questions set the tone for the subtext of this sensitive but somewhat schizophrenic case. Ostensibly, there is a formalistic question of the interpretation of Art.1 of the Brussels Convention coupled with the need to clarify the relationship between principles of state immunity and the Brussels Convention. However, the Efetio Patron places all the complex sensitivities surrounding this case centre stage in its deliberately descriptive language. The tragic background and context is elaborately conveyed by the Efetio Patron in a manner which very graphically conveys its approach towards the defendant state, Germany. The presence of Germany within Greece at the time of the events giving rise to the claim is described as being a "military occupation … following a war of aggression". The referring court continues to state that that the acts carried out by the defendant during this war, and which are the basis of the compensation claim, are first, "manifestly contrary to the law of war" and, furthermore, "may also be considered to be crimes against humanity". Most of this extraneous description of the context and circumstances of the claim against Germany is, at one lawyerly level, otiose. This is made clear when the European Court of Justice "rewrites" the first question of the Greek court in much more neutral terms. The referring court is deemed to be "essentially ask[ing]" does Art.1 of the Convention permit claims for compensation "in respect of loss of damage suffered [as a result of] acts perpetrated by armed forces in the course warfare" in the territory of

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documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed." Therefore, despite the date of the events giving rise to this case, the Convention was applicable based on the date of institution of the judicial proceedings. The Polish Government, in its written Observations in this case, noted that the referring court explicitly cites acts and omissions which took place between 1941 and 1944, i.e. before the entry into force of the Brussels Convention. However, neither the Advocate General nor the Court raised objections based on this temporal element.

the claimants.[30] This re-framing of the question by the Court suggests an unwillingness to deal with the origins of claimants' case. The diplomatic re-rendering of their circumstances to "acts of armed forces during the course of warfare" is very far away from their sad reality as potential crimes against humanity within an illegal war of aggression. The European Court of Justice's language is a metaphorical and bureaucratic brush-off to the emotional and highly charged presentation of the context of the claim by its judicial colleagues in Greece. The re-writing of preliminary reference questions (at least in an Art.234 context)[31] is a common feature of judicial relations within the EU legal order. However, the anodyne banalisation of the referring court's question does not fully respect the Greek judges' important suggestion and, moreover, deprives the Greek claimants of some of the substance of their very intimate and painful claim. The "essential question" is, fundamentally, not the one conveniently re-phrased by five judges in the cold light of Luxembourg. It is rather, I would argue, how does the European Union adequately and appropriately respond to painful memories of EU citizens seeking retribution, recognition and respect within its institutional framework? This, however, is not a question answered in the judgment, as we will see.

Poetic justice?

The Advocate General's Opinion issued in the case in November 2006.[32] Advocate General Ruiz-Jarabo Colomer immediately places this case in the context of a discussion about the evils of war as he opens his Opinion by recalling the miseries, torture and suffering caused to individuals at times of war.[33] His sympathetic and literary opening is unusual and takes the European Court of Justice, and with it the Union itself, into new territory, that of the "other country" of its own past.[34] An EU Member State, Germany, is being called to account for its actions 64 years ago before the courts of the European Union. This moving Opinion from Advocate General Ruiz-Jarabo is the element of the case which comes closest to respecting the myriad sensitivities which lie at the root of Case C-292/05. This case is of vital significance in terms of an appreciation of the depth and importance of history within the EU. The extent to which the Advocate General acknowledges that, whatever his eventual conclusion on the substance, is respectful of the complicated,

[30] Judgment of the European Court of Justice of February 15, 2007, at [27].

[31] See further D. Chalmers et al., European Union Law (Cambridge, Cambridge University Press, 2006), at Ch.7, for lengthy discussion on judicial relations in the EU generally. The Advocate General in Lechouritou also comments generally on the delicate balancing of judicial roles in the preliminary ruling procedure; "Difficulties arise if the equilibrium which prevails in the dialogue between the courts is ruptured where one of the courts goes beyond the proper exercise of its functions." (Case C-292/05 Lechouritou, at [49].) He further refers to his own Opinion in Case C-30/02, Recheio Cash and Carry [2004] E.C.R. I-6051, and his concerns about the ECJ encroaching upon the sovereign jurisdiction of the national court to resolve the main proceeding.

[32] Case C-292/05, Opinion of A.G. Ruiz-Jarabo Colomer, presented November 8, 2006, http://curia.europa.eu/.

[33] In fact, he opens with a sympathetic description of the Peloponnesian War in the 5th century BC: "The War was a prolonged struggle during the course of which an unparalleled number of misfortunes befell Hellas … never before had there been so much banishing and slaughter …" Advocate General's Opinion, at [1].

[34] L. P. Hartley, The Go-Between (London, Hamish Hamilton, 1953): "The past is another country; they do things differently there."

tragic and deeply personal (but of course also highly political) issues which lie beneath the case, and indeed beneath the whole of European integration itself.

As Mr Ruiz-Jarabo notes at the outset of the Opinion, making a very brief reference to some of the procedural history of similar cases, the written Observations submitted by Germany in Lechouritou refer to the diplomatic crises caused at the time of instigation of the series of similar cases in Greece, Strasbourg and Karlsruhe.[35] Times have changed since 1995, when the Lechouritou claim began. Several cases, most of them emanating from former eastern Europe, have been taken to the Strasbourg tribunal involving compensation claims relating to wartime activity.[36] This Greek claim which has reached Luxembourg can perhaps be seen in that context of a post-1989 altered climate as regards reparation for- and recognition of damage wrought during the years of the war.

What is of interest here is that the need to deal with the nature of war (and the Second World War in particular) and the role of states at time of war is very far from being familiar territory for the judicial institutions of the EU.[37] The Advocate General enters slowly into this *terre inconnu* with a "warning" about the need for the judicial role to be restrained and rational, and without sentiment (however understandable that would be in the circumstances).[38] This statement is fundamental to an appreciation of the importance of this case which is about "sentiment" and emotion, about trauma and memory. To completely purify or sanitise the claim of Irini Lechouritou and enmesh it in rational and technical Brussels Convention speak denies the claimants of their memories and negates their feelings about the massacre. The fundamental function of the European Court of Justice judge (and the Advocate General) is at issue here; what level of responsibility do Luxembourg judges have in terms of acknowledging the past, their past, Europe's past?[39] It

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[35] As the Observations are not made public one can only speculate as to the reference to diplomacy by Germany; was it an attempt to persuade the ECJ that the EU should avoid a similar diplomatic crisis? In the Distomo case before the European Court of Human Rights in 2002, Germany's submissions included the following: "[Germany] stressed that, were State immunity to be lifted in this type of case, past armed conflicts would give rise *ex post facto* to countless individual claims for damages, of which neither the date of introduction nor the volume were foreseeable. The political solutions that had long since been adopted would accordingly become otiose. Peaceful coexistence would be considerably undermined as a result, with unforeseeable consequences for any State that had been involved in an armed conflict." Decision on admissibility in App. No. 59021/00, Kalogeropoulou v Greece and Germany, December 12, 2002, available at http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/

[36] See, for example, most recently App. No.22860/02, Wos v Poland, judgment of the ECtHR of June 8, 2006, and App. No.44580/98, Sirc v Slovenia, decision as to admissibility of June 22, 2006, both at http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[37] As opposed to the judicial organs of the ECHR, before which cases involving the Holocaust, the Second World War and its consequences and effects are not uncommon.

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

[39] See further the recent comments of Mr Ruiz-Jarabo himself on the role of the judge at the ECJ in his Opinion delivered on March 19, 2007 in Joined Cases C 11/06 & 12/06, Morgan v Bezirksregierung Köln and Bucher v Landrat des Kreises Düren, "Selon un juriste hispano-américain, il y a trois sortes de juges: les artisans, véritables automates qui, n'utilisant que les mains, produisent des arrêts en série et en quantité industrielle, sans entrer à considérer ce qui touche à l'humain et à l'ordre social; les acteurs, qui utilisent les mains et le cerveau, en se soumettant aux méthodes d'interprétation traditionnelles, qui les conduisent inévitablement à se contenter de transcrire la volonté du législateur; et les artistes, qui, à l'aide des mains, de la tête et du c%90ur,

would be unjust and unreasonable to exaggerate the expectations one might have of the Court in this case (after all, the Convention basis for the claim was put forward by the plaintiffs) but, given the actual events, the political context, the case law background at other high level courts within the EU, I would suggest, contra the Advocate General, that this *is* a case which merits something more than rationality.

The first question which the Advocate General addresses is whether the actions of a state's armed forces during time of war can be classed as a "civil and commercial matter" under Art.1 of the Brussels Convention for the purposes of a claim against the defaulting state.[40] The case turns essentially on a terminological interpretation; although the Convention itself does not provide a definition of "civil and commercial matters" there is established precedent before the European Court of Justice that acts done in the exercise of public authority do not fall within the scope of Art.1 of the Brussels Convention.[41] In Sonntag[42] the Court clarified its approach towards the exclusion of particular state acts from the scope of Art.1 by outlining the distinction between when the state acts a private party (*acta jure gestionis*) (which fall within the scope of Art.1) and acts conducted in the exercise of sovereign authority (*acta jure imperii*) (which are excluded from the application of Art.1). The Advocate General in Lechouritou resorts to a lengthy discussion of the reasons for the exclusion of acts *jure imperii* and the criteria on which the exclusion is based in each case. He recalls the independent nature of the concept of civil and commercial matters[43] and that the exclusion of acts *jure imperii* as developed in the case law of the ECJ is based on the sovereign nature of those acts. He refers specifically to Préservatrice foncière TIARD[44] where the Court, finding no exercise of public power and therefore no exclusion from the Brussels Convention, looked at the legal relationship between the parties (one of whom was the Netherlands) and stated the state act in this case did "not entail the exercise by the State of powers going beyond those existing under the rules applicable to relations between private

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ouvrent des horizons meilleurs aux citoyens, sans tourner le dos aux réalités et aux situations concretes [citing A. Nanclares Arango, Los jueces de mármol (La Pisca Tabaca Editores, Medellín, 2001), at p.14.] Bien qu'ils soient tous nécessaires pour mener à bien la tâche juridictionnelle, la Cour, assumant le rôle qui lui revient, s'est toujours identifiée à la dernière catégorie, notamment lorsque l'inéluctable évolution des idées ayant conduit à la naissance de la Communauté a ralenti." http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=fr.

[40] The Advocate General notes that Council Regulation 44/2001 on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters, [2001] O.J. L12/1 (available at http://eurlex.europa.eu/en/index.htm) has replaced the Brussels Convention of 1968 but that the Regulation is not applicable to this case. Article 66 of the Regulation states as follows: "This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof." The Lechouritou case was instituted in Greece in 1995, i.e. after the entry into force of Regulation 44/2001.

[41] The Brussels Convention Art.1 states 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 Advocate General refers to the list of authorities from the ECJ on the interpretation of civil and commercial matters under the Brussels Convention and the exclusion of acts *jure imperii*: Case 29/76, LTU [1976] E.C.R. 1541; Case 814/79, Rüffer [1980] E.C.R. 3807; Case C-172/91, Sonntag [1993] E.C.R. I-1963; Case C-167/00, Henkel [2002] E.C.R.1-8111; Case C-271/00, Baten [2002] E.C.R. I-10489; and Case C-266/01, Préservatrice foncière TIARD [2003] E.C.R. I-4867.

[42] Case C-172/91, Sonntag [1993] E.C.R. I-1963.

[43] First outlined by the ECJ Case 29/76, LTU [1976] E.C.R. 1541.

[44] Case C-266/01, Préservatrice foncière TIARD [2003] E.C.R. I-4867.

individuals".[45] Mr Ruiz Jarabo takes this as the basis for his analysis of the specific issue in Lechouritou which he identifies as being whether the conduct of armed forces in wartime involves the exercise of powers going beyond the general law.[46] Arguments and Observations presented in this case, as well as precedents from elsewhere,[47] are strongly in favour of acts carried out by armed forces (within and out with their state territory) being classed as an exercise of state sovereignty and, therefore, not encompassed by Art.1 of the Convention.[48] However, as against that position, the plaintiffs and the Polish Government argued that the concept of acts *jure imperii* does not include wrongful acts of armed forces.[49] This is countered by the Advocate General who believes that the wrongfulness of a state act (even extending to a crime against humanity) does not affect its classification[50] as, if wrongfulness were to affect the classification of a state act, then it "would mean that authorities exercise public powers only when they do so in an irreproachable manner which would ignore the fact that, on occasions, they may not act in that way".[51] A further argument by Poland as to the nature of acts carried out outside a state's territory also met with a negative response from the Advocate General.[52] Territory does delimit the sphere of the application of sovereignty but the Advocate General identifies two special case exceptions to this, namely armed invasion of and armed intervention in another state.[53] Armed invasion, despite being reprehensible, entails an extension of the invader's territory and sovereignty and therefore does not affect acts *jure imperii*. However, the position presented here by Ruiz-Jarabo is not extensively substantiated. In particular, the issue of whether an act of a sovereign state constitutes a crime against humanity, which might negate its *jure imperii* classification, is not discussed at length. It may indeed be the case that an illegal or wrongful act *jure imperii* does not automatically convert to an act *jure gestionis* - it is more likely that it remains an act *jure imperii*, which cannot demand protection through state immunity.[54] However, this is not elaborated upon by the Advocate

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[45] ibid., at [36].
[46] Opinion in Lechouritou, at [52].
[47] ibid., at [56], reference to McElhinney v Ireland (2002) 34 E.H.R.R. 13, at [38].
[48] Opinion, at [57].
[49] Opinion, at [63]: "… military operations which are in breach of the law do not fall within that category."
[50] Opinion, at [64]: "The fact that conduct may be wrongful does not affect its classification but rather its consequences, in so far as it is a condition for the creation of liability or, where applicable, for the restriction of liability." Opinion, at [66]: "… the fact that the acts are wrongful does not cast doubt on the view I have put forward, whatever the degree wrongfulness, including where such acts constitute crimes against humanity."
[51] Opinion, at [65].
[52] Opinion, at [67]. The Polish Government argued that public authority is exercised only within the territorial boundaries of a state and that, therefore, operations by armed forces outside state boundaries may not be regarded as the exercise of public authority.
[53] Opinion, at [69]. As regards this second "special case" exception to the extra-territorial application of sovereignty, the Advocate General states: "The second situation … gives rise to particular difficulties of great relevance today, which call for solutions involving the possible consent of the attacked state and the fulfilment of the international community." This cannot but be a reference to the current situation in Iraq. As regards that issue, and making a specific explicit connection with the situation in Lechouritiou, see R. (on the application of Al-Skeini) v the Secretary of State for Defence, December 21, 2005. The Court of Appeal found that the Human Rights Act 1998 and the ECHR applied in some circumstances to British troops in Iraq. The judgment is available at http://www.publicinterestlawyers.co.uk/uploaded_documents/al_skeini_court_of_appeal_judgment_211205.doc. I am very grateful to my colleague, Robin Churchill, for this reference. On June 13, 2007, the House of Lords ruled in Al-Skeini v Secretary of State for Defence. See http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf.
[54] This reflects the position of the Greek Supreme Court in the Distomo case in 2000, Case No.111/2000, Prefecture of Voiotia v Federal Republic of Germany, May 4, 2000, Hellenic Supreme Court (Areios Pagos), see above, fn.15.

General and the connections between human rights breaches, state immunity and the Brussels Convention are not at all sufficiently excavated.[55] As regards the assertion of crimes against humanity (effectively brushed aside in the Opinion and later completely ignored by the Court) it is reasonable to ask if a legal order, such as the European Union with such an overtly strong commitment to human rights[56] can be complacent or silent about breaches of human rights in the past while it so openly preaches from that hymn book today? It may be the case that human rights principles developed for the European Union by the Court cannot specifically be used to re-interpret the wording of the Brussels Convention but the absence of some acknowledgement of the breaches of human rights in Greece in 1943 is more than puzzling.

As regards the second question raised by the referring court on the relevance of state immunity, Mr Ruiz-Jarabo sees this as a prior, procedural issue for consideration by that court and concludes that, at any rate, the competence of the European Court of Justice does not extend to an examination of the question of state immunity and its implications with regard to human rights.[57] This must be questionable at some level; a Union so ostensibly based on human rights values cannot be excused the complete drawing of a veil over breaches of rights in its historical hinterland. In one small corner of the EU (as in presumably many similar small corners) a community lives daily with reality of the excesses of a war and memories which have not been exorcised by European integration. Certainly, they probably happily receive the agricultural subsidies and the like which flow from Brussels but "closer union" between us all is constructed not on handouts alone. The people of Kalavrita opted to unroll their sad narrative in Luxembourg; it may well be the case that this Court has no answer but they deserved to be fully listened to. Despite the many sympathetic, deeply felt and poetically expressed elements of the Opinion it leaves a sense that Irini Lechouritou and her co-claimants have not been fully heard in Luxembourg.

United in integration? Member State observations

The awkwardness and sensitivities of this case are inherent in the couched and restrained language used by the Member States involved in this case. The Report for the Hearing outlines the position of the defendant German Government as well as that of three intervening Member States (Italy, Poland and the Netherlands) and the European Commission.[58] It evidences very different levels of response to the claimants' story. The

[55] When considering the issue of state responsibility under international law, Mr Ruiz Jarabo acknowledges that the concept of state immunity underwent changes in the second half of the 20th century with its limitation to acts *jure imperii* and that there is evidence of a tendency to even lift state immunity in respect of acts *jure imperii* where human rights are breached - see Opinion, at [60]. However, the Advocate General does not take account of that tendency when considering whether wrongfulness in the form of crimes against humanity may affect an act *jure imperii* classification.

[56] Art.6 EU and Art.49 EU.

[57] "In addition, it is not within the powers of the Court of Justice to examine whether there is State immunity in the present case and its implications with regard to human rights." Opinion, at [78].

[58] With many thanks to Dr Síofra O'Leary in this regard.

German Government's position is simply stated as viewing the claim relating to actions by its armed forces during "the period of war and occupation from 1941 to 1944" not to be of a civil or commercial nature and therefore outwith the Brussels Convention. As regards the issue of whether or not the Convention permits or affects state immunity, the German State's position is that it may invoke the international law state immunity principle independently of the Convention, which would automatically exclude the application of the latter. It is germane to ponder though why this case reached this stage of litigation at all, why these claimants have not been compensated and why Germany would resist this particular claim so stridently? Germany has paid out many billions in compensation for actions which occurred during the Second World War.[59] Compensation has also been paid out for actions of the German armed forces in occupied states but usually at an inter-state level as opposed to awards to individuals.[60] This claim therefore, if successful, might possibly represent a potential floodgate opening.[61] The actual amount being claimed by Irini Lechouritou and her co-claimants is not stated in any of the papers available from the European Court of Justice, but one might justifiably surmise (given the persistence of the claimants) that it is not just the amount itself but the principle (a level of public acceptance by the German State of the responsibility for the executions) which matters. If that is the case, then the resistance of Germany raises much larger political questions.

The Italian Government's position is a little more nuanced but, as to the issue of whether the claim can be considered as being of a civil or commercial nature, there is a general denial that damage claims based on the civil responsibility of armed forces falls under the Convention and, furthermore, the actions of the German armed forces during the Second World War should be seen as an expression of a *jus imperii*. The position of the Netherlands replicates that of the other Member States as regards the general non-applicability of the Brussels Convention. However, its use of language is much more expressive; Germany's position in Greece is described as a military occupation and the war as one of aggression.[62] The Dutch contribution to this case states that the position of Germany was "manifestly" an illegal war and occupation which resulted in crimes against humanity. This intervention is close to touching the bitter and raw issues which are the basis of the claims of the Kalavrita residents. The Polish Government's observation replicates the language used by the referring Greek court (and the Netherlands) but to opposite effect, namely it believes that the actions of a Convention contracting state during an illegal war of aggression, which is susceptible of having caused crimes against humanity, can be placed within the framework of the

[59] During a debate in the German Parliament on August 28, 2006 it was stated that the German State has paid out about €63 billion in compensation for the Holocaust since 1949 - much of this to Jewish victims. See generally on compensation for the Holocaust: http://www.ushmm.org/assets/frg.htm and http://www.holocaust-compensation.de/.

[60] In 1960, Germany paid a total of 115 million German marks to Greece for victims of Nazi racial discrimination.

[61] There is a background political issue here with some claiming that Germany's compensation regime is paltry and biased - that the amounts paid out to individual victims is tiny in most cases and that the largest amounts tend to relate to property/restoration and it was not until 1981 that non-Jewish claimants could claim under the formal compensation mechanisms set up in 1949. See generally on compensation paid by Germany: http://www.germany.info/relaunch/info/archives/background/ns_crimes.html, www.claimscon.org/ and http://news.bbc.co.uk/1/hi/world/europe/619896.stm.

[62] Replication of the referring Greek court's question.

Convention.[63] Finally, the European Commission intervenes to observe that the claim does not fall within the framework of the Convention and it does not therefore address the issue of state immunity. The language of the Commission's Legal Service is with the Netherlands and Poland in its description of the position of Germany as an illegal military operation but it does not extend to their repetition of the suggestion (by the Greek referring court) of there having been crimes against humanity.[64]

It is trite but nonetheless appropriate to observe here how the Member States line up in terms of their respective Second World War histories and their position adopted as regards the Greek massacres. Germany and Italy[65] both use very moderate, sanitised language in referring to the substance of the Kalavrita claims. The contrast between Germany's view of its position as defendant and the arguments of the Dutch and the Polish is stark. A situation suggested as constituting crimes against humanity by two Member States is treated as one of state immunity by the defendant state. More than 50 years of European integration has worked its diplomatic charm in the maintenance of usually excellent co-operation at all levels, political and economic, between states with extremely different wartime experiences behind them but, as this case demonstrates, they are not all willing to write off those experiences in the same manner.

Judgment

The sense that this case was as much, if not more, about listening rather than answering is reflected in how the claimants represented themselves and their narrative before the European Court of Justice. They wrote to the Court Registry after the Opinion issued requesting that they be allowed to reply to the Opinion and stating, furthermore, that the case was "of such crucial importance" that it should be referred to a Grand

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[63] There is too little exposure of the Polish position in the Rapport to begin to appreciate how it might have reached and justified such a conclusion Nonetheless, the Polish position is as convincing or as weak as that of the other Member States who adopt the majority, contrary position. For an unrelated but historically connected issue concerning Polish-German relations see "Poles Angered by German WWII Compensation Claims", Der Speigel, December 18, 2006 http://www.spiegel.de/international/0,1518,455516,00.html, where an application for compensation by German expellees from Poland at the end of the Second World War lodged at the ECtHR is discussed. The article refers to the difficulties with the Polish perception of Germans at that time as "victims". T. Judt in Postwar, cited above, at Chs I and II, discusses this extensively. Relations between Poland and Germany came to the fore during the European Council meeting on June 21-22, 2007 - "Poles in war of words over voting" at http://news.bbc.co.uk/1/hi/world/europe/6227834.stm.

[64] This case has been the occasion for the raising of many issues not previously considered before the ECJ including the issue of crimes against humanity. The only previous lengthy consideration of a related concept occurred in Omega (Case C-36/02, Omega Spielhallenund Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] E.C.R. I-9609) where the right to human dignity under the German Basic Law (Grundgesetz) was discussed with the ECJ concluding that the "killing games" such as those sought to be commercialised by the plaintiffs could be prohibited under EC law if they constituted an affront to human dignity - judgment available on http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

[65] There have been two cases similar to Lechouritou before the Italian courts: Marković (2002) 85 Rivista di diritto internazionale 682, Italian Court of Cassation (Corte di cassazione), (with a note by N. Ronzitti). See M. Frulli, "When are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Marcović Case" (2003) 1 Journal of International Criminal Justice 406 and Ferrini v Federal Republic of Germany, judgment No.5044 of March 11, 2004, Italian Court of Cassation reproduced in (2004) 87 Rivista di diritto internazionale 540. For comments see P. De Sena and F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case" (2005) 16 European Journal of International Law 89 See further M. Rau, "State Liability for Violations of International Humanitarian Law: the Distomo case before the German Federal Constitutional Court", cited above.

Chamber or a Full Court.[66] Given that this is the first time several very important issues were before the Court (the issue of an EU Member State's actions during the Second World War, the suggestion or allegation of crimes against humanity against a Member State, the fact that the Kalavrita claimants represent a potential tip of an iceberg of claims in Greece alone) it is arguable that the case could indeed be seen as being of "exceptional importance".[67]

The Court responds negatively to the request from Lechouritou and her co-claimants that the case be classed as being of "exceptional importance" and therefore referred to a Full Court or Grand Chamber: "Here, the Court holds that there is no reason for it to make such a reference."[68] Given the background of this case as well as the context of other Full Court hearings, it is perhaps regrettable that a more substantiated reasoning is not given. A similarly sparse dismissal meets the second preliminary argument which the plaintiffs raise, namely the capacity for parties to "reply" to the Advocate General's Opinion. The issue of the relationship between the general principle of a right to fair hearing based on Art.6(1) ECHR and the role of the Advocate General in European Court of Justice proceedings has arisen previously. It was invoked and discussed in a lengthy fashion in Case C-466/00 Kaba,[69] where the question of whether or not litigants should be permitted

[66] Letter of November 28, 2006. The rules of the ECJ on the allocation of cases to particular formations provide that "where [the Court] considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate General, to refer the case to the full Court" (emphasis added). See the Rules of Procedure of the ECJ at: http://www.curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/txt5.pdf. Article 44(3): "The Court shall assign to the Chambers of five and three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber." The Rules make it clear that a Member State (party or intervener) and an EC institution may affect the allocation process to the extent that they can seek a Grand Chamber allocation. This is not a privilege open to any other parties.

[67] An examination of the cases which have been allocated to a Full Court in recent years helps put this into some context. A Full (or plenary) Court (at ECJ level) is all 27 judges. It is, however, quorate at 15 (see Art.17 of the Statute of the ECJ). Since 1998 there have been at least 26 cases decided by a Full Court. Research would suggest that there has been much more frequent use of the plenary formation since enlargement and since the creation of the Grand Chamber. This may well be a simple reflection of an increased case load but, nonetheless, 20 (at least) Full Court hearings since October 2003 suggests that allocation at this level is not the rarity it used to be. As regards the Grand Chamber, it is used on a very regular basis (10 cases alone in the first two months of 2007). Some of these judgments certainly deal with very important issues (such as criteria for fining Member States, the actions of a Member State supreme court, new principles on citizenship and free movement, actions by members of the European Commission) but none of them, put simply, deal with matters rooted in war, history, inhumanity or life and death.

[68] Judgment of the Court of February 15, 2007, at [22].

[69] Case C-466/00, Arben Kaba and Secretary of State for the Home Departmen [2003] E.C.R. I-2219.

to respond after the Opinion stage of a case was considered.[70] In Lechouritou, the Court makes short shrift of the request to respond to the Opinion by dismissing with it.[71]

Thus, five judges of the Second Chamber of the Court proceed to judgment on the conduct of the German armed forces in Greece in December 1943. Or rather they do not; this is a relatively brief and succinct judgment on what constitutes civil and commercial matters under Art.1 of the Brussels Convention. It concludes that actions for compensation in respect of the acts of armed forces in the course of warfare do not fall within the Convention. As such, this judgment is of course of interest to Brussels Convention scholarship given its precedent based assessment of the extent of the exclusion of acts of a public authority from the scope of Art.1.[72] The Court begins by recalling the independence of the concept of "civil and commercial matters" and its interpretation must be with regard to the objectives and scheme of the Brussels Convention and also to general principles stemming from national legal systems.[73] The Court clearly outlines that matters may be excluded from the scope of the Convention either by reason of the legal relationship between the parties or by the subject matter of the action. Relying on its own previous case law the Court states there that not all actions by a public authority are excluded from the scope of the Convention but only where that authority is acting in the exercise of its public powers.[74] The European Court of Justice is here exercised by an elaboration of what constitutes the exercise of public powers and, in the negative, defines this as powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.[75] Therefore, the Court appears to be relying solely on the legal relationship between the parties as the justification for exclusion from the Convention (as opposed to the nature of the action). Following the Advocate General, the Court finds there is "no doubt" that acts of armed forces are clearly to be classed as

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[70] In his Opinion in Kaba A.G. Ruiz-Jarabo finds that the fact that the Rules and Statute of the European Court of Justice make no provision for parties to respond to an A.G. Opinion does not constitute a breach of general principles within the rules of the European Court of Justice. Opinion of A.G. Ruiz Jarabo in Case C-466/00, at [3]: "The general issue underlying this new reference for a preliminary ruling is whether the procedure before the Court of Justice, and in particular the limited right of the parties to be heard once the Opinion of the Advocate General has been delivered, meets the requirements of a fair hearing, as construed by the European Court of Human Rights." "In short, I take the view that neither the requirements of a fair hearing nor, still less, the objective of the proper administration of justice plead in favour of the parties to proceedings brought before the Community judicature having, as a general rule, the right to submit observations in response to the Opinion of the Advocate General." At [116] of the Opinion of A.G. Ruiz Jarabo in Case C-466/00, Kaba, July 11, 2002.This case was effectively an attempted "appeal" against the Opinion of A.G. La Pergola in Case C-356/98, Arben Kaba and Secretary of State for the Home Department (Kaba No.1) [2000] E.C.R. I-2623.

[71] At [18] of the judgment. "It must be pointed out at the outset that neither the Statute of the Court of Justice nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion. The Court has therefore held that applications to that effect must be rejected." (See, in particular, the order in Case C-17/98, Emesa Sugar [2000] E.C.R. I-665, at [2] and [19]).

[72] The Court relies on Case 29/76, LTU [1976] E.C.R. 1541; Case 814/79, Rüffer [1980] E.C.R. 3807; Case C-172/91, Sonntag [1993] E.C.R. I-1963; Case C-167/00, Henkel [2002] E.C.R. I-8111; Case C-271/00, Baten [2002] E.C.R. I-10489; and Case C-266/01, Préservatrice foncière TIARD [2003] E.C.R. I-4867.

[73] At [29] of the judgment. That latter assertion is of interest in terms of the appreciation of the possible impact of human rights on the interpretation of Art.1 of the Convention though the European Court of Justice itself does not go down this route.

[74] At [31] of the judgment. For a detailed analysis of the judgment see 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" (2007) 8 German Law Journal.

[75] At [34] of the judgment.

"emanations of State sovereignty"[76] as they "are inextricably linked to States' foreign and defence policy".[77] Therefore, the Kalavrita massacre is to be classed as the exercise of public powers on the part of Germany and any legal action based on those acts will fall outside the scope of the Convention.[78] The Court furthermore makes it clear that the nature of the action between the parties (namely a civil action for financial compensation) does not affect the question of exclusion of this claim from the scope of the Convention.[79] As to, finally, the possible impact of the lawfulness or otherwise of the acts giving rise to the claim the Court makes it clear that this would affect only the nature of those acts but not the field in which they fall.[80] There is a troubling and unconvincing circularity to the argument here; the judges delimit the "field" by reference to the nature of the act, but then state that even though the lawfulness of the act may affect its nature it cannot influence the determination of the field. In the context of the authoritative presentation of Brussels Convention case law this statement may seem logical and rational. As a judicial assessment from the European Union on a tragic, deeply contested aspect of its own history this is deficient. The plaintiffs' attempt to argue or suggest that what the German armed forces did was illegal or wrongful and that, therefore, the Convention's classifications and exclusions[81] should be re-considered is summarily dismissed by the judges with no comment on the potential illegality of the Kalavrita executions.[82] It is the "broad logic and objective" of the Convention which is stated to be at issue in this case and that is based on "mutual trust of the Contracting states in their legal systems and judicial systems".[83] The assertion or suggestion here seems to be that to attempt to claim, as the plaintiffs did, that the operation of the Convention be affected by the illegality or wrongfulness of a state's actions would cause a bouleversement inappropriate to the Brussels Convention system. Thus, this Court does not countenance an interference in its line of interpretation based on alleged wrongfulness. Furthermore, the Court does not even refer to the possibility of the impact of crimes against humanity in this case, which issue was raised specifically by the referring Greek court as well as by the Dutch and Polish Governments. The Court concludes, in answering

[76] The European Court of Justice has had occasion in the past to rule on matters which touch upon the German armed forces - see Case C-285/98, Tanja Kreil and Bundesrepublik Deutschland and Case C-186/01, Alexander Dory and Bundesrepublik Deutschland. These however are not Brussels Convention cases. See, further, below.

[77] At [37] of the judgment.

[78] At [37]-[39] of the judgment. The language of the Court is neutral: "… acts which are at the origin of the loss and damage pleaded by the plaintiffs… 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." (At [37]).

[79] At [40] and [41] of the judgment where, relying on Case 814/79, Rüffer [1980] E.C.R. 3807, the Court makes it clear that the public nature of the original act giving rise to proceedings is sufficient for an exclusion from the scope of the Convention and that, therefore, the nature of the proceedings is "entirely irrelevant".

[80] "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 which they fall. Since that field as such must be regarded as not falling within the scope of the Brussels Convention, the unlawfulness of such acts cannot justify a different interpretation." At [43].

[81] The plaintiffs' claim that acts *jure imperii* should not include illegal or wrongful actions.

[82] At [43] of the judgment: "Finally, the question as to whether or not the acts carried out in the exercise of public powers … are lawful concerns the nature of those acts, but not the field within which they fall. Since that field as such must be regarded as not falling within the Brussels Convention the unlawfulness of such acts cannot justify a different interpretation."

[83] At [44] of the judgment: "mutual trust … in legal systems and judicial systems …"

the (re-framed) first question of the Efetio Patron, that "civil matters" under Art.1 of the Convention do not cover legal actions brought in respect of acts perpetrated by armed forces in the course of warfare.[84]

There are two distinct and divergent ways in which this case may be perceived: it is, on the one hand, a relatively straightforward Brussels Convention case where the European Court of Justice takes the opportunity to further refine its case law on what constitutes the exercise of public authority and, in doing so, places the emphasis on the legal relationship between the parties and not on the nature of the proceedings.[85] However, there are, even within this framework, lacunae and curiosities in this judgment. One of the latter is the Court's reference to Regulation 805/2004[86] to justify its interpretation of what constitutes civil and commercial matters, particularly as regards the impact of the lawfulness of the act.[87] In previous Convention case law the Court has referred to EC secondary legislation, in particular in Luc Baten[88] where the Court stressed the link between the Brussels Convention and Community law in order to interpret the concept of social security.[89] This coherence between the Convention system and the Community one seems therefore well established and is certainly reinforced by the Court in Lechouritou. But coherence is in essence based on consistency and cannot operate selectively; if the two legal systems are in a state of semi-unity as regards interpretative guidance it is therefore difficult to see why principles of human rights which underpin the Community system[90] are not even referred to by the Court in its treatment of the lawfulness or otherwise of the Kalavrita executions. Another ghost lurking at the table when reading this judgment is the handling of the issue of state sovereignty: the case essentially turns on an appreciation of what constitutes the exercise of public authority and what boundaries there are to state sovereignty. The EU legal order itself is based on conceptions of sovereignty and competence which are not fully defined,[91] but in

[84] The Court does not deem it necessary to answer the second question of the Greek referring court as regards state immunity.
[85] See further Gärtner (2007), cited above, for an analysis in this framework.
[86] Regulation 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims, [2004] O.J. L143/15.
[87] At [45] of the judgment: referring to the reference to civil and commercial matters in Art.2(1) of 805/2004, which specifies that it shall not extend to the liability of the state for acts and omissions, the Court remarks that no distinction is drawn according to whether the acts or omissions are lawful. (Article 2(1) reads: "This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ("*acta iure imperii*").") The Court substantiates its reasoning further here by referring to Art.2(1) of Regulation 1896/2006 of the European Parliament and of the Council creating a European Order for payment procedure, [2006] O.J. L399/1. Article 2(1) of this Regulation reads: "This Regulation shall apply to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority ("*acta iure imperii*")".
[88] Case C-271/00, Gemeente Steenbergen and Luc Baten [2002] E.C.R. I-10489. See further in this regard Gärtner (2007), cited above.
[89] Case C-271/00, at [43]: "In view of the link between the Brussels Convention and Community law (see Case C-398/92 Mund & Fester [1994] ECR I-467, paragraph 12, and Case C-7/98 Krombach [2000] ECR I-1935, paragraph 24), regard must be had to the substance of that concept [of social security] in Community law."
[90] See D. Chalmers et al., European Union Law (Cambridge, CUP, 2006), at Ch.6, on the role and place of fundamental rights within EU law.
[91] See ibid., Ch.5, "Sovereignty and federalism; the authority of EU law and its limits".

Lechouritou the Court resorts to interesting language to deal with this. Actions by a state's armed forces are stated to be:

> "*one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy.*"[92]

This Court has not had many opportunities to rule specifically on the concept of sovereignty except in the areas of taxation and fisheries.[93] It has, however, previously considered the application of EU law to the German armed forces (in the context of both recruitment and military service) finding that:

> "*Measures taken by the Member States in this domain are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defense.*"[94]

Recalling, once again, the Court's own insistence on coherence between the Convention and Community law there appears to be a definite disparity here; for Brussels Convention purposes, actions of armed forces are classic emanations of state sovereignty and therefore not subject to interpretation by the European Court of Justice but under the Community system the Court may examine the nature of actions by Member State's armed forces. It is the competence question, stupid,[95] which is at issue here, hidden in an ostensibly bland Brussels Convention judgment.

Casting aside the surface level appreciation of this judgment, the other way in which this case may be perceived is as one going deeply to the root of the nature and purpose of European integration itself. "Closer Union"[96] cannot sustainably co-exist with democratic amnesia; let us remember that the claimants are seeking compensation, *inter alia*, for mental anguish and they have pursued this claim for 12 years in relation to a traumatic event which took place over 60 years ago. At one level it seems obvious, given this determined pursuit, that these claimants could never be satisfactorily financially compensated for their painful memories whatever legal basis they may opt for. Law, in other words, seems to be particularly impotent here and even if the Court had adopted a more generous and open approach to the claim, it may still have failed the citizens

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[92] At [37] of the judgment.

[93] Since 1997 there have been 37 European Court of Justice judgments where sovereignty was raised.

[94] Case C-186/01, Alexander Dory v Bundesrepublik Deutschland [2001] E.C.R. I-7823. In Case C-285/98, Tanja Kreil and Bundesrepublik Deutschland [2000] E.C.R. I-69, the Court stated similarly: "… it is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions are bound to fall entirely outside the scope of Community law." (At [15] of Case C-285/98).

[95] "The economy, stupid" - campaign phrase used by the Clinton team during the 1992 US presidential election campaign.

[96] Treaty on European Union Art.1: "This Treaty marks a new stage in the process of creating an ever closer union amongst the peoples of Europe …"

of Kalavrita. However, the closed, restricted nature of the judgment sits as an indictment on the nature and scope of EU law. These claimants sought, quite simply, a measure of justice in the court of the EU, a court which would not even exist were it not for events like those in a small Greek village and many more millions of similar villages across the continent of Europe. This justice was not forthcoming. Why not? The strict application of the Brussels Convention, the limited acceptance of the impact of unlawfulness, the final insistence that the Convention is an instrument founded on "mutual trust" and to simplify formalities[97] all stand as legally plausible reasons. Perhaps there are, however, more covert and unspoken political reasons in the background which relate to the stability of the integration pact and the fear of opening compensatory floodgates. Whatever the reasons, the result is the same for Kalavrita but the implications for European justice and for the respect of heritage and history are not. The Court's unwillingness to respond to the suggestion of crimes against humanity, its non-reference to human rights and the protective definition of state power (albeit applied retrospectively) all sit uneasily in the context of closer union in Europe and they defy the legitimate expectations one has of an evolved post-national legal order.

Conclusion

The European Court of Justice has not often found itself at the "bloody crossroads of law, memory and politics"[98] in such a direct way as it did in Lechouritou. An important question which arises from this case is the extent of the responsibility of the courts of the EU to deal with the continuing after-life of Europe's past. It may be formally appropriate that compensation claims such as that at issue here get siphoned off to a more procedural, less public, less controversial arena.[99] However, while mere monetary concerns may well be regulated elsewhere memories cannot be eradicated so easily and when faced with that memory what should we rightfully expect of the Luxembourg Court? In Lechouritou, given the confined Convention basis of the case, the Court was able to conveniently ignore the plaintiffs' story, the history behind the case and the human rights dimension. It may not be able to do this so easily in the future should it be faced with the difficult pasts of the people it serves in different legal circumstances.

Where now do Irini Lechouritou and others like her in Greece (and indeed perhaps in other Member States) go to claim compensation and recognition? Claims such as hers have failed or been dismissed before the German Federal Constitutional Court, before all other levels of German court, before the Greek Supreme Courts, before the European Court of Human Rights and now, before the European Court of Justice. The

[97] At [44] of the judgment.

[98] To paraphrase L. Trilling, "The bloody crossroads of literature and politics". The Liberal Imagination; Essays on Literature and Society (Secker & Warburg, New York, 1951).

[99] The Committee on Compensation for Victims of War, which was established by the International Law Association (ILA) in May 2003, has as one of its goals to draft rules for ad hoc compensation commissions as an alternative method of post-conflict justice. See further M. Rau, cited above, who points to a potential overburdening of national courts with such claims.

irony of this latest judgment is that it is the European Union as a legal and political order which has the very capacity (and arguably also the responsibility) to hold together the fragile threads which bind the people of Greece and Germany (despite the history). However, as this case demonstrates, the ideals and aspirations of EU citizenship do not extend to the shared experiences of the past. Much has been written about the weaknesses and lacunae of Union citizenship, but insufficient questions have perhaps been asked about the viability of a citizenship without a shared or common past but with (whisper it) a clearly divided past. The final reality of this case is its presentation of one small snapshot of a pre-fragmented Union. Whatever the technical and formal niceties of the judgment the whole context and origins of this case do not sit comfortably with the ideals and aspirations of closer union.

Did the European Court of Justice have a choice here? This was clearly a Brussels Convention case - even if made so by the plaintiffs perhaps desperately seeking a foothold for their claim - and the Court reasonably treated it as such. However, in doing so and in ignoring the full origins of the claim, was the Court accepting full responsibility as a judicial institution? Technically,[100] but - more importantly - morally, one could not have expected an "answer" from the European Court of Justice; but it is difficult not to have some sense of convenient institutional forgetfulness here. Perhaps, ultimately, it was impossible for five judges in Luxembourg to attempt to resolve the events of 1943 as, like a Medusa's head, they may have felt that the attempts to look directly at the horror would turn them into stone, or sentimentality.[101]

Endnote

With many thanks to Florian Becker, Bert van Roermund and especially Janet McLean for their thoughts and their time. Any errors or omissions clearly remain my own.

[100] Under the preliminary ruling system, it is for the Member State referring court to conclude the case. See generally D. Chalmers et al., European Union Law, cited above, at Ch.7.

[101] Obituary for W.G. Sebald by E. Homberger, December 17, 2001. The Guardian newspaper, "Like a Medusa's head, he felt that the attempts to look directly at the horror would turn a writer into stone, or sentimentality".