2. A claim falls within the scope of the Convention where its own subject-matter is one of the matters covered by the Convention even if it is ancillary to proceedings which, because of their subject-matter, do not come within the Convention's sphere of application.

3. The interim or final nature of a judgment is not relevant to whether the judgment comes within the scope of the Convention.

4. The Convention is applicable, on the one hand, to the enforcement of an interlocutory order made by a French court in divorce proceedings whereby one of the parties to the proceedings is awarded a monthly maintenance allowance and, on the other hand, to an interim compensation payment, payable monthly, awarded to one of the parties by a French divorce judgment pursuant to Article 270 *et seq.* of the French Civil Code.

In Case 120/79

REFERENCE to the Court under the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters by the Bundesgerichtshof [Federal Court of Justice] for a preliminary ruling in the action pending before that court between

LUISE DE CAVEL, NÉE BRÜMMER, Hügelstraße 116, Frankfurt am Main,

applicant and appellant,

and

JACQUES DE CAVEL, Flughafenbereich-Ost, Gebäude 124-2040, Frankfurt am Main,

defendant and respondent,

on the interpretation of subparagraph (1) of the second paragraph of Article 1 and subparagraph (2) of Article 5 of the Convention of 27 September 1968 (Official Journal 1978 L 304, p. 36),

THE COURT (Third Chamber)

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments advanced by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

In the course of divorce proceedings between the parties to the main action, the judge in matrimonial matters at the Tribunal de Grande Instance, Paris, by order of 18 May 1977, ordered Mr de Cavel to pay to his wife, pending divorce, a maintenance allowance of FF 3 000 per month.

On the application of the wife, the President of the Landgericht [Regional Court] Frankfurt am Main on 20 December 1977 made an order for the enforcement of that order. On 2 May 1978 that decision was set aside on appeal by the Oberlandesgericht [Higher Regional Court] Frankfurt am Main on the ground that the decision of the French court constituted an interim measure granted in the course of divorce proceedings and was accordingly concerned with litigation relating to the status of persons, which fell outside the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the 1968 Convention") by reason of the provisions of sub-paragraph (1) of the second paragraph of Article 1 of the Convention. Mrs de Cavel, the appellant in the main action, appealed to the Bundesgerichtshof against the decision of the Oberlandesgericht, seeking the restoration of the order of the Landgericht Frankfurt am Main of 20 December 1977.

Meantime, by judgment of 27 June 1978, the Tribunal de Grande Instance, Paris, granted divorce on the ground of the parties' mutual fault. Pursuant to Article 270 *et seq.* of the French Civil Code that judgment awarded the appellant in the main action an interim compensatory allowance of FF 2 000 per month.

Mrs de Cavel has appealed against that judgment.

By order of 27 June 1979 the Bundesgerichtshof, in accordance with Article 3 of the Protocol of 3 June 1971 on the Interpretation by the Court of Justice of the 1968 Convention, requested the Court to give a preliminary ruling upon the following questions:

"1. Is the European Convention applicable to the enforcement of an interlocutory order made by a French judge in divorce proceedings, whereby one of the parties to the proceedings is awarded maintenance payable monthly, or is this not a civil matter (subparagraph (1) of the second paragraph of Article 1 of the Convention)?

2. Is the Convention applicable to the payment of interim compensation, on a monthly basis, granted to one of the parties in a French judgment dissolving a marriage pursuant to Article 270 *et seq.* of the Code Civil?"

The order making the reference was registered at the Court on 30 July 1979.

The appellant in the main action, represented by W. Beck of the Frankfurt am Main Bar, the respondent in the main action, represented by L. Levi Valensin of the Paris Bar, and the Commission of the European Communities, represented by its Agent Mr Wägenbaur, assisted by Mr Krause-Ablaß of the Düsseldorf Bar, submitted written observations pursuant to Article 5 of the Protocol of 3 June 1971 and in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order of 5 December 1979 the Court decided to assign the case to the Third Chamber, in accordance with Article 95 of the Rules of Procedure.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the appellant in the main action (Mrs de Cavel)

First question

The appellant in the main action considers that, having regard to the legal nature of a right to maintenance, the 1968 Convention applies to the enforcement of the disputed claim. In principle, maintenance is a civil matter within the meaning of the first paragraph of Article 1 of the 1968 Convention and subparagraph (1) of the second paragraph of the same article does not exclude it from the field of application of the Convention.

That follows from the express reference to maintenance in subparagraph (2) of Article 5 of the 1968 Convention and is confirmed by the commentaries of various authors and in particular by the Report on the 1968 Convention (Official Journal 1979 C 59 p. 1), hereinafter referred to as "the Jenard Report", as well as by the text of the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Official Journal 1978 L 304 p. 1) and by the experts' report concerning the Convention of Accession,

known as "the Schlosser Report" (Official Journal 1979 C 59 p. 71).

The appellant in the main action also relies upon the decisions of various national courts, especially the judgment of the Oberlandesgericht Karlsruhe of 4 June 1976 (Synopsis of case-law, published by the Documentation Branch of the Court of Justice of the European Communities, Part 2, 1978, No 54) and the judgment of the Cour d'Appel, Brussels, of 1 April 1977 (Journal des Tribunaux 1978, p. 119) as well as the observations of the Commission, the United Kingdom and the Federal Republic of Germany and the opinion of Mr Advocate General Warner in Case 143/78 *(de Cavel I* [1979] ECR 1055). The appellant considers, finally, that the soundness of her position is demonstrated directly by Article 42 of the 1968 Convention.

Second question

The appellant in the main action observes that an answer to the second question is not necessary to enable the Bundesgerichtshof to decide the issue before it and accordingly, in the opinion of the appellant, this question has no place in the proceedings which have given rise to the reference to the Court of Justice. The appellant expresses the view that the Bundesgerichtshof may have framed this question in order to obtain information with an eye to a second case or an appeal from an inferior German court and she states that, for her part, she is "content" to see this question presented.

The appellant brings her observations to a conclusion by suggesting that the answer to be given by the Court of Justice should be that "under the rules of the European Convention on Jurisdiction and the Enforcement of Judgments, the amount of maintenance fixed by a non-conciliation order may be the subject of a declaration of recognition and an order for enforcement in the other contracting States".

B — Observations of the respondent in the main action (Mr de Cavel)

Construing the judgment of the Court of 29 March 1979 (Case 143/78 *de Cavel*, above cited), the respondent in the main action considers that that judgment, since the intention was to deal with all patrimonial legal relationships between spouses, placed claims in regard to the performance of maintenance obligations on a par with those which are ancillary to actions relating to the status of persons. With reference to paragraph 31 *et seq.* of the Schlosser Report he considers that the questions posed by the Bundesgerichtshof in regard to a maintenance allowance linked to divorce proceedings should receive the same answer as that given by the Court in its judgment of 29 March 1979 in regard to protective measures relating to property linked to divorce proceedings. The generality of the terms of the answer given by the Court of Justice in Case 143/78 leads to the view that it also encompasses a claim for a maintenance allowance.

In conclusion, the respondent in the main action asks the Court to rule that:

"Judicial decisions authorizing interim or final measures which are ancillary to divorce proceedings do not come within the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as the same is defined in Article 1 thereof, if those measures are concerned with, or are closely linked to, either questions relating to the status of the persons who are parties to the divorce or to the patrimonial legal relationships arising

from the conjugal bond or its dissolution".

C — Observations of the Commission

Although the order of the Bundesgerichtshof does not explain why a decision on the second question submitted for a preliminary ruling — which is concerned with the application of the 1968 Convention to a compensatory payment awarded by a divorce judgment in accordance with Article 270 *et seq.* of the French Civil Code — is necessary for it to give judgment, the Commission is of the opinion that, from the relatively short narrative of fact given in the order of the Bundesgerichtshof, the possibility that a reply to that question may also be necessary for the court making the reference cannot be ruled out. The Commission consequently proposes that an answer should be sent to both of the questions which have been posed.

Under subparagraph (2) of Article 5 of the 1968 Convention a defendant domiciled in a contracting State may, in another contracting State, be sued in a matter relating to maintenance in the courts for the place where the maintenance creditor is domiciled or habitually resident. It follows from this that the Convention applies to maintenance obligations, even if these are connected with litigation relating to the status of natural persons or rights in property arising out of a matrimonial relationship, although such litigation is, in itself, excluded from the scope of the 1968 Convention in terms of subparagraph (1) of the second paragraph of Article 1 thereof.

In order to determine whether a given case relates to a maintenance obligation within the meaning of subparagraph (2) of Article 5 it is appropriate, according to the Commission, to refer, not to the definitions given by the laws of the States concerned, but to the objectives and scheme of the Convention and to the general legal principles which stem from the corpus of the national legal systems, in accordance with the judgment of the Court of 14 October 1976 (Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541).

On the basis of the Schlosser Report (paragraph 96), the Commission distinguishes two possibilities. If a division between spouses of matrimonial property does not have the character of a decision on maintenance, subparagraph (2) of Article 5 of the 1968 Convention does not apply. If, on the contrary, a payment fixed in the course of divorce proceedings is intended to ensure the support of the spouse who is in need, this is a matter of a maintenance obligation within the meaning of the 1968 Convention. Applying this criterion, the Commission considers that, since it is fixed "according to the needs of the spouse to whom it is paid and the means of the other" (Article 271 of the French Civil Code) the maintenance payment is a maintenance obligation within the meaning of subparagraph (2) of Article 5 of the 1968 Convention. The same rule would apply equally to the earlier award under which a monthly maintenance allowance was granted on an interim basis to one of the parties for the duration of the divorce proceedings.

The Commission disputes the view adopted by the Oberlandesgericht Frankfurt am Main in its judgment of 2 May 1978, according to which the 1968 Convention does not apply to a question relating to a maintenance allowance, because this is a question relating to the status of natural persons within the meaning of subparagraph (1) of the second paragraph of Article 1 of the 1968 Convention.

In that regard the Commission puts forward the following arguments:

1. In the course of the negotiations relating to the accession of the new

Member States to the Convention, the *Schlosser Report* (paragraphs 32 to 34) expressed itself in favour of the unrestricted application of the Convention of Accession to ancillary maintenance judgments and in the amendment made to subparagraph (2) of Article 5 the Member States approved this solution.

2. On the basis of Article 42 of the 1968 Convention (each matter dealt with in the judgment has to be regarded separately for the purposes of enforcement) and to subparagraph (4) of Article 5 (ancillary civil decisions given in the course of criminal proceedings fall within the field of application of the Convention) the Commission considers that, although the 1968 Convention does not contain any express rules regarding ancillary maintenance judgments, it is necessary from now on to regard this type of judgment, given in the framework of divorce proceedings, as coming within the field of application of the 1968 Convention. This view is confirmed by the explanations given in the *Jenard Report* (Chapter III (IV)). In regard to matters falling outside the scope of the Convention by virtue of the second paragraph of Article 1, it was there explained that the exclusion has effect only if those matters constitute the principal subject-matter of the proceedings but not when they come before the Court as a subsidiary matter either in the main proceedings or in preliminary proceedings (Official Journal 1979 C 59 p. 10). Moreover, cases in which one of the matters mentioned in the second paragraph of Article 1 of the 1968 Convention has been the subject of a question preliminary to a judgment, which itself comes within the scope of the Convention, are expressly provided for in subparagraph (4) of Article 27 of that Convention. Indeed, that article provides that a judgment falling within the scope of the Convention in the course of which one of the matters mentioned in the second paragraph of Article 1 of the Convention has been the subject of a preliminary question shall not be recognized if the decision on the preliminary question conflicts with a rule of private international law of the State in which recognition is sought.

3. Case-law and legal writers support the application of the Convention to maintenance judgments given in the course of divorce proceedings in the majority of cases, and at least in the field of *recognition and enforcement* of those judgments. Although certain authors consider that, in regard to the question of the *jurisdiction* of the court involved under subparagraph (2) of Article 5, a special case has to be made in respect of ancillary maintenance claims, that view, at all events, concerns only the problem of the jurisdiction of the court before which the matter is brought and not that of the enforcement of an ancillary maintenance judgment, in regard to which all agree that the Convention applies.

4. The Commission considers finally that its view does not conflict with the judgment delivered in Case 143/78 *de Cavel.* That case was concerned with interim measures relating to patrimonial property (putting under seal and freezing of assets) in the course of divorce proceedings. The Convention does not contain any express provisions governing the problem of whether such measures do or do not fall within the exclusions mentioned in the second paragraph of Article 1 of the 1968 Convention whereas, on the contrary, litigation relating to maintenance obligations is the subject of the express provision of subparagraph (2) of Article 5 of the Convention, from which it follows that such litigation is not comprised in the exclusions mentioned in the second paragraph of Article 1.

The Commission concludes that judgments given in the course of divorce proceedings before the Tribunal de

Grande Instance dealing with an interim monthly maintenance allowance and also with a compensatory payment under Article 270 *et seq.* of the French Civil Code must be looked at separately from the divorce proceedings for the purposes of recognition and enforcement under the 1968 Convention. Given that both judgments are maintenance judgments within the meaning of subparagraph (2) of Article 5 of the Convention, the Convention applies without its being necessary to consider in the context of the order for enforcement whether the Tribunal de Grande Instance, Paris, properly assumed jurisdiction in regard to the maintenance judgments (third paragraph of Article 28 of the 1968 Convention).

Having regard to the foregoing considerations, the Commission proposes that the questions submitted for a preliminary ruling be answered as follows:

"1. The enforcement of an interim measure granted in divorce proceedings, whereby one of the parties is awarded a monthly maintenance allowance for the duration of the divorce proceedings, is not excluded by subparagraph (1) of the second paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

2. Subparagraph (1) of the second paragraph of Article 1 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not exclude the enforcement of a provisional compensatory payment, payable monthly, awarded to one of the parties by a French divorce judgment under Article 270 *et seq.* of the Civil Code".

III — Oral procedure

At the sitting on 31 January 1980 the appellant, Mrs de Cavel, represented by Dr W. Beck, Rechtsanwalt, Frankfurt am Main, the respondent, Mr de Cavel, represented by C. Roth, avocat at the Cour d'Appel, Paris, and the Commission of the European Communities, represented by W.-D. Krause-Ablaß, Rechtsanwalt, Düsseldorf, presented oral argument.

The Advocate General delivered his opinion at the sitting on 31 January 1980.

Decision

1 By order of 27 June 1979 which was received at the Court on 30 July 1979 the Bundesgerichtshof submitted to the Court of Justice, under the Protocol of 3 June 1971 on the Interpretation of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Convention"), two questions on the interpretation of subparagraph (1) of the second paragraph of Article 1 and subparagraph (2) of Article 5 of the Convention.

2 The first question is directed towards ascertaining whether the Convention, and in particular Article 31 thereof which relates to the enforcement of judgments given in another contracting State, apply to "the enforcement of an interlocutory order made by a French judge in divorce proceedings, whereby one of the parties to the proceedings is awarded maintenance payable monthly" or whether, on the contrary, such a judgment must be considered as not being a "civil matter" within the meaning of subparagraph (1) of the second paragraph of Article 1 of the Convention. This question is raised in the context of proceedings relating to the enforcement in the Federal Republic of Germany of an order made on 18 May 1977 by the judge in matrimonial matters at the Tribunal de Grande Instance, Paris, awarding the wife, pursuant to Article 253 *et seq.* of the French Civil Code, an interim maintenance allowance pending divorce.

3 The second question asks, likewise, whether the Convention — in particular its provisions relating to the enforcement of judgments — is applicable "to the payment of interim compensation, on a monthly basis, granted to one of the parties in a French judgment dissolving a marriage pursuant to Article 270 *et seq.* of the Code Civil". In terms of the said Article 270, the payment in question is intended to compensate, so far as possible, for the disparity which the breakdown of the marriage creates in the parties' respective living standards. Article 271 provides further that the compensatory payment is to be fixed according to the needs of the spouse to whom it is paid and the means of the other, having regard to the position at the time of divorce and its development in the foreseeable future.

4 According to the first paragraph of Article 1 of the Convention its scope extends to "civil and commercial matters". However, certain matters, although falling within that concept, have been removed from that field, by way of exception, by the second paragraph of the same provision. Such is the case in regard to, *inter alia*, the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.

5 It is well settled that the subject of maintenance obligations itself falls within the concept of a "civil matter" and that since it is not taken out by the exceptions provided for in the second paragraph of Article 1 of the Convention it therefore falls within the scope of the Convention. Article

5 (2) of the Convention provides confirmation, should such be necessary, that is so falls. On the other hand, the "compensatory payments" provided for in Article 270 *et seq.* of the French Civil Code and referred to in the second question are concerned with any financial obligations between former spouses after divorce which are fixed on the basis of their respective needs and resources and are equally in the nature of maintenance. They are therefore civil matters within the meaning of the first paragraph of Article 1 of the Convention and accordingly come within the scope of the Convention since they have not been excepted by the second paragraph of that article.

6 Accordingly, all that has to be considered is whether the fact that the maintenance judgment is given in the context of divorce proceedings — which unquestionably concern the status of persons and are consequently outside the field of application of the Convention — has the consequence that the maintenance proceedings must, as being ancillary to the divorce proceedings, also be excepted from that field of application, with the result that they may not benefit from *inter alia* the simplified procedures for recognition and enforcement provided by Articles 26 to 30 and Articles 31 to 45 respectively.

7 In so far as its field of application is concerned, no provision of the Convention links the treatment of ancillary claims to the treatment of principal claims. On the contrary, various provisions confirm that the Convention does not link the treatment of claims classified as "ancillary" to the treatment of the principal claim. In particular, such is the case with Article 42 which provides that, where a foreign judgment has been given in respect of several matters and enforcement cannot be authorized for all of them, the Court shall authorize enforcement for one or more of them, and with Article 24, which provides that application for such provisional, including protective, measures — which are, by definition, ancillary measures — as may be available under the law of a contracting State may be made to the courts of that State "even if, under this Convention, the courts of another contracting State have jurisdiction as to the substance of the matter".

8 These provisions demonstrate unequivocally that the general scheme of the Convention does not necessarily link the treatment of an ancillary claim to that of a principal claim. In accordance with that principle, and in regard

precisely to the Convention's scope, a criminal court, the judgments of which, when given in its proper area of activity, are clearly excluded from the scope of the Convention, has jurisdiction conferred upon it by Article 5 (4) of the Convention to entertain an ancillary civil claim, with the result that a judgment given on that claim will benefit from the Convention as regards its recognition and enforcement. That provision thus expressly provides that a claim ancillary to criminal proceedings, which are obviously excluded from the scope of the Convention, comes within it.

9 Ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim. It was by way of applying that rule that the Court held in its judgment of 27 March 1979 in Case 143/78 *de Cavel* [1979] ECR 1055, involving the same parties, that an application in the course of divorce proceedings for placing assets under seal did not come within the scope of the Convention, not on account of its ancillary nature, but because it appeared that, having regard to its true function, it concerned, in that case, rights in property arising out of the spouses' matrimonial relationship.

10 On the other hand, the Court has already recognized in that same judgment that the interim or final nature of a judgment is not relevant to whether the judgment comes within the scope of the Convention. Accordingly, the argument to the effect that the maintenance obligation is only an interim one pending divorce must be rejected.

11 It follows from the foregoing considerations that the scope of the Convention extends also, and for the same reasons, to maintenance obligations which legislation or the Court places on spouses for the period after divorce.

12 The answer to the questions put by the Bundesgerichtshof should therefore be that the Convention is applicable, on the one hand, to the enforcement of an interlocutory order made by a French court in divorce proceedings whereby one of the parties to the proceedings is awarded a monthly maintenance allowance and, on the other hand, to an interim compensation

payment, payable monthly, awarded to one of the parties by a French divorce judgment pursuant to Article 270 *et seq.* of the French Civil Code.

Costs

13 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions submitted to it by the Bundesgerichtshof by order of 27 June 1979 received at the Court on 30 July 1979, hereby rules:

The Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (English version, Official Journal 1978 L 304, p. 36) is applicable, on the one hand, to the enforcement of an interlocutory order made by a French court in divorce proceedings whereby one of the parties to the proceedings is awarded a monthly maintenance allowance and, on the other hand, to an interim compensation payment, payable monthly, awarded to one of the parties by a French divorce judgment pursuant to Article 270 *et seq.* of the French Civil Code.

Kutscher Mertens de Wilmars Mackenzie Stuart

Delivered in open court in Luxembourg on 6 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President