OPINION OF ADVOCATE GENERAL DARMON
delivered on 14 July 1994 *

1. By order of 1 March 1993, the House of Lords seeks from the Court a preliminary ruling on the interpretation of Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1] (hereinafter 'the Convention'), in the context of the delicate problem of ascertaining the place where the harmful event occurred in the case of defamation by a newspaper article.

2. The facts of the main action, which it is not necessary to go into at length, may be summarized as follows. Miss Shevill, who is domiciled in Great Britain, and three companies established in different Contracting States consider that they have been defamed by an article in the newspaper *France-Soir* suggesting that they were involved in a drug-trafficking network. On 17 October 1989 they brought proceedings before the High Court of England and Wales against Presse Alliance SA, the publisher of *France-Soir*, for damages for the harm allegedly suffered by them both in France and in other States, as well as in England and Wales. They pursued their claim despite the insertion in a later edition of a 'rectification' intended to make good the harm done to their reputation. Presse Alliance contested the jurisdiction of the court applied to, alleging the absence of any harmful event. The plaintiffs in the main proceedings limited their claim in the course of the proceedings solely to damages for the harm occasioned in England and Wales.

3. Following the dismissal at first instance and on appeal of the application to strike out the action on the ground of lack of jurisdiction, the House of Lords, hearing the case on further appeal from the Court of Appeal, considered it necessary to seek a ruling from the Court of Justice.

4. Before the questions submitted for a preliminary ruling are discussed, it is necessary to establish whether an action for compensation for harm to a person's reputation and/or honour occurring as a result of a newspaper article falls within the scope of tort or delict within the meaning of Article 5(3).

5. It should be borne in mind that that provision establishes, by way of derogation from the principle laid down in Article 2 of the Convention whereby jurisdiction is conferred on the courts of the State in which the

* Original language: French.

1 — As amended by the Accession Convention of 25 October 1982 (OJ 1982 L 388, p. 1).

defendant is domiciled, and as an alternative thereto, that 'in matters relating to tort, delict or quasi-delict' special jurisdiction is to be conferred on the 'courts for the place where the harmful event occurred'.

6. With the notable exception of the judgment in *Tessili* v *Dunlop*, [2] in which it was held that the 'place of performance of the obligation' within the meaning of Article 5(1) was to be determined in accordance with the national law governing the obligation in question, the Court has held that the concepts contained in the Convention should generally be given an independent interpretation.

7. In its judgment in *Kalfelis*, [3] the Court further defined the concept of 'matters relating to tort, delict and quasi-delict' as covering

'... all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)'. [4]

8. Although very broad, the Court has limited its scope to actions for damages other than those, such as the *action paulienne* in French law, the purpose of which is not

'to have the debtor ordered to make good the damage he has caused his creditor by his fraudulent conduct, but to render ineffective, as against his creditor, the disposition which the debtor has made'. [5]

9. In so far as its purpose is to make good the damage resulting from an unlawful act, an action for defamation falls within the scope of Article 5(3). That is, at least, the prevailing view expressed by academic lawyers. [6]

10. Furthermore, defamation is formally proscribed by the Universal Declaration

2 — Case 12/76 [1976] ECR 1473.

3 — Case 189/87 [1988] ECR 5565.

4 — Paragraph 17.

5 — Case C-261/90 *Reichert II* [1992] ECR I-2149, paragraph 19.

6 — See H. Gaudemet-Tallon: *Les conventions de Bruxelles et de Lugano*, LGDJ, 1993 No 193; G. Droz: *Compétence judiciaire et effets des jugements dans le marché commun*, Dalloz, 1972, No 77; P. Bourel: 'Du rattachement de quelques délits spéciaux en droit international privé', *Recueil des Cours, Académie de droit international de La Haye*, 1989, II, Volume 214 of the collection, p. 251 et seq.; P. Kaye: *Civil Jurisdiction and Enforcement of Foreign Judgments*, Professional Books, 1987, p. 561; Lasok and Stone: *Conflict of Laws in the European Community*, Professional Books, 1987, p. 232.

of Human Rights, Article 12 of which provides:

'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

11. Although protection against 'such attacks' constitutes a recognized fundamental principle, there are striking differences between the laws of the Contracting States. Taking as an example the laws of France and England alone, the former requires, as a condition of the tort, that there must be an intention to cause harm, so that there is no tort if good faith is established, whereas under English law the tort (known as 'libel') is committed where the writing is regarded as defamatory by the jury, without there being any requirement for the person harmed to show actual damage and without any consideration of the question of good faith. On the other hand, the reverse applies in relation to invasion of privacy, protection against which is particularly effective under French law. As Professor Badinter has written:

'... by virtue of the recognition of a subjective right to privacy, any prejudice thereto is *ipso facto* wrongful, without there being any need for the person concerned to prove that he has suffered special harm'. [7]

12. This difference of approach in relation to the protection of the victim, who is confronted with a diversity of laws applicable depending on the rules on conflict applied by the forum where the proceedings are brought (a diversity due to the calling in question and, on occasion, the abandonment of the traditional rule requiring the application of the law of the place where a tort has been committed) shows, if proof were needed, that the assertion of jurisdiction in favour of one forum as against another is not a neutral matter. [8]

13. I now turn to an analysis of the seven questions submitted to the Court for a preliminary ruling, which may be reorganized under three headings relating respectively to the place where the harmful event occurred (Question 1), the possible limitation, where it is recognized that there is more than one competent forum, of the jurisdiction of each court within whose judicial district harm has occurred (Question 3) and the concept of damage, the standard of proof and the possible consequences of plurality of jurisdiction (Questions 2, 4, 5, 6 and 7).

7 — 'Le droit au respect de la vie privée', *Semaine juridique*, 1968, No 2136, paragraph 24. See also the judgment of the Paris Court of Appeal of 27 February 1967 (*Brigitte Bardot*), which contains no reference whatever to the concept of fault (*Recueil Dalloz Sirey*, 1967, p. 450).

8 — See, in that regard, the course of lectures given by Professor Bourel, op. cit., p. 324 et seq.

I — The place where the harmful event occurred

14. As Mrs Gaudemet-Tallon has written:

'The wording of Article 5(3) creates difficulties of interpretation in three types of situation: where the place of the event giving rise to the damage and the place where the damage occurs are not the same, where the applicant suffers "ricochet" damage and, lastly, where it is difficult to ascertain the place in which the damage occurred'. [9]

15. The first of those situations was examined by the Court in its judgment in *Bier* v *Mines de Potasse d'Alsace*, [10] the second was considered in the judgment in *Dumez France and Tracoba* [11] and the third forms the subject-matter of the present case. [12]

16. The *Mines de Potasse de l'Alsace* case concerned cross-border pollution, responsibility for which was thought to lie with an undertaking established in France, causing harm to a horticultural undertaking domiciled in the Netherlands. The Netherlands court hearing the dispute, before whom the defendant raised the objection of lack of competence, asked the Court whether 'the place where the harmful event occurred' was to be understood as meaning the place where the damage occurred or the place where the event having the damage as its sequel occurred.

17. The Court, in its analysis of the basis of the special jurisdiction provided for in Article 5, held that

'this freedom of choice was introduced having regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings'. [13]

18. The Court held, therefore, without specifically taking into consideration the need to protect the victim, that the expression 'the place where the harmful event occurred' encompassed both

9 — Op. cit., No 189.

10 — Case 21/76 [1976] ECR 1735.

11 — Case C-220/88 [1990] ECR I-49.

12 — That question is also central to the case of *Marinari* (C-364/93), in which my Opinion is shortly to be delivered.

13 — Paragraph 11.

'... the place where the damage occurred and the place of the event giving rise to it'. [14]

19. The Court took the opportunity in the *Dumez* judgment [15] to point out that the jurisdictional rule contained in Article 5(3) supports the need for a close connecting factor between the dispute and the court hearing the case, that is to say, the need for the sound administration of justice.

20. Consequently, the Court considered that

'the rule on jurisdiction laid down in Article 5(3) of the Convention of 27 September 1968 ... cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets'. [16]

21. The Court identified in those cases the independent concept of 'the place where the harmful event occurred', thereby departing from the position adopted by it in its judgment in *Tessili* [17], involving the notion of the place of performance of an obligation; it again adopted that position in its recent decision in *Custom Made Commercial*, [18] in which it held, in the context of Article 5(1), that

'... the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seised ...'. [19]

22. In his Opinion in *Mines de Potasse d'Alsace*, Advocate General Capotorti stated, in terms still apposite today, that he favoured an independent definition of the concept of 'the place where the harmful event occurred'.

23. Furthermore, such a policy finds approval amongst the prevailing body of academic opinion, intended as it is to prevent positive or — more worryingly — negative conflicts of jurisdiction.

24. However, in the view of the United Kingdom and the German Government, the

14 — Operative part.
15 — Case C-220/88, cited above.
16 — Operative part.
17 — Case 12/76, cited above.
18 — Judgment of 29 June 1994 in Case C-288/92, [1994] ECR I-2913.
19 — Paragraph 29.

question of the uniqueness or plurality of harmful events falls within the scope of the national laws of each Contracting State. The Commission and the French and Spanish Governments, by contrast, suggest that there should be a Community definition both of the place where the damage occurred and of that of the event giving rise to it.

25. The latter solution would appear to reflect the purpose of the Convention, which is to allocate disputes consistently, and thus in accordance with an independent criterion, amongst the courts of the Contracting States, and which forms part of the logic underlying the Court's judgments in *Mines de Potasse d'Alsace* and *Dumez*.

26. The first of those judgments resulted, in certain Contracting States, in the creation of a new class of jurisdiction. On the other hand, the second excluded any jurisdiction founded on damage suffered indirectly by a victim.

27. It would be paradoxical, at the very least, if the effectiveness of Article 5(3) were to be compromised in the event of variation, from one Contracting State to the next, in the location of the tortious act and thus of the competent forum.

28. Whilst it is certainly true that the diversity of the solutions offered by a comparative study of the laws of the Contracting States signally complicates the choice to be made, it must not bar the exercise altogether.

29. A brief comparative study is called for since, as the Court has pointed out, the interpretation of Article 5(3) in that context must also

'... [avoid] any upheaval in the solutions worked out in the various national systems of law, since it looks to unification, in conformity with Article 5(3) of the Convention, by way of a systematization of solutions which, as to their principle, have already been established in most of the States concerned.' [20]

30. In German law, jurisdiction is vested both in the courts of the place of publication and in those of the place of distribution, provided, in the latter case, that the distribution was effected by the publisher or was foreseeable by him. [21] Under the national system, any court, whatever the basis of its jurisdiction, may order compensation for the whole of the damage. According to certain academic writers, that solution should also prevail in the international sphere, even though there has never, to my knowledge, been any decision to that effect.

20 — Judgment in Case 21/76, cited above, paragraph 23.

21 — Bundesgerichtshof, 3 May 1977, *Neue Juristische Wochenschrift*, 1977, p. 1590; Oberlandesgericht München, 17 October 1986, *Entscheidungen der Oberlandesgerichte in Zivilsachen*, 1987, p. 216.

31. Thus, according to Geimer and Schütze, [22]

'Die konkurrierende Zuständigkeit am Handlungs-wie am Erfolgsort eröffnet eine Klagemöglichkeit für den gesamten Schaden, wo immer er auch entstanden ist, nicht nur für den im Hoheitsgebiet des Gerichtsstaates entstandenen Schaden'. [23]

32. That is also Mr Kropholler's view: [24]

'So besteht bei der durch ein *Druckerzeugnis* verübten unerlaubten Handlung eine internationale Zuständigkeit nicht nur am Ort der Herstellung, sondern auch an den unter Umständen sehr zahlreichen Orten, an denen es bestimmungsgemäß verbreitet wird'. [25]

33. In Belgian law, the national courts appear to accept jurisdiction where a constituent element of the tort (distribution, publication) has been committed in Belgium, but without any recognition of the conferment of cumulative jurisdiction on the forums seised on the basis of those two elements. Academic writers generally consider that where any one of those forums is seised of the matter it must necessarily be competent, whatever the basis on which it is thus seised, to order compensation for the whole of the damage caused. [26]

34. In French law, solutions to the problem of cross-border torts committed in the press have emerged in the context of invasion of privacy. The second indent in Article 46 of the New Code of Civil Procedure allows the plaintiff to sue either in the courts of the defendant's domicile or in those of the place of the causal event or, lastly, in those in whose judicial district the damage has been suffered. The choice between those two latter forums has been understood as relating, first, to the courts for the place in which publication occurred and, second, to those for the places where distribution was effected. Whilst the former are competent to hear and determine claims in respect of the whole of the damage, wherever it may have occurred, the latter can only order compensation in respect of the harm suffered within their judicial district. [27] As will be seen, certain academic writers have criticized the decisions given to that effect.

22 — *Internationale Urteilsanerkennung*, Band I, 1. Halbband, C. H. Beck'sche Verlagsbuchhandlung, München, 1983, p. 631.

23 — Free translation: 'The competing jurisdiction of the courts of the place where the event occurred and of those of the place where the damage arose is such that it is possible to sue in respect of the whole of the damage, irrespective of where it may have occurred, and not merely in respect of the damage occurring in the national territory of the court'.

24 — *Europäisches Zivilprozeßrecht*, Verlag Recht und Wirtschaft GmbH, Heidelberg, 1991, p. 103, paragraph 45.

25 — Free translation: 'In the case of unlawful acts effected by publication in print, international competence in respect of the whole of the damage exists not only in the place of publication but also in each of the (frequently numerous) places where distribution has taken place'.

26 — J. Erauw: *De onrechtmatige daad in het internationaal privaatrecht*, Antwerpen, Maarten Kluwer, 1982, p. 194 to 197.

27 — Judgments of the Paris Regional Court of 29 September 1982 (*Romy Schneider*), 27 April 1983 (*Caroline of Monaco*) and 20 February 1992 (*Vincent Lindon*); judgment of the Paris Court of Appeal of 19 March 1984 (*Caroline of Monaco*).

35. In Luxembourg law, Article 37 of the Code of Civil Procedure provides that 'in cases involving compensation for damage caused by tort, delict or quasi-delict, the plaintiff may sue, at his option, either before the courts for the place where the defendant is domiciled or before those for the place where the harmful event occurred'. The expression 'the place where the harmful event occurred' has not been clarified by the courts, but the prevailing view amongst academic writers, relying on the decisions of the French courts, is that

'... in cases involving invasion of privacy by the press, it is acknowledged that the courts of the country in which distribution took place are competent to hear and determine claims for compensation for the damage resulting therefrom, as well as the courts of the country in which publication occurred ...'. [28]

36. The laws of Spain [29] and Italy [30] confer jurisdiction to award compensation for the whole of the damage solely on the courts for the place where the publication was printed and initially distributed, irrespective of where the damage occurred. Thus a central forum is designated in such matters.

37. The criterion applied in the United Kingdom and Ireland to determine the competent forum is the communication to a third party of material regarded by the victim as having harmed his reputation. However, although it has not proved possible to discover any decision by the English courts on the scope of jurisdiction where the damage has been suffered in more than one State, it appears from a judgment of the Supreme Court of Ireland that 'the extent of publication' constitutes a relevant factor in calculating the amount of the compensation sought. [31]

38. In Portugal, the question of competence in cases of defamation in the press has been resolved principally in the context of the criminal law. Whilst in certain judgments it is the place of despatch of defamatory correspondence which has been held to be the decisive factor, [32] in others it has been held to be the place of receipt. [33]

39. Lastly, in the Netherlands, jurisdiction is conferred only on the courts for the place where the defendant is domiciled or, failing that, where he resides. If he is neither domiciled nor resident in the Netherlands, the *forum actoris* is adopted.

28 — F. Schockweiler: *Les conflits de lois et les conflits de juridictions en droit international privé luxembourgeois*, Ministry of Justice, Luxembourg, 1987, No 858.

29 — See the orders of the Tribunal Supremo of 20 November 1980 (*Repertorio Aranzadi de Jurisprudencia (RAJ)*, 1980, No 4524), 7 July 1983 (*RAJ*, 1983, No 4112) and 28 September 1992 (*RAJ*, 1992, No 7385).

30 — See the judgment of the Corte di Cassazione of 28 July 1990, in *Cassazione penale*, 1992, p. 644.

31 — *Barrett* v *Independent Newspapers* [1986] ILRM 601.

32 — Judgments of the Supremo Tribunal de Justiça of 18 April 1990, in *Actualidade Jurídica*, No 8, p. 2, and of the Tribunal da Relação de Coimbra of 8 January 1963, in *Castelo Branco Galvão, Direito e Processo Penal*, Coimbra, 1982, p. 32.

33 — Judgments of the Tribunal da Relação de Lisboa of 11 February 1955 and 17 February 1965, in *Castelo Branco Galvão*, op. cit., p. 32.

40. The diversity of the solutions adopted by the internal legal systems of the Contracting States reflects the difficulty in ascertaining the place where the damage arose in the event that such damage is non-material. Mrs Gaudemet-Tallon is accordingly quite correct in her observation that

'the *Mines de Potasse d'Alsace* decision is not easy to apply in the absence of agreement on the place where the event occurred and the place where the damage arose'. [34]

41. Looking beyond those differences, however, it is possible to identify the twin criteria of publication or printing on the one hand and distribution or communication on the other, even though certain legal systems take only one of the two connecting factors into consideration, to the exclusion of the other, whereas other systems allow a choice to be made between the jurisdictions thus designated.

42. Some commentators have expressed doubt as to the relevance of those criteria, insisting, at least in the field of non-material damage, that the significant factor is the domicile of the victim, which is to be regarded as the place where the damage arose. Mrs Gaudemet-Tallon considers in that regard that the concept of distribution covers both the causal event and the harm itself, the result being that, even though publication may constitute the 'primary' cause, the 'secondary' cause is distribution. Consequently, for the purposes of the choice of jurisdiction, the place in which the victim is domiciled is to be regarded as that in which the damage arose. [35]

43. According to Mr Bourel,

'... that author's classification of the fact of distribution as a "generative act" stretches the bounds of reality somewhat'. [36]

He continues:

'Furthermore, the expression "causal event", substituted for "generative act", is a good illustration of the difficulty in drawing a distinction here between the fact from which the damage originates and the damage itself. It shows, by means of the concept of causality thus introduced, the close link between the two elements making up civil liability and the difficulty in separating them from each other in terms of their spatial connection. If distribution is the final causal act, it

34 — Paragraph 193.

35 — *Revue critique de Droit International Privé*, 1983, p. 674. See also J. Heinrichs: *Die Bestimmung der Gerichtlichen Zuständigkeit nach dem Begehungsort im nationalen und internationalen Zivilprozeßrecht*, 1984, p. 188 to 201; E. Schwiegel-Klein: *Persönlichkeitsrechtverletzungen durch Massenmedien im Internationalen Privatrecht*, 1983, p. 68 to 82.

36 — 'Du rattachement de quelques délits spéciaux', op. cit., p. 356.

must also be by such distribution that the damage is created and assumes concrete form'. [37]

44. In the result, Mr Bourel states that he too is in favour of the attribution of jurisdiction to the courts of the victim's domicile, '... in the sense of ... the place where the tort, taken as a whole, came into being'; in his view, neither publication nor distribution is of any relevance as regards jurisdiction, since they are 'neutral, unclassifiable and thus of no practical application'. [38]

45. However, to sanction that forum would be tantamount to conferring jurisdiction on the *forum actoris*, an attribution to which, as the Court has pointed out on numerous occasions, the Convention is hostile. Thus it observed in its judgment in *Dumez* that

'... the hostility of the Convention towards the attribution of jurisdiction to the courts of the plaintiff's domicile was demonstrated by the fact that the second paragraph of Article 3 precluded the application of national provisions attributing jurisdiction to such courts for proceedings against defendants domiciled in the territory of a Contracting State'. [39]

46. Furthermore, that forum does not appear particularly to meet the requirements of the sound administration of justice, to which the Court has drawn attention in several of its judgments, [40] even though it in fact allows the procedure to be centralized, as, after all, does the forum of the defendant's domicile. The example given by the United Kingdom is particularly apposite, concerning an Italian actor domiciled in England, where he is totally unknown. [41] An Italian newspaper not circulated in England damages his reputation. Even if the courts of the plaintiff's domicile were accepted as having jurisdiction, he could bring proceedings before the English courts without there being any justification for such forum from the standpoint of the sound administration of justice.

47. Finally, it will be noted that none of the legal systems of any of the Contracting States has sanctioned the attribution of jurisdiction to that forum.

48. It is appropriate at this point to concentrate on the spatial separation of the two criteria for jurisdiction as regards the place of damage, namely the place where it arises and the place where the event giving rise to it occurred.

37 — Ibid.

38 — P. 357.

39 — Paragraph 16. See also paragraph 17 of the judgment in Case C-89/91 *Shearson Lehman Hutton* [1993] ECR I-139.

40 — In particular, those in *Tessili* (paragraph 13), *Mines de Potasse d'Alsace* (paragraph 11), Case 266/85 *Shenavai* v *Kreischer* [1987] ECR 239 (paragraph 6) and *Dumez* (paragraph 17).

41 — Written observations, paragraph 20.

49. In *Mines de Potasse d'Alsace*, the separation of those two elements was, from the outset, not in doubt. Furthermore, as the Court pointed out in its judgment in *Dumez*:

'... the judgment in *Mines de Potasse d'Alsace* related to a situation in which the damage — to crops in the Netherlands — occurred at some distance from the event giving rise to the damage — the discharge of saline waste into the Rhine by an undertaking established in France — but by the direct effect of the causal agent, namely the saline waste which had moved physically from one place to another'. [42]

50. In the present case, the Commission and the Spanish and French Governments concur in their view that the event giving rise to the damage occurs in the place of publication of the periodical at issue, and that the damage arises in each of the Contracting States in which, as a result of the voluntary distribution of the text, a person's reputation is harmed. The United Kingdom considers for its part that the place of communication to third parties constitutes that of both the event giving rise to the damage and the damage itself.

51. It will be noted from a simple reference to the judgment in *Mines de Potasse d'Alsace* that the Court emphasized the significance, as criteria governing jurisdiction, of the 'place of the event giving rise to the damage' and the 'place where the damage occurred' [43] in a case in which a causal event gave rise to a *single* instance of damage.

52. In the present case, the situation is more complex, involving as it does a causal event giving rise to *more than one* instance of damage. The harm occurs in the place of the final element making up the tort, that is to say, in the case of torts committed in a newspaper or in radio or television programmes, in each State where the newspaper is distributed or the broadcast programme is received. In objective terms, the place in which the causal event directly giving rise to such damage occurs is that in which the newspaper is published or the programme is broadcast.

53. Damage to a person's reputation and/or honour arises in the various places where a defamatory remark is revealed to third parties. Consequently, the damage becomes apparent when that 'information' is brought into public knowledge; the publication of the newspaper at issue constitutes the vehicle by which it is transmitted. Thus there is clearly a geographical separation between the causal event and the damage.

54. The scheme imposed by the decision in *Mines de Potasse d'Alsace* presents the problem, in relation to cross-border torts committed in the form of newspaper articles, that it gives rise to a multiplicity of competent jurisdictions, with the result that some com-

42 — Paragraph 12.

43 — Paragraph 15.

mentators have proposed the adoption of specific criteria.

55. Thus, according to Lasok and Stone, [44]

'... it is thought that the *Bier* decision does not preclude the eventual adoption of specific rules for particular torts; e. g. a rule that for the purposes of defamation by a single publication, the relevant place is that of the publication to the third person'. [45]

56. Kaye, [46] for his part, states that

'... it is considered that in the context of Article 5(3), when a defamatory statement is uttered, written, broadcast or posted in State A, published in State B and causes damage to reputation in State C (to which news of the publication spread by natural processes), it is the defendant's act in State A which should be held to be the event giving rise to the damage and consequently the harmful event for the purposes of Article 5(3) ...'. [47]

57. It is certainly true that such an approach avoids the multiplication of competent forums, which is one of the purposes of the Convention. However, quite apart from the fact that the principle of proximity cannot justify preference being given either to the courts for the place where the causal event occurred or to those for the place where the damage arose, it is my view, as I stated in my Opinion in *Dumez*, that the exclusion of one of those connecting factors in certain cases and of the other factor in other cases could undermine the consistency of the Court's case-law. [48]

58. Thus, the plaintiff could bring the proceedings, at his option, either before the courts of the defendant's domicile, the courts of the place of the causal event or the courts of the place or places in which the damage arose.

59. The question immediately arises as to the scope of the jurisdiction of those courts, particularly those in whose judicial district an allegedly defamatory text has been distributed.

44 — *Conflict of Laws in the European Community*, op. cit.

45 — P. 232.

46 — *Civil Jurisdiction and Enforcement of Foreign Judgments*, op. cit.

47 — P. 580.

48 — Paragraph 11.

II — Scope of jurisdiction of the courts for the place in which the damage arose

60. Apart, therefore, from the courts of the place where the defendant is domiciled, those of the place of the causal event are competent in respect of the whole of the damage which has arisen, since all such damage originates from the unlawful act. On the other hand, do the courts within whose judicial district damage has arisen have jurisdiction to order compensation for the whole of the damage, including that which has arisen in other States?

61. I have referred above to the position of Geimer and Schütze, and also that of Mr Kropholler, all of whom consider that the courts of the place where the damage arose must necessarily be able to hear and determine claims in respect of the whole of the damage suffered, not only within their own judicial district but also in the territory of other Contracting States. [49] However, Mr Kropholler is at pains to point out the danger of 'forum shopping' inherent in such an approach.

62. By contrast, Mr Lagarde, in an article much commented upon, [50] has expressed the view that

'where an act gives rise to damage *in more than one country*, the courts of the place where that act was committed (in this case the courts of the place of publication) should hear and determine claims in respect of the whole of the damage caused by that act, wherever it may have arisen, since each instance of such damage is connected in its entirety to that act. On the other hand, a court in one of the places where the damage arose can only be competent to hear and determine claims in respect of the harmful consequences of the act in the country in which it sits, since there exists no connection between the damage caused in another country and that court, by virtue of either the place where it arose or the place where the wrongful act was committed'. [51]

63. Support for that view has been expressed by Mr Droz, [52] as well as Gothot and Holleaux. [53] Mr Huet has likewise taken the view, [54] in a note on the judgment in *Mines de Potasse d'Alsace*, that where an unlawful act causes multiple damage in different places,

'the applicant is consequently able to sue in any of the courts in whose judicial district any damage has arisen ...'. [55]

49 — See paragraphs 30 to 32, above.

50 — *Revue critique de droit international privé*, 1974, p. 700.

51 — P. 704.

52 — *Recueil Dalloz Sirey*, 1977, p. 614 to 615.

53 — *La convention de Bruxelles du 27 septembre 1968 — Compétence judiciaire et effets des jugements dans la CEE*, Jupiter, 1985, paragraph 88, p. 49.

54 — *Journal du droit international*, 1977, p. 728.

55 — P. 733. In a more recent article, Mr Huet considers that, with a view to the concentration of actions, the decision in *Shenavai* could be extended to tortious matters, so that the courts of the place where the damage mainly arose would be competent to order compensation for the whole of the damage suffered in the various Contracting States (*Journal du droit international*, 1994, p. 169 to 170).

64. That analysis is shared by most French courts, which do not regard themselves as competent to order compensation for any damage suffered in other Contracting States where the unlawful act has been committed in one of those other States. [56]

65. Whilst the solution advocated by the German authors has the undeniable merit of avoiding a multiplicity of competent forums, it appears primarily to be prompted by a desire to protect the victim, who would thus not be obliged, in order to obtain compensation for the whole of the damage suffered, to sue in each of the courts of the Contracting States in whose judicial district damage had arisen.

66. However, I scarcely need to repeat that both the courts of the place of the causal event and those of the defendant's domicile already constitute two central forums having unlimited jurisdiction.

67. Besides, particularly in cases such as this, where the victim would be able, in practice, to sue in any of the courts of any of the Contracting States, [57] such a solution would appear to conflict with the spirit of the Convention, which certainly does not favour 'forum shopping' but seeks instead to ensure the proper organization of the attribution of special jurisdiction. It is obvious that the victim, confronted with such a system, would be bound to choose the forum in which he felt that he would be best compensated for the damage suffered by him.

68. First, it is clear from the Court's case-law that

'... the "special jurisdictions" enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.' [58]

69. Second, such a solution would encourage the proliferation of concurrent forums. It should be borne in mind, as the Court pointed out in its judgment in *Effer* v *Kantner*, [59] that

'... the Convention provides a collection of rules which are designed *inter alia* to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more Member States and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the national

56 — See the various decisions cited above, footnote 27.

57 — It is undeniable that a newspaper published in one Contracting State is distributed in practically all the other States.

58 — Judgment in *Kalfelis*, cited above, paragraph 19. See also, to the same effect, Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 14.

59 — Case 38/81, [1982] ECR 825.

court territorially best qualified to determine a dispute'. [60]

70. Above all, however, it does not appear to me to form any part of the principles established by the line of decisions commencing with the judgment in *Mines de Potasse d'Alsace*. The courts of the place of the causal event have jurisdiction in respect of the whole of the damage arising from the unlawful act. They therefore constitute, along with the courts of the defendant's domicile, a firm basis of reference in respect of the whole of the damage. By contrast, in a situation such as that in the present case, the jurisdiction of the courts of the places where the damage arises is founded solely on the notion

'... of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the efficacious conduct of the proceedings'. [61]

71. Consequently, the courts of one of the places where damage arose cannot hear proceedings for compensation for damage arising in other Contracting States, inasmuch as there is no element of proximity connecting the forum with the dispute.

72. It cannot be denied that the main problem with such limitation of jurisdiction lies in the proliferation of competent forums and, consequently, in the danger of conflicting — but not irreconcilable — decisions delivered by the courts seised. [62] On the other hand, it is in conformity with many of the objectives of the Convention, as noted by the Court.

73. First, the courts of the place where the damage arises are best placed to assess the harm done to the victim's reputation within their judicial district, and to determine the extent of the damage.

74. Second, the adoption of such a criterion avoids the occurrence of concurrent litigation in different forums. [63] Its effect is that the competence of each of them is restricted to the damage arising within their respective judicial districts.

75. Third, the aim of providing legal protection can only be satisfied if the rules governing jurisdiction are foreseeable, a requirement to which the Court referred in its judgments in *Handte* [64] and *Custom Made Commercial*. [65] The defendant will be in a position to know precisely, on the basis of the place in which the newspapers are distributed, before which court or courts it

60 — Paragraph 6.

61 — Case 21/76, cited above, paragraph 11.

62 — I will revert in paragraphs 97 et seq., below, to the question of the absence of irreconcilability between decisions, within the meaning of Article 27(3) of the Convention.

63 — See paragraph 6 of the judgment in Case 38/81, cited above.

64 — Case C-26/91 [1992] ECR I-3967.

65 — Case C-288/92, cited above.

risks being sued and the pleas on which it may be able to rely in its defence, having regard to the applicable law.

76. Lastly, in this area more than in any other, the restrictive interpretation of the rules of special jurisdiction calls for the solution which I am proposing. It should in that regard be borne in mind, as the Court held in *Kalfelis*,

'... that a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.' [66]

77. It has previously been suggested by me that a claim founded simultaneously in tort, contract and unjust enrichment should be governed exclusively by the rules laid down for contractual matters by Article 5(1), having regard to the need to rationalize jurisdiction and to centralize the proceedings before a single forum. [67]

78. That conclusion results both from the grounds of such a claim, based as they are for the most part on the non-performance of contractual obligations, and on the fact that the court dealing with the contract is best placed to understand its context and its implications as regards legal proceedings. [68]

79. My view in this case does not in any way conflict with that to which I have just referred. In circumstances such as those in *Kalfelis*, the existence of a single court for the contract would allow an *objective* centralization, without any risk of 'forum shopping'. In the present case, on the other hand, that risk would be considerable if, in order to avoid the problem of multiple forums, one such forum could be chosen by the plaintiff with a view to obtaining — for reasons of procedural and substantive legal strategy — compensation for the harm allegedly suffered in the territory of several Contracting States. As I have stated above, it is already possible for proceedings to be centralized in the courts of the defendant's domicile or in those of the causal event. Such centralization should not be additionally obtainable by virtue of any special — and, let me repeat, restrictive — jurisdiction.

80. Thus, to repeat the expression used by Mr Huet, there is certainly a 'fragmentation of international jurisdiction'. [69] He has therefore suggested in a recent article [70] that the

66 — Paragraph 19.

67 — That analysis was maintained in my Opinions in Cases C-89/91 *Shearson Lehman Hutton*, cited above, and C-318/93 *Brenner and Noller* (presently in deliberation).

68 — See paragraphs 27 and 28 of my Opinion in *Kalfelis*.

69 — *Journal du droit international*, 1977, p. 728, 732.

70 — *Journal du droit international*, 1994, p. 169.

Court's decision in *Shenavai* [71] should be applied, by extension, to cross-border torts concerning invasion of privacy.

81. It will be recalled that the Court considered in that case that, where the dispute concerns a number of obligations arising under the same contract,

'... the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale*; in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction'. [72]

82. According to Mr Huet,

'If transposed to matters of tort or delict, and particularly to invasions of privacy resulting from media exposure in several countries, the principle *accessorium sequitur principale* would enable the victim of multiple damage (occurring in the various places where distribution took place) to bring a single action before the courts of the place where the main harm suffered by him arose (such "main" damage not having necessarily arisen in the country where the magazine is published)'. [73]

83. That author therefore seeks, without proposing the abandonment of the traditional criterion of the *locus delicti commissi*, to rectify its effects in situations where to apply it automatically might lead to a fragmentation of jurisdiction between several forums.

84. Attractive though that approach may be, and although the court must ascertain whether it has jurisdiction *ratione materiae*, [74] I do not think that the intention of the Convention was to bind the court's jurisdiction to an assessment of the substance of the dispute; it is based upon an objective, impersonal view of the link of proximity, which cannot vary according to the specific nature of a given case. It may be very difficult, if not impossible, to determine the 'main damage' in the case of international celebrities, particularly when they have no connection, in terms of nationality or residence, with the Community.

85. On the other hand, however, it is in the majority of cases a necessary, if sometimes delicate, task to determine objectively the place where the principal contractual obligation is to be performed.

71 — Case 266/85 [1987] ECR 239.
72 — Paragraph 19.
73 — See the references in footnote 70 above, p. 171.
74 — See paragraphs 104 et seq., below.

86. Indeed, that approach was suggested by some of the interveners in *Mines de Potasse d'Alsace* and rejected by Advocate General Capotorti as follows:

'It would also be difficult to reconcile adoption of a criterion of the "most significant connection" with the intention of the Convention to make it easy to determine the court having jurisdiction, on the basis of clear, precise and sufficiently objective criteria which could thus be applied uniformly in all the States adhering to the Convention. In this respect insufficient assurances are afforded by a criterion, such as that referred to above, which does not lend itself to abstract definition and which tends to rely upon the subjective appraisal of the court.' [75]

87. Moreover, we appear here to be 'on the fringes' of civil matters, so that it seems preferable to adhere, within certain limits, to the concept of territoriality.

88. Furthermore, it was that concept which prompted those drafting the Community Patent Convention to insert in it Article 69(2), worded as follows:

'Actions for infringement of a Community patent may also be heard before the courts of the Contracting State in which an act of infringement was committed. The court hearing the action shall have jurisdiction only in respect of acts of infringement committed within the territory of that State'.

III — The concept of damage, the standard of proof and the consequences of allowing a plurality of forums

- A -

89. In asking the second, fourth and fifth questions, the national court seeks guidance as to the existence of damage where the law applicable to the tort or delict (English law in the present case) does not require the person claiming to be the victim of defamation to prove, first, that he or she was known to certain readers and, second, that he or she suffered actual harm, such harm being, as we have seen, presumed.

75 — P. 1755.

90. I have already drawn attention to the independent nature of the concept of 'matters relating to tort, delict or quasi-delict', as identified by the Court in its judgment in *Kalfelis*. Since an attack on the reputation of another person constitutes a 'harmful event' within the meaning of Article 5(3), and given the broad scope of that provision, any action which seeks compensation for damage resulting from the breach of a legal obligation other than one arising from the existence of contractual relations between the parties must be regarded as falling within its ambit. [76]

91. Is it necessary, however, to go beyond that somewhat general definition, and to specify the factors constituting the damage? That is the question to which the House of Lords seeks an answer.

92. Neither the Commission nor the interveners have sought to maintain that, for the purposes of the uniform application of the Convention, there was any need to unify the substantive law relating to tortious liability.

93. That is my view also, since the objective of the Convention is to allocate *jurisdiction* consistently amongst the courts of the Contracting States and not to unify the rules concerning the substantive law.

94. That is also the prevailing view amongst academic writers, particularly Mr Kaye, who states:

'... no effort should be made, as part of the attempt to develop a uniform Convention concept, to define whether particular *facts* are to be held to give rise to tortious liability or not, since it is not the function of the European Court, in drawing up such a definition, to stipulate whether tortious or any other form of liability *ought* to exist in a particular fact situation and reference must always be made to the applicable national law in order to determine the characteristics of the liability, if any, which is the subject of the national court proceedings ...'. [77]

95. It is for the national court alone, therefore, to determine, in accordance with the law applicable to the tort or delict, the circumstances in which damage arises.

96. The same applies in relation to the applicable procedural rules. I would merely draw attention in that regard to the Court's judgment in *Kongress Agentur Hagen*, [78] in which it stated:

'... the object of the Convention is not to unify procedural rules but to determine

76 — See also in this regard footnote 1 to the Opinion of Advocate General Jacobs in *Handte*.

77 — Op. cit., p. 564.

78 — Case C-365/88 [1990] ECR I-1845.

which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments. It is therefore necessary to draw a clear distinction between jurisdiction and the conditions governing the admissibility of an action'. [79]

- *B* -

97. In asking the sixth question, the House of Lords seeks to know whether its decision to accept jurisdiction must be subject to the absence of any risk that the courts of another Contracting State, which also have jurisdiction, may arrive at a different solution.

98. As I have already stated, the jurisdiction of the courts of a Contracting State in which damage arises is limited to that part of the damage which occurred within their judicial district; consequently, where two courts are called upon, following the occurrence of the same causal event, to hear a claim for compensation for the damage, they do not have concurrent jurisdiction.

99. Article 22, relating to cases where jurisdiction is declined on the grounds of connexity, stipulates jurisdiction of that type as a condition of its application, and is consequently inapplicable. Mrs Gaudemet-Tallon states in that regard, moreover:

'If it is accepted that the courts of the place where damage occurs do not have jurisdiction in respect of any other damage arising from the same causal event but occurring in another Contracting State, Article 22 does not fall to be applied'. [80]

100. Does there not exist, however, the risk that irreconcilable decisions may be given, within the meaning of Article 27(3) of the Convention, where certain courts are prepared to uphold the compensation claim whilst others, by contrast, find against the victim?

101. I do not think so, in so far as the condition of irreconcilability identified by the Court in its judgment in *Hoffmann* v *Krieg* [81] is not met. In that judgment, the Court held that

'in order to ascertain whether the two judgments are irreconcilable within the meaning

79 — Paragraph 17.

80 — Paragraph 197. See also, to the same effect, Gothot and Holleaux, op. cit., paragraph 226.

81 — Case 145/86 [1988] ECR 645.

of Article 27(3), it should be examined whether they entail legal consequences that are mutually exclusive'. [82]

102. The Court found in that judgment that a decision ordering a husband to pay maintenance to his wife was irreconcilable with a decision given in another Contracting State pronouncing the divorce. The present case does not fall within that hypothesis, and even though the decisions given might be regarded as contradictory, they would not be irreconcilable.

103. The recognition of its jurisdiction by the court of the place where the damage arises cannot be compromised on the ground of a risk of conflict between the decision to be given by it and that of a court in another Contracting State which has jurisdiction to order compensation for the damage occurring within its judicial district.

- C -

104. I now turn, lastly, to the seventh question, relating to the standard of proof required of the plaintiff in order to enable the national court to decide whether it has jurisdiction under Article 5(3).

105. The influence of the substance of a dispute on the determination of jurisdiction has previously been analysed by the Court in the case of *Effer*, [83] which concerned Article 5(1) and in which the defendant contested the existence of contractual relations.

106. In his Opinion, Advocate General Reischl considered that

'If it were to be accepted that the presence of a dispute over the existence of a contractual relationship *ipso facto* excludes an action under Article 5(1) of the Convention, then it would be possible by a simple denial on the part of the defendant to render that provision largely ineffective, as well as that in Article 5(3) — jurisdiction in matters relating to tort — where indeed the defendant's defence as a rule consists of denying the existence of a tort'. [84]

107. The Court held that

'... the national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the

82 — Paragraph 22.

83 — Case 38/81, cited above.

84 — P. 838.

constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction under the Convention'

and that

'... respect for the aims and spirit of the Convention demands that that provision should be construed as meaning that the court called upon to decide a dispute arising out of a contract may examine, of its own motion even, the essential preconditions for its jurisdiction, having regard to conclusive and relevant evidence adduced by the party concerned, establishing the existence or the inexistence of the contract'. [85]

108. Thus, a dispute as to the existence of a contract does not preclude jurisdiction under Article 5(1), even if the court is prompted, for the purposes of determining its own jurisdiction, to examine substantive issues.

109. What is involved here is the application of the hallowed rule that it is for each court to determine its own jurisdiction.

110. The outcome is necessarily the same where a court before which proceedings are brought pursuant to Article 5(3) has to give a ruling on an objection of lack of competence raised by a defendant denying the existence of the tort. In order to be able to rule on that objection, the court has to verify, on the basis of the evidence adduced by the plaintiff, whether the defendant did or did not commit an act which might render him liable and giving rise to damage within the judicial district of the court.

111. I am accordingly of the opinion that the questions referred to the Court should be answered as follows:

'In the case of defamation by a newspaper article circulated in more than one Contracting State, Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning that the plaintiff may sue either in the courts of the place of publication, which have jurisdiction to order compensation for the whole of the damage arising from the unlawful act, or in the courts of the places where the newspaper is distributed, which have jurisdiction solely in respect of the damage arising, according to the law applicable to the tort or delict, within their judicial district.

85 — Paragraph 7.

The jurisdiction of any of the courts seised by reason of the damage suffered is not affected by the risk of conflicting decisions which may result from the multiplicity of courts having jurisdiction.

The fact that the defendant contests the existence of the factors constituting the tort or delict alleged by the plaintiff cannot in itself deprive the national court of its jurisdiction under Article 5(3).'