On those grounds,

THE COURT

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the applicants to pay the costs.**

Mertens de Wilmars O'Keeffe Everling Chloros

Pescatore Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 October 1982.

For the Registrar

H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 5 OCTOBER 1982 [1]

Mr President,
Members of the Court,

1. May I first briefly summarize the facts of this case. By two decisions of 30 July 1980 — which were confirmed on 28 July 1981 after being suspended for a short period — the Minister of Justice of the Grand Duchy of Luxembourg refused Miss M., who wat that time was a Portuguese citizen, permission to enter and reside in the Grand Duchy and

1 — Translated from the Italian.

withdrew her alien's identity card. Miss M. was then obliged to leave Luxembourg; but in October 1981 she returned in order to contract marriage with an official of the European Parliament residing in Luxembourg, Mr. D., a Belgian citizen. Immediately afterwards, Mrs D. (née M.) elected to adopt the nationality of her husband. Having been informed of these events the Luxembourg authorities, by a decision of 3 December 1981 which was confirmed on 10 December 1981, again refused to grant a residence permit to Mrs. D. and rejected her lawyer's request that the refusal to allow her to enter and reside in Luxembourg and likewise the withdrawal of her identity card should at least be suspended.

On 4 January 1982, Mr D. and his wife brought an action before this Court against the Grand Duchy of Luxembourg, claiming that the measures taken against Mrs D. were contrary to Article 122 (b) of the Protocol on the Privileges and Immunities of the European Communities (adopted by the Member States pursuant to Article 28 of the Brussels Treaty of 8 April 1965 on the merger of Community institutions). I should point out that pursuant to Article 12 (b) neither officials or other servants of the Community, nor their spouses or dependent members of their families are subject to immigration restrictions or to formalities for the registration of aliens in the territory of the Member States.

The defendant State has objected that the application is inadmissible on the ground that the Court lacks jurisdiction. That objection is based on the argument that the Protocol on the Privileges and Immunities of the European Communities now in force, by contrast with the previous European Coal and Steel Community Protocol, does not enable individuals to refer any disputes as to its interpretation and application directly to the Court.

The Court has decided to deal with the matter of admissibility separately from the substance of the case. The oral procedure (on 14 September 1982) was therefore limited to that aspect, to which this opinion will also be confined.

2. The Treaty establishing the European Coal and Steel Community was accompanied by a Protocol on the Privileges and Immunities of the Community, Article 16 of which (in Chapter 6, General Provisions) provided as follows: "Any dispute concerning the interpretation or application of the present Protocol shall be submitted to the Court." The manifestly wide nature of that provision enabled the Court to state in its judgment of 16 December 1960 in Case 6/60 *(Humblet* v *Belgian State* [1960] ECR 559) that an individual is empowered to bring an action in his own name before the Court of Justice to protect the rights conferred on him by the Protocol, notwithstanding the fact that no provision of the ECSC Treaty allowed individuals to have recourse direct to the Court of the Communities in the event of an alleged infringement of the Treaty by a Member State (cf. the passage in the judgment cited above regarding the admissibility of the application, [1980] ECR 559, at p. 570 *et seq.).*

The later Treaties establishing the EEC and the European Atomic Energy Community were also accompanied by Protocols (of identical content) on privileges and immunities. In them the text of the ECSC Protocol was expanded and revised, but no provision equivalent to the said Article 16 was included, or

indeed any provision regarding the setlement of disputes. In 1965, the Treaty establishing a Single Council and a Single Commission of the European Communities expressly repealed the three Protocols on Privileges and Immunities (in the second paragraph of Article 28), substituting a single Protocol for them. That Protocol — which, moreover, is almost entirely modelled on the EEC and EAEC Protocols — likewise contains no provision corresponding to Article 16 of the ECSC Protocol or specifically governing the jurisdiction of the Court in disputes concerning the interpretation or application of the Protocol. These circumstances, in my opinion, clearly indicate what when the EEC and EAEC Treaties were signed the Member States intended to ensure that the Protocols on Privileges and Immunities did not alter the scope of the Court's jurisdiction, as provided for in those Treaties (Articles 169 and 186 of the EEC Treaty and Articles 141 to 158 of the EAEC Treaty). There is also justification for saying that when the Brussels Treaty of 1965 was signed, it was the intention of the contracting parties that the single Protocol on Privileges and Immunities annexed thereto should not in any way change or add to the jurisdiction of the Court, as provided for in the relevant provisions of the three treaties establishing the Communities.

3. The applicants, whilst noting the lack of any provision similar to that of the repealed Article 16 of the EAEC Protocol, maintain that a direct action may be brought by an individual against a Member State for infringement of the single Protocol on Privileges and Immunities now in force by virtue of Article 30 of the Brussels Treaty of 1965 on the merger of the Community institutions. That provision states: "The provisions of the Treaties establishing the European Economic Community and the European Atomic Energy Community relating to the jurisdiction of the Court of Justice and to the exercise of that jurisdiction shall be applicable to the provisions of this Treaty and of the Protocol annexed thereto, with the exception of those which represent amendments to Articles of the Treaty establishing the European Coal and Steel Community, in respect of which the provisions of the Treaty establishing the European Coal and Steel Community shall remain applicable." The applicants appear to think that, since the provisions of the EEC Treaty relating to the jurisdiction of the Court are applicable to the Protocol on the Privileges and Immunities, they may deduce from Article 164 of that Treaty the principle that the Court has "general jurisdiction" and rely upon it to exercise a right of action against the Member State which they charge with infringement of the Protocol.

That view is without foundation. It is clear that the first part of Article 30 is intended solely to extend to the Merger Treaty and to the Protocol annexed thereto the provisions governing the jurisdiction of the Court contained in the EEC and EAEC Treaties. In other words, the rules governing the jurisdiction of the Court laid down in those provisions apply also — in their entirety and without amendment — to disputes concerning the interpretation and application of the Brussels Treaty of 1965 and of the Protocol on the Privileges and immunities of the European Communities. However, those provisions do not state that an individual

may bring a Member State before the Court for infringement of a Community provision. Therefore, the applicants were obliged to rely (in particular in their oral submission) on Article 164 of the EEC Treaty, endeavouring to infer from that the existence of a principle that the Court has general jurisdiction. The attempt is a vain one, however. It is a well-known fact that Article 164 concerns the function attributed to the Court, which is to ensure observance of the law in the interpretation and application of the Treaty, whilst its jurisdiction is governed by Article 169 *et seq.*, and there is no doubt that the exercise of the Court's function is confined within the limits laid down by the rules governing its jurisdiction.

It is appropriate at this stage to clarify the scope of the exception contained in the second part of Article 30 of the Merger Treaty. It applies to the provisions of the Merger Treaty itself and to those of the Protocol annexed thereto which "represent amendments" to articles of the ECSC Treaty; the rules on jurisdiction in the ECSC Treaty remain applicable to such provisions. In order to understand that exception, it should be borne in mind that *inter alia* the Merger Treaty supplemented and replaced certain provisions of the ECSC Treaty (and of the Statute of the Court of Justice annexed thereto): consider, for example, Article 8 (2) and (3), Article 21 and Articles 26 and 27. They were drafted as amendments to the ECSC Treaty and therefore became part of the text of that Treaty. That is why in disputes on the interpretation and application of those provisions of the Merger Treaty questions as to the Court's jurisdiction must be resolved by applying the rules on jurisdiction in the ECSC Treaty.

None of the foregoing in any way affects the solution of the problem with which the Court is concerned. The removal of Article 16 of the Protocol on the Privileges and Immunities of the ECSC was not brought about by means of a specific provision in the new sole Protocol, nor did it represent an amendment to the ECSC Treaty; the latter merely provided, in Article 76, that the European Communities were to enjoy privileges and immunities "under the conditions laid down in the Protocol" annexed to the Treaty, and Article 28 of the Merger Treaty repealed both Article 76 and the Protocol annexed to the ECSC Treaty. The repeal of Article 16 of the latter treaty was the consequence of the entry into force of the new sole Protocol, but the content of that Protocol was not in fact incorporated into the ECSC Treaty (as the Commission rightly pointed out in its observations).

On the other hand, we have seen that where the exception introduced by the last part of Article 30 of the Merger Treaty applies, the rules on jurisdiction in the ECSC Treaty are applicable. Among those rules there can certainly not be included Article 16 of the ECSC Protocol on Privileges and Immunities, which formed part of a legal instrument repealed by the Merger Treaty (in that respect my opinion coincides with that expressed by Mr Advocate General Gand in his Opinion of 29 January in Case 23/68 *Klomp*, [1969] ECR 43, at p. 52). The conclusion must therefore be that no rule on jurisdiction contained in the ECSC Threaty enables an individual to bring an action against a Member State when be considers that he has suffered by reason of an infringement of the Treaty. In fact, the result is no different from that which would be arrived at by

application of the rules on jurisdiction contained in the EEC and EAEC Treaties as regards the Court's lack of jurisdiction to adjudicate in disputes of the kind described earlier between individuals and Member States.

4. The applicants also referred to the judgment of the Court of 25 February 1969 in Case 23/68 *(Klomp* [1969] ECR 43) and cited the following passage of the decision: "In accordance with a principle common to the legal system of the Member States, the origins of which may be traced back to Roman law, when legislation is amended, unless the legislature expressed a contrary intention, continuity of the legal system must be ensured" (paragraphs 12-14 of the decision). From that principle of continuity the applicants wish to infer that the right of individuals to bring actions against Member States before the Court for infringement of the Protocol on the Privileges and Immunities of the European Communities has survived; they assert that: "the legislature has certainly not expressed any intention to do otherwise than to maintain the Court's jurisdiction regarding interpretation of the Protocol, indeed, the provisions of Article 30 of the Merger Treaty have the opposite effect" (observations of 18 March 1982, p. 7). But that argument cannot be upheld.

Nobody disputes the fact that the Court is empowered to interpret the Protocol on Privileges and Immunities; the problem to be settled concerns the types of procedure in which the Court has jurisdiction. The Commission has rightly pointed out that three types of procedure may be considered, namely those provided for in Articles 169, 177 and 179 of the EEC Treaty: that is to say, an action by the Commission against a Member State charged with an infringement of the Protocol, a reference for a preliminary ruling from a national court and a dispute between an official and the administration where the official charges the administration (as Mr D. appears to have done in this case) with failure to comply with the so-called duty to provide assistance, by reason of the fact that a privilege or immunity conferred upon him has been breached.

The view that the Member States wished to retain the remedy accorded by way of exception to individuals by Article 16 of the old ECSC Protocol is to be firmly resisted, however. In that regard, I have already had occasion to state that the absence of any equivalent rule in the EEC and EAEC Protocols, and subsequently the lack of any provision of a similar nature in the single Protocol on the Privileges and Immunities, clearly shows that the Member States intended to do away with that remedy, a fact which may be explained by reference to the possibilities offered by Articles 169, 177 and 179 of the EEC Treaty which I mentioned earlier.

Finally, as regards the principle of continuity referred to in the *Klomp* judgment it is important not to lose sight of the circumstances surrounding that case. The Court was called upon to give a preliminary ruling on a question submitted by a national court on the interpretation of a rule in the Protocol on the Privileges and Immunities of the ECSC which was applicable at the time of the facts of the case; but when the ruling came to be delivered the Protocol had already been repealed and therefore it was no longer possible to rely on Article 16 as the basis for the Court's

jurisdiction in the procedure for obtaining a preliminary ruling on interpretation (which, as is known, is not provided for in the ECSC Treaty). It was emphasized in the decision in *Klomp* that the procedure provided for in Article 16 of the ECSC Protocol and the procedure for obtaining preliminary rulings provided for in the EEC and EAEC Treaties, which is applicable to the new Protocol by virtue of Article 30 of the Merger Treaty, had the same purpose ("to ensure a uniform interpretation and application of the provisions of the Protocol in the six Member States": see the judgment cited earlier, paragraph 12 of the decision). On that basis, and in the light of the principle of continuity of legal institutions, the Court decided that it had jurisdiction. Therefore, the principle of continuity served to enable the new rules governing the Court's jurisdiction in disputes on the interpretation and application of the sole Protocol to be applied likewise to a dispute which arose when Article 16 of the ECSC Protocol was in force (the question resolved was essentially which law applied during a period of transition). In the present case, however, the applicants wish the rule of jurisdiction contained in Article 16, which has long since been repealed, to be applied to a dispute which falls entirely within the scope of the new rules on jurisdiction governed by Article 30 of the Brussels Treaty of 1965. Since the two situations are radically different, the *Klomp* judgment cannot be regarded as a legal precedent capable of providing support for the applicants view.

5. During the course of this action there has also been discussion as to whether the applicants may have recourse to remedies provided for by national law and obtain from the competent national court a reference for a preliminary ruling on the interpretation of the Community provision relied upon. This Court's decision must not, of course, turn upon the difficulties with which the applicants may possibily find themselves confronted. However, I should like to make two brief remarks. On the one hand there is no doubt (and it is clear from the decisions of this Court) that the Member States are obliged to place at the disposal of individuals adequate means of ensuring legal protection of the rights conferred upon them by Community law (see the judgment of 19 December 1968 in Case 13/68, *Salgoil* v *Ministero del Commercio con l'Estero* [1968] ECR 453). In the event of a State's failing to discharge that obligation, it would be the responsibility of the Commission to initiate proceedings against that State on the basis of the provisions laid down for that purpose in each of the three Treaties establishing the Communities. On the other hand, however, the choice of the appropriate legal remedy at the appropriate time is the responsibility of the individual, who must not disregard the existence of limitation periods in any legal system. The old Latin maxim *"Vigilantibus iura succurrunt"* still applies!

6. I conclude by proposing that the Court declare the action brought on 4 January 1982 by Mr and Mrs D. against the Grand Duchy of Luxembourg inadmissible. The applicants should be ordered to pay the costs.