Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Atomic Energy Community, especially Articles 150, 151 and the second paragraph of Article 188;
Having regard to the Protocol on the Statute of the Court of Justice of the European Atomic Energy Community, especially Article 21;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Belgian Cour de Cassation, by judgment of that court dated 17 February 1969, hereby rules:

The phrase 'the performance of their duties' in the second paragraph of Article 188 of the EAEC Treaty, does not, in principle, include the use by servants of the Community of their private cars in the course of their employment.

Lecourt Trabucchi Mertens de Wilmars

Donner Strauß Monaco Pescatore

Delivered in open court in Luxembourg on 10 July 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 1 JULY 1969[1]

Mr President,
Members of the Court,

This is the second time that the road accident caused by Mr Sayag, an engineer at Euratom, has led you, on reference from the Belgian Cour de Cassation, to interpret certain provisions of Community law. When criminal proceedings were brought against him in the Belgian courts, Mr Sayag claimed the immunity from legal proceedings open, by virtue of Article 11(a) of the Protocol on the Privileges and Immunities of the EAEC of 17 April 1957, to the servants of that Community 'in respect of acts performed by them *in their official capacity*'. He claimed that he was acting in this capacity when, in possession of a travel order which pro-

1 — Translated from the French.

vided for the use of his private car, he was driving from Brussels to Mol accompanied by two servants of private firms whom he was to take to visit the installations of the Joint Nuclear Research Centre.

When questioned by the Belgian Cour de Cassation on the scope of this provision of the Protocol, you replied in your judgment of 11 July 1968 (*Sayag* v *Leduc*, Case 5/68, Rec. 1968, p. 575) that the immunity applied exclusively to acts which, by their nature, represent a participation of the person claiming immunity in the performance of the tasks of the institution to which he belongs. You added that, more especially, driving a motor car is not in the nature of an act performed in an official capacity save in the exceptional cases in which this activity could not be accomplished otherwise than under the authority of the Community and by its own servants.

It was clear that the case did not simply raise a question of immunity from criminal proceedings, but also one of third party liability between the person responsible for the accident and the victim, as well as their respective insurers.

For this reason you added to your reply to the question submitted the observation that the designation of an act with regard to the immunity from legal proceedings, and any decision taken with regard to waiver of the immunity, did not prejudge any liability on the part of the Community, 'this being governed by special rules designed for a purpose separate from that of the provisions of the Protocol on the Privileges and Immunities'.

Your judgment led the Cour de Cassation to dismiss the appeal against the criminal proceedings. However, it then had to consider two applications against the judgment given in the civil actions against both the person responsible for the accident and his insurer, the Zurich Insurance Company. It was maintained on the basis of the EAEC Treaty that the Community was alone liable to third parties for damage caused by its servants in the performance in their duties, and that your Court alone had jurisdiction in disputes relating to the compensation for such damage. Alternatively, if the servant were liable for damage caused to third parties in such circumstances, this liability must be assessed, like that of the Community, 'in accordance with the general principles common to the laws of the Member States' and also fell within your jurisdiction.

It is in these circumstances that, by judgment of 17 February 1969, the Cour de Cassation requests you to interpret the phrase 'in the performance of their duties' used in Article 188 of the EAEC Treaty. In addition, where an act giving rise to a claim for damages had been committed in the performance of his duties by a servant who was not acting in his official capacity, it asks you whether such an act renders the official concerned personally liable or whether his liability is absorbed by that of the Community. Finally, it asks you, if it is necessary, to specify the law applicable to an action for liability against the servant and his insurer and the court having jurisdiction to entertain such action.

In its two aspects, this last question is contingent and secondary in nature. I consider, however, that the Cour de Cassation was right to submit it to you at this stage, not only because it arises logically out of the first questions, but also because the consideration of difficulties to which it gives rise may to some extent indicate the answer to be given to the main questions. We are in an area in which you will necessarily be creating new case-law and although it is neither possible nor desirable to propound, in relation to this particular case, a general theory concerning the extra-contractual liability of the Communities, the future developments which may be implied by the solutions which you will find today must be borne in mind.

I

The first question refers to the only two Articles of the EAEC Treaty which deal with the extra-contractual liability of the Community and for which exactly corresponding Articles are to be found in the EEC Treaty.

1. First, the second paragraph of Article 188 provides that, in the case of non-contractual liability, the Community shall, *in accordance with the general principles common to the laws of the Member States,* make good any damage caused by its institutions or *by its servants in the performance of their duties.* Secondly, Article 151 gives you jurisdiction in disputes relating to the compensation for damage provided for in the second paragraph of Article 188.

The questions as to which the court has jurisdiction and what substantive law is applicable were thus closely linked by the authors of the Treaty, since they are justified on the same grounds. The reasons which explain why, as a general rule, the Community is not subject to national law and to the jurisdiction of the national court are clear. First, it is necessary to ensure its independence; its activities must not be curbed by the obligation to submit to the law of a State whose preoccupations may justifiably be different from those of the Community, and a foreign court must not determine how it shall function. Secondly, it is necessary to ensure legal certainty through the uniformity of the law applied. But it must also be remembered that, subject to the powers vested in the Court, disputes involving the Community are not removed from the jurisdiction of national courts. Similarly, its activities may be made subject to national law if the Treaty does not decide otherwise, or if the requirements of the purpose and proper functioning of the institutions are no obstacle thereto. In the neighbouring field of contracts your jurisdiction is subject to the existence of an arbitration clause (Article 153) and the contractual liability of the Community is governed by the law applicable to the contract, which may be that of a Member State or even that of a third State (first pargraph of Article 188).

When referring to the question of non-contractual liability the Treaty lays down a double rule:

— as regards its scope, this liability concerns not only damage caused by its institutions but also that caused 'by its servants in the performance of their duties'; it is on this latter aspect that an interpretation is requested.

— as regards the principles which govern non-contractual liability, reference is made to the general principles common to the laws of the Member States.

2. Of what do these principles consist and to what extent are they able to guide you?

In a careful study of the question by the International Law Commission of the Union Internationale des Magistrats, Mr Advocate-General Dumon[1] recalled that the rather similar concept of general principles of law was as well-known in national law as in international law. In national law a general principle is an idea or an ethic 'which has been applied by law and case-law on one or more occasions and which will be applied in the future, in the light of new or different circumstances'. In international law it is accepted that a general principle, even if it be found in the laws of all the nations which form the Community of States, will not be applied if it does not fit into the pattern of the international legal system. Similarily, in the opinion of Mr Dumon, a general principle common to the laws of the Member States must remain outside the Community legal system if the situation

1 — La responsabilité extracontractuelle des Communautés Européennes et de leurs agents, *Cahiers de droit européen,* 1969, p.37 et seq.

is governed by a norm or a principle belonging to this system which is independent of or different from these principles.

In fact, although it is universally accepted that the reference in the Treaty clearly cannot concern situations of matters of positive law but rather the concepts on which these solutions are based, doubts may arise regarding its scope and its effectiveness. This concept cannot be understood as being the highest common factor or even the synthesis of the fundamental principles accepted in the Member States. Mr Advocate-General Lagrange used to observe that the only truly common legal principle is that which nowadays disapproves in all Member States of the doctrine of the non-liability of the state and that in other respects the systems are sometimes fundamentally different. He considered Article 188 to be merely a diplomatic formula, often to be found in international treaties, which is significant only to the extent to which it refers to certain principles of equity which are normally found in a State governed by the rule of law.[1]

If this is the case, the principle role finally reverts to you: it is for you to describe the limits of non-contractual liability by comparing the examples provided by the laws of the Member States with the characteristics and requirements of the Community.

In fact, when you were requiried to make a decision on this question in relation to the activities of an institution, you made no allusion to the general principles common to the laws of Member States. Your judgment in the Kampffmeyer case of 14 July 1967 (Joined Cases 5, 7 and 13 to 24/66, Rec., 1967, p. 318) acknowledges the liability of the EEC arising out of the unlawful act of the Commission which maintained in force a protective measure adopted by the Government of the Federal Republic of Germany. You considered such conduct to constitute a wrongful act or omission (the term is used in your judgment although, unlike Article 40 of the ECSC Treaty, it does not appear in Article 215 of the EEC Treaty and Article 188 of the EAEC Treaty). This case concerned the Commission's misuse of its power to take decisions, it concerned a legal measure and what, in the laws of certain Member States, is known as the 'anonymous' wrongful act or omission which cannot be associated with the activities of any specific person.

Here, on the other hand, for the first time since the establishment of the Court of Justice of the ECSC, we are dealing with a physical act which caused damage and which may definitely be imputed to a servant of the Community. Although Article 188 provides that such an act may impose a liability on the Community when it is done by a servant in the performance of his duties, it remains to be seen what must be understood by this expression and to discover first of all what solutions have been adopted by the laws of the Member States.

On this point the Commission produced in its observations an extremely detailed survey, and it will be sufficient to consider the principal conclusions which may be drawn therefrom.

— The first conclusion is that the laws of most of the Member States freely accept that liability for the act of a servant which gives rise to a claim for damages may be imputed to the administration to which he is responsible, either by applying the rules of private law to the public authority, or by virtue of a separate and independent principle. So far as it is possible to describe it in outline, liability is incurred under Italian law by an act which 'may be attributed to the public authority for which the servant is acting', even if this act is fraudulent. In the Netherlands it is an

1 — The non-contracual liability of the Community in the ECSC and in the EEC, *Common Market Law Review*, 1965-1966, p.32.

act which 'is connected with his duties in that it was done in the performance of a task entrusted to a servant, or by using the means available to him by reason of his office'. In Belgium it is an act 'which the servant had the power or the duty to perform'. In France, where the solutions to this problem are perhaps the most comprehensive, it is an act 'which is not wholly devoid of any connexion with official duties'. German case-law, on the other hand, is more restrictive: for the act of a servant which causes damage to be considered as done in the performance of his duties and as involving the public authority in liability, there must be an internal connexion between the act and his duties ('innerer Zusammenhang') which shows the act and the performance of the duties to be necessarily indissociable. In order to determine whether such internal connexion exists it is necessary to discover whether the object of the act is inherent in the performance of the task and whether this object and the action which caused the damage are indissolubly linked. Subject to this reservation, and it is an important one, national laws, or at least the application of them in practice, give a liberal interpretation to the concept of 'the performance of duties'. Perhaps we must see in this practice a desire to ensure that the damage caused is at any rate made good by laying responsibility for it on a legal person who, unlike the person who performed the act, is by definition solvent.

— The second observation arising out of this survey—which brings me to the case which led the Cour de Cassation to refer the question—is that road accidents represent an important section of the case-law concerning the liability of a public authority. This is not surprising, since the administrations of the Member States include a large number of civil or military service departments which require the use of vehicles. The decisions of the courts however, relate in particular to accidents caused by vehicles belonging to the civil administration or the army. This is, however, not always the case because, at least in French law, instances are to be found in which it has been accepted that the State has incurred liability as the result of an accident caused by the private car of an officer who had been authorized to use it for official purposes (Bourrée, C.E., 26 July 1944, Rec. Lebon, p. 217).

— The third observation is on a different level and is as follows. The ever-growing use of motor vehicles results in the introduction of new legislation or regulations which deal specifically with this field. In this respect nothing is more significant than the French law of 31 December 1957 on actions for damages in respect of injury caused by vehicles which are brought against legal persons governed by public law. This law deliberately departs from all the principles of French administrative law and gives the courts exclusive jurisdiction in such actions, which it requires to be decided in accordance with the principles of civil law. At a time when compulsory motor vehicle insurance is becoming more widespread, the majority of the Member States are concerned to prevent public authorities from becoming liable to make good damage caused by the use of private cars on official business and, to this end, impose an obligation on the servant either to insure against third party liability, including the liability of the State, or to relieve the State of liability for any action for damages. On this point, which must only be seen as an indication of a trend, I refer to the survey produced by the Commission in a schedule to its observations.

3. Having drawn this general picture I must now return to Article 188. In what cases must an official of the Community be regarded as acting 'in the performance of his duties'? More precisely, since this is what gave rise to the reference, what is the position in the case of an accident caused by an official who

was using his private car for official journeys?

In order to justify its point of view the Commission, by a rather extraordinary approach, begins with a consideration of the practice followed by the institutions which it considers satisfactory to the extent that the practice appears neither to hurt judicial feelings nor to offend the sense of justice of either those responsible for the damage or their victims; it then proceeds to review the legal foundation of the solutions thus found. Although the practice followed is not a factor which can be neglected, I consider that the opposite approach must be adopted. It is the rules of the Treaty and the situations with which they are intended to deal, as well as the special nature of the Community, which must determine the extent to which it shall be held liable for the acts of its servants and the conditions under which such servants must be regarded as acting in the performance of their duties. I have just said that the Community—and among its institutions your Court—has powers which, however far-reaching they may be, are none the less 'conferred'. The texts which concern these powers must, therefore, receive, if not a restrictive interpretation, at least an interpretation which has regard for the independence of the Community and the States alike and holds the balance fairly between them.

Both your jurisdiction and the Community's involvement in liability on the basis of its own rules are necessarily fully justified when the damaging consequences of the legal measures whereby the Community manifests its power are at issue. To return to the example of the Kampffmeyer case, it would be inconceivable for the EEC to be declared liable (or not liable) according to German law for the damage caused to the importers of that country by the improper decision of the Commission, or for such damage to be assessed by a German court. These are measures which are binding on the Community and can only be considered according to Community law.

The situation may be different when one is dealing with physical acts connected with the running of its departments. Let me leave aside the point, which may be very important in the case of Euratom, of damage caused by nuclear installations; nuclear risk is the the subject of international conventions which are as yet incomplete and raises delicate problems as regards the competent court and the law applicable.[1] On the more day-to-day level of the running of the departments, the actions of officials which give rise to a claim for damages cannot give rise to liability on the part of the Community except to the extent that a more or less close connexion, which must be defined, exists between such acts and the performance of the official's duties.

Taking into account the nature of the Community whose functions are primarily advisory, administrative and supervisory, I consider that this connexion must be well established. One cannot accept purely external links based on coincidence or concomitance and it is not sufficient that the act which gives rise to the claim for damages takes place during employment or in the place of employment, that is, during the performance of duties. A direct, internal link must exist between this act and the performance of the duties.

From this point of view what is the position as regards an accident caused by a servant driving his private car on a journey or on a mission? It appears that the reply must be that *normally* it does not render the Community liable, since no direct link exists between the act giving rise to the claim for damages and the servant's duties. Certainly the servant is obliged to carry out his mission and must first get to the place

1 — Third congress of the Fédération internationale pour le droit européen. *Bulletin des juristes européens* No 25-26.

where it is to be performed, but if he uses his car for this purpose, he does so by virtue of a free choice, for personal reasons which are not related to the requirement of the service.

It must, in fact, be accepted that in the absence of any express provision to the contrary, an official can never be compelled to use private means in carrying out his mission; in particular, to get to the place involved in the performance of his mission he must be able to use service vehicles or public transport. I consider that on this point the Commission's argument is correct and is sufficient to dictate the solution to this problem without any need to stop to consider the other arguments which have been put forward. In particular, I shall not consider the provision contained in the final paragraph of Article 12(4) of Annex VII to the Staff Regulations, by which a servant authorized to use his own car shall remain fully liable for any accidents to third parties, as a regulation cannot add to a rule which derives from the text of the Treaty or from the interpretation which you considered that it should be given. Similarly, in my opinion, the fact that the use of the private car is referred to and authorized in the travel order cannot have any bearing on the solution of this problem, since the main purpose of this authorization is to fix the basis for the reimbursement of travel expenses which the administration has to effect.

It is, however, possible to imagine situations in which the use of the private car might have a sufficiently direct connexion with the servant's duties to render the Community liable; where, for example, contrary to all appearances, this choice is not free because no other means exists of carrying out the mission. The Commission may well say that the servant is then justified in refusing the mission; this principle may be valid in theory but it is one which officials would no doubt be well advised not to apply. It is possible—this is a rather different hypothesis—that, without any suggestion on his part, a servant be called upon by his superiors to take in his car other officials of the Community or persons connected with the Community, in which case his position would be very close to that of the 'service driver'. These are special cases which may give rise to difficult problems of evidence in which I must not become involved.

Having said this, the definition which I propose of 'the performance of duties' is very similar to that which you gave last year concerning an act which is 'performed in an official capacity', although it is not identical to it. I had said at that time that no necessary parallelism existed between these two concepts; however, a more careful study of the question leads me to believe that they may overlap in the majority of cases, whatever may be the difference in the aims which they are intended to achieve. However, a definition is necessarily only an outline and it is not impossible that certain cases might arise in which the two situations are not the same.

II

I now come to the second question submitted by the Cour de Cassation. Where an act giving rise to a claim for damages was committed in the performance of his duties by a servant who was not acting in his official capacity and the Community was thus rendered liable for it, did such act also make the servant personally liable or was his liability absorbed by that of the Community?

We know that the laws of the Member States resolve this question in different ways, as only certain of them accept that an action may be brought against the servant in respect of his personal action at the same time as it is brought against the public authority. For reasons concerning both the texts and legal and practical expediency, I suggest that in this instance you leave aside the prin-

ciple of concurrent liability.

— Let me deal first with the texts. In my opinion the second paragraph of Article 188 of the Treaty only concerns the compensation *by the Community* for any damage caused by its servants in the performance of their duties. Thus, if the servants' liability were accepted, it could only be questioned before the national courts, with the consequence with which I shall deal shortly.

No doubt a contrary opinion may be based on a combination of Articles 151 and 188. Indeed, the first of these Articles gives you jurisdiction in disputes relating to the compensation for *damage provided for in the second paragraph of Article 188*; the damage referred to is all damage caused by servants in the performance of their duties, whoever may be the natural or legal person against whom the action for damages is brought. The Dutch and German versions seem to follow this interpretation although another, subsequent test will lead me to set it aside. We know that the second paragraph of Article 40 of the ECSC Treaty gave you jurisdiction to order an official to make good any injury caused to a third party by his personal wrong in the performance of his duties. When the injured party had been unable to obtain this compensation from the servant you had the power to make the Community liable for 'fair' compensation. Article 26 of the Merger Treaty replaced these provisions by the following: 'the Court shall also have jurisdiction to order the Community to make good any injury caused by a personal wrong by a servant of the Community in the performance of his duties. The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or the Conditions of Employment applicable to them'. Thus, just as a certain alignment is achieved in the basic solutions provided by the Treaties of Rome regarding liability in respect of third parties and the Community, this text takes away your jurisdiction, expressly provided for in the ECSC Treaty, to deal with the personal liability of servants *vis-à-vis* such third parties. It is difficult to believe that this solution is not that which was also desired by the authors of the EAEC Treaty.

— Thus, the action by the injured third party against the official might only be brought before a national court but the contradictory nature of the decisions which might result from such a system must lead to its rejection. Your Court, which alone has jurisdiction in actions brought against the Community, and the national court, which would give judgment in actions brought against the servant, would each apply its own law and might interpret the facts differently. It is true that this duality of jurisdiction is known in France, but the disadvantages of this system in this field do not argue in favour of its introduction in the Community sphere. The International Law Commission of the Union Internationale des Magistrats decided firmly against the personal liability of officials being called into question before national courts; it considered that it was for such courts to ask you, should occasion arise, to interpret the Treaty on this point, in the circumstances laid down in Article 150 of the EAEC Treaty. This has been done on the initiative of the Belgian Cour de Cassation, and I suggest you reply to that court as I have just indicated.

Before finishing my remarks on this point I should like to give a brief reply to a criticism which might be made of this system, which is said to blunt the official's sense of his responsibilities. I do not consider this to be a serious danger. First, I have suggested that you adopt a rather strict interpretation of the phrase 'the performance of duties'. Secondly, even where there is no immunity to be waived, an official may in any case be held liable in criminal proceedings, once he is not acting 'in his official capacity'. Finally, Article 22 of

the Staff Regulations of Officials provides that he may be required to make good any damage suffered by the Community as a result of serious misconduct on his part; an action, arising out of such misconduct, initiated by a decision taken after completion of disciplinary proceedings, would come before you. In my opinion, all these points are of such a nature as to exclude the risk referred to above.

III

There remains the third question, which concerns the legal system applicable to the action against the servant and his insurer, and the court which is competent to deal with it.

In the light of my earlier remarks, this problem only arises if the act was not committed in the performance of duties and as this question is subsidiary it is perhaps unnecessary to give any reply to it. It is, at all events, sufficient to point out that in such a case the national court may alone have jurisdiction and that it will apply the national legal principles.

However, in the observations submitted to you on behalf of Mr Sayag it was maintained that the general principles common to the laws of the Member States were to be applied whatever the court which deals with the action for damages. Taking into account certain peculiarities of Belgian case-law, which concern, in particular, the calculation of the loss suffered through permanent incapacity and the compensation for non-material damage and which do not conform with the law of the other Member States, I think that, in spite of the generality of the terms of the judgment referring the matter to you, you should specify the principles applicable to these various points 'in order to avoid the parties being again obliged to seek the interpretation of the Treaty'.

This suggestion no doubt refers to a case in which concurrent liability would be accepted; I must, however, confess that I do not clearly understand the arguments developed on this point. The second paragraph of Article 188 only refers to the general principles common to the laws of the Member States in relation to the liability incurred *by the Community* as a result of the damage caused by its servants in the performance of their duties. You would thus not be required to give a decision on the possible scope of such general principles regarding the exact extent and manner in which compensation is to be made, and the damage which may have to be taken into account, unless you were dealing with an action brought against the Community and had to give a decision on the substance of the claims of the parties. It is a problem which concerns the application of the Treaty and not its interpretation on a reference for a preliminary ruling. For this reason I think that it is unnecessary to consider the question before you in greater detail.

I have thus come to the end of my consideration of the questions submitted by the Belgian Cour de Cassation. The replies which I suggest you make may, certainly, give rise to criticisms or reservations, but I believe that they have at least the advantage of simplicity. As they set aside in all cases the concept of concurrent liability, they avoid the risk of contradictory decisions being made. Although, on the other hand, a strict interpretation of the concept 'the performance of duties' leads, in the majority of cases, to the national courts being required to deal according to their own laws with the consequences of accidents caused by officials driving their private cars, this solution does not appear to present any practical disadvantages, in fact, quite the reverse. That two accidents have, as a common feature, the fact that they were caused, at Ispra and at Mol, by two servants of Euratom, does not render it necessary for both to be dealt with according to Community law and the general principles common

to the laws of the Member States. The victim of the accident expects to be compensated in accordance with the national law.

Finally, I consider that the replies to the questions submitted by the Cour de Cassation might be given on the basis of the following ideas:

1. As regards the application of the second paragraph of Article 188 of the EAEC Treaty, an official must be considered to be acting in 'the performance of his duties' when a direct internal link exists between the act giving rise to the claim for damages, which he is alleged to have committed and his duties. An accident caused by an official while he is using his private car for travel in the course of his employment does not, without the existence of exceptional circumstances, satisfy this requirement and cannot involve the liability of the Community.

2. Where the damage has been caused by an act done in the performance of duties, the Community is alone obliged to compensate third parties, though it may, in appropriate cases, proceed against the servant within the limits and conditions provided for in Article 22 of the Staff Regulations. Otherwise the official is alone liable before the competent national courts.

3. An action for damages brought by the victim against the servant and his insurer is altogether outside the scope of Community law.