
A Trojan Horse for Sudeten Claims? On Some Implications of the Prince of Liechtenstein v. Germany

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Abstract

For the last 10 years, Prince Hans Adam II of Liechtenstein has been suing Germany in various courts, including the German Federal Constitutional Court, the European Court of Human Rights and the International Court of Justice. Originally, the subject of the Prince's claim was the ownership of a painting seized, among other property belonging to the Prince's father, by Czechoslovakia in 1945. Now, the Prince is claiming reparation for the alleged German decision to treat Liechtenstein assets as 'German' for the purpose of war reparations. The article maintains that the real motive for the claim is an attempt to reignite an international juridical-political debate on the merits of the 1945 Benes Decrees and of the still unsettled Sudeten claims. Such issues give rise to a wealth of international law problems of general interest. The article mainly focuses on the human rights issues which faced the European Court of Human Rights.

1 The Historical Background of the Post-War Confiscation of Property of German Nationals in Czechoslovakia

Following the Second World War, the property of individuals of German and Hungarian nationality or ethnicity was confiscated in the Republic of Czechoslovakia by a series of Presidential Decrees¹ (the 'Benes Decrees'), such individuals thus being

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¹ Decree No. 4 of 19 May 1945 on the nullity of property transfers which took place after 29 September 1938; Decree No. 12 of 21 June 1945 on the confiscation and accelerated allocation of agricultural property belonging to German or Magyar nationals and of those having committed treason and acted as enemies of the Czech and Slovak people; Decree No. 100 of 24 October 1945 on the nationalization of mines and industrial plants; and Decree No. 108 of 25 October 1945 on the confiscation of all property

grouped together with ‘traitors and enemies of the Republic’. An exception was made only for persons who had actively fought for the freedom of the Czech and Slovak people and for those who had been persecuted by the Nazis on account of their race or political opinion. Further, by a Presidential Decree of 2 August 1945, Czechoslovak citizens of German nationality — apart from a few stated exceptions — were deprived of their citizenship. For the Germans of the Sudetenland, this took effect retroactively as from 10 October 1938, the date on which they had been granted German citizenship under the law on the ‘reunification’ of Sudeten territory with the Reich.²

These measures were elements of a complex scheme for the compulsory transfer of the German-speaking population out of Czechoslovakia, a scheme sanctioned in the final Declaration of the Potsdam Conference of 2 August 1945. There is extensive German documentation on the difficult conditions in which the transfer of about three million Sudeten Germans took place, and on episodes of violence including the killing of a large numbers of Sudeten Germans, facts which were tolerated by the Czechoslovak authorities.³ However, the thesis put forward by some German writers⁴ that a genocide was committed against the Sudeten Germans is untenable. Noting in particular the seizure of property belonging to persons of German origin, these writers perceived this to be an international crime, a classification which imposes a legal obligation on all states not to recognize any legal effect of those acts.⁵ They reached such a conclusion by linking together the fact of the confiscations and the

belonging to the German Reich. German translations in *Bundesministerium für Vertriebene, Flüchtlinge und Kriegsgeschädigte* (ed.), *Die Vertreibung der deutschen Bevölkerung aus der Tschechoslovakei*, vol. I (1984) 204 Annex 3, 225 Annex 5, and 263 Annex 13. A list of the principal documents is available in F. Ermacora, *Rechtsgutachten über die sudetendeutschen Fragen* (1992) 56 *et seq.* For a comment, see Rado, ‘Czechoslovak Nationalization Decrees: Some International Aspects’, 40 *American Journal of International Law* (1946) 795.

² Decree No. 33, German translation in *Die Vertreibung der deutschen Bevölkerung*, *supra* note 1, at 240 Annex 8.

³ Cf. *Dokumentation der Vertreibung der Deutschen aus Ost-Mitteleuropa* (1984), published in five volumes by the *Bundesministerium fuer Vertriebene*; see in particular vol. IV on the *Sudetendeutschen*. For a well-documented study, though clearly lacking in objectivity, see H. Raschhofer and O. Kimminich, *Die Sudetenfrage: ihre völkerrechtliche Entwicklung vom Ersten Weltkrieg bis zur Gegenwart* (2nd ed., 1988). For a recent historical review, see W. Benz (ed.), *Die Vertreibung der Deutschen aus dem Osten* (1995). For the Czech point of view, see Šamalik, ‘Trauma Odsunu — Mytus a Realita’, 138 *Pravnik* (1999) 1094.

⁴ This was maintained first by Ermacora, *supra* note 1, at 123 and 256 *et seq.*, and later followed by S. Wenk, *Das konfiszierete deutsche Privatvermögen in Polen und in der Tschechoslovakei* (1993) 100; Gornig, ‘Völkerrechtswidrigkeit von Vertreibung und entschädigungsloser Enteignung der Sudetendeutschen’, 16 *Forum für Kultur und Politik* (1996) 3, at 13; and Blumenwitz, ‘Die geplante Schlussstricherklärung und die Lösung offener aus Flucht und Vertreibung resultierender Fragen’, 16 *Forum für Kultur und Politik* (1996) 45, at 57. For a more differentiated position, see Tomuschat, ‘Die Vertreibung der Sudetendeutschen. Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht’, 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996) 1. In the latter article, the author refuses to characterize the coercive transfer of the German population as ‘genocide’ as such, but concedes that ‘es während der Vertreibung . . . zu einzelnen Akten des Völkermordes gekommen ist’: *ibid.*, at 12.

⁵ Compare Article 41(2) of the ILC Code on State Responsibility, approved on 10 August 2001: ‘No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.’ (UN Doc. A/CN.4 L.602/Rev.1)

confiscations and the fact of the *Vertreibung*, both regarded as impermissible forms of collective punitive measures.⁶

In reality, the confiscation of German assets also had other motives, such as agricultural reform and in particular obtaining reparations. Indeed, President Benes himself initially characterized the decrees on confiscation as instruments of reparation. It was only later, after the Inter-Allied Reparation Agency (IARA, of which Czechoslovakia was a member) had assumed its functions in 1946 that the Czechoslovak Government preferred to consider the confiscations as an internal sanction against persons regarded as 'disloyal' to the state, by which time Czechoslovakia had obtained reparations of only US\$190,000.⁷ Various reasons can be found to explain this change in perspective. First and foremost, the growing divergence between the positions of the Western states and the central and eastern European states under Soviet protection, concerning the policy to be followed over German reparations, made it seem improbable as early as 1946 that a peace treaty or general arrangement on the matter of German reparations would be reached quickly. Hence there was a tendency for states parties to the Paris Agreement of 14 January 1946 establishing the IARA to keep the entire proceeds of confiscations of German assets on their own territories for themselves by way of advance payment, thus bypassing IARA's quotas. Since Czechoslovakia was one of the countries with the highest concentration of German assets, its reluctance to classify the confiscations of German property already effected as reparations can be easily understood; such a step might have led to the determination that Czechoslovakia had already exceeded its quota of reparations, equal to 3 per cent, on the basis of the Paris Agreement.

The difficulty of bringing the Czechoslovak confiscation measures within the ambit of reparations was also exacerbated by the fact that the Czechoslovak Government waited until 1973 before calculating the sum total of damages sustained as a result of the events of 1938–1945, although it is conceded that is difficult to establish a precise figure for the damage caused to Czechoslovakia as a consequence of its dismemberment by Nazi Germany before the start of the war. Bohemia and Moravia became almost a German colony, with the resulting ruthless exploitation of all economic resources and the deprivation of the Czech people of their fundamental civil rights, damage which is practically impossible to measure. Whatever the case may be, on 11 December 1973, on the occasion of the signing of the Treaty of Prague on the normalization of relations between Czechoslovakia and the Federal Republic of Germany,⁸ the Czechoslovak Government advanced claims for approximately

⁶ E.g. Ermacora, *supra* note 1, at 178: 'Die Konfiskationsmassnahmen haben für sich selbst im vorliegendem Gesamtzusammenhang Völkermordcharakter'; and Blumenwitz, *supra* note 4, at 27: 'Vertreibung und Enteignung können als ein Akt gewertet werden.'

⁷ Figure given by D. Blumenwitz, *Der Prager Vertrag* (1985) 84.

⁸ German text reproduced in *Bundesgesetzblatt* 1974, II, 990; unofficial English translation in 13 *ILM* (1974) 19. On the Treaty, in addition to the author quoted above, see M. Weigand, *Der Vertrag über die gegenseitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslovakschen Sozialistischen Republik vom 11 Dezember 1973. Eine völkerrechtliche Analyse* (1975).

314,000 million Czech crowns, and such a claim was also intended as a rebuttal to the claims for damages made by *Vertriebenen* in Germany.

Although the various governments of the Federal Republic of Germany have never officially supported the claims of the *Vertriebenen*, the decision of the post-war Czechoslovak Governments not to characterize the confiscations of Sudeten Germans' property as reparations, and to deprive Sudeten Germans of their Czechoslovak citizenship with retroactive effect from October 1938, had the consequence that the Federal Republic of Germany could legitimately make a claim on behalf of its citizens for the alleged wrongful act committed by Czechoslovakia with the enactment of the Benes Decrees almost 60 years ago. Reciprocal claims for damages arising out of the war were pre-empted by the Treaty of Good Neighbourhood and Cooperation of 27 February 1992.⁹ Neither were such claims settled on the occasion of the Joint Declaration of 21 January 1997, which the parties intended should reconcile the two countries.¹⁰ The aim of the Declaration was the reciprocal remission of moral debts, and a symbolic recognition by both sides of their own wrongdoing. In Article II, the Federal Republic of Germany recognizes Germany's responsibility in the historical developments leading to the Munich Agreement of 30 September 1938 and from there to the destruction of the Republic of Czechoslovakia and finally to the flight and compulsory transfer of millions of persons of German ethnicity from the territory of Czechoslovakia. In Article III, the Czech Republic in turn expresses regret for the fact that, during the compulsory transfer, 'suffering and injustices'¹¹ were inflicted even on innocent people. Regret is expressed in particular for the excesses committed in violation of basic humanitarian principles and legal norms in force at the time, and which went unpunished by virtue of a law of amnesty passed in 1946. In Article IV, the two parties declare that they agree to put aside political or legal questions deriving from past events, although each party remains bound by its own legal order and respects the fact that the other party has a different conception of the law.

This Declaration demonstrates the wish of the German federal government, if not to consider the issue closed once and for all, at least to commit itself not to make claims for itself or to lend support through diplomatic channels for claims made by its citizens. The Declaration, however, continues to be challenged by the *Vertriebenen*, who are supported in the highest ranks of the Bavarian governing party. As the Bavarian Prime Minister Stoiber himself affirmed at the time the Declaration received

⁹ German text reproduced in *Bundesgesetzblatt* 1992, II, 462.

¹⁰ On the Declaration, see Blumenwitz, 'Die deutsch-tschechische Erklärung vom 21 Januar 1997', 38 *Archiv des Völkerrechts* (1998) 19. The German text is reproduced at *ibid.*, at 67.

¹¹ Blumenwitz, *ibid.*, at 31, criticizes that the German noun *Unrecht* is given in Czech as *krivda* which is the general noun for 'injustice', and not as the more specific noun *bezpravi*, which specifically means 'wrongful act'. This criticism is specious, given the fact that in German too the term *Unrecht* could express either moral or legal disapproval.

parliamentary approval, the Declaration does not entail a waiver of individual claims, and, further, such a waiver would exceed the government's powers.¹²

2 The Prince's Action in the German Courts

In 1991, the Bureau for Monuments in Brno, Czechoslovakia, agreed to lend the Wallraf-Richartz Museum in Cologne a picture by the seventeenth-century Flemish painter Pieter van Laer, entitled 'Der Grosse Kalkofen' and valued at approximately DM500,000. This painting, part of the Liechtenstein collection since 1767, was, at the end of the Second World War, in the Moravian castle of Valtice, which was confiscated along with all the other property belonging to the Prince's family situated in Czechoslovakia, in accordance with Decree No. 12 of 21 June 1945. In proceedings brought by Prince Hans Adam II of Liechtenstein for recovery of the painting in his capacity as heir to the former owner, Prince Franz Joseph II, the Court of Cologne at first permitted recovery of the painting, but, in its decision of 10 October 1995,¹³ rejected the Prince's action as inadmissible.

At a first glance, the case seems unrelated to Sudeten claims: Prince Franz Joseph II was neither a Sudeten German nor a *Vertriebener*. On the contrary, he was the ruler of the Principality of Liechtenstein, and shortly before the war he had decided to move his residence to Vaduz. What makes the Prince's claim a 'Sudeten claim' is the legal basis of the seizure by Czechoslovakia, namely, Decree No. 12, and the reasons which the German courts gave for dismissing the claim.

The Court of Cologne based its decision on Article 3(1) and (3) of Part VI of the Treaty of Bonn of 26 May 1952, as revised in Paris, 23 October 1954 (known as the *Überleitungsvertrag*, or Settlement Convention),¹⁴ which the Federal Republic concluded with France, the United Kingdom and the United States regarding the regulation of questions arising from the war and the occupation of Germany. Under

¹² Cf. Stoiber's declaration on 30 January 1997, reproduced in *Archiv der Gegenwart* (1997) 41751: 'Für die Staatsregierung ist es von entscheidender Bedeutung, daß die Erklärung keinen Verzicht auf Individualansprüche, die das Vermögen betreffen, darstellt. Die Bundesrepublik Deutschland kann das nicht, und sie tut das auch nicht.'

¹³ Cf. *Landgericht, Cologne, Rechtsache 5 O 182/92*, reproduced in 16 *Praxis des internationalen Privat- und Verfahrensrechts* (1996) 419.

¹⁴ English text in 332 UNTS 219; 6 UST 441; German text in *Bundesgesetzblatt* 1955, II, 405. The English version reads: '(1) The Federal Republic shall in future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries or former allies of Germany... (3) No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraphs 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments.' On the Settlement Convention, see Schwarzenberger, 'The Bonn and Paris Agreements', 6 *Current Legal Problems* (1953) 297; Puttkamer, 'Vorgeschichte und Zustandekommen der Pariser Verträge vom 23 Oktober 1954', 17 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1956–1957) 448; Kewenig, 'Bonn and Paris Agreements on Germany (1952 and 1954)', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. I (1992) 422.

the Convention, the Federal Republic agreed not to raise any future objections to measures adopted with respect to German property located abroad for the purposes of reparation or restitution or as a result of the war, i.e. measures adopted unilaterally or pursuant to agreements between the three Allied Powers and other allied or neutral countries. The Federal Republic further bound itself to deny access to the courts for claims against those (including international organizations and foreign governments) who had acquired or transferred title to property on the basis of reparation measures.

In particular, the Court of Cologne rejected the applicant's argument that the measures envisaged by Article 3 of Part VI of the Settlement Convention concerned only 'German' property, and did not therefore include the property of a citizen (who was also Head of State) of a neutral country. The Court, citing previous decisions by the Court of Cassation, decided that, in the absence of a definition of 'German property abroad' in the Settlement Convention, the characterization of property as 'German' or otherwise is for the expropriating state to determine, and the German courts were not competent to judge the lawfulness or otherwise of expropriations carried out in another country.¹⁵ The decision was confirmed on appeal on 19 July 1996,¹⁶ and subsequently the Supreme Court refused to hear a further appeal, as the case did not raise issues of fundamental importance and had no prospect of success. On 28 January 1998, the Federal Constitutional Court¹⁷ also rejected Prince Hans Adam II's constitutional claim under Article 93(1) and (4)(a) of the *Grundgesetz*, alleging a violation of Article 25 of the Constitution, which guarantees that the public bodies of the Federal Republic shall observe customary international law.

In the Federal Constitutional Court, the appellant claimed that the decisions of the lower courts hearing the case on its merits violated three generally recognized norms of international law: the first forbidding victors confiscating the property of neutral citizens; the second forbidding treaties imposing obligations on third parties; and the third providing that the citizenship of an individual shall be determined solely according to the law of the state which confers it. The Constitutional Court had no difficulty in unanimously rejecting these three grounds of complaint, stating that the three norms in question were irrelevant for the purposes of the decision of inadmissibility. As regards the first norm, the lower courts had taken no position on the lawfulness or otherwise of the Czech expropriation, and neither were they obliged

¹⁵ The judgment is critically commented on by Seidl-Hohenveldern, 'Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum', 16 *Praxis des internationalen Privat- und Verfahrensrechts* (1996) 410.

¹⁶ The text of the decision, Case 22 U 215/95, is reproduced in 42 *Recht in Ost und West* (1998) 242. For a criticism of this decision, see Seidl-Hohenveldern, 'Nachwirkung der Kontrollratsgesetzgebung und die deutsche Souveränität — Zu den Urteilen über die "Bodenreform" und zur Fortgeltung des Klagestops nach dem Überleitungsvertrag', in *Festschrift Jaenicke* (1998) 975, at 982.

¹⁷ The text of the decision, Case 2 BvR 1981/97, is reproduced in 36 *Archiv des Völkerrechts* (1998) 198, with comment by Weber, 'Anmerkung zur "Liechtenstein-Entscheidung" des Bundesverfassungsgerichts vom 28 Januar 1998', 36 *Archiv des Völkerrechts* (1998) 188; and also in 18 *Praxis des internationalen Privat- und Verfahrensrechts* (1998) 482 with comment by Doehring, 'Völkerrechtswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als "deutsches Eigentum": Ein unrühmlicher Schlusspunkt', 18 *Praxis des internationalen Privat- und Verfahrensrechts* (1998) 465.

to do so according to international law. As regards the second norm, the prohibition of legal proceedings contained in Article 3(1) of Part VI of the Settlement Convention does not constitute an obligation imposed on third parties since it binds solely the Federal Republic and its courts, not Liechtenstein. With respect to the third norm, in applying the aforesaid Article 3(1) of Part VI of the Convention, the courts did not make an independent assessment as to the citizenship of the applicant's father. Rather, by means of a teleological interpretation, which was constitutionally unobjectionable, they had subsumed within the formula 'measures against German property abroad', measures which, in the intent of the actor state, were carried out against property belonging to persons of German nationality.

The reasoning behind the Constitutional Court's decision is well set out, and does not deserve the criticisms which have been levelled by authoritative German commentators.¹⁸ In fact, as another commentator has perceptively pointed out,¹⁹ the Constitutional Court could hardly have reached a different decision, since, even if we hypothesize that the lower courts had erred on some point or other, they had nonetheless violated no right or fundamental freedom of the Prince guaranteed by the German Constitution.

In the present author's opinion, however, the decisions of the lower courts do not contain the serious errors which some commentators have attributed to them. The crux of the Cologne Court's decision, which was followed by the superior courts, is the application of Article 3(1) and (3) of Part VI of the Settlement Convention. Once this provision has been identified as the applicable norm, the issue of whether the measures taken by the expropriating state conform to international law becomes irrelevant, precisely because the Federal Republic has agreed not to raise objections and not to allow recourse to domestic channels of justice.

It may well be that a norm of international law prohibits the victor from confiscating the property of neutral citizens, although this is far from certain given the widespread practice followed by various belligerents during both World Wars of including not only enemy property but also property in which enemy citizens had a predominant interest or which was destined for the enemy, or which belonged to individuals residing in enemy countries.²⁰ But, whatever the solution under international law, this does not affect the German courts, which must abstain from interfering with or determining claims regarding these matters.

In addition, it may well be the case that a norm of international law prevents a

¹⁸ See the authors quoted in the previous note.

¹⁹ For comment, see Fassbender, in 93 *American Journal of International Law* (1999) 215; and Fassbender, 'Klageausschluss bei Enteignungen zu Reparationszwecken: Das Gemälde des Fürsten von Liechtenstein', 52 *Neue juristische Wochenschrift* (1999) 1445.

²⁰ On this question, see the seminal study by C. Dominicè, *La notion du caractère ennemi des biens privées dans la guerre sur terre* (1961). As Dominicè rightly points out, measures of economic warfare taken by the belligerents *pendente bello* are to be distinguished from measures specifically enacted as a means of reparation after the termination of the conflict. Whereas *pendente bello* international law allows the belligerents to utilize a wide concept of 'enemy property' in order to give maximum effect to their economic warfare, *post bellum* measures taken by the victorious powers must be confined, as a rule, to property belonging to the defeated state's subjects.

foreign citizen from being considered to be of a certain nationality, but here again the issue is more complex than the critics of the decision would have us think. They confuse the concept of ‘ethnic allegiance’, used by the Czech legislation²¹ (and in this case by the Administrative Tribunal of Bratislava, which in 1951 rejected a claim by Prince Franz Josef II²²) with that of ‘citizenship’.²³ They maintain — this time rightly so — that a state may not attribute citizenship to a foreigner which is different from that of the local jurisdiction and from that which he actually possesses, especially in cases where there is no evidence of any effective connection with the third state whose citizenship is at issue. Even in a context such as this, whatever the solution under international law, again it is not for the German courts to censure the expropriating state’s decision.

The criticisms levelled at this specific aspect of the judgment are particularly misplaced. For example, Doehring, in criticizing the teleological interpretation used by the German courts, asks what would have happened to the waiver in the Settlement Convention if Czechoslovakia had confiscated American, British or French property as ‘German’.²⁴ This example, a *reductio ad absurdum*, proves nothing. In the unlikely event of such an occurrence, the United States, the United Kingdom or France would have been able to espouse the claim of their citizen against Czechoslovakia and could have sought restitution of the property or compensatory damages from the Czech Government.²⁵ But this would not have altered the fact that these matters lie outside

²¹ It is noteworthy that the concept of ‘ethnicity’ is not peculiar to the Benes Decrees, but, on the contrary, are typical of the legal terminology of the successor countries to the Austro-Hungarian Empire, which, for many purposes, differentiated between *Staatsangehörigkeit* and *Nationalität* or *Volkszugehörigkeit*. On this point, see E. Schmied, *Das Staatsangehörigkeitsrecht der Tschechoslowakei* (1956) 11, n. 4.

²² In a decision dated 21 November 1951, quoted by Blumenwitz, ‘Die tschechisch-lichtensteinischen Beziehungen — Ein anhaltender Konflikt im Mitteleuropa’, in *Festschrift Hacker* (1997) 347, at 360, the Bratislava Administrative Tribunal affirmed that the German nationality, i.e. the ethnic allegiance, of the claimant was a ‘fact of common knowledge’ and therefore confirmed the application of Article 1(1)(a) of Decree No. 12. Indeed, Prince Franz Joseph II had acknowledged himself as ‘German’ in the 1931 census.

²³ Actually, it was the Constitutional Court itself which used the term *Staatsangehörigkeit*, but it picked up the term from the petitioner’s request, without entering into the merits. Doehring, *supra* note 17, at 467, confuses ‘ethnicity’ with ‘citizenship’, when he affirms ‘dass die effektivere Staatsangehörigkeit hier diejenige von Liechtenstein ist, kann nicht bezweifelt werden’. More ambiguous is Fassbender, in 93 *American Journal of International Law* (1999) 215, at 218, who utilizes the term ‘national’, as synonymous with ‘citizen’, as is made clear by the following quote: ‘The father of the present Prince was never a German national, but a national (and head of state) of the Principality of Liechtenstein.’ Only Weber, *supra* note 17, at 190, seems to be aware of the problem, but he mistakenly considers that, under international law, the individual’s property located abroad can be linked only to his ‘citizenship’, and denies that the criterion of ‘ethnic allegiance’ could be of any relevance even in the context of a ‘teleological interpretation’ such as that applied by the Constitutional Tribunal.

²⁴ Doehring, *supra* note 17, at 466.

²⁵ Interestingly, the Lump Sum Agreements concluded by Czechoslovakia with France on 2 June 1950, and with the United Kingdom and the United States on 29 January 1982, could be interpreted so as to allow claims for confiscation by the pre-communist Benes regime, i.e. prior to 25 February 1948. For the text of the 1982 agreements, see B. Weston, R. Lillich and D. Bederman (eds), *International Claims: Their Settlement by Lump Sum Agreements 1975–1995* (1999) 46–47, 267 and 271. The text of the 1950 treaty is reproduced by R. Lillich and B. Weston (eds), *International Claims: Their Settlement by Lump Sum Agreements*, vol. II (1975) 38.

the competence of the German courts according to the Settlement Convention. Doebling's other argument is no more convincing. He maintains that, if we accept the interpretation given by each individual expropriating state as to the meaning to be assigned to the term 'German property', taken to extremes this might lead to the Federal Republic's being obliged to compensate the victims of possible wrongful acts done by others, since under Article 5 of Part VI of the Settlement Convention the Federal Republic committed itself to indemnify those expropriated. Leaving aside the fact that, in the case at hand, no indemnity would according to Article 15 of the Federal Law of 12 February 1969 on reparation damages (which excludes artistic property and art collections²⁶) be possible, and leaving aside the consideration that as long ago as 1960 the European Commission on Human Rights declared that Article 5 of Part VI of the Settlement Convention did not give rise to a property right within the meaning of the ECHR,²⁷ the assumption on which Doebling bases his argument is highly debatable. He assumes that the confiscation of enemy private property is unlawful according to international law, and that, under the provisions of Article 5 of Part VI of the Settlement Convention, the Federal Republic, as the true debtor as regards reparations, had recognized the right of recourse in favour of individuals whose property has been expropriated for the debt paid by the individual on its behalf.

This interpretation of the norm, an interpretation put forward notably by Seidl-Hohenveldern and Ipsen in the 1960s,²⁸ is not, however, the only possible interpretation. A brief comparison with a similar provision in the Treaty of Versailles illustrates the issue. Article 297(b) of the Treaty of Versailles established that the Allied Powers reserved 'the right to retain and liquidate all the property and interests of German subjects or companies under their control in their territory, in their colonies, possessions and protectorates, including the territory ceded to them by virtue of the present Treaty', while Article 297(e) gave the Allied Powers the right to retain the sum recovered as a guarantee for the payment of compensation due to their citizens by Germany. Article 297(h) stated that any such sum should be accredited to Germany under the heading of reparations, and Article 297(i) imposed upon Germany the obligation to indemnify its own citizens for the loss of their property.

Commentators interpreted these provisions of the Treaty of Versailles in various ways. To justify the content of Article 297, some commentators stressed the victors' need to guarantee for themselves sources of reparation wherever possible, as well as considerations of a punitive nature.²⁹ Other commentators, by contrast, read Article 297 as confirmation of the continuing validity in international law, despite the contrary practice which grew up in the First World War, of a norm prohibiting the confiscation of enemy private property. They therefore criticized the provision in Article 297(b) of the Treaty of Versailles to retain and liquidate German property as tantamount to confiscation, since Germany was clearly unable to meet the obligations

²⁶ Cf. the *Gesetz zur Abgeltung von Reparations-, Restitutions-, Zerstörungs- und Rückerstattungsschäden* (the *Reparationsentschädigungsgesetz*), in *Bundesgesetzblatt* 1969, I, 105.

²⁷ See the decision of 8 January 1960, Case 472/59, (1960) YB 3, 206, at 210.

²⁸ See I. Seidl-Hohenveldern and K. Ipsen, *Entschädigungspflicht der Bundesrepublik Deutschlands für reparationsentzogenes Auslandsvermögen* (1962).

²⁹ See, among others, G. Gidel, *Le traité de paix avec l'Allemagne et les intérêts privés* (1921) 61.

undertaken in Article 297(i).³⁰ This argument is somewhat specious. If the consent given by the defeated state were to be deemed an exoneration of the responsibility of the expropriating victor states, that would not explain the ‘right’ to compensation enjoyed by those suffering expropriation. If, on the other hand, the undertaking by the defeated state to compensate individuals suffering expropriation was to be considered equivalent to an assumption of debt, this would entail recognizing that the individuals in question held an internationally significant position as creditors *vis-à-vis* their own state, which would be in marked contrast to the then dominant theories of international law as regards an individual’s standing under international law.

An objective examination of the provisions of the Treaty of Versailles mentioned above, by contrast, leads to a different conclusion: it transpires that victor states — while, on the one hand regarding the confiscation of private property for reparation purposes as perfectly lawful, but, on the other hand, aware of the danger that private property might bear the brunt of reparations — had intended to set a ‘protective’ norm which safeguarded the interests of those whose property had been expropriated, by putting pressure on the defeated state to undertake to indemnify its citizens, thus spreading the burden over the whole community. In fact, this is the position taken by the Government of the Federal Republic *vis-à-vis* Article 5 of Part VI of the Settlement Convention. The government regards the damage as generally ascribable to the war, which therefore ought to be indemnified using the same criteria as adopted by the federal law on the sharing of the burden of war damages.³¹

In the case of the Prince of Liechtenstein’s claim, the most frequent criticism levelled at the German courts’ refusal to give an independent interpretation of the term ‘German property abroad’ is that the ‘renouncement of sovereignty’ (to use Doehring’s expression), which Germany agreed to in the Settlement Convention, cannot be interpreted as meaning that Germany ‘renounced the right to verify whether it had renounced’.³² Yet again, though, the criticism is misplaced. Here we touch upon the core of the entire matter. What we are witnessing is a clear attempt by some German legal commentators to reinterpret Article 3 of Part VI of the Settlement Convention,³³ one of the cornerstones of the structure of post-war relations between

³⁰ Cf. Borchard, ‘Enemy Private Property’, 18 *American Journal of International Law* (1924) 523; J. Kunz, *Kriegsrecht und Neutralitätsrecht* (1935) 49; and A.J. Gathings, *International Law and American Treatment of Alien Enemy Property* (1940) 82.

³¹ For the government’s view, see the book by the then Director of the Finance Ministry, E. Wolff, *Zur Abgeltung der Reparationsschäden* (1964). For the current text of the *Lastenausgleichsgesetz* of 1952, see *Bundesgesetzblatt* 1998, I, 3180. As noted above, the federal statute on reparation damages, the so-called *Reparationsschädengesetz*, was enacted in February 1969 and provided for a lump-sum indemnity, limited to German natural persons, and, under the conditions laid down by Article 13, for individuals of German ethnicity.

³² Doehring, *supra* note 17, at 466. With a slightly different emphasis, see Fassbender, in 93 *American Journal of International Law* (1999) 215, at 218: ‘It is obvious that Germany, as the State burdened by the provision, should be able to establish whether its conditions were met.’

³³ Cf. D. Blumenwitz, *Das Offenhalten der Vermögensfrage in den deutsch-polnischen Beziehungen* (1992) 63; and Blumenwitz, ‘Der Vertrag vom 12 September 1990 über die abschliessende Regelung in Bezug auf Deutschland’, 43 *Neue juristische Wochenschrift* (1990) 3041. We recall that Professor Blumenwitz served as co-agent of the Prince of Liechtenstein in the case before the European Court on Human Rights. For the same critical stance, see Fiedler, ‘Die Wiedererlangung der Souveränität Deutschlands

Germany and the rest of the world. Indeed, the purpose and meaning of Article 3 of Part VI of the Settlement Convention, in accordance with previous statutes issued by the Allied High Commission for Germany, especially Statute No. 63 of 31 August 1951,³⁴ was precisely to draw a final line — a *Schlussstrich* as the Cologne Court clearly put it — to mark the end of the expropriations and confiscations which took place abroad as a result of the Second World War and of all related controversies.³⁵ The lasting importance of Article 3 of Part VI is confirmed by the fact that it remained in force by virtue of an exchange of letters of 27–28 September 1990 between Germany and the three Allied Powers party to the Settlement Convention within the framework of the redefinition of relations with Germany following the signing of the Treaty of Moscow on 12 September 1990 ‘on the Final Settlement with Respect to Germany’.³⁶

und die Einigung Europas’, 46 *JuristenZeitung* (1991) 685, at 690; Gornig, ‘Der Zwei-plus-vier Vertrag unter besonderer Berücksichtigung grenzbezogener Regelungen’, *Recht im Ost und West* (1991) 97, at 105; Wenk, *supra* note 4, at 106; and, recently, C. Bötsch, *Die Nachbefolgung des westalliierten Besatzungsrechts im Lichte des Staats- und Völkerrecht* (2000) 43 *et seq.*

³⁴ Gesetz No. 63 zur Klarstellung der Rechtslage in Bezug auf deutsches Auslandsvermögen und andere im Wege der Reparation oder Rückerstattung erfasste Vermögensgegenstände of 31 August 1951, in *Amtsblatt der Alliierten Hohen Kommission No. 64*, 5 September 1951, at 1107. The text is reproduced by Böhmer, Duden and Janssen (eds), *Deutsches Vermögen im Ausland*, vol. III (1951) 58; F. Mann, *Zum Privatrecht der deutschen Reparationsleistung* (1962) 74. For the reason stated in the text I cannot agree with the criticisms made by Seidl-Hohenveldern, *supra* note 16, at 986, who holds that, since the renunciation of actions in domestic courts imposed on Germany in Part VI of the Settlement Convention was aimed at safeguarding the reparations system set up by the Paris Agreement of 14 January 1946, the confiscations under Presidential Decree No. 12 could not be covered by Article 3 of Part VI of the Settlement Convention, because at that time the Czech Government did not notify the Inter-Allied Reparation Agency that the confiscations came under the heading of reparations. This argument is based on the false assumption of a link between Part VI of the Settlement Convention and the Paris Agreement of 1946. The purpose of Statute No. 63 of 1951 was to clarify the legal position of German property abroad and other property included in reparations and restitution plans. Without supplying a definition of ‘German assets abroad’, Article 1(1)(a) of the statute confirmed the lawfulness of the liquidation of German property abroad, provided that it had been carried out under the law of the foreign territorial state as a consequence of the war against Germany or as a consequence of agreements with the three Allied Powers. Article 3 of the statute excluded recourse to the domestic courts in both cases. The enforceability of the statute is expressly maintained under Article 2 of Part VI of the Settlement Convention. In fact, Article 3 of Part VI confines itself to reaffirming what was already stated in Law No. 63 of 1951 and adds — appropriately for an agreement on the transfer of sovereignty — the Federal Republic’s obligation not to raise international claims for the events and actions envisaged therein.

³⁵ In this context, the Cologne Court quotes Kegel, ‘Kommentar vor Art. 7’, marginal note 881, in T. Soergel and W. Siebert, *Kommentar zum bürgerlichen Gesetzbuch*, vol. VIII (11th ed., 1983); Lieberknecht, ‘Die Enteignung deutscher Mitgliedschaftsrechte an ausländischen Gesellschaften mit in Deutschland belegenem Vermögen’, 9 *Neue juristische Wochenschrift* (1956) 569; Beitzke, ‘Anmerkung zu BGH 13.12.1956’, 11 *Monatschrift für Deutsches Recht* (1957) 276. On the quoted case law, see *infra* the text relating to notes 38–43.

³⁶ Text reproduced in 29 ILM (1990) 1186. Under the Declaration annexed to the Treaty, the rights and responsibilities of the four Allied Powers should have terminated at the date of the deposit of the last instrument of ratification, which occurred on 15 March 1991, but the parties agreed to the suspension of the exercise of their rights as from 2 October 1990, one day before the date of the formal reunification of Germany. On the ‘Two + Four’ Treaty, see Frowein, ‘Germany Reunited’, 51 *Zeitschrift für ausländisches*

There is a feeling of *déjà vu* about this doctrinal attack against Article 3 of Part VI of the Settlement Convention. After the war, German state bodies made every effort to find ways of limiting, as far as possible, the damage caused by the expropriation of German property abroad. A special agency, the *Deutsches Auslandsvermögen*, was set up within the Foreign Ministry for this purpose; and, over the years, the federal government has occasionally been successful in using diplomacy to alleviate the severity of confiscation measures. The government negotiated bilateral agreements which envisaged the restitution of part of the property or the proceeds of its liquidation in exchange for various German services, and persuaded some countries, including Turkey and various Latin American states, to return German property.³⁷

The German Supreme Court proved even more adept than the federal government at reducing the extent of the confiscations of German property abroad. At first, the Supreme Court declared that the laws of the foreign state should provide the criteria for identifying German property subject to confiscation. Within a short time, however, it took the opposite view, according to which the characterization of property as 'German' or otherwise should not be decided by applying the norms of the confiscating state, but by applying the norms of German private international law. The reason for this change of view³⁸ was that, at the time, German majority shareholders of companies incorporated abroad which held property in Germany were trying to avoid the effects of confiscation by incorporating new companies in Germany under German law and then transferring to the new company the property situated within Germany. Before receiving the backing of the Supreme Court, these so-called *Spaltgesellschaften* were supported in their legal soundness by, among others, Seidl-Hohenveldern. In a work on international confiscation and expropriation published in 1952, this eminent author maintained that, since the laws on the confiscation of German private property abroad were unlawful according to international law,³⁹ they could not have extraterritorial effect.⁴⁰ Clearly, this doctrinal justification of the *Spaltungstheorie* is a

öffentliches Recht und Völkerrecht (1991) 333; Frowein, 'The Reunification of Germany', 86 *American Journal of International Law* (1992) 152; Stern, 'Das völkerrechtliche Vertragsgeflecht zur Wiedererlangung der deutschen Souveränität', in K. Stern and B. Schmidt-Bleibtreu (eds), *Zwei-Plus-Vier-Vertrag* (1991) 3; and Ress, 'Die abschliessende Regelung in Bezug auf Deutschland: Garantiefunktion der Vier Mächte?', in *Festschrift Bernhardt* (1995) 825.

³⁷ Cf. Schaefer, 'Internationale Aspekte des deutschen Lastenausgleichs', 23 *Archiv des Völkerrechts* (1985) 102, at 119 *et seq.* for a non-exhaustive list of those agreements.

³⁸ For an overall picture of the case law on this subject prior to 1976, see Wiedemann, 'Entwicklung und Ergebnisse der Rechtsprechung zu den Spaltgesellschaften', in *Festschrift Beitzke* (1979) 811 *et seq.* A well-balanced but definitive criticism is made by Flume, 'Juristische Person und Enteignung im internationalen Privatrecht', in *Festschrift Mann* (1977) 143; and more recently in an historical perspective by Drobnič, 'Spaltgesellschaften im wiedervereinigten Deutschland', in *Festschrift Serick* (1992) 37 *et seq.*

³⁹ Cf. the text above for a refutation of this thesis.

⁴⁰ Cf. I. Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht* (1952) 131 *et seq.* For the writings of Seidl-Hohenveldern in support of the *Spaltgesellschaftstheorie*, see Seidl-Hohenveldern, 'Gegen die Verketzung der Spaltungstheorie', in *AussenWirtschaftsDienst* (1958) 66 *et seq.*; Seidl-Hohenveldern, 'Die Rechtsbeständigkeit der Spaltungstheorie', in *Recht der internationalen Wirtschaft* (1976) 133 *et seq.*; and Seidl-Hohenveldern, 'Internationales Enteignungsrecht', in *Festschrift Kegel* (1977) 265 *et seq.*

weak one and lends itself to numerous criticisms. As Serick⁴¹ observed, the principle of territoriality may perhaps be the consequence of the non-recognition of the autonomy of a juristic person, but it can never be its cause. Other scholars of company law⁴² pointed out that the *Spaltungstheorie* confused the fundamental distinctions between a non-stock corporation and a joint-stock company, and between the expropriation of the assets of a company and the expropriation of shareholders' rights. Admittedly, the courts of one state could refuse to recognize measures taken by the state (in which the company was incorporated) which confiscated the rights of shareholders, on the grounds of *ordre public*. But this 'public order' exception could not be used by German judges to oppose measures aimed at confiscating the rights of German shareholders in companies incorporated in other countries, since this is implicitly prevented by Article 3(1) and (2) of Part VI of the Settlement Convention.⁴³

3 The Prince's Application to the European Court of Human Rights

After the Constitutional Court's judgment, the painting was returned to Brno. The matter should have ended there. But, on 28 July 1998, the Prince of Liechtenstein lodged an application with the European Court of Human Rights against Germany.⁴⁴ He alleged a breach of Article 6(1) of the Convention, that is, a breach of the right of access to justice and of the right to a fair hearing, as well as a breach of Article 1 of Protocol No. 1 on account of the recognition by the German courts of the

⁴¹ Serick, 'Zur Konfiskation von Mitgliedschaften', 11 *JuristenZeitung* (1956) 198, at 200.

⁴² Cf. Lieberknecht, *supra* note 35, at 931 *et seq* with further bibliography.

⁴³ In the same sense, cf. Mann, *supra* note 34, at 24; Kegel, *supra* note 35, marginal note 889. The inapplicability of Article 30 of the EGBGB a.F. on *ordre public* was also affirmed by the Second Chamber of the *Bundesgerichtshof* in its judgment of 13 December 1956 (the so-called 'first AKU judgment'), reproduced in 11 *Monatschrift für Deutsches Recht* (1957) 276 with a comment by Beitzke, *supra* note 35; and in 10 *Neue Juristische Wochenschrift* (1957) 217. This decision is particularly interesting, because it is one of those quoted by the Cologne Tribunal in its judgment of 10 October 1995. The facts of the case are as follows: the majority of the shares of a Dutch incorporated company, *Algemene Kunstzijde Unie NV* (AKU), were held by German citizens and this Dutch company had stakes in many German companies. According to a royal decree of the Dutch exile government of 20 October 1944 on enemy property, all German shares of Dutch corporations were confiscated after the war. The German AKU shareholders, taking advantage of the then popular *Spaltungstheorie*, claimed that the Dutch measures were not applicable to their interests in German companies. In spite of the fact that the Second Chamber of the Federal Court of Cassation had twice quashed the tribunal's findings in favour of the AKU shareholders, the AKU affair almost caused the carefully negotiated and delicately balanced Treaty between the Netherlands and the Federal Republic (the so-called Transaction Treaty) of 8 April 1960 not to be ratified by the Netherlands. The crisis was averted only through a Supplementary Agreement signed in May 1962 (which entered into force in August 1963), which specified that all cases of Dutch confiscations for the purpose of reparations not already taken into account in Article 10 of the Transaction Treaty could not be the object of any claim, counterclaim or defence whatsoever before German courts. The German AKU shareholders' attempt to impede the ratification of the Supplementary Agreement was of no avail: in 1963 the Federal Constitutional Court dismissed the request for provisional measures and eventually, in 1968, declared the claim inadmissible (order published in 24 *Sammlungen der Entscheidungen des Bundesverfassungsgerichts* (1969) 33).

⁴⁴ Case 42527/98, 42527/98, registered on 31 July 1998.

Czechoslovak confiscation measures, and a breach of Article 14 of the Convention for discrimination with regard to damages. It is the first of these grounds of complaint, based on an alleged denial of justice, that deserves special attention.

Before considering the issue, however, it is appropriate to remark on the political significance of the case brought before the European Court of Human Rights. If the Court had judged Germany to be in breach of Article 6(1) of the Convention, then the obstacle posed by Article 3(3) of Part VI of the Settlement Convention would have been surmounted. Consider what would happen if this obstacle were to be removed.⁴⁵ An application to the Czech courts would not offer any prospect of success after the Czech Constitutional Court's decision of 8 March 1995, in which the Constitutional Court affirmed 'the historical responsibility' of the *Sudetendeutschen* in the events which brought about the destruction of Czechoslovakia in 1938–1939 and therefore also affirmed the legitimacy of the Benes Decrees based on 'the principles of law recognized by the civil States of Europe'.⁴⁶ To do so would open the way for a large number of claims to be brought in German courts. Some courts might admit claims for damages by the *Vertriebenen* against the states which confiscated their property (to Czechoslovakia one may add Poland and the Russian Federation), and would deny those states immunity from jurisdiction on the ground that the latter's acts could be classified as crimes against humanity (as some commentators have argued). The final decision would fall in each case to the Court of Cassation and the Constitutional Court, which would thus become the absolute arbiters of the future development of diplomatic relations between the Federal Republic of Germany and a sizeable group of states. If this were to happen, the whole relationship between Germany and its eastern neighbours would be put in jeopardy.

Another consequence of a successful outcome in the Liechtenstein case could have been to overturn what had up till then been a position of 'agnosticism' on the part of the European Convention organs with regard to the question of restitution of property in the states of central and eastern Europe.

First, concerning the question of the timeframe, although the Convention is silent on this point, the Commission and the Court of Human Rights have always declared

⁴⁵ As is well known, by virtue of Article 41 (ex Art. 50), the Court never orders a state to amend its law or to quash a judgment, yet where the law is the cause of the violation, the state may necessarily have to amend its law in order to comply with its obligations. On this, see Leuprecht, 'The Execution of Judgments and Decisions', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 775 *et seq*; Ress, 'The Effects of Judgments and Decisions in Domestic Law', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 801 *et seq*; Drzemczewski and Tavernier, 'L'exécution des "décisions" des instances internationales de contrôle dans le domaine des droits de l'homme', in Société Française de Droit International, Colloque de Strasbourg, *La protection des droits de l'homme et l'évolution du droit international* (1998) 197 *et seq*; Pellonpää, 'Individual Reparation Claims Under the European Convention on Human Rights', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual* (1999) 109 *et seq*; Barkhuysen, van Emmerik and van Kempen, *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (1999); and E. Lambert, *Les effets des arrêts de la Cour européenne des droits de l'homme* (1999).

⁴⁶ A German translation of the *Dreithaler* decision is published in *Bayerische Verwaltungsblatt* (1996) 14 *et seq*, with a critical comment by Rzepka.

that they do not have jurisdiction to decide claims relating to acts occurring before the entry into force of the Convention for the defendant state, though in this connection they distinguish between 'instantaneous acts with lasting effects', which fall outside their competence, and 'violations with a continuing character', which, conversely, fall within it.⁴⁷ Confiscation obviously comes within the former category of acts. The proposal to override the non-retroactivity of the Convention for serious violations of human rights has not met with a favourable response. The precedent set by the International Court of Justice in its judgment of 11 July 1996 regarding the Convention on the Prevention and Punishment of the Crime of Genocide⁴⁸ does not appear to lend itself easily to interpretation by analogy in different contexts. Thus the Republic of Czechoslovakia, and thereafter by succession the Czech and Slovak Republics, became subject to the Convention as from 18 March 1992.

Secondly, as regards Article 1 of Protocol No. 1, which concerns property rights, the consistent jurisprudence of both the former Commission and the Court requires the applicant to prove the existence of his or her 'substantive interest'. The Convention organs have consistently excluded from the concept of 'possessions' property over which there is merely a *prospect* of ownership, where actual ownership has not been capable of being effectively enjoyed for a long period.⁴⁹ For example, in 1975 the Commission made a decision of inadmissibility of an application by a German citizen of Sudetenland origin, who alleged that the conclusion of the Treaty of Prague of 11 December 1973 by the Federal Republic of Germany was contrary to the Convention.⁵⁰

The same decision was reached by the Commission on 4 March 1996, dismissing an application by two Slovak citizens against Slovakia⁵¹ for the recovery of assets confiscated in 1956 and 1973 in consequence of convictions for an unauthorized departure from and a refusal to re-enter the territory of the Slovak Republic. The two applicants had been judicially rehabilitated in 1990, and the effects of the prior

⁴⁷ See the Commission's decision of 9 June 1958 in Case 214/56, *De Becker v. Belgium* (1958) YB 2, 215. On this question, see Sorensen, 'Le problème inter-temporel dans l'application de la Convention européenne des droits de l'homme', in *Mélanges Modinos* (1968) 304 *et seq.*

⁴⁸ ICJ judgment in the case of *Bosnia-Herzegovina v. Yugoslavia, Preliminary Objections*, ICJ Reports (1996) 595, at 617, para. 34.

⁴⁹ This consistent jurisprudence does not appear to have been reversed by the Court's recent decision of 5 January 2000 in the *Beyeler v. Italy* case, 83 *Rivista di diritto internazionale* (2000) 821, in which the Court recognized the character of 'possession for the purposes of Article 1 of Protocol No. 1' in the applicant's 'proprietary interest' in a painting subject to the right of pre-emption by the state, according to Law 1089 of 1939. The Court, disavowing the Commission's findings, pointed out that 'the concept of possessions in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law' (judgment, para. 100). For a critical comment on this point, see Padelletti, 'Il caso Beyeler di fronte alla Corte europea dei diritti dell' uomo', 83 *Rivista di diritto internazionale* (2000) 781, at 787.

⁵⁰ Cf. the Commission Decision of 10 July 1975 in Case 6742/74, *X v. Federal Republic of Germany*, DR 3, 98. See also the Commission Decision of 4 October 1977 in Joined Cases 7655/76 to 7657/76, *X, Y and Z v. Federal Republic of Germany*, DR 12, 111, with regard to the property of German citizens expelled from the former German territories east of the Odra-Niess line and confiscated by Poland and the alleged prejudice to their interests because of the signing of the Warsaw Treaty of 7 December 1970, which aimed to normalize German-Polish relations (English text reproduced in 10 *ILM* (1971) 127).

⁵¹ *Brezny v. Slovakia*, Application 23131/1993, Decision of 4 March 1996, DR 85-A, 65.

judgments were declared to be null *ex tunc*. The applicants were, however, unable to recover their assets since Law No. 87 of 1991 on the restitution of property confiscated by the Communist regime between 25 February 1948 and 1 January 1990 makes restitution conditional on citizenship of the then Federal Republic of Czechoslovakia and residence in the national territory, this latter requirement not being satisfied by the applicants. The Commission noted that, at the time of their judicial rehabilitation, the two applicants could not yet be deemed to be the owners, in the absence of the legislative regulation for this purpose to which the 1990 Law on judicial rehabilitation referred, and that from the time of entry into force of Law No. 87 of 1991 it was no longer possible to recognize a legitimate expectation of the applicants to recover possession of the assets, given their failure to satisfy the residency requirement. In the Commission's view, even the contingency of a referral by a municipal court to the Slovak Constitutional Court⁵² would not of itself be sufficient to confer on the applicants the right to make a claim regarding their 'possessions' under Article 1 of Protocol No. 1.⁵³

The severity of this decision by the European Commission has caused some puzzlement,⁵⁴ especially if the decision is compared to decisions of the United Nations' Civil and Political Rights Committee. In two cases, in 1995 and 1996, the Committee allowed applications respectively from a Czech citizen who could not have recourse to the provisions of Law No. 87 of 1991 because of his failure to fulfil the requirement of residence in the territory of the Czech Republic,⁵⁵ and from an Australian citizen of Czech origin, who could not have recourse to the same Law, because of his failure to fulfil the citizenship requirement.⁵⁶ In both cases, the Committee reached the conclusion that the requirements of citizenship and permanent residence imposed by Article 3 of Law No. 87 of 1991 violated the general principle of non-discrimination laid down by Article 26 of the International Covenant on Civil and Political Rights. One should not, however, exaggerate the importance of these two rulings for the question of confiscations of German property after the Second World War.⁵⁷ In fact, the following year, the same Committee declared the application of a Sudeten German against the Republic of Czechoslovakia, alleging breach of Article 26 of the Covenant, inadmissible on the ground that Article 1 of Law No. 87 of 1991 did not cover

⁵² As happened in the Czech Republic, whose Constitutional Court, on 11 July 1994, declared unconstitutional Article 3 of Law No. 87 of 1991, in that it required permanent residence; see Mancini, 'Restituzione e principio di non discriminazione dinanzi al Comitato dei diritti dell' uomo e alla Commissione europea dei diritti dell' uomo: il caso dell' ex-Cecoslovacchia', 35 *Rivista di diritto internazionale privato e processuale* (1999) 223, at 229.

⁵³ DR 85-A, 81.

⁵⁴ Cf. Mancini, *supra* note 52, at 243 *et seq.*

⁵⁵ Case *Simunek*, CCPR/C/54/D 516/1992, Decision of 31 July 1995.

⁵⁶ Case *Adam*, CCPR/C/57/D 586/1994, Decision of 23 July 1996.

⁵⁷ *Contra* Blumenwitz, *supra* note 10, at 38, for whom 'aus der allgemeinen Gleichheitssatz sowie aus dem Diskriminierungsverbot lassen sich jedoch Gesichtspunkte ableiten, die eine grundsätzliche Gleichbehandlung der Opfer des Stalinismus und der des Tschechoslowakismus [sic!] gebieten'.

confiscations carried out before 25 February 1948.⁵⁸ In the Committee's view, the choice of the Republic of Czechoslovakia fulfilled reasonable and objective criteria.⁵⁹

A The ECHR and the Right of Access to Justice

In addition to the political aspects of the case, the legal task with which the Court was confronted was also very difficult. Can a state by subsequent treaty remove the right of access to justice, and, if so, for what purpose? This question has implications well beyond the case under discussion, and touches upon such difficult issues as the succession in time of different norms, the removal by a state of the rights of its citizens, the exercise of diplomatic protection, and their relationship with treaties dealing with the protection of human rights.

This is not an entirely novel issue, and indeed came before the Commission 44 years ago in relation to the same Settlement Convention under discussion here. That case dealt with the acceptance by the Federal Republic of Germany of the establishment of a Supreme Court of Restitutions with jurisdiction under Part III of the Convention to hear final appeals relating to claims for the restitution of assets belonging to citizens of the Allied Powers and transported to Germany during the war.⁶⁰ The Commission declared the application inadmissible, observing *inter alia* that 'neither the Settlement Convention nor the Charter annexed thereto contained any provision which was either expressly or implicitly inconsistent with the provisions of the European Convention on Human Rights'.⁶¹

Considering the dynamic methods its organs adopt in interpreting the Convention as a living instrument,⁶² there was a good chance that the Court could have revised its earlier decision, especially in view of the fact that since then the right of access to justice has not only been recognized as a right protected by the Convention, but has also been defined by the Court as 'one of the universally recognized fundamental principles of law'.⁶³

⁵⁸ Case *Drobek*, CCPR/C/D 643/1995, Decision of 14 July 1997.

⁵⁹ For a not wholly convincing criticism of the Committee's decision, see Mancini, *supra* note 52, at 241–242, according to whom Mr Drobek suffered a *de facto* discrimination.

⁶⁰ The Supreme Court for Restitutions replaced the former Court of Appeals for Restitutions created by Law No. 21 of the US High Commissioner for the US Zone of Occupation.

⁶¹ Decision of 10 June 1958 in Case 235/56. *X v. Federal Republic of Germany* (1958) YB 2, 257, at 302. On the question of a possible contradiction between Article 6 and subsequent treaties which created international jurisdictional bodies on the territory of the Federal Republic of Germany, see Golsong, 'Interferences entre les obligations incombant à un Etat en vertu de la Convention des droits de l'homme et d'autres accords internationaux', in *La Protection internationale des droits de l'homme dans le cadre européen, Colloque organisé par la Faculté de droit et des sciences politiques et économiques de Strasbourg* (1961) 253 *et seq.*

⁶² On this point, among many contributions, see Matscher, 'Methods of Interpretation of the Convention', in Macdonald, Matscher and Petzold, *supra* note 45, at 63 *et seq.*; Golsong, 'Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of the Treaties?', in Macdonald, Matscher and Petzold, *supra* note 45, at 147 *et seq.*; and Loucaides, 'The Case Law of the Commission as Regards Rules of Interpretation', in *Liber Amicorum Nørgaard* (1998) 117 *et seq.*

⁶³ *Golder v. United Kingdom*, ECHR (1975) Series A, No. 18, para. 35.

To understand the significance of this issue, some preliminary remarks on the scope of Article 6(1) of the European Convention on Human Rights are in order. A ‘right of access to justice’ is not specifically mentioned in the Article, but, starting from the judgment in the *Golder* case in 1975, the European Court has considered it to be an implied prerequisite for the fulfilment of the right, expressed in the Article, to a ‘fair and public hearing’.⁶⁴ In *Golder*, the Court had not had to deal with issues of particular difficulty: the case concerned an impediment placed by the UK Government on a prisoner hindering him from consulting a lawyer with a view to suing for defamation. The subsequent case law of the Court has, however, established some general principles on the matter. First, the right of access to justice obviously presupposes a substantive right recognized by the legal order of the state in question, and which can normally be exercised before the courts.⁶⁵ Secondly, for the purposes of Article 6(1), a distinction between immunity from jurisdiction and an impediment to proceeding does not seem relevant, a fact explained by the greater attention accorded by Convention organs to matters of substance than to matters of form.⁶⁶ Thirdly, restrictions on access to justice are compatible with the Convention, where: (a) they pursue a legitimate aim; (b) they are proportionate to the aim pursued; and (c) they do not restrict the right to the point of extinguishing it.⁶⁷

The question of immunity from jurisdiction of international organizations is one that recently came before the European Court, giving it occasion to reassert the limits stated above. In the two (coincidental) judgments pronounced on 18 February 1999 in the cases of *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*,⁶⁸ a Grand Chamber of the Court held unanimously that the granting of immunity from jurisdiction to international organizations (in the case in point the European Space Agency) on the basis of constituent agreements or supplementary agreements, has for some time constituted a practice designed to ensure the proper functioning of such organizations and therefore pursues a legitimate aim.⁶⁹ As for the proportionality requirement, the Court asked itself whether the applicants had ‘reasonable alternative means’ available to protect effectively their rights under the Convention, and found on the facts that they had.⁷⁰

⁶⁴ For the previous case law, see Eissen, ‘Le “droit à un tribunal” dans la jurisprudence de la Commission’, in *Miscellanea Ganshof van der Meersch*, vol. I (1972) 455 *et seq.*

⁶⁵ On this point, see Hampson, ‘Restrictions on Rights of Action and the European Convention on Human Rights: The Case of Powell and Rayner’, in 61 *British Yearbook of International Law* (1990) 279, who criticizes the (not always well-reasoned) developments of the Convention’s organs.

⁶⁶ See *ibid.*, at 286.

⁶⁷ For a clear indication of those limits, see the Court’s judgment of 28 May 1985, in *Ashingdane v. United Kingdom*, ECHR (1985) Series A, No. 93, para. 57.

⁶⁸ Grand Chamber, Judgment on Merits, *Waite and Kennedy v. Germany*, ECHR, *Reports of Judgments and Decisions* (1999-I) 393.

⁶⁹ *Ibid.*, at para. 63.

⁷⁰ *Ibid.*, at para. 68. This aspect is criticized by Pustorino, ‘Immunità giurisdizionale delle organizzazioni internazionali e tutela dei diritti fondamentali: le sentenze della Corte europea nei casi Waite e Kennedy e Beer e Regan’, 83 *Rivista di diritto internazionale* (2000) 132, at 147, who observes that the Court did not pay sufficient attention to the so-called criterion of ‘equivalent protection’, which the author considers to be the crucial test as to whether or not to recognize the immunity of international organizations in labour

The Court's two judgments confounded the many commentators who had until then pointed out that, in the case of a conflict between applying the rule on immunity from jurisdiction and risking a denial of justice, the European Court would have had to sacrifice the former in order to guard against the latter.⁷¹

Indeed, in a central passage from the judgments, the Court went so far as to affirm that, since states establish international organizations and grant them immunity, the protection of fundamental rights may consequently be affected. However, the Court went on to state that it would be incompatible with the purpose and objective of the Convention if the contracting states were thereby absolved from all responsibility under the Convention in the sphere of the activity under review.⁷² Therefore, while not wishing to prejudice its future decisions, the Court rejected the general supremacy of Convention norms over other international norms, and omitted to clarify whether the latter covers only rules of customary international law or treaty law as well. It is easy to understand the Court's reticence on this point, if one bears in mind the ongoing doctrinal debate as to whether rules on immunity from jurisdiction of

disputes. However, the case law survey presented by Pustorino as evidence of his thesis and as evidence of the formation of a customary norm is far from complete: for a clear opposing precedent, see the Decision of the French *Cour de Cassation, Première Chambre Civile* of 14 November 1995, in *Hintermann v. Union de l'Europe Occidentale*, in which the Court took for granted the immunity from jurisdiction of the Organization under Article 4 of the Convention of 11 May 1955, and dismissed the claim 'par ce seul motif'; see the summary in 85 *Revue critique de droit international privé* (1996) 337, with the supportive comment by Muir Watt, *ibid.*, at 338 *et seq.*, and in 124 *Journal de droit international* (1997) 141, with the critical comment by Byk, *ibid.*, at 142 *et seq.* The *Waite and Kennedy* judgment has been commented on critically also by Pingel-Lenuzza, 'Autonomie juridictionnelle et employeur privilégié: concilier les contraires', 104 *Revue générale de droit international public* (2000) 445; and Flauss, 'Droit des immunités et protection internationale des droits de l'homme', 10 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (2000) 299.

⁷¹ As proposed by Byk, *supra* note 70, at 148; J. Bröhmer, *State Immunity and the Violation of Human Rights* (1996) 160 *et seq.*; and Ress, 'The Changing Relationship Between State Immunity and Human Rights', in *Liber Amicorum Nørgaard* (1998) 175. As early as 1968, Pahr maintained that state immunity from jurisdiction was incompatible with the principle of a 'fair trial' under Article 6(1): see Pahr, 'Die Staatenimmunität und Artikel 6, Absatz 1 der Europäischen Menschenrechtskonvention', in *Mélanges Modinos* (1968) 222, at 231. Contra Matscher, 'Vertragsauslegung durch Vertragsrechtsvergleichung in der Judikatur internationaler Gerichte, vornehmlich vor den Organen der EMRK', in *Festschrift Mosler* (1983) 545, at 555, who remarks that, rightly or wrongly, European states are firm in considering state immunity as an international customary law norm, as is also shown by the Basel Convention of 16 May 1972 promoted by the same Council of Europe. In order to ensure a systematic interpretation of the sources, it is not possible to assume that a treaty implicitly denies what a subsequent treaty, promoted by the same international organization, explicitly admits and regulates. On the question of the compatibility of state immunity and Article 6(1), the Court recently had the opportunity to clarify matters. In its decision of 1 March 2000, the Third Chamber of the Court judged admissible three requests against the United Kingdom dealing with this matter. In the first case, *McElhinney* (Application No. 31253/96), the applicant, an Irish policeman, had sued a British soldier for injuries; in the second case, *Al-Adsani* (Application No. 35763/97), the applicant had sued the Government of Kuwait for alleged torture; and in the third case *Fogarty* (Application No. 37112/97), the applicant had sued the Government of the USA for sex discrimination in the workplace. For a short discussion of the *McElhinney* and *Al-Adsani* cases, see Ress, *supra* note 71, at 196 *et seq.* Addendum: On 21 November 2001 the Court found in all three cases no violation of Article 6(1), but the *Al-Adsani* case, which addressed the question of state immunity for breaches of *just cogens*, was decided by a majority of nine against eight.

⁷² *Waite and Kennedy*, *supra* note 68, Judgment, at para. 67.

international organizations are customary or exclusively conventional in nature.⁷³ One argument in favour of the view that the Court actually wanted to refer to general rules of international law, or at least to the specific subject of immunity from jurisdiction, could perhaps be evinced from a comparison with the judgment of the same date in the case of *Matthews v. United Kingdom*. In that case, the Court was called upon to decide whether the United Kingdom could be held responsible for not having permitted citizens of Gibraltar to participate in elections to the European Parliament, in conformity with European Community acts; the Court stated in clear terms that the Convention does not preclude the transfer of competences to international organizations, provided the rights guaranteed by the Convention continue to be secured.⁷⁴

Nonetheless it remains true that the Court's ambiguity in the extract from the judgment in *Waite and Kennedy* referred to above could have important consequences in the more general sphere of conflicts between norms. For example, in the case in point, the constituent agreement of the European Space Agency (ESA) is dated 1975, and the agreement concerning the European Centre for Space Operations at Darmstadt, concluded by Germany with the European Space Research Organization (the predecessor to the ESA), dates from 1967, while the ECHR came into effect for Germany as from 3 September 1953.⁷⁵ Recognizing ESA's immunity on the basis of a norm of the convention establishing the ESA would entail calling into question the assertion repeatedly made by the Commission that ECHR norms always prevail over subsequent treaty obligations of state parties.

In the *Liechtenstein* judgment of 12 July 2001, the Court unanimously held that there had been no violation of Article 6(1) of the Convention.⁷⁶ It found that the limitation on the right of access to a court imposed by Article 3 of Part VI of the Settlement Convention was legitimate, because: (a) it pursued a legitimate aim, namely, the 'public interest in regaining sovereignty and unifying Germany'; and, for that reason (b) it did not appear disproportionate to the legitimate aim pursued.⁷⁷

The Court found itself in a more difficult position in verifying the third condition, namely, the non-impairment of the very essence of the applicant's right. Here the Court attached 'particular significance' to the fact that the painting was expropriated as part of the Prince's 'agricultural property' under Benes Decree No. 12. If it is true, as was claimed by the defendant government, that the exclusion of German jurisdiction did not affect the great majority of expropriation cases under Decree No. 12, in which the property had remained on Czechoslovak territory, the present case was clearly one

⁷³ On this question, see Pustorino, *supra* note 70, at 141, with further bibliographical references.

⁷⁴ Grand Chamber, Judgment on Merits, *Matthews v. United Kingdom*, ECHR, *Reports of Judgments and Decisions* (1999-I) 251, at para. 32.

⁷⁵ Cf. *Bundesgesetzblatt* 1954, II, 14.

⁷⁶ Grand Chamber, Judgment on the Merits, *Prince Hans-Adam II of Liechtenstein v. Germany*, not yet published. For a first critical comment on the judgment, see Fassbender, 'Der Fürst, ein Bild und die deutsche Geschichte', 28 *Europäische Grundrechte Zeitschrift* (2001) 459. Unfortunately, the present author could not take note of this article, because it was published after the deadline for the present contribution.

⁷⁷ Judgment, para. 69.

of the many possible exceptions. The fact that the link between the factual basis of the applicant's claim and German jurisdiction was only fortuitous — having been brought about by a Czech loan to the municipality of Cologne — is not as decisive as the Court wants it to be.⁷⁸ Neither is the Court's second argument — that the 'genuine forum' for the settlement of disputes in respect of those expropriation measures was the courts of the Czech or of the Slovak Republic — decisive.⁷⁹ Eventually, the Court reached the conclusion that the third condition was satisfied, by rather clumsily drawing on the existence of the other two conditions.⁸⁰

B *The ECHR and Subsequent Treaties*

More significantly, there is another essential point, about which the Court's reasoning conveys an impression of evasion. As the Court recognizes, the Settlement Convention was one of a series of agreements signed by the Federal Republic of Germany, together with France, the United Kingdom and the United States in 1952, and amended in 1954. The Court observes at the outset that the Federal Republic of Germany, when ratifying the ECHR on 5 December 1952, 'was still an occupied country' and that this 'situation prevailed when the Convention entered into force on 3 September 1953'.⁸¹ What the Court glossed over was the well-known fact that the 1952 Bonn Treaties never entered into force because of their rejection by the French National Assembly, and that therefore the 1954 Treaty was in all respects a treaty subsequent to the ECHR.

Although the Court tries not to put too much stress on it, there is an evident link in its reasoning between the question of the timeframe of ECHR norms in relation to other international treaty norms, and the question of the admissibility of limitations on the right of access to justice imposed for a legitimate aim. In other words, it is a matter of assessing whether the legitimate aims that permit restrictions to Article 6(1) include the need to perform certain subsequent treaty obligations. The question is doubly difficult, on the one hand owing to the uncertainty over whether the ECHR should be considered *lex specialis* or *lex generalis*, and, on the other hand, owing to its particular character, that is to say, the *erga omnes* character of its norms.

⁷⁸ *Ibid.*, at para. 68.

⁷⁹ *Ibid.*, at para. 66.

⁸⁰ *Ibid.*, at para. 69. This aspect has been rightly criticized in the concurring opinions of Judges Ress and Zupancic, and in that of Judge Costa. According to the first two Judges, Article 3 of Part VI of the Settlement Convention infringes the 'very essence' of the right to access to courts, but it is, exceptionally, justified in the present case as being a kind of *force majeure* for the Federal Republic of Germany, in order to regain the full authority of a sovereign state (p. 32 of the electronic version of the judgment). For Judge Costa also, it was undeniable that the Settlement Convention impaired the 'very essence' of the right, but he preferred to resolve the matter by finding that Article 6 was inapplicable as such, because the applicant did not have a recognized complaint under German domestic law (p. 35 of the electronic version of the judgment).

⁸¹ Judgment, at para. 54.

Regarding the first question,⁸² it is worth stressing again that the Commission has often affirmed the principle of the supremacy of ECHR norms over every other subsequent treaty obligation contracted by member states either with each other or with third states.⁸³ However, it was not entirely clear from the decisions of the Commission how it arrived at this conclusion. The Commission's fundamental approach is contained in its celebrated decision in the so-called *Pfunders* case, in which it affirmed that the obligations undertaken by the contracting parties were 'essentially of an objective character'.⁸⁴ However, the Commission did not explain the basis of the special nature of the Convention, nor its purpose of protecting the fundamental rights of individuals, the lack of material reciprocity between the contracting parties, or the fact that the ECHR established 'a common public order of the free democracies of Europe', or all of these aspects taken together.

It is noteworthy, however, that the Court is by contrast more prudent in its decisions than the Commission.⁸⁵ The Court has tried up till now to avoid having to acknowledge a direct conflict between a Convention norm and a norm contained in a later treaty, in particular where the treaty was concluded with a third state. The most instructive case appears to be the judgment in *Soering v. United Kingdom*,⁸⁶ in which the Court correlated the prohibition against inhuman and degrading treatment laid down in Article 3 with the risk that the application of the United Kingdom–United States Extradition Treaty of 1972 would lead to exposing the applicant to the 'death row syndrome'. After the Court recalled the 'beneficent purpose' that an extradition agreement in itself possesses, and invoked the principle by which Convention norms

⁸² For an analysis of the issue of conflicting obligations between human rights treaties, using the classical tools of the law of treaties, see Capotorti, 'Interférences dans l'ordre juridique interne entre la Convention et d'autres accords internationaux', in Ganshof van der Meersch (ed.), *Les droits de l'homme en droit interne et en droit international. Actes du deuxième colloque international sur la Convention Européenne des Droits de l'Homme, Vienne 18–20 octobre 1965* (1968) 123 et seq. For a criticism of this approach, see Roucouas, 'Engagements parallèles et contradictoires', 206 *Recueil des Cours* (1987) 9, at 197: 'Dans ces conditions le jeu antériorité-postériorité, spécialité-généralité, présente une portée relativement réduite, puisque l'objectif de l'interprétation et de l'application de tout traité de cette catégorie est d'assurer une protection efficace.' On this debate, see in general Drzemcewski, 'The Sui Generis Nature of the European Convention on Human Rights', 29 *International and Comparative Law Quarterly* (1980) 54.

⁸³ Among the earliest statements of the Commission, see the Decision of 10 June 1958 in Case 235/56, *X v. Federal Republic of Germany* (1958) YB 2, 257, at 301: 'it is clear that, if a State contracts treaty obligations and subsequently concludes another international agreement which prevents it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty'; Decision of 25 May 1975 in Case 2631/73, *Ilse Hess v. United Kingdom*, DR 2, 72; Decision of 14 July 1977 in Joined Cases 7289/75 and 7349/76, *X and Y v. Switzerland*, DR 9, 57; and Decision of 9 February 1990 in Case 13258/87, *M. & Co. v. Federal Republic of Germany*, DR 64, 138.

⁸⁴ See the Commission's Decision of 11 January 1961 in Case 788/60, *Austria v. Italy* (the so-called *Pfunders* case), in 4 *European Yearbook of Human Rights* (1961) 116, at 140.

⁸⁵ Apart from the recent judgment in the *Matthews* case, where the Court took up the language used by the Commission 10 years earlier in *M & Co. v. Federal Republic of Germany*, *supra* note 83, though here the emphasis was on the observance of rights enshrined in the Convention in the case of a transfer of competences to international organizations.

⁸⁶ ECHR (1989) Series A, No. 161.

cannot be imposed on third states through the intervention of states parties,⁸⁷ it nonetheless decided that a violation of Article 3 of the Convention would occur if the extradition went ahead. Strictly speaking, the Court's judgment in this case led to no derogation from the later bilateral treaty, because that treaty itself provided the possibility for the United Kingdom to impose conditions on the extradition. Anyway, as observers have rightly noted, even a derogation would have been justified by reason of the risk of a serious violation of what is considered a norm of 'jus cogens of human rights'.⁸⁸

It would appear more fruitful to examine closely the second aspect mentioned above, that is, the *erga omnes* character of the obligations enshrined in the Convention. The peculiar character of the Convention, defined as 'altruistic' or 'individualistic',⁸⁹ was readily highlighted by Commission decisions.⁹⁰ Important consequences flow from this characteristic of the Convention, which is further reinforced by the institutionalization of the control mechanisms. The first consequence is that a state party which evades the duties incumbent on it would find itself exposed to the possibility of complaints being lodged against it by the other states parties as well as by individuals suffering harm. Another consequence that some commentators believe can be drawn from the *erga omnes* nature of the Convention's obligations seems less certain, namely, the impossibility for a contracting state to exercise diplomatic protection in favour of its citizens as against another contracting state.⁹¹

⁸⁷ *Ibid.*, at para. 86. See also the following passage in the *Prince of Liechtenstein* Judgment, at para. 56: 'In this context, the Court would add that it was not only Contracting Parties to this Convention who were involved in these negotiations. *Vis-à-vis* the United States of America, the Federal Republic of Germany could not invoke any obligations under the Convention.'

⁸⁸ Cf. Cohen-Jonathan, *Les rapports entre la Convention européenne des Droits de l'Homme et les autres traités conclus par les Etats parties*, in *Essays Schermers*, vol. III (1994) 79, at 103, with reference to the following passage of the *Soering* judgment: 'This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe' (para. 88).

⁸⁹ These expressions are used by Geck, 'Diplomatic Protection and the Extension of Individual Rights Through Treaties', 31 *Law and State* (1985) 42, at 44 and 59.

⁹⁰ Cf. again the Commission's remarks in the *Pfunders* case, 4 *European Yearbook of Human Rights* (1961) 116, at 140: 'The obligations provided therein are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.' In the literature, this position has been particularly endorsed and developed by Frowein, 'The European Convention on Human Rights as the Public Order of Europe', 1 *Collected Courses of the Academy of European Law* (1990) 267; Walter, 'Die europäische Menschenrechtskonvention als Konstitutionalisierungsprozess', 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1989) 961.

⁹¹ This opinion is shared by Geck, *supra* note 89, at 59, and Bernhardt, in G. Ress and T. Stein (eds), *Der diplomatische Schutz im Völker- und Europarecht* (1996) 25. According to the latter author, the *erga omnes* nature of human rights treaties would as a rule exclude all 'Dispositionsmöglichkeiten des Heimatstaates'. For a contrary view and with specific reference to the European Convention, see the reply of Doehring in the same symposium; and Ress, 'Diplomatischer Schutz und völkerrechtliche Verträge', in G. Ress and T. Stein (eds), *Der diplomatische Schutz im Völker- und Europarecht* (1996) 83, at 95, according to whom the Convention's procedures have precedence over countermeasures but might yield to the exercise of diplomatic protection, for instance through the conclusion of an 'amicable settlement'.

The relationship between human rights treaties and diplomatic protection has not received particular attention in the jurisprudence until now. There is a general tendency to consider the latter to be superseded by the former, whenever the human rights instrument provides for the individual's direct access to the control mechanisms instituted by the treaty. Here again the concept of the speciality of human rights treaties appears. As was recently pointed out by Crawford in his reports to the ILC on state responsibility, what is special about human rights obligations is their formulation in terms of *rights of individuals*, whereas by contrast the rules relating to diplomatic protection are framed as involving *rights of states*.⁹² It is evident that the change in terminology must have some legal significance, but it is precisely here that the main difficulties arise.

In a recent article on the speciality of human rights treaties in international law, Craven infers from the Commission's approach in the *Pfunders* case that, because of a lack of reciprocity, the inter-state petition mechanism envisaged by Article 33 of the Convention should be regarded rather as a form of *actio popularis* than as a mechanism designed for dispute resolution.⁹³ In Craven's words, by exercising their right of petition, states are 'serving something in the nature of a public function', in order to 'further the ends of the regime as an institution embodying collective values'. Though, as the same author concedes, the Court did not go as far as the Commission in its judgment in the case of *Ireland v. United Kingdom*, in which it confined itself to stressing the possibility of a 'collective enforcement' of the objective obligations enshrined in the Convention, created by the treaty 'over and above a network of mutual bilateral undertakings'.⁹⁴ The cautious wording of the Court reinforces the position of those authors, like Simma, who, by adhering to a concept of legal reciprocity, arrive at the conclusion that human rights treaties do not differ on a normative level from other treaties, in that they 'set forth reciprocal rights and obligations in precisely the same way'.⁹⁵

In the case law of the Commission, there are decisions which contain statements about the lack of a right to diplomatic protection in the Convention, statements made in relation to cases of violation of rights committed by third states, such as the Soviet Union or Morocco, or by states parties, such as Turkey (in the latter case, prior to that country's acceptance of direct individual petition).⁹⁶ It is clear, though, that in such cases the problems are different from those that would be posed if the individual were to submit a petition against his or her own state, complaining of a deprivation of a right guaranteed by the Convention on account of a bad exercise of diplomatic

⁹² Crawford, 'Third Report on State Responsibility', A/CN.4/507, 15 March 2000, para. 89.

⁹³ Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 11 *EJIL* (2000) 489, at 512.

⁹⁴ *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, at 90.

⁹⁵ Simma, 'From Bilateralism to Community Interests in International Law', 250 *Recueil des Cours* (1994) 217, at 401. See also Simma, 'International Human Rights and General International Law: A Comparative Analysis', 4 *Collected Courses of the Academy of European Law* (1993) 153, at 195 *et seq.*

⁹⁶ Cf. the Commission's Decision of 2 May 1978 in Case 7597/76, *Bertrand Russell Peace Foundation Ltd v. United Kingdom*, DR 14, 117; Decision of 5 October 1984 in Case 10686/83, *S v. Federal Republic of Germany*, DR 40, 291; Decision of 9 December 1987 in Case 12822/87, *Kapas v. United Kingdom*, DR 54, 201.

protection. Even admitting the improbability of such a case, since it is likely that the individual would have recourse to the Convention instruments whenever possible before applying to his or her own government, nevertheless the possibility cannot be ruled out that the state of the applicant's citizenship might use diplomatic protection without consulting the individual concerned, especially where disputes concerning a large number of individuals are involved.⁹⁷

Article 55 of the Convention does not seem to provide a solution in such a case; this Article binds states parties not to submit a dispute arising out of the interpretation or application of the European Convention to a means of settlement other than those provided for in the Convention itself. In effect, as the text of the norm clearly shows, the prohibition only applies to conventional means of settlement that already exist and are directly actionable by way of petition;⁹⁸ it does not seem to apply to methods under general international law, such as diplomatic protection. Even if this is so from a strict legal point of view, nevertheless one has to take into account the practice of the ECHR organs, especially the Commission, in not availing themselves of general international law rules which could lead to a restrictive interpretation of the Convention.⁹⁹

In the only instance in which the Commission was required to interpret Article 55,

⁹⁷ Simma, 'Self-Contained Regimes', 16 *Netherlands Yearbook of International Law* (1985) 111, at 133, rightly observes that, because of the control mechanisms of the Convention, 'the necessity of resorting to enforcement according to general international law will hardly ever arise'. The lack of logical necessity does not, though, guarantee that in fact such a situation will not arise. This eventuality is taken into account by Dugard, Special Rapporteur of the International Law Commission for the topic of diplomatic protection. In his commentary to Draft Article 3 on the right to diplomatic protection of the state of citizenship, the Special Rapporteur maintains that the possibility for the individual directly to bring an international claim does not impede the freedom of choice of his state: see Dugard, 'First Report on Diplomatic Protection', A/CN.4/506, 7 March 2000, para. 70.

⁹⁸ On the interpretation of Article 55 in the light of the *travaux préparatoires*, see Velu and Ergec, *La Convention européenne des droits de l'homme* (1990) 748 *et seq.*; and L. Pettiti, E. Decaux and P.H. Imbert (eds), *La convention européenne des droits de l'homme* (1995) 909 *et seq.* The parties took special care to avoid the risk of an overlapping of competence between the new Convention organs and the International Court of Justice. For the view that Article 55 derogates from the general principle of freedom of states to choose the most suitable method to settle a dispute and therefore 'logica giuridica vorrebbe che si desse a questa deroga una interpretazione restrittiva, così da lasciare agli Stati la più ampia libertà negoziale', see Salerno, 'Rapporti fra procedimenti concernenti le medesime istanze individuali presso diversi organismi internazionali di tutela dei diritti umani', 82 *Rivista di diritto internazionale* (1999) 363, at 387.

⁹⁹ As noted by Simma, 'International Human Rights and General International Law: A Comparative Analysis', 4 *Collected Courses of the Academy of European Law* (1993) 153, at 200: "The European Convention . . . institutions . . . have established themselves as "masters" of their treaty to a degree which is unparalleled in the history of international law', with the notable exception, of course, of the European Community institutions. Simma further observes that the language used by the European Convention organs often 'reminds us of the European Community, whose Court has, for decades, brought it home to the Member States that the genie of the Community legal order is out of the EEC treaty bottle for good. I see the Convention organs in Strasbourg discreetly working in the same direction.' See also J. Merrills, *The Development of International Law by the ECHR* (1993) 203 *et seq.*, who points to the *Abdulaziz* case as a rare instance of the Court making use of general international law in order to justify a restrictive interpretation of the Convention; see *Abdulaziz, Cabales and Balkandali v. United Kingdom*, ECHR (1994) Series A, No. 94.

namely, in its decision of 28 June 1996 on the admissibility of the claim submitted by Cyprus against Turkey, it affirmed that, as a rule, the Convention institutions enjoy ‘the monopoly ... for deciding disputes arising out of the interpretation and application of the Convention’, and that alternative means of disputes settlement could apply only in ‘exceptional circumstances’.¹⁰⁰ However, one looks in vain in the Commission’s decision for a legal basis for their decision other than the well-known and axiomatic principle of the Convention’s supremacy. Indeed, it would be difficult to sustain the Commission’s position by reference to the different entitlement to the right claimed — on the one hand by the individual before the international organ, and on the other hand by the state of citizenship against the state responsible. The rationale behind conventional norms that grant individuals international standing to bring actions is to provide those individuals with a means of protection to remedy possible breaches of their rights. Obviously, the usefulness of such a means is manifest where it is the state of citizenship that has committed the breach, since practice shows that it is very rare for there to be an inter-state claim. In the case of a violation committed by another state, however, the rationale behind the protective norm is less obvious, since the claim can be settled through other mechanisms of general international law, such as the exercise of diplomatic protection.

While, at a practical level, various mechanisms can be established to avoid the risk of double recovery, the picture is more complex for cases where the individual is faced with a definitive settlement of the dispute at the international level through the waiver of the claim by his or her state of citizenship, a course which for international law still represents under certain circumstances a legitimate outcome of an exercise of diplomatic protection.¹⁰¹

It can be inferred from practice that waiver by a state can be done in two ways: either waiver of the state’s own claim, but preserving the possibility of individual claims on the part of the state’s citizens; or waiver in the name of the state and also in the name of its citizens, in which case a specific undertaking is sometimes given not to

¹⁰⁰ Application No. 25781/94, *Cyprus v. Turkey*, DR 86-A. 104. The Commission’s bold language is even more impressive, if one considers that the alleged ‘special agreement’ to settle the dispute by other means invoked by Turkey was evidently devoid of foundation. The means referred to by the Government of Turkey were the possibility of a UN Secretary-General’s mission of good offices, and intercommunal talks which were being conducted at the time between the two communities with the objective of elaborating a new constitution for the state of Cyprus on a federal, bi-communal and bi-zonal basis.

¹⁰¹ This hypothesis would not be considered acceptable in the context of Article 55 by Ganshof van der Meersch, ‘La Convention européenne des droits de l’homme a-t-elle, dans le cadre du droit interne, une valeur d’ordre public?’, in van der Meersch, *supra* note 82, at 233, for whom the system of then Article 62, while permitting divergences from the Convention’s rules on procedural matters and the exercise of the right, would not permit states to renounce the Convention’s rights altogether. Though the author concedes that ‘la réserve qu’elle [the clause of Article 62] comporte se concilie difficilement avec le caractère d’ordre public de la matière’.

permit recourse to domestic complaints procedures.¹⁰² There is no doubt as to the lawfulness of these various types of waiver in general international law, insofar as the waiver does not contravene peremptory international norms.¹⁰³

The International Law Commission recently had occasion to examine the issues arising from a state's waiver of claim, when at its 52nd session in 2000 it tackled various questions relating to the implementation of international responsibility under its codification project. The provisionally adopted Article 46 (now Article 45)¹⁰⁴ provided that the responsibility of a state may not be invoked, *inter alia*, if the injured state has 'validly waived the claim in an unequivocal manner'. This wording echoed the formulation proposed by Special Rapporteur Crawford in his third report. Unfortunately, the relevant passage in the report is not very illuminating on the precise meaning to be attributed to the adverb 'validly', which plays an essential role in the Article's scope. The Special Rapporteur draws a parallel with the case where the consent of the party entitled to make a claim is a circumstance precluding wrongfulness, and gives examples relating to invalid consent of state representatives; otherwise, he confines himself to leaving 'to the general law the question of what amounts to a valid waiver in the circumstances'.¹⁰⁵

The relevance for our purpose of the ILC's Draft Articles on State Responsibility is somewhat lessened by the wording of Article 33(2), which expressly states that Part

¹⁰² Peace treaties offer remarkable examples of the waiver of reparations together with either (i) the extinction of the individual's right, or (ii) a procedural bar to the individual's right, or (iii) the commitment not to exercise diplomatic protection. These formulae demonstrate how states generally take great care to make their intentions unmistakable. As an example of the first category, see e.g. Article 76(1) of the Peace Treaty with Italy of 25 February 1947, in which Italy renounced 'au nom du Gouvernement italien et des ressortissants italiens' to assert every kind of claim for any reason, thus providing for a total renunciation of the right to claim (cf. also Article 30(1) of the Peace Treaty with Rumania, Article 32(1) of the Peace Treaty with Hungary and Article 28(1) of the Peace Treaty with Bulgaria). As an example of the second category of treaty, see Article 3 of Part VI of the Bonn Convention of 26 May 1952, in which Germany renounced its right to 'bring forward claims in its name', and pledged itself 'not to allow claims from its citizens', thus making apparent its will to foreclose access to domestic justice. An example of the third category of treaty is Article 3 of the Paris Agreement of 14 January 1946 establishing the Inter-Allied Reparation Agency, in which it was provided that the parties commit themselves not to bring claims before international tribunals and not to exercise diplomatic protection in favour of eligible claimants.

¹⁰³ For an interesting restatement of this principle in post-war international law, see the opinion written by Kelsen in 1950 on behalf of the Uruguayan Government regarding Article 76(3) of the Peace Treaty with Italy. The opinion was not published until 1986: see 'Opinion Concerning the Claims of the Italian Owners of the Ship "Fausto"', 37 *Österreichische Zeitschrift für öffentliches Recht* (1986) 1, at 14. An opportunity to clarify the position of the European Commission on Human Rights on the point was provided in 1975 by Case 6742/74, *X v. Federal Republic of Germany*, DR 3, 100, in which the applicant alleged, among other things, violation of Article 1 of Protocol No. 1 by the Federal Republic of Germany for sacrificing the interests of its own citizens for reasons of political opportunism, through the conclusion of the Treaty of Prague in December 1973. However, the Commission declared this head of complaint inadmissible, on the ground that no provision of the Treaty of Prague entailed a waiver on the part of the Federal Republic, thus in no way prejudicing the question of assets confiscated from German-speaking Sudetenland inhabitants.

¹⁰⁴ See UN Doc. A/CN.4/L.600, 11 August 2000. Article 45(a) of the adopted Articles omits the words 'in an unequivocal manner'.

¹⁰⁵ Crawford, 'Third Report on State Responsibility', Add. 2, A/CN.4/507, 1 July 2000, para. 253.

Two of the Draft Articles ‘is without prejudice to any right, arising from the international law responsibility of a State, which accrues directly to any person or entity other than a State’,¹⁰⁶ thus effectively limiting the scope of the entire Part Two to issues of inter-state responsibility. Indeed, on a closer look, one can question whether the topic of international responsibility is the proper context for dealing with the question of the consequences that a state’s disposition has on its citizens’ rights. Interestingly, the Special Rapporteur had included settlements alongside waiver as a ground for the loss of the right to invoke responsibility.¹⁰⁷ The ILC, however, decided to delete the reference to settlement, considering it as out of place in the framework of the invocation and implementation of responsibility. As the Chairman of the Drafting Committee at the 52nd session, Gaja, rightly pointed at, when a dispute is settled, there is an agreement which modifies the legal situation and extinguishes the dispute.¹⁰⁸ It is precisely that agreement — which is outside the scope of international responsibility and therefore outside the scope of Article 33(2) — which might produce lasting adverse effects on the legal position of the individual with regard to his or her claim.

The ILC will shortly have the opportunity to consider the question of the consequences of waivers in greater depth as part of the project of codification regarding diplomatic protection. This specific matter should be the subject of a forthcoming report by Special Rapporteur Dugard,¹⁰⁹ but an outline of the Special Rapporteur’s views is already contained in his first report. To assist the progressive development of international law, Dugard proposed establishing a state’s obligation of diplomatic protection in the case of a serious violation of a norm of *jus cogens* committed by another state, thus moving away from the dominant legal theory in this respect, according to which the exercise of diplomatic protection constitutes a right, but not an obligation, of the state. In the Special Rapporteur’s view, this obligation would be subject to certain limits, such as where fulfilling the duty might ‘seriously endanger the overriding interests of the state and/or its people’.¹¹⁰ Although, for various reasons, the draft of the Article did not meet with the necessary support of the ILC,¹¹¹ its underlying rationale may be perfectly acceptable, and lend itself to being applied also to the different case of waiver. If the imperative of defending the overriding interests of the nation is such as to prevent a state even from intervening

¹⁰⁶ The Article was first proposed by Special Rapporteur Crawford in his Third Report, *ibid.*, at n. 801.

¹⁰⁷ See *ibid.*, at para. 260.

¹⁰⁸ See ‘Statement of the Chairman of the Drafting Committee’, 262nd Meeting, 17 August 2000, at p. 36 of the extract.

¹⁰⁹ See the future plan of work announced by the Special Rapporteur in UN Doc. A/CN.4/L.506, para. 186.

¹¹⁰ See Draft Article 4(2)(a) as proposed by the Special Rapporteur, *ibid.*, at para. 74. His proposal draws upon some observations by Doehring, ‘Handelt es sich bei einem Recht, das durch diplomatischen Schutz eingefordert wird, um ein solches, das dem die Protektion ausubenden Staat zusteht, oder geht es um die Erzwingung von Rechten des betroffenen Individuums?’, in Ress and Stein, *supra* note 91, at 19.

¹¹¹ Cf. Simma, ‘The Work of the International Law Commission at Its 52nd Session (2000)’, 70 *Nordic Journal of International Law* (2001) 183, who reports the opposition by many ILC members to an alleged ‘duty’ of diplomatic protection, given the lack of practice and *opinio juris* on this matter, and because of the attempt by the Special Rapporteur to transform the classical institution of diplomatic protection into a tool for the protection and promotion of human rights.

diplomatically in favour of a single citizen, the same must be true *a fortiori* to justify the state's choice to settle once and for all at the international level legal disputes of such complexity and concerning such a large number of individuals, such as those normally dealt with by peace settlements.¹¹²

Returning now to the European Convention system, it follows that agreements between member states that not only have the effect of eliminating an international dispute, but which also limit some rights of the individual, such as the right of access to justice enshrined in Article 6(1), are not of themselves unlawful, but must be weighed by the Court bearing in mind their purpose.¹¹³ Only when the requirement of respect for human rights guaranteed by the Convention seems endangered, should the Court condemn an agreement under Article 17.¹¹⁴

Borrowing the language of the Court's jurisprudence on the margin of appreciation, the limitations on Article 6 must answer to an imperative social need.¹¹⁵ Applying this test to Article 3(1) of Part VI of the Settlement Convention shows that the test is satisfied. In the early 1950s, the Federal Republic of Germany's interest in reacquiring

¹¹² For a similar line of thought, see Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in Ranzelzhofer and Tomuschat, *supra* note 45, at 7, where the author warns against overturning 'the traditional legal edifice of how war claims are settled'.

¹¹³ For a similar line of thought, see Capotorti, *supra* note 82, at 139, for whom 'avant d'estimer qu'une disposition moins favorable (parce qu'accompagnée de restrictions plus grandes) est en contradiction avec la Convention, il faut considérer l'ensemble de l'accord qui a créé cette disposition'.

¹¹⁴ Article 17 of the Convention provides: 'Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' For a discussion of Article 17, see Capotorti, *supra* note 82, at 138 *et seq.* Some arguments in support of my thesis could also be inferred from Article 37 of the Convention, which permits the Court to strike an application out of its list where the circumstances lead to the conclusion that the matter has been resolved (Article 37(1)(b)), or where, for any other reason established by the Court, it is no longer justified in continuing an examination of the application (Article 37(1)(c)), and in either of these cases without prejudice to the option provided in Article 37(2) for the Court to continue an examination of the application if respect for the human rights guaranteed in the Convention so requires. The actual formulation of Article 37 dates back to the Eighth Protocol of 19 March 1985, which entered into force on 1 January 1990. In the explanatory report to the Protocol, however, there is no mention of a diplomatic transaction as a means of resolution of the dispute and as a cause for striking off the list. As regards Article 37(1)(b), the explanatory report considers that the matter has been resolved when the applicant has received 'pleinement réparation sur le plan national', whereas for Article 37(1)(c), notwithstanding the breadth of the wording, the report specifies that they should be comparable to those provided for in Article 37(1)(a) (which deals with the lack of interest of the applicant in maintaining his request) and Article 37(1)(b). See Conseil d'Europe, *Rapport explicatif au Protocole No. 8* (1985) 15, at para. 35.

¹¹⁵ Cf. *Berthold v. Federal Republic of Germany*, ECHR (1985) Series A, No. 90, at 25, para. 55. The applicability of the 'margin of appreciation' doctrine to Article 6 is a matter of some controversy in legal literature, see MacDonald, 'The Margin of Appreciation in the Jurisprudence of the ECHR', 1 *Collected Courses of the Academy of European Law* (1992) 95, at 160, for whom in theory there would be no limit to the Articles of the Convention to which the margin of appreciation could be applied. For the contrary view, see P. van Dijk and J. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed., 1998) 86, for whom 'the margin is of little relevance in regard to questions of a purely procedural matter ... for example the requirements of Articles 5 and 6'.

the sovereign rights belonging to a state far outweighed its interest in seeking to support the alleged rights claimed by a number of its citizens, and the waiver was therefore fully justified. The words of the Commission pronounced 44 years ago in the decision cited above are significant in this regard: in negotiating the terms of the Treaty of Bonn/Paris of 1952/1954, it was not a question of the Federal Republic consenting to limitations on a sovereignty it already possessed, but rather of first obtaining a transfer of sovereignty to itself. In the light of this consideration, the Commission questioned whether there was any reason to apply to the case in hand the principle that treaties entered into at a later date should be compatible with Convention norms.¹¹⁶

In the *Liechtenstein* judgment, the Court reached the same conclusion, although understandably without wishing to make a general statement on this delicate issue. Therefore the Court limited itself to noting the ‘unique circumstances’ of the particular status of Germany under public international law after the Second World War, which partly endured until the Treaty on the Final Settlement with Respect to Germany of 12 September 1990 entered into force. The Court added that, in the negotiations with the three Allied Powers, the Federal Republic of Germany ‘had to accept’ that the specific limitation on its jurisdiction dictated by Article 3 of Part VI of the Settlement Convention was not abolished.¹¹⁷

The emphasis laid by the Court on the constraints on the German negotiating position seems exaggerated and even dangerous, particularly if one is aware of the view of some German authors who see the Settlement Convention as an unequal treaty. Consequently, they seek to oppose the entrenchment of what they consider to be the lower status of Germany, in particular by casting doubt on the constitutionality of the treaty in its form consequent on the exchange of notes of 27–28 September 1990.¹¹⁸ These authors contend that, because the exchange of notes maintained in force rules that would otherwise have been extinguished by virtue of Article 7 of the Treaty of Moscow of 12 September 1990, a new agreement in fact came into existence, which ought to have been approved by the federal Parliament under Article 29(2) of the *Grundgesetz*.

The German Constitutional Court had the opportunity to refute this in its order of 28 January 1998 in the *Liechtenstein* case. In line with its previous case law on the impossibility of bringing claims challenging confiscatory measures effected from 1945 to 1949 in the Soviet-occupied zone,¹¹⁹ the Court stressed that the government’s commitment to prohibiting legal actions relating to events stemming from the occupation regime cannot be assessed under Article 14 of the *Grundgesetz* (which

¹¹⁶ Commission’s Decision of 10 June 1958 in Case 235/56, *X v. Federal Republic of Germany* (1958) YB 2, 257, at 300.

¹¹⁷ Judgment, para. 58.

¹¹⁸ See *supra* note 33.

¹¹⁹ These are the so-called *Bodenreform-Urteile* judgment of 23 April 1991, in 84 *Entscheidungen des Bundesverfassungsgerichtshofes* (1991) 90; and the judgment of 18 April 1996, in 94 *Entscheidungen des Bundesverfassungsgerichtshofes* (1996) 12. For a critical comment, see Seidl-Hohenveldern, *supra* note 16, at 977 *et seq.*

concerns respect for private property) because the Settlement Convention is directed at settling issues that arose before the entry into force of the *Grundgesetz*. The Court also rejected, on the merits, the argument that through the exchange of notes the German Government had renewed an undertaking that would otherwise have been discharged, noting that Article 7(1) of the Treaty of Moscow has the aim of extinguishing the agreements between the four Allied Powers, but not those freely made by the Federal Republic of Germany with the three Western Powers. As the Court was easily able to demonstrate, if Article 7 had had the purpose of making all the norms relating to the German occupation regime temporary independently of their origin, the German Government and the three Western Powers would have had no reason to indicate in their exchange of notes which of the norms of the Settlement Convention were to be considered discharged and which, on the other hand, were still in force.¹²⁰

4 The Stakes Increase: Liechtenstein's Application before the ICJ

Curia locuta, causa finita? Far from it. Shortly before the decision of the European Court, the Prince's lawyers conceived a new strategy: the claim would not only concern the human rights of the Prince, but also the sovereign rights of the state of Liechtenstein itself. Therefore, on 1 June 2001, an application was submitted by the Principality of Liechtenstein against the Federal Republic of Germany. Liechtenstein requests the Court to adjudge that Germany has incurred international legal responsibility and therefore is bound to make appropriate reparation to Liechtenstein because of its conduct with respect to Liechtenstein property since 1998.

Liechtenstein alleges that, as a result of the Federal Constitutional Court's decision of 28 January 1998, on the one hand Germany is now treating as German assets which belonged to nationals of Liechtenstein, to their detriment and to the detriment of Liechtenstein itself, while on the other hand denying that it has any obligation towards Liechtenstein to compensate it.¹²¹ In other words, Liechtenstein alleges that Germany is now, for whatever reason, wilfully taking advantage of Czechoslovakia's post-war seizures of Liechtenstein's property.

¹²⁰ The grounds for the Prince of Liechtenstein's application alleging violation of the right to a fair hearing under Article 6(1) of the European Convention refer precisely to this part of the Constitutional Court's order. The Court is accused of basing its decision on facts about the existence of which the applicant had not previously been notified, i.e. the 'new legal views of the Federal Republic and of the three Western Powers'. The European Court had no difficulty in finding that considerations similar to those of the Constitutional Court had already been dealt with by the Appeal Court of Cologne, and that they were drawn in any case from a logical and systematic interpretation of international negotiations and the content of international agreements, i.e. 'circumstances which had been known to the applicant and which had been the subject of argument in court' (Judgment, para. 75).

¹²¹ Application of the Principality of Liechtenstein to the International Court of Justice, 30 May 2001, paras 19–20.

It is inconceivable that such a claim could ever succeed. Without entering into the details, it suffices to indicate briefly the main stumbling blocks in the jurisdictional and (the unlikely) merits phases. With regard to jurisdiction, for Liechtenstein the jurisdiction of the Court arises under Article 1 of the 1957 European Convention for the Peaceful Settlement of Disputes,¹²² which entered into force as between Liechtenstein and Germany in 1980. Article 32(1) of the Convention provides that it ‘shall remain applicable as between the Parties thereto, even though a third State, whether a Party to the Convention or not, has an interest in the dispute’. It does not seem likely that this provision could bar the International Court of Justice from evaluating the applicability of the ‘necessary third party’ rule: for this rule to apply, the Court must conclude that its decision in the case would not only affect the legal interests of the Czech Republic, but would form the ‘very subject-matter’ of the case.¹²³

Despite the obvious insistence by Liechtenstein that the case only concerns Germany’s supposed change of position in 1998, and not the Czechoslovak seizures of 1945, it is evident that Germany’s actions — which we recall consist in complying with a Convention to which it is bound — could be considered unlawful only in relation to the subject-matter of the claim, namely, the ownership issue, whose solution entirely depends on the wrongfulness or not of the Czechoslovak seizures.

As regards the merits, the issue can be easily summed up as follows: under what conditions could or should a state disregard an obligation it undertook not to allow claims or actions relating to property seized under certain circumstances elsewhere? The answer is, when the seizure was a breach of a peremptory norm of international law.¹²⁴ It is difficult to characterize the Benes Decrees in that way, even taking account of *jus cogens superveniens*. Here again, the Sudeten German problematic appears under the surface of Liechtenstein’s claim. We recall that it was only by linking the Benes Decrees to the *Vertreibung* that commentators were able to characterize the Benes Decrees as genocidal acts. But, seen in this perspective, Liechtenstein’s application simply misses the target: Prince Franz Joseph II was neither a Sudeten German nor a *Vertriebener*. Only in one circumstance could the *Vertriebenen* benefit from a positive result of Liechtenstein’s claim, namely, if the ICJ were to affirm that the seizure of property *tout court*, or alternatively the seizure of property for the purpose of reparations, constituted a violation of *jus cogens*.

It is most unlikely that the ICJ would ever arrive at this conclusion. Therefore, we can safely conclude that, at least this time, the war of Troy will not take place.

¹²² 320 UNTS 243.

¹²³ For the application of the ‘necessary third party’ by the ICJ, see *Monetary Gold Removed from Rome in 1943 — Preliminary Question (Italy v. France, United Kingdom and United States of America)*, Judgment of 15 June 1954, ICJ Reports (1954) 19, at 32: ‘To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent’; see also *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Reports (1995) 90, at 105, para. 34.

¹²⁴ See *supra* note 5 for the text of Article 41(2) of the ILC Draft Articles on State Responsibility.