

**ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK**  
CENTRE OF EUROPEAN LAW AND POLITICS

University Bremen

**ZERP**

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## **The ICJ and Transnational Law**

The “Case Concerning Jurisdictional Immunities” as an Indicator for the Future of the Transnational Legal Order

ZERP-Working Paper 2/2011

## **Editorial**

Publisher &  
Distributor:

Zentrum für Europäische Rechtspolitik  
Fachbereich Rechtswissenschaft  
Universität Bremen  
Universitätsallee, GW 1  
28359 Bremen  
[www.zerp.eu](http://www.zerp.eu)

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ISSN (Internet):

1868-7520

Bremen, September 2011

# Contents

I.	The background .....	2
II.	The central issues for the doctrine of international law .....	4
	1. Individual claims for compensation .....	5
	2. Exceptions from state immunity .....	7
III.	Objections from the viewpoint of <i>Rechtspolitik</i> .....	8
	1. Reparations and property agreements .....	9
	2. Intertemporality .....	12
	3. Transnational human rights protection through “role splitting” .....	13
IV.	Conclusion .....	15

On 22 December 2008 the Federal Republic of Germany initialized proceedings against the Italian Republic before the International Court of Justice (ICJ) in The Hague.<sup>1</sup> In January 2011 Greece applied for permission to intervene in the case. On 4 July 2011 the ICJ decided that Greece is permitted to intervene as a non-party in the case, pursuant to Article 62 of the Statute.<sup>2</sup> Public hearings in The Hague will take place from 12 to 16 September 2011.

The outcome of this “Case Concerning Jurisdictional Immunities” is of central significance for the future of the transnational enforcement of human rights insofar as the ICJ decision will determine the role national courts are to play in the enforcement of compensation claims under civil law in the field of “transitional justice.” Consequently, it will also determine how the tension between human rights, on the one hand, and state immunity, on the other, is to be adjusted. If one conceives “transnational law” in the vein of Philip C. Jessup<sup>3</sup> – i.e. as law that breaks with the paradigm of an *ius inter gentes*, which can be invoked by individuals and which transcends the dualism of national and international law<sup>4</sup> – it can be concluded that the future of transnational law and the leeway for the transnational enforcement strategies of civil societal actors<sup>5</sup> depend significantly on the course of the proceedings in The Hague.

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1 ICJ, Case concerning Jurisdictional Immunities of the State (Germany v. Italy); the current status of proceedings and documents are available at [www.icj-cij.org](http://www.icj-cij.org); a counter-claim, submitted by Italy, which seeks to espouse Italian victims of Nazi crimes, was declared inadmissible on 20 July 2010 due to lack of temporal jurisdiction; Knabe, Pending ICJ Case questions scope of Foreign Sovereign Immunity Defense, *International Enforcement Law Report* 25 (2009), 162 ff.; Bettauer, Germany sues Italy at the International Court of Justice on Foreign Sovereign Immunity, *ASIL Insight* of November 19, 2009, <http://www.asil.org/files/insight091119pdf.pdf> (accessed 29 December 2009); for further background information, see Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and others*. Order No 14201, *AJIL* 103 (2009), 122 ff.

2 ICJ, order of 4 July 2011, available at <http://www.icj-cij.org/docket/files/143/16556.pdf> (accessed 30 August, 2011).

3 Jessup, *Transnational Law*, 1956.

4 Hanschmann, *Theorie transnationaler Rechtsprozesse*, in: Buckel et al., *Neue Theorien des Rechts*, 2nd ed., 2009, 385 ff.

5 For the proceedings concerning the support of the South-African apartheid regime, see Saage-Maaß, *Geschäft ist Geschäft? Zur Haftung von Unternehmen wegen der Förderung staatlicher Menschenrechtsverletzungen*, *KJ* 43 (2010), 54 ff.; see also Blisset, *Globales nunca más!*, *KJ* 41 (2008), 279 ff.

## I. The background

Several different groups of non-German victims of Nazi Germany have hitherto been excluded from German compensation payments.<sup>6</sup> In recent years, some of these groups have been able to partially attain final verdicts from national courts in Greece and Italy awarding them compensation to be provided by Germany.

Once all Italian legal remedies were exhausted, the German government – according to its written statement to the ICJ – understands the legal action before the ICJ as the last resort to block a perceived infringement of German sovereignty and to prevent the impending enforcement of the Italian and Greek verdicts. Instead of accepting its historic responsibility by including the hitherto excluded groups of victims who are still seeking justice,<sup>7</sup> The German government aims, with the help of the authority of the ICJ,<sup>8</sup> to put an end to the remaining compensation issues for victims of Nazi Germany under civil law.<sup>9</sup> Concretely, three different key issues have emerged during these proceedings.

The first matter concerns claims of Italian citizens who were deported to Germany during World War II in order to perform forced labour, but who were subsequently excluded from compensations provided by the foundation “Remembrance, Responsibility and Future” (RRF)<sup>10</sup> established in August 2000.

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6 For an overview, cf. Hense, Ein- und Ausschlüsse von NS-Opfern. Grundzüge der deutschen Entschädigungspolitik, in RAV-Informationsbrief 103 (2010), 44 ff. (available at [www.rav.de](http://www.rav.de)).

7 See, for instance, the 10th Bericht der Bundesregierung über den Stand der Rechtssicherheit für deutsche Unternehmen im Zusammenhang mit der Stiftung „Erinnerung, Verantwortung und Zukunft“ (31 March 2009, BT-Drs. 16-9047).

8 The at times rather instrumental attitude of the Federal Republic towards the ICJ is already documented in the institution of proceedings documents. Even as the Federal Republic addresses the Court willingly as applicant, the Federal Government has established, at the same time, constitutionally and legally problematic structural measures in an effort to avoid being taken to court due to acts within the framework of military interventions. The German declaration of 1 May 2008 recognizes the jurisdiction of the Court as compulsory, but excludes disputes relating to the deployment of German armed forces abroad and the use of the territory of the Federal Republic for military purposes from its jurisdiction, cf. BT-Drs. 16-9218 of 5 May 2008; cf. Bothe/Klein, Bericht einer Studiengruppe zur Anerkennung der Gerichtsbarkeit des IGH gemäß Art. 36 Abs. 2 IGH-Statut, ZaöRV 67 (2007), 825 ff.

9 Klingner, Staatenimmunität als Instrument der Entschädigungsverweigerung, RAV-Informationsbrief 102 (2009), 5 ff., <http://www.rav.de/publikationen/infobriefe/info-brief-102-2009/> (accessed 5 January 2010).

10 For the genesis of the foundation RRF, as well as its historical, legal and political

These claims include in particular those of members of the Italian armed forces who were taken prisoner after the armistice between Italy and the Allied Forces in September 1943 and who had to perform forced labour as so-called Italian Military Internees (Internati Militari Italiani, IMI). Although the Italian captives had been granted neither the formal nor the material status of prisoners of war, they have not hitherto received any compensation for the forced labour performed in the German Reich. Rather, according to the German government, they are to be treated – in contradiction to the factual situation in World War II – as unentitled prisoners of war, since their transfer from military internees to civil status violated international law.<sup>11</sup> In Germany, legal action against the rejection of respective applications by the RRF has been unsuccessful (for instance, a constitutional complaint to the Constitutional Court was dismissed in 2004<sup>12</sup>), while, by contrast, legal actions before Italian courts have been successful. In this context, the decision of the Italian Supreme Court of Cassation in the case *Ferrini v. Germany* was particularly significant for future developments. Here, the Court comprehensively discussed the German objection to state immunity and approved the cognizance of the Italian jurisdiction for the enforcement of claims of former forced labourers of Nazi Germany.<sup>13</sup>

The second issue pertains to Italian victims of war massacres, who have been awarded compensation by Italian criminal courts to be provided by the Federal Republic of Germany. The case *Milde v. Civitella* can be seen as exemplary in this context: In October 2006, the Military Court of La Spezia sentenced a former member of the German Armed Forces (*Wehrmacht*), Max Milde, to life imprisonment for his participation in a massacre conducted by the tank division Hermann Göring on 29 June 1944, during which 203 civilians were killed. In addition, the Court sentenced both Milde and the Federal Republic of Germany, as joint debtors, to pay one million Euros in compensation to the victims of the massacre or to their surviving relatives respectively. After the German government lodged an appeal, the Supreme Court of Cass-

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context, cf. Hense, *Verhinderte Entschädigung*, 2008.

- 11 Cf. Tomuschat's argument (who also represents the Federal Republic in the ICJ proceedings): Tomuschat, *Rechtsgutachten: Leistungsberechtigung der Italienischen Militärinternierten nach dem Gesetz zur Errichtung einer Stiftung „Erinnerung, Verantwortung und Zukunft“?*, 2001, <http://www.berliner-geschichtswerkstatt.de/zwangsarbeit/imi/imi-tomuschat-gutachten.pdf> (accessed 5 January 2010).
- 12 BVerfG, 2 BvR 1379/01, Decision of 28 June 2004, NJW 2004, 3257-3258.
- 13 Supreme Court of Cassation, Verdict of 11 March 2004, *Ferrini v. Federal Republic of Germany*, fn 5044/2004, *International Law Report* 128 (2004), 658 ff.; for an informative account, see Bianchi, *Ferrini v. Federal Republic of Germany*, *AJIL* 99 (2005), 242 ff.

ation confirmed this verdict on 21 October, 2008.<sup>14</sup>

The third key issue of the ICJ proceedings concerns Greek victims of Nazi war crimes, whose legal claims have also been dismissed by German Courts,<sup>15</sup> but who have attained a final verdict for compensation to be paid by Germany in Greece (Distomo case)<sup>16</sup> and who are now trying to enforce this verdict in Italy.<sup>17</sup> During the subsequent legal proceedings initiated by the German government, the Italian Supreme Court of Cassation dismissed the objection of state immunity and stressed the primacy of the fundamental values of freedom and human dignity.<sup>18</sup>

## II. The central issues for the doctrine of international law

From a legal positivist view of international law, the issues heard by the ICJ revolve around two central questions. On the one hand, the cases broadly address the emerging international law of compensation, i.e. the question of whether individuals can enforce their claims for compensation against states in the aftermath of serious human rights violations. On the other hand, they raise the issue of the extent to which state immunity has to be determined. In the words of Richard Falk, these cases are about the legal protection of “‘a reparations ethos’ to the effect that individuals who have been wronged by applicable international human rights standards ... should be compensated as fully as pos-

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14 Verdict of the Supreme Court of Cassation, Sezione I Penale. n 1972 of 21 October 2008. See Ciampi, *The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War*, *Journal of International Criminal Justice* 7 (2009), 597 ff.

15 BGH, III ZR 245/98 Verdict of 26 June 2003, NJW 2003, 3488 ff.; BVerfG, 2 BvR 1476/03, Decision of 15 February 2006, NJW 2006, 2542 ff.

16 Hellenic Supreme Court (Aeropag), Verdict of 4 May 2000, KJ 2000, 472 ff.; cf. also comprehensively Nessou, *Griechenland 1941-1944: Deutsche Besatzungspolitik und Verbrechen gegen die Zivilbevölkerung. Eine Beurteilung nach dem Völkerrecht*, 2009, 467 ff.; Paech, *Staatenimmunität und Kriegsverbrechen AVR* 47 (2009), 36 ff.; Fleischer, „Endlösung“ der Kriegsverbrecherfrage, in: Frei (ed.): *Transnationale Vergangenheitspolitik*, 2006, 474 ff.

17 After unsuccessful enforcement attempts in Greece, see ECHR *Kalogeropoulou et al. / Greece*, Nr. 59021/00, decision about the admissibility of an application of 12 December 2002, NJW 2004, 275 ff.

18 Verdict of the United Senates of the Supreme Court of Cassation (Corte Suprema di Cassazione, Sezione Unite Civili), fn 14199 of 6 May 2008.

sible. This ethos is a challenge to notions of sovereignty”.<sup>19</sup>

Both issues – individual claims for compensation and state immunity – concern central questions regarding the restructuring of international law,<sup>20</sup> which are briefly outlined below.

### *1. Individual claims for compensation*

If the Federal Republic denies in its written statement to the ICJ the existence of a norm establishing direct claims for compensation under international law, it not only contradicts the fundamental intuition of justice according to which violations of pivotal personality rights such as bodily integrity and human dignity have to be pre-empted, but also the idea that once such violations occur, they are to be compensated. The Federal Republic’s line of argument is at any rate directed against an emerging norm of international law according to which individuals possess a subjective right to compensation against a state that violates international law.

In recent decades, the transnational process of generating law has produced a network of decisions, in which national courts in the United States, Italy, Greece, Japan, Israel, the United Kingdom, etc., have acknowledged individual claims for compensation.<sup>21</sup> The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (Basic Principles and Guidelines) are one manifestation of this trend in international law at the universal level.<sup>22</sup> With these Basic Principles and Guidelines, the UN General Assembly<sup>23</sup> systematised the international law of compensation – and the resulting individual claims – and pointed out that the

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19 Falk, Reparations, International Law, and Global Justice, in: de Greiff (ed.), *The Handbook of Reparations*, 2006, 478 ff. (485).

20 For more on this issue, see generally Bothe, *Wandel des Völkerrechts*, in: *KritV* 91 (2008), 235 ff.

21 For extensive references on state practices, see Fischer-Lescano, *Subjektivierung völkerrechtlicher Sekundärregeln*, *AVR* 45 (2007), 299 ff.

22 For further evidence, see Sassòli, *State Responsibility for Violations of International Humanitarian Law*, *International Review of the Red Cross* 84 (2002), 401 ff. (419); Bong, *Compensation for Victims of Wartime Atrocities*, in: *Journal of International Criminal Justice* 3 (2005), 187 ff. (203); Kalshoven, *State responsibility for warlike acts of the armed forces*, *International and Comparative Law Quarterly* 40 (1991), 847 ff.; Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It wrong*, *European Journal of International Law* 18 (2008), 955 ff.

23 UN GA, 21 March 2006, A/RES/60/147.



Basic Principles and Guidelines do not develop effective customary international law further, but only reflect it.

This trend towards subjectivation of individual secondary rights is also confirmed in the United Nations' report "International Commission of Inquiry on Darfur", which investigated human rights violations in Sudan. The report states that

"there has now emerged in international law a right of victims of serious human rights abuses (in particular war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses."<sup>24</sup>

In an advisory opinion regarding a recent decision about the Israeli wall construction,<sup>25</sup> the ICJ also recognised the state's obligation

"to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction."<sup>26</sup>

The aforementioned statement has subsequently given rise to the interpretation "that the Court ruled in favour of a general principle to compensate individuals in cases where there is a violation of their rights."<sup>27</sup>

The German legal action therefore opposes vigorously the significant trend that international law

"could – if not, should – be interpreted in such a way as to confer, on the individual victims of violations of international humanitarian law, a right to claim compensation for such violations."<sup>28</sup>

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24 International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General pursuant to Security Council Resolution 1564, 25 January 2005, cl. 597, [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (accessed 9 December 2009).

25 ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Rep. 2004 and I.L.M. 43 (2004), 1009 ff.

26 ICJ, *ibid.*, marginal number 153.

27 Schwager, The Right to Compensation for Victims of an Armed Conflict, in: Chinese Journal of International Law 4 (2005), 417 ff. (430), with further references.

28 Hofmann, Victims of Violations of International Humanitarian Law, in: Dupuy et al. (eds.), *Völkerrecht als Wertordnung*. Tomuschat, 2006, 341 ff. (357-358), with further references; see also Art. 6 Draft Declaration of International Law Principles on Compensation for Victims of War (International Law Association, Report of the Working Group „Compensation for Victims of War“, 2008, <http://www.ila-hq.org/en/committees/index.cfm/cid/1018> (accessed 5 January 2010)).

## 2. *Exceptions from state immunity*

As concerns state immunity, a similar structural change of international law can be observed.

Within the framework of immunity against enforcement, only such measures are banned under international law which concern the state property

“that at the point of time when the enforcement measure commences serves sovereign functions of the foreign state.”<sup>29</sup>

To the extent that the German cultural institute *Villa Vigoni* in Italy was subject to such enforcement measures, due to the above-mentioned compensation claims, such a link to a central function of sovereignty is non-existent.<sup>30</sup>

In international law, state immunity in litigation is no longer absolute. Rather, the principle of state immunity is in “a process of decline;” its history has turned “into a history of the struggle for the number, kind and extent of exceptions.”<sup>31</sup> Hersh Lauterpacht argued as early as 1951 that

“no legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to ... torts committed in the territory of the state assuming jurisdiction.”<sup>32</sup>

Consequently, there is a significant trend in state practice and *opinio iuris* not to grant immunity in cases of torts and, hence, even less so in cases of gross violations of international law. The practice that assumes exceptions from immunity in the case of tort is, after all, common. It is therefore difficult to claim that a general state practice and *opinio iuris* exists according to which the armour of immunity applies without reservations in cases of gross violations of international law. This is even more so as, according to the “Basic Principles and Guidelines,” the required legal protection of victims of serious violations of international law includes the duty to provide

“equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation.”<sup>33</sup>

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29 BVerfGE 46, 342, 364.

30 Nor can it be established by a retrospective – and legally abusive – declaration of the cultural institute as part of the diplomatic infrastructure of Germany.

31 BVerfGE 16, 27, 33.

32 Lauterpacht, Jurisdictional Immunities of Foreign States, British Yearbook of International Law 28 (1951), 229.

33 “Basic Principles and Guidelines,” Fn 23, cl 3c.

Especially, for legal violations occurring in the territory of the state which exercises jurisdiction, (forum state) the immunity of the violating state is therefore regularly denied.<sup>34</sup> Consequently, Art. 12 of the United Nations Convention on State Immunity provides an exception from immunity if an act or omission occurred entirely or in part in the territory of the forum state.<sup>35</sup> The underlying notion is that “since the injuries covered by the exception occur within the forum state, that state is the most convenient forum.”<sup>36</sup> It is therefore no evident violation of international law that offences committed in Italy or Greece are tried there and that immunity is not adjudicated; rather it is merely a consequence of the common interpretation of the *locus delicti commissi* as an “agreed basis or an unchallenged or undoubted basis for jurisdiction.”<sup>37</sup>

### III. Objections from the viewpoint of *Rechtspolitik*

From the perspective of public international law, Germany’s success before the ICJ can therefore not be taken for granted, particularly since the German legal argumentation runs counter to the above-mentioned developments in modern international law.

Why could the German government’s legal action nevertheless be successful?

The decentralised enforcement of human rights before national courts usually faces numerous, general and specific objections – some explicit, some implicit – from the viewpoint of *Rechtspolitik*. The three central objections are detailed in the following sections: (1) In the case at hand, it is argued that the Federal Republic has already provided a massive amount of compensation within the framework of *global agreements* and other bilateral arrangements;

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34 See the comprehensive overview in Paech, Fn 16, 36 ff.; Cremer, Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit, AVR 41 (2003), 137 ff.; furthermore cf. Reimann, A Human Rights Exception to Sovereign State Immunity, Michigan Journal of International Law 16 (1995), 403 ff.

35 United Nations Convention on Jurisdictional Immunities of States and Their Property of December 2, 2004, A/RES/59/38; however, the Convention has not yet come into effect, since the required 30 ratifications have hitherto not been deposited.

36 Forcese, De-Immunitizing Torture: Reconciling Human Rights and State Immunity, McGill Law Journal 52 (2007), 127 ff. (151); see also Crawford, International Law and Foreign Sovereigns: Distinguishing Immune Transactions, British Yearbook of International Law 54 (1983), 75 ff. (111).

37 International Law Commission, Fifth report on jurisdictional immunities of States and their property, A/CN.4/363, 39.

additionally, that Italy and Greece had already waived all further claims for compensation. (2) More generally, an *intertemporal argument* is made: Today, it might be the case that international law recognizes individual claims and allows for a decentralised enforcement, but what matters is the legal situation at the time the offences were committed; and those rules do not allow such a decentralised enforcement. (3) Finally, from a procedural perspective, some international lawyers are apprehensive of a decentralised enforcement of human rights as this might result in *legal chaos*.

### 1. *Reparations and property agreements*

Let us first discuss the argument that the Federal Republic has already provided sufficient compensation for the respective offences. Overall, Germany has hitherto paid about 65 billion Euros in compensation. At no point, however, has the amount of compensation paid exceeded 0.7 percent of the gross domestic product (or seven percent of the Federal budget). During the 1960s, the Federal Republic entered into so-called global and complementary agreements with a number of states, including Greece and Italy.<sup>38</sup> The German government argues that these agreements exert an inhibiting effect on the present dispute.<sup>39</sup> The present claims, according to this line of argument, would be contradicted by the Italian waiver of claims in Article 77, paragraph 4, of the 1947 Peace Treaty,<sup>40</sup> as well as by the two Italo-German Agreements dating back to 2 June 1961 concerning (a) the regulation of certain proprietary, economic and financial issues, and (b) the payments in favour of Italian citizens who were subject to Nazi persecution.<sup>41</sup> In accordance with these latter two Agreements, Germany had, in both cases, paid 40 million Deutschmarks.

However, the 1961 agreements did not deal with the aforementioned violations of individual rights. While the “Compensation Agreement” of 1961 was exclusively directed at the compensation claims of Italian citizens on the grounds of Nazi injustice in the form of racist and political persecution, the “Property Agreement” aimed at resolving property-related claims. Neither of

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38 For a historical account of the negotiations, see de la Croix/Rumpf, *Der Werdegang des Entschädigungsrechts unter national- und völkerrechtlichem und politologischem Aspekt*, 1985, 251 ff.; see also Stuby, *Völkerrechtliche Probleme bei der Entschädigung von ausländischen NS-Zwangsarbeitern*, *Zeitschrift für Rechtspolitik* 1990, 314 ff.

39 Reply of the Federal Government to a parliamentary question, BT-Drs. 16-11884 of 10 February 2009, 2; the legal argumentation follows Tomuschat, Fn 11.

40 Printed in *AJIL* 42 (1948), Suppl., 42 ff.

41 *BGBI.* 1963 II p. 669/793.

the two Agreements, however, dealt with the violations of international humanitarian law tried before the ICJ today. Due to their limited scope, these agreements therefore cannot exert a limiting effect on compensations which would have to be paid due to violations of core provisions of international humanitarian law.

A similar reasoning would apply with respect to the Peace Treaty of the Allied Powers with Italy of 10 February 1947. Art. 77, paragraph 4, of this Treaty states that

“Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945.”<sup>42</sup>

Nevertheless, payments of reparation and those of compensation due to the violation of highly personal legal interests must not be equated – they are categorically different.<sup>43</sup> Compensations for violations of pivotal rights of personal integrity differ from those based on reparations. In the latter case, the civil population is compensated for being hit by the inevitable consequences of war, while in the case of the former the population is subject to war crimes to be prevented under all circumstances according to international humanitarian law.<sup>44</sup> The Peace Treaty of the Allied Forces thus regulates the issue of reparations, but does not rule out any potential individual compensation claims based on the commitment of war crimes.<sup>45</sup>

Furthermore, the interplay of the 1953 London Debt Agreement (LDA)<sup>46</sup> and the 1990 Two Plus Four Agreement<sup>47</sup> cannot exempt the Federal Republic. In the post-war period, the Federal Republic initially argued, with respect to individual compensation claims for war crimes, that they were part of the moratorium under Art. 5, section 2, LDA. As a consequence all claims were deferred until the reparation issue had been finally clarified in a peace treaty.<sup>48</sup>

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42 This provision can be found in Part VI, Section 1 of the Peace Treaty entitled “Reparations,” which deals exclusively with the regulation of legal issues in this context.

43 Cf. BVerfGE 94, 315 ff. (331), with further references.

44 Similarly to this argumentation of the Aeropag, cf. Fn 16.

45 Cf., yet without a conclusive argument for the equation of reparations and compensations, Tomuschat, Fn 11, 6 (in Fn 24).

46 Comprehensively Rombeck-Jaschinski, *Das Londoner Schuldenabkommen. Die Regelung der deutschen Auslandsschulden nach dem Zweiten Weltkrieg*, 2005.

47 BGBI. 1990 II, 1318.

48 The Strategy of the Federal Government became obvious in a note verbale sent by the German Ambassador in Athens to the Foreign Ministry in 1969: “It should be in our interest to prolong as much as possible this transitory state of the non-

According to a later line of argument, this moratorium has become irrelevant through the Two Plus Four Agreement, which states: “This Agreement includes the final regulation of the legal issues caused by the war.”<sup>49</sup> However, a legal position arguing that the Agreement includes the dispensation with compensations for Italy and Greece cannot be applied, precisely because Greece and Italy were not contractual parties to the Two Plus Four Agreement. Hence, the Agreement draws no negative consequences for the two countries, let alone a waiver of the position of individual rights. Any agreement to the detriment of a third state or its citizens is not permitted under Art. 35 of the Vienna Convention on the Law of Treaties, which is part of customary international law. And even if an agreement to the detriment of third parties were allowed, the issue of compensation is at no point mentioned in the Two Plus Four Agreement; thus, the issue of compensation is neither regulated explicitly nor by “qualified silence.”

Finally, even if the previously mentioned agreements were intended to have such limiting effects, they could not be used to counter the claims of individuals. The Geneva Conventions of 1949 state in Article 6 and 7 respectively that all agreements undermining the rights of individuals established by international humanitarian law are banned. Accordingly, Art. 7 of the IVth Geneva Convention, relative to the Protection of Civilian Persons, states:

“No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.”<sup>50</sup>

This statement expressly prohibits the waiver of rights, including the individual’s right to claim for compensation. A waiver of compensation for violations of pivotal individual rights in peace treaties would violate “an explicit prohibition of international humanitarian law;”<sup>51</sup> as such, it leads the waiver agreement to be void<sup>52</sup> and rules out a limitation for those offences in question.<sup>53</sup>

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completion of a peace treaty, in order to forfeit claims by our past enemies with dint of the passing of time”; quoted from Paech, *Wehrmachtsverbrechen in Griechenland*, KJ (1999), 381 ff. (391).

49 Reply of the Federal Government to a parliamentary question, BT-Drs. 16-1634 of 30 May 2006, 5.

50 Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (UNTS 75, 287).

51 Sassòli, Fn 22, 419.

52 Bong, Fn 22, 203: “a waiver ... would clearly violate the explicit prohibition of these provisions.”

53 See also the Verdicts of the Supreme Court of Cassation, Fn 18.

## 2. *Intertemporality*

The second objection raised against the compensation claims of victims of World War II is of an intertemporal nature.<sup>54</sup> It is argued that compensation claims cannot be asserted retrospectively.

From an intertemporal point of view, the issue of the emergence of an international law of compensation<sup>55</sup> is structurally similar to that of raising the question about the existence of an international criminal law at the time of the Nuremberg Trials. Comparable to the argument made by Carl Schmitt, who disbelieved in the legitimacy of the Nuremberg Trials because a war of aggression was not an offence and therefore not punishable at the time the offence was committed,<sup>56</sup> the exponents of the intertemporal limitation argue that, whereas claims for compensation perhaps have to be admitted today, this was not the case when the offences were committed.

Like with International Criminal Law in Nuremberg,<sup>57</sup> the law of compensation can, however, take up many elements of international law that were in fact already in force when the offences were committed. Especially, Art. 3 of the IVth Hague Convention concerning the Laws and Customs of War on Land of 1907 states explicitly:

“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

This norm has already been an established part of international customary law.<sup>58</sup>

All cases mentioned above and currently being heard in The Hague are vio-

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54 For intertemporal international law, see Krause-Ablass, *Intertemporales Völkerrecht*, 1970; Elias, *The Doctrine of intertemporal Law*, *AJIL* 74 (1980), 285 ff.; Higgins, *Some Observations on the inter-temporal Rule in International Law*, in: Makarczyk (ed.), *Theory of international law at the threshold of the 21st century*, 1996, 173 ff.; Grodecki, *Intertemporal conflict of laws*, 1976.

55 Derleder, *Individualentschädigungsansprüche zur Durchsetzung des Kriegsvölkerrechts*, in: IALANA (ed.), *Frieden durch Recht*, 2010, 331 ff.

56 Schmitt, *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz „Nullum crimen, nulla poena sine lege“* (1945), in: Quaritsch (ed.), 1994.

57 Cf. already Kantorowicz, *Gutachten zur Kriegsschuldfrage 1914, mit einer Einführung von Imanuel Geiss*, 1967.

58 Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (3 May 1993), para. 35.

lations contradicting the earlier Hague Conventions. The obligation to provide compensation for such offences came into force already in 1907. Thus, there is no reason to argue about the retroactive recognition of claims for compensation. The claim for compensation rests on a legal basis, its contractual form being more than a century old. For this reason, the frequently used reference to Article 28 of the Vienna Convention on the Law of Treaties is misleading: there is no retrospective contractual effect, as the obligation to pay compensation has been in effect since 1907.

Nevertheless, the problem rests not on the origin of the claim but on its enforcement. From an intertemporal perspective the point in time when the act takes place is decisive. In the present case, two relevant issues have to be distinguished: Firstly, whether the international humanitarian law was violated depends on the legal situation at the time when the offence was committed. The second issue pertains to the enforcement (can individuals take action before national courts and can they refer to exceptions from state immunity?), which has to be assessed on the basis of the international law in effect at the time when the potential violations of state immunity took place. In this context, it must be noted that under current international law, the relevant norms can be interpreted as norms that entitle individuals to claim for compensation and rule out state immunity.<sup>59</sup>

### 3. *Transnational human rights protection through “role splitting”*

The third objection, pursued by opponents to an individual’s claim for compensation before national courts, is of a procedural nature. It coincides with a debate between judges of the ICJ on the occasion of the “arrest warrant case” (Democratic Republic of the Congo *./.* Belgium), which revolved around the decentralised enforcement of criminal law by means of the principle of universal jurisdiction. The judges had different ideas about the adequate form of the forums under international law, which became manifest especially in the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal on the one hand, and that of President Guillaume on the other. The latter (no longer a member of the Court) painted a dark picture of “judicial chaos,” arguing that

“Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.”<sup>60</sup>

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59 In this sense, see also the reasoning in the recent decision of the Tribunale Ordinario di Prescia, 6601/10, to refer the case to the ECJ for preliminary ruling.

60 ICJ of 14 February 2002, Arrest warrant case (Democratic Republic of the Congo *v.* Belgium), Guillaume, cl. 15.



Higgins, Kooijmans and Buergenthal countered this view by referring to the issue of efficiency:

“[M]oreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court.”<sup>61</sup>

The central issue evoked in these statements concerns the role national courts should play in the enforcement of international law. As termed by George Scelle,<sup>62</sup> “role splitting” allows national courts to become increasingly active as enforcers of international law.<sup>63</sup> In doing so, they not only represent an important addition to international tribunals, but they also become engines in enforcing and strengthening the rule of law. For instance, Spanish and British courts significantly strengthened the decentralised protection against arbitrary state violence in the Pinochet case<sup>64</sup> and US-American courts lead the way in the enforcement of a global rule of law (often even against American foreign policy interests).<sup>65</sup> Thus, national courts in a number of cases have shown their ability to be effective actors in the struggle for the law of peace.<sup>66</sup>

In this respect, national courts serve an important complementary function that is recognised under international law. Therefore, “legal chaos” is by no means a necessary result of such a system of decentralised and overlapping jurisdictions. There are numerous functional equivalents to the ideology of a hierarchy of norms (*Stufenbau des Rechts*). Especially, the fragmented sectors of the international legal order<sup>67</sup> have produced mechanisms<sup>68</sup> that by means of

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61 ICJ, *ibid.*, joint sep. opinion, Higgins, Kooijmans, Buergenthal, cl. 75.

62 Scelle, *Précis de droit des gens*, vol. I, 1932, 47; on this Cassese, Remarks on Scelle’s Theory of ‘Role Splitting’ (*dédoulement fonctionnel*) in *International Law*, *EJIL* 1 (1990), 210 ff.

63 Cf. also Bothe, *Complementarity: Ensuring compliance with international law through criminal prosecutions*, in: *Die Friedens-Warte* 83 (2008), 59 ff.

64 For the Pinochet case see, among others, Brody/Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, 2000.

65 Cf., for instance, Halfmeier, *Menschenrechte und Internationales Privatrecht im Kontext der Globalisierung*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 68 (2004), 653 ff.

66 Benvenisti, *National courts, domestic democracy, and the evolution of international law*, *EJIL* 20 (2009), 59 ff.; Shany, *National Courts as International Actors: Jurisdictional Implications*, Hebrew University International Law Research Paper No 22/08, October 2008.

67 Among others, Koskeniemi, *Legal fragmentation(s)*, in: Calliess et al. (eds.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner*, 2009, 795 ff.

68 Neumann, *Die Koordination des WTO-Rechts mit anderen Ordnungen. Konflikte*

procedural norms of complementarity and by the obligation to mutual consideration provide for effective forms of coordination between judicial tribunals. These coordination techniques can be used when human rights are implemented in decentralised ways.<sup>69</sup>

#### IV. Conclusion

In these proceedings the Federal Republic, regrettably motivated by blatant economic reasons<sup>70</sup> and in alliance with proponents of a traditional global order, battles against a strengthening of forensic enforcement mechanisms. If the position of the German government is to succeed, decades of international efforts to sanction war crimes not only under criminal law but also under civil law could be undermined. What holds true for the German government – the proceedings in Italy and Greece being an unwelcome incident – also applies to the Italian executive: The verdicts of the Italian courts – as the Italian executive might become a target for compensation claims as well – are also unasked for; as unasked for as the proceedings of Spanish Courts against Pinochet were for the Spanish Aznar administration or the American Holocaust trials for the US Government.

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des materiellen Rechts und Konkurrenzen der Streitbeilegung, 2002.

69 For the notion of network and the relations of mutual consideration among courts, see Fischer-Lescano/Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, *Michigan Journal of International Law* 25:4 (2004), 999 ff.; pointing in a similar direction: the concept of “dialectical legal interaction” in Berman, *Global Legal Pluralism*, in: *Southern California Law Review* 80 (2007), 1155 (1197 ff).

70 It can be doubted whether or not the link to Nazi crimes and their economic consequences leads the Federal Government to argue in such a sovereignty-heavy manner. In the Varvarin case concerning claims for compensation stemming from the intervention in Kosovo, the Federal Government also disputed individual claims for compensation, not only substantively but also, and unnecessarily, in principle. It can only be hoped the BVerfG will use a pending constitutional appeal (concerning BGHZ 169, 348 ff.) to clarify the matter. In addition, regarding the question of compensation for the victims of the Kunduz incident, the Federal Government seems unprepared to accept any statutory obligation. The phrase, payments should be made „according to custom” (see Rath, *Entschädigung nach Landessitte*, *die tageszeitung*, 9 December 2009) is similar to the US-American strategy of solatia payments in Afghanistan. By this means, one attempts to locate the grounds for payments in local custom and to keep the issue of national or international statutory obligations to provide compensation unanswered. For solatia payments in Afghanistan, see Fischer-Lescano, Fn 21, 363 ff.

Hence, the ICJ will have to decide about fundamental questions of the structure of the international legal order, namely on how far the power of bureaucracies extends in international relations, and how the demand for the inclusion of victims into law<sup>71</sup> can be implemented procedurally. If one intends to juridify international relations, there is no alternative but to strengthen the independence of law and those juridical procedures that allow for attributing responsibility and compensation before national courts as well.

It is in this sense that the proceedings in The Hague are not only about compensation claims of an ultimately rather assessable scope. Instead, the proceedings are in fact about the very future of the global rule of law itself. In the words of Hans Kelsen:

“To the extent that international law penetrates areas that heretofore have been the exclusive domain of national legal orders, its tendency toward directly authorizing and obligating individuals must increase.”<sup>72</sup>

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71 See Hitzel-Cassagnes, *Die Inklusion von Betroffenenperspektiven bei der Anerkennung von Menschenrechten*, 43 (2010), 4 ff.

72 Kelsen, *Pure Theory of Law*, 1978, 327.

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