DEVELOPMENTS

State Liability for Violations of International Humanitarian Law - The *Distomo* Case Before the German Federal Constitutional Court

By Markus Rau[*]

A. Introduction

For quite some time the question of how to cope with violations of international humanitarian law was primarily one of individual criminal responsibility.[1] However, over the last few years, the position of the victims of armed conflict has increasingly come into focus. In particular, attention has been given to the issue of reparations, including compensation,[2] for breaches of international humanitarian law.[3]

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[1] *See, e.g.*, Kai Ambos, *Zur Bestrafung von Verbrechen im internationalen., nicht-internationalen und internen Konflikt*, *in* HUMANITÄRES VÖLKERRECHT: POLITISCHE, RECHTLICHE UND STRAFGERICHTLICHE DIMENSIONEN 325 (Jana Hasse, Erwin Müller and Patricia Schneider eds., 2001); M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, 2001 THE GLOBAL COMMUNITY (YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE) 3 (2001); ELIES VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (2003).

[2] It is generally understood that under international law reparation can take the form of restitution, compensation or satisfaction, either singly or in combination. In regard to inter-state relations, see Article 34 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session, GAOR, 56th Session, Supp. No. 10 (A/56/10).

[3] Among the vast literature, *see, e.g.*, Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, 20 BERKELEY JOURNAL OF INTERNATIONAL LAW 297 (2002); Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 529 (2003); Bernhard Graefrath, *Schadensersatzansprüche wegen Verletzung humanitären Völkerrechts*, HUMANITÄRES VÖLKERRECHT - INFORMATIONSSCHRIFTEN 110 (2001); Wolfgang Heintschel von Heinegg, *Entschädigung für Verletzungen des humanitären Völkerrechts*, 40 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 1 (2003);

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The recent decision of the *Bundesverfassungsgericht* (BVerfG - Federal Constitutional Court) in the *Distomo* case[4] adds to that discussion. The decision is of special interest because, for the first time, the BVerfG was confronted, *inter alia*, with the question of applying the domestic rules of *Staatshaftungsrecht* (state liability law) to damage resulting from armed conflict. Yet, as will be addressed in more detail below, the Court deliberately circumvented part of the problem, thus leaving the issue open for further discussion.

B. Background

I. Facts of the Case[5]

On 10 June 1944, SS forces integrated into the German occupying troops in Greece shot some 200-300 of the inhabitants of the mountain village of Distomo, near Delphi in central Greece, in retaliation for an attack by Greek partisans. The victims of the massacre, among them the plaintiffs' parents, were mainly elderly persons, women and children who had not been involved in the partisan activities. The plaintiffs, children at the time of the incidenct, only survived the massacre because a German soldier warned them and urged them to hide. As a consequence of the incident, the plaintiffs suffered, *inter alia*, psychic damage as well as disadvantages regarding their personal and professional advancement.

Burkhard Heß, *Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht*, 40 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 107 (2003); Riccardo Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 339 (2003); Ana Salado-Osuna, *The Victims of Human Rights Violations in Armed Conflicts: The Right to Justice, Truth and Compensation*, *in* THE NEW CHALLENGES OF HUMANITARIAN LAW IN ARMED CONFLICTS – IN HONOUR OF PROFESSOR JUAN ANTONIO CARRILLO-SALCEDO 315 (Pablo Antonio Fernández-Sánchez ed., 2005); Elke Schwager, *The Right to Compensation for Victims of an Armed Conflict*, 4 CHINESE JOURNAL OF INTERNATIONAL LAW 417 (2005); Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 157 (2002); Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 497 (2003). See, also, the contributions in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS (Albrecht Randelzhofer and Christian Tomuschat eds., 1999).

[4] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[5] *Id.* at para. 2.

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II. Procedural History[6]

In September 1995, the plaintiffs brought action for declaratory judgment before the *Landgericht* (LG - Regional Court) of Bonn claiming that Germany was liable to pay compensation for the incident. The Regional Court dismissed the action[7] and the plaintiffs lodged a *Berufung* (appeal) with the *Oberlandesgericht* (OLG - Higher Regional Court) of Cologne, which upheld the lower court's decision.[8] On 26 June 2003, the *Bundesgerichtshof* (BGH - Federal Court of Justice) rejected the plaintiffs' application for *Revision* (appeal on points of law), arguing that neither international law nor domestic state liability law, as of 1944, provided a basis for the plaintiffs' claims.[9]

Meanwhile, the plaintiffs also had participated in a claim for damages for the Distomo massacre before the District Court of Livadeia in Greece. The proceedings resulted, in October 1997, in a default judgment against Germany.[10] This ruling was upheld by the *Areopag* (Greek Supreme Court) in a judgment of 4 May 2000.[11] However, the Federal Court of Justice, in its decision of 26 June 2003, found that it could not give enforceable recognition to the judgment of the District Court of Livadeia because the acts at issue had been sovereign or public acts (*acta jure imperii*) for which Germany was immune from another state's jurisdiction.[12]

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[6] *Id*. at para. 3.

[7] Landgericht (LG – Regional Court) Bonn, 1 O 358/95 (June 23, 1997).

[8] Oberlandesgericht (OLG – Higher Regional Court) Köln, 7 U 167/97 (August 27, 1998).

[9] Bundesgerichtshof (BGH – Federal Court of Justice), 56 NEUE JURISTISCHE WOCHENSCHRIFT 3488 (2003). *See* Sabine Pittrof, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Constitutional Court Hands Down Decision in the* Distomo *Case*, 5 GERMAN LAW JOURNAL 15 (2004), at http://www.germanlawjournal.com/pdf/Vol05No01/PDF_Vol_05_No_01_15-21_Public_Pittrof.pdf.

[10] Court of First Instance of Livadeia, *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997 (October 30, 1997). English translation (excerpts) reproduced in: 50 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 595 (1997) (with note by Maria Gavouneli). For an analysis of the decision, *see* Ilias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 765 (1998).

[11] Hellenic Supreme Court (Areios Pagos), *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 111/2000, 4 May 2000; for a comment see Maria Gavouneli/Ilias Bantekas, *Case Report: Prefecture of Voiotia v. Federal Republic of Germany*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 198 (2001).

[12] Bundesgerichtshof (BGH – Federal Court of Justice), 56 NEUE JURISTISCHE WOCHENSCHRIFT 3488-3489 (2003) .

Against the German ordinary courts' decisions, the plaintiffs filed a *Verfassungsbeschwerde* (constitutional complaint) to the BVerfG, pursuant to Article 93 para. 1 (4a) of the *Grundgesetz* (GG – Basic Law or Constitution) in concjunction with Sections 13 (8), 90-95 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG - Federal Constitutional Court Act).

III. Plaintiffs' Arguments Before the BVerfG

Before the BVerfG, the plaintiffs argued:

- That the ordinary courts' refusal to grant compensation violated the freedom of property, as guaranteed by Article 14 of the Basic Law.[13] The plaintiffs reasoned that they were entitled to damages both under Article 3 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land[14] [hereinafter "Hague Convention IV"] and under domestic law of state liability. These rights to compensation, the plaintiffs argued, formed part of their property.

- That the decisions of the ordinary courts attacked by the constitutional complaint violated the equal treatment clause in Article 3 para. 1 of the Basic Law.[15]

- That the ordinary courts' failure to submit to the BVerfG, under Article 100 para. 2 of the Basic

[13] Article 14 of the Basic Law states: "(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts."

[14] Reichsgesetzblatt (RGBl.) 1910, 107. For the wording of Article 3 of Hague Convention IV see *infra* at C.II.2.a.

[15] Article 3 para. 1 of the Basic Law states: "All persons shall be equal before the law."

> Law,[16] the question of whether there was a rule of general international law providing an enforceable right to compensation for victims of armed conflict constituted a violation of the right to the lawful judge, set out in Article 101 para. 1 of the Basic Law.[17]

In addition, the plaintiffs alleged violations of their right of access to court (Article 19 para. 4 of the Basic Law), their right to a hearing in accordance with law (Article 103 para. 1 of the Basic Law), their *allgemeines Persönlichkeitsrecht* (general personality right) (Art. 2 para. 1 in conjunction with Article 1 para. 1 of the Basic Law), and their right of physical integrity (Art. 2 para. 2 of the Basic Law). These allegations, which were rejected by the BVerfG as being inadmissible,[18] will not be dealt with in this casenote.

C. Court's Ruling

I. Effect of the Judgment of the District Court of Livadeia

Before turning to the plaintiffs' arguments, the BVerfG addressed the issue of whether the refusal, by the Federal Court of Justice, to recognize the judgment of the District Court of Livadeia was in conformity with the Basic Law. Without going into much detail, the BVerfG found that, indeed, it was. According to current international law, the Court reasoned, a state could claim immunity from another state's jurisdiction if and to the extent that acts of sovereign power (*acta jure imperii*) were at issue. As the SS unit involved in the Distomo incident had been integrated into the German occupying forces, its acts were to be classified as *acta jure imperii*, irrespective of whether or not they were to be considered legal under international law. Consequently, the Federal Court of Justice had been right in holding that the judgment of the District Court of Livadeia was not binding on the German courts.[19]

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[16] Article 100 para. 2 of the Basic Law states: "If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court."

[17] Article 101 para. 1 of the Basic Law states: "Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge."

[18] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 13-16 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[19] *Id.* at para. 18.

It is not fully clear why the BVerfG felt inclined to pronounce on this issue. The plaintiffs did not raise the question of *res judicata* before the Court. The BVerfG itself did not specify in any way how the decision of the Federal Court of Justice, refusing to recognize the judgment of the District Court of Livadeia, might have affected the plaintiffs' constitutional rights. Rather, the BVerfG confined itself to a more or less abstract constitutional review of the refusal of enforceable recognition without linking its examination to a particular provision of the Basic Law.

In fact, it is far from evident that there is a constitutional guarantee to the effect that individuals may claim recognition of foreign judgments if the prerequisites for recognition, as stipulated in Section 328 of the *Zivilprozessordnung* (ZPO - German Code of Civil Procedure) or the relevant inter- or supra-national instruments respectively,[20] are met. On the contrary, while it is generally understood in academic writing that the Basic Law may, under certain conditions, impose an obligation on the German courts *not* to recognize a foreign judgment,[21] the question of whether there is an individual right to recognition of foreign judgments is hardly debated.[22]

Be that as it may, by holding that the judgment of the District Court of Livadeia was not to be recognized by the Federal Court of Justice because it contravened the rules of state immunity, the BVerfG expressly adhered to the view that, under international law as it stands today, there is no exception to immunity from adjudication that allows for private suits against foreign states for violations of international law. Thus, the BVerfG's ruling adds another important precedent to the list of domestic and international decisions arguing against such an exception.[23]

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[20] Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC).

[21] *See, e.g.,* REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT margin number 2774 (5th ed. 2005).

[22] There is, however, some discussion on the question of whether Article 6 para. 1 of the European Convention on Human Rights (ECHR) grants an individual right to recognition of foreign judgments. *See, e.g.,* Franz Matscher, *Die Einwirkungen der EMRK auf das Internationale Privat- und zivilprozessuale Verfahrensrecht*, *in* EUROPA IM AUFBRUCH – FESTSCHRIFT FRITZ SCHWIND ZUM 80. GEBURTSTAG 71, 82-83 (Franz Matscher and Ignaz Seidl-Hohenveldern eds., 1993). *See also* Reinhold Geimer, *in* ZIVILPROZESSORDNUNG, § 328 margin number 2 (Richard Zöller ed., 25th ed. 2005).

[23] For a recent comprehensive analysis of the concept of state responsibility under international law, *see* ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW – PRIVATE SUITS AGAINST SOVEREIGN STATES IN DOMESTIC COURTS (2005). Among the bulk of publications, *see also* Andrea Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUSTRIAN JOURNAL OF PUBLIC AND INTERNATIONAL LAW 195 (1994); JÜRGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS (1997); Wolfgang Cremer, *Entschädigungsklagen wegen schwerer Menschenrechtsverletzungen und Staatenimmunität vor nationaler Zivilgerichtsbarkeit*, 41 ARCHIV DES VÖLKERRECHTS 137 (2003); Oliver Dörr,

One would have wished, however, that the Court, once it entered into the debate on the effect of the Greek decision, had discussed in some more depth the issue of state immunity for acts contrary to international law. Apart from a reference to the, albeit highly important, decision of the European Court of Human Rights (ECHR) in the *Al-Adsani* case,[24] the BVerfG did not go any deeper into the existing jurisprudence and literature in that field.

II. Alleged Violation of Article 14 of the Basic Law

As to the alleged violation of the freedom of property set down in Article 14 of the Basic Law, the BVerfG confirmed that existing claims for damages were part of the concept of property within the meaning of Article 14 of the Basic Law.[25] Hence, the refusal by a court to grant compensation even though the conditions are met may, indeed, encroach upon a claimant's rights under that provision. Yet, in the case at hand, the BVerfG concluded that neither international nor domestic law, as of the relevant time of 1944, provided a basis for the plaintiffs' claims.

1. Claims Under International Law

With respect to potential claims under international law, the plaintiffs relied on Article 3 of Hague Convention IV,[26] which states that:

Staatliche Immunität auf dem Rückzug?, 41 ARCHIV DES VÖLKERRECHTS 201 (2003); Burkhard Heß, *Staatenimmunität bei Menschenrechtsverletzungen*, *in* WEGE ZUR GLOBALISIERUNG DES RECHTS – FESTSCHRIFT FÜR ROLF A. SCHÜTZE ZUM 65. GEBURTSTAG 269 (Reinhold Geimer ed., 1999); MARIA GAVOUNELI, STATE IMMUNITY AND THE RULE OF LAW (2001).

[24] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79. *See* Markus Rau, *After* Pinochet*: Foreign Sovereign Immunity in Respect of Serious Human Rights Violations - The Decision of the European Court of Human Rights in the* Al-Adsani *Case*, 3 GERMAN LAW JOURNAL No. 6 (2002), at http://www.germanlawjournal.com/article.php?id=160. *See also* Klaus Ferdinand Gärditz, *Staatenimmunität, ius cogens und das Recht auf Zugang zu einem Gericht*, *in* VÖLKERRECHTSPRECHUNG – AUSGEWÄHLTE ENTSCHEIDUNGEN ZUM VÖLKERRECHT IN RETROSPEKTIVE 434 (Jörg Menzel, Tobias Pierlings and Jeannine Hoffmann eds., 2005); Christian Maierhöfer, *Der EGMR als "Modernisierer" des Völkerrechts? - Staatenimmunität und ius cogens auf dem Prüfstand*, 29 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 391 (2002); Christian Tams, *Schwierigkeiten mit dem Ius Cogens. Anmerkungen zum Urteil des Europäischen Gerichtshofes für Menschenrechte im Fall Al-Adsani gegen Vereinigtes Königreich vom 21. November 2001*, 40 ARCHIV DES VÖLKERRECHTS 331 (2002).

[25] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 19 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html. *See, e.g.*, BVerfGE, 42, 263 (293).

[26] *Supra* note 14.

> 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.

However, the BVerfG had already held, in its decision of 28 June 2004 concerning claims of Italian military detainees, that Article 3 of Hague Convention IV did not provide an individual right to compensation. Rather, the norm restated the traditional concept of state responsibility and was thus applicable only among states.[27] This holding was confirmed by the BVerfG in its judgment of 26 October 2004 concerning the expropriations in the *Sowjetische Besatzungszone* (Soviet Occupation Zone) between 1945 and 1949.[28] Not surprisingly, therefore, the BVerfG, in the *Distomo* case, found that Article 3 of Hague Convention IV did not support the plaintiffs's case.[29]

The BVerfG's understanding of Article 3 of Hague Convention IV, which was recently also expressed by the *Oberlandesgericht* (OLG - Higher Regional Court) of Cologne in the *Bridge of Varvarin* case,[30] is in line with the predominant opinion in legal doctrine.[31] Likewise, the Japanese courts have consistently interpreted Article 3 of Hague Convention IV as not conferring a right upon individuals to seek payment of damages.[32] In the United States of America, courts regard the provision

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[27] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 57 NEUE JURISTISCHE WOCHENSCHRIFT 3257, 3258 (2004).

[28] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 58 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 560, 564 (2005).

[29] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, paras. 20-22 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[30] Oberlandesgericht (OLG – Higher Regional Court) Köln, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2860, 2861 (2005).

[31] *See, e.g.*, PIERRE D'ARGENT, LES REPARATIONS DE GUERRE EN DROIT INTERNATIONAL PUBLIC. LA RESPONSABILITE DES ÉTATS A L'EPREUVE DE LA GUERRE, 784-788 (2002); Dolzer, *supra* note 3, at 308; Heintschel von Heinegg, *supra* note 3, at 31-32; Tomuschat, *supra* note 3, at 178-179.

[32] *See, e.g.*, Tokyo High Court, *X et al. v. The State of Japan*, judgment of 7 August 1996. English translation reproduced in 40 JAPANESE ANNUAL OF INTERNATIONAL LAW 116 (1997); Tokyo High Court, *X et al. v. The State*, judgment of 6 December 2000. English translation reproduced in 44 JAPANESE ANNUAL OF INTERNATIONAL LAW 173 (2000); Tokyo High Court, *X et al. v. The Government of Japan*, judgment of 8 February 2001. English translation reproduced in 45 JAPANESE ANNUAL OF INTERNATIONAL LAW 142 (2002); Tokyo District Court, *X et al. v. State of Japan*, judgment of 17 June 1999. English translation reproduced in 43 JAPANESE ANNUAL OF INTERNATIONAL LAW 192 (2000). *See also* Shin Hae Bong,

as not being self-executing.[33] Interestingly, this latter position was now also put forward, for the first time, by the BVerfG, which referred somewhat questionably to the wording ("if the case demands") of Article 3 of Hague Convention IV.[34]

It should be noted, however, that in recent years the view that the obligation laid down in Article 3 of Hague Convention IV was conceived as one among states only has increasingly been challenged. In particular, Frits Kalshoven has argued that the *traveaux préparatoires* of Article 3 of Hague Convention IV prove that the provision had originally been intended to establish an individual right to compensation.[35] Other scholars have referred to the open phrasing of Article 3 of Hague Convention IV, which allowed for interpreting the norm in light of recent developments in international law, especially the emergence of international human rights law and the growing recognition of the individual as a subject of international law. A similar approach was recently taken by the International Commission of Inquiry on Darfur in its Report to the United Nations Secretary-General of 11 February 2005.[36]

While the BVerfG, citing Kalshoven, accepted that Article 3 of Hague Convention IV *ultimately* was aimed at benefiting the individual,[37] it did not go any further into that debate. Instead, it held that both under traditional and current international law, it was, as a general rule, only the home states of the victims of acts contrary to international law that were entitled to secondary rights of reparation, including compensation.[38] Besides this, the BVerfG reasoned that

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Compensation for Victims of Wartime Atrocities. Recent Developments in Japan's Case Law, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 187 (2005).

[33] *See, e.g.*, Handel v. Artukovic, 601 F. Supp. 1421, at 1425 (C.D.Cal. 1985); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, at 968-969 (4th Cir. 1992); Princz v. Federal Republic of Germany, 26 F.3d 1166, at 1175 (D.C.Cir. 1994).

[34] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 21 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[35] Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces. From Article 3 of Hague Convention IV to Article 91 of Additional Protocol I and Beyond*, 40 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 827 (1991). *See also* Schwager, *supra* note 3, at 422-427; Zegveld, *supra* note 3, at 506-507.

[36] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General. Pursuant to Security Council Resolution 1564 of 18 September 2004, UN doc. S/2005/60 of 11 February 2005, at § 594.

[37] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 20 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[38] *Id.* at para. 21.

changes in international law that had taken place since 1944 were irrelevant for the assessment of the plaintiff's case.[39]

2. Claims Under Domestic Law

Regarding claims under domestic law, the plaintiffs relied on the rules of *Amtshaftung* (governmental liability) as well as on the rules relating to *enteignungsgleicher Eingriff* (quasi-expropriation) and *Aufopferung* (sacrificial encroachment in the narrow sense). These form part of *Staatshaftungsrecht* (state liability law), which has developed out of different roots and is, therefore, rather complex and confusing. Thus, before presenting and assessing the BVerfG's findings on this subject, a few words seem warranted about the meaning and content of the pertinent rules.[40]

a) Overview of the Relevant Rules of German State Liability Law

The German law on state liability rests on two pillars: *Amtshaftung* (the rules of governmental liability), on the one hand, and the concept of *Aufopferung* (sacrificacial encroachment in the broad sense), on the other.

In the area of governmental liability, the starting point in German law is Section 839 of the *Bürgerliches Gesetzbuch* (BGB - German Civil Code), the first paragraph of which reads as follows:

> If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation elsewhere.

Thus, within the framework of the Civil Code, it is the official him- or herself who is liable for damage caused to a citizen as a result of a breach of duty.[41] Section 839

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[39] *Id.* at para. 22.

[40] For an overview of the German law on state liability in English, *see* Wolfgang Rüfner, *Basic Elements of German Law on State Liability*, *in* GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY 249 (John Bell and Anthony W. Bradley eds., 1991). The leading German manual on the subject is FRITZ OSSENBÜHL, STAATSHAFTUNGSRECHT (5th ed. 1998).

[41] This is referred to as *Beamtenhaftung* in German.

of the Civil Code must be read, however, in conjunction with Article 34 of the Basic Law, which provides that normally the employing authority is liable for the acts of its officials (*Amtshaftung*):

> If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.

A similar provision, which was relevant in the *Distomo* case for reasons of intertemporal law,[42] had already been enshrined in Article 131 of the Weimar Constitution of 1919. Further, reference must be made to the *Reichsbeamtenhaftungsgesetz* (RBHG - Imperial Law on the Liability for Civil Servants) of 1910,[43] which completes the general principle contained in Article 34 of the Basic Law or Article 131 of the Weimar Constitution respectively.

As to the concept of *Aufopferung* (sacrificial encroachment in the broad sense)., it is, for the most part, not codified, but consists of judge-made law. Drawing from the *Rechtsgedanke* (legal idea) contained in Sections 74 and 75 of the *Einleitung zum Preußischen Allgemeinen Landrecht* (ALR - Introduction to the Prussian General Land Law),[44] it has developed quite a differentiated set of regimes, relating to property rights, on the one hand, and immaterial rights, on the other hand. *Enteignung*

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[42] *See* BURKHARD HEß, INTERTEMPORALES PRIVATRECHT (1998).

[43] Reichsgesetzblatt (RGBl.) 1910, 798.

[44] Sections 74 and 75 of the Introduction to the Prussian General Land Law state:

> "§ 74 The furthering of the common good takes precedence over individual rights and privileges of the members of the state if a genuine conflict (collision) exists between these two provisions.
>
> § 75 The state is, however, bound to compensate anybody who is forced to sacrifice his particular rights and privileges for the common good."

The original German text of the norms is reproduced *in* Ossenbühl, *supra* note 40, at 126.

(compensation for expropriation), as mandated under Article 14 para. 3 of the Basic Law,[45] is regarded as a special application of the concept.

As already mentioned, the plaintiffs in the *Distomo* case referred to the rules relating to *enteignungsgleicher Eingriff* (quasi-expropriation) and *Aufopferung* (sacrificial encroachment in the narrow sense). While the former apply to unlawful encroachments on property interests that do not amount to an expropriation, the latter cover measures that affect personal interests (life, health, bodily integrity, freedom, personality).

b) Governmental Liability

On the issue of governmental liability, pursuant to Section 839 para. 1 of the Civil Code together with Article 131 of the Weimar Constitution, the BVerfG found that liability was excluded by virtue of old Section 7 of the Imperial Law on the Liability for Civil Servants.[46] Before it was changed in 1992,[47] this norm provided that, with respect to foreigners, the state assumed liability only if *Verbürgung der Gegenseitigkeit* (reciprocity of liability) was secured, either by way of legislation of the foreign state or through an international agreement. Yet, such reciprocity had been guaranteed on the part of Greece only in 1957,[48] *i.e.* after the Distomo incident.

The reliance, by the BVerfG, on the exclusion of liability provided in old Section 7 of the Imperial Law on the Liability for Civil Servants is somewhat unsatisfying, to say the least. Since the entry into force of the Basic Law, old Section 7 of the Imperial Law on the Liability for Civil Servants has been the object of serious constitutional concerns. In particular, it has been argued that the norm was contrary to the equal treatment clause in Article 3 para. 1 of the Basic Law.[49] Further concerns resulted from European Community (EC) law, in particular the prohibition against discrimination laid down in what is now Article 12 of the

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[45] For the text of Article 14 para. 3 of the Basic Law, see *supra* note 13.

[46] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, paras. 23-27 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[47] *See Auslandsverwendungsgesetz* (Law on Service Regulations for Employments Abroad), July 28, 1993, BGBl. I at 1394, art. 6.

[48] *See* Announcement, May 31, 1957, BGBl. I at 607.

[49] *See, in particular,* Jochen A. Frowein, *Staatshaftung gegenüber Ausländern,* 19 JURISTENZEITUNG 409, 410-411 (1964). *See also* Ossenbühl, *supra* note 40, at 99-100.

EC Treaty,[50] and international law.[51] While it is true that the BVerfG had already found that old Section 7 of the Imperial Law on the Liability for Civil Servants violated neither constitutional nor international law,[52] the Court would have been better advised not to decide the *Distomo* case on that ground.

This impression is reinforced when considering in some more detail the reasoning employed by the BVerfG in favor of the applicability of old Section 7 of the Imperial Law on the Liability for Civil Servants in the *Distomo* case. For example, the Court's proposition that the Distomo massacre did not constitute *spezifisch nationalsozialistisches Unrecht* ("typically National Socialist injustice"), but was to be qualified as an *unerlaubter Exzess von Vergeltungsmaßnahmen* ("illicit excess of retribution measures"),[53] is, even if correct as a matter of juridical subsumtion, rather unfortunate. Similarly, the argument that the exclusion of liability provided in old Section 7 of the Imperial Law on the Liability for Civil Servants only affected the liability of the state, not of its officials,[54] appears to be somewhat strange given the practical difficulties in making the members of the SS unit responsible for the Distomo incident, or their successors in law respectively, liable for the massacre.

Apparently, by relying on the exclusion of liability provided in old Section 7 of the Imperial Law on the Liability for Civil Servants, the BVerfG wanted to avoid tackling the crucial issue whether the rules on governmental liability cover activities by the German troops during an armed conflict. In fact, the Federal Court of Justice, in its decision of 26 June 2003, had argued that at least at the time of the Distomo incident, it had been agreed that the application of general state liability law was suspended in wartime and replaced by the special regime of the laws of

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[50] *See, e.g.,* Christoph E. Hauschka, *Der Ausschluß der Staatshaftung nach § 839 BGB gegenüber Staatsangehörigen aus Ländern der Europäischen Gemeinschaft*, 9 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 1155 (1990). *See also* Ossenbühl, *supra* note 40, at 100.

[51] *See, e.g.,* Ludwig Gramlich, *Ausgerechnet ein Italiener! oder: Staatshaftungsausschluß gegenüber Ausländern versus Völkervertragsrecht?*, 5 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 448 (1986). On the whole subject, *see also* HARALD MUELLER, DAS INTERNATIONALE AMTSHAFTUNGSRECHT 183-188 (1991); STEFAN KAISER, DIE STAATSHAFTUNG GEGENÜBER AUSLÄNDERN. ZUR ZULÄSSIGKEIT NORMATIVER HAFTUNGSAUSSCHLÜSSE GEGENÜBER AUSLÄNDERN IM RECHT DER STAATLICHEN ERSATZLEISTUNGEN (1996).

[52] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 89 (1983). *See also* BVerfGE 61, 149 (199).

[53] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 26 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[54] *Id.* at 25.

war.[55] By contrast, in the *Bridge of Varvarin* case, the Higher Regional Court of Cologne held that the law on governmental liability had developed since World War II and could now be considered as applying both in times of peace and war.[56] In support of this holding, the Higher Regional Court of Cologne also referred to the fundamental changes in the international legal landscape brought about by, *inter alia*, the continuing codification of rules for the protection of the individual.[57]

The BVerfG, which was, of course, aware of this debate, explicitly left the issue open. However, citing both the *Bridge of Varvarin* decision of the Higher Regional Court of Cologne and its own ruling in the *Italian Military Detainees* case,[58] the BVerfG at least asked the question of whether the suspension of the rules on governmental liability would meet the necessity of ensuring compliance with international humanitarian law by way of *parallele Sanktionsmöglichkeiten* ("parallel sanction possibilities") at the national level.[59] The very phrasing of this question and the manner of its formulation might suggest that the BVerfG is willing to accept the approach of the Higher Regional Court of Cologne, *i.e.* that the rules on governmental liability *do* apply to activities by the German armed forces. Yet, a definitive response to the question must be the subject of a future decision of the BVerfG.

c) Quasi-Expropriation and Sacrificial Encroachment

By contrast, and - in view of the BVerfG's reluctance on the issue of governmental liability - maybe somewhat surprisingly, the Court expressly held that the rules relating to *enteignungsgleicher Eingriff* (quasi-expropriation) and *Aufopferung* (sacrificial encroachment in the narrow sense) did not cover acts of the German troops during an armed conflict. The decisive argument here was that the evolution of these rules[60] gave evidence that they were meant to apply to *Sachverhalte des alltäglichen Verwaltungshandelns* ("circumstances of day-to-day administrative

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[55] Bundesgerichtshof (BGH – Federal Court of Justice), 56 NEUE JURISTISCHE WOCHENSCHRIFT 3488, 3491-3493 (2003).

[56] Oberlandesgericht (OLG – Higher Regional Court) Köln, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2860, 2862-2863 (2005).

[57] *Id.* at 2863.

[58] *See supra* note 28.

[59] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 24 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[60] *See* Ossenbühl, *supra* note 40, at 126-127.

action") only. In the opinion of the BVerfG, damage resulting from belligerent activity cannot be considered a consequence of such "genuine" administrative action.[61]

While the BVerfG's reliance on the original history of the rules relating to quasi-expropriation and sacrificial encroachment appears to be somewhat problematic from a methodological point of view,[62] the result reached by the BVerfG might be supported by other arguments. In fact, scholarly writings suggest that by its very character and purpose, the general concept of *Aufopferung* (sacrifice in the broad sense) is meant to address normal cases only.[63] By contrast, situations of national catastrophes, such as war, might deserve special compensatory mechanisms. Also, the fact that the legislature enacted specific laws for compensating the victims of National Socialist injustice, such as the *Bundesentschädigungsgesetz* (Federal Law for the Compensation of the Victims of National Socialist Persecution) of 1956,[64] or the more recent *Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"* (Federal Law on the Establishment of a Foundation "Responsibility, Remembrance and Future") of 2000,[65] could suggest that the general rules relating to "sacrifice" do not apply to the settlement of war-related claims.[66]

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[61] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 28 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

[62] In fact, recourse to the historical argument usually is not the method of first resort for the Federal Constitutional Court. For the methods of analysis referred to by the Federal Constitutional Court, *see, e.g.,* Albert Bleckmann, *Zu den Methoden der Gesetzesauslegung in der Rechtsprechung des BVerfG*, 42 JURISTISCHE SCHULUNG 942 (2002), Horst Sendler, *Die Methoden der Verfassungsinterpretation - Rationalisierung der Entscheidungsfindung oder Camouflage der Dezision?*, in STAATSPHILOSOPHIE UND RECHTSPOLITIK – FESTSCHRIFT FÜR MARTIN KRIELE ZUM 65. GEBURTSTAG 457 (Burkhardt Ziemske, *et al.* eds., 1997).

[63] *See* Ossenbühl, *supra* note 40, at 127. *See also* ALBRECHT RANDELZHOFER/OLIVER DÖRR, ENTSCHÄDIGUNG FÜR ZWANGSARBEIT? ZUM PROBLEM INDIVIDUELLER ENTSCHÄDIGUNGSANSPRÜCHE VON AUSLÄNDISCHEN ZWANGSARBEITERN WÄHREND DES ZWEITEN WELTKRIEGES GEGEN DIE BUNDESREPUBLIK DEUTSCHLAND 48 (1994).

[64] Bundesentschädigungsgesetz (Federal Law for the Compensation of the Victims of National Socialist Persecution), June 29, 1956, BGBl. I at 559.

[65] Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" (Federal Law on the Establishment of a Foundation "Responsibility, Remembrance and Future"), August 2, 2000, BGBl. I at 1263. *See* Roland Bank, *The New Programs for the Payment to Victims of National Socialist Injustice*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 307 (2002); Roland Bank, *Die Leistungen an NS-Zwangsarbeiter durch die Stiftung "Erinnerung, Verantwortung und Zukunft"*, *in* DIE RECHTSSTELLUNG DES MENSCHEN IM VÖLKERRECHT 83 (Thilo Marauhn ed., 2003); Hugo J. Hahn, *Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg. Das Entschädigungsgesetz vom 2.8.2000*, 53 NEUE JURISTISCHE WOCHENSCHRIFT 3521 (2000).

[66] Ossenbühl, *supra* note 40, at 127.

It should be noted, however, that while this reasoning certainly has quite some plausibility, it is far from being cogent.[67] Besides, similar reasoning could arguably be employed also in regard to the rules on governmental liability.[68]

III. Alleged Violation of Article 3 para. 1 of the Basic Law

Having dealt with the alleged violation of Article 14 of the Basic Law, the BVerfG turned to the question of whether the refusal, by the ordinary courts, to grant compensation to the plaintiffs was in conformity with the equal treatment clause in Article 3 para. 1 of the Basic Law. The plaintiffs relied on the fact that other victims of the National Socialist regime had been compensated under special legislation. However, the BVerfG found that the plaintiffs' rights under Article 3 para. 1 of the Basic Law had not been violated. In particular, there was no evidence that the ordinary courts' decisions violated the *Willkürverbot* (standard of non-arbitrariness).[69] Moreover, it had to be taken into account that Article 3 para. 1 of the Basic Law did not prevent the legislator from distinguishing between different categories of victims of National Socialist injustice.[70] Further, by way of both general reparations and payment of compensation through bilateral agreements, Germany had attempted to establish a *Zustand näher am Völkerrecht* ("state closer to international law").[71]

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[67] This holds particularly true for the *argumentum e contrario* from the existence of special legislation for the settlement of National Socialist injustice. On the validity of such argument in legal discourse, *see, generally,* MAXIMILIAN HERBERGER/DIETER SIMON, WISSENSCHAFTSTHEORIE FÜR JURISTEN 60-64 (1980).

[68] In this context, it is worth mentioning once more that unlike the concept of "sacrifice", the rules on governmental liability presuppose *culpable* conduct, thus giving the courts more flexibility. This could make it easier to accept their applicability to activities of the German troops during an armed conflict.

[69] According to the standard of non-arbitrariness, the equal treatment clause in Article 3 para. 1 of the Basic Law is violated by a Court decision only if the latter is in no way legally justifiable, thus appearing to be influenced by irrelevant considerations. *See, e.g.,* BVerfGE 4, 1 (7); BVerfGE 74, 102 (127); BVerfGE 80, 48 (51).

[70] This argument was already made by the Federal Constitutional Court in its decision concerning claims of Italian military detainees. See Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 57 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3257, 3258 (2004).

[71] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 30 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html.

This latter formulation stems from the BVerfG's judgment of 26 October 2004 concerning the expropriations in the Soviet Occupation Zone.[72] Here, as in that case, its exact meaning remains rather obscure. In the *Expropriations* case, the BVerfG made reference to Article 41 of the ILC Articles on State Responsibility.[73] This provision addresses the particular consequences of a serious breach of an obligation under a peremptory norm of general international law (*jus cogens*).[74] More precisely, it sets out the *positive* obligation of states to cooperate to bring to an end through lawful means any such breach ("duty of solidarity"[75]) as well as the *negative* obligations not to recognize as lawful a situation created by a serious breach and not to render aid or assistance in maintaining that situation ("duties of isolation").[76] However, while Article 41 of the ILC Articles might indeed have had its role in determining Germany's duties arising out of the expropriations in the Soviet Occupation Zone,[77] its relevance in the *Distomo* case is highly questionable. Unlike the expropriations in the Soviet Occupation Zone,[78] the Distomo massacre clearly falls in the area of responsibility of the Federal Republic of Germany.[79]

Be that as it may, the BVerfG's finding that the ordinary courts' refusal to grant compensation to the plaintiffs did not contravene Article 3 para. 1 of the Basic Law, and in particular did not violate the standard of non-arbitrariness, seems, all in all, acceptable.

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[72] *See* Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 58 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 560, 564 (2005).

[73] *Id.* at 565.

[74] For the concept of *jus cogens* in international law *see* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006). *See also* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW. HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988); STEFAN KADELBACH, ZWINGENDES VÖLKERRECHT (1992).

[75] Andrea Gattini, *A Return Ticket to "Communitarisme", Please*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1181, 1185 (2002).

[76] *Id.* at 1188.

[77] *See* Theodor Schweisfurth, *Die verfassungsgerichtlich eingetrübte Völkerrechtsfreundlichkeit des Grundgesetzes*, 24 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1261, 1264-1265 (2005).

[78] *See* Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 58 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 560, 563 (2005).

[79] As the Federal Constitutional Court stated in its judgment of 26 October 2004, Article 41 of the ILC Articles is concerned with duties of *third states*. *Id.* at 565. By contrast, the obligations of the *responsible state* are addressed in Articles 28-39 of the ILC Articles.

IV. Alleged Violation of Article 101 para. 1 of the Basic Law

Finally, the BVerfG found that there was also no violation of the right to the lawful judge, guaranteed by Article 101 para. 1 of the Basic Law. According to the Court, the ordinary courts had not been under an obligation, pursuant to Article 100 para. 2 of the Basic Law, to submit to the BVerfG the question of whether there existed a rule of general international law providing an enforceable right to compensation for victims of armed conflict. This was the case, the Court reasoned, because there were no objective doubts in the jurisprudence and legal literature about the existence or non-existence of such a rule. [80]

This last holding is somewhat misleading. Since the early 1990s, the question of whether there is, under general international law, an individual right to reparation, including compensation, for violations of international humanitarian law has been increasingly discussed in academic writing.[81] Most recently, the United Nations Commission on Human Rights (UNCHR), in its *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*, took the view that remedies for gross violations of international human rights law and serious violations of international humanitarian law included the victim's right to, *inter alia*, "[a]dequate, effective and prompt reparation for harm suffered."[82] Similarly, the International Commission of Inquiry on Darfur, in its Report to the United Nations Secretary-General of 11 February 2005, stated that:

> [T]here 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

[80] Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, para. 31 (February 15, 2006), http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html. The existence of such objective doubts is a required element of the referral process provided by Article 100 para. 2 of the Basic Law. *See, e.g.,* Matthias Hartwig, *Art. 100*, *in* GRUNDGESETZ. MITARBEITERKOMMENTAR UND HANDBUCH margin number 183 (Dieter C. Umbach and Thomas Clemens eds., 2002).

[81] See the references *supra* note 3.

[82] Human Rights Resolution 2005/35 of 19 April 2005, § 11, available at: http://www.iccnow.org/documents /OHCHR_Res35_VictimsReparations_19Apr05.pdf?PHPSESSID=0986e969849b7dad2500a2296b6c3229.

> compensation) for damage resulting from those abuses.[83]

On the other side, both the *Basic Principles* and the Report of the International Commission of Inquiry on Darfur have been heavily criticized in academic writing as not reflecting the current state of general international law.[84]

What the BVerfG obviously meant is that there are no doubts that *at the relevant time of the Distomo massacre* non-conventional international law did not provide for an individual right to reparation, including compensation, for victims of international humanitarian law violations. In fact, the BVerfG held in its *Forced Labor* decision of 13 May 1996, to which it could refer in that context, that during the years of 1943 and 1945, only states had been entitled to make claims for breaches of international law.[85] By contrast, the current state of general international law in regard to reparation for human rights and international humanitarian law violations was not at issue, neither in the *Forced Labor* case nor in the *Distomo* case.

D. Final Remarks

The *Distomo* case, though especially tragic, is but one example of victims of armed conflict seeking compensation before national courts. Other recent examples include, amongst many others, the *Bridge of Varvarin* case in Germany[86] as well as the *Marković* case[87] and the *Ferrini* case[88] in Italy. The victim's quest for redress is understandable. While it is true that Germany, for instance in the years of 1952 to

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[83] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, *supra* note 36, at § 597.

[84] *See, in particular,* Christian Tomuschat, *Ein umfassendes Wiedergutmachungsprogramm für Opfer schwerer Menschenrechtsverletzungen*, 80 DIE FRIEDENS-WARTE 160 (2005); Christian Tomuschat, *Darfur - Compensation for the Victims*, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 579 (2005).

[85] BVerfGE 94, 315 (329-330).

[86] Oberlandesgericht (OLG – Higher Regional Court) Köln, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2860 (2005).

[87] Italian Court of Cassation (Corte di cassazione), 8 February 2002, reproduced in 85 RIVISTA DI DIRITTO INTERNAZIONALE 682 (2002) (with a note by Natalino Ronzitti). *See* Micaela Frulli, *When are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The* Marcović *Case*, 1 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 406 (2003).

[88] Italian Court of Cassation, *Ferrini v. Federal Republic of Germany*, Judgment No. 5044 of 11 March 2004, reproduced in: 87 RIVISTA DI DIRITTO INTERNAZIONALE 540 (2004). For comments see Pasquale De Sena/Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 89 (2005).

1964, agreed upon payment of (inter-state) reparations for Nazi oppression through multilateral and bilateral agreements,[89] such lump sum payments cannot bring about individual justice in each and every case of violations of international humanitarian law.

Nevertheless, much speaks in favor of national courts being overburdened with the settlement of large-scale injustices resulting from armed conflict.[90] For this reason, the Committee on Compensation for Victims of War, which was established by the International Law Association (ILA) in May 2003,[91] has as one of its goals to draft model rules for *ad hoc* compensation commissions as an alternative method of post-conflict justice.[92] In fact, such *ad hoc* compensation commissions, which must pay due regard to the specificities of the conflicts for which they are established, may be the most adequate means of bringing justice to victims of international humanitarian law violations.[93]

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[89] See, *e.g.*, Dolzer, *supra* note 3, at 324-328.

[90] See also Tomuschat, *supra* note 3, at 174-180.

[91] *See* ILA Newsletter, June 2003 (No. 18), at 6.

[92] See the Committee's Draft Report for the 2006 ILA Conference in Toronto, at 3, available at: http://www.ila-hq.org/pdf/Compensation%20for%20Victims%20of%20War/Draft%20Report%202006.pdf. For further information on the work of the Committee see the Background Report prepared by Rainer Hofmann and Frank Riemann, 17 March 2004, available at: http://www.ila-hq.org/pdf/Compensation%20for%20Victims%20of%20War/Background%20 ReportAugust2004.pdf.

[93] *See* Jann K. Kleffner, *Improving Compliance with international Humanitarian Law through the Establishment of an Individual Complaints Procedure*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 237 (2002); Jann K. Kleffner and Liesbeth Zegveld, *Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law*, 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 384 (2003). On the general problematic of adequately coping with mass claims see the contributions in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES – INNOVATIVE RESPONSES TO UNIQUE CHALLENGES (International Bureau of the Permanent Court of Arbitration ed., 2006).