INTERNATIONAL COURT OF JUSTICE

Principality of
Liechtenstein

Special Commissioner and Agent for the case brought before the International Court of Justice

CASE CONCERNING CERTAIN PROPERTY
(LIECHTENSTEIN v. GERMANY)

MEMORIAL

OF

THE PRINCIPALITY OF LIECHTENSTEIN

28 MARCH 2002

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A. Liechtenstein's application

1. On 30 May 2001, Liechtenstein lodged its Application instituting proceedings in the name of the Principality of Liechtenstein (hereafter "Liechtenstein") against the Federal Republic of Germany (hereafter "Germany"). The dispute thereby brought to the Court concerns a decision by Germany to treat certain property of Liechtenstein nationals (hereafter the "Liechtenstein property") as having been "seized for the purpose of reparation or restitution, or as a result of the state of war", without ensuring any compensation for the loss of that property to its Liechtenstein owners, and to the detriment of Liechtenstein itself.

2. The property in question includes substantial arable land and forests, numerous buildings and their contents, factories etc. It was seized by Czechoslovakia in 1945 under the "Beneš Decrees", on the basis that its owners were "German". About 38 Liechtenstein nationals were affected as owners of the property, including the then Prince of Liechtenstein and members of his family. In fact at no time were the owners of the property concerned German nationals.

3. Beginning in 1995, Germany has classified all the Liechtenstein property as having been "seized for the purpose of reparation or restitution, or as a result of the state of war", within the meaning of Article 3 of Chapter Six of the Convention on the Settlement of Matters arising out of the War and the Occupation, signed at Bonn on 26 May 1952 (hereafter the "Settlement Convention") (Annex 16).[1] It has done so by a combination of decisions of its courts and statements by Ministers and officials.

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[1] *United Nations Treaty Series*, No. 4762. The Settlement Convention was amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Paris, 23 October 1954: *United Nations Treaty Series*, No. 4758.

4. By virtue of this conduct, Germany has thereby

(a) failed to respect the sovereignty and neutrality of Liechtenstein, and has committed other breaches of international law as specified in this Memorial, and

(b) in consequence of its acts, is liable to compensate Liechtenstein for the injury and damage suffered.

5. By order of 28 June 2001, the Court laid down the timetable for the proceedings, with Liechtenstein to file its Memorial by 28 March 2002. This Memorial is filed in accordance with that Order.

B. Background to the dispute

6. During World War II, Liechtenstein was a neutral State. Its neutrality was generally recognized, including by Germany.

7. In 1945, Czechoslovakia through a series of decrees (hereafter the "Beneš Decrees") seized property located on its territory. Czechoslovakia applied those decrees not only to German nationals but also to other persons allegedly belonging to the German "people", including to nationals of Liechtenstein. However, the present case does not deal with Liechtenstein's claims against the Czech Republic, but only concerns claims against Germany arising from Germany's own conduct in and after 1995.

8. Questions of title to property seized in time of war, and of compensation for such seizure, cannot be determined unilaterally but must be the subject of agreement between the parties concerned, either in a final peace treaty or otherwise. No final peace treaty was ever concluded in the aftermath of World War II between Germany and the Allied Powers. But the question of repara-

tions and compensation for seizures was regulated by agreement. Of particular importance so far as Germany was concerned was the Settlement Convention (Annex 16). Chapter Six of that Convention deals with reparations. In accordance with Article 3 (1) of Chapter Six, Germany agreed that it would...

> "in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany."

By Article 3 (3), it further agreed that:

> "No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1... of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments."

By Article 5 Germany further agreed that:

> "The Federal Republic shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated."

9. There was thus created a special regime with respect to property seized for the purpose of reparation. Property falling within that regime is specifically affected in that Germany is obliged to raise no objections to the seizure, to bar actions (including actions in its own courts) against persons, organizations or governments in possession of such property, and thus to recognise the title of those persons. As a corollary of the regime, Germany undertook to compensate "the former owners of property seized".

10. Subsequent to the conclusion of the Settlement Convention, Germany and Liechtenstein both proceeded on the basis that the Liechtenstein property did

not fall within the regime of the Convention. It was understood that the property was not "property, seized for the purpose of reparation or restitution, or as a result of the state of war" within the meaning of Article 3 (1) of the Convention. As a corollary, Germany maintained the position that property falling outside the scope of the Convention was unlawfully seized, that the German courts were entitled to consider claims affecting such property, and that no question of compensation to the "former owners" of such property under Article 5 arose.

11. Article 1 (1) of Chapter Six of the Settlement Convention provided that the problem of reparation was to be "settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter". The subsequent provisions of the Convention were to apply "[P]ending the final settlement envisaged in paragraph 1 of this Article". When that final settlement occurred, as a result of a series of agreements in 1990,[2] key provisions of the Settlement Convention remained in force by virtue of an Exchange of Notes between the parties to that Convention. The provisions which remained in force included, in particular, Articles 3 (1) and (3) of Chapter Six of the Settlement Convention.[3] By contrast Article 5 of Chapter Six of the Settlement Convention was terminated. Thus Germany continued - and continues - to be under the obligations of the Settlement Convention with respect to property "seized for the purpose of reparation or restitution, or as a result of the state of war". The only reason why no further compensation arrangements were envisaged under Article 5 was that these had already been made. According to Germany's understanding, in 1990, there was no further property which was covered by the regime of the Settlement Convention but the seizure of which had not been

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2 See Federal Republic of Germany, German Democratic Republic, France, Union of Soviet Socialist Republics, United Kingdom, United States, Treaty on the Final Settlement with respect to Germany, Moscow, 12 September 1990, *United Nations Treaty Series*, No. 29226, Federal Law Gazette (*Bundesgesetzblatt*) 1990 II, p. 1318.

3 France, Federal Republic of Germany, United Kingdom, United States, Exchange of Notes concerning the Relations Convention and the Settlement Convention, Bonn, 28 September 1990, *United Nations Treaty Series*, No. 28492; Federal Law Gazette (*Bundesgesetzblatt*) 1990 II p. 1386.

compensated for. On any other basis, the deletion of Article 5 would have implied a breach of international law, since it would have left uncompensated by Germany those nationals of third States whose property had been "seized for the purpose of reparation or restitution, or as a result of the state of war". With respect to any such property, Germany would have been in the position of treating it as subject to the regime of war reparations without any form of compensation to the dispossessed owners.

12. Even after the amendments made to the Settlement Convention in 1990, Germany continued to take the position that the Convention did not cover the Liechtenstein property, which had not been "seized for the purpose of reparation or restitution, or as a result of the state of war". Thus Germany continued to recognize the sovereignty and neutrality of Liechtenstein and that the claims of the owners of the Liechtenstein property remained open. In a letter to the Reigning Prince of Liechtenstein, the German Chancellor, Mr. Kohl, said that the Declaration, then under negotiation, "leaves open legal questions in connection with expropriations in the then Czechoslovakia" (Annex 40).

C. The dispute between Liechtenstein and Germany

13. In the years after 1995, the position of the Federal Republic of Germany changed, as a result of decisions of its courts, and ultimately of the Federal Constitutional Court of 28 January 1998, and of the adoption and extension of the court decisions by the Government of Germany. These decisions concerned a painting[4] which was among the Liechtenstein property seized in 1945, and which was in the possession of the Historic Monuments Office in Brno, Czech Republic, a State entity of the Czech Republic. It was brought to Germany for the purpose of an exhibition, and thus came into the possession of the Municipality of Cologne. At the request of the Reigning Prince, Prince Hans-Adam II,

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[4] The painting, by Pieter van Laer, is entitled "Szene um einen römischen Kalkofen". It was part of the Princely family collection since the 18th century. It is not State property of Liechtenstein.

acting in his private capacity, the painting was seized pending determination of the claim. Eventually, however, the claim failed, the Federal Constitutional Court holding that the German courts were required by Article 3 of Chapter Six of the Settlement Convention to treat the painting as the property of the Historic Monuments Office, and not to entertain the claimant's demand. In particular it held that the painting was to be treated as property "seized for the purpose of reparation or restitution, or as a result of the state of war" within the meaning of Article 3. Accordingly the painting was released and returned to the Czech Republic. The decision of the Federal Constitutional Court is final and without appeal. It is attributable to Germany as a matter of international law and is binding upon Germany as a matter of German law.

14. Following the decision, Liechtenstein protested to Germany that the latter was treating assets which belonged to citizens of Liechtenstein as German assets, to the detriment of Liechtenstein and of its nationals. Germany rejected this protest. In subsequent consultations it became clear that Germany now adheres to the position that the Liechtenstein assets as a whole were "seized for the purpose of reparation or restitution, or as a result of the state of war", even though the decision of the Federal Constitutional Court only concerned a single item. In taking this position Germany ignores and undermines the rights of Liechtenstein and its nationals in relation to the Liechtenstein property as a whole, as well as failing to respect the sovereignty and neutrality of Liechtenstein itself.

15. Thereupon the Reigning Prince of Liechtenstein, acting in his personal capacity, commenced proceedings before the European Court of Human Rights. The case between the Reigning Prince and the Federal Republic of Germany concerned only the Pieter-van-Laer painting, and was based on Article 6 (1) and Article 14 of the European Convention of Human Rights, as well as Article 1

of the First Protocol to that Convention. The Application was rejected by the European Court.[5]

16. The question before this Court in the present case does not concern individual human rights under the European Convention on Human Rights, but rather the rights of Liechtenstein as a State and its nationals under general international law and in relation to the post-war reparations regime. In particular the question is whether in its treatment of the Liechtenstein property in and after 1995, Germany has acted consistently with its obligations to Liechtenstein under international law. Germany denies that it has committed any breach of international law, and thus claims that it is entitled to treat the Liechtenstein property as property "seized for the purpose of reparation or restitution, or as a result of the state of war". It further denies that it has any obligation to Liechtenstein to compensate it in respect of its conduct in that regard, or to make reparation for injury suffered by Liechtenstein as a result of the change in Germany's legal position. There is accordingly a legal dispute between Liechtenstein and Germany. It is this dispute which is the subject of the present Application.

D. Jurisdiction of the Court and admissibility of Liechtenstein's Application

17. In accordance with Article 36 (1) of the Statute of the International Court of Justice, the jurisdiction of the Court arises under Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 (hereafter "the Convention").[6] Both Liechtenstein and Germany are parties to the Convention without reservation. The Convention entered into force as between the two States on 18 February 1980.

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5 Judgment of the European Court of Human Rights of 12 July 2001, Appl. No. 42527/98.

6 *United Nations Treaty Series*, No. 4646.

18. The dispute between the parties is admissible under the Convention. Article 27 of the Convention provides that:

> "The provisions of this Convention shall not apply to:
>
> (a) disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute;
>
> (b) disputes which by international law are solely within the domestic jurisdiction of States."

The present dispute arises from and concerns conduct of German courts and officials in and after 1995. It concerns the effect of the post-war reparations regime and is not solely within the domestic jurisdiction of Germany under international law.

19. To the extent that the dispute concerns "a decision with final effect" of the German courts, the decision in question was that of the Federal Constitutional Court of 28 January 1998. The present proceedings are brought within the 5-year time limit laid down by Article 29 of the Convention.

20. This Court accordingly has jurisdiction over the dispute, and the present proceedings are admissible under the Convention.

E. Structure of this Memorial

21. This Memorial is in two Parts. **Part One** sets out the factual background in three chapters. Chapter 1 presents Liechtenstein's neutrality in World War II, and describes the fate of the Liechtenstein property in Czechoslovakia and, much later, of the Pieter-van-Laer painting before the German courts. Chapter 2 details the development of the post-war reparations regime and in particular the scope of the Settlement Convention. Chapter 3 shows how Germany's posi-

tion changed vis-à-vis Liechtenstein in the years after the final amendment of the Settlement Convention in 1990.

22. **Part Two** specifies Liechtenstein's claims under three headings, and sets out the remedial consequences of those claims. Chapter 4 concerns Germany's failure, in and after 1995, to respect the sovereignty and neutrality of Liechtenstein, specifically by treating its property as "seized for the purpose of reparation or restitution, or as a result of the state of war". Chapter 5 concerns Germany's failure to respect the rights and interests of Liechtenstein nationals in their property, specifically by treating such property as incorporated in the reparations regime. Chapter 6 concerns Liechtenstein's claims based on Germany's unjust enrichment (*enrichissement sans cause*), and on its unwarranted change of position in and after 1995, causing detriment to Liechtenstein and its nationals. Chapter 7 deals with the legal consequences of these breaches in terms of the declaratory and other relief to which Liechtenstein is correspondingly entitled. There follow Liechtenstein's conclusions and submissions, and a list of the 47 annexes to this Memorial, which are contained in three separate volumes.

PART ONE

FACTUAL BACKGROUND

CHAPTER 1

LIECHTENSTEIN AND LIECHTENSTEIN PROPERTY

A. The position of Liechtenstein in and after World War II

1.1 As a small sovereign European State, the Principality of Liechtenstein found itself in a precarious situation on the eve of World War II. Close to Germany, Austria and Switzerland, Liechtenstein had maintained its neutral status since 1806 and continued to concentrate its foreign policy on a preservation of this State in the period after Hitler's seizure of power in the German Reich. Against the backdrop of the expansionism of the German Reich, this was a difficult, but eventually successful balancing act.

1.2 Liechtenstein - unlike almost all other European States - never recognised the extinction of Czechoslovakia following the Munich Agreement of 29 September 1938, by which Germany, Italy, France and Great Britain agreed on the cession of the hitherto Czechoslovakian Sudetenland to the German Reich. Despite having adopted this independent position, Liechtenstein's skilful diplomatic endeavours succeeded in gaining recognition of its neutral status even by Germany.

1.3 On 30 August 1939 - one week after the non-aggression treaty between Germany and the Soviet Union had been sealed by the German Foreign Minister von Ribbentrop and the Soviet Foreign Minister Molotow in Moscow, and two days before Hitler invaded Poland - the Liechtenstein Government proclaimed on behalf of the then Reigning Prince of Liechtenstein that Liechtenstein would maintain "strictest neutrality" in the event of an outbreak of war. The task of informing all Powers that might be involved in a possible conflict of this decision was assigned to the Political Department (Foreign Ministry) of the Swiss Confederation.

1.4 The Liechtenstein Government's note addressed to the Political Department of the Swiss Confederation in Bern on 30 August 1939 (Annex 1) reads as follows:

> *"Seine Durchlaucht der regierende Fürst Franz Josef II. von Liechtenstein haben die fürstliche Regierung beauftragt, dem Eidgenössischen Politischen Departement in Bern zur Kenntnis zu bringen, dass das Fürstentum im Falle eines kriegerischen Konfliktes die strengste Neutralität bewahren wird.*
>
> *Indem die fürstliche Regierung bittet, von dieser Haltung des Fürstentums den an einem allfälligen Konflikt beteiligten Mächten gütigst Kenntnis geben zu wollen, dankt sie im voraus für die allfällige Mühewaltung und benützt auch diesen Anlass, dem Eidgenössischen Politischen Departemente erneut den Ausdruck vorzüglicher Hochachtung auszusprechen."*
>
> Translation[7]:
> "His Serene Reigning Highness, Prince Franz Josef II of Liechtenstein, asked the Prince's Government to inform the Political Department of the Swiss Confederation in Bern that Liechtenstein will maintain strictest neutrality in the event of an outbreak of war.
>
> The Prince's Government would like to ask you to kindly inform all Powers that might be involved in a possible conflict of the Principality's attitude, and would also like to thank you in advance for your effort involved in this respect. The Prince's Government avails itself of this opportunity to renew to the Political Department of the Swiss Confederation the assurance of its high esteem and consideration."

1.5 The Swiss Ambassador Frölicher handed over the Liechtenstein declaration of neutrality together with the Swiss declaration of neutrality, dated 31 August 1939, to the German State Secretary Weizsäcker at the Foreign Office at midday of 1 September 1939. As Frölicher reported back to the Political Department of the Swiss Confederation, the German Reich committed itself to respecting their neutrality. In the *Copie de réception* of 1 September 1939 (Annex 2), the Ambassador Frölicher states:

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[7] As not otherwise stated, all translations have been prepared by Liechtenstein.

"*Auch Neutralitätserklärung Liechtenstein wurde in zustimmendem Sinne entgegengenommen.*"

Translation:
"Liechtenstein's declaration of neutrality was similarly accepted in an affirmative way."

France, Italy and United Kingdom, made declarations to similar effect.

1.6 In a note dated 1 September 1939 and addressed to the Swiss Ambassador in London, Charles Paravicini, the Foreign Office of the United Kingdom, stated as follows (Annex 3):

"I have the honour to acknowledge the receipt of your note of the 31st August in which you conveyed to me the text of a declaration by His Serene Highness the Prince of Liechtenstein affirming that in the event of the outbreak of war the Principality of Liechtenstein will maintain the strictest neutrality.

2. I shall be glad if you will cause His Serene Highness to be informed that His Majesty's Government in the United Kingdom have taken due note of this communication.

3. His Serene Highness may rest assured that if in the event of a European war, Liechtenstein adopts an attitude of neutrality, His Majesty's Government in the United Kingdom will, in accordance with their traditional policy, be resolutely determined to respect this neutrality, provided that it is respected by other Powers."

1.7 The Italian Ministry of Foreign Affairs made a statement to the same effect in a note addressed to the Swiss Ambassador in Rome, Paul Ruegger, on 4 September 1939 (Annex 4):

"*Ho l'onore di segnare ricevuta della Vostra Nota in data 1° settembre, relativa alla dichiarazione di neutralità del Principato di Liechtenstein.*

Nell'informarVi che il Governo Fascista ha preso atto di tale comunicazione, Vi porgo, Signor Ministro, gli atti della mia alta considerazione."

Translation:
"I have the honour to acknowledge receipt of your note dated 1 September concerning the declaration of neutrality of the Principality of Liechtenstein.

I may inform you that the Fascist Government has taken note of such communication and may assure you, Mr. Ambassador, of my highest consideration."

1.8 In the name of the French Republic, the French Foreign Ministry declared in a note dated 10 September 1939 and addressed to the Swiss Embassy in Paris (Annex 5):

"A la date du 1er septembre 1939, la Légation de Suisse a bien voulu faire part au Ministère des Affaires Etrangères d'une décision prise par Son Altesse Sérémissime le Prince régnant de Liechtenstein, et aux termes de laquelle, en cas de conflit armé, la Principauté de Liechtenstein observera la plus stricte neutralité.

Le Ministère des Affaires Etrangères a l'honneur d'accuser réception à la Légation de Suisse de sa communication."

1.9 Liechtenstein neutrality was never challenged thereafter, and for the duration of the War.

B. Seizure of the property of Liechtenstein nationals under the "Beneš Decrees"

1.10 At the end of World War II, in 1945, the former Czechoslovakian President Eduard Beneš returned to Prague from his exile in London. Apart from reconstructing the State of Czechoslovakia which had been destroyed by Hitler Germany, his primary goal was to free his country of German and Hungarian minorities living there. This policy led to the expulsion of more than 2.5 mil-

lion persons belonging to the German and Hungarian "people" from Czechoslovakia and to the seizure of their property without any compensation.

1.11 The legal mechanism to achieve this purpose in relation to the property of German and Hungarian minorities were so-called presidential decrees, the "Beneš Decrees". Of particular importance were Decrees No. 12 and No. 108.

1.12 Decree No. 12 of 21 June 1945 (Annex 6) concerned the confiscation and accelerated allocation of agricultural property owned by Germans, Hungarians and also by people who have committed treason and acted as enemies of the Czech and Slovak people.[8] The aims of Decree No. 12 were described in the Preamble as follows:

> "*Vycházeje vstříc voláni českých a slovenských rolníků a bezzemků po důsledném uskutěcnení nové pozemkové reformy a veden snahou především jednou pro vždy vzíti českou a slovenskou půdu z rukou cizáckých německých a mad'arských statkářů, jakož i z rukou zrádců republiky a dáti ji do rukou českého a slovenského rolnictva a bezzemků, k návrhu vlády ustanovuji:*"
>
> Translation:
> "In order to accommodate Czech and Slovak peasants and people who do not own any land and call for a consistent implementation of a new land reform, and in particular guided by the intention to take Czech and Slovak land once and for all out of the hands of foreign German and Hungarian landowners and also out of the hands of traitors of the Republic, and in order to give it into the hands of the Czech and Slovak peasantry and people not owning any land, I hereby order upon the government's proposal:"

1.13 On the basis of Decree No. 12 all agricultural property of persons regarded as belonging to the German and Hungarian "people" was confiscated. Section 1 (1) of Decree No. 12 provides:

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[8] Offizial Gazette of the Czechoslovakian State, 23 June 1945, pp. 17 *et seq.*

"§ 1
(1) S okamžitou platností a bez náhrady se konfiskuje pro účely pozemkové reformy zemědělský majetek, jenž je ve vlastnictví:

a) všech osob německé a mad'arské národnosti, bez ohledu na státní příslušnost,

b) zrádců a nepřátel republiky jakékoliv národnosti a státní příslušnosti, projevivších toto nepřátelství zejména za krise a války v letech 1938 až 1945,"

Translation:
"§ 1
(1) For the purposes of land reform, agricultural property owned by the following persons is confiscated with immediate effect and without compensation:

a) all persons belonging to the German and Hungarian people, regardless of their nationality

b) persons who have committed treason and acted as enemies of the Republic, regardless of their nationality, and who have shown their hostility in particular during the years of crisis and the war between 1938 and 1945."

1.14 Section 2 of Decree No. 12 contains a definition of persons who were regarded as belonging to the German or Hungarian "people":

"§ 2
(1) Za osoby národnosti německé nebo mad'arské jest považovati osoby, které při kterémkoliv sčítání lidu od roku 1929 se přihlásily k německé nebo mad'arské národnosti nebo se staly členy národních skupin nebo útvarů nebo politických stran, sdružujících osoby německé nebo mad'arksé národnosti.

(2) Výjimky z ustanovení odstavce 1 budou určeny zvláštním dekretem."

Translation:
"§ 2
(1) Those persons are considered to belong to the German or Hungarian people who declared on the occasion of every census since the year 1929 that they belonged to the German or Hungarian people, or who have become members of national groups or politi-

cal parties made up of persons belonging to the German or Hungarian people.

(2) Exceptions to the provisions of paragraph 1 will be laid down in a separate Decree."

1.15 The assets subject to confiscation in accordance with Decree No. 12 were very broadly defined. Contrary to the terms of the preamble, they included not only agricultural property in the narrow sense, but the Decree and in particular the implementing provisions issued in relation thereto covered practically all kinds of assets, even though they were in no way related to agricultural business. Section 4 and Section 7 (4) of Decree No. 12 state:

"*§ 4*
Zemědělským majetkem (§ 1, odst. 1) jest rozuměti zemědělskou a lesní půdu, k ní patřící budovy a zařízení, závody zemědělského průmyslu, sloužící vlastnímu zemědělskému a lesnímu hospodářství, jakož i movité příslušenství (živý a mrtvý inventář) a všechna práva, která jsou spojena s držbou zkonfiskovaného majetku anebo jeho části."

Translation:
"§ 4
Agricultural property [§ 1 (1)] means agricultural and forest land which also comprises buildings and installations pertaining thereto, agricultural industrial undertakings used for the owner's agricultural and forestry activities, as well as movable property pertaining thereto (livestock and equipment) and all rights related to the confiscated property or part thereof."

"*§ 7*
(4) Konfiskované budovy, zařízení, sloužící vlastnímu zemědělskému nebo lesnímu hospodářství, závody zemědělskeho průmyslu, sady, památnosti, archivy a pod., jakož i všechny konfiskované nemovitosti, pokud nebudou přiděleny veřejnoprávním subjektům, mohou se přidělit do vlastnictví:"

Translation:
"§ 7
(4) Confiscated buildings, facilities serving for actual agricultural or forest management, forest industry enterprises, orchards, monuments, archives, etc., as well as the confiscated buildings, installa-

tions used for the owner's agricultural or forestry activities, agricultural industrial undertakings, gardens, memorabilia, archives, etc, as well as all confiscated real property unless donated to public entities may be allocated to the ownership of:"

1.16 In addition Decree No. 108 of 25 October 1945 (Annex 7) regarding the Confiscation of Enemy Property and the National Reconstruction Fund deals with the confiscation of non-agricultural property owned by persons belonging to the German or Hungarian people.[9] Section 1 of Decree No. 108 reads as follows:

"§ 1 Vymezení konfiskovaného majetku

(1) Konfiskuje se bez náhrady - pokud se tak již nestalo - pro Československou republiku majetek nemovitý i movitý, zejména i majetková práva (jako pohledávky, cenné papíry, vklady, práva nehmotná), který ke dni faktického skončení německé a mad'arské okupace byl nebo ještě jest ve vlastnictví:

1. Německé říše, Království mad'arského, osob veřejného práva podle německého nebo mad'arského práva, německé strany nacistické, politických stran mad'arských a jiných útvarů, organisací, podniků, zařízení, osobních sdružení, fondů a účelových jmění těchto režimů nebo s nimi souvisících, jakož i jiných německých nebo mad'arských osob právnických, nebo

2. osob fysických národnosti německé nebo mad'arské, s výjimkou osob, které prokáži, že zůstaly věrny Československé republice, nikdy se neprovinily proti národům českému a slovenskému a buď se činně zúčastnily boje za její osvobození, nebo trpěly pod nacistickým nebo fašistickým terorem, nebo"

Translation:
"§ 1 Scope of confiscated property

(1) Confiscation without compensation shall take effect - as far as this has not been already done - to the benefit of the Czechoslovak Republic in respect of movable and immovable property, including in particular property rights (such as claims, securities, deposits or contributed capital, intangible rights) which were owned

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9 Official Gazette of the Czechoslovakian State, 25 October 1945, pp. 248 *et seq.*

to this day of the actual termination of the German and Hungarian occupation or have hitherto been owned by the following parties:

1. the German Reich, the Kingdom of Hungary, corporate bodies under German or Hungarian public law, the German Nazi Party, the Hungarian political parties and associations of persons, organisations, companies, institutions, associations, funds and special purpose funds of their regimes or connected with them, or other German or Hungarian legal entities, or

2. natural persons belonging to the German or Hungarian people other than persons who can furnish proof that they remained faithful to the Czechoslovak Republic, have never acted to the detriment of the Czech or Slovak people and either participated actively in the fight for its liberation or suffered under Nazi or Fascist terror, or"

1.17 These Decrees No. 12 and No. 108 were not only applied to former Czechoslovakian citizens of German or Hungarian nationality or to citizens of the German Reich who lived in Czechoslovakia prior to 1938 (so-called *Altreichsdeutsche*), but also to citizens of the Principality of Liechtenstein.

1.18 When the State of Czechoslovakia came into existence in 1918, a number of Liechtenstein families had lived in Bohemia and Moravia for several centuries. All these families held only Liechtenstein citizenship, which has existed since 1806. As far as it is known, none of them also had German nationality. They owned extensive agricultural and forestry property, houses, livestock and equipment used in agriculture, personal furniture and fittings and other valuables, as well as interests in agricultural and industrial business. All Liechtenstein citizens were regarded by Czechoslovakia as persons belonging to the German "people" and their entire property was confiscated without compensation on the basis of the Decrees No. 12 and No. 108.

1.19 In 1945, the government of Liechtenstein drew up a list of families affected by the confiscation measures of the then Czechoslovakian government (Annex 8).

1.20 The confiscations affected in particular the family of the Head of State of the Principality of Liechtenstein, the then Reigning Prince Franz Josef II of Liechtenstein. The family of the Prince of Liechtenstein has been resident in what is today the territory of the Czech Republic for more than 700 years and owned large forests and agricultural lands. In addition, they owned several castles which were home to an important art collection.

1.21 By order of 30 July 1945, the Regional National Committee in Olomouc and the National Committee in Brno confiscated the property of the princely family situated in Czechoslovakia applying Decree No. 12 to the Reigning Prince Franz Josef II of Liechtenstein and to all members of his family. This confiscation was effected even though neither he - nor any other member of the princely family or any other Liechtenstein citizen - had ever declared on the occasion of any census that they belonged to the German or Hungarian "people", neither was he - nor any other Liechtenstein citizen - a member of any organization consisting of persons belonging to the German "people". The Reigning Prince was a citizen and the Head of State of an independent and neutral State, the Principality of Liechtenstein.

1.22 The Reigning Prince filed all possible appeals against the confiscation in accordance with the then existing Czechoslovakian law. The final Court of Appeal, the Administrative Court in Bratislava, rejected his appeals and upheld the decisions of the National Committee in a judgment dated 21 November 1951 (Annex 9). The Czechoslovakian Administrative Court held that

> "*Ve věci samé dospěl žalovaný úřad k závěru, za stěžovatel je osobou německé národnosti ve smyslu ustanovení § 1 odst. 1 písm. a) dekretu č. 12/1945, Sb.na základě zjištění, že u nás bylo a jest všcobecně známo, že je německé národnosti.*" (page 3 of the judgment)
>
> Translation:
> "On the merits of the case, the defendant office has come to the conclusion that the Appellant is a person belonging to the German

people within the meaning of the provisions of Section 1 (1) (a) of the Decree No. 12/1945 Coll., on the grounds of the finding that this has been and is of public knowledge here." (page 4 of the translation)

1.23 Neither the judgment nor the relevant Czechoslovakian measures against Liechtenstein property were recognised by Germany over the next 40 years until 1995. It was only in the context of the Pieter-van-Laer case, when a Liechtenstein item of property was brought to German territory, that Germany first changed its position vis-à-vis Liechtenstein.

C. The Pieter-van-Laer case

1.24 From 28 August to 17 November 1991, the Wallraf-Richartz-Museum of the Municipality of Cologne staged a large exhibition featuring Dutch painters of the 17th century who were influenced by Italian painting. The exhibition was entitled "*I Bamboccianti - niederländische Malerrebellen im Rom des Barock*" (The Bamboccianti - Dutch rebel painters in Rome during the Baroque period). When Dr. Reinhold Baumstark, then Curator of the private art collection of the present Reigning Prince Hans-Adam II of Liechtenstein and today the Director General of the Bavarian Museums, visited the exhibition, he made an unexpected discovery. There was a painting listed under catalogue number 19.12 entitled "*Szene um einen römischen Kalkofen*" ("Scene set around a Roman lime kiln") painted by Pieter van Laer, the most prominent Dutch member of the so-called *Bamboccianti* group of painters. This painting was described in the catalogue as follows:

"*19.12 Szene um einen römischen Kalkofen*
Öl auf Leinwand
51,5 x 69,2 cm
Valtice (Feldsberg), Schloß
CSFR
Inv. Nr. 724/597

Herkunft: Aus der Sammlung des Fürsten von Liechtenstein."

Translation:
"19.12. Scene set around a Roman lime kiln
Oil on canvas
51.5 x 69.2 cm
Valtice (Feldsberg), castle
CSRF
Inv. No. 724/597

(Provenance: Collection of the Prince of Liechtenstein)"

The catalogue entry also explained that the painting, which had been part of the Prince of Liechtenstein's collection located at Feldsberg Castle, had been "re-discovered in 1981" after it "had been considered lost for many decades".

1.25 When the painting was examined more closely at the exhibition, a label of the Liechtenstein Gallery in Vienna was detected on the back of the canvas bearing the number 669; there was a further label with numbers relating to Feldsberg Castle, namely object No. 170, inventory No. 129.

1.26 On his return to Vaduz, Dr. Baumstark started his research into the history of this painting. He discovered that the painting had been the subject of a private acquisition by the Prince of Liechtenstein prior to 1712 and since 1888 the painting had been at Feldsberg Castle in Lower Austria where it was registered as object No. 170 under inventory No. 129. Parts of Lower Austria, including the part in which Feldsberg Castle is situated, became part of the territory of the former State of Czechoslovakia in 1918. Feldsberg was subsequently re-named Valtice. At that time, the painting formed part of the private art collection of the then Reigning Prince of Liechtenstein, Franz Josef II, which was located at Valtice. At the end of the war in 1945, major parts of the collection remained at Valtice among other places. After 1945 - when Eduard Beneš returned from exile in London - Prince Franz Josef II of Liechtenstein was no longer allowed access to his estate.

1.27 As a consequence of these discoveries, the present Reigning Prince Hans-Adam II of Liechtenstein, acting as a private person and in his capacity as owner of the painting, filed an application in the *Landgericht Köln* (hereafter "Regional Court of Cologne"). That Court had jurisdiction over the painting while it remained in the exhibition. Prince Hans-Adam II asked the Court to grant an interim injunction to the effect that an order for sequestration of the painting should be granted. He claimed that he was the rightful owner of this painting, as son and sole heir of his late father, Franz Josef II of Liechtenstein. In accordance with his application, the Regional Court of Cologne ordered the painting to be surrendered to the custody of a German bailiff acting as sequestrator until the conclusion of the proceedings on the merits of the case, i.e. until a final court decision was reached on the question of whether Prince Hans-Adam II of Liechtenstein actually had a legally enforceable claim for restoration of the painting.

1.28 In the subsequent proceedings on the merits, Prince Hans-Adam II claimed from the Municipality of Cologne that the painting should be finally returned to him as its rightful owner. At this point the Brno National Historical Monuments Office - acting as a body of the State of Czechoslovakia which still existed at the time - intervened in support of the Municipality of Cologne, and the whole lawsuit lasted for more than eight years. As it turned out during the legal proceedings, all traces of this painting had been lost for some time, but in the end it was determined to have formed part of the assets that had been confiscated as German assets by the then State of Czechoslovakia on the basis of Decree No. 12 (Annex 6).

1.29 German civil courts, supported by the *Bundesverfassungsgericht* (hereafter "Federal Constitutional Court"), dismissed the Prince's claim, holding that German courts had no jurisdiction in the case. The courts held that Germany was bound by a treaty vis-à-vis the Allies not to raise objections under substantive law against expropriation measures which were taken against German ex-

ternal assets for the purpose of paying German reparations, nor to hear cases relating to such measures before German courts. The German courts classified Liechtenstein property as German assets in this context, and thereby included the property of Liechtenstein citizens into the post-war reparations regime. Subsequently the German government confirmed and adopted this position in general terms. This is the basis of Liechtenstein's complaint.

A. Introduction

2.1 The present dispute has to be seen in the context of the reparations regime, established by a number of treaties after the end of World War II. In general, these treaties were premised upon the duty to make reparations for losses suffered as a result of the war. For such reparation purposes, the Allied and Associated Powers were entitled to use both property belonging to Germany as a State and property belonging to German nationals. This included also the property of German nationals located on foreign territory. Germany was further obliged to compensate those German nationals whose property was affected. Thus responsibilities for reparations were not ultimately imposed on private German citizens but on the German State. The loss of German external assets, i.e. German private properties which were expropriated for reparation purposes, was to be compensated for by Germany so as to achieve this result.

2.2 The post-war reparations regime was imposed by the Allied and Associated Powers. These measures were implemented in the period prior to the termination of the occupation. Subsequently, these measures were implemented by Germany itself, in particular pursuant to the Settlement Convention to which Germany was a party.

B. The measures taken by the Allied and Associated Powers

2.3 Even before the surrender of the German High Command on 8 May 1945,[10] the governments of the Allied Powers at their meeting in Yalta in February 1945 determined German's obligation to make reparations. Subsequently, after the military surrender of Germany and the assumption of supreme authority over

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[10] Act of Military Surrender, Berlin, 8 May 1945, United States of America, Executive Agreement Series 502; 59 Stat. 1857; Official Gazette of the Control Council for Germany, Supplement No. 1, p. 6.

Germany by the Allied Powers[11] (Annex 10), this regime was further developed by the Protocol of Potsdam of 2 August 1945 and by the Agreement of Paris of 14 January 1946.

1. The Yalta Protocol of 11 February 1945

2.4 In the Protocol of Proceedings of the Crimea Conference (Yalta Protocol) (Annex 11), which took place from 4 to 11 February 1945,[12] the heads of the governments of the United States of America, the United Kingdom and the Union of Soviet Socialist Republics stated that Germany had an obligation to make reparations. Section 1 of the Protocol reads as follows:

> "1. Germany must pay in kind for the losses caused by her to the Allied nations in the course of the war. Reparations are to be received in the first instance by those countries which have borne the main burden of the war, have suffered the heaviest losses and have organised victory over the enemy."

2.5 According to Section 2 of the Protocol, reparation in kind was to be exacted from Germany in three forms, of which the following is most relevant:

> "(a) Removals within two years from the surrender of Germany or the cessation of organized resistance from the national wealth of Germany located on the territory of Germany herself as well as outside her territory (equipment, machine-tools, ships, rolling-stock, German investments abroad, shares of industrial, transport and other enterprises in Germany, etc.), these removals to be carried out chiefly for purpose of destroying the war potential of Germany."

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[11] Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, Berlin, 5 June 1945, *United Nations Treaty Series*, No. 230; Official Gazette for the Control Council for Germany, Supplement No. 1, pp. 7 *et seq.*

[12] Protocol of the Proceedings of the Crimea Conference, British Command Paper, Cmd. 7088 (1947).

Thus the Yalta Protocol covered property located on the German territory as well as property outside of it (German external assets).

2. The Potsdam Protocol of 2 August 1945

2.6 On 2 August 1945, the heads of governments of the United States of America, the United Kingdom and the Union of Soviet Socialist Republics met in Potsdam in order to prepare the peace settlement in Europe. As a result of this meeting, the Potsdam Protocol (Annex 12) provided for a division of the assets concerned into two parts: a "Western zone" which would satisfy reparation claims of the Western allies and an "Eastern zone" as regards reparation claims from the Union of Soviet Socialist Republics.[13]

2.7 Accordingly, Chapter IV (1) stated as regards reparation claims of the Union of Soviet Socialist Republics:

> "1. Reparation claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R., and from appropriate German external assets."

2.8 Chapter IV (3) concerned reparation claims of the Western allies as well as other countries. It reads as follows:

> "3. The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets."

2.9 The Protocol aimed solely at dividing German assets into two parts. It left open the question of which countries - other than the Allied Powers which were expressly named - were entitled to reparations.

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[13] Official Gazette of the Control Council for Germany, Supplement No. 1, pp. 13 *et seq.*.

3. The Paris Agreement of 14 January 1946

2.10 The Agreement on Reparations from Germany, on the Establishment of an Inter-Allied Agency and on the Restitution of Monetary Gold, signed in Paris on 14 January 1946 (the Paris Agreement) (Annex 13) concerned the allocation of German reparations to 18 creditor States, including Czechoslovakia, and their respective shares.[14] German reparations were divided into two categories. In Category A were included "all forms of German reparation except those included in Category B". In Category B were included "all industrial and other capital equipment removed from Germany, and merchant ships and inland water transport". Each signatory government was entitled to a *pro rata* share of the total value of reparations. Czechoslovakia was entitled to a share of 3 % of Category A reparations and 4.3 % of Category B reparations. An Inter-Allied Reparation Agency (IARA) was set up to allocate German reparations among the signatory states according to their respective shares.

2.11 As regards German external property, Part I Article 6 of the Paris Agreement, provided as follows:

> "A. Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets (net of accrued taxes, liens, expenses of administration, other in *rem* charges against specific items and legitimate contract claims against the German former owners of such assets).
>
> B. The Signatory Governments shall give to the Inter-Allied Reparation Agency all information for which it asks as to the value of such assets and the amounts realised from time to time by their liquidation.

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[14] Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Paris, 14 January 1946, *United Nations Treaty Series*, No. 8105.

C. German assets in those countries which remained neutral in the war against Germany shall be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom and the United States of America, pursuant to arrangements to be negotiated with the neutrals by these countries. The net proceeds of liquidation or disposition shall be made available to the Inter-Allied Reparation Agency for distribution on reparation account.

D. In applying the provisions of paragraph A above, assets which were the property of a country which is a member of the United Nations or its nationals who were not nationals of Germany at the time of the occupation or annexation of this country by Germany, or of its entry into war, shall not be charged to its reparation account. It is understood that this provision in no way prejudges any questions which may arise as regards assets which were not the property of a national of the country concerned at the time of the latter's occupation or annexation by Germany or of its entry into war.

E. The German enemy assets to be charged against reparation shares shall include assets which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy. Each Signatory Government shall enact legislation or take other appropriate steps, if it has not already done so, to render null and void all transfers made, after the occupation of its territory or its entry into war, for the fraudulent purpose of cloaking German enemy interests, and thus having them harmless from the effect of control measures regarding German enemy interests.

F. The Assembly of the Inter-Allied Reparation Agency shall set up a Committee of Experts in matters of enemy property custodianship in order to overcome practical difficulties of law and interpretation which may arise. The Committee should in particular guard against schemes which might result in effecting fictitious or other transactions designed to favour enemy interests, or to reduce improperly the amount of assets which might be allocated to reparation."

Thus, in defining the notion of German external assets, an "enemy association" was indispensable.

2.12 It was agreed that reparations were to be made through the IARA with its seat in Brussels. Reparations in the sense of the Paris Agreement were those repara-

tions which were notified to the Agency. As stated in Part I Article 6 A., it was left up to the Signatory States how to hold and dispose of German enemy assets located on their territory in order to prevent their return to German ownership. The assets were to be charged against the respective reparation share. Czechoslovakia, as one of the parties to the Paris Agreement, notified an amount of only US$189,263.00 to IARA for German external assets which were seized under the reparations regime.[15]

C. Implementation of the agreements of the Allied and Associated Powers

2.13 In implementation of the above mentioned agreements, two laws are of particular importance, Control Council Law No. 5 and Allied High Commission Law No. 63.

2.14 The Control Council was established by the Allied Powers. After Germany's surrender on 8 May 1945, the four powers assumed supreme authority in and over Germany. It is stated in the first paragraph of the Allied Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers of 5 June 1945 (Annex 10).

> "The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her."

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15 I. Seidl-Hohenveldern, Comment on the decision of the Federal Constitutional Court of Justice of 29 January 1953, *Neue Juristische Wochenschrift* 1953, p. 1389 *et seq*; H. Slapnicka, Die rechtlichen Grundlagen für die Behandlung der Deutschen und der Magyaren in der Tschechoslowakei 1945 bis 1948, in: R.G. Plaschka (ed.), "*Nationale Frage und Vertreibung in der Tschoslowakei und Ungarn*", 1938-1948, Verlag der Österreichischen Akademie der Wissenschaften, Wien, 1997, p. 17.

2.15 The fifth paragraph concerns the assumption of supreme authority over the territory of Germany:

> "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany."

2.16 Germany was divided into four zones which were administered respectively by the supreme military commanders of the four powers. They dealt jointly, through the Inter-Allied Control Council, with all matters relating to the territory as a whole including reparations. External assets taken as a reparation measure were subject to Control Council Law No. 5.

2.17 After the Soviet Union had left the Control Council, the Allied High Commission was set up. It consisted of representatives of the three Western powers: the United States of America, the United Kingdom and the French Republic. Even after the three occupying powers of the Western zone had accorded to the Federal Republic limited power of self-government in the occupation statute of 10 April 1949,[16] some issues, including reparation, remained in the competence of the Allied High Commission. Law No. 63 aimed at clarifying the status of German external assets taken by way of reparation.

1. Law No. 5 of the Control Council of 30 October 1945

2.18 Law No. 5 of the Control Council concerning "vesting and marshalling of German external assets" of 30 October 1945 (Annex 14) vested German exter-

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[16] Official Gazette of the Allied High Commission, No. 1, 10 April 1949, p. 2.

nal assets in a Commission established by the law.[17] Even though the law was intended to make provisions in particular for assets located in neutral States, it is of particular importance since relevant terms such as "German nationality" and "German property" were defined by the Allied Powers in that Law.

2.19 Article IX defines the scope of application of the Law as follows:

> "Articles II and III of this Law shall not apply to assets subject to the jurisdiction of the United Kingdom, British Dominions, India, Colonies and Possessions, the Union of Soviet Socialist Republics, the United States, France and any other United Nations determined by the Control Council."

2.20 Article III of the Control Council Law deals with property located outside Germany and the definition of German nationality. It reads as follows:

> "Article III
>
> All rights, titles and interests in respect of any property outside Germany which is owned or controlled by any person of German nationality outside Germany or by any branch of any business or corporation or other legal entity organised under the laws of Germany or having its principal place of business in Germany are hereby vested in the Commission.
>
> For the purpose of this Article the term "any person of German Nationality outside Germany" shall apply only to a person who has enjoyed full rights of German citizenship under Reich Law at any time since 1 September 1939 and who has at any time since 1 September 1939 been within any territory then under the control of the Reich Government but shall not apply to any citizen of any country annexed or claimed to have been annexed by Germany since 31 December 1937."

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[17] Official Gazette of the Control Council for Germany, No. 2, 30 November 1945, p. 27.

2.21 The term "property" was defined in Article X b) in broad terms as follows:

> "The term "property" shall include all movable and immovable property and all rights or interests in or claims to such property whether matured or not, including all property, rights, interests or claims transferred to or held by third parties as nominees or trustees and all property, rights, interests or claims transferred by way of gift or otherwise or for consideration, express or implied, but not including the rights or interests of third parties to a bona fide sale for full consideration, and shall include but shall not be limited to buildings and lands, goods, wares and merchandise, chattels, coin, bullion, currency, deposits, accounts or debts, shares, claims, bills of lading, warehouse receipts, all kinds of financial instruments whether expressed in Reichsmarks or in any foreign currency, evidences of indebtedness or ownership of property, contracts, judgments, rights in or with respect to patents, copyrights, trademarks, etc., and in general property of any nature whatsoever."

2. Law No. 63 of the Council of the Allied High Commission of 31 August 1951

2.22 By Law No. 63 of the Council of the Allied High Commission (Annex 15), the three Western allies intended to clarify the status of German external assets.[18] The preamble reads as follows:

> "WHEREAS international agreements have been entered into by the Allied Powers with respect to the liquidation of German external assets and the removal of property from Germany for the purpose of reparation,
>
> WHEREAS the Declaration of London of January 5, 1943, reserved the rights of countries occupied by Germany during the war to the restitution of property which was looted or wrongfully removed from their territories,
>
> WHEREAS property has been or may be transferred, liquidated or delivered in accordance with the aforesaid agreements and declaration and

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18 Law No. 63 clarifying the status of German external assets and of other property taken by way of reparation or restitution, Official Gazette of the Allied High Commission, No. 8, p. 1107.

WHEREAS it appears expedient to give recognition by legislation to, and to define certain legal consequences of, the divesting of title to the aforesaid property,

NOW THEREFORE for the purpose of quieting title and of preventing unwarranted disputes and litigations;

The Council of the Allied High Commission enacts as follows:"

2.23 The law addresses German external assets in Article 1 (1) (a) as follows:

"any property which, on or prior to the effective date of this Law, was located in any foreign country and German-owned and which, after September 1, 1939, has been or will be transferred or liquidated under the law of such country, or under the law of any other country by agreement with the former country

(i) pursuant to measures taken in connection with the war against Germany by the government of any country which has adhered to the United Nations Declaration of January 1, 1942, or

(ii) pursuant to any agreement, accord or treaty regarding the disposition of German external assets which has been or will be concluded with the participation of France, the United Kingdom and the United States of America, or

(iii) pursuant to measures taken in satisfaction of claims against Germany, or

(iv) pursuant to reparation measures in Japan or Tangier;"

2.24 Article 3 enacted the non-objection and inadmissibility rule according to which the seizure of property for reparation purposes shall not be objected to and any claims relating thereto shall be inadmissible:

"No claim or action based on or arising out of the transfer, liquidation or delivery of property to which this law extends shall be admissible:

(a) against any person who has transferred or acquired title to or possession of such property or against such property,

(b) against any international agency, any government of a foreign country, or any person acting in conformity with the instructions of such agency or government."

2.25 Germany in the meaning of the Law was the territory of the former Reich on 31 December 1937. Article 4 (a) and (b) state:

"For the purposes of this Law:

(a) the term "foreign country" means any country except Germany and the countries listed in the Schedule to this Law;

(b) the term "Germany" means the territory of the former Reich on December 31, 1937."

2.26 Neither Liechtenstein nor Czechoslovakia was listed in the Schedule to the Law. Each was accordingly a "foreign country" in the meaning of Article 4 (a). German assets located in Czechoslovakia were German external assets.

D. The Settlement Convention of 26 May 1952

2.27 The Convention on the Settlement of Matters arising out of the War and the Occupation (Settlement Convention) (Annex 16) is one of four Conventions that were signed at Bonn on 26 May 1952.[19] These Conventions, to which the three Western allies as well as the Federal Republic of Germany were parties, were designed to end the occupation regime in the Western zone. However, the reparations regime established by the measures of the Allied and Associated Powers was continued. The other three conventions were:

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19 Convention on the Settlement of Matters arising out of the War and the Occupation, signed by the United Kingdom, the French Republic, the United States of America and Federal Republic of Germany, Bonn, 26 May 1952, *United Nations Treaty Series,* No. 4762.

- the Convention on Relations between the Three Powers and the Federal Republic of Germany (hereafter the "Relations Convention");[20]
- the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany;[21] and
- the Finance Convention.[22]

The conventions did not enter into force in their original form. They were subsequently amended by five schedules to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, one of the agreements signed in Paris on 23 October 1954.[23] The amended Conventions entered into force on 5 May 1955.

2.28 In Article 1 (1) of the Relations Convention (Annex 17), it is stated:

> "1. On the entry into force of the present Convention the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic (hereinafter and in the related conventions sometimes referred to as "the Three Powers") will terminate the Occupation régime in the Federal Republic, revoke the Occupation Statute and abolish the Allied High Commission and the Offices of the Land Commissioners in the Federal Republic."

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20 Convention on Relations between the Three Powers and the Federal Republic of Germany, signed by the United Kingdom, the French Republic, the United States of America and the Federal Republic of Germany, Bonn, 26 May 1952, *United Nations Treaty Series*, No. 4759.

21 *United Nations Treaty Series*, No. 4760.

22 *United Nations Treaty Series*, No. 4761.

23 Protocol between the United Kingdom of Great Britain and Northern Ireland, the United States of America, the French Republic and the Federal Republic of Germany on the Termination of the Occupation Regime in the Federal Republic of Germany, Paris, 23 October 1954, *United Nations Treaty Series*, No. 4758.

As regards sovereignty it is stated in paragraph 2 of this Article:

> "2. The Federal Republic of Germany shall have accordingly the full authority of a sovereign State over its internal and external affairs."

However, according to Article 2, the three Western allies retained their rights relating to Germany as a whole. It is stated:

> "Article 2
>
> In view of the international situation, which has so far prevented the re-unification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the re-unification of Germany and a peace settlement. The rights and responsibilities retained by the Three Powers relating to the stationing of armed forces in Germany and the protection of their security are dealt with in Articles 4 and 5 of the present Convention."

2.29 Reparation measures are dealt with in Chapter Six of the Settlement Convention. These were intended to be of a provisional nature. In Article 1 of Chapter Six it is stated:

> "1. The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter. The Three Powers undertake that they will at no time assert any claim for reparation against the current production of the Federal Republic.
>
> 2. Pending the final settlement envisaged in paragraph 1 of this Article, the following provisions shall apply."

2.30 With the termination of the occupation regime, Law No. 5 of the Control Council (Annex 14) was deprived of its effect in the Western zone. However, it was not revoked as a law of the four Allied Powers. The Federal Republic agreed not to repeal or amend Law No. 63 of the Allied High Commission

(Annex 15). Article 2 of Chapter Six of the Settlement Convention (Annex 16) reads as follows:

> "Control Council Law No. 5 is deprived of effect in the Federal territory, except in respect of the countries listed in the Schedule to Allied High Commission Law No. 63, as amended by Decision No. 24 of the Allied High Commission, but shall not be further deprived of effect or amended without the consent of the Three Powers. The Federal Republic will not repeal or amend Law No. 63 except with the consent of the Three Powers. However, paragraph 1 of Article 6 of Law No. 63 shall be deemed to be repealed and paragraph 2 to be amended to provide that the powers therein conferred upon the Allied High Commission may be exercised by the Federal Government. The Federal Republic undertakes that appropriate decisions under Article 6 of Law No. 63, as so amended, removing the countries from the list in the Schedule thereto shall be issued after the Three Powers have consented."

2.31 As regards reparation measures, the non-objection and inadmissibility rule is stated in Article 3 (1) and (3):

> "1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.
>
> 2. The Federal Republic shall abide by such provisions regulating German external assets in Austria as are set forth in any agreement to which the Powers now in occupation of Austria are parties or as may be contained in the future State Treaty with Austria.
>
> 3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments."

2.32 Article 5 of Chapter Six stated that Germany is obliged to compensate the former owners of property seized. It reads as follows:

> "The Federal Republic shall ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of this Chapter shall be compensated."

2.33 Article 4 expressly provided for the possibility of Germany negotiating agreements with all countries which had been at war with Germany since 1 September 1939 regarding German external assets which had not been transferred or liquidated. However, this did not apply to members of IARA, and thus not to Czechoslovakia which was a member of IARA.

2.34 Negotiations with the member countries of IARA, including Czechoslovakia, were only possible so far as specific assets were concerned. Article 4 (2) of Chapter Six of the Settlement Convention provides as follows:

> "2. Moreover, the Federal Republic may negotiate agreements with the member countries of IARA, provided such agreements relate only to:
>
> (a) property of the types which member countries of the IARA may, under Part III of the IARA accounting rules, voluntarily exclude from the charge to be made under Part II of the rules;
>
> (b) securities of German issue expressed in Reichsmarks;
>
> (c) pensions;
>
> (d) a final date for sequestration of German property in countries in which such a date has not yet been determined."

2.35 The Settlement Convention did not terminate the reparation regime. On the contrary, the non-objection and inadmissibility rule first enacted by Law No. 63 of the Allied High Commission was upheld. The Federal Republic agreed not to object to the seizure of property for reparation purposes and to consider

any claims relating thereto to be inadmissible. It also agreed to compensate the former owners of the property concerned.

E. Further development of the Settlement Convention

2.36 The situation remained unchanged until 1990. Germany's reunification created a situation which required amendments to the existing regime. However, a final settlement of the reparation issues was not achieved. To the contrary, certain provisions of the Settlement Convention remained in force.

1. The Treaty on the Final Settlement with respect to Germany of 12 September 1990 (Two-Plus-Four-Treaty)

2.37 On 12 September 1990, the Treaty on the Final Settlement with Respect to Germany (hereafter the "Two-Plus-Four-Treaty") (Annex 18) was signed in Moscow by the German Republic, the German Democratic Republic, the French Republic, the Soviet Union, the United Kingdom and the United States of America.[24] The Treaty aimed at finally ending the post-war regime by conferring upon Germany full sovereignty over its internal and external affairs. As stated in the 13th paragraph of the preamble:

> "Recognizing that thereby, and with the unification of Germany as a democratic and peaceful state, the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole lose their function;"

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[24] Treaty on the Final Settlement with Respect to Germany, signed by the Federal Republic of Germany, the German Democratic Republic, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, Moscow, 12 September 1990, *United Nations Treaty Series*, No. 29226, Federal Law Gazette (*Bundesgesetzblatt*) 1990 II, p. 1318.

2.38 Consequently, Article 7 of the Treaty states that:

> "(1) The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practises are terminated and all related Four Power institutions are dissolved.
>
> (2) The united Germany shall have accordingly full sovereignty over its internal and external affairs."

The Treaty thus ended the post-war regime by terminating the rights of the four Allied Powers and acknowledging Germany's full sovereignty.

2. The Exchange of Notes of 27 and 28 September 1990

2.39 Following an Exchange of Notes on 27 and 28 September 1990 (Annex 19),[25] an agreement was reached between the governments of the Federal Republic of Germany and the three Western Allies concerning the Relations Convention as well as the Settlement Convention (Annex 16). In principle, it was agreed that both Conventions would terminate on the date of the entry into force of the Two-Plus-Four-Treaty. It is stated in the Exchange of Notes:

> "1. The Convention on Relations between the Three Powers and the Federal Republic of Germany of 26 May 1952 (as amended by Schedule I to Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on 23 October 1954) ("the Relations Convention") shall be suspended upon the suspension of the operation of quatripartite rights and responsibilities with respect to Berlin and to Germany as a whole, and shall terminate upon the entry into force of the Treaty on the

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25 Exchange of Notes constituting an Agreement concerning the Relations Convention and the Settlement Convention between the Three Powers and the Federal Republic of Germany of 27/28 September 1990, *United Nations Treaty Series*, No. 28492, Federal Law Gazette (*Bundesgesetzblatt*) 1990 II, p. 1386.

> Final Settlement with respect to Germany, signed at Moscow on 12 September 1990.
>
> 2. Subject to paragraph 3 below, the Convention on the Settlement of Matters arising out of the War and the Occupation of 26 May 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on 23 October 1954) ("the Settlement Convention") shall be suspended and shall terminate at the same time as the Relations Convention; this also applies to the letters and exchanges of letters relating to the Relations Convention and the Settlement Convention."

However, it was agreed that the Settlement Convention shall partly remain in force. In particular Article 3 (1) and (3) of Chapter Six of the Settlement Convention. The relevant text of paragraph 3 of the Exchange of Notes reads as follows:

> "The following provisions of the Settlement Convention shall, however, remain in force:
> ...
> Chapter Six:
> Article 3, paragraphs 1 and 3
> ..."

2.40 The Government of the Federal Republic expressly assumed the obligation to adhere to the Settlement Convention. It is stated in paragraph 4 (a) of the Exchange of Notes:

> "4. (a) The Government of the Federal Republic of Germany declares that it shall take all adequate measures to ensure that the provisions of the Settlement Convention which remain in force shall not be circumvented in the territory of the present German Democratic Republic and in Berlin."

2.41 The non-objection and inadmissibility rule of Article 3 (1) and (3) of Chapter Six of the Settlement Convention was thereby confirmed. It lost its provisional character and became final. By virtue of the revocation of Article 1 of the Settlement Convention, the rule (which had hitherto been regarded as having only a temporary effect, pending the conclusion of a peace treaty) acquired a permanent character.

A. Introduction

3.1 Once the occupation status had come to an end and the Allied Powers had restored to Germany competence over its internal and external affairs, Germany was obliged to accept the legal framework established by the Allied Powers after the end of the war as a given fact. Germany consistently stressed, however, that its consequent acceptance of the confiscation of German external assets for purposes of reparations as a given fact in no way implied a recognition of these measures. Germany always referred to the preliminary nature of all reparation measures and in particular the Settlement Convention and maintained that a final settlement of all questions related to World War II and the post-war regime could only be dealt with by a peace treaty. It was never suggested that Liechtenstein, as a neutral State, was subject to the reparation system as described above.

3.2 This position changed in the 1990s, when Germany, contrary to its invariable practice hitherto

(a) as a consequence of a decision of its highest constitutional court, for the first time included Liechtenstein assets among "German external assets" within the meaning of Article 3 of Chapter Six of the Settlement Convention and

(b) by entering into the Exchange of Notes of 27/28 September 1990, permitted the conversion of the hitherto temporary reparations regime into a final settlement and thereby terminated Germany's obligation to compensate former owners of property seized for the purpose of reparation.

B. Germany's former position

3.3 Germany consistently held the opinion that the seizure of German external property for reparation purposes was contrary to international law. When Germany became a party to the Settlement Convention, however, it agreed to the non-objection and inadmissibility rule provided for in Article 3 (1) of Chapter Six of the Settlement Convention. Thereby, Germany accepted that German external assets were used for the purpose of reparations. It agreed not to raise any objections to the measures. Although the German Government was well aware of the fact that the Western Allied Powers were of the opinion that the title of ownership had been lost with respect to German assets properly so-called (i.e., that there has been a divesting of title), it expressly avoided recognising these measures. The property question was thus left open.

1. Germany regarded seizure of German external assets as unlawful

3.4 In the opinion of Germany, the seizure of German external property as a consequence of World War II was unlawful, on the grounds that such measures could only be imposed by a peace treaty. No such peace treaty was concluded after the end of World War II.

3.5 Accordingly, in 1952 the Committee of the Federal Parliament for the Occupation Statute and Other External Affairs described the seizure of German external assets as "advance reparations" (Annex 20).[26] The relevant sentences of the report read as follows:

> "*Völkerrechtlich ist die Auferlegung von Reparationen jedoch nur durch einen Friedensvertrag möglich. Die Maßnahmen gegen das deutsche Eigentum verstoßen gegen die Bestimmungen der Haager Landkriegsordnung von 1907... Die Verletzung des völkerrechtli-*

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[26] Report of the Committee of the Federal Parliaments for the Occupation Statute and Other External Affairs, Official Gazette of the Parliament (*Bundestags-Drucksache*), No. 3389, p. 6.

chen Grundsatzes, daß Reparationen nur von dem unterlegenen Staat und nicht von einer willkürlich herausgegriffenen Gruppe seiner Staatsangehörigen zu leisten seien, ist bis zur letzten Folgerung durchgeführt worden."

Translation:
"In international law the imposition of reparations is however only possible by means of a peace treaty. The measures against German property contravene the provisions of the Hague Convention IV Respecting the Laws and Customs of War on Land of 1907 ..... The contravention of the basic principle of international law that reparations have to be made by the defeated country and not from a group of its nationals chosen at random, has been carried out to the full extent."

3.6 The German Government was of the opinion that title to ownership was not affected by what it regarded as unlawful expropriation measures. For example, when the question arose as to whether ownership of securities had passed following their confiscation for reparation purposes, the Secretary of State of the Federal Ministry of Finance drew the attention of the Federal Parliament to the fact that seizures carried out by the Allied and Associated Powers or other States outside German territory could not be recognised as a valid basis for acquiring title to a security. Therefore, the Czechoslovakian State did not acquire the ownership of securities that were expropriated and, consequently, could not have these securities registered under the Law on Validation of Securities (*Wertpapierbereinigungsgesetz*) of 19 August 1949.[27] On 22 February 1951, the Secretary of State of the Federal Ministry of Finance stated as follows (Annex 21):[28]

"*Eigentumsübergänge nach dem 1. Januar 1945 aufgrund von Maßnahmen der Hohen Hand werden nur anerkannt, wenn es sich um rechtswirksame Maßnahmen der Behörden oder der Besatzungsmächte des Währungsgebietes handelt. Andere Maßnahmen von Hoher Hand, also von Behörden und Besatzungsmächten au-*

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27 Law Gazette of the Administration of the United Economic Area (*Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebietes*) 1949, p. 295.

28 Stenographer's Report of the 120th Session of the Federal Parliament, 22 February 1951, p. 4582.

ßerhalb des Währungsgebietes, werden nicht anerkannt. Danach müssen die Anmeldungen des tschechoslowakischen Staates, soweit sie enteignete Wertpapiere sudetendeutscher Eigentümer betreffen, abgelehnt werden."

Translation:
"Transfer of property after 1 January 1945 because of measures of the 'High Hand'[29] shall only be recognised if these are legally effective measures of the authorities or the occupying powers of the currency area.[30] Other measures of the 'High Hand', that is to say of authorities and occupying powers outside the currency area, shall not be recognised. Accordingly the registrations of the Czechslovakian State inasmuch as they contain expropriated securities of Sudeten German owners, will have to be refused."

2. Germany acknowledged the reparation measures only as a fact and did not recognize them

3.7 During the negotiation of the Settlement Convention, Germany was obliged to accept the reparation measures as a given fact. However, it carefully avoided recognizing them. Accordingly, in its Explanatory Memorandum to the Federal Parliament on the Settlement Convention of 21 July 1952 (Annex 22),[31] the Federal Government interpreted the Settlement Convention in Chapter Six on reparations as follows:

"Wie in den Friedensverträgen, die den ersten Weltkrieg beendeten, haben auch die Siegermächte des zweiten Weltkrieges in den 6 bisher geschlossenen Friedensverträgen das in ihrem Gebiete belegene private Auslandsvermögen der besiegten Nationen zu Reparationszwecken herangezogen. Das gleiche ist für Deutschland im Potsdamer Abkommen von den Großmächten vereinbart worden. Kontrollratsgesetz Nr. 5 und AHK-Gesetz Nr. 63 sind zur Durchführung dieser Vereinbarungen erlassen worden, und 19 alliierte Staaten haben das Pariser interalliierte Reparationsabkommen vom 14. Januar 1946 geschlossen.

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29 "High Hand" means the Allied Powers.

30 "Currency area" is the geographical area in which the German Mark was used.

31 Explanatory Memorandum to the Settlement Convention, Annex 4 to the Official Gazette of the Federal Parliament (*Bundestags-Drucksache*), No. 3500, 21 July 1952, pp. 54 -56.

Die Verwendung des deutschen Auslandsvermögens für Reparationszwecke durch internationale Abkommen und durch Gesetze der Besatzungsmächte war als eine harte Tatsache hinzunehmen. Es mußte darauf ankommen, diese internationalen Abkommen und Gesetze nach Möglichkeit aufzulockern. Dies dürfte im wesentlichen gelungen sein.

...

Eine Anerkennung der interalliierten Verträge und der Gesetze der Besatzungsmächte ist in dem Vertrage vermieden worden. Die Bundesrepublik erklärte nur, in Zukunft keine Einwendungen gegen die Enteignungsmaßnahmen zu erheben (Artikel 3 Absatz (1)). Darin liegt ein deutlicher Hinweis auf den bisher geltend gemachten Rechtsvorbehalt und nur ein Verzicht auf dessen künftige Wiederholung, jedenfalls keine Anerkennung der Rechtmäßigkeit der vorgenommenen Maßnahmen."

Translation:
"As in the peace treaties which terminated the First World War, the victorious powers of the Second World War have, in the peace treaties of which six have so far been concluded, also had recourse to the private external assets of the conquered states which were located on their territory for the purposes of reparation. The same has been agreed by the big powers with respect to Germany in the Potsdam Agreement. The Control Council Ordinance No. 5 and AHC Law No. 63 were adopted for the purpose of implementing these agreements and 19 Allied countries concluded the Paris Inter-Allied Reparation Agreement of 14 January 1946.

The use of German external assets for the purposes of reparation on the basis of international agreements and laws of the occupying powers had to be accepted as a hard fact. It was a matter of relaxing these international agreements and laws where possible. This ought to have been for the most part achieved.

...

The recognition of the inter-allied treaties and the laws of the occupying powers was avoided in the Convention. The Federal Republic merely stated that it would not in the future raise any objections against expropriation measures (Article 3 para. 1). Herein lies a clear reference to the legal reservation previously asserted and only a dispensation with its future reuse, in any case no recognition of the measures carried out."

3.8 Thus, Germany accepted that German external assets were used for the purposes of reparation. It agreed not to raise any objections to the measures. Although the German Government was well aware of the fact that the Western Allied Powers were of the opinion that the title of ownership had been lost (i.e., that there had been a divesting of title),[32] it expressly avoided recognising these measures.

3.9 Accordingly, the Committee for Legal Issues and Constitutional Law stated in its written report on the Settlement Convention (Annex 23):[33]

> "*Die Bundesregierung erkennt die Rechtsgültigkeit der Enteignungen nicht an. Nach den Mitteilungen der Verhandlungsführer ist gerade deshalb die Formulierung gewählt, daß sie gegen die alliierten Maßnahmen, die schon beschlagnahmtes Vermögen betreffen, keine Einwendungen erheben will. Im Zusammenhang damit werden auch keine Klagen aus den der Vergangenheit angehörigen Tatbeständen in den Vertragsstaaten zugelassen werden. Aber eine* ***rechtliche Anerkennung der Enteignung*** *ist damit* ***nicht*** *gegeben.*"
>
> Translation:
> "The Federal Government does not recognize the validity of the expropriations. According to information from the negotiators [Note of the translator: of the Convention], this is exactly why wording has been agreed on to the effect that no objections are to be raised against the allied measures affecting property already confiscated. In this context, claims relating to facts from the past are not to be admitted in the contracting states. However, this does **not** constitute a **legal recognition of the expropriation**."

3.10 In its Explanatory Memorandum (Annex 22), the Federal Government referred to German external assets. There was no mention of the inclusion within the scope of the Convention of assets owned by non-Germans; i.e., citizens of a neutral State such as Liechtenstein.

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[32] See above paras. 2.13 *et seq.*

[33] Report of the Committee for Legal Issues and Constitutional Law of 15 November 1952, Official Gazette of the Federal Parliament (*Bundestags-Drucksache*), No. 1/3900, pp. 32 et *seq.*, p. 37.

3.11 The situation was not affected in 1973, when the Prague Treaty (Annex 24) was signed. This Treaty on Mutual Relations between Germany and Czechoslovakia[34] was intended to harmonize relations between the two States. In the preamble, it is stated:

> "Purposing to create lasting foundations for the development of good-neighbourly relations..."

3.12 The Treaty did not address reparation measures. Until today, Czechoslovakia and subsequently the Czech Republic, has unsettled reparation claims of approx 315 billion Kcs.[35] Germany is well aware of this fact.[36] However, as concerns the Prague Treaty, the German Government made clear in a statement of 11 June 1974 (Annex 26)[37] that:

> *"dieser Problemkreis nicht Teil der Verhandlungen war, daß der Vertrag nicht ein Friedensvertrag, sondern ein Vertrag zur Normalisierung der Beziehungen ist, in dem über Reparationen und das Vermögen der Sudetendeutschen nicht verhandelt worden ist."*
>
> Translation:
> "this issue package was not part of the negotiations, that the Treaty is not a peace treaty, but a Treaty on the normalisation of relations, in which reparations and the Sudeten-German assets have not been negotiated on."

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34 Treaty on the Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic, 11 December 1973, *United Nations Treaty Series*, No. 13589, Federal Law Gazette (*Bundesgesetzblatt*) 1974 II, p. 990.

35 Memorandum for the Prague Treaty, 11 December 1973, Official Gazette of the Federal Assembly of the Czechoslovakian Socialist Republic 1974, No. 66; see also Memorandum to the German-Czech Declaration of 17 December 1996, reprinted in German: D. Blumenwitz, *Interessenausgleich zwischen Deutschland und den östlichen Nachbarstaaten*, Wissenschaft und Politik, Köln, 1998, pp. 139-144.

36 Statement of defense of 25 June 2001, Proceedings before the Administrative Court of Berlin (Kretschmer ./.. Federal Republic of Germany, Ref. No. VG I A 261.00) (Annex 25).

37 Statement of the German Government concerning the Prague Treaty of 11 June 1974, Official Gazette of the Federal Parliament (*Bundestags-Drucksache*), No. 7/2270 of 17 June 1974, p. 4.

3.13 This was again stressed by the Constitutional Court in a decision of 25 January 1977 on the Prague Treaty[38] (Annex 27) in paragraphs 2 and 3 of the substantive part of the judgment:

> "*2. Der Abschluß des deutsch-tschechoslowakischen Vertrags kann auch nicht als ein Mitwirken der Bundesregierung an den tschechoslowakischen Konfiskationsmaßnahmen gedeutet werden. Der Vertrag selbst enthält keine Bestimmung, die sich auch nur entfernt auf Fragen des deutschen Privateigentums bezieht. Die Bundesregierung hat auch bei Vertragsabschluß keine auf die von den tschechoslowakischen Behörden vorgenommenen Konfiskationsmaßnahmen bezügliche Willenserklärung abgegeben und insbesondere keine Billigung oder Anerkennung dieser Maßnahmen ausgesprochen.*
>
> *3. Dem Vertrag kann auch nicht die Wirkung beigemessen werden, in sonstiger Weise eine Veränderung der eigentumsrechtlichen Lage zum Nachteil der Beschwerdeführer herbeigeführt zu haben. Dabei kann offenbleiben, ob der deutsch-tschechoslowakische Vertrag einen Wechsel des staats- und völkerrechtlichen Status der Sudentengebiete im Sinne des Vortrags der Beschwerdeführer bewirkt hat. Jedenfalls hat eine nachträgliche Legalisierung der gegen das Grundeigentum der Beschwerdeführer gerichteten tschechoslowakischen Konfiskationsmaßnahmen im Zusammenhang mit dem Vertrag nicht stattgefunden. Ebensowenig enthält der Vertrag eine Bestimmung, die als Verzicht auf die Geltendmachung etwaiger daraus resultierender Ansprüche verstanden werden könnte. Soweit also den Beschwerdeführern bei Vertragsabschluß hinsichtlich ihres Vermögens noch Eigentumsrechte oder Rückgewähr- und Entschädigungsansprüche zustanden, hat sich die Rechtslage durch den Abschluß des Vertrags nicht verändert.*"
>
> Translation:
> "2. The conclusion of the German-Czechoslovakian Agreement cannot be construed as an acceptance by the Federal Government of the Czechoslovakian confiscation measures. The agreement itself does not contain any provision that is even remotely concerned with issues of German private assets. Upon conclusion of the agreement, the Federal Government did not issue any manifestation of intent with reference to the confiscation measures taken by the

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38 Decision of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts, BVerfGE*), No. 43, pp. 203 *et seq.*

Czechoslovakian authorities and, in particular, did not express any approval or recognition of these measures.

3. The agreement cannot be credited with having caused in any way a change of the property law situation to the detriment of the applicants. At the same time, it can remain open whether the German-Czechoslovakian agreement has brought about a change in the national and international status of the Sudeten territories within the meaning of the argument of the applicants. In any case, there has been no subsequent legalisation of the Czechoslovakian confiscation measures directed against the real property of the applicants in connection with the agreement. Nor does the agreement contain a provision that could be understood as a waiver of the assertion of possible claims resulting out of this. Inasmuch, therefore, as the applicants upon conclusion of the agreement are still entitled to ownership rights or claims of restitution and compensation with respect to their assets, the legal situation has not changed as a result of the conclusion of the agreement."

3.14 Germany carefully avoided recognizing the legality of seizure of German external assets. Thus, the property question was left open even after the Prague Treaty was signed. According to the German position, there was no loss of title following the confiscations effected for example by Czechoslovakia at the end of the war. Germany had accepted that reparation claims of Czechoslovakia had been left open, but there was never any question of including confiscated property of Liechtenstein, a neutral State during the war, into this regime.

C. Germany's position after amendments of the Settlement Convention

3.15 Until 1990, the year in which the Two-Plus-Four Treaty and the Amendments to the Settlement Convention were signed, Germany's position was clear in principle. The confiscation measures based on the "Beneš Decrees" (including the confiscation of Liechtenstein property) were not recognized because Germany took the view that they violated generally accepted rules of international law and regarded them as being of a preliminary nature only, pending their fi-

nal resolution by a peace treaty. There was never any question that property of neutral States was covered by the Settlement Convention.

3.16 Since 1990, this position has changed fundamentally in a series of gradual steps, commencing with the Pieter-van-Laer case and the judgments of the German courts, reaching its climax in Germany's position before the European Court of Human Rights in Strasbourg and ensuing diplomatic correspondence and consultations.

1. The decisions of the German Civil Courts in the *Pieter-van-Laer* case

3.17 By their judgments of 10 October 1995 and 9 July 1996 respectively, both the Court of first instance, the Regional Court of Cologne (Annex 28), and the *Oberlandesgericht Köln* (hereafter "Court of Appeal of Cologne") (Annex 29), rejected the claim of Prince Hans-Adam II of Liechtenstein for the restoration of the painting. They ruled that they had no jurisdiction over such a claim by virtue of the Settlement Convention.

3.18 Both German courts invoked the inadmissibility rule of Article 3 (3) of Chapter Six of the Settlement Convention (Annex 16), thereby denying the plaintiff the relief sought.

3.19 The German civil courts held that the regulations cited were still applicable, irrespective of the termination of the Allied Powers' rights and responsibilities relating to Germany as a whole set out in the Two-Plus-Four Treaty (Annex 18). In the courts' opinion, the agreement concluded between the governments of the Federal Republic of Germany and the Three Powers on 27/28 September 1990 stipulated rather that individual provisions of the Settlement Convention remained in force, including Article 3 (1) and (3) of Chapter Six of the Settle-

ment Convention. The Court of Appeal of Cologne stated in its decision of 9 July 1996:

> *"Das in Art. 7 Abs. 1 S. 2 Zwei-plus-Vier-Vertrag statuierte Erlöschen der Vier-Mächte-Rechte in bezug auf Deutschland als Ganzes wird ergänzt durch die Ziffern 2 und 3 der Vereinbarung der Regierung der Bundesrepublik Deutschland und der drei West-Alliierten vom 27./28.09.1990 zu dem Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den Drei Mächten sowie zu dem Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen. Gemäß Ziffer 2 dieses Abkommens tritt der Überleitungsvertrag mit Ausnahme der in Ziffer 3 aufgeführten Einzelbestimmungen des Vertragswerkes, zu denen auch Teil VI Art. 3 Abs. 1, 3 zählt, außer Kraft."* (page 8/9 of the decision)
>
> Translation:
> "The extinction of quadripartite law with respect to Germany as a whole, as established by Article 7 paragraph 1 sentence 2 Two-Plus-Four Treaty, is supplemented by paragraphs 2 and 3 of the agreement between the governments of the Federal Republic of Germany and the three Western Allies dated September 27/28 1990 with respect to the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Convention on the Settlement of Matters Arising out of the War and the Occupation. In accordance with paragraph 2 of this Convention, the Settlement Convention ceases to be in force with the exception of individual provisions of the instrument listed under paragraph 3, which also includes Article 3 paragraph 1 and 3 of Chapter Six." (page 7 of the translation)

3.20 In the opinion of both the Regional Court of Cologne and the Court of Appeal of Cologne, the applicability of Article 3 (3) of Chapter Six of the Settlement Convention extends to Liechtenstein citizens. According to this view, Liechtenstein property is to be regarded as German external assets within the meaning of Article 3 in so far as German courts are obliged to accept the categorisation by the then Czechoslovakian State:

> *"Insbesondere nach dem Urteil des BGH vom 11.04.1960 (BGHZ 32, 170, 172 f) reicht es zur Anwendung der Bestimmung des Teil VI Art. 3 Überleitungsvertrag aus, daß das Vermögen als deutsches*

Vermögen beschlagnahmt worden sei." (page 20 of the judgment of the Court of Appeal)

Translation:
"In particular in accordance with the judgment of the Federal Court of Justice dated April 11 1960 (*BGHZ - Amtliche Entscheidungssammlung des BGH in Zivilsachen* - 32, 170, 172 f), it will be sufficient for the application of Article 3 Chapter Six Settlement Convention that the assets were seized as German assets." (page 18 of the translation)

3.21 At the same time the Regional Court of Cologne rejected an application by the Plaintiff for a stay of the proceedings until the competent administrative courts had reached a final decision on a compensation claim pursuant to the legislation concerning losses due to reparations, on the ground of such a claim was the corollary of the Regional Court of Cologne's ruling. In accordance with that legislation, German citizens have a right to be compensated for losses or damage suffered in connection with reparation measures affecting their property. However, the Regional Court of Cologne held that none of the prerequisites for compensation under that legislation were fulfilled in the case under consideration. On page 16 of its judgment, the Court stated:

"*Lastenausgleichsansprüche des Klägers bestehen nämlich unabhängig von der Frage, ob er deutscher Volkszugehöriger im Sinne des § 230 a LAG ist, nicht. Ansprüche bestehen nämlich gemäß § 230 Abs. 1 LAG nur dann, wenn der Geschädigte am 31.12.1952 seinen ständigen Aufenthalt im Geltungsbereich des Grundgesetzes oder in Berlin (West) hatte. Dies trifft jedoch für den Kläger bzw. seinen Vater offensichtlich nicht zu.*"

Translation:
"...independent of the question of whether or not the Plaintiff is "*deutscher Volkszugehöriger*" (of German ethnic origin) within the meaning of Section 230(a) *LAG-Lastenausgleichsgesetz* (Equalisation of Burdens Act), the Plaintiff is not entitled to claim equalisation of burdens. And this is so, because according to Section 230 paragraph 1 *LAG*, the person who suffered the loss is only entitled to raise such a claim if he had his permanent residence within the territory of application of German Basic Law or in Berlin (West) on December 31 1952. However, this is obviously not the case as

far as the Plaintiff or his father are concerned." (page 14/15 of the translation)

3.22 The Regional Court of Cologne also rejected as unfounded the Plaintiff's argument that the measures effected on the basis of the Decree No. 12 of 12 June 1945 had not been reparation measures directed against German assets, but rather measures of a punitive character - as the wording of the Decree's preamble clearly shows.

3.23 The Court of Appeal Cologne considered it to be undeniable that the seizure of the painting was effected as a result of a state of war and for the purpose of reparations within the meaning of Article 3 (1) and (3) of Chapter Six of the Settlement Convention:

> "*Die Beschlagnahme des Gemäldes erfolgte auch aufgrund des Kriegszustands zu Zwecken der Reparation im Sinne des Teiles VI Art. 3 Abs. 1, 3 Überleitungsvertrag.*" (page 25 of the decision)
>
> Translation:
> "The seizure of the painting was also effected because of the state of war and for the purpose of reparation measures within the meaning of Article 3 paragraph 1 and 3 of Chapter Six Settlement Convention." (page 21 of the translation)

3.24 During the oral hearings before the Court of Appeal of Cologne, both the Czech Republic and Hans-Adam II argued that the Beneš Decree No. 12 was not a reparation measure. The Court, however, gave its own interpretation of Beneš Decree No. 12, categorising the measures taken under it as reparation measures against German external assets. In its reasoning on this point, the Court invoked a statement made by President Beneš in 1944:

> "*Das Vermögen der betroffenen Personen wurde als Feindvermögen eingezogen und sollte den Äußerungen des Staatspräsidenten Benes zufolge als "Vorschuß auf die Reparation gegenüber dem Deutschen Reich" dienen (zitiert bei Raschhofer in FS von der Heydte, 495, 511).*" (page 25 of the judgment)

Translation:
"The assets of the persons concerned were confiscated in their capacity as enemy assets and, according to President Beneš' comments it was meant to serve as "*Vorschuß auf die Reparation gegenüber dem Deutschen Reich*" (an advance on the reparation vis-à-vis the German *Reich*) (cited by Raschhofer in *Festschrift von der Heydte*, pages 495, 511)." (page 22 of the translation)

On page 22 of the decision the Court stated also:

"*Unmaßgeblich für die streitgegenständliche Rechtsfrage ist schließlich auch die gegenwärtige Rechtsauffassung des tschechischen Staates.*"

Translation:
"And, finally, with respect to the matter at issue, the present legal opinion of the Czech State is of no importance either." (page 19 of the translation)

3.25 In its decision dated 25 September 1997 (Annex 30), the highest German court for civil matters, the *Bundesgerichtshof* (hereafter "Federal Court of Justice"), finally confirmed to its full extent the judgment delivered by the Court of Appeal of Cologne.

2. The Decision of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 14 January 1998

3.26 On 30 October 1997, Hans-Adam II filed a constitutional complaint against the Federal Court of Justice's decision of 25 September 1997 before the Federal Constitutional Court in Karlsruhe. Hans-Adam II argued that the Exchange of Notes of 27/28 September 1990, in which the signatories agreed to keep part of the Settlement Convention in force, should actually have been ratified by the German Parliament. Furthermore, he complained in respect of a violation of international law, international law being directly applicable as German law pursuant to Article 25 of the German Basic Law. He argued that it was not possi-

ble on any ground to regard Liechtenstein property as German external assets within the meaning of the Settlement Convention. Concurrently, he filed a motion for an interlocutory order against the Federal Court of Justice's decision in order to prevent the return of the Pieter-van-Laer painting to the Czech Republic prior to the conclusion of the proceedings pending before the Federal Constitutional Court.

3.27 In its decision dated 26 November 1997 (Annex 31), the Federal Constitutional Court made the interlocutory order as requested and prohibited the sequestrator from returning the painting to the Czech Republic. This decision was exceptional, indeed, in Germany's previous history, because, as a rule, the Federal Constitutional Court does not make interlocutory orders against the Federal Court of Justice in its capacity as the highest court in civil matters. Such an order is made only if - after an initial look to the case - the Court considers it likely that the constitutional appeal will succeed on the merits, because it seems evident that the Federal Court of Justice's decision was unconstitutional.

3.28 However, on 28 January 1998 the Federal Constitutional Court issued a final decision (Annex 32) rejecting the Applicant's constitutional complaint. Stating the reasons for their decision, the judges of the Constitutional Court agreed with the line of argument adopted by the civil courts. However, the Court presented an additional argument in holding that, where an original law of the Three Powers had existed in Germany, that law could legitimately be extended to the territory of the former German Democratic Republic by a simple exchange of letters and without participation of the German Parliament - as was the case with the Exchange of Notes of 27/28 September 1990.

3.29 In addition, the Court not only applied the inadmissibility rule of Article 3 (3), but also the non-objection rule of Article 3 (1) of Chapter Six of the Settlement Convention and declared that where the requirements of Article 3 (1) of Chapter Six of the Settlement Convention are fulfilled - as was the case here - the

German courts were not only obliged to dismiss claims before them, but Germany was also prohibited from raising objections against such measures carried out by the Three Powers and other allied countries.

3.30 The Federal Constitutional Court confirmed the civil court's opinion that Liechtenstein property fell within the scope of the Settlement Convention. In the Court's view it was not arbitrary for the civil courts to rely upon the classification of Liechtenstein assets as German external assets by the expropriating State. In this connection, the Court resorted to the purpose of the Settlement Convention and accepted the civil court's view on this point. It held that the question of whether or not any specific property was to be classified as German external assets within the meaning of Article 3 (1) of Chapter Six of the Settlement Convention was a matter exclusively within the competence of the expropriating State.

3. Statements of the Municipality of Cologne

3.31 The Municipality of Cologne - the local German authority responsible for the Wallraf-Richartz-Museum - was the defendant in the Pieter-van-Laer case. However, at the earliest stage, when the case was brought before the Regional Court of Cologne, the Municipality of Cologne served a third party notice on the Brno National Historical Monuments Office and demanded that the latter should replace them as a party to the action, because the Municipality of Cologne had no economic interest in the matter, while the National Historical Monuments Office was the lender of the painting. The Brno National Historical Monuments Office joined the action in support of the Municipality of Cologne, but did not replace the Municipality as defendant. It merely acted as a third party intervener against the Applicant. Pursuant to Section 67 of the German Code of Civil Procedure, any pleadings used by the intervener to defend his position or to raise objections are attributable to the defendant unless they contradict the defendant's own declarations and actions.

3.32 In the course of the lawsuit, and in particular before the Regional Court of Cologne, the Brno National Historical Monuments Office made a number of statements related to the Principality of Liechtenstein's alleged lack of sovereignty and to the allegation that Liechtenstein was part of the German nation.

3.33 For example, in its capacity as intervening third party in support of the Municipality of Cologne, the Brno National Historical Monuments Office *inter alia* made the following assertions: (a) it was and has been generally known that Liechtenstein nationals belong to the German people; (b) residents of Liechtenstein are Catholic Germans, and (c) the Regional National Committee in Olomouc correctly declared that the Head of State of the Principality of Liechtenstein was a person belonging to the German people, which was generally known, and that he consequently was a member of the group of persons whose property could be expropriated in accordance with Section 1 (1 a) of Decree No. 12 (Annex 6).

3.34 The lawyers representing the Applicant before the court at the time expressly asked the Municipality of Cologne to contradict this argument (Annex 33), but the Municipality of Cologne as principal defendant failed to do so and accepted the argument put forward by the intervener, the Brno National Historical Monuments Office (Annex 34). In these circumstances, the intervener's statements may be attributed to the Municipality of Cologne pursuant to Section 67 of the German Civil Procedure Law.

3.35 In the belief that the Municipality of Cologne's position was unlikely to have been shared by the Government of the Federal Republic of Germany, the Government of the Principality of Liechtenstein instructed its Embassy in Bern to present an aide-mémoire to the German Ambassador Heyken on 4 October 1995 (Annex 35). Referring to the Municipality of Cologne's conduct in its capacity as a local authority forming part of the Federal Republic of Germany

and therefore subject to the legal oversight of the Land of North-Rhine Westphalia as far as questions of the legality of administrative acts are concerned, the Liechtenstein Government asked the following questions:

> *"1. Entspricht die von der Stadt Köln mittelbar eingenommene Haltung auch der Auffassung der Bundesrepublik Deutschland?*
>
> *2. Sollte die Haltung der Stadt Köln nicht der Auffassung der Regierung der Bundesrepublik Deutschland entsprechen, welche Möglichkeiten gibt es, auf die Stadt Köln einzuwirken, von derartigen rechtsverbindlichen Erklärungen mit weitreichenden Konsequenzen auch auf das Verhältnis zwischen dem Fürstentum Liechtenstein und der Bundesrepublik Deutschland im Hinblick auf die Reparationsfrage abzusehen, um ein einheitliches Bild in der außenpolitischen Haltung der Bundesrepublik Deutschland gegenüber dem Fürstentum Liechtenstein wiederherzustellen?"*
>
> Translation:
> "1. Does the position indirectly taken by the Municipality of Cologne correspond to the position taken by the Federal Republic of Germany?
>
> 2. In the event that the position of the Municipality of Cologne does not correspond to the point of view supported by the Government of the Federal Republic of Germany, what possible means are available to influence the Municipality of Cologne to the effect that the latter will refrain from making such declarations of a legally binding nature which are bound to have far-reaching consequences for the relationship between the Principality of Liechtenstein and the Federal Republic of Germany also with respect to the reparation issue, and in order to restore the Federal Republic of Germany's consistent attitude vis-à-vis the Principality of Liechtenstein with regard to foreign affairs?"

3.36 The German Embassy took delivery of the aide-mémoire of 4 October 1995, but the Ambassador of the Principality of Liechtenstein was advised only in December 1995 that the contents of the aide-mémoire had been brought to the attention of the responsible court, but that those contents had not been considered as having any relevance for the court's decision.

4. Statements of the German Government before the European Court of Human Rights

3.37 The Municipality of Cologne's attitude in the Pieter-van-Laer case reflected a major change in Germany's position. This was particularly evident in the submission of the Agent of the Government of the Federal Republic of Germany in the context of the action for violation of human rights brought before the European Court of Human Rights in Strasbourg by Prince Hans-Adam II of Liechtenstein.

3.38 Following the decision of the Federal Constitutional Court of 28 January 1998 (Annex 32), in which the constitutional complaint of Prince Hans-Adam II of Liechtenstein was dismissed, Hans-Adam II filed an individual application to the European Court of Human Rights on 8 June 1998. He based his application on the fact that his human rights had been violated by the decision of the German courts and also by the Municipality of Cologne's refusal to return the Pieter-van-Laer painting to him. He asserted in particular a violation of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (denial of justice). In addition, he complained of a violation of Article 1 of the First Protocol to this Convention and Article 14 of this Convention in conjunction with Article 1 (1) of the First Protocol.

3.39 In a statement dated 29 October 1999 (Annex 36), in response to the application, the Agent of the Federal Republic of Germany also invoked the decision of the Administrative Court in Bratislava of 21 November 1951 (Annex 9). He adopted the principal arguments on which the Administrative Court in Bratislava had based its decision, namely that the Reigning Prince of Liechtenstein in his capacity as the Head of State of Liechtenstein was to be regarded as a person of German nationality on the grounds that this was a fact that "*allseitig bekannt war und ist*" (official translation of Germany: "was and is generally known"). Referring to this decision of the Administrative Court in Bratislava,

the Agent of the Government of the Federal Republic of Germany considered that:

> (Es ist)"*jedenfalls nicht willkürlich und vertretbar, wenn die deutschen Gerichte davon ausgingen, daß das Vermögen als deutsches Vermögen beschlagnahmt worden sei. Artikel 3 des VI. Teils des Überleitungsvertrags wird vom Beschwerdeführer zu eng ausgelegt, wenn er deutsches Auslandsvermögen mit dem Vermögen deutscher Staatsangehöriger gleichsetzt.*" (page 14 of the reply)
>
> Official Translation of Germany:
> "With respect to these reasons, it is at least not arbitrary and it is defensible if the German courts proceeded on the assumption that the property was seized as German property. Article 3 of Chapter Six of the Settlement Convention is interpreted too narrowly by the Applicant if he equates German external assets with the assets of German citizens." (page 14 of the translation)

3.40 Furthermore, the Agent of Germany clearly pointed out in his pleading that he considered Liechtenstein citizens to be "*deutsche Volkszugehörige*" (persons belonging to the German "people"). In his view, Liechtenstein citizens are to be regarded as "Germans" in the ethnic meaning of the term. In this context he alleged that the Principality of Liechtenstein had formed part of the Habsburg Empire, another point on which the Agent of Germany was in error, as this was never the case.

3.41 This opinion was expressly confirmed by the Agent of Germany in his oral pleading before the European Court of Human Rights on 31 January 2001. He declared that the 1951 decision of the Administrative Court in Bratislava was defensible. He argued that the relevant issue was not citizenship but "*Volkszugehörigkeit*" (belonging to the German "people"). Therefore - in the opinion of the Agent of Germany - it is a natural corollary to include Liechtenstein citizens among those who can be regarded as "*deutsche Volkszugehörige*" (persons belonging to the German "people"), like the so-called "*Sudetendeutsche*" (Germans from Sudetenland), because they speak a German language and be-

longed to the Habsburg Reich and consequently - according to Germany's assertion - are part of the "*deutscher Kulturkreis*" (German cultural community).

5. Diplomatic correspondence and bilateral consultations

3.42 Responding to the first signs of Germany's imminent change of position, which Liechtenstein found increasingly difficult to understand, Liechtenstein exchanged several diplomatic notes with Germany and also initiated two bilateral consultations between Liechtenstein and German government delegations. It became apparent that the fundamental change in Germany's position was not restricted to the Pieter-van-Laer painting, but extended to the entirety of Liechtenstein property located in the territory of the Czech Republic.

3.43 Not having received any satisfactory reply to its aide-mémoire of 4 October 1995, the Government of the Principality of Liechtenstein felt obliged to consult the Government of the Federal Republic of Germany in connection with the "German Czech Declaration on Mutual Relations and their Future Development" signed by the Government of the Federal Republic of Germany and the Government of the Czech Republic in Prague on 21 January 1997 (Annex 37). In its diplomatic note of 5 May 1997 (Annex 38), the Government of the Principality of Liechtenstein stated:

> *"Unter Bezugnahme auf die am 21.01.1997 in Prag von der Regierung der Bundesrepublik Deutschland und von der Regierung der Tschechischen Republik unterzeichneten "Deutsch-Tschechische Erklärung über die Gegenseitigen Beziehungen und deren künftige Entwicklung", nach deren Ziff. IV "beide Seiten darüber einstimmen, dass das begangene Unrecht der Vergangenheit angehört" und dass "jede Seite ihrer Rechtsordnung verpflichtet bleibt und respektiert, dass die andere Seite eine andere Rechtsauffassung hat" ist es der Regierung des Fürstentums Liechtenstein ein Bedürfnis festzuhalten, dass diese Deutsch-Tschechische Erklärung die Rechte des Fürstentums Liechtenstein sowie die Rechte seiner Staatsangehörigen im Hinblick auf die völkerrechtswidrige Enteignung liechtensteinischen Vermögens durch die tschechoslowaki-*

sche Regierung nicht berührt, obwohl diese Enteignungen unter dem Titel "volksdeutsches Vermögen" oder "deutsches Auslandsvermögen" erfolgt sind."

Translation:
"With reference to the "*Deutsch-Tschechische Erklärung über die Gegenseitigen Beziehungen und deren künftige Entwicklung*" (German Czech Declaration on Mutual Relations and their Future Development) signed by the Government of the Federal Republic of Germany and the Government of the Czech Republic in Prague on January 21, 1997, and subparagraph IV thereof, pursuant to which "*beide Seiten darüber übereinstimmen, dass das begangene Unrecht der Vergangenheit angehört*" (both sides agree that the wrongs committed shall be a matter of the past) and that "*jede Seite ihrer Rechtsordnung verpflichtet bleibt und respektiert, dass die andere Seite eine andere Rechtsauffassung h*at" (each side remains committed to its legal order and respects that the other side has a different legal position), it is the desire of the Government of the Principality of Liechtenstein to emphasise that this German Czech Declaration will not affect the rights of the Principality of Liechtenstein and the rights of her citizens with regard to Liechtenstein assets which were expropriated by the Czechoslovakian Government contrary to international law, in spite of the fact that such expropriations were effected under the heading of "*volksdeutsches Vermögen*" (ethnic German assets) or "*deutsches Auslandsvermögen*" (German external assets)."

3.44 In reply thereto, the Federal Government had its Embassy in Bern declare in a *procès-verbal* of 10 June 1997 (Annex 39):

"Bei der deutsch-tschechischen Erklärung über die gegenseitigen Beziehungen und deren künftige Entwicklung vom 21. Januar 1997 handelt es sich um eine bilaterale politische Erklärung, die die Rechte dritter Staaten und deren Angehöriger nicht berührt.

Was im übrigen die Frage deutscher vermögensrechtlicher Ansprüche betrifft, ist mit der Erklärung keine Aufgabe von Rechtspositionen verbunden. Es wird im Gegenteil ausdrücklich eine Unterschiedlichkeit der Rechtsauffassungen zwischen beiden Staaten festgehalten, wie in Ziffer IV der Erklärung zum Ausdruck kommt, worin es heißt "... wobei jede Seite ihrer Rechtsordnung verpflichtet bleibt und respektiert, dass die andere Seite eine andere Rechtsauffassung hat"."

Translation:
"The German-Czech Declaration with Respect to the Mutual Relations and their Future Development dated 21 January 1997 is a bilateral political declaration which does not affect the rights of third States and their nationals.

As far as the question of German claims with respect to property rights is concerned, this Declaration is not connected with any waiver of legal positions. On the contrary, the difference in the legal opinions of both states is expressly set out, as expressed in item IV of the Declaration, which reads "... while each side remains committed to its legal order and respects that the other side has a different legal position"."

3.45 This point of view expressed by the German government in their *procès-verbal* of 10 June 1997 reflected the position Germany had taken over several decades, namely to consider all measures taken by the Allies against German external assets as contrary to international law. It also corresponded to the point of view expressed by the then Chancellor of the Federal Republic of Germany, Dr. Helmut Kohl, in his letter of 14 January 1997 (Annex 40) to the effect that Germany has not yet recognized Czechoslovakia's measures directed against the Liechtenstein property and others. The Chancellor pointed out in his letter addressed to the Reigning Prince Hans-Adam II of Liechtenstein:

"*Die deutsch-tschechische Gemeinsame Erklärung wird im übrigen keinerlei Einfluß auf diesen Rechtsstreit haben, da sie Rechtsfragen im Zusammenhang mit Enteignungen in der damaligen Tschechoslowakei offenhält.*"

Translation:
"As far as the German Czech Joined Declaration is concerned, it will not have any influence on this lawsuit, because it leaves open the questions in connection with expropriations in the then Czechoslovakia."

3.46 However, by this letter, the Government of Germany contradicted the rulings of the civil courts in Cologne, which already had been delivered by the date of the letter. In their rulings, the courts had applied Article 3 of Chapter Six of the Settlement Convention to Liechtenstein property located in the Czech Repub-

lic, thereby expressly settling for good the issue of Allied confiscation measures. After the Exchange of Notes dated 27/28 September 1990, Article 3 of Chapter Six of the Settlement Convention was no longer a temporary measure pending the conclusion of a peace treaty, but had now become definitive and final, and this final character of Article 3 deprived Germany of the chance to raise substantive objections at any point of time against measures governed by Article 3 of Chapter Six of the Settlement Convention. As a result, the German courts had *not* left the property issue open, but had come to a final settlement on the point, with the result that all persons concerned had lost their title of ownership.

3.47 After the Federal Constitutional Court failed to contradict the point of view taken by the civil courts, the Government of the Principality of Liechtenstein turned to the Government of the Federal Republic of Germany and referred to the fact that Liechtenstein property had been included in the post-war reparations regime contrary to international law and asking for a meeting on a diplomatic level. In its aide-mémoire of 3 June 1998 (Annex 41), sent to the Foreign Office of the Federal Republic of Germany, the Principality of Liechtenstein expressed its doubts as to whether Germany's position was in conformity with international law and stated that it could not accept the legal injury caused thereby.

> "*Die Entscheidung des Bundesverfassungsgerichts der Bundesrepublik Deutschland vom 28. Januar 1998 in dem Verfahren über die Verfassungsbeschwerde S.D. Fürst Hans-Adam II. von und zu Liechtenstein (2 BvR 1981/97) wirft nach übereinstimmender Ansicht der von der Regierung des Fürstentums Liechtenstein konsultierten Experten erhebliche Zweifel bezüglich ihrer Vereinbarkeit mit dem Völkerrecht auf. Die vom Bundesverfassungsgericht praktizierte "zweckorientierte Auslegung" des Artikels 3 Absätze 1 und 3 des VI. Abschnitts des sogenannten Überleitungsvertrags von 1954 läuft im Ergebnis darauf hinaus, das Fürstentum Liechtenstein und liechtensteinische Staatsangehörige in die Reparations- und Kriegsschadensregelung der Bundesrepublik Deutschland einzubeziehen, ohne dass es hierfür irgendeinen Zurechnungszusam-*

menhang gäbe. Das verletzt gleichermaßen völkerrechtlich garantierte Rechtspositionen des liechtensteinischen Staatsoberhauptes wie des Staates Liechtenstein selbst.

Die Regierung des Fürstentums Liechtenstein bittet daher um Verständnis dafür, dass sie, bei aller Anerkennung der Unabhängigkeit der Gerichte, die entstandenen Rechtsbeeinträchtigungen nicht hinnehmen kann.

Im Interesse einer kooperativen und freundschaftlichen Erörterung der mit der erwähnten Entscheidung des Bundesverfassungsgerichts entstandenen Situation und der sich aus ihr ergebenden Fragen sollten daher möglichst umgehend Gespräche auf diplomatischer Ebene unter Einschluß von Experten stattfinden."

Translation:
"Legal experts consulted by the Government of the Principality of Liechtenstein concur in the opinion that the decision of the Federal Constitutional Court of the Federal Republic of Germany of 28 January 1998 in the proceedings concerning the constitutional complaint filed by HSRH Prince Hans-Adam II of Liechtenstein (2 BvR 1981/97) gives rise to considerable doubt as to whether such decision is compatible with international law. In the last analysis, the "purpose-oriented interpretation" of Article 3 paragraph 1 and 3 of Chapter Six of the so-called Settlement Convention of 1954 amounts to an inclusion of the Principality of Liechtenstein and Liechtenstein citizens into the Federal Republic of Germany's settlement of reparations and damages caused by the war, even though there is no reason whatsoever to establish such a link. This constitutes a violation of the legal status guaranteed by virtue of international law both with respect to the Liechtenstein Head of State and the State of Liechtenstein itself.

The Government of the Principality of Liechtenstein therefore asks you to understand that, regardless of its recognition of the independence of courts, they cannot accept the legal injury caused thereby.

In the interest of a cooperative and friendly discussion of the situation created by the above-described decision of the Federal Constitutional Court and the questions arising as a result thereof, talks on a diplomatic level should be held as soon as possible with the participation of experts."

3.48 Following this aide-mémoire, two consultations took place between German and Liechtenstein government delegations. They were held on 10 July 1998 in Bonn and on 14 July 1999 in Vaduz.

3.49 During the first consultation in Bonn, the Liechtenstein delegation expressly asked whether Germany agreed with the interpretation of the Federal Constitutional Court to the effect that, even where Liechtenstein's neutral property was concerned, German courts were prohibited by the Settlement Convention from deciding on the lawfulness of confiscation measures carried out against German external property if the confiscations had been carried out to meet German reparation obligations.

3.50 The German delegation replied that the German Executive had taken cognisance of the decision of its supreme court. They said they were bound by that decision and it would also be bound in relation to any future cases. In all other respects, Germany was unable to see that the decision of the Federal Constitutional Court could amount to a violation of rights of the State of Liechtenstein. Nor were there any *delicta juris gentium* involved for which Germany would be liable vis-à-vis Liechtenstein.

3.51 In preparation for the second round of bilateral consultations, Liechtenstein sent in advance a list of questions (Annex 42) intended to serve as a framework for discussions at the second round:

> *"1. Teilt die neue Bundesregierung die Rechtsansicht ihrer Vorgängerin, dass aufgrund einer zweckorientierten Auslegung von Teil VI Art. 3 Abs. 1 und 3 des Überleitungsvertrages (Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen ... BGBl. 1955 II S. 405) unter "Maßnahmen gegen das deutsche Auslandsvermögen" alle Maßnahmen verstanden werden, die nach der Intention des handelnden Staates gegen deutsches Vermögen gerichtet waren und demgemäß die Tschechoslowakei 1945 auch das Vermögen von Bürgern des im Zweiten Weltkrieg neutralen Für-*

stentums Liechtenstein zum Zwecke der Reparation konfiszieren durfte?

2. Ist sich die Regierung der Bundesrepublik Deutschland bewußt, daß die Bundesrepublik Deutschland gemäß Art. 5 Überleitungsvertrag grundsätzlich verpflichtet war, die Eigentümer der Werte, die aufgrund der in Art. 3 Überleitungsvertrag bezeichneten Maßnahmen beschlagnahmt worden sind, zu entschädigen, und daß der dem Grunde nach bestehende, vom Bundesverfassungsgericht erst durch Beschluß vom 28. Januar 1998 tatbestandsmäßig festgestellte Entschädigungsanspruch betroffener liechtensteinischer Bürger von der Aufhebung des Art. 5 Überleitungsvertrag durch den Notenwechsel vom 27./28.09.1990 (BGBl. 1990 II S. 1387) nicht berührt wurde und nicht berührt werden konnte?

3. Teilt die Regierung der Bundesrepublik Deutschland den von dem Bundesgerichtshof wie auch vom Bundesverfassungsgericht nicht beanstandeten Rechtsstandpunkt des LG/OLG Köln (Az: 5 O 182/92/22 U 215/95 - Urteil vom 09.07.1996), dass die bis dato geltende deutsche innerstaatliche Rechtsordnung den betroffenen Bürgern Liechtensteins zu keinem Zeitpunkt eine Art. 5 Überleitungsvertrag adäquate Entschädigung einräumte? Wie wird die Bundesregierung diese Diskriminierung gegenüber anderen Kriegsfolgegeschädigten ausgleichen?

4. Durch eine Reihe von völkerrechtlichen Verträgen mit den im Zweiten Weltkrieg neutralen Staaten hat die Bundesrepublik Deutschland sichergestellt, daß deren Angehörige nicht unter Kriegsfolgen zu leiden haben, für die der Angriff Deutschlands auf seine Nachbarstaaten kausal war und ist.

Vgl. z.B. die Abkommen mit der Schweiz (BGBl. 1953 II S. 15), mit Schweden (BGBl. 1956 II S. 811), mit Spanien (BGBl. 1959 II S. 245) und mit Portugal (BGBl. 1959 II S. 264)

Ist die Bundesregierung bereit, im Geiste der genannten Verträge und in der Erkenntnis, dass der Notenwechsel vom 27. /28.09.1990, die Entscheidung des Bundesverfassungsgerichts vom 28.01.1998 und die deutsch-tschechische "Schlusserklärung" vom 08.03.1999 nunmehr die das Fürstentum treffenden Kriegsfolgeschäden endgültig fixiert haben, auch mit Liechtenstein einen gerechten Ausgleich zu vereinbaren?"

Translation:
"1. Does the new German Government share the legal opinion of its predecessor that on the basis of a purpose-oriented interpretation of Article 3 paragraph 1 and 3 of Chapter Six Settlement Convention (Convention on the Settlement of Matters Arising out of the War and the Occupation... *BGBl.* [*Bundesgesetzblatt* - Federal Law Gazette] 1955 II p 405) the term "measures carried out with regard to German external assets" is to be understood to include all measures directed against German property in accordance with the intention of the acting State, and that, consequently, in 1945, Czechoslovakia was entitled to confiscate for the purpose of reparations also the assets of citizens of the Principality of Liechtenstein which was neutral in World War II?

2. Is the Government of the Federal Republic of Germany aware of the fact that pursuant to Art. 5 Settlement Convention, the Federal Republic of Germany was in principle obliged to compensate the owners of assets which had been seized on the basis of the measures specified in Art. 3 Settlement Convention, and that the compensation claim of Liechtenstein citizens affected hereby - a claim which has existed on the merits, but was established in recognition of the facts by the decision of the *Bundesverfassungsgericht* [Federal Constitutional Court] no earlier than on January 28, 1998 - was not affected and could not be affected by the abrogation of Art. 5 Settlement Convention by means of the exchange of notes dated September 27/28, 1990 (*BGBl.* 1990 II p 1387)?

3. Does the Government of the Federal Republic of Germany share the view of the *LG/OLG Köln* [*Landgericht/Oberlandesgericht Köln* - Regional Court/Court of Appeal Cologne] (ref No: 5 O 182/92 /22 U 215/95 - Judgment of July 9, 1996) - a view that has not been contradicted neither by the Bundesgerichtshof [Federal Court of Justice] nor by the Federal Constitutional Court - that the German national legal order applicable to date had at no point in time granted adequate compensation - in terms of Article 5 Settlement Convention - to Liechtenstein citizens affected in this context? How will the Federal Government even out such a treatment that is discriminating in comparison to other persons who suffered losses as a result of the war?

4. By means of a number of international treaties with States that were neutral during World War II, the Federal Republic of Germany ensured that their nationals will not have to suffer such losses as a result of the war which were and are caused by Germany's attack on her neighbouring States.

> Cf eg the treaties with Switzerland (*BGBl.* 1953 II p 15), with Sweden (*BGBl.* 1956 II p 811), with Spain (*BGBl.* 1959 II p 245) and with Portugal (*BGBl.* 1959 II p 264)
>
> Is the Federal Government prepared also to agree on a just settlement with Liechtenstein, in the spirit of the above-mentioned treaties and in recognition of the fact that the exchange of notes of September 27/28, 1990, and the German-Czech "final declaration" of March 8, 1999, have now finally fixed such losses resulting from the war that have been suffered by the Principality?"

3.52 In the course of the second consultation, the German delegation gave precise answers to some of these questions, while other questions were answered in a summary manner.

3.53 With respect to the first question, Germany stressed that the Federal Government had to accept the result of the proceedings before German courts as binding for the future. In addition, the German delegation stated that the Federal Government had to accept the ruling of its supreme court. This decision would be attributable to Germany under international law.

3.54 With respect to questions 2 and 3, the German delegation read out an official statement of the Ministry of Finance which had been contacted in advance - as had the Ministry of Justice and the Chancellor's Office - to agree on a concerted position. According to the Ministry of Finance's statement, Article 5 of Chapter Six of the Settlement Convention had been deleted because the German Government was of the opinion that sufficient provision had been made for compensation of all German citizens concerned. Consequently, Germany had considered Article 5 obsolete. When deleting that Article, the parties involved had not been aware of the Liechtenstein property issue. In this context, the German delegation explained that Liechtenstein citizens could not claim compensation by virtue of German domestic law. They had to rely on the diplomatic protection of their home country in order to enforce their claims. The Principality of Liechtenstein was free to have recourse to diplomatic means.

3.55 As regards question 4, the German delegation pointed out that Liechtenstein had also been included in the compensation agreement entered into with Switzerland at the time. However, it conceded that no payments had been made to Liechtenstein under the agreement, because such agreement only covered the confiscation of German assets in Liechtenstein. No such German property had been confiscated in Liechtenstein.

3.56 Taking up the results of the consultations, Liechtenstein's Foreign Minister Dr. Andrea Willi wrote to the German Foreign Minister Josef Fischer on 9 December 1999 (Annex 43). The German Foreign Minister having refused to discuss this matter with the Liechtenstein Foreign Minister in an informal meeting during the OSCE Summit Meeting on 18/19 November 1999 in Istanbul, the Liechtenstein Foreign Minister asked for an urgent appointment to talk about the issue and achieve a solution. Enclosed with her letter of 9 December 1999 was an aide-mémoire (Annex 44) also dated 9 December 1999, setting out once more the Principality of Liechtenstein's position and making renewed reference to treaties in connection with consequences of war Germany had already concluded with other countries having also been neutral during World War II. The Principality of Liechtenstein declared:

> "*Die Regierung des Fürstentums Liechtenstein, das im Zweiten Weltkrieg ebenfalls neutral war, bringt daher die Erwartung zum Ausdruck, daß die Regierung der Bundesrepublik Deutschland auch im Fall der jüngst betroffenen liechtensteinischen Staatsangehörigen in Verhandlungen mit dem Ziel eines gerechten Ausgleichs eintritt.*" (page 4 of the aide-mémoire)
>
> Translation:
> "The Government of the Principality of Liechtenstein, a country which had equally been neutral during World War II, therefore expresses to its expectation, that the Government of the Federal Republic of Germany will also commence negotiations in the matter of the Liechtenstein citizens affected of late, with the objective to reach a just compensation." (page 3 of the translation)

3.57 The Principality of Liechtenstein was all the more interested in a clarification of the matter in due course, as the Czech Republic had meanwhile expressly adopted the ruling of the German courts with respect to reparation confiscations as providing a legal justification for its own position. The declarations of the Principality of Liechtenstein and the Czech Republic of 25/26 May 1999 made in this context on the occasion of the 7th OSCE Economic Forum in Prague were also attached to the aide-mémoire.[39]

3.58 However, the German Foreign Minister Josef Fischer declared in his letter of 20 January 2000 (Annex 45) that the Federal Republic of Germany refused to enter into negotiations. In principle, the Government did not see any reason to grant compensation for a loss of Liechtenstein property either. The German Foreign Minister said:

> *"vielen Dank für Ihr Schreiben vom 9. Dezember 1999 und das beigefügte Aide-mémoire. Die Bundesregierung teilt die darin vertretene Rechtsauffassung bekanntlich nicht. Auch nach erneuter Prüfung der Sach- und Rechtslage sieht sie deshalb keine Möglichkeit, gegenüber dem Fürstentum Liechtenstein für die aufgrund von Nachkriegsenteignungen in der ehemaligen Tschechoslowakei erlittenen Vermögensverluste Kompensationsleistungen zu erbringen."*
>
> Translation:
> "Thank you very much for your letter of 9 December 1999 and the enclosed aide memoire. It is known that the German Government does not share the legal opinion expressed therein. Even upon renewed examination of the legal and factual position, they do not see a possibility to make compensation payments to the Principality of Liechtenstein for losses of property suffered as a result of post-war expropriations in former Czechoslovakia."

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39 Declaration of the Liechtenstein Delegation of 25 May 1999 and the written reply of the Czech Republic, Attachments to Annex 44 of this Memorial.

D. Decision to submit the dispute to the Court

3.59 Following the letter of 20 January 2000, the consultations between Germany and Liechtenstein had to be regarded as failed. Neither was Germany prepared to concede that its attitude towards Liechtenstein and Liechtenstein property was contrary to international law nor was Germany willing to accept any responsibility for this behaviour in terms of compensation. Therefore, Liechtenstein decided to submit the dispute to the Court.

CHAPTER 4

GERMANY'S FAILURE TO RESPECT LIECHTENSTEIN'S NEUTRALITY AND SOVEREIGNITY

A. Overview

4.1 By virtue of its conduct in the period 1995 and subsequently, Germany violated the rights of Liechtenstein. By declaring Liechtenstein property to be German property, Germany failed to respect Liechtenstein's acknowledged status as a neutral State during World War II, as well as infringing its sovereignty. Germany committed both these violations by the same conduct, i.e. by applying the reparations regime to Liechtenstein property during this period.

4.2 The peace treaties concluded both after World War I[40] and World War II, included provisions on the question of reparations by the defeated States. There was no waiver of reparations arising from World War II in Europe, any more than there had been in 1919. The Peace Treaties concluded after World War II, as well as the regime concerning Germany which resulted from the Yalta and Potsdam Conferences as well as the Paris Agreement of 14 January 1946, imposed a duty of reparations on the defeated States. Each of the Peace Treaties actually concluded contained a section on "Reparation and Restitution" (for example Part V of the Peace Treaties with Bulgaria,[41] with Hungary[42] and with Romania,[43] Part IV of the Peace Treaty with Finland,[44] Part VI, Section I, of the Peace Treaty with Italy[45]) which provided the duty to make reparations for the losses caused to members of the Allied and Associated Powers by military operations and by the occupation. A similar provision was contained in the Peace Treaty with Japan of 1951.[46]

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40 The duty to make reparations was reflected in Article 297 i) of the Treaty of Versailles; see below para. 5.37.

41 *United Nations Treaty Series*, No. 643.

42 *United Nations Treaty Series*, No. 644.

43 *United Nations Treaty Series*, No. 645.

44 *United Nations Treaty Series*, No. 746.

45 *United Nations Treaty Series*, No. 747.

46 *United Nations Treaty Series*, No. 1832.

4.3 No peace treaty as such was concluded with Germany. But no decision was ever made to relieve Germany of its obligation to make reparations. The leaders at the Yalta Conference, speaking on behalf of the Allied nations, agreed on exacting reparations from Germany. Consequently, the Protocol that was approved at the Yalta Conference (Annex 11) provided as follows:

> "1. Germany must pay in kind for the losses caused by her to the Allied nations in the course of the war. Reparations are to be received in the first instance by those countries which have borne the main burden of the war, have suffered the heaviest losses and have organised victory over the enemy..."

Hence, it was clear that reparations would be sought from Germany. The duty of reparations incumbent upon Germany was confirmed by the Paris Agreement of 14 January 1946 (Annex 13).

4.4 The mere fact that the Allies were only speaking on behalf of the Allied and Associated Powers did not mean that they were excluding reparations owed to neutrals arising from their status of neutrality during the War. Indeed, they could not exclude this obligation of reparations to neutral States. Neither, of course, did they entitle Germany to use neutral property (such as Liechtenstein property) to meet its duty of reparations.

4.5 The position of Germany taken in 1995 and subsequently denied that the German courts had jurisdiction over claims raised by Liechtenstein concerning the property of Liechtenstein nationals who had become subject of measures on account of their allegedly German status under the "Beneš Decrees" (Annexes 6, 7, 46). Germany sought to justify this denial by claiming that the reparations regime applied to Liechtenstein property, irrespective of Liechtenstein's neutrality during the War. By declaring this property as being subject to the reparations regime and applying the legal consequences prescribed by that regime, Germany treated the Liechtenstein property as property of a belligerent State,

i.e. of Germany itself, and thereby breached its international obligation to respect the sovereignty and neutrality of Liechtenstein.

4.6 This new position of Germany constitutes a breach of Liechtenstein's rights arising out of its recognised status as a sovereign and neutral State during World War II. The breach materialised in the inclusion of Liechtenstein property in the reparations regime for Germany, and the treatment of Liechtenstein nationals as nationals of a belligerent State.

B. Liechtenstein was a neutral State in World War II

4.7 As explained in Chapter 1, Liechtenstein's neutrality was established and generally recognised during the War.[47] That neutrality had an *erga omnes* effect, and was applicable vis-à-vis both Germany and Czechoslovakia. There can be no doubt as to the neutrality of Liechtenstein with regard to all States involved in the War. Correspondingly, Germany as a belligerent State was obliged to respect the neutrality of Liechtenstein during the War. In fact, it respected Liechtenstein neutrality at the time, and subsequently, until its change of position in and after 1995.

4.8 However, at no stage was Germany freed from the obligation to respect the status of Liechtenstein as a neutral State during the War, and not to treat its property as property taken by way of war reparations. The reparations regime which Germany applied to Liechtenstein property was a result of the legal status of Germany during World War II as the enemy of the Allied and Associated Powers.[48] It was only in 1995 and thereafter, i.e. more than fifty years after the end of the hostilities, that Germany applied this regime to Liechtenstein property. The decisive fact is that Germany, in and after 1995, applied to

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47 See above paras. 1.1 to 1.9.

48 See above paras 2.1 *et seq.*

Liechtenstein property a regime which resulted from the status of Germany and its allies as enemy countries during the War. In this regard, the application of the reparations regime is conditioned by the status of the State concerned as a belligerent rather than a neutral. But Liechtenstein was indisputably not a belligerent during the War. On the contrary, its status as a neutral was expressly recognized, including by Germany. Nor has any State, including Germany, ever argued that Liechtenstein violated its duty of neutrality, or that individuals of Liechtenstein nationality acted in non-neutral ways, so as to justify treating their property as effective enemy property. It is for this reason that Germany had to respect the status of neutrality of Liechtenstein in respect of any action concerning the legal regime resulting from the War. This is a continuing obligation and applies to action taken at any time up to the present.

C. The law of neutrality

4.9 The law of neutrality is mainly embodied in the Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed at The Hague, 18 October 1907, and the Convention concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague, 18 October 1907 (Hague Conventions V and XIII).[49] Germany is and at all relevant times was party to the two Hague Conventions.[50] These Conventions grant the belligerent powers only limited rights to requisition or the use of neutral property, i.e. property of a neutral State or its nationals (as long as the latter fall within the definition of neutral persons). These rights include the right of belligerent States to seize war materials or contraband destined for the enemy, and certain rights relating to railway material according to Article 10 of Hague Convention V. These rights constitute an exception to the general rule that the property of neutral States and their nationals has to be respected even in times

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[49] Official Gazette of the German Reich (*Reichsgesetzblatt*) 1910, pp. 107 *et seq.*

[50] Official Gazette of the German Reich (*Reichsgesetzblatt*) 1910, p. 151 and p. 343.

of war. These exceptions are to be narrowly construed.[51] In no case do these Conventions entitle a belligerent State to use neutral property for the purpose of meeting its reparation duties arising from damage caused during a war. Hague Convention XIII likewise does not grant such a right.

4.10 Since Liechtenstein is not a party to the Hague Conventions, customary international law concerning neutrality applies to the relations between Germany and Liechtenstein. However, the Hague Conventions are generally viewed as reflecting the existing customary international law on neutrality. This is evidenced by reference to State practice, *opinio iuris* and judicial decisions.

4.11 For instance, the uniform *Rules of Neutrality* adopted by the Northern Countries in 1938 are based on the principles of Hague Convention XIII.[52] Likewise, the Swiss Federal Council stated in 1993 that

> "les droits et les obligations existants entre les belligérants et les Etats neutres dans le cadre d'un conflit armé sont régis par le droit de la neutralité. Ce droit s'est transformé au XIXe siècle en droit coutumier et a été en partie codifié dans deux conventions du 18 octobre 1907 signées lors de la deuxième Conférence de la paix de La Haye."[53]

International judicial practice confirms the customary nature of the rules embodied in the Hague Conventions. In *Damage caused by Germany in the Portuguese Colonies in South Africa* (1928),[54] the arbitral tribunal based its decision on Article 11 of Hague Convention V, although the Convention was not applicable *ratione personae* in the circumstances of that case. Thus the Tribu-

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51 *Lotus* case, 1927 PCIJ, Ser. A, No. 10, p. 18.

52 E. Castrén, *The Present Law of War and Neutrality*, Acad. Scientarum Fennicae, Helsinki, 1954, pp. 436 *et seq.*; E. Hambro, "Das Neutralitätsrecht der nordischen Staaten", 8 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1938, pp. 445 *et seq.*, pp. 468 et *seq.*

53 L. Caflisch, "La pratique suisse en matière de droit international public 1993", 4 *Revue suisse de droit international et de droit européen* 1994, pp. 597 *et seq.*, p. 629.

54 UNRIAA, Vol. II, pp. 1013 *et seq.*, p. 1027.

nal considered Hague Convention V as reflecting customary international law. In *Attiliò Regolo and Other Vessels* (1945), the Sole Arbitrator held that the entire Hague Convention XIII was declaratory of customary international law as it stood in 1907.[55] In his separate opinion to the advisory opinion of this Court on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* of 21 June 1971, Judge Ammoun cited the Hague Conventions as cornerstones of the "status of neutrality".[56]

4.12 The core of the law of neutrality undoubtedly forms part of general customary international law. During the proceedings before this Court on the advisory opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, a number of governments referred to the principle of neutrality. The Court confirmed this view, since it found...

> "that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflicts, whatever type of weapons might be used."[57]

4.13 The customary international law of neutrality imposes duties on neutrals as well as the belligerent States. As Schwarzenberger puts it, the

> "counterpart to the duty of the neutral Powers to safeguard their position of neutrality and, in particular, to prevent their territories

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55 G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict*, Stevens, London, 1968, p. 571.

56 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1970*, Advisory Opinion of 21 June, *I.C.J. Reports* 1971, p. 93.

57 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July, *I.C.J. Reports* 1996, pp. 226 *et seq.*, p. 261, para. 89.

> from being used as bases for hostile operations, is that of belligerents to respect the rights of neutral Powers."[58]

These rights of the neutral States are already expressed in Article I of Hague Convention XIII, according to which "belligerents are bound to respect the sovereign rights of neutral powers".

4.14 The basic and generally recognized duty in this regard is the duty of the belligerent State to respect a specific status of the neutral State, involving impartiality and neutrality. This duty is well established. According to Oppenheim/Lauterpacht "the duties of belligerents are, in the first place, to act towards neutrals in accordance with their attitude of impartiality; and, secondly, not to suppress their intercourse, and in particular their commerce, with the enemy".[59] As to the first mentioned duty, the authors continue that...

> "the contents of the duty of belligerents to treat neutrals in accordance with their impartiality are so manifest that elaborate treatment is unnecessary. This duty excludes, in the first place, any violation of neutral territory for military or naval purposes of the war, and any interference with the legitimate intercourse of neutrals with the enemy; and, secondly, the appropriation of neutral goods, contraband excepted, on enemy vessels. On the other hand, it includes, in the first place, due treatment of neutral diplomatic envoys accredited to the enemy and found on occupied enemy territory; and, secondly, due treatment of neutral subjects and neutral property on enemy territory."[60]

4.15 Thus there exists a rule of general international law according to which the neutral status has to be respected by every belligerent. Any breach of this duty,

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58 G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict*, Stevens, London, 1968, p. 565.

59 Oppenheim/Lauterpacht, *International Law*, Vol. II, 7th ed., Longman, London, 1952, p. 674.

60 *Ibid*, p. 676. This view is confirmed by other authors, such as E. Castrén, *The Present Law of War and Neutrality*, Acad. Scientarum Fennicae, Helsinki, 1954, p. 488; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, *The Law of Armed Conflict*, Stevens, London, 1968, p. 583; and Ch. Rousseau, *Le droit des conflits armeés*, A. Pedone, Paris, 1983, pp. 371 *et seq*.

in particular with regard to neutral property, is to be qualified as a wrongful denial of the neutrality of the State whose nationals are concerned as owners of the property, and entails the international responsibility of the belligerent and thus the duty to make compensation. Such a failure to respect neutrality may consist in the interference with neutral property, as well as the disrespect of the neutral status of the nationals.

4.16 This is confirmed by many arbitral and judicial decisions. In *Karmatzucas v. Germany* (1926), the German-Greek Mixed Arbitral Tribunal established Germany's responsibility for requisition of property belonging to a neutral national resident in an occupied territory.[61] In *Evghenides v. Germany*, the same Tribunal held that the requisition of a number of African workers employed by the claimant, a neutral national, became illegal as it was not followed by an indemnity: the requisition was therefore considered to constitute an "act committed" which under article 297 of the Peace Treaty of Versailles[62] engaged the responsibility of Germany.[63] The duty to make reparations for the failure to respect the special status of neutral States by interfering with the property of their nationals was also confirmed in the case *Goldenberg et Fils v. Germany* (1928)[64] as well as the *Union Bridge Company Case (United States v. Great Britain)*. According to the decision in the latter case, Great Britain committed "a wrongful interference with neutral property". The Tribunal continued:

> "The action constituted an international tort, committed in respect of neutral property, and falls to be decided not by reference to nice distinctions between trover, trespass and action on the case, but by reference to that broad and well-recognized principle of interna-

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61 Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix, Vol. VII, pp. 17 *et seq.*, p. 22.

62 Official Gazette of the German Reich *(Reichsgesetzblatt)* 1919, p. 687.

63 Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix, Vol. IX, pp. 692 *et sec.*, p. 694.

64 UNRIAA, Vol. II, pp. 903 *et seq.*, pp. 909-910.

tional law which gives what, in all circumstances, is fair compensation for the wrong suffered by the neutral owner."[65]

4.17 There are numerous further instances which confirm the duty of belligerents to respect neutral property. These include, for example, the German agreement to compensate the United States for losses from the *Lusitania* sinking.[66] As late as the 1970s, Greece was still raising claims against Germany for the sinking of Greek merchant ships at a time when Greece was neutral.[67]

4.18 Belligerent States are also obliged to respect the neutral status of the nationals of neutral States. Thus Hague Convention V refers to "neutral persons" and specifies under which circumstances these persons lose their right to invoke their neutrality. Articles 16 - 18 provide as follows:

"Neutral Persons

Article 16

The nationals of a State which is not taking part in the war are considered as neutrals.

Article 17

A neutral cannot avail himself of his neutrality

(a) If he commits hostile acts against a belligerent;

(b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

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65 UNRIAA, Vol. VI, pp.138 *et seq.*, p. 141.

66 UNRIAA, Vol. VII, p. 32.

67 47 ILR, p. 418.

Article 18

> The following acts shall not be considered as committed in favour of one belligerent in the sense of Article 17, letter (b):
>
> (a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;
>
> (b) Services rendered in matters of police or civil administration."

These provisions reflect the corresponding rule under customary international law. This aspect of the law of neutrality was for instance emphasised in a *Note concertée* of the French Foreign Minister and the French Minister of Trade of 10 September 1861 where it was stated:

> "Un belligérant ne peut employer, pour nuire à son ennemi, aucun moyen qui frappe directement les peuples restés étrangers à la lutte."[68]

The neutral character of individual persons results from their being nationals of a neutral State. The factual or legal consequences of the war entail a continuing duty, even after the cessation of the war, to respect the specific status which the neutral State has taken during the war, and to do so as long as any unresolved question arising from the war is at issue. In the present case, such legal consequences are bound up with the reparations regime established as a result of World War II. Thus, although World War II has long been ended, Germany still has the obligation to respect the neutral status of Liechtenstein as well as of its nationals and their property, if and to the extent it applies legal rules which have their origin in, and are a consequence of, World War II.

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[68] A. C. Kiss, *Répertoire de la pratique française en matière de droit international public*, Editions du Centre national de la recherche scientifique, Vol. VI, 1969, p. 558, No. 1076.

D. Germany's violation of the law of neutrality

4.19 Despite its duty to respect the neutrality of Liechtenstein and of its nationals, Germany applied the post-war reparations regime to Liechtenstein property in and after 1995; indeed it does so up to the present.

4.20 According to the regime of reparations established as a consequence of World War II, Germany was bound to make reparations for losses suffered arising from the war. As an aspect of this regime, the Allied Powers were entitled to use property belonging both to Germany as a State and to German nationals in order to provide compensation for war damages.[69] As a corollary, Germany acknowledged its obligation, as reflected in Article 5 of Chapter Six of the Settlement Convention (Annex 16), to make compensation to those German nationals whose property was thereby affected. It was thus of cardinal importance to define and fix on a stable basis the scope of the reparations regime, and to avoid any subsequent changes in that regime detrimental to neutral States and their nationals.

4.21 In view of the objective of these post-war reparations, they could only be taken against property of Germany as an enemy country and against German nationals, i.e. exclusively against property qualified as "enemy property". A condition for the use of private property for reparation purposes was that this property was owned by individuals possessing the nationality of a belligerent State, i.e. Germany. This condition was firmly established in the instruments forming the basis of the reparations regime.

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[69] See above paras 2.1 *et seq.*

4.22 Already at Yalta (Annex 11), this restriction to Germany as enemy country was made very clear:

> "1. Germany must pay in kind for the losses caused by her to the Allied nations in the course of the war."

At Potsdam in 1945 (Annex 12) this restriction to Germany was reiterated.

4.23 Hence, the whole reparations regime could not and did not affect neutral States such as Liechtenstein, and their nationals. This was not only or even primarily because such States and their nationals were not bound by those treaties; it had a more fundamental rationale associated with the basic principles of the laws of war and neutrality to which the treaties gave effect. Neutral States and their nationals cannot be the object of measures which subject property to the post-war reparations regime.

4.24 In its position taken in 1995 and subsequently, Germany has admitted that the measures taken under the "Beneš Decrees" were directed against "enemy property", whether or not they were deemed to be reparation measures.[70] As was stated by Germany before the European Court of Human Rights (Annex 36):

> "On the contrary, in their interpretation of Article 3 para. 1 of Chapter Six of the Settlement Convention ("purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany") the courts have found that, going beyond the classical notion of reparation, this provision is intended to cover measures against 'enemy property' more generally." (page 16 of the Memorial)

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[70] However, the fact that Germany now accepts that the taking of the Liechtenstein property is part of the reparations regime injustly enriches Germany as will be demonstrated below in Chapter 6, section B.

In both consultation meetings between Liechtenstein and Germany on 10 July 1998 and on 14 July 1999, Germany took the position that this understanding of "enemy property" applied not only to the particular painting that was the subject of the dispute before the European Court of Human Rights, but to the Liechtenstein property in general.

4.25 It is a fact that this new German position relates to property belonging to Liechtenstein nationals, and that it treats such property as covered by the post-war reparations regime. It is also undisputed at the international level that such property was in no case German, and was not to be treated as enemy property for the purposes of the post-war reparations regime, in particular by Germany.

4.26 It has been shown above that the law of war does not give a right to belligerents to disregard neutral status. The exceptional cases in which such disregard may be permitted are not applicable to the present case. These exceptions concern unneutral services of neutrals or transport of contraband. Neither of these two situations could apply to the property in question, and the contrary has not been suggested.

4.27 Following the decision of the Federal Constitutional Court of 28 January 1998 (Annex 32) and in support of this decision, German official statements declared it reasonable to regard Liechtenstein nationals as German nationals (Annex 36).[71] Germany thus treated Liechtenstein nationals who had been neutral during World War II as if they were nationals of one of the belligerent States, namely Germany. This is to be considered as a disregard for Liechtenstein's neutrality.

4.28 In and after 1995, in disregard of these obligations, Germany denied the Liechtenstein nationality of these persons, regarded them as German nationals for the

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[71] Annex 36, p. 14.

purposes of the reparations regime, and consequently denied their neutral character. It treats Liechtenstein as if the latter had been a belligerent during World War II. Since Germany had expressly recognised that Liechtenstein was neutral during World War II, it was under a particular duty to respect the neutral status of Liechtenstein.

E. The breach of the duty to respect the neutral character of Liechtenstein and of Liechtenstein nationals gives rise to a claim of the neutral State

4.29 The breach of the duty of a belligerent State to respect the specific status of a neutral State gives rise to a claim of the neutral State. Hague Convention XIII is unequivocal in this respect when it specifies that "neutral states have an equal interest in having their rights respected by belligerents". These rights include the treatment of their nationals as neutrals and, consequently, of their property as neutral property. Any violation of the neutrality of a State, including the neutral character of its nationals, generates a direct claim of the neutral State itself. Thus Brownlie includes "wrongful interference with neutral property" in his calendar of causes of actions giving rise to State responsibility.[72] Similarly Schwarzenberger states that international responsibility is involved if the action taken by the belligerent against neutral nationals or property is contrary to the law of war.[73] Rousseau writes that the "observation des règles relatives au respect des obligations découlant de la neutralité est sanctionnée par la mise en cause éventuelle de la responsabilité internationale de l'Etat".[74]

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72 I. Brownlie, *System of the Law of Nations. State Responsibility,* Clarendon Press, Oxford, 1983, p. 79. See also *ibid*, p. 238 (violations of neutrality as a form of direct injury to the State interest).

73 G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II, The Law of Armed Conflict, Stevens, London, 1968, pp. 550 *et seq.*, p. 576.

74 Ch. Rousseau, *Le droit des conflits armés*, A. Pedone, Paris. 1983, p. 514. In the same sense P. Guggenheim, *Traité de Droit international public*, Vol. II, Georg, Geneva, 1954, p. 511: "Ce sont en principe les normes sur le délit international et les sanctions qu'il déclenche qui sont applicables aux violations de la neutralité, que celles-ci soient le fait des belligérents ou des neu-

4.30 In the present case Germany breached the right of Liechtenstein as a neutral State, viz., that its nationals and their property be treated as neutral. International law requires that nationals of neutral states are to be treated as neutral persons as long as these persons are not acting in an unneutral way, as stipulated in Article 17 of Hague Convention V, or are also of the belligerent's nationality.

4.31 Since neutrality is a legal status of a State, which becomes manifest, *inter alia*, in the treatment of its property and that of its nationals, any denial or disregard of the neutral character of this property necessarily affects the rights of the neutral State. By denying the treatment of this property as a neutral property, the belligerent State necessarily denies the neutral status of the State since neutral persons acquire their status by virtue of their status as nationals of the neutral State. Any interference with this status of neutrality entails an injury to the neutral State.

F. Germany's failure to respect Liechtenstein's sovereignty

4.32 The equation of Liechtenstein nationals with German nationals in the context of the post-war reparations regime furthermore violates Liechtenstein's sovereignty. Neutrality directly concerns the status, in particular the scope and extent of sovereignty, of the neutral State in time of war.[75] The principle of sovereign equality of States includes, *inter alia*, the right of each State freely to choose and develop its political system,[76] for instance by deciding to remain

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tres". See also P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, L.G.D.J., Paris, 1999, 6th ed., p. 940.

75 K. Hailbronner, "Der Staat und der Einzelne als Völkerrechtssubjekt", in W. Graf Vitzthum, *Völkerrecht,* 2nd ed., Walter de Gruyter, Berlin, 2001, pp. 212-213, where a declaration neutrality is considered as an exercise of sovereign jurisdiction.

76 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (1970).

neutral. Neutrality is a manifestation of and therefore inseparably linked with the sovereign equality of States. Accordingly, Principle I of the Final Act of the Conference on Security and Cooperation in Europe of 1975, which deals with the sovereign equality of States and respect for the rights inherent in sovereignty, refers to the right of every State to declare itself as neutral.[77]

4.33 In 1995 and subsequently, the German courts applied Article 3 (1) of Chapter Six of the Settlement Convention (Annex 16) to Liechtenstein nationals although the application of this provision is confined to "German external assets or other property". The word "German" in Article 3 (1), as will be established in Chapter 5 of this Memorial,[78] refers to the nationality of the owner of the seized property, irrespective of the ethnicity of the owner of the seized assets or property.[79] In other words, Article 3 (1) of Chapter Six applies only to the property of nationals of the Federal Republic of Germany and not to those of other States. By applying this provision to Liechtenstein nationals, Germany extended the scope *ratione personae* of the treaty provisions, contrary to the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose.

4.34 In the present case, the interference with the sovereign rights of Liechtenstein lies in the fact that by extending the scope of the Settlement Convention to Liechtenstein nationals, Germany ultimately treats them like its own nationals, without any justification for doing so. That this German conduct amounts to a

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77 Conference on Security and Co-Operation in Europe, Final Act, 1 August 1975, 14 ILM 1292, 1294 (1975), Principle I.

78 See below paras. 5.9 *et seq.*

79 K. Doehring, "Völkerrechtswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als "deutsches Eigentum": Ein unrühmlicher Schlusspunkt", 18 *Praxis des Internationalen Privat- und Verfahrensrechts* 1998, pp. 465 *et seq.*, p. 466; B. Fassbender, "International Decisions", 93 *American Journal of International Law* 1999, pp. 215 *et seq., p.* 218; *idem*, "Klageausschluß bei Enteignungen zu Reparationszwecken - Das Gemälde des Fürsten von Liechtenstein", *Neue Juristische Wochenschrift* 1999, pp. 1445 *et seq.*, p. 1447.

violation of Liechtenstein's sovereignty is widely accepted, in particular in German doctrine.[80]

4.35 Germany violated Liechtenstein's sovereignty in three ways. First, it treated Liechtenstein nationals as German nationals for the purpose of reparations; secondly, this equal treatment amounts to a *de facto* involuntary conferment of nationality without any reasonable relationship of the Liechtenstein nationals to Germany, let alone an effective or genuine link; and thirdly, this equation is made solely to the detriment of the Liechtenstein nationals, in that they are deprived of their property but, contrary to German nationals, do not receive any benefit, in particular compensation.

1. Germany may not treat Liechtenstein nationals as its own nationals for reparation purposes

4.36 Nationality is the status of a natural person who is attached to a State by a specific tie of allegiance which forms the basis for personal rights and duties of the individual under domestic and international law.[81] In other words, the enjoyment of these personal rights by the individual, such as the right to vote, or the obligation of the individual to perform specific personal duties towards the

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80 I. Seidl-Hohenveldern, "Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum", 16 *Praxis des Internationalen Privat- und Verfahrensrechts* 1996, pp. 410 et *seq.*; *idem*, "Nachwirkung der Kontrollratsgesetzgebung und die deutsche Souveränität - Zu den Urteilen über die "Bodenreform" und zur Fortgeltung des Klagestops nach dem Überleitungsvertrag", in V. Götz/P. Selmer/R. Wolfrum (eds.), *Liber Amicorum Günther Jaenicke - Zum 85. Geburtstag*, Springer, Berlin, 1998, pp. 975 *et seq.*, pp. 983, 984; H. Weber, "Anmerkung zur "Liechtenstein-Entscheidung" des Bundesverfassungsgerichts vom 28. Januar 1998", 36 *Archiv des Völkerrechts* 1998, pp. 188 *et seq.*, p. 192; K. Doehring, "Völkerrechswidrige Konfiskation eines Gemäldes des Fürsten von Liechtenstein als "deutsches Eigentum": Ein unrühmlicher Schlusspunkt", 18 *Praxis des Internationalen Privat- und Verfahrensrechts* 1998, pp. 465 *et seq.*, p. 466.

81 *Nottebohm* case, *I.C.J. Reports* 1955, p. 23. See also P. Weis, *Nationality and Statelessness* in *International Law*, 1979, p. 29; D.P. O'Connell, *International Law*, Vol. 2, 2nd ed., Stevens, London, 1970, p. 670 *et seq.*; Sir R. Jennings and Sir A. Watts, (eds.) *Oppenheim's International Law*, Vol. 1, 9th ed., Longman, London, 1992, p. 857, § 379; Ch. Rousseau, *Droit international public*, Vol. V, *Les rapport conflictuels*, Sirey, Paris, 1983, p. 101; I. Seidl-Hohenveldern/T. Stein, *Völkerrecht*, 10th ed., Heymanns, Köln, 2000, p. 234.

State, such as the duty of military service, presuppose that the individual has the nationality of the relevant State. It is generally recognised that control over matters of nationality is a concomitant of State sovereignty itself and that these matters fall under the personal supremacy of the State.[82] Therefore, a State cannot treat foreigners completely according to discretion particularly in respect of those matters which concern the personal relationship between an individual and his State. For example, a State calling up foreigners for military service violates the sovereignty of the State of nationality of these individuals, at least if these individuals do not have any connection or link whatsoever with that State.[83]

4.37 Likewise, if a State accepts in its legal order that individuals have to contribute, in certain circumstances, with their private property to meet international reparation obligations imposed on that State, such a duty is exclusively effective on the ground of nationality. Since the obligation to provide reparations is an obligation of the responsible State, any contribution to this obligation by individuals (whether voluntary or, as in the present case, prescribed by the German legal order) has its foundation in the public interest of the State,[84] in that it reduces the amount of reparations due by the responsible State.[85] In other words, such an obligation of individuals to contribute to the fulfilment of the State's reparation obligations is a "personal" obligation, similar to that of military service, which a State may only exact from its own nationals.

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82 P. Weis, *Nationality and Statelessness in International Law*, 1979, p. 65; A. Verdross, *Völkerrecht* 5th ed., Springer, Wien, 1964, p. 307; Ch. Rousseau, *Droit international public*, Vol. III, *Les compétences*, Sirey, Paris, 1983, p. 134.

83 I. Seidl-Hohenveldern/T. Stein, *Völkerrecht*, 10th ed., Heymanns, Köln, 2000, p. 234; Sir R. Jennings and Sir A. Watts, (eds.) *Oppenheim's International Law*, Vol. 1, 9th ed., Longman, London, 1992, p. 907.

84 This was recognized by the German Federal Court of Justice, see, e.g., Collection of the Decisions of the Federal Court of Justice in Civil Law Matters *(BGHZ)*, Vol. 13, pp. 83 *et seq.*

85 See I. Seidl-Hohenveldern, , *Entschädigungspflicht der Bundesrepublik für reparationsbezogenes Auslandsvermögen. Völkerrechtliche Begründung*, Verlagsgesellschaft Recht und Wirtschaft, Heidelberg, 1962, p. 169.

4.38 Therefore, a State obliged to provide reparations may only resort to the property of its own nationals in order to meet its reparation obligations. If it extends this duty to non-nationals, it will thereby violate the personal authority or supremacy, and thus the sovereignty, of their State of nationality. By including the property of Liechtenstein nationals into the reparations regime, Germany violated the sovereignty of Liechtenstein.

2. The treatment by Germany of Liechtenstein nationals amounts, *pro tanto*, to an unlawful involuntary *de facto* naturalization

4.39 According to the decision of this Court in the *Nottebohm* case,

> "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".[86]

Any conferment of nationality by a State on individuals who are nationals of other States, who do not have any link to the State conferring its nationality and who do not consent to such conferment infringes the sovereignty of the State of nationality of the individual and is a breach of international law.[87] Such conduct amounts to a forced conferment of nationality by individuals which occurs not only if the State formally confers its nationality upon foreign nationals against their will, but also if it applies its national law on the basis of allegiance.

4.40 The effects of the position taken by Germany in and after 1995 are comparable, *pro tanto*, to those of a forced imposition of nationality, which is considered as being in violation of international law, precisely because it is a violation of the

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86 *Nottebohm* case, *I.C.J. Reports* 1955, p. 23.

87 *In re* Rau, German-Mexican Claims Commission, 14 January 1930, 6 *Annual Digest p.* 251; *Flegenheimer Claim*, Italian-US Conciliation Commission, 20 December 1958, 25 *ILR*, pp. 91 *et seq.*, p. 112; *Compulsory Acquisition of Nationality* case, Court of Appeal of Cologne, 16 May 1960, 32 *ILR*, pp. 166 *et seq.*, p. 167.

personal supremacy and hence sovereignty of the State of nationality. While it is clear that the German authorities did not intend to confer *de jure* nationality upon the Liechtenstein nationals in question, they nevertheless treated them as German nationals by applying to them and their property Article 3 (1) and (3) of Chapter Six of the Settlement Convention, whose application is explicitly confined to "German nationals". Thus Germany considered and still considers Liechtenstein nationals as German nationals *pro tanto*, and does so without their consent or the consent of Liechtenstein.

4.41 Moreover, the treatment of Liechtenstein nationals as if they were German nationals is even less justified in view of the fact that the Liechtenstein nationals do not have any link to Germany. As is well known, the Court held in the *Nottebohm* case that the conferment of nationality requires a genuine or effective link on the part of the individual to the State.[88] Moreover, if a State applies its nationality laws to a large number of nationals of a particular foreign State without their consent, such conduct constitutes an encroachment upon the jurisdiction and personal supremacy of that State and must be regarded as an unfriendly or even hostile act against the State of nationality comparable to a violation of the State's territorial jurisdiction.[89]

4.42 In the present case, Germany considers the Reigning Prince of Liechtenstein as an owner of "German external assets or other property" pursuant to Article 3 of Chapter Six of the Settlement Convention. Moreover it is clear that all other Liechtenstein nationals having assets or other property located in the former Czechoslovakia and affected by the measures taken under the "Beneš Decrees" are also regarded by Germany as falling under Article 3 (1) and (3) of Chapter Six of the Settlement Convention. By so doing, Germany has violated the personal jurisdiction and authority of Liechtenstein over its nationals.

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88 *Nottebohm* case, *I.C.J. Reports* 1955, p. 23.

89 Weis, *Nationality and Statelessness in International Law*, 2nd ed., 1979, p. 112.

4.43 Furthermore Germany treats Liechtenstein nationals as German nationals *pro tanto*, only to their detriment. Germany included Liechtenstein nationals in the Settlement Convention only after the duty of Germany to compensate according to Article 5 of Chapter Six of the Settlement Convention had been terminated. Germany thus deprived Liechtenstein nationals of any right to obtain compensation for the inclusion of their property in the reparations regime. Whereas German nationals from the outset fell under the regime established by Articles 3 and 5 of Chapter Six of the Settlement Convention and thus could obtain compensation, Liechtenstein nationals were not considered as being subject to that regime as long as compensation was ensured. It was only after Article 5 of Chapter Six of the Settlement Convention had been terminated and compensation therefore was no longer available that Germany changed its position. Thus Liechtenstein nationals were considered as German nationals only with regard to the negative effects of the reparations regime, and thus only at their expense and to their detriment, without at the same time granting them also the benefits of that situation, which were granted to German nationals properly called.

CHAPTER 5

GERMANY'S OBLIGATIONS OF COMPENSATION FOR PROPERTY BROUGHT WITHIN THE REPARATIONS REGIME

A. Germany's interference with Liechtenstein property rights

5.1 By taking its new position in and after 1995, Germany interfered with property and other economic rights of Liechtenstein nationals since it declared their property to be German property which could be used for reparation purposes. Germany was not entitled to do this, since Chapter Six of the Settlement Convention (Annex 16) does not relate to Liechtenstein property, and cannot lawfully be extended to include such property.

1. The Settlement Convention does not relate to Liechtenstein property

5.2 Chapter Six of the Settlement Convention, which excludes German jurisdiction in respect of a certain category of claims, does not contain any provision which could lawfully be applied by Germany to Liechtenstein and its nationals. Chapter Six only relates to German property. This restriction results from the clear wording of the Convention itself as well as from the latter's object and purpose. Indeed the text is unequivocal in respect of its scope of application. Article 3 (1) and (3) of Chapter Six of the Settlement Convention (Annex 16) reads as follows:

> "1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.
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> ...
>
> 3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1... of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments."

Paragraph 3 refers to the measures defined in paragraph 1. Paragraph 1 stipulates two criteria which must attach to the measures in question. First, they must be measures which have been (or will be) carried out with regard to German external assets or other property. Second, the objective or basis of the measures must have been either reparation, restitution, the result of the state of war or an agreement concluded by the Three Powers (i.e., France, United Kingdom and United States) with other Allied countries, neutral countries or former allies of Germany.

5.3 In the present case, the first criterion already excludes Liechtenstein property from the scope of the Settlement Convention. It is only German property which is addressed by that provision. By no stretch of imagination can it be established that this provision of the Settlement Convention was intended to cover also third States and nationals of third States. The qualifier "German" used in Article 3 of Chapter Six of the Settlement Convention applies not only to "external assets" but likewise to "other [German] property". It defines the permissible scope of the post-war reparations regime.

5.4 In order to establish whether Chapter Six of the Settlement Convention could relate also to non-German property, this provision has to be interpreted according to the applicable rules of international law. Although the Settlement Convention dates back to 1954, its interpretation has to conform to the rules of interpretation as embodied in Article 31 of the Vienna Convention on the Law of Treaties of 1969, which reflect customary international law. In this regard, this Court in the *Kasikili/Sedudu* case reaffirmed:

> "that customary international law found expression in Article 31 of the Vienna Convention (see *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, paragraph 41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 812, paragraph 23). Article 4 of the Convention, which provides that it 'applies only to treaties which are concluded by States

after the entry into force of the... Convention with regard to such States' does not, therefore, prevent the Court from interpreting the 1890 Treaty in accordance with the rules reflected in Article 31 of the Convention."[90]

5.5 Article 31 of the Vienna Convention provides as follows:

"General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

5.6 If a special meaning of an expression used in the treaty is invoked, then the parties to the treaty must have explicitly agreed upon such a special meaning. Since the Settlement Convention does not stipulate a special meaning in the sense of Article 31 (4) of the Vienna Convention to the term "German external

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90 *Case concerning Kasikili/Sedudu Island* (Botswana/Namibia), *I.C.J. Reports* 1999, pp. 1045 *et seq.*, p. 1059, para. 18 (Judgment of 13 December).

assets or other property", the ordinary meaning in the sense of Article 31 is decisive.

(a) Interpretation according to the ordinary meaning

5.7 The ordinary meaning of the expression "German external assets or other property" as used in the Settlement Convention is unequivocal. Where the Settlement Convention refers to German property, it means property in the possession of German nationals, either natural or juridical persons. Nationality in this sense is the nationality granted by national legislation of the State whose nationality is being referred to.[91]

5.8 Liechtenstein nationals affected by the change of Germany's position never acquired German nationality, whether by a formal procedure or by *ex lege* conferment of nationality or in any other way. Thus according to German national law, Liechtenstein nationals do not have German nationality, and the qualification of Liechtenstein nationals as German nationals does not correspond to the ordinary meaning of the word "German" in the Settlement Convention.

5.9 Contrary to the use of the relevant terms in the Settlement Convention, the Beneš Decree No. 12 (Annex 6) defined the term "German" exclusively on the basis of the belonging to a "people". Section 1 (1) (a) of the Decree, that lists the persons affected by confiscation measures under the Decree states:

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91 Ch. Rousseau, *Droit international public*, Vol. III, Les compétences, 1977, p. 134; P. Reuter, *Droit international public*, Presses Univ. de Paris, Paris, 1983, p. 274; Sir R. Jennings and Sir A. Watts, (eds.) *Oppenheim's International Law*, Vol. 1, 9th ed., Longman, London, 1992, p. 853. This principle is reflected in Article 3 of the European Convention on Nationality (European Treaty Series, 6 November 1997, No. 166), which reads:

"1. Each State shall determine under its own law who are its nationals.

2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality."

> "a) *vsech osob německé a mad'arské národnosti, bez ohledu na statni prislusnost,*"
>
> Translation:
> "a) All persons belonging to the German and Hungarian people regardless of their nationality,"

This Decree does not aim at conferring or attributing nationality in the sense of the law on nationality when it speaks about belonging to the German or Hungarian "people". It clearly distinguishes between "*národnost*" in the sense of belonging to a "people" and "*státní přislušnost*" in the sense of the legal status of nationality. This distinction is also illustrated by Constitutional Decree No. 33 of 2 August 1945 on the regulation of the Czechoslovak nationality of persons belonging to the German or Hungarian "people" (Annex 46) since Section 1 (1) of the Decree refers to

> *"(1) Československí státní občané národnosti nemecké nebo mad'arské, kteří podle předpisů jeizi okupační moci nabyli státní přislušnosti německé nebo mad'arské, pozbyli dnem nabytí takové státní přislušsnosti československého statního občanství.*
>
> Translation:
> "(1) Czechoslovak nationals belonging to the German or Hungarian people who acquired German or Hungarian nationality under the regulations of the foreign occupational power lost their Czechoslovak nationality as of the day of such acquisition."

Where the "Beneš Decrees" refer to persons belonging to the German (or Hungarian) "people", this qualification is unconnected with, and independent of, the nationality of these persons in the legal sense, including in the sense of the Settlement Convention.

5.10 Germany cannot rely on the "Beneš Decrees" for the purpose of interpreting or applying the Settlement Convention. The term "belonging to a people" used by the "Beneš Decrees" cannot be interpreted as relating to nationality in its ordinary meaning under international law as a legal status of individuals. Liechten-

stein nationals did not become German nationals by these Decrees, whether for the purposes of the Czechoslovak nor of the German legal order, including the Settlement Convention.

(b) Interpretation according to the context, object and purpose of the Settlement Convention

5.11 This interpretation of the term "German" used in the Settlement Convention is corroborated by the object and purpose of the relevant provisions of the Convention. The objective of these provisions is to ensure that no German court can exercise jurisdiction over a dispute concerning reparation measures for damages caused by Germany in World War II. According to the regime of reparations established as a consequence of the War, Germany as an enemy State was bound to make reparations. In the Peace Treaties after World War II reparations were exacted from the enemy countries because of "losses caused to [specific Allied and Associated States] by military operations and by the occupation by [the relevant enemy country] of the territory of those States". Similarly, in the Protocol of the Yalta Conference (Annex 11) the object of the reparations to be made by Germany was to make good "the losses caused by her to the Allied Nations in the course of the war". Under this title the Allied Powers were entitled to use property belonging to Germany as a State and German nationals to cover damages caused in World War II.

5.12 In view of the objective of such reparations, they could be taken only against property of Germany as an enemy State and German nationals as nationals of such a State, and under no circumstances against neutral States and their nationals. This condition was firmly established in the conventional and customary rules of international law on which the post-war reparations regime was based.

5.13 Hence, the whole post-war reparations regime cannot and does not affect neutral States such as Liechtenstein, or the nationals of such States. In this context, the application of Chapter Six of the Settlement Convention necessarily requires that the person affected by reparation measures be a German national. Even the property of persons who obtained German nationality only after the annexation or incorporation of the State whose nationals they were, such as, for example, persons who had Czechoslovakian nationality prior to the occupation of the latter but who acquired German nationality during the occupation period, could not be used for reparation purposes.[92] Neither Liechtenstein nor Liechtenstein citizens caused losses during World War II in the sense of the post-war reparations regime. Thus there was no basis whatever for treating them as covered by the regime.

5.14 A further indication on the correct interpretation of German property for the purposes of the post-war reparations regime is provided by Law No. 5 of the Control Council on "Vesting and Marshalling of German External Assets" of 30 October 1945 (Annex 14). Its preamble refers to the control of the Control Council of all "German assets abroad" and to the intention to "divest the said assets of their German ownership". Article III (2) defines "any person of German Nationality outside Germany" as follows:

> "For the purpose of this Article the term "any person of German Nationality outside Germany" shall apply to a person who has enjoyed full rights of German citizenship under Reich Law at any time since 1 September 1939 and who has at any time since 1 September 1939 been within any territory then under the control of the Reich Government but shall not apply to any citizen of any country annexed or claimed to have been annexed by Germany since 31 December 1937."

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92 See I. Seidl-Hohenveldern, , *Entschädigungspflicht der Bundesrepublik für reparationsbezogenes Auslandsvermögen. Völkerrechtliche Begründung,* Verlagsgesellschaft Recht und Wirtschaft, Heidelberg, 1962, p. 127; this consequence was corroborated in a decision of the Austrian Supreme Court of 2 June 1958, SZ XXXI (1958), No. 83.

Although this definition is confined to the application of Article III, it nevertheless furnishes a certain understanding of the term "German" which is based on nationality *stricto sensu*. There is no indication that, in other legal instruments of that time and relating to matters of this kind, any different understanding was meant.

5.15 This interpretation is confirmed by Law No. 63 of the Council of the Allied High Commission on "Clarifying the Status of German External Assets and of their Property taken by Way of Reparation or Restitution" (Annex 15) which partially replaced Law No. 5. It addresses in its Article 1 (1) (a):

> "any property which, on or prior to the effective date of this Law, was located in any foreign country and German-owned and which, after September 1, 1939, has been or will be transferred or liquidated under the law of such country, or under the law of any other country by agreement with the former country
>
> (i) pursuant to measures taken in connection with the war against Germany by the government of any country which has adhered to the United Nations Declaration of January 1, 1942, or
>
> (ii) pursuant to any agreement, accord or treaty regarding the disposition of German external assets which has been or will be concluded with the participation of France, the United Kingdom and the United States of America, or
>
> (iii) pursuant to measures taken in satisfaction of claims against Germany, or
>
> (iv) pursuant to reparation measures in Japan or Tangier;"

In view of the context, German property in the sense of this law can only be understood as property of German nationals. The measures taken under the "Beneš Decrees" against Liechtenstein cannot fall within the purview of this provision since these assets cannot be considered as "German-owned" or as "German external assets".

5.16 This definition of German assets was confirmed by Article 6 A of the Paris Agreement on Reparation from Germany of 14 January 1946 (Annex 13) which provided that each Signatory Government should...

> "...hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets..."

This provision leaves no doubts that only those assets were referred to which belonged to Germans being enemies to the Allied and Associated Powers. The neutral status of Liechtenstein excludes the application of the expression "German enemy assets" to Liechtenstein property. The notion of "German ownership or control" must be constructed as referring only to property of German nationals.

5.17 According to the ordinary meaning, the object and purpose of the Settlement Convention (Annex 16), its context as well as other applicable rules of international law, Chapter Six of the Settlement Convention only concerned Germany and German nationals, and neither related to nationals of third States, nor obliged third States to tolerate such an extension of the scope of the measures addressed by it.

5.18 According to the standards formulated by this Court in the *Fisheries Jurisdiction* case with regard to the position of the United Kingdom, Germany "cannot be held ignorant" of such an interpretation so that it cannot claim the inopposability of this interpretation.[93] Some of the instruments defining the meaning of the term "German" were concluded by Germany, others were promulgated in the Official Gazette of the Allied High Commission or the Control Council in Germany and had therefore the force of law (e.g. Allied High Commission Law No. 63 (Annex 15) and Control Council Law No. 5 (Annex 14)).

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[93] *Fisheries Case (United Kingdom v Norway)*, Judgment of 18 December 1951, *I.C.J. Reports* 1951, p. 139.

2. Interference with property rights

5.19 Having regard to the absence of any right to interfere with Liechtenstein property under Chapter Six of the Settlement Convention (Annex 16), Germany infringed the property rights of Liechtenstein and Liechtenstein nationals by including the Liechtenstein property into the post-war reparations regime and refusing compensation for it. This infringement consisted, in particular, in the denial by Germany of rights to Liechtenstein property which was subject to the measures under the "Beneš Decrees".

5.20 Prior to the judgments of the German courts and the subsequent German declarations, Liechtenstein nationals enjoyed rights under German jurisdiction concerning their property which was subject to the "Beneš Decrees". Neither had Germany included this property into the German external assets which were subject to their reparations regime, nor had it regarded their reparations issue as a settled matter which would have entailed the final loss of any rights to such assets. Liechtenstein nationals could, under German jurisdiction, dispose of property they possessed in foreign countries since, in terms of the German legal order, they had not lost their title to such property, and they could enforce these transactions by resort to the German judicial system, since they could institute legal proceedings to protect transactions relating to their property. These rights are to be seen as related to the right of enjoyment of their property, which is protected by general international law. According to the German position taken before 1995, it was well established that, for Germany, the persons whose property was subject to measures under the "Beneš Decrees" did not lose their title to that property. Liechtenstein nationals who were in a similar situation still possessed their title to the property under and according to German jurisdiction.

5.21 In this regard, it is important to note that Germany had until the 1990s consistently taken the position that the post-war seizure of German external assets was unlawful, and that the question of the transfer of the rights to the property, including the question of the title, was an open question. In particular, it had consistently held that the question of expulsion and expropriation of individuals from Czechoslovakia under the "Beneš Decrees" was an unsettled question. This position was still reflected in a letter of the German Federal Chancellor Dr. Helmut Kohl of 14 January 1997 to the Reigning Prince of Liechtenstein, (Annex 40), contrary to the first German court decisions in the *Pieter-van-Laer* case. Germany did not state that Liechtenstein nationals had lost their rights relating to property subject to the "Beneš Decrees".

5.22 In its position taken in 1995 and subsequently, Germany, however, declared that the measures taken under the "Beneš Decree" against Liechtenstein property were reparation measures in the sense of the Settlement Convention. This position was exacerbated by the fact that Germany declared the issue of reparations as finally settled. This position entailed a final loss of the title to property being subject to reparation measures so far as Germany is concerned. By virtue of the application of the reparations regime to Liechtenstein property, Germany recognised the passing of title from the Liechtenstein owners to Czechoslovakia (and then the Czech Republic), so that Liechtenstein and its nationals lost any legal possibility to regain their property or to enter into legal transactions regarding this property under German jurisdiction and, even, with respect to other countries. Only the application of the reparations regime completed the loss of the rights to property of the former owners[94] once Germany regarded the reparations matter as finally settled. The effect of the loss of title has been explicitly provided for in the laws enacted by the Control Council. Thus Law

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94 See I. Seidl-Hohenveldern, *Entschädigungspflicht der Bundesrepublik für reparationsbezogenes Auslandsvermögen. Völkerrechtliche Begründung*, Verlagsgesellschaft Recht und Wirtschaft, Heidelberg, 1962, p. 175.

No. 5 of the Control Council on "Vesting and Marshalling of German External Assets" of 30 October 1945 (Annex 14) provided in Article III:

> "All rights, titles and interests in respect of any property outside Germany which is owned or controlled by any person of German nationality outside Germany or by any branch of any business or corporation or other legal entity organised under the law of Germany or having its principle place in Germany are hereby vested in the Commission."

5.23 The laws enacted by the Control Council had legal force in Germany, so that all rights to property which fell within the scope of this law, including title to that property, passed *ex lege* to the Commission.

5.24 Article 2 of Law No. 63 of the Allied High Commission (Annex 15) confirmed this effect with regard to property defined in Article 1 (1):

> "1. All rights, title or interests of former owners to or in property to which this Law extends shall be deemed to be extinguished -
> (a) in the case of property within the purview of Article 1, paragraph 1 (a), of the date of transfer or liquidation;
> (b) in the case of property transferred or delivered by way of restitution within the purview of Article 1, paragraph 1 (b), at the date of release to the claimant country;
> (c) in the case of property transferred or delivered by way of reparation within the purview of Article 1, paragraph 1 (b), at the date of the actual delivery of such property, or where there has been no actual delivery, at the date shown in the inventory determining the valuation for the purpose of reparation."

Law No. 63 was confirmed by the second sentence of Article 2 of Chapter Six of the Settlement Convention (Annex 16):

> "The Federal Republic will not repeal or amend Law No. 63 except with the consent of the Three Powers. However, paragraph 1 of Article 6 of Law No. 63 shall be deemed to be repealed and paragraph 2 to be amended to provide that the powers therein conferred upon the Allied High Commission may be exercised by the Federal Government."

Although this legal effect was confined to property which was not situated within the jurisdiction of the Allied and Associated Powers (Article IX of Law No. 63), it reflects that the loss of title is a necessary legal consequence of reparation measures. However, as far as measures such as the "Beneš Decrees" were concerned, since these were not at that time considered or held to be reparation measures, Germany, according to its former position, did not attach to them the same legal effect. In particular it did not consider them as entailing any loss of rights, including title, to the property in question, since it considered those measures as unlawful.

5.25 The position taken by Germany in and after 1995 - applied to all Liechtenstein property seized by the measures based on the "Beneš Decrees" - has the effect of invalidating the title of Liechtenstein nationals to their property being subject to the "Beneš Decrees", so far as Germany is concerned. Liechtenstein nationals no longer obtain legal protection for any legal transaction regarding this property under German jurisdiction. The invalidation of this title and of all other rights to the Liechtenstein property amounted to an internationally wrongful infringement of Liechtenstein property rights.

5.26 This position would have effect not only with regard to German jurisdiction, but also with regard to the other States Parties to the Settlement Convention, and even to third States. In general, a treaty creates rights and duties only as between States parties. It is, however, not excluded, but - on the contrary - even very likely that courts of third States acknowledge the loss of a right which was relinquished by a treaty concluded by the State of nationality of the plaintiff.[95] That the interpretation of the Settlement Convention by Germany has indeed effect for other jurisdictions than Germany is corroborated by the decision of a Japanese Court in *Roland Sonderhoff v. Minister of Finance*:

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95 *Ibid*, p. 74.

> "Since the Convention [i.e. Settlement Convention] is interpreted to mean that with regard to the disposition of the seized German external assets by the United States, the United Kingdom and France, neither the German Government nor an individual German national who had title to such German external assets is allowed to contest by litigation the validity of the disposition and the measures taken in connection with such disposition... Hence, Japan, according to the purpose of the Convention, may not disturb in a litigation against German nationals the disposition of German property in Japan made by the United States of America, the United Kingdom and France and the measures taken by the Japanese Government following such disposition."[96]

Since the effect of the German position relating to the interpretation of the Settlement Convention reaches even beyond the parties to the Settlement Convention as demonstrated by the case *Roland Sonderhoff v. Minister of Finance*, the position taken by Germany in 1995 and subsequently considerably reduces the possibility of Liechtenstein nationals making use of the rights relating to their property also within other jurisdictions. For these other jurisdictions such an interpretation would be the only legally correct one. If in a case before any national court the judges are bound to examine the applicability of the Settlement Convention, they would have to conform to such an interpretation. If other States follow the position taken by Germany in 1995 and subsequently, the loss suffered by the Liechtenstein nationals would be aggravated further. In this respect, it has to be noted that the Czech Republic replied to Liechtenstein during the OSCE Economic Forum on 26 May 1999:

> "The concrete property claims of the Liechtenstein family were dealt with in the past by Czech and German courts, the proceedings of which, however, resulted in verdicts rejecting the claims raised by the Liechtenstein party." (Attachment to Annex 44)

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[96] 3 *Japanese Annual of International Law* 1959.

This reply reveals that the Czech Republic identified itself with the new German position. This German position precludes the invocation of the illegal nature of the taking of Liechtenstein property under the "Beneš Decrees".

5.27 This conduct attributable to Germany and resulting from its position taken in 1995 and subsequently breaches the duty to respect the rights of foreigners. In particular, in the present case Germany has interfered with the rights of Liechtenstein nationals to their property.

5.28 Every State is bound by international law to respect the rights of foreigners. In this regard, Germany in its Memorial in the *LaGrand* case relied on § 711 of the *Restatement of the Foreign Relations Law of the United States* as a reflection of existing customary international law. This paragraph provides:

> "A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates
> ...
> (b) a personal right that, under international law, a state is obligated to respect of individuals of foreign nationality; ..."[97]

5.29 The right to enjoy property as protected by customary international law has to be given a broad understanding. This understanding is well established in the literature and by numerous international decisions. Katzarov states that:

> "the content given to property by the law from remotest times down to the codes of the nineteenth and early twentieth centuries which are still in force, has a positive and a negative aspect :
> (a) it is a right of disposal which is both absolute and also unlimited in point of time ; this is the positive aspect ;
> (b) it is exclusive, which means that it confers upon its holder the power to forbid any other person to perform an act of disposal; this is the negative aspect." [98]

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97 American Law Institute, Restatement of the Law (Third). The Foreign Relations Law of the United States, ALI Publishers, 1987, Vol. 2, p. 184, § 711.

98 K. Katzarov, *The Theory of Nationalisation*, Nijhoff, The Hague, 1964, p. 103.

This broad meaning is confirmed also, for example, by Higgins[99] or by Mann.[100]

5.30 More generally, international tribunals have confirmed the broad meaning of the term expropriation and recognised that taking of contract rights, like taking of tangible property, or of any right which can be the object of a commercial transaction, is compensable. In the *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* case, a Chamber of this Court referred to the "use, enjoyment and disposal" of property which was protected by international law.[101] Numerous other judgments and awards on international tribunals corroborated this broad meaning, such as the Iran-United States Claims Tribunal in *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran*,[102] *Tippetts, Abbets, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*[103] and *Phillips Petroleum Co Iran v. The Islamic Republic of Iran et al.*,[104] or an ICSID Tribunal in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*.[105]

5.31 Declarations by international authorities and broad judicial practice clearly establish the rule of customary international law which Germany has breached by virtue of its position taken in and after 1995 and subsequently, as it interfered in the rights of Liechtenstein nationals to property which had become subject to the "Beneš Decrees". The qualification of such property as being subject of

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99 R. Higgins, "The Taking of Property by the State", 176 *Recueil des Cours* 1982 III, pp. *et seq.* 259, p. 271.

100 F.A. Mann, "Outlines of a History of Expropriation", 75 *Law Quarterly Review* 1988, pp. 188 *et seq.*, p. 190.

101 *Case Concerning Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports* 1989, p. 15.

102 Partial Award No. 310-56-3, 14 July 1987, 15 Iran-US.C.T.R. 189, p. 220.

103 Award No. 141-7-2, 29 June 1984, 6 Iran-U.S. C.T.R. 219, p. 225

104 Partial Award No. 425-39-2, 29 June 1989, 21 Iran-US C.T.R., p. 79

105 32 ILM 968 (1993).

reparation measures, ensuring the invalidation of the title to such property and denying any other right to such property including the right of legal protection, amounted to an infringement of property rights of Liechtenstein nationals which entails the duty of compensation.

B. Failure to compensate Liechtenstein notwithstanding its inclusion within the reparations regime

1. The regime of Articles 3 and 5 of Chapter Six of the Settlement Convention

5.32 Germany is bound to compensate the Liechtenstein nationals because it included their property within the reparations regime under Chapter Six of the Settlement Convention (Annex 16) without any compensation to the owners of the property. In this respect, Germany also breached international law since, even supposing that Germany were considered to be entitled to use Liechtenstein property for the purpose of reparation, it is under a duty to compensate for the loss suffered by the former owners. According to Article 5 of Chapter Six of the Settlement Convention, the Federal Republic must ensure that the former owners of property seized pursuant to the measures referred to in Articles 2 and 3 of that Chapter are compensated. Article 3 (1) refers to...

> "measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation ...".

Article 3 (3) provides that

> "no claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1..."

5.33 Germany is thus bound to ensure compensation to all individuals suffering from measures referred to in Article 3 of Chapter Six of the Settlement Convention. Beneficiaries of Article 5 of Chapter Six of the Settlement Convention are *expressis verbis* "the former owners of property" seized for the purpose of reparations.

5.34 If the property of Liechtenstein nationals was seized for reparation purposes, these persons would have to be classified as "former owners" of these properties. The Principality of Liechtenstein relies on Germany's classification of Liechtenstein property seized by Czechoslovakia. Referring to these assets the Federal Government, in its reply to the application of Prince Hans-Adam II before the European Court of Human Rights (Annex 36), confirmed that the two requirements of Article 3 (1) of Chapter Six of the Settlement Convention (i.e. "German external assets" and "seized for the purpose of reparation") are fulfilled.[106] Thus, Germany qualified Liechtenstein property as German foreign assets that had been seized for reparation purposes.

2. Duty of Germany to compensate victims of reparation measures

5.35 In and after 1995 Germany declared the post-war reparations regime applicable to Liechtenstein property. This position necessarily entails that, although the measures of expropriation were not taken by Germany itself, Germany nevertheless accepted that Czechoslovakia, as a member of the Allied and Associated countries, was entitled to take post-war reparations against Liechtenstein property because of its classification as German property.

5.36 The obligation to make reparations for World War II was imposed on Germany as a defeated State. In this sense, Article 2 A of the Paris Agreement (Annex

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[106] Memorial of the Agent of Germany of 29 October 1999, p. 14 (Annex 36).

13) clearly spells out that the reparations after World War II were directed against the State itself:

> "The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for), including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the *Reichskreditkassen*."

The same principle, according to which the subject obligated by the reparations regime was the State itself, was already embodied in Part VIII of the Treaty of Versailles[107] and Part VIII of the Treaty of St. Germain[108] after the First World War.

5.37 This established system entails the general duty of the defeated State to compensate the individual owners for losses suffered by them as a consequence of the use of their property for reparation purposes. As a preliminary to the negotiations to the Peace Treaties after World War I, the ultimatum of the Allied Powers referred to Germany as being obliged to compensate its nationals.[109] The Peace Treaty of Versailles provided such a duty in Article 297 (i):

> "SECTION IV.
> PROPERTY, RIGHTS AND INTERESTS.
> ARTICLE 297.
>
> The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

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107 Official Gazette of the German Reich *(Reichsgesetzblatt)* 1919, p. 687.

108 Official Legal Gazette of Austria (*Staatsgesetzblatt*) 1920, No. 303.

109 See I. Seidl-Hohenveldern, *Entschädigungspflicht der Bundesrepublik für reparationsbezogenes Auslandsvermögen. Völkerrechtliche Begründung,* Verlagsgesellschaft Recht und Wirtschaft, Heidelberg, 1962, p. 100.

...

(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States."

The Treaty of Saint-Germain contained a similar provision in its Article 249.

5.38 After World War II, a duty to pay reparations was imposed on the enemy countries by the various Peace Treaties. Again, this duty was imposed directly on the enemy States, and the Peace Treaties did not stipulate the right to use private property for reparation purposes. Such provisions, each under the heading "Reparation and Restitution", were contained in the Peace Treaties with Bulgaria (Article 21),[110] Finland (Article 23),[111] Hungary (Article 23),[112] and Romania (Article 22)[113]. The Peace Treaty with Italy contained a Section "Reparation" by which similar duties were imposed on Italy (Article 74 *et seq.*). The Peace Treaty with Japan also confirmed the duty to pay reparations.[114] Since these duties were imposed directly on the enemy States and did not therefore involve property owned by individuals, these treaties did not contain a duty of compensation towards individuals in this context.

5.39 These provisions clearly establish that the objective of the reparations regimes was to impose an economic burden on the defeated States themselves and not on their nationals as individuals. The duty to make reparations could only be imposed on the States themselves, as the acts which entailed the duty of reparations were attributable specifically to each of those States. For its part, Germany identified itself with this view in 1952 when it declared that measures

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110 *United Nations Treaty Series*, No. 643.

111 *United Nations Treaty Series*, No. 746.

112 *United Nations Treaty Series*, No. 644.

113 *United Nations Treaty Series*, No. 645.

114 *United Nations Treaty Series*, No. 1832.

against individuals under the title of reparations were contrary to international law.[115]

5.40 Whenever these treaties contain clauses according to which private property may be used in order to meet obligations imposed on the States such as reparation duties, they regularly connect it with a duty of the State in question to compensate the individuals for the relevant losses. In this regard, the Peace Treaty with Italy provided in Article 74 D that claims of Allied and Associated Powers other than those mentioned in Article 74 A-C (*i.e.* USSR, Albania, Ethiopia, Greece and Yugoslavia)...

> "shall be satisfied out of the Italian assets subject to their respective jurisdictions under Article 79 of the present Treaty."[116]

In this case, Article 74 E recognized the duty to compensate the individuals who suffered losses:

> "The Italian Government undertakes to compensate all natural or juridical persons whose property is taken for reparation purposes under this Article."

5.41 These Peace Treaties consistently contain a section on "Economic Clauses" which, *inter alia*, entitles the Allied and Associated Powers to confiscate property owned by nationals of the relevant enemy country. In these treaties, the relevant enemy country is routinely obliged to compensate the nationals whose property was taken. For example, Article 25 of the Peace Treaty with Bulgaria reads:[117]

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115 Written report of the Committee of the Federal Parliament for the Occupation Statute and Other External Affairs of 16 May 1952 (Annex 20), p. 6; Explanatory Memorandum to the Settlement Convention of 21 July 1952 (Annex 22), p. 55.

116 *United Nations Treaty Series*, No. 747.

117 *United Nations Treaty Series*, No. 643.

"Article 25

1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Bulgaria or to Bulgarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Bulgaria or Bulgarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Bulgarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

...

3. The Bulgarian Government undertakes to compensate Bulgarian nationals whose property is taken under this Article and not returned to them."

Equivalent provisions were contained under the heading "Economic Clauses" in the Peace Treaties with Hungary (Article 29),[118] Italy (Article 79)[119] and Romania (Article 27)[120]. In all these cases, the same structure with regard to the duty to compensate individuals for the losses they had suffered from confiscations either under the title of reparation or of other claims against the relevant enemy State, which were made by the Allied and Associated Powers after World War II, was applied as to Germany. Irrespective of the question of the legal basis for the taking of property, the State Treaty for the Re-Establishment of an Independent and Democratic Austria of 15 May 1955 provided a similar duty of compensation in its Article 27 (2):[121]

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118 *United Nations Treaty Series*, No. 747.

119 *United Nations Treaty Series*, No. 747.

120 *United Nations Treaty Series*, No. 645.

121 *United Nations Treaty Series*, No. 2949.

"Article 27

Austrian property in the territory of the Allied and Associated Powers

2. Notwithstanding the foregoing provisions, the Federal People's Republic of Yugoslavia shall have the right to seize, retain or liquidate Austrian property, rights and interests within Yugoslav territory on the coming into force of the present Treaty. The Government of Austria undertakes to compensate Austrian nationals whose property is taken under this paragraph."

5.42 The fact that all these Peace Treaties provide for this duty of compensation reflects the existence of such a duty even in the absence of corresponding treaty provisions, i.e., a duty under customary international law

5.43 While it is true that this kind of post-war reparations regime has been imposed on the defeated States only since World War I, mainly on a treaty basis, this reiteration of the same conventional rule in subsequent conventional texts "considerably facilitates identification, since it leads to the accumulation, and concentration, of consistent State practice upon these rules over a longer period of time".[122] This conclusion is generally recognised in the doctrine as well.

5.44 A series or recurrence of treaties laying down a similar rule may not only produce a new principle of customary law,[123] but may already establish the existence of the corresponding customary rule. What is essential is that the rule be capable of general application, irrespective of whether it is contained in a multilateral or bilateral treaty, the rule may not be subject to reservations, the trea-

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122 M. E. Villiger, *Customary International Law and Treaties*, 2nd ed., Kluwer, The Hague, 1997, p. 236.

123 Starke, "Treaties as a "Source" of International Law", 23 *British Yearbook for International Law* 1946, pp. 344 *et seq.*

ties must be widespread and representative, and the parties to them must in particular include the States whose interests are specifically affected.[124]

5.45 As regards the rule to the effect that a State obliged to provide war reparations is under the obligation to compensate those individuals who are affected by the measures taken for reparation purposes, all the criteria necessary for the existence of a customary rule of international law are met. This rule is part of a general regime whose purpose is to regulate and control the process of reparations and which, therefore, does not allow for reservations. This rule furthermore has met with widespread and representative recognition by State Parties belonging to the Western as well as the Eastern European Group, the North and Latin American as well as the Asian and the African Group.[125] More importantly, the participation in the practice of the compensation rule includes the States whose interests are specifically affected. This widespread and representative practice reveals that at the time of the conclusion of the peace treaties there existed a general conviction that this duty of compensation was a necessary corollary of the post-war reparations system in cases where the reparations were covered by property owned by private individuals.

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124 *North Sea Continental Shelf* case, *I.C.J. Reports*, 1969, p. 42, para. 73; R. Baxter, *Treaties and Custom*, 129 *Recueil des Cours*, 1970-I, pp. 62 *et seq.* See also: Statement of Principles Applicable to the Formation of General Customary International Law, adopted by the International Law Association on its 69th Conference in 2000, Report of the Sixty-Ninth Conference, London, 2000, Principle 26, p. 760.

125 For instance, the following States, representing all continents, are parties to the Peace Treaty with Italy (*United Nations Treaty Series*, No. 747): Albania, Australia, Belgium, Brazil, Byelorussia, Canada, Taiwan, Czechoslovakia, Ethiopia, France, Greece, India, Italy, Mexico, Netherlands, New Zealand, Pakistan, Poland, South Africa, The United Kingdom, the United States of America, Ukraine and Yugoslavia. Likewise, the signatories to the Peace Treaty with Japan (*United Nations Treaty Series* No. 1832) are representative: Argentina, Australia, Belgium, Bolivia, Brazil, Cambodia, Canada, Ceylon, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Indonesia, Iran, Iraq, Laos, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, Saudi Arabia, Syria, Turkey, South Africa, the United Kingdom, the United States, Uruguay, Venezuela, Vietnam and Japan.

5.46 The duty to pay compensation as expressed in the Peace Treaties reflects the general duty of the State which is subject to reparation measures to compensate its own nationals as the former owners who have suffered losses from such measures. As these nationals are not obliged to make reparations, but only the State itself, their losses are economic sacrifices to the benefit of their State which, in turn, requires the State to compensate the individuals. Any other solution would give the State the possibility to externalise its duty of reparations to individuals without suffering any economic losses or, at least, any losses commensurate with the required reparations. Under this latter assumption, the purpose of the post-war reparations regime would have failed. It is however a general principle of interpretation that legal rules, including those of customary law, must be interpreted so as to achieve their objective. This would also conflict with basic principles of general international law, such as the protection of private property rights or the prohibition of unjust enrichment. Furthermore, the incidence of reparations in such a case would be arbitrary, since it would fall only on those nationals who possessed external property.

5.47 If Germany was not under a duty to compensate the former owners of the assets which became subject of reparation measures, it would have been in a better position than the other enemy States. With regard to these States, the Peace Treaties impose directly on them a duty to make payments to Allied and Associated States.[126] In this context, it must be stressed that the post-war reparations regime is a legal consequence of the waging of war by a State and of the losses caused by it. This duty of compensation is a necessary legal consequence of the application of the reparations regime, which is embodied in general international law.

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126 See above paras. 5.38 *et seq.*

5.48 Practice outside the relevant treaty or treaties is important to assess the customary character of the provision in question.[127] In the present case, such practice confirms the conclusion reached above. The Commander in Chief of the United States Forces of Occupation in Germany, for example, has given the following instruction in 1947:

> "You will attempt to obtain Control Council recognition of the principle of compensation for property taken for reparation or where it has been necessary to destroy property under the agreements for economic disarmament, such compensation to constitute a charge against the German economy as a whole."[128]

This instruction was given independently of any existing treaty obligation at that time. It is evidence of the existing conviction that the post-war reparations regime necessarily was supplemented by this duty of compensation.

5.49 In the present case, there is a pattern not of bilateral but of multilateral treaties with a practically identical structure concerning this duty. The best explanation for this identity is the existence of a conviction that a rule of customary international law required such provision in the relevant treaties. This conviction was then reflected in the relevant treaty provisions. As is shown by the instruction quoted above, this conviction was expressed even irrespective of any treaty provision. In combination with the necessity of such a provision (since otherwise the system could not achieve its object) which reflects the *opinio necessitatis* as referred to by Verdross,[129] the reflection in the treaties as well as the

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127 M. Villiger, *Customary International Law and Treaties*, 1997, 2nd ed., Kluwer, The Hague, 1997, p. 183.

128 Directive to the Commander in Chief of the US Forces of Occupation, JCS 1779/1947, No. 16 d, quoted by I. Seidl-Hohenveldern, *Entschädigungspflicht der Bundesrepublik für reparationsbezogenes Auslandsvermögen. Völkerrechtliche Begründung*, Verlagsgesellschaft Recht und Wirtschaft, Heidelberg, 1962, p. 100.

129 A. Verdross, *Die Quellen des universellen Völkerrechts*, Rombach, Freiburg (Breisgau), 1973, p. 115.

acts isolated from any treaty are sufficient to prove the existence of a rule of customary international law in this regard.

5.50 This conclusion on the existence of a norm of customary international law generating a duty of compensation is corroborated by the interpretation of Chapter Six of the Settlement Convention in the light of its object and purpose. The existence of this customary norm was also explicitly recognized by Germany in the process of the conclusion of the Settlement Convention.

5.51 By signing and ratifying the provision in Article 5 of the Settlement Convention, Germany accepted the confirmation of its general duty to compensate former owners. The existence of such a "general principle" was recognized by the Federal Government in its Explanatory Memorandum to the Settlement Convention of 21 July 1952 (Annex 22). Subsequent statements confirmed this position. In a statement before the German Federal Constitutional Court dated 14 August 1953 (Annex 47) the Federal Government made clear that:

> "*Die Enteignung des deutschen Auslandsvermögens erfolgt zugunsten Deutschlands zwecks Abtragung der ihm obliegenden politischen Reparationsschuld. Daher ist die Bundesrepublik verpflichtet, die liquidierten Eigentümer gemäß den Bestimmungen ihres Grundgesetzes zu entschädigen. Um diese Entschädigungspflicht zu begründen, bedarf es keiner besonderen vertraglichen oder gesetzlichen Grundlage; sie ergibt sich aus den dem Institut der Enteignung zugrundeliegenden "allgemeinen Rechtsgrundsätzen"*."
>
> "The expropriation of the German external assets take place to the benefit of Germany in order to pay off the political reparation debt incumbent on it. For this reason, the Federal Republic is obliged to indemnify the liquidated owners according to the provisions of their constitution. No particular contractual or legal base is required for substantiating this obligation towards compensation; it ensues from the 'general legal principles' on which the expropriation institution is based."

Thus, Article 5 and its duty to compensate is declaratory in nature, i.e. it reaffirms general international law, which was as such recognized by Germany.

5.52 The Termination of Article 5 by the Agreement of 27/28 September 1990 (Annex 19) did not change the general duty of Germany to compensate. According to Article 7 of the Two-Plus-Four-Treaty (Annex 18), the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole terminated, with the result that the corresponding, related quadripartite agreements, decisions and practices were terminated. As regards the Settlement Convention, an Agreement was reached between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, following an Exchange of Notes on 27/28 September 1990 (Annex 19). This Agreement reads in part:

> "1. The Convention on Relations between the Three Powers and the Federal Republic of 26 May 1952 ... ("the Relations Convention") shall be suspended upon suspension of the operation of quadripartite rights and responsibilities with respect to Berlin and to Germany as a whole, and shall terminate upon the entry into force of the Treaty on the Financial Settlement with respect to Germany, signed at Moscow on 12 September 1990 ("the Two-Plus-Four-Treaty").
>
> 2. Subject to paragraph 3 below, the Convention on the Settlement of Matters arising out of the War and the Occupation of 26 May 1952 ... ("the Settlement Convention") shall be suspended and shall terminate at the same time as the Relations Convention; ...
>
> 3. The following provisions of the Settlement Convention shall, however, remain in force: ...
> Chapter Six:
> ....
> Article 3, paragraphs 1 and 3
> ..."

5.53 The Agreement did not deal with the reparation issue more explicitly - contrary to the original conception of Article 1 (1) of Chapter Six of the Settlement Convention. Thus, it was clearly not intended to deviate from the post-war reparations regime as established and recognized by Chapter Six of the Settle-

ment Convention. The view was confirmed by the German delegation in the course of the bilateral consultations with Liechtenstein.[130]

5.54 As an exception to the general termination of the Settlement Convention, the Exchange of Notes on 27/28 September 1990 confirms Article 3 (1) and (3) of Chapter Six of the Settlement Convention, which remain in force. The non-objection and inadmissibility rule in Article 3 thus became permanent, while Article 5, Germany's obligation to compensate former owners of property seized pursuant to the measures referred to in Article 3, was terminated.

5.55 The duty to grant compensation to former owners of seized property (Article 5) is a consequence of - that is to say, is entailed by - the non-objection and inadmissibility rule of Article 3 (1) and (3) of Chapter Six of the Settlement Convention. It was meant to preserve the complementary interests of the former owners, interests that continue to exist in view of the newly confirmed non-objection and inadmissibility rule.

5.56 The Agreement of 27/28 September 1990 (Annex 19) did not depart from the concept of the post-war reparations regime under customary law to pay compensation as reflected in Article 5. The text does not contain anything to that effect. On the contrary, in the bilateral consultations of 14 June 1999 Liechtenstein was informed by the Head of the German delegation that Article 5 of Chapter Six of the Settlement Convention, reflecting the duty of compensation, had only been abrogated in 1990 because it was thought that it had become obsolete on the grounds of sufficient precautionary measures, and that there were no cases left to compensate. This view is reaffirmed, again, by the fact that the German government concluded the agreement without participation of parliament as it was approved by the Federal Constitutional Court. Had Germany considered the Agreement of 1990 a *lex specialis* replacing a general rule of

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130 See above paras. 3.42 *et seq.*

customary international law, parliamentary assent would have been needed according to Article 59 of the German Basic Law.[131]

5.57 The German Explanatory Memorandum furnished in connection with the conclusion of the Settlement Convention (Annex 22) as well as the conclusion of the Exchange of Notes of 1990 (Annex 19) prove that Germany considers itself bound by the norm of customary international law regarding the duty to compensate individuals whose property was used for post-war reparations purposes.

5.58 The inclusion of Liechtenstein property into the reparations regime did not release Germany from the duty to compensate the former Liechtenstein owners. It has to be stressed that Liechtenstein nationals remained foreigners in the legal sense for Germany, irrespective of the qualification of Liechtenstein property as "German" property. Since Liechtenstein nationals have remained foreigners in the legal sense, the duty to compensate foreigners which was explained above also applies in such a situation. Liechtenstein nationals suffered from reparation measures of other States, which addressed Germany as a State but were satisfied by the private property of Liechtenstein nationals. The cause for these reparation measures was the conduct of Germany as a State during World War II. The duty of compensation of foreigners exists even if Germany considers the measures taken against Liechtenstein property as lawful. Germany remains under the duty to compensate Liechtenstein nationals for the losses suffered by these measures.

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131 Art. 59 Basic Law reads as follows:

(1) The Federal President represents the Federation in its international relations. He concludes treaties with foreign states on behalf of the Federation. He accredits and receives envoys.

(2) Treaties which regulate the political relations with the Federation or relate to matters of Federal legislation require the consent or participation, in the form of a Federal law, of the bodies competent in any specific case for such Federal legislation. For administrative agreements the provisions concerning the Federal administration apply mutatis mutandis."

CHAPTER 6

UNJUST ENRICHMENT AND GERMANY'S CHANGE OF POSITION

A. Introduction and overview

6.1 In the two previous Chapters, Liechtenstein has established Germany's responsibility for its breaches of several rules and principles of international law. The purpose of the present Chapter is to show that, independently of these breaches, Germany is liable towards Liechtenstein under two related principles of international law. These are the principles of unjust enrichment and detrimental reliance or change of position. Both are underpinned by the fundamental principle of good faith; both are aimed at achieving an equitable result in terms of the relations of the States concerned. These causes of action do not necessarily imply (though they do not exclude) an internationally wrongful act. In one case a State is enriched without cause, i.e. unjustly, at the expense of another or of its nationals. In the other case, a State, having adopted or agreed on some policy on a matter of concern to another State, has unjustifiably changed its position, to the detriment of the latter State or its nationals.

6.2 Both principles stem from a more general concept, well known to public international law, which is the principle of good faith. This fundamental rule, which has been recalled on various occasions by the International Court,[132] requires a State to act in a way compatible with what it expects from another State in the same circumstances. Thus for example a State does certainly not expect another State to keep properties acquired without a well-founded cause and causing prejudice to this second State. Such conduct is irreconcilable with the re-

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132 See *Nuclear Tests (Australia v France)*, 20 December 1974, *I.C.J. Reports* 1974, pp. 253 *et seq.*, p. 268, para. 46; *Border and Transborder Armed Action (Nicaragua v Honduras)*, Jurisdiction and Admissibility, 20 December 1988, *I.C.J. Reports* 1988, pp. 69 *et seq.*, p. 105, para. 94; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius, Cambridge, 1987, p. 105, esp. No. 1-5, and authorities referred to in No. 180. Authorities on the related doctrine of "abus de droit" in international law include: *Free Zones* case, 7 June 1932, PCIJ Ser. A/B No. 46 (1932), pp. 93 *et seq.*, p. 167; *Oscar Chinn* case, 12 December 1934, PCIJ Ser. A/B No. 63 (1934), pp. 62 *et seq.*, p. 86; *Fisheries Case (United Kingdom v. Norway)*, 18 December 1951, *I.C.J. Reports* 1951, pp. 116 *et seq.*, p. 142.

quirement of good faith, as well as the most firmly admitted considerations of justice and equity.

6.3 These principles apply to the facts of the present case in the following way. On the one hand, it is apparent that, by including the Liechtenstein assets in the reparations regime, Germany has enriched itself unjustly, quite apart from the issue of the lawfulness of those takings (Section B). On the other hand, by radically changing its position concerning the status of the Liechtenstein's assets since 1995, having earlier adopted a lawful policy in agreement with Liechtenstein as to those assets, Germany has caused an irremediable loss to Liechtenstein for which it owes compensation (Section C).

B. Germany's unjust enrichment at Liechtenstein's expense

1. The principle of unjust enrichment (*enrichissement sans cause*) in international law

6.4 Well known in all systems of domestic law, the principle of unjust enrichment is a general principle of law, and as such a rule of general public international law. It has been applied by international tribunals in order to grant remedies in cases of unjustified wealth transactions under international law. The content of the principle can therefore be inferred from the international jurisprudence itself.

(a) Unjust enrichment as a general principle of law

6.5 It is widely acknowledged that the general principles of law mentioned in Article 38 (1) (c) of the Statute of the International Court of Justice are an autonomous source of public international law, based on the application in the international sphere of "the general principles of municipal jurisprudence, insofar as

they are applicable to relations of states".[133] In other words, a rule must be considered as a general principle of law (i) if it is applied in the main systems of municipal law and (ii) if it is "transposable" in international law, i.e., it is not inconsistent with any general principle of or applicable rule of public international law.

6.6 The principle of unjust enrichment meets both conditions: it applies in many, if not all, domestic legal systems and it is entirely compatible with the structure of international law in which it has been implemented on a number of occasions.

(i) Domestic legal systems recognize unjust enrichment as basis for compensation or restitution

6.7 Prohibition of unjust enrichment is as ancient as law itself. Roman law already recognised the necessary repayment of patrimonial advantages reached without any legal ground. The *Corpus Iuris Civilis* and many writings of Roman lawyers and authorities stated that:

> "*iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem.*"[134]
>
> Translation:
> "For this by nature is equitable, that no one be made richer through another's loss."

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133 Sir R. Jennings and Sir A. Watts, (eds.) *Oppenheim's International Law*, Vol. 1, 9th ed., Longman, London, 1992, p. 37; see also, G. Ripert, "Les règles du droit civil applicables aux rapports internationaux. Contribution à l'étude des principes généraux du droit visés au Statut de la Cour permanente de Justice internationale", 44 *Recueil des cours*, 1933-II, pp. 569 *et seq.*, pp. 571-587; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, L.G.D.J., Paris, 6th ed., 1999, pp. 344-348.

134 D.50.17.206 *Pomponius libro nono ex variis lectionibus*, cited in J. Hallebeek, "Developments in Mediaeval Roman Law", in E.J.H. Schrage (ed.), *Unjust Enrichment. The Comparative Legal History of the Law of Restitution*, Duncker & Humblot, Berlin, 1999, pp. 59 *et seq.*, p. 61.

Relief for unjust enrichment is thus described as a fundamental legal principle inspired by equity and even by the law of nature. In this sense, the principle has a bearing on a wide variety of issues concerning wealth transactions: contracts, property, delicts or torts, etc. But the specification of the principle in the context of the positive law of contract or delict does not mean that it has lost its generating capacity. On the contrary there has been a substantial development in the law of restitution and cognate fields in modern times, based upon such a general principle.

6.8 As a matter of fact, all or virtually all domestic legal systems incorporate this principle and have organised their legal provisions concerning wealth around it. Relief is granted for advantages reached not only for wrongful acts but also for acts (for example in cases of frustration of contract) in the absence of any wrongful act on the part of the defendant.[135] By its very nature, civil law aims at avoiding unjust enrichment of a person as a consequence of the loss endured by another and has drawn a large range of legal consequences from this broad principle. Even rules related to the calculation of compensation are influenced by considerations based on unjust enrichment. Moreover, several codifications have adopted broad provisions expressing the generic principle of unjust enrichment.[136]

6.9 Even when a specific cause of action, for example in contract or tort, is not available, most domestic legal systems have developed remedies in order to deal with unjustified acquisitions of wealth, i.e. acquisitions lacking a cause and thus unjustified in legal terms. Such cases of enrichment, lacking a legal "cause", entitle the party which has suffered damage to recover compensation.

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135 This possibility is expressly reserved in certain cases by Article 27 (b) of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts: ILC Report, 2001, UN General Assembly, Official Records, A/56/10, p. 210.

136 Article 1382 *Code civil* (France), Article 1041 *Allgemeines Bürgerliches Gesetzbuch* (Austria), Article 62-67 *Schweizerisches Obligationenrecht* (Switzerland), Article 6:162 *Burgerlijk Wetboek* (the Netherlands), etc.

6.10 German Civil Law contains very clear provisions in this respect, based on Section 812 (1), of the German Civil Code which states:

> "*Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zu Herausgabe verpflichtet.*"
>
> Translation:
> "A person who has gained something by the performance of another or in any other way at the other's expense without legitimate ground is bound to make restitution."

German jurisprudence initially established a sophisticated network of different unjust enrichment remedies and conditions: more recently the decisions have developed towards a more general principle not imprisoned by categories.[137] Similar developments have occurred in other countries.[138]

6.11 In France, the courts have developed a distinct remedy system in cases of unjustified enrichment. For a long time, French judges, in the absence of a textual basis for unjust enrichment claims, developed remedies in order to close the legal gap.[139] In a famous decision concerning unjust enrichment, the French *Cour de Cassation* stated that the *actio de in rem verso*:

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137 See, e.g., Decisions of the Federal Court of Justice in civil law matters (*Entscheidungssammlung des Bundesgerichtshofes in Zivilsachen, BGHZ*) Vol. 122, pp. 46 *et seq.*, p. 52.; Vol. 89, pp. 376 et *seq.*, p. 378; Vol. 67, pp. 75 *et seq.*, p. 77.

138 See, e.g., Articles 1021, 1042 and 1043 *Allgemeines Bürgerliches Gesetzbuch* (Austria) or Article 2041 Italian Civil Code; for further references, see F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity", 24 *International & Comparative Law Quarterly* 1975, pp. 255 *et seq.*, p. 273.

139 See E.J.H. Schrage & B. Nicholas, "Unjust Enrichment and the Law of Restitution: A Comparison", in E.J.H. Schrage (ed.), *Unjust Enrichment. The Comparative Legal History of the Law of Restitution*, Duncker & Humblot, Berlin, 1999, pp. 9 *et seq.*, pp. 22-24; J.P. Dawson, *Unjust Enrichment. A Comparative Analysis*, Little & Brown, Boston, 1951, pp. 92 *et seq.*

> "dériv[e] du principe d'équité qui défend de s'enrichir aux dépens d'autrui et n'[a] été réglementée par aucun texte de nos lois."[140]

Indeed, the Court established clearly that *actio de in rem verso* is itself based on the more fundamental principle of equity prohibiting unjust enrichment.

6.12 In the common law, an independent ground for relief based on unjust enrichment does not seem to be as old as in the Continental law system. This is a result of the different approach to the question of general principles of law in the two fundamental different systems. For a long time, English law seems not to have recognised a general theory of unjust enrichment as such, but developed specific remedies for situations which are indeed classified as unjust enrichment circumstances by civil law systems.[141] But, far from ignoring the principle of unjust enrichment, English law only treated it differently and, in any case, it has now recognised unjust enrichment as an independent cause of action.[142] For its part, the American Law Institute in its *Restatement* declared in general terms that:

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[143]

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140 Cour de cassation, Chambre des Requêtes, 15 June 1892, *Julien Patureau v. Boudier Dalloz* 1892.I.596; *Sirey*, 1893.I.281, note Labbé.

141 *Orakpo v. Manson Investment Ltd* (1978) A.C. 95, p. 104; E. J. H. Schrage & B. Nicholas, "Unjust Enrichment and the Law of Restitution: A Comparison", in Eltjo J. H. Schrage (ed.), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, Duncker & Humblot, Berlin, 1999, pp. 9 *et seq.*, p. 10; E. Wahl, "Die ungerechtfertigte Bereicherung der Bundesrepublik Deutschland als Rechtsgrundlage für die Ansprüche der Reparationsgeschädigten", 26 *Juristenzeitung* 1971, pp. *et seq.* 715, p. 718; F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity", 24 *International & Comparative Law Quarterly* 1975, pp. 255 *et seq.*, pp. 273-274.

142 See E.J.H. Schrage & B. Nicholas, *ibid*, pp. 9 *et seq.*, pp. 10 and 27; F. Francioni, *ibid*, pp. 255 *et seq*, p. 274.

143 American Law Institute, *Restatement of the Law of Restitution*, 1937, p. 12, § 1.

In common law systems there has been an enormous development of the law of restitution based on this principle.[144]

6.13 Legal systems based on Islamic law also recognise the principle of unjust enrichment.[145]

6.14 For these reasons, it can be concluded that the principle of unjust enrichment constitutes a general principle of law common to the main legal systems. Even if there are certain differences in the application of this principle in the different legal systems,[146] the underlying principle is the same. All legal systems provide for restitution or compensation in the case of someone's enrichment, causing a loss to someone else, without any legal basis.[147]

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144 For a selection of leading and recent cases in common law jurisdictions, see generally, Vernicos Shipping Co. v. United States, 349 F, 2d, 465 (1965); 42 ILR, 1971, pp. 186 *et seq.*, pp. 187-188, *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd (*1979) 3 All ER 822; *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548; *Derby v Scottish Equitable plc* (2001) 3 All ER 818; *Banque Financière de la Cité v Parc (Battersea) Ltd* (1998) 2 WLR 475; *David Securities P/L v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221; *Rural Municipality of Storthoaks v Mobil Oil Canada* (1975) 55 DLR (3d) 1; *RBC Dominion Securities Inc v Dawson et al.* (1994) 111 DLR (4th) 230; *Deglman v Guaranty Trust Co.* (1954) 3 DLR 785 (S.C.C.).

145 See the findings of the Iran-United States Claims Tribunal in Award No. 35-219-2, 30 March 1983, *Benjamin R. Isaiah v. Bank Mellat*, 2 *Iran-United States Claims Tribunal Reports*, 1983-I, pp. 232 *et seq.*, pp. 236-7 and Award No. 207-217-2, 5 December 1985, *Shannon and Wilson, Inc. v. Atomic Energy Organization of Iran*, 9 *Iran-United States Claims Tribunal Reports*, 1985-II, pp. 397 *et seq.*, p. 402; see also: Arbritral Tribunal Mahmassani Award,, 12 April 1977, Libyan American Oil Company (*LIAMCO v. Government of the Libyan Arab Republic*), 62 ILR, pp. 140 *et seq.*, pp. 175-176.

146 F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity", 24 *International & Comparative Law Quarterly*, 1975, pp. 255 *et seq.*, p. 274; C.H. Schreuer, "Unjustified Enrichment in International Law", 22 *American Journal of Comparative Law*, 1974, pp. 218 *et seq.*, p. 283.

147 See also: Mexico-United States Claims Commission, Decision, July 1931, *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, *UNRIAA*, Vol. IV, pp. 669 *et seq.*, p. 676; Georges Ripert, "Les règles du droit civil applicables aux rapports internationaux. Contribution à l'étude des principes généraux du droit visés au Statut de la Cour permanente de Justice internationale", *Recueil des Cours* 1933-II, Vol. 44, pp. 569 *et seq.*, p. 631; F. Francioni, *ibid*, pp. 255 *et seq.*, pp. 273-274.

6.15 It thus appears that the principle of unjust enrichment is more than an "expression of noble sentiments inspiring the creators of the law".[148] Rather it is a foundational principle underlying restitution or compensation in numerous domestic legal systems.

(ii) The principle is transposable to international law

6.16 There is no conceptual or practical obstacle to the transposition into public international law of this general principle. There is nothing in international law, whether in its positive rules or its general principles, that excludes or contradicts the principle of unjust enrichment. On the contrary, as explained below, the principle is received at the international level.

6.17 It is true that some authorities have denied that the principle of unjust enrichment can be transposed at the international level.[149] However, the basis for these doubts is, above all, an over-reliance (amounting to a *petitio principii*) on the difficulties of the transposition of rules having a civil law origin into public international law which regulates the relations between sovereign States, and which has not the same degree of precision or development as domestic law.

6.18 No doubt general principles of domestic law systems cannot be transposed "mechanically" into international law.[150] As Judge Sir Arnold McNair stated in

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148 C.H. Schreuer, "Unjustified Enrichment in International Law", 22 *American Journal of Comparative Law*, 1974, pp. 218 *et seq.*, p. 281.

149 See G. Ripert,"Les règles du droit civil applicables aux rapports internationaux. Contribution à l'étude des principes généraux du droit visés au Statut de la Cour permanente de Justice internationale", *Recueil des Cours*, 1933-II, Vol. 44, pp. 569 *et seq.*, p. 631; H. Pazarci, "La responsabilité internationale des États à l'ocassion des contrats conclus entre États et personnes privées étrangères", 79 *Revue générale de Droit international public*, 1975, pp. 354 *et seq.*, pp. 415-416.

150 E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", *Recueil des Cours*, 1978-I, Vol. 159, p. 1 *et seq.*, p. 300; see also e.g.: F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity", 24 *International & Comparative Law Quarterly*, 1975, pp. 255 *et seq.*, p. 275.

a celebrated separate opinion in the *Status of South West Africa* advisory opinion of 1950:

> "International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (*c*) of the Statute of the Court bears witness that this process is still active and it will be noted that this article authorizes the Court to 'apply ... (*c*) the general principles of law recognized by civilized nations'. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules... In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions."[151]

6.19 Beyond the differences in the various municipal legal systems, the general idea lying under the principle is certainly not unfamiliar in international law. Furet asserts:

> "C'est un principe d'équité très général que nul ne peut s'enrichir injustement aux dépens d'autrui. Il a été dégagé par le droit privé, mais il y a toutes raisons de penser qu'il demeure valable en droit international public."[152]

Even Ripert, who presumed that unjust enrichment is not easily transposable into public international law, nevertheless concluded:

> "Il ne faut pourtant pas renoncer délibérément à ce principe dans le droit des gens... Il n'y a aucune raison pour ne pas dire qu'un Etat ne saurait s'enrichir injustement ou sans cause aux dépens d'un au-

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151 *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, *I.C.J. Reports* 1950, pp. 128 *et seq.*, p. 148.

152 M.-F. Furet, "L'application des concepts du droit privé en droit international public", 68 *Revue général de Droit international public* 1964, pp. 887 *et seq.*, p. 901.

> tre. L'application de cette règle pourra peut-être un jour donner le moyen de réparer certaines injustices."[153]

6.20 There is no incompatibility between the unjust enrichment principle and public international law. As far as wealth transactions are concerned - and this is the case more and more often between States and from a public international law perspective - equitable considerations surrounding the remedies for unjust enrichment could be applied even between States, or between States and non-State entities. A State may not enrich itself without any legal basis, causing thereby a loss to another State or person.

6.21 Thus the concept of unjust enrichment is received in public international law; it inspires many of its rules and nowadays constitutes a valid international legal principle.

(b) The principle of unjust enrichment has been incorporated into international law

6.22 The principle of unjust enrichment has been incorporated in public international law as both, a fundamental principle governing and inspiring rules of law and a separate cause of action.

(i) Unjust enrichment as a basic principle of international law

6.23 The principle of unjust enrichment inspires various legal regimes in public international law. Thus, in the law of State succession, it is recognised that a successor State is under an obligation to reimburse the debts of its predecessor as

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153 G. Ripert, "Les règles du droit civil applicables aux rapports internationaux. Contribution à l'étude des principes généraux du droit visés au Statut de la Cour permanente de Justice internationale", *Recueil des Cours*, 1933-II, Vol. 44, pp. 569 *et seq.*, p. 632.

far as it has derived benefit from them.[154] And even if, practically, the decisive criterion is laid on the financial capacities of the State (in relation, of course, to what it received from its predecessor), unjust enrichment has to be seen as the real justification of these rules.[155]

6.24 The principle has also shaped the international law of compensation for expropriation of property.[156] The legal basis of the obligation to compensate in case of lawful takings of property is founded in the principle of unjust enrichment. Indeed, in the absence of any internationally wrongful act, the international responsibility of the expropriating State is not entailed and it cannot be deemed to have a duty to compensate the foreign investor for its losses on the basis of the law of responsibility. Therefore, the *ratio legis* for the duty to compensate is the principle of unjust enrichment and this is confirmed by State practice. As D.P. O'Connell put it: "The juridical justification for the obligation to pay compensation is to be found in the concept of unjust enrichment, which lies at the basis of the doctrine of acquired rights, and which is formalised by reference to the international standard of civilised society."[157]

6.25 Finally, the concept of unjust enrichment also finds application concerning the evaluation of compensation, in cases of lawful expropriations as well as within the framework of State responsibility for internationally wrongful acts. The amount of the compensation has to be determined in such a way that it does not

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154 See articles 37, 40 and 41 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 7 April 1983; See also: M.-F. Furet, "L'application des concepts du droit privé en droit international public", 69 *Revue générale de Droit international public* 1964, pp. 887 *et seq.*, p. 901.

155 See further D.P. O'Connell, "Unjust Enrichment", 5 *American Journal of Comparative Law* 1956, p. 2.

156 See A.D. McNair, "The Seizure of Property and Enterprises in Indonesia", 6 *Netherlands International Law Review* 1959, pp. 218 *et seq.*, pp. 239-242; H. Dagan, *Unjust Enrichment. A Study of Private Law and Public Values*, CUP, Cambridge, 1997, ch. 6 and references.

157 D.P. O'Connell, *International Law*, Vol. II, Stevens & Sons, London, 1970, pp. 780-781; see also: E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", *Recueil des cours*, 1978-I, Vol. 159, p. 1, pp. 299-300.

amount to an unjustified enrichment neither of the injured party nor of the wrongdoer. The exact balance of the enrichment and the loss is to be established and to be corrected. Every surplus or shortfall in the compensation would result in an unjustified enrichment of one of the parties.[158] It appears therefore that unjust enrichment is the underlying principle explaining the full (and not more than full) compensation principle.

(ii) Unjust enrichment as a cause of action

6.26 As clearly shown by international precedents, restitutionary remedies quite often are based on the concept of unjust enrichment.

6.27 The Arbitral Tribunal constituted between the United States and Peru in order to decide the *Landreau Claim* concerning the payment of compensation for performance of a later denounced contract stated:

> "The Government got the information on the footing of the contract of 1865 and having repudiated that contract by the decree of 12th December, 1868, they are bound to pay on a *quantum meruit* for the discoveries which they appropriated for their own benefit."[159]

6.28 Similarly, in the *William A. Parker Case*, the Mexico-United States Claims Commission based its decision on the principle of unjust enrichment and awarded compensation in the absence of any contract or tortious act, thus recognising unjust enrichment as a cause of action.[160]

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158 See, e.g., Arbitral Tribunal (Max Huber), Award, 1 May 1925, *Spanish Zone of Maroco Claims*, *UNRIAA*, Vol. II, pp. 615 *et seq.*, pp. 733-735; I. Seidl-Hohenveldern, "L'évaluation des dommages dans les arbitrages transnationaux", 33 *Annuaire français de droit international*, 1987 pp. 7 *et seq.*, p. 21; F. Francioni, "Compensation for Nationalisation of Foreign Property: The Borderland between Law and Equity", 24 *International & Comparative Law Quarterly* 1975, pp. 255 *et seq.*, pp. 277-281; C.H. Schreuer, "Unjustified Enrichment in International Law", 22 *American Journal of Comparative Law* 1974, pp. 281 *et seq.*, pp. 286-287.

159 Award, 26 October 1922, *UNRIAA*, Vol. I, pp. 347 *et seq.*, p. 364.

160 Mexico-United States Claims Commission, Interlocutory decision, 31 March 1926, *William A. Parker (U.S.A.) v. United Mexican States*, *UNRIAA*, Vol. IV, pp. 35 *et seq.*, p. 40.

6.29 Even more directly, the Tribunal in the *Lena Goldfields Arbitration* found the ground of recovery in the unjust enrichment principle:

> "On ordinary legal principle this constitutes a right of action for damages, but the Court prefers to base its award on the principle of 'unjust enrichment', although in its opinion the money result is the same."[161]

6.30 Similarly, in various awards, other arbitral bodies granted indemnity to applicants to the extent of actual profit gained by the respondent.[162]

6.31 Under Article V of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) of 19 January 1981,[163] the Tribunal is to apply "principles of commercial and international law". The Iran-United States Claims Tribunal has recognised the principle of unjust enrichment as a restitutionary remedy. For example Chamber 1 of the Tribunal asserted:

> "The concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device 'to cover those cases in which a general action for damages was not available'. It is codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been as-

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161 Arbitral Tribunal Award, 3 September 1930, *Lena Goldfields, Ltd. v. USSR*, full text of award reproduced in A. Nussbaum, "The Arbitration between the Lena Goldfields Ltd and the Soviet Government", 36 *Cornell Law Quarterly* 1950, pp. 31 *et seq.*, p. 51.

162 Arbitral Award, *Thomas C. Baker's Claim* (United States v. Mexico), in J. B. Moore, 4 *History and Digest of Arbitrations to which the United States have been a Party* 1898, p. 3668; Hungaro-Belgian Mixed Arbitral Tribunal, 29 October 1925, *Sucrerie de Roustchouk v. Etat hongrois*, 5 *Recueil des decisions des T.A.M.*, p. 772; P.C.A., Arbitral Award, 27 July 1956, *Lighthouses Case (merits)*, *UNRIAA*, Vol. XII, pp. 155 *et seq.*, p. 253.

163 1 *Iran-United States Claims Tribunal Reports*, 1981-82, pp. 9 *et seq.*, pp. 11-12.

> similated into the catalogue of general principles of law available to be applied by international tribunals."[164]

6.32 It is thus apparent, that unjust enrichment is a generally applied principle of law, transplanted from municipal systems of law in international law, now widely applied in international law, which constitutes *per se* a distinct cause of action.

(c) The content of the principle of unjust enrichment

6.33 Concerning the content of the principle, the arbitral practice has clarified the conditions which have to be met in order to successfully invoke unjust enrichment as a restitutionary remedy. The Iran-United States Claims Tribunal summed up these conditions in the following way:

> "There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched."[165]

6.34 The four criteria are thus (a) an enrichment of one party, (b) an impoverishment of the other party, (c) a causal link between the impoverishment and the

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164 Iran-United States Claims Tribunal, Award No. 135-33-1, 22 June 1984, *Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al.*, 6 *Iran-United States Claims Tribunal Reports*, 1984-II, pp. 149 *et seq.*, p. 168; see also Award No. 207-217-2, 5 December 1985, *Shannon and Wilson, Inc. v. Atomic Energy Organization of Iran*, 9 *Iran-United States Claims Tribunal Reports*, 1985-II, pp. 397 *et seq.*, p. 402; Award No. 259-36-1, 13 October 1986, *Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran*, 12 *Iran-United States Claims Tribunal Reports*, 1986-III, pp. 335 *et seq.*, pp. 352-353; Award No. 295-834-2, 27 March 1987, *Schlegel Corporation (on behalf of Schlegel Lining Technology GmbH) v. National Iranian Copper Industries Company*, 14 *Iran-United States Claims Tribunal Reports*, 1987-I, p. 176 *et seq.*, p. 180.

165 Iran-United States Claims Tribunal, Award No. 135-33-1, 22 June 1984, *Sea-Land Service, Inc. v. Government of the Islamic Republic of Iran et al.*, 6 *Iran-United States Claims Tribunal Reports*, 1984-II, pp. 149 *et seq.*, p. 169; see also: Award No. 207-217-2, 5 December 1985, *Shannon and Wilson, Inc. v. Atomic Energy Organization of Iran*, 9 *Iran United States Claims Tribunal Reports*, 1985-II, pp. 397 *et seq.*, p. 402 or Mexico-United States Claims Commission, Decision, July 1931, *Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, *UNRIAA*, Vol. IV, pp. 669 *et seq.*, p. 676.

enrichment and, finally, (d) the absence of a cause, that is of any contractual or legal basis of the transaction.

2. Unjust enrichment of Germany through the inclusion of the Liechtenstein property within the reparations regime

6.35 It results from the above exposed principles that unjust enrichment can be envisaged both as a distinct cause of action and as a means to evaluate the damage sustained by Liechtenstein as a consequence of Germany's behaviour. In both cases, the same conditions must be met:

(a) Germany must have enriched itself through its acts or omissions;
(b) to the detriment of Liechtenstein;
(c) a causal link must exist between Germany's enrichment and Liechtenstein's impoverishment,
(d) without a "cause" in the legal sense, i.e. without justification.

All four conditions are met in the present case, as will now be demonstrated.

(a) Germany's Enrichment

6.36 The present case relates to a debtor's use of other people's property in order to clear himself from his debt (or part of it) towards his creditor. Germany is a debtor for war reparations; by including Liechtenstein's assets in the reparations regime, it has used them to pay part of its debt due to Czechoslovakia, thus clearly enriching itself at the detriment of Liechtenstein.

(i) The debt and the debtor

6.37 There can be no doubt as to Germany's indebtedness towards Czechoslovakia as a result of the post-war reparations regime.

6.38 As explained in Chapter 2 above, after the war, Germany was subject to a strict obligation of reparations "for the losses caused by her to the Allied nations in the course of the war" (Yalta Protocol) (Annex 11). This is a continuing obligation.

6.39 According to Chapter IV (3) of the Potsdam Protocol of 2 August 1945 (Annex 12),

> "[t]he reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western zones and from appropriate German external assets".

The Paris Agreement of 14 January 1946 (Annex 13) lists Czechoslovakia among these "other countries entitled to reparations" for a share amounting to 3 % of Category A reparations and 4.3 % of Category B.[166] Provision for payment of reparations were detailed in various legal instruments including Law No. 63 of the Council of the Allied High Commission of 31 August 1951 (Annex 15) and the Settlement Convention of 26 May 1952 (Annex 16). Although the Convention has been partly terminated following the Exchange of Notes of 27/28 September 1990 (Annex 19), the obligation to make reparations has never been questioned.

6.40 It follows from the above that Germany was under an obligation to make reparations to Czechoslovakia for the losses sustained by the latter in the course of the war.

(ii) The enrichment

6.41 As shown in Chapter 3 of this Memorial, until the mid 1990s, Germany had consistently regarded the "Beneš Decrees" as contrary to international law. Under this situation, there was no question of Germany's enrichment: the Re-

spondent State rightly considered that the Liechtenstein nationals' assets were not part of the reparations regime and could not, therefore, be deducted from the debt it owed to Czechoslovakia on this account.

6.42 The picture changed completely when Germany contended, following the Pieter-van-Laer case, that the Liechtenstein nationals' assets confiscated by Czechoslovakia had been rightly treated as German assets, as defined by the reparations regime. In other words, Germany now accepts that these properties were "seized for the purpose of reparation or restitution, or as a result of the state of war", within the meaning of Article 3 (1) of Chapter Six of the Settlement Convention (Annex 16).

6.43 Henceforth, Germany includes the confiscated assets among the global amount owed by it to Czechoslovakia and this amount comes as a deduction from its debt. It thus clearly constitutes an enrichment for Germany. As acknowledged by popular wisdom, "*Qui paye ses dettes s'enrichi*". This is not only a traditional maxim. It is a legal principle firmly anchored in international law. In the *Raymond* case, the United States-Venezuela Mixed Arbitral Commission already recognized this principle.[167] Equally, in the *Aminoil* case,[168] the Arbitral Tribunal effectively took into account the liabilities of Aminoil, stating:

> "Decree Law No. 124, and the measures taken under it, determined the transfer of the Company's assets and operations on the basis of the clause in the Concession providing for a normal completion of its term... This way of dealing with the matter was not opposed by Aminoil. The transfer of the assets gave rise to a credit in its favour, whereas that of liabilities created a debt. The sums due at the

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166 See above paras. 2.10-2.12.

167 Mixed Claims Commission United-States Venezuela constituted under the Protocol of 17 February 1903, Award, 1903, *Raymond et al.* (United States of America v. Venezuela), *UNRIAA*, Vol. IX, pp. 310 *et seq.*, p. 314: "As the assignment ... was received in discharge of a money debt due from De Sonneville, it is in judgment of law to be considered as the same thing as if De Sonneville had actually paid money to the amount agreed upon...".

168 Arbitral Tribunal, Award, 24 March 1982, *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, 21 ILM 1982, p. 976.

> date of 19 September, 1977, and paid by the Government, have to be refunded by the Company".[169]

The debts of Aminoil were, consequently, deducted from the compensation owed by Kuwait for the expropriation of the concession rights.[170] The Iran-United States Claims Tribunal proceeded in a similar sense concerning a counterclaim "which arises out of the same contract, transaction or occurrence that constitutes the subject matter of [the original] national's claim".[171]

6.44 By acknowledging that the Liechtenstein assets are part of its debt Germany has, therefore, enriched itself since its debt has been lessened in the same proportions. This fact was clearly recognised by the German Government in its comment of 14 August 1953 in the proceedings on the second action for a declaratory judgment of the parliamentary group of the SPD before the Federal Constitutional Court (Annex 47):

> *"Die Enteignung des deutschen Auslandsvermögens erfolgt zugunsten Deutschlands zwecks Abtragung der ihm obliegenden politischen Reparationsschuld. Daher ist die Bundesrepublik verpflichtet, die liquidierten Eigentümer gemäß den Bestimmungen ihres Grundgesetzes zu entschädigen. Um diese Entschädigungspflicht zu begründen, bedarf es keiner besonderen vertraglichen oder gesetzlichen Grundlage; sie ergibt sich aus den dem Institut der Enteignung zugrundeliegenden "allgemeinen Rechtsgrundsätzen"."*

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169 *Ibid.*, p. 1027.

170 *Ibid.*, p. 1041 *et seq.*

171 Article II, paragraph 1, of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) of 19 January 1981, 1 *Iran-United States Claims Tribunal Reports* 9, 1981, 1982. See also G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal,* Clarendon, Oxford, 1996, p. 110 *et seq.*; P. Daillier (ed.), "Tribunal irano-américain de réclamations", 46 *Annuaire français de droit international* 2000, pp. 326 *et seq.*, pp. 339-342. Even outside any counterclaim consideration, the very same Tribunal accepted competing debts to be compensated between themselves (see, e.g., Iran-United States Claims Tribunal, Award No. 419-128/129-2, 30 March 1989, *Sedco, Inc. for itself and on behalf of Sedco International, S.A. v. Iran Marine Industrial Company, et al.*, 21 *Iran-United States Claims Tribunal Reports* 31, 1989-I, pp. 53 *et seq.* - deducing from the compensation accorded to the claimant a debt owed to the respondent).

Translation:
"The expropriation of German external assets takes place to the benefit of Germany in order to pay off the political reparations debt incumbent on it. For this reason, the Federal Republic of Germany is obliged to indemnify the liquidated owners according to the provisions of their constitution. No particular contractual or legal base is required for substantiating this obligation towards compensation; it ensues from the 'general legal principles' on which the expropriation institution is based."

(b) Liechtenstein's correlative impoverishment

6.45 The second aspect of Germany's unjust enrichment in the present case is self-evident. Germany has been enriched at least in the same measure as the Liechtenstein nationals have been impoverished. They have lost the use of the assets, the income deriving from them and any possibilities of liquidating them. In this respect, it appears that the loss sustained is even higher than Germany's enrichment, since the owners of the confiscated assets have been deprived not only of their properties (*damnum emergens*), but also, in many cases (agricultural lands, factories) of their expected profits (*lucrum cessans*).

(c) The link between Germany's enrichment and Liechtenstein's impoverishment

6.46 The behaviour of Germany is entirely independent from the lawfulness or unlawfulness of Czechoslovakia's acts. As explained above,[172] the principle of unjust enrichment applies independently of any unlawfulness of the act generating the enrichment: whether the post-war decisions of Czechoslovakia were lawful or not, the fact is that they were at the origin of the deprivation of property endured by Liechtenstein and its nationals, and that, by endorsing them, Germany has enriched itself. Thus, Germany's enrichment only generated from the Germany's decision, after 1995, to include the Liechtenstein property in the

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[172] See above para. 6.8.

reparations regime. Without the decision taken *by Germany* the impoverishment of Liechtenstein and its nationals would not have resulted in an enrichment for Germany and the whole matter would have remained *res inter alios acta*. And this holds true whether Czechoslovakia's acts were lawful or not.

6.47 In other words, the direct causation of Germany's enrichment lies in its own behaviour and the confiscation of the assets in 1945 is a mere fact in this respect, the qualification of which as legal or not does not matter.

6.48 Had Article 5 of Chapter Six of the Settlement Convention (Annex 16) been applied, there would have been no room for a claim under the principle of unjust enrichment: Liechtenstein and its nationals would have been compensated for their losses. They could have invoked no impoverishment - while the whole operation would have been financially neutral for Germany: it would have paid part of its debt to Czechoslovakia through the Liechtenstein property which would have, then, been compensated by it.[173]

6.49 The problem precisely is that Germany has included the Liechtenstein property into the reparations regime while at the same time denying its obligation to compensate Liechtenstein and its nationals for the losses sustained under the pretext that Article 5 of the Settlement Convention is no longer applicable since 1990. Therefore Germany profits from the late inclusion of the assets in the reparations regime without accepting its liability to afford compensation to the victims. Germany is enriched and Liechtenstein and its nationals are irremediably impoverished by the same pattern of acts by Germany.

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[173] This does not mean that such an operation would have been lawful in other respects. As shown in previous Chapters, it would have infringed the rights of Liechtenstein, in particular the right to respect for its neutrality and sovereignty.

(d) The absence of legal cause or justification

6.50 Liechtenstein has shown in the previous Chapters of this Memorial that Germany's behaviour was unlawful under general international law. This has no special relevance regarding its claim based on the principle of unjust enrichment: whether lawful or unlawful, Germany's behaviour is the direct source of both its own enrichment and Liechtenstein's impoverishment.

6.51 And this behaviour is devoid of any legal basis in international law. In particular:

(a) Germany was, at the very least, not legally bound to include Liechtenstein's assets within the reparations regime;
(b) nor was it legally bound to refuse compensation for the losses resulting from its doing so;
(c) nor was Germany in a situation such as *force majeure*, distress or a state of necessity - which might apply even in absence of responsibility - of such a nature that it had to adopt the behaviour it took;
(d) nor has Liechtenstein consented to or acquiesced in this behaviour.

6.52 Therefore, independently of their unlawful character, the acts of Germany, by which it has enriched itself, have no legal cause which could justify its enrichment. It clearly appears as an "*enrichissement sans cause*" the consequences of which must be compensated by Germany.

C. Germany's unjustified change of position to Liechtenstein's detriment

1. Equitable claims based on a detrimental and unjustified change of position: in principle

6.53 Germany's unjustified change of position, in the years after 1990, caused detriment to Liechtenstein which should be compensated for under international law. This would be true, even if it were considered that Germany did not itself gain any advantage, tangible material or other, from the change of position.

6.54 It is submitted that under general international law, when a State acts on a matter concerning another State to the detriment of the latter, and does so in a way which is contrary to a prior understanding or position taken by the former State and shared with the latter, the State taking the action is responsible to compensate for the detriment caused, unless its change of position is otherwise justified.

6.55 As a matter of principle, this conclusion may be supported by reference to considerations of equity and good faith in international relations. The continued generative force of such considerations is affirmed, for example, by decisions of this Court,[174] as well as by the following paragraphs of the Friendly Relations Declaration, which elaborate on the principle that States must fulfil "in good faith the obligations assumed by them in accordance with the present Charter":[175]

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174 See, e.g., *Nuclear Tests (Australia v France)*, 20 December 1974, *I.C.J. Reports* 1974, pp. 253 *et seq.*, p. 268, para 46: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.".

175 Charter of the United Nations, Article 2 (2).

> "Every State has the duty to fulfill in good faith its obligations under the *generally recognized principles and rules* of international law.
>
> Every State has the duty to fulfill in good faith its obligations under international agreements valid under the *generally recognized principles and rules* of international law."[176]

6.56 As a matter of authority, this principle underlies and explains a range of decisions of arbitral tribunals given in cases which did not involve a specific obligation of conduct imposed by a treaty or other rule of international law. A number of illustrations may be given.

6.57 In his treatment of the range of decisions and state practice grouped under and supportive of the general principle of good faith, Bin Cheng states that:

> "The protection of good faith extends equally to the confidence and reliance that can reasonably be placed not only in agreements but also in communications or other conclusive acts from another State. If State A has knowingly led State B to believe that it will pursue a certain policy, and State B acts upon this belief, as soon as State A decides to change its policy - although it is at perfect liberty to do so - it is under a duty to inform State B of this proposed change. Failure to do so, when it knows or should have known that State B would continue to act upon this belief, gives rise to a duty to indemnify State B for any damage it may incur. What the principle of

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176 General Assembly Resolution 2625 (XXV), 24 October 1970, para. 1, Principle 7 (emphasis added). For further material on the general principle of good faith in international law, see Sir R. Jennings and Sir A. Watts, (eds.) *Oppenheim's International Law*, Vol. 1, 9th ed., Longman, London, 1992, p. 38; M. Shaw, *International Law*, 4th ed., Cambrige University Press, Cambridge, 1997, pp. 81, 82; E. Zoller, *La bonne foi en droit international public*, A. Pedone, Paris, 1977; H. Thirlway, "The Law and Procedure of the International Court of Justice", 60 *British Yearbook of International Law* 1989, pp. 1 *et seq.*, pp. 7 *et seq.*; and G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Grotius, Cambridge, 1986, Vol. I, p. 183 and Vol. II, p. 609. For references to equitable principles as part of international law, see Individual Opinion by M.O. Hudson, *Diversion of Water from the Meuse*, 28 June 1937, PCIJ Series A/B No. 70, p. 73, p. 77; *North Sea Continental Shelf* cases (Germany/Denmark, Germany/Netherlands), 20 February 1969, *I.C.J. Reports*, pp. 3 *et seq.*, p. 53; M. Shaw, *International Law*, 4th ed., Cambrige University Press, Cambridge, 1997, pp. 82-86, especially No. 121; A.V. Lowe, "The Role of Equity in International Law", 12 *Australian Yearbook of International Law* 1992, p. 54.

> good faith protects is the confidence that State B may reasonably place in State A."[177]

6.58 The author gives as an example the *Blockade of Portendic Case. Claims of British Subjects against France* (1843). This controversy was resolved by an award of the King of Prussia given at Berlin on 30 November 1843 in favour of the claimants.[178] The French Minister of War and Marine had informed the British Ambassador, some ten months prior to the closure of the port, that it would not be closed, and British merchants relied on that assurance to their detriment. The British argument was to the following effect:

> "The Minister of Marine may not be able to engage his Government as to what it will do, but he may be perfectly able to say what the Government, in the department over which he presides, is not going to do. There is not (precisely speaking) an engagement in this case, but there is a confidential communication, which communication, in all good faith, is to be believed, until otherwise explained or contradicted... [W]here a Minister of the French Government has made an official communication, relative to his own department, the Government of Great Britain is justified by all the rights and constant usage subsisting in the intercourse between civilised nations, to give trust and confidence to such declaration; and that if the French Government should think fit, afterwards, to act contrary to the assurances of its own official organ, that then, in common justice, the British Government have a fair right to expect the earliest communication of such intention."

6.59 The King of Prussia as Arbitrator in substance agreed. He held:

> "...[A]yant... à nous prononcer, comme Arbitre, sur la question de savoir, si par suite des mesures et des circonstances qui ont précédé, accompagné, ou suivi l'établissement et la notification du blocus de la côte de Portendic en 1834 et 1835, un préjudice réel a été induement apporté à tels ou tels sujets de Sa Majesté Britannique, exerçant sur la dite côte un trafic régulier et légitime, et si la France

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177 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius, Cambridge, 1987, p. 137.

178 34 *British and Foreign State Papers* 1377. The facts appear from the pleadings and other documents published in the same series, Vol. 23, p. 543; Vol. 33 p. 1064.

> est équitablement tenue de payer à telle ou telle classe des dits réclamants des indemnités à raison de ce préjudice;
> ...
> Nous sommes d'avis,
> ...
> Que la France devra indemniser les réclamants des dommages et préjudices auxquels ils n'auraient pas été exposés si le dit Gouvernement, en envoyant au Gouverneur du Sénégal l'ordre d'établir le blocus, avait simultanément notifié cette mesure au Gouvernement Anglais...".[179]

The equitable character of this finding and its basis in a general principle of good faith appear both from the award and the pleadings of the successful claimant. It should be stressed that in that case the Arbitrator proceeded on the basis that France had the right to close the port by way of the blockade, so there was no question of any breach of a rule of international law in doing so. Nonetheless France was responsible to nationals of a third State who had relied on an assurance given by a French official to that State as to its own future conduct. This is very similar to estoppel in the general sense.

6.60 A second example is provided by the decision of the King of Sweden and Norway in the *Samoan Claims* arbitration (1902). The claims concerned certain German and other nationals injured by military action taken unilaterally by Britain and the United States, contrary to the prior understanding of the three governments that only collective action would be taken. The Arbitrator upheld the claim, saying, *inter alia*:

> "Whereas, furthermore, by proclamation issued on the 4th of January, 1899, the consular representatives of the treaty powers in Samoa, owing to the then disturbed state of affairs and to the urgent necessity to establish a strong provisional government, recognized the Mataafa party... to be the provisional government of Samoa pending instructions from the three treaty powers, and thus those powers were bound upon principles of international good faith to

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179 34 *British and Foreign State Papers*, p. 1378.

> maintain the situation thereby created until by common accord they had otherwise decided; and
>
> Whereas, that being so, the military action in question undertaken by the British and American military authorities before the arrival of the instructions mentioned in the proclamation, and tending to overthrow the provisional government thereby established, was contrary to the aforesaid obligation and can not be justified on the plea neither of the invalidity *ab initio* of the said provisional government, nor of its establishment under a species of *force majeure*..."[180]

6.61 In both these cases the action taken was not unlawful *per se*; and the situation in which reliance occurred was temporary in character. However situations may occur where the neighbouring State has irrevocably relied on the situation, i.e. where no adjustment is possible which would enable it to avoid detriment arising. In such a case, which is closely akin to that of estoppel, the State concerned may not be permitted to change the common policy, even in the absence of a treaty commitment.

6.62 Moreover the equitable character of such a requirement and its close relationship to the underlying principle of good faith is reinforced when the conduct in question contradicts the evident and general legal position of the claimant State. In such a case there is independent legal support for the position taken by that State, with which the respondent State has agreed and to which it has conformed its own position. When this occurs the respondent State should not be allowed to change its position to the detriment of the claimant State or its nationals, or at least should be required to indemnify the latter as a condition of doing so.

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[180] *Claims on Account of Military Operations conducted in Samoa in 1899*, Preliminary Decision of 14 October 1902, *Foreign Relations of the United States*, 1902, pp. 444 *et seq.*, p. 446.

2. The principle applied to the present case

6.63 In the present case this principle leads to the conclusion of Germany's liability to compensate Liechtenstein for the loss suffered arising from its own unjustified change in its position with respect to the assets seized under the "Beneš Decrees". In fact, Germany and Liechtenstein had previously taken the same position concerning those assets (a); in consequence of which Germany was not called upon to compensate victims of those decrees, including those of Liechtenstein nationality (b); but, having procured or accepted the termination of any express obligation as a result of the 1990 Exchange of Notes, Germany subsequently changed its position with respect to the Liechtenstein assets without any justification (c), thereby causing detriment to Liechtenstein and its nationals (d).

6.64 These facts and circumstances have already been reviewed in Part One of this Memorial, and are recited in the context of the unjust enrichment claim earlier in this Chapter. They may however once again be briefly recalled.

(a) The initial position of Germany and Liechtenstein concerning property seized under the "Beneš Decrees"

6.65 The initial position of Germany and Liechtenstein in the years before 1990 was that the property taken under the "Beneš Decrees" was not part of the reparations regime and would not be included in any of the provisions concerning that regime; this position applied *a fortiori* to Liechtenstein property having regard to the non-German character of that property and to the strict neutrality of Liechtenstein during World War II.[181] Liechtenstein had no need to take any different position.

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[181] See above paras. 1.1 to 1.9.

(b) Germany's consequent refusal to compensate victims of the "Beneš Decrees" in the context of the reparations regime

6.66 In consequence of this common position, Germany consistently took the view, with which Liechtenstein agreed, that the Liechtenstein property was not part of the reparations regime, that Germany would not count it as such, and that in consequence it was under no obligation to compensate Liechtenstein or its nationals for the loss of that property.

(c) Germany's unwarranted change of position after 1990

6.67 In 1990 Germany's express obligation to compensate those whose property was taken as German property under the reparations regime was terminated. Liechtenstein's legal position in respect of that change in the system of the Reparations Convention was of course unaffected, since it was so far as Liechtenstein was concerned *res inter alios acta*. But it was legitimate to infer from the agreements and actions of this period that the established approach to German property and the reparations regime would be maintained. For example the deletion of the reparations obligation was not intended to deprive any person of a right to compensation but was a reflection of Germany's view that the obligation to compensate had been fully performed.[182] But this turned out not to be the case.

6.68 In the period after 1995 Germany progressively took the position that the Liechtenstein property was covered by the reparations regime as German property, with the consequence, inter alia, that Liechtenstein's claim to such property, if in Germany or subject to the jurisdiction of the German courts, would be denied. This was a clear change of position on the part of Germany.[183]

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182 See above para. 3.54.

183 See above paras. 3.15 *et seq*.

6.69 This position was referred to in an aide-mémoire of 4 October 1995 by Liechtenstein to Germany (Annex 35), which recited the facts and their consequences in the following terms:

> *"1945 wurde das Vermögen aller liechtensteinischer Staatsbürger, darunter auch umfangreicher Besitz des seinerzeit regierenden Fürsten von Liechtenstein, als Staatsoberhaupt, von der Regierung der Tschechoslowakei unter Ministerpräsident Benes entschädigungslos konfisziert. Zur Begründung berief sich die tschechoslowakische Regierung darauf, dass alle liechtensteinischen Staatsbürger als "Deutsche" im Sinne des Dekrets Nr. 12 vom 21. Juni 1945 anzusehen seien.*
>
> *Gegen diese Konfirmationen wurde sowohl auf diplomatischem als auch rechtlichem Wege von der seinerzeitigen Regierung Liechtensteins wie auch dem Fürsten von Liechtenstein vergeblich demonstriert. Ansätze zu einer Regelung dieser das Verhältnis zwischen Liechtenstein und der seinerzeitigen Tschechoslowakei belastenden Fragen wurden durch die Machtergreifung durch die kommunistische Partei zunichte gemacht.*
>
> *Nach der Rückkehr der demokratisch gewählten Regierung in der Tschechoslowakei wurden die liechtensteinischen Ansprüche auf Rückgabe - oder zumindest Entschädigung - durch die liechtensteinische Regierung erneuert. In grundsätzlicher Anerkennung des durch das kommunistische Regime verursachten Unrechts, erfolgten Restitutionen einzig von Konfiskationen und Enteignungen nach 1948. Alle Enteignungsakte auf der Grundlage der sog. Präsidenten-Dekrete von Ministerpräsident Benes wurden nicht in Frage gestellt.*
>
> *Anlässlich einer Ausstellung über niederländische Malerei in dem Kölner Walraff-Richartz-Museum mußte der regierende Fürst von Liechtenstein, Hans Adam II., feststellen, dass ein seit dem Jahre 1945 verschollen geglaubtes, in Wirklichkeit jedoch von der tschechoslowakischen Regierung aufgrund des Präsidenten-Dekretes Nr. 12 konfisziertes Bild aus dem fürstlichen Eigentum ausgestellt wurde. Durch seine deutschen Rechtsvertreter erwirkte er eine auf Sequestration gerichtet Sicherungsverfügung gegen die Stadt Köln als Besitzer des Bildes und Rechtsträger des Walraff-Richartz-Museums. In dem sich anschließenden Hauptsacheverfahren, gerichtet gegen die Stadt Köln als Besitzer, trat die Tschechische Republik als Streithelfer auf Seiten der Stadt Köln dem Prozeß bei,*

weigerte sich jedoch, diesen anstelle der Stadt Köln zu übernehmen. Diese bleibt vielmehr nach wie vor Hauptpartei dieses Rechtsstreits.

Im Verlaufe dieses Prozesses wurde von der Tschechischen Republik die Behauptung wiederholt, dass Liechtenstein einen Teil der deutschen Nation bilde und alle liechtensteinischen Staatsbürger, also auch das Staatsoberhaupt von dem Fürstentum Liechtenstein, als Deutsche anzusehen seien.

Da die Stadt Köln dieser Rechtsauffassung ihrer eigenen Streithelferin in dem Prozeß nicht entgegengetreten ist, wird ihr diese nach der deutschen Zivilprozeßordnung zugerechnet. Da auf der anderen Seite die Stadt Köln als öffentlich-rechtliche Körperschaft einen Teil der Bundesrepublik Deutschland darstellt und der Rechtsaufsicht des Landes Nordrhein-Westfalen unterliegt, stellen sich folgende Fragen:

1. Entspricht die von der Stadt Köln mittelbar eingenommene Haltung auch der Auffassung der Bundesrepublik Deutschland?

2. Sollte die Haltung der Stadt Köln nicht der Auffassung der Regierung der Bundesrepublik Deutschland entsprechen, welche Möglichkeiten gibt es, auf die Stadt Köln einzuwirken, von derartigen rechtsverbindlichen Erklärungen mit weitreichenden Konsequenzen auch auf das Verhältnis zwischen dem Fürstentum Liechtenstein und der Bundesrepublik Deutschland im Hinblick auf die Reparationsfrage abzusehen, um ein einheitliches Bild in der außenpolitischen Haltung der Bundesrepublik Deutschland gegenüber dem Fürstentum Liechtenstein wiederherzustellen?"

Translation:
"In 1945, the property of all Liechtenstein citizens, including extensive property owned by the then Reigning Prince of Liechtenstein as Head of State, was confiscated without compensation by the Government of Czechoslovakia under President Beneš. Stating the reasons for their measures, the Czechoslovak Government invoked the provision that all Liechtenstein citizens had to be regarded as 'Germans' within the meaning of the Decree No. 12 of 21 June 1945.

At the time, the then Government of Liechtenstein and the Prince of Liechtenstein demonstrated against such confirmations both by diplomatic and legal means, but without success. Initial stages of an attempt to solve this problem which weighed on the relationship

between Liechtenstein and the then State of Czechoslovakia were destroyed when the Communist Party seized power.

Upon the return of a democratically elected Government in Czechoslovakia, the Liechtenstein Government renewed Liechtenstein claims for restitution - or at least compensation. In principle acknowledgment of the injustices suffered under the communist regime, restitutions were only effected for confiscations and expropriations carried out after 1948. All expropriation measures carried out on the basis of the so-called Presidential Decrees of President Beneš were not called into question.

On the occasion of an exhibition about Dutch painting in the Walraff-Richartz Museum in Cologne, the Reigning Prince of Liechtenstein, Hans-Adam II, was surprised to find that a painting shown there had belonged to the princely property and was presumed to be lost since 1945, while it had in fact been confiscated by the Czechoslovakian Government on the basis of the Presidential Decree N. 12. By the agency of his German legal representatives, the Prince obtained an order against the Municipality of Cologne - possessing the painting at the time in its capacity as the legal entity responsible for the Walraff-Richartz-Museum - to have the painting kept in the custody of a sequestrator. In the proceedings on the merits of the case, in which the Municipality of Cologne as possessor of the painting acted as defendant, the Czech Republic intervened as a third party on the side of the Municipality of Cologne, but refused to take the place of the Municipality of Cologne in the proceedings. Hence, the latter has remained principal party of this lawsuit.

In the course of the proceedings, the Czech Government repeated its assertion that Liechtenstein was part of the German nation and that all Liechtenstein citizens, i.e. inclusive of the Head of State of the Principality of Liechtenstein, have to be regarded as Germans.

During the proceedings, the Municipality of Cologne did not counter this legal opinion presented by the third party intervening on the side of Cologne, and hence such opinion is attributable to the Municipality of Cologne in accordance with the German Code of Civil Procedure. Considering that, on the other side, the Municipality of Cologne as a public corporation is part of the Federal Republic of Germany and - as far as questions regarding the legality of administrative activities are concerned - under the authority of the Land North-Rhine Westphalia, the following questions arise:

> 1. Does the position indirectly taken by the Municipality of Cologne correspond to the position taken by the Federal Republic of Germany?
>
> 2. In the event that the position of the Municipality of Cologne does not correspond to the point of view supported by the Government of the Federal Republic of Germany, what possible means are available to influence the Municipality of Cologne to the effect that the latter will refrain from making such declarations of a legally binding nature which are bound to have far-reaching consequences for the relationship between the Principality of Liechtenstein and the Federal Republic of Germany also with respect to the reparation issue, and in order to restore the Federal Republic of Germany's consistent attitude vis-à-vis the Principality of Liechtenstein with regard to foreign affairs?"

6.70 Germany did not formally reply to this note, but its subsequent conduct, as evidenced by the position taken before the German courts,[184] before the European Court of Human Rights,[185] and in subsequent diplomatic exchanges[186] evidences its refusal "to restore the Federal Republic of Germany's consistent attitude vis-à-vis the Principality of Liechtenstein with regard to foreign affairs".

6.71 It is not for Liechtenstein to seek to justify Germany's conduct in this regard; Germany can plead such justifications as it wishes to propose in the course of the pleadings in the present case. But in any event, no justification or warrant for Germany's change of position appears. As noted already, Germany was not in a situation such as *force majeure*, distress or a state of necessity - which might apply even in absence of responsibility - of such a nature that it had to adopt the behaviour it took; nor has Liechtenstein consented to or acquiesced in this behaviour.

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184 See above paras. 3.31 *et seq.*

185 See above paras. 3.37 *et seq.*

186 See above paras. 3.42 *et seq.*

(d) The detriment to Liechtenstein arising from Germany's change of position

6.72 Liechtenstein and its nationals have suffered detriment as a result of Germany's unjustified change of position, and have done so in a number of ways. These need only to be summarized here.

6.73 In the first place, there was the loss of the Pieter-van-Laer painting itself, to which on the basis of Germany's own prior position Liechtenstein had, as a minimum, a legitimate claim. But the detriment does not stop with the immediate object of the litigation before the German courts, and the present claim would not have been brought if that was all that was at stake. Over and above the immediate issues associated with the return of the painting to the Czech Republic are the following elements: the opening up of a channel for the disposition of Liechtenstein movable property seized under the "Beneš Decrees"; the reinforcement of the Czech position with respect to the dispute, and the consequent harm to Liechtenstein nationals in terms of the further pursuit of their claims, as well as the direct moral and other injury suffered by reason of the classification of their property as German and its inclusion, without any manner of justification, in the war reparations regime. Furthermore the delay in the German change of position deprived Liechtenstein's citizens from the opportunity of seeking and obtaining compensation from Germany, whether in the courts or otherwise.

D. Conclusion

6.74 For these reasons, in addition to those presented in the preceding Chapters of this Memorial, it is submitted that the Respondent State is responsible to Liechtenstein, on its own behalf and on behalf of its nationals, in respect of the injury suffered by Germany's unjustified enrichment at their expense, and by virtue of their detrimental and fruitless reliance on Germany's good faith in maintaining the reparations regime in a form which did not implicate Liechtenstein or its nationals.

CHAPTER 7

LEGAL CONSEQUENCES OF GERMANY'S CONDUCT TOWARDS LIECHTENSTEIN

A. Germany's obligations of cessation and reparation (including compensation)

7.1 As demonstrated in the preceding Chapters, by including the Liechtenstein property within the scope of the post-war reparations regime Germany breached its international obligations towards Liechtenstein. As reflected in Article 12 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, annexed to General Assembly resolution 56/83 of 12 December 2001 (the ILC Articles), this conduct gives rise to the international responsibility of Germany. Article 12 provides:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

There is no doubt that any breach of an international obligation incumbent upon a State entails its international responsibility, with all its remedial consequences.

7.2 This legal principle is firmly rooted in international law. It was already expressed by the Permanent Court of International Justice:

> "This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States."[187]

In the *Rainbow Warrior* case, the Arbitral Tribunal emphasised that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[188]

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187 *Phosphates in Morocco (Preliminary Objections)*, 14 June 1938, PCIJ, Series A/B, No. 74, pp. 7 *et seq.*, p. 28.

188 Arbitral Tribunal Award, 30 April 1990, *Rainbow Warrior (New Zealand/France)*, Decision of 30 April 1990, UNRIAA, Vol. XX, pp. 217 *et seq.*, p. 251.

7.3 Article 1 of the ILC Articles reflects this principle:

> "Article 1
>
> Responsibility of a State for its internationally wrongful acts
>
> Every internationally wrongful act of a State entails the international responsibility of that State."

This principle is confirmed in Article 28:

> "Article 28
>
> Legal consequences of an internationally wrongful act
>
> The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part."

The commentary refers to decisions of this Court, of its predecessor and of arbitral tribunals as well as the relevant doctrine which emphases this duty and which establish the universal applicability of this principle.[189]

7.4 Germany explicitly recognized this general principle in its pleadings in the *LaGrand* case before this Court:

> "Germany submits that the general rules of State responsibility are applicable to all kinds of internationally wrongful acts unless expressly stipulated otherwise. This derives from the very nature of the rules on State responsibility as 'secondary rules' which are to be applied whenever 'primary' obligations have not been observed... To state otherwise would mean that it would be necessary for each and every treaty or convention to reiterate the rules on State responsibility."[190]

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189 ILC Report 2001, UN General Assembly, Official Records, A/56/10, pp. 63-65, esp. Nos. 35-48.

190 *La Grand Case (Germany v. United States of America)*, Memorial of the Federal Republic of Germany, Vol. I, 16 September 1999, para. 6.06.

7.5 The legal content of State responsibility is laid out in Articles 28 and following of the ILC Articles. A responsible State remains obliged to comply with the rule breached, as the breach does not terminate the obligation. This effect is reflected in Article 29 of the ILC Articles, entitled "Continued duty of performance":

> "The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached."

As a result of this obligation Germany continues to be bound to respect the neutrality of Liechtenstein, which the latter faithfully observed during World War II, and Germany has to desist from any acts which impairs this status.

B. The remedial situation

7.6 Although the legal consequences arising from an internationally wrongful act are determined by international law and arise irrespective of the will of the injured State, nonetheless it is in the first instance a matter for that State to indicate what forms of remedy it seeks in respect of any particular breach. This is reflected in Article 43 of the ILC Articles, pursuant to which an injured State "may specify in particular... (b) what form reparation should take in accordance with the provisions of Part Two".

7.7 In the consultations that took place between Liechtenstein and Germany, which are described in Chapter 3 above, Liechtenstein sought in the first instance an acknowledgement by Germany of its breach of the relevant obligations and assurances of respect in the future for Liechtenstein's sovereignty, and for the property rights and claims of its citizens. Germany not only refused to make such an acknowledgement but in the course of the discussions made it clear that its attitude was not limited to the Pieter-van-Laer painting, the subject of

the proceedings before the German courts; it applied to the Liechtenstein property as a whole and in general.[191]

7.8 Liechtenstein further claimed that this conduct of Germany, whether or not it was as such a breach of an international obligation of Germany to Liechtenstein, entailed an obligation on the part of Germany to compensate for loss suffered by Liechtenstein's nationals. Whether or not Germany was entitled to treat the Liechtenstein property as falling within the scope of the reparations regime, it was in any event required to compensate the owners of the property in question, either directly or by way of action by Liechtenstein on their behalf. As explained in Chapter 6, Germany's unjust enrichment at Liechtenstein's expense, and its unjustified change of position in the matter of the scope of the reparations regime, also entail an obligation to compensate persons affected thereby, independently of any responsibility as well as for its unjust enrichment and/or its change of position to Liechtenstein's detriment. But in the consultations referred to in the previous paragraph and in other diplomatic exchanges (as set out in Chapter 3), Germany also refused to make compensation consequential upon its classification of the Liechtenstein property as falling within the scope of the reparations regime. The remedies sought by Liechtenstein thus encompass remedies for all internationally wrongful acts of Germany, including its failure to compensate under the relevant primary obligations.

1. Declaratory relief

7.9 Liechtenstein seeks in particular to ensure respect for its sovereignty and neutrality, and for their legal consequences under the reparations regime. Liechtenstein having maintained strict neutrality during World War II, its property is in no case to be classified as property seized on account of reparations, nor is the value of that property to be accounted for in terms of any final settlement of

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191 See above paras. 3.37 *et seq.* and 3.42 *et seq.*

reparations claims arising from the war and its aftermath. In any event, any losses suffered by the owners of the Liechtenstein property are to be made good by compensation.

7.10 In these circumstances, Liechtenstein seeks, in the first instance, a declaration from the Court of the resulting legal situation in terms of Germany's responsibility.

2. Cessation and assurances and guarantees of non-repetition

7.11 Secondly, Liechtenstein seeks to ensure that Germany ceases for the future to consider the Liechtenstein property as having been "seized for the purposes of reparation or restitution, or as a result of the state of war", i.e. as covered by the reparations regime. In the *LaGrand* case Germany itself sought guarantees of non-repetition in order to prevent further violations of its rights and those of its nationals in the future. Quoting literature[192] as well as judicial practice,[193] it declared that this duty was "in full accordance with international practice and doctrine". In its judgment, this Court held:

> "that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), [of the Vienna Con-

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192 "En général, dans tous les cas de préjudices de caractère moral et politique, l'État lésé, entre autres formes de satisfaction demande des assurances de sécurité pour l'avenir, ce qui signifie que l'État intéressé s'acquittera avec plus de diligence ou plus d'efficacité de son devoir de protection.", F. Przetacznik,"La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", 78 *Revue générale de Droit international public* 1974, pp. 919 *et seq.*, pp. 966-967, and the examples cited therein. See also, *inter alia*, Sir R. Jennings and Sir A. Watts, (eds.) *Oppenheim's International Law*, Vol. 1, 9th ed., Longman, London, 1992, p. 532; I. Brownlie, *Principles of Public International Law*, 5th ed., Clarendon, Oxford, 1998, p. 463 (counting guarantees among measures of satisfaction).

193 The International Tribunal for the Law of the Sea explained that "(r)eparation may be in the form of 'restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition either singly or in combination' "; *M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, 38 ILM 1999, pp. 1323 *et seq.*, p. 1357, para. 171.

> vention on Consular Relations of 1963] must be regarded as meeting Germany's request for a general assurance of non-repetition."[194]

However, it continued that:

> "...if the United States, notwithstanding its commitment referred to ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."[195]

7.12 Article 30 of the ILC Articles, entitled "Cessation and non-repetition", reflects this duty. It provides:

> "The State responsible for the internationally wrongful act is under an obligation:
> a) To cease that act, if it is continuing;
> b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require."

As a consequence of the breach of respect of the sovereignty and neutrality of Liechtenstein and the rights of its nationals, Germany is under the duty to offer these measures. The circumstances of the case require such assurances and guarantees in view of the particular legal nature of the acts by which the new German position has been created. Without such a guarantee, Liechtenstein would have no certainty that a German court in future will not take again a decision in disrespect of the neutrality of Liechtenstein during World War II. Germany is bound to ensure that in future no legal ground will exist which could enable a judgment equivalent to that relating to the property of its nationals.

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194 *La Grand Case* (*Germany v. United States of America*), 27 June 2001, para. 124.

195 *Ibid*, para. 125.

3. Reparation and, in particular, compensation

7.13 In addition to the aforementioned obligations, Germany is obliged to provide full reparation for the wrong it has committed towards Liechtenstein, whether by its inclusion of the Liechtenstein property within the scope of the reparations regime or by its failure to compensate the owners of that property as a consequence of such inclusion.

7.14 As the Court most recently affirmed in its judgment in the *Arrest Warrant* case,[196] it is a general principle of law that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[197] Depending on the type and extent of damage, the relevant primary norm violated as well as the circumstances of the case, reparation takes the form of restitution, compensation and satisfaction.[198]

7.15 Article 35, entitled "Restitution", provides as follows:

> "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
> (a) Is not materially impossible;
> (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

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196 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, para. 76.

197 *Factory at Chorzów, (Merits)*, 13 September 1928, PCIJ, Ser. A, No. 17, 1928, p. 47.

198 See Article 34 of the Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Report*, 2001, UN General Assembly, Official Records, A/56/10, p. 52.

In cases where the wrongful act consists of a domestic judicial decision, restitution requires the abrogation of that decision or judgment.[199] From the point of view of international law, the fact that domestic law may not readily allow for such a measure, is immaterial for the responsible State's obligation to restitution because the provisions of the internal law of the author State may not serve as justification for failure to comply with an international obligation.[200] Neither may the wrongdoing State in such cases rely on material impossibility of restitution; since legal acts, including final judicial decisions, can in principle always be rescinded. Even though a change in the domestic legal order may give rise to difficulties or may even require an amendment of the responsible State's constitution, such abrogation can never be materially impossible.[201]

7.16 As established in this Memorial, the conduct of Germany violates Liechtenstein's rights and its status as a neutral State during World War II, as well as the rights of its nationals. Germany is obliged to re-establish the situation that existed prior to this violation. In the present case, Germany is therefore obliged to provide restitution, as set out in Article 35 of the ILC Articles.

7.17 Insofar as restitution does not make good the damage caused by the wrongful act, the State responsible for this act has to provide compensation for the material damage suffered by the injured State.[202] Compensation covers any financially assessable damage incurred by the State directly or indirectly through its

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199 Cf. Arbitral Tribunal Award, the *Martini* case (*Italy v. Venezuela)*, 3 May 1930, UNRIAA, Vol. II, pp. 973 *et seq.*, p. 1002.

200 See Article 32 of the Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Report*, 2001, UN General Assembly, Official Records, A/56/10, p. 51.

201 W. Riphagen, "State Responsibility. Sixth report on the content, forms and degrees of international responsibility; and "Implementation" (*mise en oeuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)", *Yearbook of the International Law Comission* 1985, Vol. II, part 1, pp. 3 *et seq.*, p. 9, sub-para. (9); G. Arangio-Ruiz, "Preliminary report on State responsibility", *Yearbook of the International Law Comission* 1988, Vol. II part 1, pp. 6 *et seq.*, p. 33, para. 98; J. Crawford, "Third report on State responsibility. Addendum", A/CN.4/507/Add.1, 15 June 2000, pp. 4-18, paras. 124-146.

202 See Article 36 of the Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report, 2001, UN General Assembly, Official Records, A/56/10, p. 52.

nationals. In the present case, Liechtenstein has incurred financially assessable damage by reason of the injury and detriment suffered by the owners of the Liechtenstein property, and Germany is obliged to compensate for this.

7.18 Alternatively, as explained in paragraph 7.8 above, Germany is under a primary obligation to provide compensation consequential upon the inclusion of the Liechtenstein property within the scope of the reparations regime. Its failure to provide such compensation is thus in itself an internationally wrongful act.

7.19 To the extent that neither restitution nor compensation can wipe out all the injurious consequences of the internationally wrongful acts referred to above, the responsible State has to provide satisfaction for the non-material damage suffered by the injured State. Typical cases of non-material damage involve violations of State sovereignty, i.e., of respect for the identity and personality of the State.[203] Included in this category is a failure of respect for a State's neutrality and for the rights of its nationals. Appropriate forms of satisfaction would include a declaration by the Court of the wrongfulness[204] and an apology by the respondent State.[205] In the present case, by its failure to respect Liechtenstein's status as a sovereign and neutral State, Germany violated Liechtenstein's rights and caused non-material damage to Liechtenstein for which it has to provide satisfaction in the form of an apology.

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203 The *Corfu Channel* Case (Merits), 9 April 1949, *I.C.J. Reports* 1949, pp. 4 *et seq.*, p. 35.

204 *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, 1 July 1999, 38 ILM 1999, pp. 1323 *et seq.*, p. 1358, para. 176; *Rainbow Warrior (New Zealand/France)*, Decision of 30 April 1990, UNRIAA, Vol. XX, pp. 217 *et seq.*, pp. 272-273.

205 Arbitral Tribunal Award, 5 January 1935, *The "I'm Alone" case (Canada/U.S.A)*, UNRIAA, Vol. III, pp. 1609 *et seq.*, p. 1618; *Rainbow Warrior (New Zealand/France)*, 6 July 1986, UNRIAA, Vol. XIX, 1986, pp. 199 *et seq.*, p. 213.

4. Conclusion

7.20 Accordingly, Liechtenstein requests that the Court make a declaration as to the responsibility, in principle, of Germany for its failure to respect the sovereignty and neutrality of Liechtenstein, and for its failure to compensate Liechtenstein for losses suffered, as set out in this Memorial. The Court should correspondingly decide on the appropriate forms of cessation and reparation among those discussed in this Chapter. In particular, it should declare that by reason of the breaches of obligation towards Liechtenstein, Germany is obliged to pay compensation for these breaches. Liechtenstein requests the Court, in a subsequent phase of the proceedings, to determine and to assess the amount of compensation due.[206]

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206 See *Fisheries Jurisdiction* (*Federal Republic of Germany v. Iceland*), 25 July 1974, *I.C.J. Reports* 1974, pp. 175 *et seq.*, pp. 204-206, paras. 76-77; *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 24 May 1980, *I.C.J. Reports* 1980, pp. 3 *et seq.*, pp. 45 *et seq.* (operative para. 6).

1. For the reasons set out above, and reserving the right to amend these submissions in the light of further evidence and argument, the Principality of Liechtenstein requests the Court to adjudge and declare that:

   (a) by its conduct with respect to Liechtenstein and the Liechtenstein property, Germany has failed to respect the sovereignty and neutrality of Liechtenstein and the legal rights of Liechtenstein and its nationals with respect to the property;

   (b) by its failure to make compensation for losses suffered by Liechtenstein and its nationals, Germany is in breach of the rules of international law;

   (c) consequently Germany has incurred international legal responsibility and is bound to provide appropriate assurances and guarantees of non-repetition, and to make appropriate reparation to Liechtenstein for the damage and prejudice suffered.

2. Liechtenstein further requests that the amount of compensation should, in the absence of agreement between the parties, be assessed and determined by the Court in a separate phase of the proceedings.

Dr. Alexander Goepfert
Agent of the Principality of Liechtenstein
Vaduz
28 March 2002

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THIS IS TO CERTIFY that this List of Annexes is complete and correct and contains all annexes attached to the Memorial.

Dr. Alexander Goepfert
Agent for the Principality of Liechtenstein
28 March 2002