the circumstances of each claim. The approach of the Supreme Court seems to be factually based.

As noted by the minority, however, this approach will make extensive litigation "almost inevitable" and is likely to lead to the "judicialisation of war" (para. 150, Mance, L.J., minority op.). This argument was taken even further by commentators who argue that the Supreme Court's approach has "undermined the armed forces' ability to operate effectively on the battlefield" because litigation "hangs a Sword of Damocles over the heads of commanders."[24] Nevertheless, these arguments exaggerate the effect of the judgment. First, since the Court ruled on an issue that arose *before* battle, the question of judicializing war is misplaced. Second, over the past sixty years there has been a rapprochement of human rights and international humanitarian law, but what this case does *not* do is mesh the two. Third, no question of operating effectively on the battlefield is prompted by this case, as the issues at hand arose out of facts that took place during the preparation and pre-deployment phase. Therefore, this is not a case of "the apogee of judicial encroachment"[25] but of narrowly confining the immunity of the state during combat.

When assessing the just, fair, and reasonable standard for imposing a duty of care on the Ministry, the Supreme Court held that assigning unrealistic or excessively burdensome duties to decision makers on the battlefield ought to be avoided (para. 99) and that attention must be paid to the public interest and the unpredictable nature and inevitable risks of armed conflict (para. 100). This is a carefully balanced and cautious conclusion, and accords with the holding of the Court on positive duties under Article 2 of the Convention.

The present case, however, leaves yet another important question unanswered: how international humanitarian law interacts with UK public law, part of which is the Convention. The underlying presumption of the decision is that the international law of armed conflict works in parallel with UK public law. The Human Rights Act of 1998, which incorporates the Convention, seems to work as a complement to the *jus in bello*. The decision underscores that the two paradigms have not yet fused, as the Supreme Court stressed that the facts in question took place during the pre-deployment and preparation phase of combat, which situates the present case in the human rights realm of *ante bellum*.

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National law of state liability and international law—fourth Hague Convention—customary international humanitarian law—compensation of civilian victims—judicial review of military operations

"BRIDGE OF VARVARIN." Nos. 2 BvR 2660/06, 2 BvR 487/07. *At* http://www.bundesverfassungsgericht.de. Federal Constitutional Court of Germany, August 13, 2013.

In the *Bridge of Varvarin* case, the Federal Constitutional Court of Germany (Bundesverfassungsgericht, the Court) held that customary international law, as applicable in German courts, did not afford Serbian residents a right to compensation for injuries caused by a NATO

[24] *Id.* at 10.
[25] *Id.* at 28.

airborne operation in Serbia during the Kosovo war in 1999.[1] The Court also rejected claims for compensation based on the relevant provisions of international humanitarian treaty law.

In the underlying case, compensation was sought by victims of a NATO military operation in which the Federal Republic of Germany (Germany or Federal Republic) allegedly participated. As a reaction to armed conflict between Serbs and Albanians, forced mass displacement, and various reported atrocities, the North Atlantic Treaty Organization first (and without success) threatened and later commenced military operations against the then Federal Republic of Yugoslavia to stop the violent assaults by the Serbian forces against the Albanians, who were fighting for independence. Germany, as a member of NATO, joined Operation Allied Force by providing airborne reconnaissance against the antiaircraft radar defense of the Serbian army. The federal parliament had approved the deployment of units of the German federal army beforehand in accordance with German constitutional law.[2]

The incident that constitutes the factual basis of the litigation occurred during this operation. On May 30, 1999, two F-16 warplanes bombed a bridge over the Morava River, which divides the Serbian town of Varvarin (para. 4). The bridge had been marked as a potential target on an operational planning list. In hindsight it became clear that the structure had been neither defended nor used for any military purposes by the Serbian army. Instead, at the time of the operation the bridge and its surroundings were crowded with civilians, ten of whom were killed and seventeen seriously wounded accidentally. To the present day, it remains unclear why and for what military purpose the warplanes fired the rockets. The nationality of the aircraft involved in the bombing has not been officially revealed, although speculation has it that the planes belonged to the United States Air Force. It is undisputed that German warplanes did not directly engage in the bombing, but they admittedly took part in a flanking reconnaissance mission on that day (*id.*).

Some civilians (non-German residents of Serbia) who were injured or lost relatives in the attack alleged that Germany had assisted the NATO forces during the miscarried operation and claimed compensation on that basis. They sued the Federal Republic, arguing that they were entitled to make such a claim under German public liability law and the international law of armed conflict. The German ordinary courts threw out the suits at all three levels. The regional court of Bonn denied that international law provided for a right to claim compensation, as international law had traditionally addressed individuals indirectly via their home state.[3] The sole exception was the European Convention for the Protection of Human Rights and Fundamental Freedoms,[4] which was not applicable here because the claimants were not subject to German jurisdiction in the sense of Article 1 of the Convention (paras. 6–7). As for the German law of state liability, it was not applicable to armed conflicts, as the international laws of war were *leges speciales* (para. 8). The higher regional court of Cologne quashed the

[1] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 13, 2013, docket nos. 2 BvR 2660/06, 2 BvR 487/07, *at* http://www.bundesverfassungsgericht.de/entscheidungen/rk20130813_2bvr266006.html ("*Bridge of Varvarin*"). Quotations of passages from the decision below were translated by the author.

[2] BVerfG Apr. 20, 1994, 90 BVERFGE 286 (388), 1994; BVerfG Feb. 12, 2008, 121 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 135 (153–55), 2008; BVerfG May 4, 2010, 126 BVERFGE 55 (69–70), 2010.

[3] Landgericht Bonn [regional court Bonn] Dec. 10, 2003, 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 525, 2004.

[4] See the judgment of the European Court of Human Rights under the Convention, *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333 (reported by Alexandra Rüth & Mirja Trilsch at 97 AJIL 168 (2003)).

appeal,[5] rejecting compensation because the German military staff was not involved in the bombing and no harmful conduct could be attributed to the Federal Republic (para. 11). The Federal Court of Justice[6] refused the final appeal and agreed with the lower courts that neither customary nor treaty-based international law afforded a sufficient basis for individual claims against a foreign state with regard to a purported violation of the laws of war (paras. 13–14).

Finally, in 2007, the claimants filed a constitutional complaint with the Federal Constitutional Court to have the judgments reversed. The competent chamber of the Court[7] dismissed the case because constitutional rights were not violated. It decided, in particular, that victims of military operations in a foreign country enjoy no individual right to compensation under customary international law.

Pursuant to Article 25 of the German Constitution, the "general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."[8] The term "general rules of international law" is usually interpreted as equivalent to (universal) customary international law. Article 25 of the Constitution has two effects: First, the provision incorporates general rules of international law, that is, universal customary international law,[9] into binding federal law, which transforms it automatically into national law. Second, it ranks customary international law above parliamentary statutory law (but below the Constitution). As a consequence, customary international law can override inconsistent statutory law. And a claimant may invoke the prerogative of customary international law over national statutory law before the courts,[10] which the Court reaffirmed here (para. 41). In contrast, treaty-based international law must obtain validity under national law by a transforming federal statute that gives an international treaty the national rank of federal statutory law.[11]

After referring to the generally accepted legal prerequisites of customary international law—a consistent practice attributable to the states forming the relevant international law community (the objective element) and the opinion that they are acting out of a sense of legal obligation (the subjective element)—the Court concluded that there are no customary rules that bestow a right to compensation on foreigners who suffered injuries in an armed conflict, even those for which the state is responsible (para. 43). True, states had occasionally agreed to compensate victims of military operations. But the rulings in those scattered and rare cases had never crystallized into a general entitlement to compensation under customary international law. The Court recalled the judgment of the International Court of Justice in *Germany v. Italy* (*id.*), which explicitly left undecided whether "international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim

[5] Oberlandesgericht Köln [higher regional court Cologne] July 28, 2005, 58 NJW 2860, 2005.

[6] Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 2, 2006, 169 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 348, 2006.

[7] The case was heard by the First Chamber of the Second Senate.

[8] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Basic Law], May 23, 1949, BUNDESGESETZBLATT, Teil I [BGBL. I], Art. 25.

[9] *E.g.*, BVerfG May 8, 2007, 118 BVERFGE 124 (135), 2007.

[10] BVerfG Dec. 16, 1983, 66 BVERFGE 39 (64), 1983; BVerfG June 9, 1971, 31 BVERFGE 145 (177–78), 1971; BVerfG (Chamber), Jan. 30, 2008, 13 KAMMERENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGK] 246 (252), 2008.

[11] GG Art. 59(2).

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compensation."[12] Similarly, the United Nations International Law Commission had drafted a set of rules to codify existing state practice and expressly excluded individual claims directly against the state, which indicated the lack of a sufficient basis for compensation claims enforceable by individuals under customary international law (*id.*).[13]

The Court then turned to the question whether the relevant provisions of international humanitarian treaty law formed a legal basis for individual compensation claims, and if so, whether they had evolved into customary international law. Both Article 3 of Hague Convention No. IV Respecting the Laws and Customs of War on Land of 1907 and Article 91 of Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts of 1977 constituted a legal basis for state responsibility.[14] Although Germany is party to both treaties, these provisions did not directly bestow a right upon individual victims to claim compensation. Thus, the Court left undecided whether the relevant treaty provisions had achieved the status of customary international law (para. 45).

In earlier jurisprudence considering Article 3 of the fourth Hague Convention, the Court had noted that the article merely codified the general principle of international law that the parties to a treaty are responsible for a breach of contract, so that an obligation to compensate was established only between the affected contracting parties. Such an interstate claim for compensation was clearly different from a primary claim of an affected individual arising from a violation of international humanitarian law.[15] Even though the history of the relevant treaty provisions indicated that they were designed to protect the individual in armed conflict, this objective did not provide the "basis for a direct claim, under original international law, of the affected individual for damages and compensation against the state" (para. 46).

The Court corroborated its interpretation by convincingly arguing, citing its prior jurisprudence, that the individual under the "traditional concept of international law"—an undisputed concept when the member states entered into the treaties mentioned above—was never a subject of international law (para. 46). "Disregarding (the permanently advancing) developments in the field of international human rights law, which have amounted to recognition of partial subjectivity of the individual under international law and to the establishment of treaty-based individual complaints, a comparable development in the field of compensation claims cannot be verified" (*id.*). Damages claims based on a violation of international law affecting foreign nationals were, at least in principle, still exclusively to be handled by the home state of the victim. The same reasoning held true for Article 91 of Protocol I (para. 47).

Another element of the claimants' constitutional complaint was that their right to be heard by a competent judge under Article 101(1) of the Constitution had been violated. Pursuant to Article 100(2) of the Constitution, if it is doubted, in the course of litigation, whether a rule

[12] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), para. 108 (Int'l Ct. Justice Feb. 3, 2012), *at* http://www.icj-cij.org (reported by Alexander Orakhelashvili at 106 AJIL 609 (2012)).

[13] Articles on Responsibility of States for Internationally Wrongful Acts, Art. 33(2), *in* Report of the International Law Commission on the Work of Its Fifty-Third Session 26, 28, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) (suggesting, however, that individuals might be able to bring such claims under human rights law).

[14] Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 91, June 8, 1977, 1125 UNTS 3.

[15] BVerfG Oct. 16, 2004, 112 BVERFGE 1 (32–33), 2004; BVerfG (Chamber), June 28, 2004, 3 BVERFGK 277 (283), 2004.

of customary international law constitutes an integral part of federal law and whether it directly creates rights and duties for the individual, the competent court shall obtain a decision from the Federal Constitutional Court (paras. 48–50). The reason for this procedural obligation is that, because of the often scattered and incoherent nature of state practice, the existence, and even more the precise content, of a rule under customary international law will usually be vigorously disputed. Vesting the interpretative competence with regard to customary international law in the Constitutional Court protects the Federal Republic from the binding effect of the sometimes erratic and poorly grounded decisions of lower courts that could be regarded—whether or not the court is minor—as state practice[16] and thus contribute to the formation of a customary rule. Since distinguishing between the creation and the interpretation of customary international law is not easy, the Federal Constitutional Court makes clear that its task under the preliminary reference procedure is not to develop international customary law but merely to interpret it (para. 51). This ostensibly modest approach, of course, obfuscates the true effect of the "interpretation," which will be regarded as state practice from an outside perspective and, as such, may have the effect of generating a right even if it was meant only as an attempt to interpret an already-existing rule. That is the likely consequence of a court's rejection of a customary rule granting compensation, which, in the guise of state practice, could be invoked by the courts of other states when searching for relevant customary international law.

Finally, the Court considered whether the standards applied by the ordinary courts that denied public liability were compatible with substantive—in contrast to procedural—constitutional requirements. The Court assumed that international law—whether or not it provides for individual tort claims—does not exclude national remedies for public liability.[17] The Court criticized the Court of Justice for deferring to the military's evaluation and choice of strategy in armed conflict on the grounds that those issues fell within the military's discretion. The Constitutional Court affirmed that under the German doctrine of effective judicial control,[18] judges on the bench must exercise full-scale judicial review concerning the law as well as the facts (paras. 52–53). Administrative (and military) discretion is an exception to that rule and must be justified (para. 54). Rather surprisingly, the Court held that whether targeting infrastructure is a legitimate military aim was a question of law, hence subject to in-depth judicial review:[19] "The preparation of military target lists and the noninvocation of a veto right against the inclusion of an object on those lists as a legitimate military target are not political decisions, which would be beyond judicial control" (para. 55). In this case, however, the list did not reflect a final military decision by NATO to attack those targets but a temporary and abstract assessment that they might be marked for attack should circumstances occur that would allow such action in conformity with international law. Against this background, it was reasonable to include the bridge of Varvarin as a potential target (para. 58).

Additionally, the Court, in a broad obiter dictum, hinted at possible further procedures in similar cases: as the plaintiffs did not have access to the facts about the operation and therefore

[16] ICJ Statute Art. 38(1)(b).

[17] BVerfG May 13, 1996, 94 BVERFGE 315 (328–30), 1996 (concerning forced laborers during World War II).

[18] GG Art. 19(4).

[19] A U.S. circuit court denied that a dispute regarding damage caused by military operations (in that case, the shooting down of an aircraft by a naval vessel) fell under the political question doctrine. *See* Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992). Thus, the tort claim was justiciable. To similar effect, see *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984).

lacked sufficient evidence, the Court argued that effective judicial review might permit modification of the burden of proof by requiring the state to explain its military conduct and disclose facts that had been kept secret (para. 64). Thus, the Court avoided the question whether principles of state liability *under national law* may be applied to military operations in foreign countries. Those claims based on customary international law that cannot be advanced before the German courts must still be distinguished from those based on German law, which might be invoked under different circumstances when damage caused by military action—as in Afghanistan—can easily be attributed to Germany.

* * * *

The Constitutional Court's decision is important to the international community, first, because it rejected the popular argument that individual victims of military operations are entitled to claim compensation because of the infusion of human rights concerns into international law. Second, the decision demonstrates the abstract character of the concept of international law applied by the Court, which should have substantial bearing on future constitutional cases affecting international law disputes. The question of individual compensation is deeply entwined with the concept of international law and the status of the individual within it.[20] Accordingly, the Court constantly looked to the concept of international law behind the compensational provisions in humanitarian law. It clarified that customary international law does not provide for individual compensation claims and based its analysis primarily on the structure of international law as *interstate* law.

To be sure, the traditional concept of international law has gradually been enriched by individual rights since World War II. The developments in both international human rights law and international criminal law have enhanced the status of the individual in international law, though (as seldom discussed) these developments are not a one-way street: international criminal law even deals with the individual primarily to his disadvantage, as it provides a direct basis for punishment. Nonetheless, the increasing recognition of the individual as a subject of international law remains timely and is limited to certain, rather narrow fields of law, which are still based on (and therefore tightly circumscribed by) state consent; their embrace of individual rights does not erode the general structure of international law, where, in principle, the individual remains an object of protection. Individual remedies for a violation of international law are explicitly instituted against the state under special treaty-based regimes, like the elaborate system established by the European Convention on Human Rights. The Constitutional Court has wisely withstood the temptation to adopt modern *theoretical* concepts of individualization of international law to reinterpret the existing *positive* body of international humanitarian law. The Court's decision might even be a portent that the overstretched concept of the individualization of international law has reached its useful limits.

Since international law imposes no obligation on states to provide individual remedies to obtain compensation, the national law of public liability is also not transformed under the influence of international law. Still, the question remains whether the national law of state liability is applicable to torts caused by military operations abroad. It would have furthered legal certainty if the Constitutional Court had addressed this crucial, but controversial, question—

[20] *See* FRITZ OSSENBÜHL & MATTHIAS CORNILS, STAATSHAFTUNGSRECHT 43 (6th ed. 2013).

which was previously left undecided by all higher German courts[21]—instead of focusing on the facts presented in the case before it. Tort liability for breaching the laws of armed conflict might be seen as an additional safeguard toward making international law more effective. For example, it has been argued regarding this question in the United States that the "presence of the remedy . . . would demonstrate to the world and to U.S. citizens that the United States is serious about adhering to the rule of law in its conduct of military operations."[22]

This author is reluctant to agree. National courtrooms are not necessarily adequate forums for assessing state conduct in international affairs, in particular armed conflicts. The perspective of the judge deciding on tort (or criminal) liability is unavoidably of a discrete case where the parties present arguments and evidence. Armed conflicts, on the other hand, are usually widespread, complex, and highly political. Applying tort liability against the state for military operations entails the risk that macroconflicts will be broken down into separate cases that can be fought as microwars at court, bereft of their political character. The rather discouraging experience with international criminal courts, torn between deciding cases and writing history, should be a warning not to overdo the judicialization of foreign affairs. But that danger holds true for "incorporated" rules of customary international law as well as for national legislation that could specifically authorize such suits as *Bridge of Varvarin*, in that way universally extending jurisdiction to extraterritorial acts for which the state could be held liable. In fact, in 2002, the federal legislature did just that by adopting the German Code of Crimes Against International Law in the statute transposing into domestic law the crimes defined in the Rome Statute of the International Criminal Court, which empowers the courts to exercise universal jurisdiction over criminal offenses.[23]

In contrast, the Federal Constitutional Court presupposes that the constitutional guarantee of an effective judicial remedy has extraterritorial effect, that is, that it permits judicial review even if the disputed act of public authority was committed abroad and the claimant is a foreigner, as long as the substantive right invoked is extraterritorially applicable. The rather bold standards the Court applies to judicial review inadvertently reveal that it might overburden the judicial branch to make military operations the object of compensational litigation and in-depth surveillance by the judiciary—in particular, under German constitutional law with its concept of comprehensive justiciability. Of course, in Germany, as in the United States, individual constitutional rights are "a source of constitutional limitation on foreign policy and process."[24] And the Court has tried to restrain executive discretion by wielding tighter judicial control after a period in which the judicial branch had seemingly loosened the legal reins on administration. Nonetheless, it is doubtful that military operations are an appropriate means for testing a course correction. The Court actually treats military operations as if they were regular administrative procedures. Even though it implicitly seems to distinguish between the abstract planning of a military operation and its fulfillment by armed forces, the high level of control of military requirements— comparable to that of police operations—will leave its mark

[21] The Federal Court of Justice has rejected liability for individual injuries caused through the end of World War II. *See* BGH June 26, 2003, 156 BGHZ 279 (293–96), 2003.

[22] Kenneth Bullock, *United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation*, 58 L. & CONTEMP. PROBS. 139, 159 (1995).

[23] Völkerstrafgesetzbuch [Act to Introduce the German Code of Crimes Against International Law], June 26, 2002, BGBL. I at 2254, 42 ILM 998 (2003) (Eng. trans.).

[24] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 283 (2d ed. 1996).

on the organization of military missions abroad, in addition to the constraints put on military missions by the growing impact of international criminal law and extraterritorial criminal jurisdiction under national law. When the differences between military and police operations are blurred—as they are in the so-called war on terror—internal police actions will become fiercer and, as the other side of the same coin, military assessments will be taken over by the judiciary. The embedded jurist will become essential to operational planning staffs, whose use of intelligence information may be seriously hampered when its later disclosure in the course of litigation for compensation must be taken into account. The NATO allies might be more than a little discomfited by the possible imposition by a German civil or administrative court of in-depth judicial surveillance of their joint military operations. Judicialization of armed conflicts comes at a price.

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