Leiden Journal of International Law, 19 (2006), pp. 441–458
 Printed in the United Kingdom doi:10.1017/S0922156506003372

The End of the Road for the Prince? Sixty Years after the Czechoslovak Confiscation of Liechtenstein Property

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Abstract
In 1945 Czechoslovakia confiscated Liechtenstein property as reparation for the damage done by Nazi Germany. Private claims failed before the courts of Czechoslovakia, and international law did not provide Liechtenstein with a means of action against Czechoslovakia. When the property was on loan in Germany, a private case for recovery was declared inadmissible by the German courts, in line with Germany's international obligations. The European Court of Human Rights accepted these decisions. Liechtenstein, on the other hand, considered them to violate its sovereignty. In 2005, the International Court of Justice decided that it lacked temporal jurisdiction to rule on the issue.

Key words
access to justice; confiscation of neutral private property; International Court of Justice; jurisdiction *ratione temporis*; reparation; Second World War

1. Introduction

On 10 February 2005, the International Court of Justice (ICJ) rendered a judgment on the preliminary objections in the case between Liechtenstein and Germany concerning *Certain Property*. The ICJ was the final judicial forum to secure reparation for a case of confiscation of private property which originated in the immediate aftermath of the Second World War and which was heard before several national jurisdictions, the European Court of Human Rights, and the ICJ.

More concretely, the case revolved around a painting formerly owned by the Liechtenstein princely family and confiscated by Czechoslovakia in 1946. Czechoslovakia considered the people of Liechtenstein to be of 'German origin' and, accordingly, their property subject to confiscation pursuant to postwar Allied agreements on German external assets. International law did not provide Liechtenstein with a means of action against Czechoslovakia.

As a condition for its regaining independence in 1952, Germany undertook not to allow any cases concerning the postwar Allied taking of private property to

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be heard before its courts. Liechtenstein, however, was of the opinion that this rule only affected claims regarding the property of German nationals, not of the nationals of neutral states such as Liechtenstein. The German courts refused to make this distinction and relied for the qualification of nationality on the views of the confiscating state. By doing so, Liechtenstein felt that Germany violated its sovereignty and the property rights of its nationals, and brought the case before the ICJ.

This article will first describe the historical and legal background of the case, the origins of which date back to the immediate post-Second World War period and the reparation owed by Germany on account of the war (section 2). The next part will discuss the proceedings initiated by Prince Hans-Adam II of Liechtenstein before the German national courts and before the European Court of Human Rights (section 3). The adjudication of Germany's preliminary objections to the jurisdiction of the ICJ will then be analysed and commented on (section 4).

2. Background

The case is set against the background of the reparation owed by Germany on account of the Second World War. It has been clear since the Treaty of Versailles in 1919, settling the peace after the First World War, that a state is under an obligation to provide reparation for the damage caused by its internationally unlawful acts.[1] Such an obligation, as well as its precise scope, is typically enshrined in a peace treaty. After the Second World War, however, no peace treaty was concluded with Germany. Its obligations were enshrined in consecutive inter-Allied and international agreements.

2.1. Peace conferences and the Paris Reparations Agreement

Germany's responsibility after the Second World War was grounded in its violation of both *jus ad bellum* and *jus in bello*.[2] The scope of its liability for reparation had already been extensively debated at the Yalta (or Crimea) and Potsdam (or Berlin) Conferences of 1945, when the leaders of the United States, the Soviet Union, and the United Kingdom further dealt with such topics as the division of Germany into zones of occupation, the punishment of war criminals, and the creation of the United

1. Peace settlements in earlier times were characterized by the imposition of tributes or war indemnities, the existence and extent of which depended solely on the will of the triumphant state. See I. Seidl-Hohenveldern, 'Reparations', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4 (2000), 178, at 178–9. Lesaffer has eloquently formulated the modern position as the 'ascendancy of right over might.' R. Lesaffer, 'Conclusion', in R. Lesaffer (ed.), *Peace Treaties and International Law in European History. From the Late Middle Ages to World War One* (2004), 399 at 400.
2. See for instance B. Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', (1984-II) 185 *Recueil des cours* 1, at 91: 'The duty of reparation, by itself, was related to the whole damage caused by the war . . . There was . . . no distinction between direct and indirect damages, losses and expenses. The duty of reparation was not limited to expenses of the war or to damages caused by violations of the Hague Rules. The duty of reparation was understood as an obligation en bloc to compensate for the integral damage caused by the illegal war and on principle was regulated in this way. The whole damage was comprised in it.'

https://doi.org/10.1017/S0922156506003372 Published online by Cambridge University Press

Nations. At Yalta the three states agreed that reparation should be provided from the following sources:

(a) Removals . . . 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 the purpose of destroying the war potential of Germany.

(b) Annual deliveries of goods from current production for a period to be fixed.

(c) Use of German labor.[3]

At the Potsdam Conference it was decided that the reparation should take into consideration Germany's capacity to pay, and that enough resources should be left 'to enable the German people to subsist without external assistance'.[4] As a result of the general devastation of the German economy, it soon became clear that available removals from German territory and deliveries from current production would be quite inadequate. It was equally evident that the use of German labour would come down to a modern form of slavery and, accordingly, had to be rejected. Consequently, the main source for reparation consisted of German external assets.

As the tensions between East and West steadily mounted, each bloc was left to secure its own reparation. The Russian hegemony over debtor and creditor states in eastern Europe pushed the issue of reparation into obscurity. In the western hemisphere, on the other hand, an elaborate reparation scheme was established under the auspices of the United States, the United Kingdom, and France.

Various Allied states had subjected German external assets present on their territories to seizures as a guarantee for Allied reparation claims against Germany. These factual takings, as well as comparable future measures, were legitimated by the Paris Reparations Agreement of 1946:

> Each Signatory Government shall . . . 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.[5]

This rule, which also figured in the 1919 Versailles Treaty, forms an exception to the general international law rule of protection of private property rights.[6] Three

3. Protocol of the Proceedings of the Yalta Conference, 11 February 1945, Part V, para. 2.
4. Protocol of the Proceedings of the Potsdam Conference, 1 August 1945, Part II, B, para. 19.
5. 1946 Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, 555 UNTS 69 at Part I, Art. 6(A). On the basis of this provision, for instance, the United States passed the 1948 War Claims Act, which prevented the return of German property seized on US territory during the war by the Alien Property Custodian. The Act created a War Claims Fund to provide reparation from the proceeds of the sales of seized enemy property. See 'The Policy and Practice of the United States in the Treatment of Enemy Private Property', (1948) 34 *Virginia Law Review* 928, at 939–41.
6. See I. Brownlie, *Principles of Public International Law* (2003), 511–12, allowing an exception to the protection from expropriation of private foreign property for 'the taking of enemy property as part payment of reparation for the consequences of an illegal war'. See also C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), 1737: 'utilization of enemy private property is not confiscatory when it serves to release the enemy from the payment of claims against it'. Quoted in H. P. DeVries, 'The International Responsibility of the United States for Vested German Assets', (1957) 51 AJIL 18, at 27.

conditions can be distilled from First and Second World War practice.[7] First and foremost, confiscation is only allowed for the purpose of reparation. This implies that only those goods may be seized which belong to the nationals of a responsible enemy state. Second, only enemy goods within the jurisdiction of the taking state – that is, generally speaking, those present on its national territory – may be confiscated. Third, the takings need to be agreed to by the responsible enemy state, usually in an international treaty.

2.2. The Beneš Decrees

One of the states with the highest concentration of German assets on its territory was Czechoslovakia. Already in 1945 it had seized such properties pursuant to a series of Presidential Decrees, called the Beneš Decrees after the then president.[8] Under the terms of Decree No. 12, which is the most relevant for this case, the Czechoslovakian authorities could confiscate all agricultural property of German nationals. Such property was defined to include, *inter alia*, buildings and installations and movable property pertaining thereto. One of the goods thus confiscated was a painting by Pieter van Laer owned by the Liechtenstein head of state, Prince Franz Josef II.[9]

In 1946, the Beneš Decrees were legitimated when Czechoslovakia became a party to the Paris Reparations Agreement, which allowed the taking of German external assets. While it was thus never contended that the Decrees were unlawful in themselves, they were criticized to the extent that they were allegedly applied to non-German assets. For instance, Prince Franz Josef II in 1951 appealed against the Czechoslovakian authorities' interpretation of the Beneš Decrees applying to Liechtenstein property:

> [T]he competent Czechoslovakian administrative authorities as well as the Bratislava Administrative Court . . . found that Presidential Decree no. 12 of 21 June 1945 applied to the [Liechtenstein nationals'] confiscated property. Article 1 § 1 (a) of this decree provided for the confiscation of agricultural properties of 'all persons of German . . . nationality' irrespective of their citizenship. The notions of 'German nationality', or of 'German origin' ('*deutsche Volkszugehörigkeit*'), likewise used at that time, comprised as relevant elements a person's citizenship and nationality, the latter depending on the mother tongue.[10]

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7. B. Delmartino, 'Reparation for the Violation of Property Rights during War', doctoral thesis, Katholieke Universiteit Leuven, 2006, 305–7.
8. A total of 141 decrees were issued between July 1940 and October 1945, which regulated various aspects of political, economic, cultural, and social life. Only a limited number of these dealt with property rights: Decree No. 4 of 19 May 1945 on the nullity of property transfers which took place after 29 Sept. 1938; Decree No. 12 of 21 June 1945 on the confiscation and accelerated allocation of agricultural property belonging to German and Magyar nationals and of those having committed treason and acted as enemies of the Czech and Slovak people; Decree No. 100 of 24 October 1945 on the nationalization of mines and industrial plants; Decree No. 108 of 25 October 1945 on the confiscation of all property belonging to the German Reich. See A. Gattini, 'A Trojan Horse for Sudeten Claims? On Some Implications of the *Prince of Liechtenstein v. Germany*', (2002) 13 EJIL 513, at 513 n. 1.
9. The painting by the seventeenth-century Flemish painter Pieter van Laer, entitled *Szene an einem römischen Kalkofen* (or *Der Große Kalkofen*), had been part of the Liechtenstein princely collection since 1767 and had hung in the Moravian castle of Valtice until it was confiscated. It was valued at approximately DM 500,000.
10. *Prince Hans-Adam II of Liechtenstein v. Germany*, Decision of 12 July 2001, [2001] ECHR Rep. VIII, at para. 18. As indicated by Germany, 'Liechtenstein did not explain whether any of the other property owners have brought any legal action before Czechoslovak courts nor did it explain to what extent it has exercised diplomatic

In other words, the Czechoslovakian courts and administration found that the taking of Liechtenstein property under the Beneš Decrees was lawful since Liechtenstein nationals, regardless of their nationality, had to be treated as persons of 'German origin', which sufficed to entail the applicability of the Paris Reparations Agreement.[11]

2.3. Claims against Czechoslovakia and its successor states

Private claims regarding Liechtenstein property failed before the national courts of Czechoslovakia, and that state would enjoy immunity from jurisdiction before the courts of Liechtenstein or before the courts of any third state.[12] As a result, relief could only be sought at international level. The case pre-dated the adoption of European Convention of Human Rights, however, and no other international instrument granted individual standing on the subject.

Accordingly, only the possibility of a Liechtenstein state claim remained. For lack of a special agreement, a compromissory clause, or reciprocal optional clauses, however, 'there appears to be no clear jurisdictional basis for any ICJ claim between Liechtenstein and Czechoslovakia or its successors'.[13] It may nevertheless be interesting to have a prima facie look into the theoretical issue of the merits of a claim by Liechtenstein against Czechoslovakia or its successors – in particular the Czech Republic, where most of the goods in question are located.

As mentioned above, the Beneš Decrees were not unlawful in themselves, as they were legitimated by the Paris Reparations Agreement. The latter, however, limits the goods available for confiscation to German properties, that is, those owned by German nationals. Under international law it is up to each state to determine who its nationals are.[14] A state may not decide on the nationality of a foreign citizen.[15] In other words, it seems that Czechoslovakia was not in a position to treat Liechtenstein nationals as persons of German origin in order to trigger the application of the Paris Reparations Agreement.

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protection on behalf of Liechtenstein nationals.' ICJ, *Certain Property (Liech. v. Ger.)*, Germany's Oral Pleadings of 14 June 2004, at para. 13.

11. See ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, Judgment of 10 February 2005 (not yet published), at para. 13: 'The properties confiscated under Decree No. 12 comprised some owned by Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein. These measures were contested by Prince Franz Josef II in his personal capacity before the Administrative Court in Bratislava. On 21 November 1951, it held that the confiscations of the property of the Prince of Liechtenstein were lawful under the law of Czechoslovakia.'
12. The confiscation by Czechoslovakia clearly constituted an act *jure imperii* for which the state enjoyed immunity. As for national laws dealing with immunity, most notably the US Foreign Sovereign Immunities Act, the case does not present the required connection to the forum state to justify an exception to immunity. The situation could be different, however, if the painting were on loan in the forum state.
13. J. R. Crook, 'The 2001 Judicial Activity of the International Court of Justice', (2002) 96 AJIL 397, at 407.
14. See for instance the 1930 Hague Convention on Conflict of Nationality Laws, 179 LNTS 89, pursuant to Art. 1 of which 'It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.'
15. See B. Renauld, 'Le Code de la nationalité belge. Présentation synthétique et développements récents', in J.-Y. Carlier and S. Saroléa (eds.), *Droit des étrangers et nationalité* (2005), 9 at 13–14: 'Chaque État est . . . exclusivement compétent pour déterminer les règles d'acquisition et de perte de sa propre nationalité. En corrolaire, les États ne disposent d'aucune compétence pour légiférer en matière de nationalité étrangère. Il faudra donc se reporter à la législation de chaque État pour savoir si une personne en possède la nationalité.'

2.4. The Settlement Convention

While various Allied states, including Czechoslovakia, enacted national legislation confiscating external assets, Germany, or at least the western part, was on the road to democratization. In 1949, pursuant to the Basic Law, the Federal Republic of Germany (FRG) was established. As the main Western powers wanted to welcome it back into the international community as a strong ally in a divided Europe, a series of agreements ending its occupation were concluded in Bonn in 1952 and amended in Paris in 1954.[16]

Nevertheless, the FRG had to confront its Nazi past of aggression, persecution, and destruction. To that end, the Convention on the Settlement of Matters Arising out of the War and the Occupation (hereinafter the Settlement Convention) was included in the Bonn and Paris Agreements.[17] It contained provisions on (internal and external) restitution of spoliated property, on compensation for racial persecution, and on reparation in general for war damage. In this context Germany undertook the following engagements:

> 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 . . . , seized for the purpose of reparation or restitution, or as a result of the state of war.
> . . .
> 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.[18]

The FRG further undertook to provide compensation to the former owners of confiscated German external assets.[19] The reparation regime of the Settlement Convention was introduced pending a definitive peace settlement.[20] Although not strictly speaking a peace treaty, the 1990 Treaty on the Final Settlement with regard to Germany provided such a definitive arrangement.[21] In the context of the four-plus-two treaty, the parties to the Settlement Convention – that is, the three Western powers and the Federal Republic of Germany – agreed to the termination of the Convention, with the exception of, *inter alia*, Article 3(1) and (3) of Chapter Six.[22]

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16. W. A. Kewenig, 'Bonn and Paris Agreements on Germany (1952 and 1954)', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 1 (1992), 422, at 422.
17. 1952 Convention between the United Kingdom, France, the United States and the Federal Republic of Germany on the Settlement of Matters Arising out of the War and the Occupation, as amended in 1954. The Settlement Convention, in German called the *Überleitungsvertrag*, 'regulates a great variety of questions arising out of the war and the occupation. It represents a peculiar mixture of regulations normally found in a peace treaty.' Kewenig, *supra* note 16, at 426.
18. Settlement Convention, *supra* note 17, at Chapter Six, Art. 3.
19. Ibid., at Chapter Six, Art. 5.
20. Ibid., at Chapter Six, Art. 1.
21. 1990 Treaty on the Final Settlement with regard to Germany, between France, the United Kingdom, the United States, and the USSR on the one hand and the Federal Republic of Germany and the German Democratic Republic on the other (hence 'the four-plus-two treaty'). The treaty constituted the legal basis for the reunification of Germany.
22. ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, *supra* note 11, at para. 15: 'On 27 and 28 September 1990, an Exchange of Notes was executed between the three Western Powers and the Government of the Federal Republic of Germany (the parties to the Settlement Convention) under which that Convention would terminate simultaneously with the entry into force of the Treaty. Whereas that Exchange of Notes

As a result, cases regarding the postwar confiscation of German external assets were still inadmissible before German courts, but no compensation was owed any more.[23]

3. Proceedings before 2001

3.1. German national courts

After the reparation claims of Liechtenstein nationals had failed before the courts of Czechoslovakia, the issue lay dormant for forty years. In 1991, however, the painting by Van Laer taken under the Beneš Decrees was on loan from the Brno Office for Historical Monuments to the Wallraf-Richartz Museum in Cologne. Prince Hans-Adam II, who had succeeded his father Franz Josef II as the head of state of Liechtenstein, seized the opportunity and brought a private case for recovery before the Cologne regional court (*Landgericht*).

The fate of the claim depended on the evaluation of the takings of Liechtenstein property under the Beneš Decrees in the light of the Settlement Convention. The German courts had two options. On the one hand, if these takings were deemed lawful on the basis of the Settlement Convention – that is, if they were regarded as directed against German external assets and seized as a source of reparation or as a result of the state of war – all claims against Czechoslovakia or its citizens filed by Liechtenstein nationals would have to be dismissed. If, on the other hand, the takings were considered unlawful, the case would have to be heard on the merits. According to Liechtenstein, the latter approach would reflect a long-standing common position with Germany.[24]

The case was consecutively heard before the regional court (*Landgericht*), the regional court of appeal (*Oberlandesgericht*), the Federal Court of Justice (Bundesgerichtshof) and the Federal Constitutional Court (Bundesverfassungsgericht).[25] On the basis of the Settlement Convention, the courts refused to hear the case.[26]

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terminated the Settlement Convention itself, including Article 5 of Chapter Six (relating to compensation by Germany), it provided that paragraphs 1 and 3 of Article 3, Chapter Six, "shall, however, remain in force".'

23. According to Liechtenstein, on the other hand, 'Notwithstanding the deletion of Article 5, Germany has continued to be under the obligation to pay compensation.' ICJ, *Certain Property (Liech. v. Ger.)*, Application of Liechtenstein (1 June 2001), at para. 25. While this position holds true for cases filed before 1990 but decided thereafter, it does not for cases filed after 1990 as the opposite would render the deletion devoid of all meaning.

24. According to Liechtenstein, 'Subsequent to the conclusion of the Settlement Convention, it was . . . understood, as between Germany and Liechtenstein, that the Liechtenstein property did not fall within the regime 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 not barred from considering claims affecting such property, and that no question of compensation by Germany to the "former owners" of such property under article 5 arose.' ICJ, *Certain Property (Liech. v. Ger.)*, Application of Liechtenstein, *supra* note 23, at para. 10.

25. For a summary of these proceedings see ECRH, *Prince Hans-Adam II of Liechtenstein v. Germany*, *supra* note 10, at paras. 14–21.

26. Certain authors criticized the judgments for applying the Settlement Convention as, allegedly, the Beneš takings were not performed 'for the purpose of reparation or restitution, or as a result of the state of war'. Indeed, Czechoslovakia considered the takings to constitute internal sanctions against persons having been 'disloyal' to the state during the war. The explanation for this approach can be found in the Paris Reparation Agreement, which not only allowed states to seize German external assets as a source for reparation, but

They rejected the argument that the owner of the contentious property had not been a German national, finding that the view of the confiscating state was decisive. As a result of the inadmissibility of the claim, the Van Laer painting was returned to the Czech Republic.

Before the Federal Constitutional Court Prince Hans-Adam II advanced three grounds of complaint against the decisions of the civil courts.[27] The Court unanimously rejected these arguments. First, it found that the German courts did not, and did not have to, rule on the merits of the issue of the lawfulness of the Czechoslovakian confiscations of Liechtenstein property. As a result, the question of whether the rules regarding the international protection of private neutral property had been violated was not relevant.

Instead, second, the Constitutional Court adopted a teleological interpretation of the Settlement Convention and found that the term 'measures . . . carried out with regard to German external assets' had to be understood as measures which were regarded by the taking state as directed against German properties.[28] In other words, if Czechoslovakia treated Liechtenstein goods as German property, the German courts had to respect that interpretation.

Finally, the Court held that the Settlement Convention did not impose any obligations on Liechtenstein as a third state, since Germany had only undertaken to bar relevant claims from its own national courts.

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which also established for each state party the percentage share of the total German reparation to which they were entitled (Part I, Art. 1). Thus, for instance, the United States and the United Kingdom were each entitled to 28 per cent, France to 16 per cent and Czechoslovakia to 3 per cent. As the value of the German assets present on Czechoslovakian territory far exceeded its share, it was more profitable for Czechoslovakia to bypass the Agreement and seize the properties present solely for its own benefit. The state tried to achieve this by labelling at least part of the seizures as sanctions, rather than reparations. This artificial construction should be discarded, however, as it is quite clear that the true purpose of the Beneš takings lies in obtaining reparations, which was indeed how President Beneš himself had originally characterized them. See Gattini, *supra* note 8, at 515. This position was countered by I. Seidl-Hohenveldern, 'Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich "deutsches" Eigentum', (1996) 16 *Praxis des Internationalen Privat- und Verfahrensrechts* 410, at 411, who concluded that most Czechoslovakian takings had to be characterized as internal sanctions. Seidl-Hohenveldern rather easily derived this conclusion from (i) the fact that Czechoslovakia cannot at the same time benefit from the Settlement Convention and ignore the Paris Reparation Agreement, and (ii) the fact that the US$189,265 reported as seized to the Inter-Allied Reparation Agency (IARA, which was established by the Paris Reparations Agreement as the supreme Allied authority dealing with reparation issues) cannot account for all the takings effected. A similar line of thought was followed by C. Tomuschat, 'Die Vertreibung der Sudetendeutschen. Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht', (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, at 43, who deduced from the fact that none of the states involved in the IARA complained about the figures advanced by Czechoslovakia that these states accepted that the takings of other property constituted internal sanctions.

27. German Federal Constitutional Court (2nd Senate, 3rd Chamber), Judgment of January 28, 1998, (1998) 18 *Praxis des Internationalen Privat- und Verfahrensrechts* 482, at para. 4: 'Nach Ansicht des Beschwerdeführers verstoßen die Entscheidungen gegen drei allgemeine Regeln des Völkerrechts i.S. von Art. 25 GG, nach denen erstens das Vermögen von Angehörigen neutraler Staaten von den Siegern eines Krieges nicht konfisziert werden dürfe, zweitens völkerrechtliche Verträge zu Lasten dritter Staaten verboten seien, und drittens die Frage, welche Staatsangehörigkeit eine natürliche Person habe, sich ausschließlich nach dem Recht des die Staatsangehörigkeit vermittelnden Staates beantworte.'

28. See Gattini, *supra* note 8, at 519, who found this approach to be 'constitutionally unobjectionable'. *Contra* B. Fassbender, 'International Decisions. Prince of Liechtenstein v. Federal Supreme Court', (1999) 93 AJIL 215, at 218.

3.2. The European Court of Human Rights

Disagreeing with the findings of the German courts, in July 1998 Prince Hans-Adam II brought the case before the European Commission of Human Rights on the basis of the alleged violation of three different norms.[29] More concretely, he complained of a breach of Articles 6(1) and 14 of the European Convention and of Article 1 of the first Protocol, laying down respectively the right of access to justice and of a fair trial, the right of non-discrimination, and the right of peaceful enjoyment of property.

The European Court first stressed that the right of access to court is not absolute, but rather subject to exceptions invoked by states. Although states enjoy a margin of appreciation in this respect, three conditions must be fulfilled: the restriction should pursue a legitimate aim, be proportionate with that aim, and not impair the very essence of the right of access to justice. In the concrete case at hand, the legitimate aim of the exception was Germany's regaining full sovereignty, which the Allies made dependent on its accepting the Settlement Convention. The Court considered Germany also to have met the criteria of proportionality and non-impairment of the essence of the right of access to justice:

> [T]he applicant's interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany. Accordingly, the German court decisions declaring the applicant's ownership action inadmissible cannot be regarded as disproportionate to the legitimate aim pursued and they did not, therefore, impair the very essence of the applicant's 'right of access to a court' within the meaning of the Court's case-law.[30]

With regard, second, to the alleged violation of property rights (Article 1 of the first Protocol additional to the European Convention), the Court found that the claim revolved around the eventual return of the painting by Van Laer to the Czech Republic as a result of the refusal of the German courts to decide on the merits of the case brought by Prince Hans-Adam II of Liechtenstein. As these events occurred during the 1990s, the Court was competent *ratione temporis* to hear the case.[31]

The Court then turned to the substance of Article 1 of Protocol 1. Underlying the present case was the expropriation by Czechoslovakia of the property in question in 1946, as confirmed in 1951. These events preceded the entry into to force of the European Convention in 1953 and of Protocol 1 in 1954. 'Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation

29. The case was transferred to the European Court of Human Rights with the entry into force of Protocol No. 11 to the European Convention, which restructured the Convention's control machinery. ECHR, *Prince Hans-Adam II of Liechtenstein v. Germany*, *supra* note 10, at para. 4.

30. Ibid., para. 69. On the questionable reasoning of the Court with regard to the non-impairment of the very essence of the right of access to court, see Gattini, *supra* note 8, at 532–3. This aspect of the judgment has been criticized in the Concurring Opinions of Judges Ress, Zupancic, and Costa. According to the first two, the very essence of the right of access to court had been violated, but the violation was justified because Germany's regaining 'the full authority of a sovereign State' constituted 'a kind of force majeure' which 'cannot be judged according to the principle of proportionality'. Judge Costa also rejected the Court's conclusion that an impairment of the very essence of the right of access to court had not occurred. He maintained, however, that Art. 6(1) was not applicable in the first place as 'the applicant did not have a recognised complaint . . . under domestic law in Germany.'

31. *Prince Hans-Adam II of Liechtenstein v. Germany*, *supra* note 10, at para. 81.

https://doi.org/10.1017/S0922156506003372 Published online by Cambridge University Press

or the continuing effects produced by it up to the present date'.[32] With regard to the expropriation, 'there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany'.[33]

On the other hand, regardless of the lawfulness of the expropriation, there was the question of Germany's responsibility for the return of the painting. After the expropriation, Prince Hans-Adam II and his father had 'not been able to exercise any owner's rights in respect of the painting'.[34] Consequently, the Court concluded as follows:

> In these circumstances, the applicant as his father's heir cannot, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained a title to property nor a claim to restitution against the Federal Republic of Germany amounting to a 'legitimate expectation' in the sense of the Court's case-law.
>
> This being so, the German court decisions and the subsequent return of the painting to the Czech Republic cannot be considered as an interference with the applicant's 'possessions' within the meaning of Article 1 of Protocol No. 1.[35]

Thus the European Court of Human Rights found that the judgments of the German national courts did not violate Prince Hans-Adam II's right of access to court, nor his right to the peaceful enjoyment of property.

The applicant also complained of discrimination under German legislation for the indemnification of expropriated former owners of external assets, which excluded compensation for losses suffered by citizens of neutral states and for works of art. In this respect, the European Court referred to its consistent case law that Article 14 'has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by' the other substantive provisions of the European Convention and its Protocols.[36] As the Court had denied any violation of the right to property, it concluded that Prince Hans-Adam II 'cannot therefore claim that . . . he had been discriminated against in the enjoyment of his property rights'.[37]

4. Proceedings before the International Court of Justice

4.1. The claim and the preliminary objections

The individual claims of Liechtenstein nationals against Germany proved unsuccessful at all levels. Thus, according to Liechtenstein, first, Germany violated its sovereignty as the interpretation by the German courts of the Settlement Convention implied the identification of Liechtenstein property with German assets. Second, still according to Liechtenstein, Germany also violated the property rights of its nationals as the contested property was returned to the Czech Republic and no reparation was awarded for the loss. Therefore, after fruitless negotiations with

32. Ibid., para. 85.
33. Ibid.
34. Ibid.
35. Ibid., paras. 85–6.
36. Ibid., para. 91.
37. Ibid., para. 92.

Germany, the state of Liechtenstein submitted a case against Germany to the International Court of Justice:

> Liechtenstein claims that:
>
> (a) by its conduct with respect to the Liechtenstein property, in and since 1998, Germany failed to respect the rights of Liechtenstein with respect to that property;
>
> (b) by its failure to make compensation for losses suffered by Liechtenstein and/or its nationals, Germany is in breach of the rules of international law.[38]

The ICJ was requested 'to adjudge and declare that Germany has incurred international legal responsibility and is bound to make appropriate reparation to Liechtenstein for the damage and prejudice suffered'.[39]

Like the claim before the European Court, the case before the ICJ was based on the German court decisions of the 1990s, not on the acts of Czechoslovakia or its successors.[40] Liechtenstein founded the ICJ's jurisdiction on Article 1 of the European Convention for the Peaceful Settlement of Disputes, which provides:

> The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:
>
> (a) the interpretation of a treaty;
>
> (b) any question of international law;
>
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (d) the nature or extent of the reparation to be made for the breach of an international obligation.[41]

Germany, for its part, raised six preliminary objections to the jurisdiction of the ICJ.[42] On 10 February 2005 the ICJ ruled on the value of these preliminary objections.

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38. ICJ, *Certain Property (Liech. v. Ger.)*, Application of Liechtenstein, *supra* note 23, at para. 25.
39. Ibid. at para. 26.
40. In order to situate these court decisions in time, the Parties and the ICJ have used different formulae: the 1990s, 1995 (the decision of the Cologne Regional Court), and 1998 (the decision of the Federal Constitutional Court). These are formal differences, without any practical implications.
41. 1957 European Convention for the Peaceful Settlement of Disputes, 320 UNTS 244. The Convention was drafted under the auspices of the Council of Europe. On the Convention and its designation of the ICJ as the forum for the settlement of disputes, see I. Seidl-Hohenveldern, 'Le règlement des différends en Europe au-delà du marché commun (Convention européenne du 29 avril 1957 et autres moyens)', in D. Bardonnet (ed.), *The Peaceful Settlement of International Disputes in Europe: Future Prospects* (1991), 173. See also J. G. Merrills, *International Dispute Settlement* (1998), 122.
42. The ICJ summarized these preliminary objections as follows: 'According to the first objection put forward by Germany, there exists no dispute between Liechtenstein and Germany within the meaning of the Statute of the Court and Article 27 of the European Convention for the Peaceful Settlement of Disputes. In its second objection, Germany argues that all the relevant facts occurred before the entry into force of the European Convention for the Peaceful Settlement of Disputes as between the Parties. Germany contends in its third objection that the European Convention for the Peaceful Settlement of Disputes has no application because the acts on which Liechtenstein bases its claims fall within the domestic jurisdiction of Germany. In its fourth objection, Germany submits that Liechtenstein's claims have not been sufficiently substantiated as required by Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraph 2, of the Rules of Court. Germany argues in its fifth objection that adjudication of Liechtenstein's claims would require the Court to

4.2. The judgment of the ICJ

4.2.1. Existence of a dispute between Liechtenstein and Germany

The first preliminary objection questioned the existence of a dispute. According to Liechtenstein, a dispute followed from Germany's change of position, 'whereby for the first time in 1995 it began to treat Liechtenstein assets as German external assets for purposes of the Settlement Convention, thus infringing Liechtenstein's neutrality and sovereignty'.[43] Germany denied any such change of position.[44] It also rejected Liechtenstein's contention that its participation in diplomatic consultations at the request of Liechtenstein constituted an acknowledgement of the existence of a dispute between both states.[45]

The ICJ first recalled its consistent jurisprudence that any 'disagreement on a point of law or fact, a conflict of legal views or interests between parties' constitutes a dispute.[46] On this basis the ICJ concluded that 'in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter . . . [and] that "By virtue of this denial, there is a legal dispute" between Liechtenstein and Germany'.[47]

The International Court then found the subject matter of the dispute to consist of the following questions:

> [W]hether, by applying Article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that had been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of the international obligations it owed to Liechtenstein and, if so, what is Germany's international responsibility.[48]

4.2.2. Temporal jurisdiction of the ICJ

According to Germany's second preliminary objection, the ICJ lacked jurisdiction *ratione temporis* to decide the case. It referred to Article 27(a) of the European Convention for the Peaceful Settlement of Disputes – on which Liechtenstein had based its claim – which excluded from its scope of application 'disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute'. As between Germany and Liechtenstein, the Convention entered into force on 18 February 1980, when Liechtenstein ratified it.

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pass judgment on rights and obligations of the successor States of the former Czechoslovakia, in particular the Czech Republic, in their absence and without their consent. Finally, according to Germany's sixth objection, the alleged Liechtenstein victims of the measures of confiscation carried out by Czechoslovakia have failed to exhaust the available local remedies.' ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, *supra* note 11, at para. 19.

43. Ibid., para. 22.
44. Ibid., para. 21.
45. Ibid., paras. 21–2.
46. Ibid., para. 24.
47. Ibid., para. 25. In support of this position, the ICJ referred to '*East Timor (Portugal v. Australia)*, ICJ Reports 1995, p. 100, para. 22; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, ICJ Reports 1996, p. 615, para. 29'. From this conclusion follows the Court's implicit recognition of Liechtenstein's argument that the existence of a dispute between itself and the Czech Republic did 'not negate the existence of a separate dispute between itself and Germany'. ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, *supra* note 11, para. 22.
48. ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, *supra* note 11, para. 26.

https://doi.org/10.1017/S0922156506003372 Published online by Cambridge University Press

For Liechtenstein, the relevant factor to situate the dispute in time was 'the generating fact . . . which triggers the dispute'.[49] Concretely,

> the dispute was triggered neither by the Settlement Convention nor by the Beneš Decrees because, prior to the 1990s, that Convention had never been applied to neutral assets and thus gave rise to no dispute with neutral Liechtenstein. In Liechtenstein's view, Germany's decisions in the years from 1995 onwards were the origin and are at the heart of the present dispute. They are the facts to which the dispute relates.[50]

Germany, on the other hand, contended that 'the key issue for the purpose of applying Article 27(a) is not the date when this dispute arose, but whether the dispute relates to facts or situations that arose before or after the critical date'.[51] It maintained that there had been no change of position with regard to Liechtenstein property 'because the judicial decisions in the 1990s did not depart from prior German case law on the subject'[52] and that the case 'had its real source . . . in facts and situations existing prior to the 1980 critical date'.[53]

The ICJ turned to its own case law and that of its predecessor, the Permanent Court of International Justice. It recalled that, in order to determine its jurisdiction *ratione temporis*,

> The facts or situations to which regard must be had . . . are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'.[54]

According to the ICJ, 'The text of Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes . . . does not differ in substance from the temporal jurisdiction limitations dealt with in [its case law] . . . [and] [a]ccordingly, the Court finds its previous jurisprudence on temporal limitations of relevance in the present case'.[55]

The central question to be answered by the ICJ in the case at hand was 'whether the present dispute has its source or real cause . . . in the decisions by the German

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49. Ibid., para. 38.
50. Ibid. See ICJ, *Certain Property (Liech. v. Ger.)*, Liechtenstein's Written Observations of 15 November 2002 at paras. 3.26 and 3.27. In other words, according to Liechtenstein, the decisions of the German courts from 1995 on marked a change of position vis-à-vis the common understanding 'between Germany and Liechtenstein that Liechtenstein property confiscated pursuant to the Beneš Decrees could not be deemed to have been covered by the Settlement Convention because of Liechtenstein's neutrality' (para. 32 of the judgment of the ICJ). See also para. 33: 'In these decisions and positions, Germany made clear for the first time that it regarded Liechtenstein property as coming within the scope of the reparations régime of the Settlement Convention. . . . These were the facts with regard to which the dispute arose. Prior thereto there was no dispute between Liechtenstein and Germany. The facts that triggered the present dispute were therefore not the Settlement Convention or the Beneš Decrees, but Germany's decision in 1995 to apply the Settlement Convention to Liechtenstein property.'
51. ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, *supra* note 11, para. 30.
52. Ibid., para. 35.
53. Ibid., para. 31. See ICJ, *Certain Property (Liech. v. Ger.)*, Germany's Preliminary Objections of 27 June 2002, paras. 77–9 and 99–100.
54. *Right of Passage over Indian Territory (Port. v. India)*, Judgment of 12 April 1960, [1960] ICJ Rep. at 35. See also the cases concerning *Phosphates in Morocco (Italy v. France)*, Judgment of 14 June 1938, PCIJ Rep. Series A/B No. 74, at 22, and *Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.)*, Judgment of 4 April 1939, PCIJ Rep. Series A/B No. 77, at 82.
55. ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, *supra* note 11, para. 43.

courts in the *Pieter van Laer Painting* case, or whether its source or real cause is the Beneš Decrees . . . and the Settlement Convention'.[56] The Court would only have temporal jurisdiction to hear Liechtenstein's case if

> Germany either departed from a previous common position that the Settlement Convention did not apply to Liechtenstein property, or if German courts, by applying their earlier case law under the Settlement Convention for the first time to Liechtenstein property, applied that Convention 'to a new situation' after the critical date.[57]

As to the first alternative, the ICJ had 'no basis for concluding that . . . there [had] existed a common understanding or agreement between Liechtenstein and Germany'.[58] More concretely, 'The issue whether or not the Settlement Convention applied to Liechtenstein property had not previously arisen before German courts, nor had it been dealt with prior thereto in intergovernmental talks between Germany and Liechtenstein'.[59]

With regard to the second alternative, the ICJ pointed out that the German courts had not faced 'any "new situation" when dealing for the first time with a case concerning the confiscation of Liechtenstein property as a result of the Second World War'.[60] It found that the decisions of the German courts, as in previous cases dealing with the confiscation of German external assets, could not be 'separated from the Settlement Convention'. The present case, furthermore, was also inextricably linked to the Beneš Decrees. Thus, while the decisions of the German courts 'triggered the dispute between Liechtenstein and Germany, the source or real cause of the dispute is to be found in the Settlement Convention and the Beneš Decrees'.[61] As a result, the dispute at hand had arisen prior to 1980, which excluded the Court's jurisdiction.

In light of the above reasons, the ICJ concluded as follows:

> Having dismissed the first preliminary objection of Germany, but upheld its second, the Court finds that it is not required to consider Germany's other objections and that it cannot rule on Liechtenstein's claims on the merits.[62]

Disagreeing with the majority decision on the ICJ's temporal jurisdiction, Judges Kooijmans, Elaraby, and Owada, and Judge ad hoc Berman appended dissenting opinions to the judgment. They criticized the majority for stating, in paragraph 50 of the judgment, that 'German courts have consistently held that the Settlement Convention deprived them of jurisdiction to address the legality of any confiscation of property treated as German property by the confiscating State'. The majority thus allegedly failed to appreciate that 'This misses the central point, . . . which is that the German courts had never before applied the Settlement Convention to

56. Ibid., para. 47.
57. Ibid., para. 49.
58. Ibid., para. 50.
59. Ibid.
60. Ibid., para. 51.
61. Ibid., para. 52.
62. Ibid., para. 53.

https://doi.org/10.1017/S0922156506003372 Published online by Cambridge University Press

property belonging to a neutral State, so there is no long line of cases to be taken into account'.[63]

According to the dissenting judges, their approach would have led the Court to confirm its jurisdiction, in line with the criteria set forth in paragraph 49 of the judgment, quoted above: 'it suffices entirely to show that Germany *first* took an explicit position over neutral assets in relation to the post-war confiscations after 1980, in order to bring the case squarely within the view taken by the Court' in previous cases.[64] In other words, 'it thus seems undeniable that the position of the German courts in the *Pieter van Laer Painting* case . . . has had the *effect* of creating a new case law in applying the principle . . . to a new situation involving a neutral property of Liechtenstein'.[65] Accordingly, the decisions of the German courts regarding the claim of Prince Hans-Adam II would constitute a 'new situation' arising after 1980, thus granting the Court jurisdiction under the European Convention for the Peaceful Settlement of Disputes.

4.2.3. Evaluation

The ICJ was correct in finding that it lacked temporal jurisdiction to hear the case. It is true that German courts during the 1990s had for the first time to hear a case with regard to neutral property confiscated for the purpose of reparation. In the case at hand, this did not, however, constitute a substantial difference from situations concerning confiscated German property. In both cases, German courts had no choice but to declare the claims inadmissible, in line with the obligations undertaken by Germany in the Settlement Convention.

Czechoslovakia treated Liechtenstein goods as German property. The damage stemming therefrom can only form the subject of a claim by Liechtenstein against Czechoslovakia, or its successor states.[66] The present case, on the other hand,

63. Dissenting Opinion of Judge Elaraby at para. 7. See also Dissenting Opinion of Judge Kooijmans at para. 13: 'the pivotal issue is not that the German courts in the *Pieter van Laer Painting* case confirmed the previous case law, but that they applied it – for the first time – to neutral assets, and thus introduced a new element'.

64. Dissenting Opinion of Judge ad hoc Berman at para. 19. See also Dissenting Opinion of Judge Elaraby at para. 10: 'It should, in my view, be manifestly clear that the German courts' decisions purporting to include neutral Liechtenstein property under the umbrella of German external assets – in the 1990s, a decade after the critical date – should be considered the "real cause" of the dispute.' He referred for support to the judgment of the European Court of Human Rights in the case of Prince Hans-Adam II of Liechtenstein against Germany, *supra* note 10, at para. 81: 'the applicant's complaint . . . does not concern the original confiscation of the painting which had been carried out by authorities of former Czechoslovakia in 1946. In the present proceedings, the applicant complains that, as in the German court proceedings instituted in 1992 he could not obtain a decision on the merits of his claim for ownership of the painting, it was eventually returned to the Czech Republic. The Court's competence to deal with this aspect of the application is therefore not excluded *ratione temporis*.'

65. Dissenting Opinion of Judge Owada at para. 24. See also Dissenting Opinion of Judge Kooijmans at para. 18: 'My conclusion, therefore, can only be that the court decisions in the *Pieter van Laer Painting* case applied the Settlement Convention to neutral assets for the very first time, and that this introduced the new element I referred to earlier – or, to use the words of the Court, that the German courts faced a "new situation".'

66. On the precedence of recourse to Czechoslovakian courts over recourse to German courts, see ECHR, *Prince Hans-Adam II of Liechtenstein v. Germany, supra* note 10, at para. 66: 'the exclusion of German jurisdiction did not affect the great majority of such cases where property had remained within the territory of the expropriating State. The genuine forum for the settlement of disputes in respect of these expropriation measures was, in the past, the courts of the former Czechoslovakia and, subsequently, the courts of the Czech or Slovak Republics.'

concerns a separate dispute between Liechtenstein and Germany, for which the inherent lawfulness of the Czechoslovakian takings need not be examined and for which it is of no relevance that there is no jurisdictional basis for a Liechtenstein claim against Czechoslovakia.[67]

Indeed, nothing in the Settlement Convention makes the dismissal of reparation cases before German courts dependent on a finding of wrongfulness. On the contrary, it would undermine the purpose of the Settlement Convention, which is to safeguard the Allied states from reparation claims, if it were left to the German courts themselves to decide on the applicability of the Convention. This applicability depends, *inter alia*, on the question of whether the property involved belonged to German or to third-state, including neutral-state, nationals.[68]

The German Federal Constitutional Court's teleological interpretation of the Settlement Convention was correct: for the purpose of that Convention, a confiscation is lawfully directed at German external assets if the taking state so decides. Again, the lawfulness of that decision does not concern Germany.[69] Thus although the reparation claim before the German courts for the first time involved property belonging in fact to a neutral national, the courts had no choice but to dismiss the claim as if it concerned a confiscation of German property. Accordingly there was no 'new situation' giving rise to the jurisdiction of the ICJ.

The above argument relates to both the preliminary objections and the merits of the case. If abstraction were made of the former, the claim would still fail on account of the latter. Liechtenstein maintained that Germany violated its sovereignty by treating the property of its nationals as German assets. In fact, however, the German courts did not rule on the nationality of the property. Rather, they refused to question the qualification made by the taking state. As discussed above, this decision was in line with the Settlement Convention. Accordingly, Germany did not violate international law or Liechtenstein's sovereignty.

The judgment of the ICJ has implications on three levels, first for the case of Liechtenstein against Germany, second for similar claims, and third for cases before

67. Accordingly, there would have been no merit in Germany's fifth preliminary objection, invoking the so-called indispensable third party principle, according to which the ICJ should refrain from exercising its jurisdiction if its decision were to necessitate an examination of the legality of the acts of a third state which has not given its consent to the case. This principle follows from the case of *Monetary Gold Removed from Rome in 1943 (Italy v. France, U.K. and U.S.)*, Judgment of 15 June 1954, [1954] ICJ Rep. at 32. See ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, Dissenting Opinion of Judge Kooijmans, paras. 32–3, and Dissenting Opinion of Judge ad hoc Berman, para. 26.

68. For a comparable result see the *Algemene Kunstzijde Unie (AKU)* case, where the Bundesgerichtshof decided that the Settlement Convention did not leave room for an examination of contrariety of confiscatory measures with German *ordre public*. German Federal Supreme Court, Judgment of December 13, 1956, 23 ILR 21, 21–4 (1956). *Contra* ICJ, *Certain Property (Liech. v. Ger.)*, Preliminary Objections, Dissenting Opinion of Judge ad hoc Berman, paras. 11–15, who rejected 'the proposition that the victorious Allies, in their eagerness to ensure that their former enemy should not be in a position to question measures taken by them against enemy property, were completely indifferent to any risk that this régime might be applied to the detriment of neutral . . . property' and also 'the supposition that the Three Powers consciously intended to breach *their own* obligations towards States whose neutrality they had recognized during the War' (para. 14).

69. The only exception to this rule would occur if the confiscations breached a peremptory norm of international law, which is not the case here. See Gattini, *supra* note 8, at 544, referring to Art. 41(2) of the ILC Draft Articles on State Responsibility: 'No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [i.e., 'a serious breach by a State of an obligation arising under a peremptory norm of general international law'], nor render aid or assistance in maintaining that situation.'

the ICJ in general. First of all, it would seem that Germany is definitively freed from Liechtenstein claims regarding property confiscated by Czechoslovakia after the Second World War. Neither private claims nor state actions have any chance of success. It is stressed once again that this issue has no bearing whatsoever on the relationship between Liechtenstein and Czechoslovakia and its successor states.

Second, the decision casts some light on the legal situation vis-à-vis Germany of any comparable cases involving the property of nationals of other states, neutral or not, taken by the Allies after the Second World War in line with the Paris Reparations Agreement.[70] On the one hand, individual claims will lawfully be barred from the German national courts. As for state claims, on the other hand, they will depend on the existence of an appropriate jurisdictional basis whether a case can be brought before the ICJ. It should be noted, however, that even if the ICJ had jurisdiction, such a state claim would fail on the merits, since Germany acted in accordance with its international obligations, as indicated above.

Third, and most generally, the judgment of the ICJ may clarify the Court's reasoning and thus predict future case law. More specifically, it evidences that the ICJ is fairly strict in recognizing a 'new situation' which would bring a case within its jurisdiction. As the dissenting judges noted, the decision deals for the first time with the confiscation of property belonging to nationals of neutral states. The ICJ, however, implicitly recognizes that, for a meaningful application of the Settlement Convention, the nationality of the dispossessed owner does not make a difference to the position of Germany. In more general terms, this would mean that the ICJ looks beyond the formal characteristics of a case and only finds a new situation to exist when there is a substantial difference from previous situations. Admittedly, this approach risks mixing up preliminary findings on jurisdiction and findings on the merits of the case.[71]

5. Conclusion

Sixty years after the end of the Second World War, the ICJ has spoken what seems to be the final word in the saga concerning the confiscation of Liechtenstein property by Czechoslovakia for the purpose of reparation for the damage done by Nazi Germany. Different aspects of this case have given rise to at least five national court decisions and two international judgments.

It is clear that the heart of the problem lies in the relationship between Liechtenstein and Czechoslovakia. The latter confiscated property which the former – correctly – claims should not have been affected as it belonged to neutral individuals. International law did not, however, provide a means of action to adjudge this case.

70. Due to a lack of reliable sources, it is not quite clear to the author whether many such cases exist.
71. Most of the dissenting judges indeed suggest, in line with Art. 79(9) of the Rules of the Court, that the issue should have been decided at the merits stage of the proceedings. See Dissenting Opinion of Judge Kooijmans, para. 26, Dissenting Opinion of Judge Elaraby, para. 16, Dissenting Opinion of Judge Owada, para. 43, and Dissenting Opinion of Judge ad hoc Berman, para. 24.

In an attempt to have his property returned, or at least to receive compensation, a Liechtenstein national filed suit in a German court when the property was on loan in Germany. Since the 1950s, however, German courts had consistently upheld Germany's international undertaking to dismiss any court cases concerning the confiscation of German property. Given the unconditional nature of Germany's obligation, the courts had no choice but to accept Czechoslovakia's qualification of the confiscations and, accordingly, to dismiss the Liechtenstein case. In other words, as far as Germany was concerned, there was no substantial difference between Allied measures confiscating German assets and those seizing neutral property for the purpose of reparation.

At the international level, the European Court of Human Rights failed to find a violation of the Liechtenstein national's rights in the position of the German courts. The International Court of Justice, on the other hand, ruled that it did not have jurisdiction to hear the case of Liechtenstein against Germany whereby the former qualified the decisions of the latter's courts as a violation of its sovereignty and the property rights of its nationals.