H e a d n o t e

to the Order of the Second Senate of 26 October 2004

– 2 BvR 955/00 –

– 2 BvR 1038/01 –

The state governed by the Basic Law (*Grundgesetz*) in principle has a duty to guarantee on its territory the integrity of the elementary principles of public international law, and, in the case of violations of public international law, to create a situation that is closer to the requirements of public international law in accordance with its responsibility and within the scope of its possibilities of action. However, this does not create a duty to return the property that was seized without compensation outside the state's sphere of responsibility in the period between 1945 and 1949.

FEDERAL CONSTITUTIONAL COURT

– 2 BvR 955/00 –

– 2 BvR 1038/01 –

IN THE NAME OF THE PEOPLE

in the proceedings

on

the constitutional complaints

I. of Mr von der M.,

against a) the order of the Berlin Higher Administrative Court (*Oberverwaltungsgericht*) of 30 March 2000 – OVG 8 N 81.99 –,

b) the judgment of the Berlin Administrative Court (*Verwaltungsgericht*) of 14 October 1999 – VG 29 A 88.98 –,

c) the ruling on an objection of the Federal Institute for Special Tasks Arising from Unification (*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*) of 26 May 1998 – GVO Z W 193/98 –,

d) the land transaction permit of the Federal Institute for Special Tasks Arising from Unification of 11 February 1998 – GVO 3294/97 –

– 2 BvR 955/00 –,

II. of Prince von H.,

against a) the order of the Federal Administrative Court (*Bundesverwaltungs-gericht*) of 25 July 2000 – BVerwG 8 B 134/00 –,

b) the judgment of the Magdeburg Administrative Court of 7 March 2000 – A 5 K 284/98 –,

c) indirectly § 1.8 letter a of the Act on the Settlement of Open Property Issues (*Gesetz zur Regelung offener Vermögensfragen*)

– 2 BvR 1038/01 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President Hassemer,

Jentsch,

Broß,

Osterloh,

Di Fabio,

Mellinghoff,

Lübbe-Wolff,

Gerhardt

held on 26 October 2004:

The proceedings are combined for a joint decision.

The constitutional complaints are rejected as unfounded.

Reasons:

A.

The constitutional complaints relate to the compatibility of the expropriations in the former Soviet occupation zone between 1945 and 1949 with public international law and the consequences of a potential contravention of public international law for the constitutional commitments of the Federal Republic of Germany. 1

I.

1. a) After the unconditional surrender of the German armed forces on 7 and 8 May 1945, at first each of the occupying powers exercised sole control over the German national territory it occupied. It was only on 5 June 1945 that the four victorious powers – the United States, the Soviet Union, the United Kingdom and France – in their Berlin Declaration of 5 June 1945 jointly assumed “supreme authority with respect to Germany”, including “all the powers possessed by the German Government” The Allied Control Council, which consisted of the commanders-in-chief of the occupying forces, became the highest decision-making body for Germany. However, in addition to this the individual commanders exercised sovereignty in their occupation zones, that is, they were above all able to issue orders and introduce legislation themselves. 2

At the Potsdam Conference of the four victorious powers from 17 July to 2 August 1945, the Allies again emphasised that the commanders-in-chief of the armed forces, 3

as members of the Allied Control Council, exercised the highest government power in Germany, each of them in his own occupation zone in accordance with the basic principles of his own government, and jointly in the questions relating to Germany as a whole. The following were named as goals of the occupation regime:

> German militarism and Nazism will be extirpated and the Allies will take in agreement together, now and in the future, the other measures necessary to assure that Germany never again will threaten her neighbours or the peace of the world. 4
>
> It is not the intention of the Allies to destroy or enslave the German people. It is the intention of the Allies that the German people be given the opportunity to prepare for the eventual reconstruction of their life on a democratic and peaceful basis (Report of the Tripartite Conference of Berlin (Potsdam Declaration) of 2 August 1945; German version in Rauschning (ed.), *Rechtsstellung Deutschlands*, 2nd ed., 1989, no. 6, p. 24 with reference to the Official Gazette of the Control Council for Germany, Supplementary Volume no. 1, pp. 13 ff.) 5

In connection with the economy, there was a call for the elimination of Germany's war potential, the elimination of the "present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements". During the period of occupation, Germany was to be treated as a single economic unit. 6

b) On 9 June 1945, "Order no. 1" created the Soviet Military Administration in Germany (*Sowjetische Militäradministration in Deutschland – SMAD*) as the supreme organ of power. Order no. 1 announced "for general information" that "in order to monitor the implementation of the conditions imposed on Germany after its unconditional surrender and to administer the Soviet Occupation Zone in Germany" the SMAD was created, headed by Marshal Shukov. Order no. 5 of 9 July 1945 created SMAD administrations in the *Länder* (states) and provinces and appointed their heads. The SMAD was the central agency of the Soviet interests in the Soviet occupation zone (on the SMAD in general see Foitzik, in: W. Benz (ed.), *Deutschland unter alliierter Besatzung* 1945 – 1949/55, 1999, pp. 302 ff.). The central form of acting of the SMAD was the written or oral "order". In this connection, the German authorities to be newly created could act only as auxiliary agencies of the Soviet authorities. They were both to receive direct instructions and to be monitored. 7

A substantial step towards the alteration of the property system in the Soviet occupation zone related to land (see the accounts in Dölling, *Wende der deutschen Agrarpolitik*, 1950; Lochen, in: *Deutschland-Archiv* 1991, pp. 1025 ff.; Biehler, *Die Bodenkonfiskationen in der Sowjetischen Besatzungszone nach Wiederherstellung der gesamtdeutschen Rechtsordnung 1990*, 1994, pp. 32 ff.; see also Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts – 8

BVerfGE) 84, 90 (96 ff.)). The Central Committee of the Communist Party of Germany (*Kommunistische Partei Deutschlands – KPD*) worked together with the SMAD on a land reform in the Soviet Occupation Zone from 1945 on. In this connection, the term Democratic Land Reform (*Demokratische Bodenreform*), which had already been used before 1945 in Germany, was used (Stern, *Staatsrecht*, vol. V, 1995, p. 987 with further references). There was also reference to ideas of all of the Allies that the economic foundations "of Junkerdom" and of the "big capitalists" should be eliminated in order to advance the "democratisation" of the German people. Under the motto "Junker land in farmers' hands", this was to cover not only National Socialists and war criminals, but all landholdings of over 100 hectares as an "urgent national, economic and social necessity", in order to guarantee the "liquidation of feudal Junker large-scale landholdings", which had always been "a bastion of reaction and fascism and one of the main sources of aggression (...) against other peoples".

In this connection, legislation on land reform was passed in all *Länder* and provinces of the Soviet occupation zone in September 1945. In some cases, referendums were held on the subject. The lead was taken by the Province of Saxony, which issued an ordinance on land reform on 3 September 1945. This affected all the agricultural landholdings, including livestock, implements and machinery, of the following: 9

1. war criminals, those responsible for the war, Nazi leaders, active supporters of the Nazi party and of the leading persons in the Hitler government, including all the persons who in the period of Nazi rule were members of the Reich government, the Reichstag, a German *Land* government or a *Land* parliament. 10

2. feudal and Junker big landowners with more than 100 hectares; 11

3. the state, to the extent that the land is not dedicated to agricultural or scientific research institutes, experimental stations and educational establishments. 12

A total of 7,112 estates larger than 100 hectares were expropriated. In addition, 4,728 enterprises below the 100-hectare limit that belonged to suspected war criminals and National Socialist functionaries, and 2,309 areas of other kinds, the overwhelming majority of which were in state ownership, were also expropriated. The expropriated landholdings were used to form a land fund of approximately 3.22 m hectares of land. The land fund therefore comprised about one-third of the total acreage used for agriculture and other purposes of the later German Democratic Republic. From the land fund, 2.1 m hectares of land in plots was given to landless or near-landless farmers, agricultural labourers, refugees and migrants; the amount of land granted was not to be more than 5 hectares, or if the land was of poor quality 10 hectares (see Decisions of the Federal Administrative Court (*Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE) 95, 170 ff.). 13

Part of the expropriated real property remained in public ownership. The persons to 14

whom the land was allocated had to pay a sum for it in the amount of the value of one year's harvest. The newly created agricultural holdings were permitted neither to be divided nor sold in whole or in part, nor leased or pledged. Commissions on the level of the local authority, district and *Land* were entrusted with implementing the land reform. The expropriated landowners were normally expelled from the district in which their land was situated. Frequently they had to leave their farms within a period of a few hours and were permitted to take only essential belongings with them. There were no judicial means of legal protection against the measures. Classification as a war criminal or active National Socialist was also subject to no judicial supervision.

Quite a few new farmers soon gave up their agricultural activity, for a large number of enterprises were too small and could therefore not be managed at a profit. In addition, in the year 1952 a first phase of deliberate collectivisation of agriculture began. But it was only a collectivisation campaign that began in spring 1960 that led to approximately 85% of the agricultural acreage being united in over 19,000 cooperatives with just under 1 m members. Under the Act on Agricultural Cooperatives (*Gesetz über die landwirtschaftlichen Produktionsgenossenschaften*) of 3 June 1959 and the model articles of association that were also issued of the three different types of agricultural cooperatives, the land brought into the cooperatives for general use remained the property of the members and was permitted to be sold only to the state, the agricultural cooperative or its members who owner little or no land. 15

c) The German Democratic Republic entrenched the legal effectiveness of the land reform at an early date in Article 24 of its Constitution of 7 October 1949 (reprinted in: Roggemann (ed.), *Die DDR-Verfassungen*, 4th ed., 1989, pp. 452 ff.). Under the new pre-Communist order, however, the only form of ownership of means of production such as the commercially used areas was publicly owned property ("Socialist property"), whether in the form of property jointly owned by society as a whole ("*gesamtgesellschaftliches Gesamteigentum*") or as cooperative common property ("*genossenschaftliches Gemeineigentum*"). 16

2. a) Upon reunification, the ownership of public property together with the total indebtedness of the budget of the former German Democratic Republic passed to the Federal Republic of Germany. Chapter VI of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity – Unification Treaty (*Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands – Einigungsvertrag*) of 31 August 1990 (Federal Law Gazette (*Bundesgesetzblatt – BGBl*) II p. 889) lays down the principles by which the assets are to be allocated between the various corporate bodies in the federal system. 17

With regard to the retransfer of property rights in land and buildings, there was a preliminary decision for the solution of the connected open property issues in the Joint Declaration of the Governments of the Federal Republic of Germany and the German Democratic Republic (*Erklärung der Regierungen der Bundesrepublik* 18

Deutschland und der Deutschen Demokratischen Republik) of 15 June 1990 (Federal Law Gazette II p. 1237). The Joint Declaration states that the expropriations under occupation law or on the basis of sovereign acts by occupying powers (1945–1949) were “no longer reversible”. For the expropriations in the German Democratic Republic from 1949–1990, the principle “return before compensation” was laid down. The Joint Declaration, by Article 41.1, became part of the Unification Treaty, which in turn, by Article 143.3 of the Basic Law (*Grundgesetz – GG*), amended version, was laid down in the Basic Law. The key points laid down in the Declaration were put in concrete terms in the Act on the Settlement of Open Property Issues (*Gesetz zur Regelung offener Vermögensfragen)* of 23 September 1990, Federal Law Gazette II pp. 885, 1159), which governs the claims to restitution of what are known as the former owners (*Alteigentümer*) for the expropriations by corporate bodies of the German Democratic Republic.

b) No. 1 of the Joint Declaration, which is relevant to the present cases, reads as follows: 19

> The expropriations under occupation law or on the basis of sovereign acts by occupying powers (from 1945 to 1949) shall not be reversed. The governments of the Soviet Union and of the German Democratic Republic see no possibility of revising the measures taken at that time. The government of the Federal Republic of Germany takes notice of this in view of the historical development. It is of the opinion that a final decision on any state equalisation payments must be left to a future parliament for the whole of Germany. 20

Article 41 of the Unification Treaty provides as follows on the settlement of open property questions: 21

> (1) The Joint Declaration of 15 June 1990 on the Settlement of Open Property Issues (Annex III) issued by the government of the Federal Republic of Germany and the government of the German Democratic Republic shall form an integral part of this Treaty. 22
>
> **(2) (...)** 23
>
> (3) The Federal Republic of Germany shall not otherwise enact any legislation contradicting the Joint Declaration referred to in paragraph 1 above. 24

In connection with the signing of the Moscow Two-Plus-Four Treaty (*Vertrag über die abschließende Regelung in bezug auf Deutschland*, *Zwei-Plus-Vier-Vertrag*) of 12 September 1990, the Federal Minister for Foreign Affairs and the Minister-President of the German Democratic Republic, in number 1 of the Joint Letter, informed the ministers for foreign affairs of the Four Powers as follows: 25

> 1. The Joint Declaration of the governments of the Federal Repub- 26

lic of Germany and the German Democratic Republic on the Settlement of Open Property Issues of 15 June 1990 states, *inter alia*, as follows:

(there follows the passage from the Joint Declaration on the expropriations from 1945 to 1949 quoted above). 27

By Article 41.1 of the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity of 31 August 1990, the Joint Declaration is part of this Treaty. By Article 41.3 of the Unification Treaty, the Federal Republic of Germany is not to enact any legislation contradicting the part of the Joint Declaration quoted above (reprinted in Bulletin of 14 September 1990, no. 109 p. 11). 28

At an earlier date, in an aide-mémoire of 28 April 1990, the Soviet government made the following request: 29

Nothing in the draft treaty between the Federal Republic of Germany and the German Democratic Republic may be allowed to permit the calling into question of the legality of the measures taken and delegated legislation issued by the Four Powers in questions of denazification, demilitarisation and democratisation, either jointly or in their own former occupation zones. The lawfulness of these orders, above all in matters of possession and land, shall require no new review or revision by German courts or other German state bodies (reprinted in Fieberg/Reichenbach/Messerschmidt/Verstegen, *Vermögensgesetz*, § 1, marginal no. 179). 30

Article 4.5 of the Unification Treaty added the following new Article 143.3 to the Basic Law: 31

(3) Notwithstanding paragraphs 1 and 2 above, Article 41 of the Unification Treaty and the rules for its implementation shall remain valid in so far as they provide for the irreversibility of interferences with property in the territory specified in Article 3 of the said Treaty. 32

§ 1.8 letter a of the Act on the Settlement of Open Property Issues, the original version of which was passed by the German Democratic Republic and which, under the Unification Treaty, was taken over as federal law, contains the following provision on this: 33

This Act, subject to its provisions on jurisdiction and proceedings, does not apply to 34

a) expropriations of assets under occupation law or on the basis of sovereign acts by occupying powers; claims under § 1.6 and 1.7 shall remain unaffected; (...) 35

(Version after the Act to Amend the Act on the Settlement of Open Property Issues and other Provisions (*Gesetz zur Änderung des Vermögensgesetzes und anderer Vorschriften* (*Zweites Vermögensrechtsänderungsgesetz – 2. VermRÄndG*), Second Property Law Amendment Act) of 14 July 1992, Federal Law Gazette 1992 I p. 1257). 36

c) According to the background materials of the Federal German government on the Property Act (*Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 11/7831), the expropriations under occupation law or on the basis of sovereign acts by occupying powers, which in principle may not be reversed, consist essentially of the expropriations made without compensation in the field of industry in favour of the *Länder* of the former Soviet-occupied zone or as part of Soviet reparations measures, and of expropriations in the field of agriculture as part of what was known as the democratic land reform. 37

The expropriations are qualified as “under occupation law” or “on the basis of sovereign acts by occupying powers”; in the explanation these are distinguished from each other from a formal point of view depending on whether the expropriations were based on corresponding orders or instructions by the SMAD (under occupation law) or on legislative measures or acts of state by the *Länder* of the former Soviet occupation zone and by local agencies of the Soviet sector of Berlin (on the basis of sovereign acts by occupying powers; *Bundestag* document 11/7831, p. 1 (3). 38

According to the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht)*, expropriations on the basis of sovereign acts by occupying powers are expropriations that were deliberately made possible by act of the Soviet occupying power and that were substantially based on its decisions (see BVerfGE 94, 12 (31-32)). In this connection it is immaterial that German agencies were also involved by mutual consent. It is equally irrelevant that the expropriations were not carried out for the benefit of the occupying power. At all events, even expropriation measures where the relevant legal basis was interpreted too broadly or was interpreted arbitrarily when measured by the principles of a state under the rule of law were carried out on the basis of sovereign acts by occupying powers. In order that the legal assessment is uniform, in the following the term “expropriations on the basis of sovereign acts by occupying powers” will be used. 39

d) In no. 1 sentence 4 of the Joint Declaration, the government of the Federal Republic of Germany affirmed its opinion that a final decision on any state equalisation payments must be left to a future parliament for the whole of Germany. Accordingly, the legislature passed the Act on Compensation under the Act on the Settlement of Open Property Issues and on State Equalisation Payments for Expropriations under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (*Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen und über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlich-* 40

er oder besatzungshoheitlicher Grundlage (*Entschädigungs- und Ausgleichsleistungsgesetz – EALG*), Compensation and Equalisation Payments Act of 27 September 1994, Federal Law Gazette I p. 2624). It consolidates several Acts, including – as Article 1 – the Act on Compensation in Accordance with the Act on the Settlement of Open Property Issues (*Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen* (*Entschädigungsgesetz – EntschG*), Compensation Act) and – as Article 2 – the Act on State Equalisation Payments for Expropriations under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers that May No Longer Be Reversed (*Gesetz über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage, die nicht mehr rückgängig gemacht werden können*, (*Ausgleichsleistungsgesetz – AusglLeistG*), Equalisation Payments Act). In principle, the Equalisation Payments Act provides that the persons entitled shall receive an equalisation payment that is payable from a compensation fund in money; this will be paid by the allocation of bonds. On this, and on the details of the calculation, the Act refers to §§ 1 to 9 of the Compensation Act (see § 2.1 of the Equalisation Payments Act).

§ 3 of the Equalisation Payments Act makes it possible to elect damages in the area of agriculture and forestry. However, the damages are not awarded by granting a claim to compensation in the form of land, but in a private-law form, that is, by purchase. In this connection, the agency entrusted with the privatisation of plots of agricultural and forestry land that were formerly publicly owned is restricted in its discretion by detailed conditions. Under § 3 of the Equalisation Payments Act, the agricultural plots of land, the total number of which is greater, are to be sold to various groups of purchasers for less than half of the market value – the valuation for agricultural areas is three times the value assessed in 1935 (§ 3.7 of the Equalisation Payments Act). The purchaser groups consist above all of the lessees at the time, the enterprises that succeeded the agricultural cooperatives, farmers taking over land they previously worked who were dispossessed between 1945 and 1949 or in the time of the German Democratic Republic and now farming again, as reorganisers, and lessees known as new organisers who had no previous landholdings in the area of the former German Democratic Republic (§ 3.2 of the Equalisation Payments Act) and, subordinate to these, the former owners dispossessed before 1949 and not entitled to restitution, who are not working locally again. But the last group are to be able to acquire only the areas that are not bought by the other persons entitled (§ 3.5 of the Equalisation Payments Act). With regard to the acquisition of forestry areas, however, this hierarchy does not apply; here, the quality of the operating concept submitted is the only determining factor (§ 4.5 of the Land Acquisition Ordinance, *Flächenerwerbsverordnung*). The details of purchase and of the procedure are governed by the Ordinance on the Acquisition of Agricultural and Forestry Land, the Procedure and the Advisory Board under the Equalisation Payments Act (*Verordnung über den Erwerb land- und forstwirtschaftlicher Flächen, das Verfahren sowie den Beirat nach dem Ausgleichsleistungsgesetz,* of 20 December 1995 (*Flächenerwerbsverordnung –FlErwV*), Land Acquisition Ordinance, Federal Law Gazette I p. 2072). 41

II.

1. a) The first complainant is the heir of von der M., who was previously registered as owner. Von der M. was dispossessed in the year 1946 under the Ordinance on Land Reform in the Province of Mark Brandenburg (*Verordnung über die Bodenreform in der Provinz Mark Brandenburg*) of 6 September 1945. 42

The Federal Institute for Special Tasks Arising from Unification (*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*), on the basis of § 1.2 sentence 2 of the Real Property Transactions Act (*Grundstücksverkehrsordnung– GVO*), issued a land transaction permit for one of the plots of land expropriated in 1946, since the first complainant's application for retransfer of the land was, in its opinion, plainly unfounded. The assets sought by the complainant by way of restitution, it stated, had been expropriated in the course of what was known as the democratic land reform. 43

The complainant filed an action to set aside the land transaction permit at the Berlin Administrative Court (*Verwaltungsgericht*). The Administrative Court dismissed the claim under § 1.2 of the Real Property Transactions Act and § 30.1 and § 1.8 letter a of the Act on the Settlement of Open Property Issues as plainly unfounded. It stated that the permit related to a plot of land that had been expropriated in the course of what was known as the democratic land reform and thus on the basis of sovereign acts by occupying powers. With regard to the constitutional assessment of these expropriations and of the exclusion of restitution, the court was, under § 31.1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*), bound by what was known as the land reform judgment of the Federal Constitutional Court of 23 April 1991 (BVerfGE 84, 90 ff.) and the order of 18 April 1996 confirming this decision (BVerfGE 94, 12 ff.). The Federal Constitutional Court had also reviewed the exclusion of restitution from the public-international-law point of view argued by the complainant. 44

The complainant contested this in an application for admission of an appeal to the Berlin Higher Administrative Court (*Oberverwaltungsgericht*) and at the same time requested that the matter be submitted to the Federal Constitutional Court for a decision under Article 100.2 of the Basic Law. The Higher Administrative Court rejected both applications in its order of 3 March 2000. For the grounds, the court referred to the above-named decisions of the Federal Constitutional Court. According to the court, contrary to the complainant's submissions, the Federal Constitutional Court there too considered the legal position under private international law. 45

b) The second complainant is the sole heir of his grandfather, Duke of B. The second complainant's grandfather was originally the owner of the assets that the second complainant seeks to recover, in particular the plots of land situated in district B. 46

On 30 July 1945 the *Landrat* (chief administrative officer) of the district ordered that the assets be expropriated in accordance with SMAD Order no. 124, in view of the fact that Duke of B. and his family "had left" the district B. "in great haste". The assets 47

in question were then incorporated in the land reform until the end of 1949.

The Halle Regional Government Council – *Land* Office for the Settlement of Open Property Issues (*Regierungspräsidium Halle – Landesamt zur Regelung offener Vermögensfragen*) rejected the application for restitution of the second complainant in a ruling of 31 August 1998. The second complainant commenced proceedings against this, but they were unsuccessful. In its judgment of 7 March 2000, the Magdeburg Administrative Court stated that the complainant had no claim to restitution, since the factual requirements for excluding the application of § 1.8 letter a of the Act on the Settlement of Open Property Issues were satisfied. Irrespective of the fact that at the time it had been lawful, the de facto expropriating seizure of the assets in question was attributable to the Soviet occupying authorities. Nor could the complainant successfully rely on a prohibition on expropriation in favour of foreign citizens. Such a prohibition on expropriation could, admittedly, in principle be inferred from the intention expressed repeatedly, even by the Soviet Union, to protect the property of foreign citizens from seizure by German agencies. However, this did not apply to the assets of foreign citizens who had at the same time held German nationality, as was the case for the grandfather of the second complainant. 48

By order of 25 July 2000, the Federal Administrative Court (*Bundesverwaltungsgericht*) rejected the complaint against the refusal of leave to appeal contained in the judgment of the Magdeburg Administrative Court. The court held that the complainant had failed to show a question of federal law that needed clarifying under § 133.3 sentence 3 of Rules of Procedure of the Administrative Courts (*Verwaltungsgerichtsordnung* – VwGO). No. 19.b of Proclamation No. 2 of the Commanders-in-Chief of the Occupying Forces of 20 September 1945 on persons with dual nationality, and also the Dartwin administrative instructions, were not unambiguous and were not on their own suitable to produce a result favourable to the complainant, since it depended on the practice of the Soviet authorities whether a measure could be attributed to the occupying power. The Federal Administrative Court had also already assessed the other relevant statements of the Allies several times and had not been able to infer from them any prohibition on expropriation for persons with dual nationality. 49

2. In their constitutional complaints, the complainants, whose submissions largely coincide with each other, in the present case indirectly challenge § 1.8 letter a of the Act on the Settlement of Open Property Issues. 50

a) The first complainant's constitutional complaint challenges the violation of his fundamental rights under Article 1.1, Article 2.1 in conjunction with Article 25, Article 3.1 and Article 14 of the Basic Law and Article 79.3 of the Basic Law with regard to the principles laid down in Article 1 and Article 20 of the Basic Law, and also, in essence, of his right under Article 103.1 of the Basic Law. 51

He submits that the constitutional complaint is admissible under § 31.1 of the Federal Constitutional Court Act, since a new decision may also be based on a fundamental change in the interpretations of the law. 52

He submits that the land reform expropriations in the years 1945 to 1949 did not effect a loss of ownership in the legal sense for those concerned. As acts of an occupying power contrary to international public law, they merely deprived those concerned of possession. As a result, the consequences of the expropriations were still capable of being reversed in 1990. At that date, the possibility still existed of making legal provision for this case by way of a peace treaty, for example by reversing the expropriations. Only an agreement between the victorious occupying power and the sovereign (conquered) state or its successor in title could be regarded as such a peace treaty; in the present case, therefore, the Treaty of 12 September 1990 on the Final Settlement With Respect To Germany (*Vertrag vom 12. September 1990 über die abschließende Regelung in bezug auf Deutschland*, Treaty on the Final Settlement, Federal Law Gazette 1990 II pp. 1318 et seq.). But this treaty did not contain such a provision. On the contrary, it was only the Unification Treaty between the Federal Republic of Germany and the German Democratic Republic of 31 August 1990 that declared that the land reform expropriations were inviolable. 53

However, this provision laid down in the Unification Treaty, which later led to the introduction of Article 143.3 in the Basic Law, and following this to the exclusion of restitution being laid down in nonconstitutional law in § 1.8 letter a of the Act on the Settlement of Open Property Issues, violated mandatory rules of general public international law. 54

As one of the contracting parties, the Federal Republic of Germany had been prevented by Article 25 of the Basic Law from making such an agreement and from passing Article 143.3 of the Basic Law and § 1.8 letter a of the Act on the Settlement of Open Property Issues in order to implement it. Article 25 of the Basic Law obliged the sovereign power in the Federal Republic of Germany to observe the general principles of international law. General principles of international law existed that prohibited the removal of property by an occupying power and in return required the Federal Republic of Germany, to the extent that this was in its power, to reverse expropriations with regard to German citizens that had been carried out against public international law by an earlier occupying power. 55

As evidence of the alleged violation of public international law, the first complainant cites a total of six principles which in his opinion are general principles of mandatory public international law and which were binding on the Federal Republic of Germany at the date when the Unification Treaty was entered into. *Inter alia*, according to this, there is said to be a principle that the restitution to the original owner of movable or immovable property that was expropriated in violation of mandatory public international law is a particular form of redress for wrongs under public international law and takes account of the principle of the effectiveness of the public international law system. 56

The Unification Treaty, in its preservation of expropriations under occupation law and on the basis of sovereign acts by occupying powers, perpetuated the violation of 57

mandatory public international law contained in this and thus itself violated general principles of international law. The amendments of constitutional and ordinary law based on this, in consequence, also violated mandatory public international law and were thus unconstitutional. For mandatory public international law was entrenched in Article 79.3 of the Basic Law as a component of the principle of the rule of law. Article 143.3 of the Basic Law, as a statute amending the constitution, did not satisfy these requirements and was therefore in its turn unconstitutional.

b) The second complainant substantiates his opinion of the unconstitutionality of the exclusion of restitution largely with the same arguments, based on public international law. 58

In addition he submits that the interpretation and application of the internal German legal basis does not stand up to a review under Article 3.1 of the Basic Law in its meaning as a prohibition of arbitrariness. For the occupying power expressly prohibited the dispossession of citizens of the allied forces. Under public international law and under occupation law (Proclamation no. 2 of the Commanders-in-Chief of the Occupying Forces, SMAD Orders nos. 97, 104, 154 and Dartwin administrative instructions), however, the Soviet Union was permitted to and intended to expropriate only the property of the citizens of the enemy state Germany. None of the provisions differentiated between “only foreigners” and persons of dual nationality, and therefore the interpretation of the Federal Administrative Court was too restrictive. The German bodies carrying out the expropriation therefore acted *ultra vires* when expropriating the complainant’s grandfather, a British citizen. Since this was therefore not a measure on the basis of sovereign acts by occupying powers, § 1.8 letter a of the Act on the Settlement of Open Property Issues did not apply. 59

III.

The Berlin Regional Finance Office (*Oberfinanzdirektion*), the Federal Administrative Court and the Halle Regional Government Council have made use of their possibility of stating an opinion. 60

1. The President of the Berlin Regional Finance Office, who now has jurisdiction (see Article 3 of the Act to Amend the Right to Land in the Former German Democratic Republic, *Gesetz zur Änderung des Rechts an Grundstücken in den neuen Ländern* of 2 November 2000, Federal Law Gazette I p. 1481), made the following statement on the constitutional complaints: the constitutional complaints, he stated, raised the question as to whether the Unification Treaty violated mandatory public international law that applied in Germany under Article 25 of the Basic Law. This question had not yet been the subject of a decision of the Federal Constitutional Court. Article 25 of the Basic Law, however, had no more been violated than Article 100.2 of the Basic Law.

Contrary to the complainants’ submission, it was not Article 41 of the Unification Treaty that first effectively expropriated property, but the earlier land reform. The 62

case-law of the Federal Administrative Court on de facto expropriation proceeded on this assumption, just as did the European Commission on Human Rights in its decision of 4 March 1996 (*Europäische Kommission für Menschenrechte*, nos. 19048/91; 19049/91; 19342/92; 19549/92; 18890/91, *Neue Juristische Wochenschrift – NJW* 1996, p. 2292 – *Weidlich und Fullbrecht, Hasenkamp, Golf, Klausser und Mayer gegen Deutschland*). In addition, the German Democratic Republic, as a sovereign state, accepted the expropriations that took place on the basis of sovereign acts by occupying powers as part of its own will. Admittedly, it was only the Treaty on the Final Settlement of 12 September 1990 that finally ended the occupation of Germany. But the German Democratic Republic, like the Federal Republic of Germany, became a sovereign state in the meaning of public international law before this. Under public international law, therefore, only the German Democratic Republic was authorised to decide on the continuation of the expropriations made at an earlier date by the occupying power. For fundamentally, under public international law, the state freed from occupation or the state following it was free in its decision as to whether it recognised and would preserve measures taken by the occupying power. In enacting its Constitution of 7 October 1949 and in several later provisions under nonconstitutional law, the German Democratic Republic had permitted the effects of the land reform expropriations to continue in existence.

In addition, the complainants were not correct when they submitted that the Two-Plus-Four Treaty contained no provision on the restitution question. In an aide-mémoire of 28 April 1990, the Soviet government demanded that the lawfulness of the expropriations should not be questioned. The Joint Letter of the Federal Foreign Minister and the Minister-President of the German Democratic Republic to the foreign ministers of the victorious powers in the course of the Two-Plus-Four Talks had confirmed this demand. This correspondence, therefore, under Article 31.2 letter b of the Vienna Convention on the Law of Treaties of 23 May 1969 (Federal Law Gazette 1985 II p. 926), was to be consulted in interpreting the Treaty on the Final Settlement and to be understood to the effect that the Federal Republic of Germany had committed itself vis-à-vis the victorious powers to leave the expropriations on the basis of sovereign acts by occupying powers untouched. 63

This commitment was not a violation of mandatory public international law. A provision of mandatory public international law that would have conflicted with the land reform expropriations did not exist, either at the date when they were made or when the Unification Treaty was entered into. The land reform expropriations did not even violate the international law of war; the Hague Convention Respecting the Laws and Customs of War on Land did not apply. Nor did the land reform have the punitive nature claimed; instead, it was the expression of Socialist ideology and in this sense had served the reallocation of agricultural means of production in favour of the landless proletariat. The fact that the land reform orders had provided not only for the expropriation of property in landholdings over 100 hectares but also for the expropriation of property of Nazi activists and war criminals did not give them the character of 64

a collective punitive measure in the meaning of the Hague Convention Respecting the Laws and Customs of War on Land.

Nor could any provision be found under which an expropriation in violation of public international law was simply ineffective. On the contrary, such expropriations merely led to discussions on the amount of the damages obligations. Finally, even if there was an international-law prohibition on expropriation, it was doubtful whether the Soviet Union was obliged to permit this to be enforced against it. Its understanding of public international law was shaped by ideology and based on the fundamental principle of class war or the Socialist liberation of the oppressed classes. 65

Finally, under Article 25 of the Basic Law, general public international law took precedence over nonconstitutional law, but not over constitutional law. Nor could it be objected that the actual exclusion of restitution was created by treaty and that therefore its entrenchment in constitutional law in Article 143.3 of the Basic Law was a circumvention of general public international law. For the Basic Law had always contained the requirement of reunification, which was specifically stated in Article 143.3 of the Basic Law. 66

2. The Seventh Senate of the Federal Administrative Court, in its opinion, refers to its case-law on the two questions raised by the proceedings. 67

The prohibition on expropriation under Article 46.2 of the Hague Convention Respecting the Laws and Customs of War on Land (Land Warfare Convention) had no effect after the unification of the two German states, because there was no ownership position that could de facto be enforced. The factual assessment that the reunification, and thus the restoration of a constitutional state of affairs in the east of Germany too, could not have been achieved without accepting the exclusion of restitution, was not affected by the submissions of Article 46.2 of the Land Warfare Convention. Irrespective of this, the Seventh Senate doubts that the restructuring of the property and economic system, for which the Soviet Union was responsible in its period of occupation, is covered by the provisions of the Hague Land Warfare Convention on armed occupation with regard to its goals. 68

With regard to the second constitutional complaint, the Seventh Senate of the Federal Administrative Court submits that the promise of the Soviet occupying power to protect the property of foreigners does not apply to persons of dual nationality. The question as to whether the promise of protection also applied to domestic persons of dual nationality – that is, whether the element “on the basis of sovereign acts by occupying powers” also covers the seizure of the assets of such persons of dual nationality – was at all events a question of nonconstitutional law. Admittedly, Article 143.3 of the Basic Law provides that the exclusion of restitution undertaken in Article 41 of the Unification Treaty and in § 1.8 letter a of the Act on the Settlement of Open Property Issues is to continue in force. However, this does not make a constitutional question of the question as to whether this exclusion of restitution covers the deprivation of the assets of domestic persons of dual nationality. 69

3. The Halle Regional Government Council – *Land* Office for the Settlement of Open Property Issues – is of the opinion that the exclusion of reversal of the expropriations on the basis of sovereign acts by occupying powers pursuant to the Joint Declaration of the Federal Republic of Germany and the German Democratic Republic for the Settlement of Open Property Issues of 15 June 1990 was intended to prevent German authorities or courts reviewing the lawfulness of measures for which the Soviet Union as one of the four occupying powers is responsible in whole or in part. This, it states, is unobjectionable. The protection of the individual and of private property, that is, the protection of the civil population and civil objects contained in Article 46.2 of the Land Warfare Convention does not have an absolute effect. Confiscations on the basis of sovereign acts by occupying powers are therefore not *ultra vires* and do not result in voidness. 70

The grandfather of the second complainant had not only German citizenship, but also British, but this did not conflict with nature of the expropriation measure in the second constitutional complaint proceedings as a measure on the basis of sovereign acts by occupying powers. For persons of dual nationality, until the end of the Second World War, the public-international-law rule applied that one of the two states was at all events not permitted to protect the interests of such a person against the other state. Nor, if the promise of protection was interpreted from the point of view of what is known as effective nationality, did this lead to a different conclusion. The second complainant's grandfather had had a closer relationship to Germany, even after his flight from the area of Soviet occupation, since he continued to have his residence in the western area of occupation, he preferred the German language and he regarded himself as a German citizen. In other respects, the definition of the term "on the basis of sovereign acts by occupying powers" (*besatzungshoheitlich*) made in the decisions challenged coincided with the intention at the time and with the acts of the Soviet occupying power. The background of all the expropriation measures had been, *inter alia*, the nationalisation of real property and the redistribution of real property to the near-landless population. The expropriations made without compensation in this connection would questionable from the point of view of public international law only with regard to foreigners. To satisfy the requirements of public international law, however, it was sufficient to restrict the protection to those foreign persons who did not at the same time have German citizenship. 71

B.

The constitutional complaints are admissible to the extent that the complainants assert a violation of their fundamental rights and rights that are equivalent to fundamental rights under Article 2.1 and Article 3.1 of the Basic Law in conjunction with Article 1.2, Article 20.2, Article 25 and Article 79.3 of the Basic Law and Article 103.1 of the Basic Law, and the second complainant in addition under Article 3.1 of the Basic Law in its meaning of a prohibition of arbitrariness. With regard to the challenge of a violation of Article 14.1 of the Basic Law, the complainants lack the entitlement to file 72

(I.). The Second Senate of the Federal Constitutional Court has authority to decide without calling on the Plenum of the Federal Constitutional Court (II.).

I.

1. The complainants cannot base their constitutional complaints on Article 14.1 of the Basic Law. 73

Article 14 of the Basic Law is not the basis of judicial review for the decisions of the federal German legislature on the restitution of the assets expropriated between 1945 and 1949, because the expropriations themselves were completed and any claims arising from them in practice not enforceable and therefore valueless (BVerfGE 84, 90 (122 ff.)). This interpretation of Article 14 of the Basic Law, which is in harmony with the decision-making practice of the Strasbourg bodies responsible for the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention; on this, see D. VI. below) also stands up against the background of the meaning of public international law. The right of ownership, in addition to the institutional guarantee, has an aspect directed to actual exercise of freedom in a period of time. A person who is excluded by a foreign sovereign power from disposing over his or her property in the long term, where this exclusion is legitimate under public international law, loses his or her legal position as owner. If the use of the property is excluded for a long period as the result of measures relating to it by a state power that is foreign but that has territorial jurisdiction, there is no connecting factor giving rise to the fundamental right to property in Article 14 of the Basic Law. 74

Property, in the meaning of Article 1.2 of the Basic Law, has the same priority as a human right as other civil rights and liberties, but it remains dependent on an existing legal system that structures and guarantees it. If a legal system such as the Soviet occupation regime, which comes into existence lawfully under public international law, breaks the connection between the owner and the property owned, then, independently of the question of the legality of the expropriation, the formal legal position of the owner ends when the expropriation occurs. If the expropriation took place outside the temporal or territorial area of application of the Basic Law, the previous owner cannot rely on Article 14 of the Basic Law. 75

2. The complainants are entitled to make constitutional complaints under Article 2.1, Article 1.2 and Article 20.3 of the Basic Law in conjunction with Article 25 of the Basic Law and Article 3.1 of the Basic Law. 76

a) Article 2.1 of the Basic Law protects personal freedom to act and thus in principle every act and omission effected by a person’s own will, and in the last instance every freedom from state compulsion, subject to higher-ranking special fundamental rights (see BVerfGE 6, 32 (36)). Article 2.1 of the Basic Law therefore also offers protection against the imposition by state power of a disadvantage whose origin and inner justification do not lie in the constitutional order. 77

The constitutional order comprises all components of applicable law. Article 25 of the Basic Law makes the general principles of international law applicable in the Federal Republic of Germany, with priority over German statutes, and in principle gives the inhabitants of the territory of the Federal Republic of Germany the right to rely on this domestic validity. The wording of Article 25 sentence 2 of the Basic Law, which provides that the general principles of international law create “rights and duties directly for the inhabitants of the Federal territory”, shows the assessment of the constitution that compliance with the general principles of international law should if necessary be enforceable before the Federal Constitutional Court (see BVerfGE 18, 441 (448); 27, 253 (274)). Doubts as to the validity and scope of a rule of public international law are to be removed in the rule verification proceedings under Article 100.2 of the Basic Law and § 83 et seq. of the Federal Constitutional Court Act by federal constitutional law. 78

A judicial decision that finds an individual at fault and that is based on a provision of domestic law that conflicts with the general principles of international law or an interpretation and application of a provision of domestic law that is incompatible with general public international law may violate the right of the free development of personality protected by Article 2.1 of the Basic Law. 79

In the state system created by the Basic Law, irrespective of whether claims of individual persons already exist under public international law, it may be necessary to be able to assert violations of public international law as infringements of subjective rights. This principle, at all events, applies to constellations in which public-international-law rules have a close relationship to high-ranking individual legal interests, as is the case in the international law of expropriation. The institution of ownership contains in itself the private allocation of objects that can be assessed in financial terms, with the result that the international-law protection of ownership positions, for example through a prohibition on expropriation, at least in its protective effective is directed towards subjective rights, even if the original intention related more to the objective observation of mutually recognised minimum standards of civilisation. 80

In the present case it must also be taken into account that the complainants may have been injured in their claim to equal treatment under Article 3.1 of the Basic Law. For if the exclusion of restitution of the assets expropriated on the basis of sovereign acts by occupying powers violates a prior-ranking constitutional duty, it lacks inner constitutional justification, and there is unconstitutional unequal treatment of the former owners entitled to restitution. 81

b) To the extent that the second complainant asserts that, for reasons of public international law and occupation law, the expropriation with regard to himself was not a measure on the basis of sovereign acts by occupying powers, but a measure of the authorities of the German Democratic Republic, the possibility of a violation of Article 3.1 of the Basic Law is given in its character as a prohibition of arbitrariness. 82

II.

The Second Senate is entitled to decide on the merits. The Plenum of the Federal Constitutional Court is not to be called on under § 16.1 of the Federal Constitutional Court Act. 83

Under § 16.1 of the Federal Constitutional Court Act, if a Senate intends to deviate in a question of law from an interpretation of the law contained in a decision of the other Senate, the Plenum of the Federal Constitutional Court decides. The decisive factor is whether a statement of the Federal Constitutional Court exists on the precise question of constitutional law now arising (see BVerfGE 40, 88 (93–94); 79, 256 (264); Detterbeck, *Streitgegenstand und Entscheidungswirkung im öffentlichen Recht*, 1995, pp. 354-355). This must be a question of law on which the decision of the other Senate is based; the interpretation of the law must be the basis of the decision (see BVerfGE 77, 84 (104)). 84

The decision of the First Senate of the Federal Constitutional Court that the exclusion of restitution under Article 143.3 of the Basic Law is compatible with Article 79.3 of the Basic Law was based *inter alia* on the view that the amendment of the constitution did not conflict with public international law. The main ground of the decision is the interpretation of Article 14.1 of the Basic Law, under which this fundamental right protects only claims that are not practically valueless, and that this also applies to claims under public international law. Notwithstanding the question as to whether the grounds of the decision of BVerfGE 84, 90 ff. and BVerfGE 94, 12 ff. therefore see public international law only from the point of view of its guarantee of subjective rights and thus do not include the question raised by the constitutional complaints as to whether the objective public-international-law position is significant under Article 25 of the Basic Law and the principle of the rule of law, the Second Senate does not at all events intend to deviate from the interpretation of the law on which the decision of the First Senate was based. 85

C.

The constitutional complaints are unfounded. 86

A violation of the constitutional duty to respect public international law cannot be established; for this reason alone, a violation of Article 79.3 of the Basic by the constitution-amending legislature is also excluded (I.). A violation of Article 103.1 of the Basic Law cannot be established (II.). With regard to the second complainant's constitutional complaint, it is not apparent that the courts violated constitutional requirements when interpreting and applying national and international nonconstitutional law. This result also agrees with the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms as shaped by the decision-making practice of the European Court of Human Rights (ECHR) (IV.). 87

I.

The general principles of international law, under Article 25 of the Basic Law, are part of German law, with a priority higher than that of federal nonconstitutional law. The duty arising from this to respect these rules requires that the German state bodies comply with the provisions of public international law that bind the Federal Republic of Germany and refrain from violations, that the legislature in principle guarantees a possibility of correction for the German legal system for violations by German state bodies, and that German state bodies – in certain circumstances – enforce public international law in their own areas of responsibility if third-party states violate it (1.). 88

The state governed by the Basic Law has a duty to guarantee on its territory the integrity of the elementary principles of public international law, and, in the case of violations of public international law, to create a situation that is closer to the requirements of public international law in accordance with its responsibility and within the scope of its possibilities of action. However, this does not create a duty to return the property that was seized without compensation outside the state's sphere of responsibility in the period between 1945 and 1949 (2.). 89

1. a) The German state bodies, under Article 20.3 of the Basic Law, are bound by public international law, which claims domestic validity as the law of international agreements under Article 59.2 of the Basic Law, and with its general rules, in particular as customary international law, under Article 25.1 of the Basic Law. 90

The Basic Law integrates the state constituted by it in a public-international-law system that preserves freedom and peace because it seeks a harmony between its own free peaceful order and a public international law that not only relates to the coexistence of the states, but is intended to be the basis of the legitimacy of every state order (see Tomuschat, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – VVDStRL* 3 (1978), p. 7 (50-51)). The constitution emphasises particular institutions and sources of law of international cooperation and public international law (Article 23.1, Article 24, Article 25, Article 26 and Article 59.2 of the Basic Law). In this respect, the Basic Law facilitates the genesis of public international law with the participation of the Federal Government and ensures the effectiveness of existing public international law. The Basic Law places the state bodies in the indirect service of the enforcement of public international law and in this way reduces the risk that international law is not observed (see Order of the Second Senate of the Federal Constitutional Court of 14 October 2004 – 2 BvR 1481/04 –, in offprint p. 30 and also BVerfGE 109, 13 (24); 109, 38 (50)). 91

However, under German constitutional law such a direct constitutional duty is not to be assumed indiscriminately for any and every provision of public international law, but only to the extent that it corresponds to the conception of the Basic Law laid down in Articles 23 to 26 of the Basic Law and in Article 1.2 and Article 16.2 sentence 2 of the Basic Law. The Basic Law aims to achieve the opening of the domestic legal sys- 92

tem for public international law and international cooperation in the form of a supervised binding effect; it does not provide that the German legal system should be subordinated to the system of public international law and that public international law should have absolute priority over constitutional law, but instead, it seeks to increase respect for international organisations that preserve peace and freedom, and for public international law, without giving up the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority (see Order of the Second Senate of the Federal Constitutional Court of 14 October 2004 – 2 BvR 1481/04 –, in offprint p. 17).

b) This duty to respect public international law, a duty that arises from the fact that the Basic Law is open to public international law, has three elements: firstly, the German state bodies have a duty to follow the provisions of public international law that bind the Federal Republic of Germany, and, if possible, to refrain from violating them. What legal consequences arise from a violation of this duty depends on the nature of the public-international-law provision in question. The Basic Law itself deals with particular groups of cases. Thus, it may be inferred from Article 25 sentence 2 of the Basic Law that the general principles of international law have priority at least over nonconstitutional law. Secondly, the legislature must guarantee for the German legal system that violations of public international law committed by its own state bodies can be corrected. Thirdly, the German state bodies – subject to conditions which will not be set out in more detail here – may also have a duty to assert public international law in their own area of responsibility if other states violate it. 93

Even before now, the beginnings of such a duty have been evident in the German legal system. It is the basis, for example, of the Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) of the Federal Republic of Germany of 26 June 2002 (Federal Law Gazette I p. 2254), which implements essential provisions of general public international law relating to individuals who have acted as the representatives of foreign states. In addition, the Federal Republic of Germany, on the basis of the United Nations Convention on the Law of the Sea of 10 December 1982 (Federal Law Gazette 1994 II p. 1799), as a coastal state, may proceed against ships of its own and of foreign nationality that have violated the provisions of environmental protection on the high seas, if they call at a port of the coastal state. This provision enables the law of the sea to be enforced in a decentralised way in non-territorial sea areas (see Article 218 of the United Nations Convention on the Law of the Sea). 94

The legal question as to how the German legal system should deal with potential violations of public international law of a sovereign power that is not bound by the Basic Law has also arisen above all in the area of extradition law. By the standard developed for this area, the authorities and courts of the Federal Republic of Germany are in principle prevented by Article 25 of the Basic Law from interpreting and applying domestic law in such a way that it violates the general rules of public international law. By the constitutional standard, the authorities and courts of the Federal Republic of Germany have a duty to refrain from anything that gives effect to an act 95

that is undertaken by non-German public authorities in the area of application of the Basic Law in violation of general rules of international law, and are prevented from cooperating in a decisive way in an act by non-German public authorities in violation of general rules of international law (see BVerfGE 75, 1 (18-19); 109, 13 (26); 109, 38 (52)).

There may, however, be a tense relationship between this outwardly directed duty and the international cooperation between the states and other subjects of public international law, which is also intended by the constitution, in particular if a violation of law may be terminated only by cooperation. Then this manifestation of the duty of respect can be put into concrete form only in interaction with and balanced against Germany's other international obligations. 96

c) In Article 1.2 and Article 25 sentence 1 of the Basic Law, the Basic Law also adopts the gradual recognition of the existence of mandatory provisions, that is, provisions that are in the individual case not open to disposition by the states (ius cogens). These are rules of law which are firmly rooted in the legal conviction of the community of states, which are indispensable to the existence of public international law, and the compliance with which all members of the community of states may require (see BVerfGE 18, 441 (448-449)). This relates in particular to provisions on the international maintenance of peace, the right of self-determination (see Article 1.2 of the Charter of the United Nations; on this, see Doehring, in: Simma (ed.), *Charter of the United Nations*, 2nd ed., vol. II, 2002, Self-Determination, marginal nos. 57 ff.), fundamental human rights and central norms for the protection of the environment (see generally International Court of Justice – ICJ, Barcelona Traction, Light and Power Company, Limited (New Application: 1962), ICJ Reports 1964, 3, nos. 33-34). Such public international law may not be excluded by the states either unilaterally or by agreement, but only altered by a later norm of general international law of the same legal nature (see Article 53.2 of the Vienna Convention on the Law of Treaties). 97

The concept of peremptory rules of public international law has recently been confirmed and further developed in the articles of the International Law Commission (ILC) on the law of state responsibility (see the Annex to Resolution 56/83 of the General Assembly of the United Nations of 12 December 2001, quoted from the unofficial German version of the translation service of the United Nations). This field of law is a central area of general international law that governs the (secondary) legal consequences of a state's violation of its (primary) obligations under international law. Article 40.2 of the ILC Articles on the responsibility of states contains the definition of a serious violation of ius cogens and obliges the community of states to cooperate in order to terminate the violation by use of the means of public international law. In addition, a duty is imposed on the states not to recognise a situation created in violation of ius cogens. 98

2. In the cases to be decided, there is no violation of this duty of respect by German state bodies. The expropriations were the responsibility of the Soviet occupying pow- 99

er (a). On German unification, the Federal Republic of Germany attained the sovereign competence to decide on the reversal of the measures on the basis of sovereign acts by occupying powers. Public international law does not require the Federal Republic of Germany to make restitution. Nor did it have a duty to attach the legal consequence of voidness to the expropriations. The Federal Republic of Germany had merely a duty of cooperation with regard to the consequences (b). It fulfilled this duty by bringing about German unification peacefully by way of negotiations. Only by doing this did it achieve the de facto possibility to correct the situation, which was determined by history. The Federal Republic of Germany was allowed to come to the conclusion that dealing cooperatively with German unification would be incompatible with treating the expropriations as void (c).

(a) The expropriations on the territory of the Soviet occupation zone of Germany in the years 1945 to 1949, irrespective of whether they were occasioned directly by the Soviet occupying power or whether the German authorities installed by this occupying power had their own scope for decision in this respect, cannot be attributed to the sphere of responsibility of the state power of the Federal Republic of Germany, bound by the Basic Law (see BVerfGE 84, 90 (122-123)). Admittedly, since its foundation, the Federal Republic of Germany has seen itself as responsible for the whole of Germany in the meaning of the Preamble to the Basic Law (see BVerfGE 36, 1 (16); 77, 137 (149 ff.)). However, its state power was restricted not only in fact, but also under constitutional law, to the then territory of the Federal Republic of Germany (Article 23 sentence 1 of the Basic Law, original version). Under this Article, there was no responsibility of the Federal Republic of Germany in the sense of bearing responsibility for any measures it regarded as unlawful or unconstitutional in the Soviet-occupied zone, any more than with regard to measures taken by foreign state powers. 100

Instead, the Soviet occupying power, which carried out the expropriations on the basis of sovereign acts or was responsible for them by reason of the factual circumstances of control, claimed special authorisation, in order to restructure the property system in its occupation zone as planned. 101

There is more than one reason to suggest that the competence to structure the occupation regime is restricted by the minimum requirements of humanity laid down in the Hague Land Warfare Convention (on the application of the Land Warfare Convention as customary public international law as early as in the course of the Second World War, see International Military Court (Internationaler Militärgerichtshof), *Prozess gegen die Hauptkriegsverbrecher, 14. November 1945 bis 1. Oktober 1946*, judgment, pp. 260 ff., 267 ff.; Greenwood, in: Fleck (ed.), *Handbuch des humanitären Völkerrechts*, 1994, no. 120). 102

Under Articles 42 et seq. of the Land Warfare Convention, armed occupation creates a legal relationship between the occupying and the occupied state. The occupier has particular rights and duties in the occupied territory. It is true that the victorious powers, in the legal foundation documents for the exercise of government power with 103

regard to Germany, agreed that it should be possible for the victorious power in question to intervene significantly in the political and economic life of Germany. They regarded it as their duty "to fundamentally restructure the political system, the basis of the constitution, indeed, the education system and the whole economic and social structure of Germany" (see Part III.a § 3, 7, 9 and 11 et seq. of the Potsdam Agreement; on this, see E. Kaufmann, *Deutschlands Rechtslage unter der Besetzung*, 1948, pp. 16-17; Guggenheim, *Lehrbuch des Völkerrechts*, vol. II, 1951, pp. 930 ff.; Schweisfurth, in: Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. III, 1997, p. 191 (196-197)).

However, the humanitarian core of the Land Warfare Convention, which consists of the principles of humanity in the meaning of the Martens clause of the Preamble to the Hague Land Warfare Convention (see Partsch, *Internationale Menschenrechte?, Archiv des öffentlichen Rechts – AöR* 74 (1948), p. 158 (173); Scupin, *Über die Menschenrechte, Gegenwartsprobleme des internationalen Rechts und der Rechtsphilosophie,* in: *Festschrift für Laun*, 1953, pp. 184 ff.; F. Münch, *Das Völkerrecht der militärischen Besetzung,* in: *Festschrift für Schlochauer*, 1981, p. 457 (459); in passing, also Laun, *Die Haager Landkriegsordnung*, 5th ed., 1950, pp. 38 ff.), was binding even at the time of the occupation. The Martens clause was confirmed as follows in Article 1.2 of Protocol I Additional to the Geneva Conventions: 104

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. 105

It cannot be excluded that – as the complainants believe – acts of the Soviet occupying power were inconsistent with elementary principles of law, because, without differentiation as to individual responsibility, they were directed against a group of persons called the "class enemy" and aimed at its economical or even physical destruction. 106

However, it is not necessary to decide here the precise position of the boundaries of competence to structure the occupation regime and whether in this specific case they were exceeded. 107

b) On German unification, the Federal Republic of Germany attained the sovereign competence to decide on the continuation of the measures on the basis of sovereign acts by occupying powers (aa). Public international law did not impose on the Federal Republic of Germany a duty to make restitution (bb). The Federal Republic of Germany was subject only to a duty of cooperation with regard to the consequences, in order to achieve a situation closer to public international law (cc). 108

aa) After the end of an armed occupation of its territory or of a part of its territory, the returning sovereign power may decide freely on the continuation of measures on 109

the basis of sovereign acts by occupying powers and may in particular treat expropriations as void (see F. Münch, loc. cit., p. 457 (466); Wengler, *Fragen der Faktizität und Legitimität bei der Anwendung fremden Rechts*, in: *Festschrift für Lewald*, 1953, pp. 622 (629 ff.)). In the case of the expropriations on the basis of sovereign acts by occupying powers in the Soviet occupation zone, this sovereign is the Federal Republic of Germany.

A measure undertaken before 7 October 1949 – the date of foundation of the German Democratic Republic – on the basis of sovereign acts by occupying powers did not lose its character as the result of an official or judicial confirmation that occurred after this date (see the official parliamentary background materials to the annexes to the Unification Treaty of 31 August 1990, *Bundestag* document 11/7831, pp. 3-4). The fact that the German Democratic Republic in turn accepted the expropriations as its own will does not alter this. On the foundation of the German Democratic Republic, another sovereign in the meaning of public international law had moved into the territory of the German Reich (legally) vacated by the Soviet occupying power (see BVerfGE 92, 277 (320)). From the point of view of public international law, the German Democratic Republic, as a third-party state, on the basis of its territorial sovereignty and under its contractual obligations, reverse measures of the occupying power, but it waived the right to do so. After the end of the German Democratic Republic, the Federal Republic of Germany as the following sovereign over this territory was able to make such a correction. 110

bb) The Federal Republic of Germany is subject to no duty derived from public international law to make restitution to the persons affected by the expropriations. In connection with the Two-Plus-Four Talks, it impliedly and admissibly waived the right to any claims it had to damages under public international law (1). There are no rules of mandatory public international law preventing this (2). 111

(1) Between the German Reich and the Soviet Union, the states that were succeeded by the Federal Republic of Germany and the Russian Federation, there was a state of war under international law (see Zimmermann, *Staatennachfolge in völkerrechtliche Verträge*, 2000, pp. 85 ff.). The Hague Land Warfare Convention may give rise to claims on an international level, that is, between the occupying power and the returning sovereign. A party to a conflict that does not observe the provisions of Hague law is, by Article 3 of the Land Warfare Convention (see Article 91 of Protocol I Additional to the Geneva Conventions, of 1977) obliged to pay damages. This provision corresponds to the principle under customary international law that the violation of its duties under public international law makes a state responsible (see too Article 1 of the ILC article on the responsibility of states). This right to damages under secondary law, however, exists only in the public-international-law relationship between the states involved and is subject to their disposition. In this respect, the claim to damages differs from the claim under primary law of the persons involved that the prohibitions of humanitarian public international law are observed; this claim exists in the public-international-law relationship between the state occupying a territory and 112

the population living in this territory.

In the Two-Plus-Four Talks, the Federal Republic of Germany impliedly waived any claims under the Hague Land Warfare Convention. By the wording of the Land Warfare Convention and the practice of the states, the Federal Republic of Germany was not obliged to assert such claims towards the former occupying power. 113

It is not in contradiction to this that each of the four Geneva Conventions of the year 1949 contains a provision depriving the states that are parties the right to release themselves or another from the responsibility for “serious violations” of public international law (Article 51 of the First Geneva Convention, Article 52 of the Second Geneva Convention, Article 131 of the Third Geneva Convention and Article 148 of the Fourth Geneva Convention). When these provisions were created, the creators believed that they had found in them an efficient means of enforcing the Hague law. In the practice of the law of war, however, this principle has not yet succeeded in establishing itself. Instead, as a rule the victor demands the payment of compensation from the conquered (reparations), although there was no unambiguous agreement to base this on violations of the law of war, and above all without the victor paying damages for the violations of law committed by itself. It cannot be concluded from the provisions of the Geneva Convention that the states are forbidden to waive claims under the Hague Land Warfare Convention in connection with entering into a peace treaty. 114

Any claims of the individuals protected by the Land Warfare Convention are burdened in advance by this authorisation of the occupying power and the sovereign to legislate and to waive, and they are also restricted by it. 115

(2) In the case of a violation of peremptory norms of public international law by the Soviet occupying power, the Federal Republic of Germany was not obliged even under general public international law to attach the legal consequence of voidness to the expropriations. 116

At the date that was decisive for creating standards, the date of the expropriations, there was no general legal conviction that the protection of property of the state’s own citizens was part of universally applicable public international law in the sense of ius cogens. 117

Nor can it be established that at a later date a rule of peremptory public international law arose that excludes ex nunc the possibility of treating the existing situation as lawful (ius cogens superveniens). The institution of newly developed peremptory international law overtaking older law has been laid down in positive contract law. Under Article 53 of the Vienna Convention on the Law of Treaties, treaties that conflict with a peremptory norm of general international law are void. Under Article 64 of the Convention, a treaty entered into earlier that to date has been unobjectionable becomes void if it is in conflict with a peremptory norm of general international law that comes into existence later. 118

Accordingly, what is important is not so much the obligations to which the occupying power was subject in the period from 1945 to 1949 as the obligations to which the Federal Republic of Germany was subject when it entered into the Unification Treaty. Universal public international law has not contained and does not contain a guarantee of the property of a state's own citizens as a protective standard for human rights. It is true that in the year 1948, in Article 17.2 of the Universal Declaration of Human Rights, the General Assembly of the United Nations (Resolution 217 A (III) of the General Assembly of 10 December 1948, quoted [in the original ruling] in the version of the German translation service) laid down that "(n)o-one" may be "arbitrarily deprived of his or her property", but the Universal Declaration is not binding public international law. By reason of differences of opinion between West and East, property was also not mentioned in the International Covenant on Civil and Political Rights of 19 December 1966 (Federal Law Gazette 1973 II p. 1543). In view of this hesitation on the part of the international community to enter into a binding agreement, there can be no question of a customary norm of the legal protection of property as a human right applying worldwide, that is, in favour not only of the citizens of foreign states, but also of a state's own citizens. The significance of property for the dignity and the freedom of humanity – as part of the minimum protection of human rights – was recognised only later; the process of discussion on the level of public international law has not been completed even today (see, for example, Tomuschat, *Die Vertreibung der Sudetendeutschen*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – ZaöRV* 56 (1996), p. 1 (29)). 119

cc) Modern public international law is characterised by a continuous increase in the severity of the legal consequences which it attaches to the violation of particular central norms; the states are increasingly subjected to a duty to terminate and remove grave violations of peremptory international law. 120

Article 53.1 of the Vienna Convention on the Law of Treaties provides that treaties that, at the time of their conclusion, conflict with existing international law are void. In its Articles on the law of state responsibility, the International Law Commission has now also formulated clear rules for the legal consequences of a state's violation of peremptory international-law duties that apply to that state. Thus, under Article 26 of the ILC Articles, the general grounds of justification of a violation of public international law under Articles 20-25 do not apply to a violation of a peremptory norm. The consent of the injured state does not justify the violation of a peremptory norm of public international law. The same applies to necessity (Article 25) and *force majeure* (Article 23). Even when a state takes countermeasures that for all intents and purposes are justified against the violation of public international law of another state (Article 22), it may not violate peremptory law. 121

The ILC Articles contain a Chapter III, dealing separately with a duty to act on the part of third-party states (Articles 40 et seq.), but this treats only serious violations of peremptory international law. A breach is serious if it is gross or systematic in nature (Article 40.2). The states must cooperate in order to bring an end to any such breach 122

(Article 41.1). In addition, no state may recognise as lawful a situation created by such a breach or render aid or assistance in maintaining it (Article 41.2).

123 However, these provisions do not give rise to the legal consequence that the expropriations on the basis of sovereign acts by occupying powers – assuming they violated mandatory international law – are to be treated as void. Instead, the legal consequence of voidness is laid down only to the extent that duties under treaties are directed precisely to performance that is prohibited by a peremptory norm. Apart from this, however, and all the more so if a factually established situation and differing political interests are involved, the states have merely a duty to cooperate with regard to the consequences. Behind this duty of cooperation is the consideration that it is urgently necessary to create a situation that, while safeguarding the interests on both sides, does actually mitigate the breach of peremptory law as far as possible.

124 There is no conflict here with the fact that the states, under public international law, may also have a duty not to recognise particular factual developments that have occurred in breach of fundamental principles of the international order. Thus, the Friendly Relations Declaration of the General Assembly of the United Nations of 24 October 1970, which has been recognised by the International Court of Justice to a large extent as a condensed version of applicable customary public international law (see ICJ, Judgment of 27 June 1986, Military and Paramilitary Activities in and Against Nicaragua, ICJ Reports 1986, 14, no. 199) states that no acquisition of territory by force may be treated as legal by the community of states. The report of the International Court of Justice on the situation of Namibia (ICJ, Report of 22 June 1971, ICJ Reports 1971, 16) contains a very similar assessment. In this report, the International Court of Justice came to the conclusion that the rule of Namibia by the state of South Africa had become illegal by reason of the effective termination of the mandate under which South Africa had been entrusted with responsibility for former German South West Africa by the League of Nations. In view of the occupation of the country, which was now unlawful, all states in the world had an obligation to regard the action of South Africa for or in relation to Namibia as invalid to the extent that such non-recognition was not contrary to the vital interests of the inhabitants of Namibia (ICJ, loc. cit., p. 58). In this case too, however, the main emphasis was on the termination or removal of the situation. In consequence, the community of states also cooperated with South Africa when the occupation of Namibia came to an end.

125 c) The Federal Republic of Germany satisfied this duty to cooperate with regard to the consequences by bringing about reunification by way of peaceful negotiations. Only in this way did it create the de facto possibility, if not of undoing the situation created from 1945 to 1949, yet of substantially correcting it, and at all events of softening its actual effects. In this connection, the Federal Government was permitted to come to the conclusion that managing reunification cooperatively would be incompatible with treating the expropriations as void.

126 To the extent that the public-international-law duties in this connection include a du-

ty of the state not to enrich itself from another state's breach of international law, no breach has occurred. Such a duty in this case is not mandatorily directed to the regained assets being returned specifically to the former owners. Instead, it is required that the total amount of distribution is adequate and that when this is carried out, the state may continue to take account of further constitutional requirements (see BVerfGE 102, 254 (321)). In addition to the distribution of assets on the basis of the global compensation agreement with the United States of America (Agreement Concerning the Settlement of Certain Property Claims, *Abkommen über die Regelung bestimmter Vermögensansprüche* of 13 May 1992, Federal Law Gazette II p. 1223) and the rehabilitation of alleged war criminals by Russian authorities (see K. Hesse, *Führt die Rehabilitierung durch russische Behörden zur Rückgabe entzogener Vermögenswerte?, Zeitschrift für Vermögens- und Immobilienrecht – VIZ* 1997, p. 268 (270); M. Redeker, *Wiedergutmachung auf Grund russischer Rehabilitierungsentscheidungen, Neue Juristische Wochenschrift* 2001, pp. 2359 ff.), the Federal Government has adequately distributed the enrichment resulting from Articles 21 et seq. of the Unification Treaty by passing the Compensation and Equalisation Payments Act.

In addition, the legislature, in addition to the Act on Compensation under the Act on the Settlement of Open Property Issues, passed the Act on State Equalisation Payments for Expropriations under Occupation Law or on the Basis of Sovereign Acts by Occupying Powers (*Gesetz über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage* – AusglLeistG, Equalisation Payments Act (Federal Law Gazette 1994 I p. 2624, corrected Federal Law Gazette 1995 I p. 110)). In this respect, the Equalisation Payments Act exercises the rights reserved by the Federal Government in number 1 sentence 4 of the Joint Declaration. 127

In principle, the Equalisation Payments Act provides that the persons entitled shall receive an equalisation payment that is payable from a compensation fund in money; this will be paid by the allocation of bonds. For the basis of assessment, the Act refers to the relevant provisions of the Compensation Act. In addition, there are provisions on what is known as the Land Acquisition Programme in § 3 and 4; this creates for particular groups of persons the possibility of acquiring agricultural and forestry land in the area of the former German Democratic Republic on favourable terms (see BVerfGE 94, 334 (336)). § 3 of the Equalisation Payments Act creates the possibility of acquiring agricultural and forestry land on favourable terms; the privatisation task of the Trust Agency (*Treuhandanstalt*) and its successors related to this land. The Land Acquisition Ordinance was passed to supplement this. 128

The equalisation arrangements made are compatible with the constitutional requirements of a state under the rule of law and the social welfare state and with Article 3.1 of the Basic Law (see BVerfGE 102, 254 (301 ff.)). Nor can higher standards be derived from the constitutional duty to respect public international law. 129

This applies on the one hand to the absolute amount of the equalisation payments made by the Federal Republic of Germany. But it also applies to the drafting of the provisions on the acquisition of land on favourable terms. The provisions make it possible for reorganisers and new organisers of agricultural and forestry operations in the area of the former German Democratic Republic and the successors in title of the former agricultural cooperatives to acquire land on favourable terms, with priority. Here, a distinction is made between agricultural and forestry land. The Regulations of the Trust Agency for Implementing the Valuation and Management of Publicly Owned Agricultural and Forestry Land (*Richtlinie der Treuhandanstalt für die Durchführung der Verwertung und Verwaltung volkseigener land- und forstwirtschaftlicher Flächen*) of 26 June 1992 as amended by the Adaptation Regulations (*Anpassungsrichtlinie*) of 22 June 1993 (reprinted in: *Zeitschrift für Vermögens- und Investitionsrecht – VIZ* 1993, pp. 347 ff.; see also *Bundestag* document 12/7588, pp. 15 ff.) provide in relation to the land acquisition programme that when a decision is made to lease land for agricultural purposes, persons affected by the land reform and their heirs – within the priority group of reorganisers and new organisers treated in the same way and where the plan for the enterprise is of equal value – are to be taken into account “in the sense of a reconcilement of interests”. 130

In the rules on acquisition of land on favourable terms, the legislature had two purposes: on the one hand, it intended a compensation programme for former owners in the field of agriculture and forestry, and on the other hand, it intended a promotion programme to encourage private agriculture and forestry in the area of the former German Democratic Republic (see BVerfGE 94, 334 (349 f.)). This is just as much in harmony with any goals required by public international law as it is with constitutional law. 131

In this connection it should also be taken into account that German unification is a process in which the Federal Republic of Germany may classify the treatment of individual topics – such as dealing with the land reform – as parts of an overall conception of the balancing of interests. The consequences of the Second World War, a period of rule under occupation and a post-war dictatorship must be borne by the Germans as a community of fate and also, within particular limits, as the individual experience of injustice, without it being possible in every case to obtain adequate compensation, to say nothing of restitution in kind. For this reason too, it would be inappropriate to balance precisely the increased assets of the Federal Government as a result of reunification against the sums distributed to the persons affected. 132

3. If the existing constitutional duties of the Federal Republic of Germany with regard to public international law are fulfilled, the exclusion of restitution under Article 143.3 of the Basic Law cannot violate Article 79.3 of the Basic Law. It need not, therefore, be decided whether and to what extent the constitutional duty to respect public international law also binds the constitution-amending legislature. 133

II.

There is no violation of Article 103.1 of the Basic Law. It is true that the nonconstitutional courts assessed the complainants' public-international-law arguments only by referring to the fact that they are bound by the decisions of the Federal Constitutional Court under § 31.1 of the Federal Constitutional Court Act. But this does not mean that there has been a violation of the right to a fair hearing, which is equivalent to a fundamental right. 134

Under § 31.1 of the Federal Constitutional Court Act, the nonconstitutional courts are bound by the grounds on which the decisions of the Federal Constitutional Court are based. To the extent that the ordinary courts here possibly erroneously assessed the binding effect under § 31.1 of the Federal Constitutional Court Act, this does not result in a violation of the constitution. Article 103.1 of the Basic Law has been complied with, because the ordinary courts heard the submissions of the complainants and at most subsumed them under the wrong legal category when they chose Article 14.1 of the Basic Law in conjunction with § 31.1 of the Federal Constitutional Court Act. 135

III.

The interpretation of the law expressed in the decisions challenged with regard to the dual nationality of the predecessor in title of the second complainant is unobjectionable from the point of view of constitutional law. In particular, there can be no objection, with regard to Article 3 of the Basic Law, to the opinion that the prohibition on expropriation of foreign assets pronounced by the Soviet occupying power does not apply to persons who had not only foreign but also German citizenship. 136

1. An expropriation on the basis of sovereign acts by occupying powers is a measure that was formally undertaken on the basis of statutes, delegated legislation and other acts of state by German agencies, but which was carried out at the suggestion or wish of the occupying power or with its consent. This applies above all to the expropriations in connection with the land reform and the expropriations carried out following SMAD Order no. 124 of 30 October 1945, which were expressly confirmed by SMAD Order no. 64 of 17 April 1948 – in which the highest chief of the SMAD ordered the termination of the sequestration proceedings in the Soviet Occupation Zone (see BVerfGE 84, 90 (113)). 137

It is not significant whether the expropriations were formally based on legal acts of the occupying power or of the German authorities established by that power. What is decisive, instead, is whether the measure was not merely accepted by the Soviet occupying power, but also coincided with its declared intention (see BVerfGE 84, 90 (114)), or whether the occupying power as a non-German state authority still had the highest sovereignty at the time of the expropriation (see BVerfGE 94, 12 (31)). In particular, expropriations in connection with the land reform are therefore to be regarded as being "on the basis of sovereign acts by occupying powers". The only acts of ex- 138

propriation that are to be regarded as German orders are those which lacked the decisive elements making them attributable to the occupying power, for example because the occupying power had expressly prohibited the expropriations by reason of their character or in the individual case. Only a distinction on this basis between Allied decisions – whether under occupation law or on the basis of sovereign acts by occupying powers – and German orders does justice to the legal reality in the Soviet occupation zone (see BVerfGE 94, 12 (32)).

2. This conclusion is also unobjectionable from the point of view of public international law. In the law of state responsibility, it is recognised that acts of the bodies of a state give rise to the responsibility of another state if they can be attributed to the latter (see Article 18 of the ILC Articles on state responsibility, loc. cit.). Accordingly there are no objections to attributing the expropriations under public international law to the Soviet Union, in view of its overall responsibility as occupying power and its formative influence on the events. 139

IV.

Finally, the decision does not conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. 140

1. The relevant provision for the protection of property in Article 1 of the First Protocol (the First Protocol came into force for the Federal Republic of Germany on 13 February 1957, Federal Law Gazette 1956 II p. 1880) reads as follows [Translator's note: originally quoted from the unofficial German-language version]: 141

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions [Translator's note: German: right to respect of his property]. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. 142
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties (as promulgated in the amended version of the Convention of 4 November 1950 for the Protection of Human rights and Fundamental Freedoms of 17 May 2002, Federal Law Gazette II, p. 1054). 143

The material area protected by the right is described in the German language version in the phrase "right to respect of property" ("Recht auf Achtung des Eigentums"). This wording corresponds to the wording in the authentic versions, "peaceful enjoyment of his possessions" and "droit au respect de ses biens". The European Convention for the Protection of Human Rights, in its conception of property, does not follow 144

a specific national property and economic system shaped by civil law, but is based on the ideas of public international law. By this definition, property includes all rights acquired from private persons (see Dolzer, *Eigentum, Enteignung und Entschädigung im Völkerrecht*, 1985, p. 170; Grabenwarter, *Europäische Menschenrechtskonvention*, 2003, § 25 marginal [no. 3).

By the established case-law of the European Court of Human Rights, however, Article 1 of the First Protocol protects not only property positions already existing under national law (existing possessions), but also acquired claims on the realisation of which the claimant was rightfully entitled to rely (legitimate expectations) (European Court of Human Rights, no. 39794/98, Judgment of 10 July 2002, no. 69 – Gratzinger v. the Czech Republic; no. 40057/98, Judgment of 4 March 2003, no. 2 – Walderode v. the Czech Republic). This definition of property excludes reliance on the continuation in existence of earlier property rights that over a long period of time could not be effectively exercised (European Commission on Human Rights, nos. 18890/91, 19048/91, 19049/91, 19342/92 and no. 19549/92, Order of 4 March 1996 – Weidlich u.a. gegen Deutschland, *Neue Juristische Wochenschrift* 1996, p. 2291 (2292)). 145

2. a) The European Commission on Human Rights and the European Court of Human Rights have now had the opportunity in several proceedings comparable to the present constitutional complaints to express their opinion on the compatibility of expropriations and confiscations with Article 1 of the First Protocol. The resulting decision was that the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols are, ratione temporis, not applicable to expropriations that took place before the Convention came into force. With regard to expropriations by the Soviet occupying power in Germany, in addition, it was held that the Convention bodies were not competent, ratione personae, because the Federal Republic of Germany was not responsible for the expropriations in question and therefore was not obliged to permit any resulting claims to damages to be enforced against itself. 146

Here, it is not significant for the legal assessment that the effect of an unlawful expropriation continued in existence even after the Convention came into force. The expropriation is seen as a non-recurring act without a permanent effect in the legal sense (see European Commission on Human Rights, loc. cit., p. 2292). 147

b) The crucial factor for the present cases, however, is the opinion of the European Court of Human Rights, expressed several times, that in the immediate post-war period, property rights removed as a consequence of the Second World War in principle created no “legitimate expectations” protected by Article 1 of the First Protocol for the former holders of rights (see ECHR, no. 42527/98, Judgment of 12 July 2001, in particular no. 85 – Prince Hans-Adam II of Liechtenstein v. Germany). 148

The interpretation of the law of the European Commission on Human Rights, by which neither “existing possessions” nor legally recognised rights to damages existed when the Unification Treaty entered into force, has been confirmed by the Court in 149

three more recent decisions. The proceedings related to the lawfulness of expropriations in the Czech Republic in the years 1945/46 and 1983 under the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the cases of Walderode (ECHR, no. 40057/98, judgment of 4 March 2003) and Harrach (ECHR, no. 77532/01, Order of 27 May 2003), the property was the land of former German citizens who were expropriated under the Benes Decrees; in the case of Gratzinger (ECHR, no. 39794/98, Judgment of 10 July 2002), the expropriation, the subject of the proceedings was the expropriation of a married couple who had fled from Czechoslovakia. The complainants attempted without success to obtain restitution on the basis of relevant legislation of the year 1992.

The challenge of a violation of Article 1 of the First Protocol was rejected as unfounded in each case, with the argument that the complainants had no longer had a legal position that could have given them “legitimate expectations” of their former property being restored. 150

Hassemer Jentsch Broß

Osterloh Di Fabio Mellinghoff

Lübbe-Wolff Gerhardt

Dissenting opinion

of Justice Lübbe-Wolff

on the Order of the Second Senate of 26 October 2004

– 2 BvR 955/00 –

– 1038/01 –

The Senate replies to questions that are not raised in the case with constitutional principles that are not contained in the Basic Law. 151

The second complainant's constitutional complaint relates *inter alia* to the following question: if a person who is directly affected by expropriations on the basis of sovereign acts by occupying powers has more than one nationality, what significance does this have for the exclusion of restitution under § 1.8 letter a of the Act on the Settlement of Open Property Issues? My objections do not relate to the way the Senate dealt with this question. 152

Before the Federal Administrative Court, the second complainant, as far as is apparent from the documents submitted, even pursued the restitution claim he asserted exclusively with reasons relating to the point of view just mentioned. It should therefore have been examined whether the challenges with which the second complainant now generally proceeds against the constitutionality of the exclusion of restitution in the proceedings before the Federal Constitutional Court were admissibly made. Admittedly, the case-law on admissibility developed by the Senates and Chambers of the Federal Constitutional Court under the aspects of subsidiarity and substantiation needs discussion. However, deviations from it may not be tacitly made in the individual case but must, where they are necessary, be openly set out and thus also be made a basis of case-law in future cases. 153

Apart from this, both complainants, supporting their arguments by considerations of public international law, challenge the fact that the decisions proceeded against regarded provisions of applicable nonconstitutional law as constitutional and applied them, although by these provisions the complainants are neither owners of the disputed plots of land nor entitled to restitution. In order to decide on the present constitutional complaints, therefore, it is necessary only to determine whether the fundamental exclusion of a return of the plots of land expropriated under occupation law or on the basis of sovereign acts by occupying powers – and the treatment included in this of the disputed expropriations as effective – violates fundamental rights of the complainants. The question as to whether these expropriations are to be reversed is answered by the Basic Law itself (Article 143.3 of the Basic Law) in a sense unfavourable to the complainants. The complainants' fundamental rights may therefore be injured by the challenged decisions only subject to the condition that Article 143.3 of the Basic Law is unconstitutional constitutional law. 154

Consequently, the Federal Constitutional Court can only examine, as the First Sen- 155

ate correctly held, whether the requirements that Article 79.3 of the Basic Law makes of amendments of the constitution have been satisfied (see BVerfGE 94, 12 Act (33-34)). The Senate therefore chooses the wrong approach when it examines whether a possible violation of general principles of international law (Article 25 of the Basic Law) violated the complainants' fundamental right not to be subjected by public authority to a disadvantage that has no foundation in the constitutional system. It was necessary to examine whether the exclusion of restitution laid down in Article 143.3 of the Basic Law and the associated acceptance of the changes in ownership that took place violated the core of human dignity of fundamental rights of the complainants, which under Article 79.3 of the Basic Law may not be violated even by a statute amending the constitution.

This question has already been answered in the negative by decisions of the First Senate. The First Senate – taking account of all fundamental rights, the violation of which the complainants also assert, and taking account of public-international-law points of view –established that Article 143.3 of the Basic Law is compatible with Article 79.3 of the Basic Law (BVerfGE 84, 90; confirming, BVerfGE 94, 12; on the meaning of public international law for the constitutionality of the exclusion of restitution, pp. 46-47 ibid.). This does not prevent the Second Senate from examining whether this answer was correct, and, under § 16.1 of the Federal Constitutional Court Act, calling on the Plenum of the Federal Constitutional Court if it regards it as incorrect. However, in this case it must proceed from the right question – the question as to a potential violation of the core of human dignity of fundamental rights of the complainants. If the Senate had asked the original question in this way, it would have directly become obvious that public-international-law aspects, such as those adduced by the complainants, are not capable of casting doubt on the correctness of the decisions of the First Senate. The general principles of international law, as the Second Senate recently emphasised, take precedence under Article 25 of the Basic Law over federal statutes, but not over the constitution (see Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04). Therefore, if only on account of the priority accorded them by the Basic Law, they cannot be in a position to enrich the complainants' fundamental rights with core contents that also stand up to the constitution-amending legislature. Consequently, the case gave no occasion to undertake more detailed discussion of the position under public international law. 156

Even if there had been occasion to consider the position under public international law, the Senate would have had to confront the charge that in doing this it went far beyond what was necessary for the decision. Under C.I.2.b)bb) of the grounds, it is established and justified that public international law does not require the Federal Republic of Germany either to make restitution or to treat the expropriations that occurred as void. This would have sufficed, assuming that matters of public international law had been of any relevance whatsoever. All other arguments on the situation under public international law, on the constitutional duties of enforcement and correction to which the German state is subjected in connection with breaches of public in- 157

ternational law by other states, and on the question whether the Federal Republic of Germany distributed any enrichments from the expropriations carried out to those affected in a manner complying with these duties are not relevant to the issue, for the disputes relate solely to the duty of restitution or to the associated question as to the effectiveness of the expropriations at issue. In all questions above and beyond this, the Senate could even have held the opposite to what it did without this being of any relevance to the result of the decision.

158 The novel constitutional principles which the Senate nevertheless developed on the basis of the present constitutional complaints have no foundation in the constitution. There will be no further consideration here of the question as to how far the Basic Law, above and beyond the specific contents of Article 1.2, 16.2 sentence 2 and 23 to 26 of the Basic Law, lays down a general constitutional “duty to respect public international law” (on this, see Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04). At all events, it cannot be derived from the above-named provisions or from the openness to public international law of the Basic Law expressed in them that the Federal Republic of Germany is constitutionally obliged to help to enforce public international law against violations by other states, and that it, as a consequence of this duty, is obliged to correct and thus compensate for acts of other states that are contrary to public international law in the sense of creating a situation that is “closer to public international law”. Moreover, it is misleading to introduce obligations of this kind as partial elements of a duty to respect public international law, for they decidedly aim at more than mere respect.

159 With regard to the duty to “enforce public international law in their own areas of responsibility if third-party states violate this”, the Senate restricts itself to the statement that such a duty exists or may exist “subject to conditions which will not be set out in more detail here”. This statement is impossible to refute or confirm, for it has no definable legal content. The situation is different with regard to the consequences that the Senate derives from this, despite the fact that the conditions mentioned are not defined and the scope of the area of German responsibility is not clarified. As a consequence of its hypothetical constitutional duty to enforce public international law, a duty that exists subject to conditions that are not set out in more detail, the state is to be obliged, when other states commit breaches of public international law, or at least breaches of elementary, peremptory general rules of international law, “to create a state that is closer to the requirements of public international law” in accordance with its responsibility and within the scope of its possibilities of acting. It is not clear in what way the situation is qualified because this principle is to apply to the German state only in accordance with its responsibility; at all events, the Senate assumes that in the specific case of the expropriations in the course of the land reform concrete duties would arise with regard to compensation and distribution of any enrichment if – and this is left open – these expropriations were to be seen as breaches of peremptory public international law. But for this case too, duties of compensation and distribution under public international law certainly do not exist (on constitutional duties

under the principle of the social welfare state see BVerfGE 84, 90 (126); 102, 254 (298), with further references).

Public international law does not contain a general rule to the effect that states have a duty to enforce public international law against breaches on the part of other states or to mitigate and compensate the consequences of such breaches, nor does it contain principles that create such duties in the present situation. Accordingly, the case-law of the Federal Constitutional Court has previously assumed that the German state is not answerable for breaches of public international law by other states (BVerfGE 84, 90 (123 f.), with further references). The draft articles of the International Law Commission on state responsibility quoted by the Senate do contain a provision (Article 41.2) requiring states not to recognise as lawful situations that have arisen as a result of a serious breach of peremptory public international law and not to support the maintenance of such situations. The case-law on which this draft provision is based, according to the comments on the draft articles by the International Law Commission, relates to the recognition of annexations and occupations of foreign territory in breach of public international law. Over and above the specific situation in the present case, which has a number of unusual features, public international law contains no general duty of third-party states to work towards a closer accord with the *status quo ante* where situations in the world (with regard to property, to files of the State Security Service of the German Democratic Republic or to any other matter) have come about in breach of public international law. Nor does the Senate itself claim that a duty under public international law to this effect exists; it does not present the duty as one under public international law, but as one under constitutional law. However, it remains unexplained how a constitutional duty to respect public international law can give rise to duties that public international law itself does not contain. 160

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