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COMPENSATION FOR VIOLATIONS OF THE LAWS  
OF WAR – THE *VARVARIN* CASE BEFORE GERMAN  
AND INTERNATIONAL COURTS\*\*\*

*As has happened in many wars, during NATO's 1999 war against Yugoslavia innocent civilians became accidental targets. International Humanitarian Law (IHL) prohibits indiscriminate attacks, that is, attacks which do not distinguish between legitimate military targets and civilians. A NATO aircraft bombed the bridge in Varvarin, resulting in the death of several civilians. Although the aircraft had not been German, family members of those who had been killed sued for compensation in German courts on the basis of Germany's NATO membership. German law includes rules on compensation for illegal activities by public authorities. In the Varvarin case, German courts have continued to find that these rules are not applicable to armed conflicts. In autumn 2013, the German Federal Constitutional Court upheld this jurisprudence. This article shows the shortcomings of this approach as well as the gaps in current International Humanitarian Law concerning compensation for victims of violations of the laws of war.*

Key words: Germany. – Varvarin. – War. – Humanitarian Law. – Compensation.

1. INTRODUCTION

On 30 May 1999, NATO aircraft operated in Yugoslavian Airspace during Operation “Allied Force”. On this day, two NATO F-16 fighter

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planes bombarded the bridge over the Morava River in a small town of 4,000 with the name of Varvarin, located in Serbia, some 200 km north of Kosovo. A total of 10 civilians were killed and some 30 injured when the planes attacked the bridge in two waves in the early afternoon of that day. The first wave of attacks killed three people, among them 15 year old *Sanja Milenkovic*, the daughter of Prof. *Zoran Milenkovic*, the small town's mayor and a political enemy of *Slobodan Milosevic*. Although the bridge had been destroyed another attack followed three to six minutes later, killing seven. Among those killed in the second attack were local residents attempting to rescue the initial victims including the 76 year old priest *Milivoje Ciric*. At the time of the attacks, some 2,000 to 3,000 people were in the immediate vicinity of the bridge, many of them on a nearby market square for the Sunday market, and many others at the nearby church for the celebration of the religious holiday of the Holy Trinity. It appears as if Germany's air force is not directly responsible for the attacks, since Germany only used Tornado Aircraft in the 1999 war and the attack was conducted by F-16s, most likely American or British.<sup>1</sup>

Nevertheless, the plaintiffs brought the case before courts in Germany since the country not only supported Operation Allied Force but actively participated in it. Furthermore, the legal fees for the plaintiffs were paid by some 1,500 German citizens who donated the required funds.<sup>2</sup> Moreover, the mother of *Sanja Milenkovic*, a lawyer who became a spokesperson for the plaintiffs, grew up in Germany and still feels at home there.<sup>3</sup> The survivors and relatives claimed financial compensation from the Federal Republic of Germany for their loss which cannot be measured in money.<sup>4</sup>

## 2. THE ATTACK AT VARVARIN AS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW

Whichever party to the conflict actually conducted the attacks on Varvarin violated fundamental norms of International Humanitarian Law in doing so.

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<sup>1</sup> R. Jung, "Die Brücke von Vavarin", Frankfurter Rundschau Online, 14 October 2003, [www.fr-online.de](http://www.fr-online.de) (also available at <http://aldeilis.net/german/die-bruecke-von-varvarin/>), last accessed 21 March 2014.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> On this case see also H.-J. Heintze, "Durchsetzung eines menschenrechtlichen Mindeststandards im bewaffneten Konflikt", 25 *Sicherheit und Frieden* 2007, 43, 49 and N. Quenivet, "The Vavarin Case: The Legal Standing of Individuals as Subjects of International Humanitarian Law", 2 *Journal of Military Ethics* 2004, 181.

## 2.1 Art. 48, 52 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions

According to Art. 48 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions,<sup>5</sup> armed attacks may only be directed against military targets. These are defined by Art. 52 of the same protocol as those “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>6</sup> Aside from the fact that the bridge over the Morava River was only 4.5 meters wide<sup>7</sup> and was only capable of supporting a weight of eight tons, making it too small to allow for significant military use, it was located some 200 km north of the actual battlefields of Kosovo. While the bridge was referred to by NATO as a highway bridge,<sup>8</sup> the next highway is 15 km away, which in fact forced the Yugoslav Armed Forces to actively avoid the Varvarin area.<sup>9</sup> Therefore, the bridge over the Morava at Varvarin did not make an “effective contribution” to the military activities undertaken by Yugoslav forces. Consequently, the bridge did not constitute a military target within the meaning of Art. 52 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions, making the attack a violation of Art. 48 of the 1<sup>st</sup> Additional Protocol. Even if the bridge had been used by the armed forces of Yugoslavia, the bombardment was also at odds with other norms of International Humanitarian Law.

## 2.2 The prohibition of disproportionate bombardment, Art. 51 (5) lit. b of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions

The bombardment of the bridge over the Morava at Varvarin could have also constituted a disproportionate bombardment within the meaning of Art. 51 (5) lit. b of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions because the attacks “may [have been] expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. As of yet, it is unclear which military advantages could have been gained from bombarding the bridge. The word “anticipated” seems to indicate that prior knowledge of the bombarding party regarding the target at the time of the bombardment is required. But even if the pilots and weapons system officers had assumed

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<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, available online at <http://www.icrc.org/ihl/INTRO/470> last accessed 21 March 2014.

<sup>6</sup> Art. 52 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions.

<sup>7</sup> R. Jung, *ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

that they were in fact bombarding a highway bridge, the fact that hundreds and thousands of people had assembled in the immediate vicinity of the bridge for the holiday must have been a clear warning as to the true nature of the bridge and the potential dangers for the civilian population resulting from attacking the bridge.

### 2.3 Art. 57 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions

Moreover, the bombardment amounted to a violation of Art. 57 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions, which in essence requires that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”

## 3. THE OBLIGATION TO COMPENSATE FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Art. 91 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions and Art. 3 of the 4<sup>th</sup> Hague Convention state that violations of provisions of the Geneva Conventions or the Additional Protocols, in this case the violation of Articles 48, 51 (5) lit. b and 57 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions, lead to liability of the “party to the conflict which violates the provisions of the Conventions or of this Protocol” to pay compensation and that it “shall be responsible for all acts committed by persons forming part of its armed forces.” Art. 3 of the 4<sup>th</sup> Hague Convention has become part of the law of the land of the Federal Republic of Germany by virtue of Art. 25 of the Federal Constitution<sup>10</sup> (the *Grundgesetz* or GG for short<sup>11</sup>) and both the 4<sup>th</sup> Hague Convention<sup>12</sup> and the 1<sup>st</sup> Additional Protocol to the Geneva Conventions have been ratified by Germany.

## 4. GERMAN RESPONSIBILITY FOR ALLIED CONDUCT

But it was not the German air force which in fact bombarded the bridge in Varvarin. Yet, the German air force was involved in Operation Allied Force. Moreover, German-based AWACS Aircraft had a supportive

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<sup>10</sup> Oberlandesgericht Köln, Case no. 7 U 167/97, Judgment of 27 August 1998, available online at <http://openjur.de/u/154971.html> last accessed 21 March 2014.

<sup>11</sup> Federal Gazette (*Bundesgesetzblatt*) 1949, 1.

<sup>12</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, available online at <http://www.icrc.org/ihl.nsf/INTRO/195> last accessed 21 March 2014.

role with regard to the aircraft employed for the actual bombardment. This raises the question of whether or not, and if yes, under which conditions, a state can be held liable for the wartime conduct of her allies. The wording of Art. 91 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions refers to the armed forces of a party to a conflict. The term “party” within the meaning of Art. 91 of the 1<sup>st</sup> Additional Protocol to the Geneva Conventions refers to states, rather than to international organisations such as NATO, since only states are parties to the convention. Yet this would mean that within an alliance of states, among which the respective treaty law IHL obligations differ considerably, the “dirty work” could be allocated to those states which have accepted less strict IHL obligations through international treaties. Therefore there is a necessity for a shared responsibility, at least in cases in which there is a unified and integrated command. Especially in cases where decision makers consider not the nationality of the employed forces, but rather their technical and military skills when deciding which tasks will be assigned to which force.

#### 5. *LOCUS STANDI* OF INDIVIDUALS FOR CLAIMS ARISING OUT OF A VIOLATION OF INTERNATIONAL LAW

Yet, even if one assumes that Germany could be liable under Art. 91 of the First Additional Protocol to the Geneva Conventions for the unlawful conduct of its allies, the question arises again, whether individuals can bring such a claim before German courts. In the *Distomo* decision, concerning a massacre committed by German forces during the occupation of Greece in World War II, the *Bundesgerichtshof* (BGH), Germany’s Federal Court of Justice, deliberately left the open the question of whether individual victims are still required to rely on their state to bring a claim for compensation for war crimes on their behalf.<sup>13</sup>

#### 6. THE DECISION OF THE LANDGERICHT BONN<sup>14</sup>

The *Landgericht* (District Court) in Bonn,<sup>15</sup> sitting as the court of first instance in that matter, accepted the case as admissible<sup>16</sup> but denied

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<sup>13</sup> Bundesgerichtshof, Case no. III ZR 245/98, Judgment of 26 June 2003, available online at <http://openjur.de/u/66929.html> last accessed 21 March 2014.

<sup>14</sup> Landgericht Bonn, Case no. 1 O 361/02, Judgment of 10 December 2003, available online at <http://openjur.de/u/100649.html> last accessed 21 March 2014.

<sup>15</sup> The court in Bonn was the correct forum as the Federal Republic of Germany is represented in such cases by the Federal Ministry of Defense which retains its seat in Bonn rather than Berlin.

<sup>16</sup> Landgericht Bonn, *ibid.*

compensation based on both domestic and international law.<sup>17</sup> The court held that neither domestic German law nor international law provides a basis for the claims by survivors and relatives of victims of the Varvarin attack.<sup>18</sup> But by examining both German and international legal rules, the court produced a highly instructive ruling which touches upon many of the problems faced in various cases involving compensation claims for violations of International Humanitarian Law.

### 6.1 Claims based on International Law

The court denied the existence of norms of international law which provide for direct compensation for the plaintiffs.<sup>19</sup> The traditional, *i.e.* Westphalian, understanding of international law does not, in the words of the Bonn court, accept the individual to be a subject of international law, but only “grants indirect international protection”.<sup>20</sup> Just like a society which is organised in a state is collectively responsible for violations of international law by the state,<sup>21</sup> only a collective can claim rights under international law.<sup>22</sup> Under the Westphalian system, a state which claims that international law was violated to the detriment of its citizen(s) does not claim a right of its citizen but its own right.<sup>23</sup> The individual is merely connected to the international legal system by the state, without being a subject of this legal system itself.<sup>24</sup> Although this traditional view can hardly be sustained in the light of the developments in the field of international human rights law in the last half century, the Bonn court in upholding this concept<sup>25</sup> remains in line with both the majority view on international law as well as the jurisprudence of Germany’s Federal Constitutional Court, the *Bundesverfassungsgericht*.<sup>26</sup> Therefore, under this traditional understanding of international law, in general, an individual cannot claim damages under international law.<sup>27</sup> However, the court in Bonn also accepted the changes imposed on this traditional view by the

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<sup>17</sup> *Ibid.*, no. 113 *et seq.*

<sup>18</sup> *Ibid.*, no. 114 *et seq.*

<sup>19</sup> *Ibid.*, no. 120.

<sup>20</sup> *Ibid.*, no. 121.

<sup>21</sup> Cf. A. Cassese, *International Law*, Oxford University Press 2001, 7.

<sup>22</sup> Landgericht Bonn, no. 121.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, no. 122.

<sup>26</sup> Cf. Bundesverfassungsgericht, Case no. 2 BvL 33/93, Order of 13 May 1996, BVerfGE (Collection of the Decisions of the German Federal Constitutional Court) 94, 315, 334, available online at <http://www.servat.unibe.ch/dfr/bv094315.html> last accessed 22 March 2014.

<sup>27</sup> Landgericht Bonn, no. 122.

development of International Human Rights Law in the UN era.<sup>28</sup> Nowadays individuals have become not only mere stakeholders but also holders of rights under international law who can enforce them within the frameworks offered by different International Human Rights documents, both on a global<sup>29</sup> and regional level, e.g. with the European Convention on Human Rights. But as has been held in the discussion surrounding Art. 36 of the Vienna Convention on Consular Relations (VCCR),<sup>30</sup> which was triggered by the cases *Breard*,<sup>31</sup> *LaGrand*<sup>32</sup> and *Avena*<sup>33</sup> before the International Court of Justice (ICJ) in The Hague and which eventually led to the U.S. withdrawal from the VCCR settlement procedure involving the ICJ,<sup>34</sup> individuals can also have rights under treaties not primarily intended to be Human Rights Treaties.<sup>35</sup> The court in Bonn followed the earlier jurisprudence of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, that “as far as states create norms of international law to this effect, they can, through these norms, give or allocate rights or duties to an individual and thereby grant him or her partially the status of a subject of international law”<sup>36</sup> – by relating to the content of the norm in question and the states concerned. A true right of the individual under international law is created only if the states also offer a treaty-based procedure to enforce these rights against states.<sup>37</sup> Otherwise we are only talking about a right of state. Individuals can at best be (merely) beneficiaries, without being holders of these rights themselves.

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<sup>28</sup> *Ibid.*

<sup>29</sup> For an overview on the UN system see A. F. Bayefsky, *The UN Human Rights Treaty System*, Transnational Publishers, Ardsley 2001 and A. F. Bayesky *How to complain to the UN Human Rights Treaty System*, Transnational Publishers, Ardsley 2003.

<sup>30</sup> Vienna Convention on Consular Relations, 24 April 1963, available online at <https://treaties.un.org/doc/Publication/UNTS/Volume%20596/volume-596-I-8638-English.pdf> last accessed 21 March 2014.

<sup>31</sup> International Court of Justice, Case concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Order of 10 November 1998, I.C.J. Reports 1998, 426.

<sup>32</sup> International Court of Justice, *LaGrand* (*Germany v. United States of America*), Judgment of 27 June 2001, I.C.J. Reports 2001, 466.

<sup>33</sup> International Court of Justice, *Avena and other Mexican Nationals* (*Mexico v. United States of America*), Judgment of 31 March 2004, I.C.J. Reports 2004, 12.

<sup>34</sup> See J. Quigley, “The United States’ Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences”, 19 *Duke Journal of Comparative & International Law* 2009, 263, 265.

<sup>35</sup> See S. Kirchner, “The Right to Consular Assistance: Is the Vienna Convention on Consular Relations Self-Executing?”, Social Science Research Network, 8 January 2008, available online at <http://ssrn.com/abstract=1081584> last accessed 22 March 2014.

<sup>36</sup> Landgericht Bonn, no. 123.

<sup>37</sup> *Ibid.*, Bundesverfassungsgericht BVerfGE 93, 315, 334.

At present, the most successful example of such a system has been the system created by the European Convention on Human Rights (ECHR),<sup>38</sup> which includes both the right to life (Art. 2 ECHR) and compensation rules (Art. 5 (5) ECHR).<sup>39</sup> Thus, relying successfully on the ECHR requires that the case in question fall within the jurisdiction of the respondent state. Based on the *Bundesgerichtshof*'s decision in the case concerning the World War II massacre in Distomo,<sup>40</sup> the *Landgericht* Bonn therefore denied the possibility for individuals to bring claims under international law.<sup>41</sup> The latter court also did not accept the idea that Art. 25 GG could provide for individuals to make a claim based on general rules of international law in case of violations of International Humanitarian Law<sup>42</sup>. In cases of IHL violations, international law therefore does not provide standing in German courts.

## 6.2 State liability claims

Plaintiffs in German courts therefore have to resort to rules of German law, in particular to the law of compensation for illegal activities attributable to the state (*Staatshaftungsrecht*). The Bonn court accepted that international law allows for claims under domestic law against a claimant's home state parallel to the claims brought by the home state on the international plane.<sup>43</sup> Nevertheless, it denied that there is a legal basis for such a claim under German law.<sup>44</sup>

## 6.3 Compensation claims based on constitutional rights

Fundamental or constitutional rights (*Grundrechte*) alone are also insufficient for the purpose of obtaining compensation before Germany's civil law courts since they lack legal basis for a claim beyond the protected right itself.<sup>45</sup>

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<sup>38</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, European Treaty Series No. 5, available online at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) last accessed 22 March 2014.

<sup>39</sup> Landgericht Bonn, no. 124.

<sup>40</sup> Bundesgerichtshof, Case no. III ZR 245/98, Judgment of 26 June 2003, available online at <http://lexetius.com/2003,1416> last accessed 22 March 2014.

<sup>41</sup> Landgericht Bonn, no. 124.

<sup>42</sup> *Ibid.*, no. 129 *et seq.*

<sup>43</sup> *Ibid.*, no. 133.

<sup>44</sup> *Ibid.*, no. 134.

<sup>45</sup> *Ibid.*, no. 135.

#### 6.4 The German law of torts

The court furthermore rejected claims based on § 823 of the Civil Code (*Bürgerliches Gesetzbuch* (BGB)<sup>46</sup>), the cornerstone rule of the German law of torts, due to the fact that liability was to be based on the conduct of a state official.<sup>47</sup> The court specifically referred to an earlier decision by the *Bundesgerichtshof* in which the latter had dealt with the issue and had drawn the line between the law of torts and the law of state liability.<sup>48</sup>

#### 6.5 The German law of state liability and International Humanitarian Law

The court denied claims based on the law of state liability. It stated that in cases involving armed conflicts domestic law of state liability disappears behind International Humanitarian Law.<sup>49</sup> For the time of hostilities, many peacetime rules become suspended<sup>50</sup> and all questions surrounding the responsibility for the outbreak of hostilities and the legal questions stemming from the use of force are to be answered only by international law.<sup>51</sup> Consequently, all questions of compensation regarding the use of force are questions of international law.<sup>52</sup> On the national level, according to the Bonn court, claims require a codified legal basis in order to be successful.<sup>53</sup> The fact that Art. 74 para. 1 GG sees a difference between civil law<sup>54</sup> and the law concerning compensation for victims of war<sup>55</sup> indicated to the court that war compensation cannot be based on civil law, including tort and state liability law.<sup>56</sup> Although one can understand Art. 74 para. 1 no. 10 GG to include compensation for future conflicts,<sup>57</sup> this interpretation appears to be adhering very strictly to the

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<sup>46</sup> Bürgerliches Gesetzbuch, 18 August 1896, as promulgated on 2 January 2002, last changed on 1 October 2013, available online at <http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf> last accessed 22 March 2014.

<sup>47</sup> Landgericht Bonn, no. 135.

<sup>48</sup> Bundesgerichtshof, Case no. III ZR 40/95, Judgment of 13 June 1996, *Neue Juristische Wochenschrift* 1996, 3208.

<sup>49</sup> Landgericht Bonn, no. 135.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, no. 136.

<sup>54</sup> Art. 74 para.1 no.1 GG.

<sup>55</sup> Art. 74 para. 1 no. 10 GG.

<sup>56</sup> *Cf.* Landgericht Bonn, no. 137.

<sup>57</sup> C. Pestalozza, *Article 74*, in: H. von Mangoldt / F. Klein / C. Pestalozza, *Das Bonner Grundgesetz*, Vol. 8, Verlag Franz Vahlen, Munich 1996<sup>3</sup>, Article 74, margin no. 438.

wording of the norm. From the perspective of German courts: too strictly. The history of the *Grundgesetz*, which was created in the wake of the Second World War, on the other hand seems to indicate that the focus of Art. 74 para. 1 no. 10 GG was indeed the question if the states or the federal republic had the legislative competence to deal with the question of wartime compensation with regard to World War II, which was a pressing issue for post-war West Germany at the time the *Grundgesetz* entered into force in 1949. Accordingly, for the court in Bonn the narrow view added to the opinion that the law of state liability is not applicable in armed conflicts.

### 6.6 Interim Conclusion

Since the court did not find that there was a legal basis for any of their claims it did not even have to examine whether the requirements of the claims made on the ground of law of torts or the law of state liability were given and consequently the plaintiffs were denied compensation by the *Landgericht* Bonn.

## 7. APPEAL COURTS

The *Oberlandesgericht*, that is, the regional Court of Appeals, in Cologne upheld the Bonn court's ruling<sup>58</sup> and the *Bundesgerichtshof*, Germany's Federal Court of Justice, decided in Fall 2006 that neither German nor International Law would provide a legal basis for compensation.<sup>59</sup>

## 8. THE DECISION OF THE GERMAN FEDERAL CONSTITUTIONAL COURT 2013

On 13 August 2013, the German Federal Constitutional Court (*Bundesverfassungsgericht*) finally ruled on the matter.<sup>60</sup> While focusing on procedural issues, the judges denied a right to compensation<sup>61</sup> and

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<sup>58</sup> Oberlandesgericht Köln, Case no. 7 U 7/04, Judgment of 28 July 2005, available online at <http://openjur.de/u/112612.html> last accessed 22 March 2014.

<sup>59</sup> Bundesgerichtshof, Case no. III ZR 190/05, Judgment of 2 November 2006, available online at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=38105&pos=0&anz=1> last accessed 22 March 2014.

<sup>60</sup> Bundesverfassungsgericht, Case no. 2 BvR 487/07, Order of 13 August 2013, available online at [http://www.bverfg.de/entscheidungen/rk20130813\\_2bvr266006.html](http://www.bverfg.de/entscheidungen/rk20130813_2bvr266006.html) last accessed 22 March 2014.

<sup>61</sup> *Ibid.*, no. 38 *et seq.*

ruled, based on a few pieces of academic literature,<sup>62</sup> that there is no such right of individual victims in international law.<sup>63</sup>

The disappointingly short treatment the issue at stake received in the *Bundesverfassungsgericht*'s decision, though, indicates that the view described here appears to be fairly set in stone for German judges. However, the political pressure to provide compensation, also for older cases, is increasing.<sup>64</sup>

The question which the courts have failed to address in detail is whether there is a new rule of customary international law to the effect that States are directly liable towards individual victims for violations of International Humanitarian Law. So far, many States appear reluctant to accept such a legal obligation. Payments to victims of U.S. actions in Iraq or Afghanistan,<sup>65</sup> for example, have usually been made *ex gratia*, without accepting an obligation to compensate e.g. for damage to homes caused by U.S. troops operating there. Right now it is questionable whether there is already a new rule of customary international law<sup>66</sup> to the effect that compensation is owed to the victim. This question, however, should have been answered by the *Bundesverfassungsgericht*. The Federal Constitutional Court will take academic literature into account. When it comes to a question of customary international law, however, merely relying on academic literature which is already several years old is not enough. *Iura novit curia*, the principle that the Court knows the law, also applied here. The Federal Constitutional Court should have investigated the existing state practice, and in particular the question of whether or not the practice of States which provide compensation in similar cases is supported by a corresponding *opinio juris*.

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<sup>62</sup> *Ibid.*, no. 43.

<sup>63</sup> *Ibid.*

<sup>64</sup> S. Kirchner, *Völkerrechtliche Immunitäten und die Frage der Entschädigung für Verletzungen des Humanitären Völkerrechts im Kontext des Globalisierungsdiskurses*, Grin-Berlag, Munich 2011, 58.

<sup>65</sup> See e.g. D. I. Grimes / J. Rawcliffe / J. Smith (eds.), *2006 Operational Law Handbook*, The Judge Advocate General's Legal Center and School, International and Operational Law Department, Charlottesville 2006, 155; United States of America, Code of Federal Regulations, Title 32, Subtitle A, Chapter V, Subchapter B, Part 536, Subpart J, Section 536.145 (32 CFR 536.145), available online at <http://www.law.cornell.edu/cfr/text/32/536.145> last accessed 22 March 2014; United States Government Accountability Office, *Report to Congressional Requesters, Military Operations – The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan*, GAO, Washington D.C. 2007, available online at <http://www.gao.gov/new.items/d07699.pdf> last accessed 22 March 2014.

<sup>66</sup> The *Bundesverfassungsgericht*, no. 43, concludes that at this time there is no such rule of customary international law but does not exclude its potential emergence for the future.

## 9. CONCLUSIONS AND OUTLOOK

According to German courts, only states, not individuals, can claim compensation against other states for violations of the laws of war. In Germany therefore, the courts maintain an old fashioned view which seriously undermines the position of individuals in international law and is not in line with the developments of international law since 1945. It is therefore to be hoped that the courts will abandon this conservative view in the future and open the way for at least some form of compensation for victims of violations of the laws for war. Leaving the legal situation as it is can only be considered unsatisfactory. As a nation with a rich history in the legal sciences, Germany cannot afford to stay behind current developments but should set the pace in times of change. So far, German courts seem unwilling to take up this task. However, courts can only make decisions when cases are brought before them. At the end of the day, it is the lawmakers and those who elect them who have to change the course.

The fact that German armed forces are deployed under EU, NATO and UN mandates around the world makes it likely that sooner or later German forces will again cause damage to civilians. Germany could remedy the situation by establishing a norm in domestic law to the effect that compensation is paid for intentional violations of the laws of war. In doing so, Germany could aid victims of war crimes worldwide by contributing to the development of a future norm of customary international law which would provide for compensation for war crimes victims outside Articles 75<sup>67</sup> and 79 of the Rome Statute.<sup>68</sup>

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<sup>67</sup> Article 75 Rome Statute, entitled “Reparations to victims”, reads as follows: “1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States. 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1. 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article. 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.” More information on the work of the Trust Fund created under Article 79 Rome Statute and mentioned in Article 75 para. 2 Rome Statute is available online at <http://www.trustfundforvictims.org/> last accessed 21 March 2014.

<sup>68</sup> Rome Statute of the International Criminal Court, 17 July 1998, available online at [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) last accessed 21 March 2014.