COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF PRINCE HANS-ADAM II OF LIECHTENSTEIN
v. GERMANY

(Application no. 42527/98)

JUDGMENT

STRASBOURG

12 July 2001

In the case of Prince Hans-Adam II of Liechtenstein v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mrs E. PALM, *President*,
Mr C.L. ROZAKIS,
Mr G. RESS,
Mr J.-P. COSTA,
Mr A. PASTOR RIDRUEJO,
Mr I. CABRAL BARRETO,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mr B. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr J. HEDIGAN,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,

and also of Mr M. DE SALVIA, *Jurisconsult*, *for the Registrar*,

Having deliberated in private on 31 January and 27 June 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 42527/98) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by His Serene Highness Prince Hans-Adam II of Liechtenstein ("the applicant"), on 28 July 1998.

2. The applicant was represented before the Court by his counsel. The German Government ("the Government") were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*.

3. The applicant alleged, in particular, that he had been deprived of an effective access to a court in respect of his claim for restitution of property, namely a painting confiscated by the former Czechoslovakia under Presidential Decree no. 12. He also complained that the German court decisions to declare his action inadmissible, and the consequential return of the painting to the Czech Republic, violated his right to property. He relied

on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, taken alone and in conjunction with Article 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Fourth Section of the Court. On 6 June 2000 it was declared admissible by a Chamber of that Section, composed of Mr A. Pastor Ridruejo, President, Mr G. Ress, Mr I. Cabral Barreto, Mr V. Butkevych, Mrs N. Vajić, Mr J. Hedigan, and Mr M. Pellonpää, judges,and Mr V. Berger, Section Registrar [*Note by the Registry*. The Court's decision is obtainable from the Registry].

The Government of Liechtenstein, having been informed of their right to intervene (Article 36 § 1 of the Convention and Rule 61 § 1 of the Rules of Court), indicated that they had no intention of so doing.

On 14 September 2000 the Chamber relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to the relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Due to the withdrawal of Mr L. Wildhaber, the President of the Court, Mrs E. Palm replaced him as President of the Grand Chamber in this case and Mr K. Traja participated as judge.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 31 January 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*
Mr K. STÖHR, *Ministerialrat*, *Deputy Agent*,
Mrs S. WASUM-RAINER, *Ministerialrat*, *Adviser*;

(b) *for the applicant*
Mr A. GOEPFERT, of the Düsseldorf Bar, *Counsel*,
Mr P. RÄDLER, of the Düsseldorf Bar,
Mr D. BLUMENWITZ, Professor of law at Würzburg University,
Mrs G. KLEIN, *Advisers*.

The Court heard addresses by Mr Goepfert, Mr Rädler, Mr Blumenwitz and Mr Stöhr, and their answers to questions put by some of the judges.

8. The applicant and the Government each filed observations on the question of just satisfaction under Article 41 of the Convention.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is the monarch of Liechtenstein, born in 1945 and living in Vaduz (Liechtenstein).

A. The background of the case

10. The applicant's late father, the former monarch of Liechtenstein, had been the owner of the painting *Szene an einem römischen Kalkofen* (alias *Der große Kalkofen*) of Pieter van Laer, which had formed part of his family's art collection since at least 1767. Until the end of the Second World War the painting had been in one of the family's castles on the territory of the now Czech Republic.

11. In 1946 the former Czechoslovakia confiscated the property of the applicant's father which was situated in its territory, including the painting in question, under Decree no. 12 on the "confiscation and accelerated allocation of agricultural property of German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people" (*dekretu prezidenta republiky č. 12/1945 Sb. o konfiskaci a urychleném rozdělení majetku Němců, Mad'arů, zrádců a nepřátel*), issued by the President of the former Czechoslovakia on 21 June 1945 ("the Beneš Decrees" – "*Benešovy dekrety*").

12. On 21 November 1951 the Bratislava Administrative Court (*správní soud*) dismissed the appeal lodged by the applicant's father.

In its reasoning on the merits of the case, the Administrative Court stated that the defendant office had come to the conclusion that the appellant was a person of German nationality within the meaning of the provision in Article 1 § 1 (a) of the decree, on the basis of a finding that this was and had been generally known. It noted that the defence of the complaint directed against this finding was restricted to the representation that this finding was not supported in the files and that, due to this shortcoming, it had not been necessary to deal with the finding in greater detail. The Administrative Court considered that this approach was mistaken as, under the relevant

provision of the administrative regulations, no evidence was required for facts which were generally known and, therefore, it was not necessary for evidence to be contained in the administrative files; however, counter-evidence against an official finding that a certain fact was generally known would have been admitted.

The Administrative Court concluded that, as the appellant had failed to raise the objection that the issue was not a fact of general knowledge and to contend that he was in a position to bring counter-evidence, the finding of the defendant office had remained uncontested.

B. The proceedings in the German courts

13. In 1991 the municipality of Cologne obtained the painting as a temporary loan from the Brno Historical Monuments Office in the Czech Republic.

14. On 11 November 1991 the Cologne Regional Court (*Landgericht*) granted the applicant's request for an interim injunction ordering the municipality of Cologne to hand over the painting to a bailiff at the end of the exhibition. The painting was sequestrated on 17 December 1991.

15. At the beginning of 1992 the applicant instituted proceedings before the Cologne Regional Court against the municipality of Cologne, requesting that the defendant consent to the delivery of the painting to him by the bailiff. He argued that, as his late father's heir, he was the owner of the painting. He submitted that the painting had not been subject to expropriation measures in the former Czechoslovakia and that in any event such measures were invalid or irrelevant on account of violation of the *ordre public* of the Federal Republic of Germany.

16. The Brno Historical Monuments Office intervened in these proceedings in support of the defendant. It submitted that the applicant's father had lost his ownership of the painting as a result of the confiscation in 1946 and that the lawfulness of this confiscation had been confirmed by the Bratislava Administrative Court in its decision of 21 November 1951.

17. On 10 October 1995 the Cologne Regional Court, following a hearing, declared the applicant's action inadmissible. In the court's view, Chapter 6, Article 3, of the Convention on the Settlement of Matters Arising out of the War and the Occupation (*Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen* – "the Settlement Convention") of 23 October 1954 between the United States of America, the United Kingdom of Great Britain and Northern Ireland, the French Republic and the Federal Republic of Germany excluded German jurisdiction over the applicant's case.

In its reasoning, the Regional Court noted that, under the terms of that Article's paragraph 3 taken in conjunction with paragraph 1, claims or actions against persons having acquired or transferred title to property on

the basis of measures carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of specific agreements, were not admissible. These particular provisions had been confirmed upon German unification.

According to the Regional Court, Chapter 6, Article 3 § 3, of the Settlement Convention applied, *mutatis mutandis*, to the applicant's claims against the defendant, which had obtained the painting on loan and had not acquired property, because any review of the aforementioned measures should be excluded.

The Regional Court found that the confiscation of the applicant's father's property under Decree no. 12 on the "confiscation and accelerated allocation of agricultural property of German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people", issued by the President of the former Czechoslovakia on 21 June 1945, constituted a measure within the meaning of Chapter 6, Article 3 § 3.

The Regional Court rejected, in particular, the applicant's argument that this provision did not apply as it only concerned measures carried out with regard to German external assets or other property and his father had never been a German citizen. In this respect, the court, referring to case-law of the Federal Court of Justice (*Bundesgerichtshof*), stated that the view of the confiscating State was decisive. The aim and purpose of this provision, namely to sanction, without any further examination, confiscation measures implemented abroad could only be achieved by excluding such measures from judicial review in Germany.

Moreover, the Regional Court found that the confiscation measure in question pursued one of the purposes mentioned in Chapter 6, Article 3 § 3. Having regard to German case-law regarding other "Beneš Decrees", especially Decree no. 108 on the "confiscation of enemy property and the national reform fund", it considered that Decree no. 12, while also pursuing economic aims, was intended to expropriate the property of German and Hungarian nationals, that is, "enemy property".

The Regional Court further noted that the applicant's father's painting had been expropriated under Decree no. 12. The competent Czechoslovakian authorities had interpreted its provisions as applying to the applicant's father, regarding him as a "person of German nationality". The applicant's father had unsuccessfully appealed against this decision which

had been confirmed by the Bratislava Administrative Court in 1951. The German courts were not in a position to review the lawfulness of the confiscation at issue.

Finally, the Regional Court considered that the painting at issue, as part of the inventory of the agricultural property, had been included in the confiscation measure.

The Regional Court dismissed the applicant's request to suspend the proceedings in order to await the outcome of proceedings to be instituted under the German Equalisation of Burdens Act (*Lastenausgleichsgesetz*) concerning compensation for damage and losses due to, *inter alia*, expulsion and destruction during the Second World War and the post-war period in the then Soviet-occupied zone of Germany and of Berlin. The Regional Court considered that the question underlying the litigation before it would not be clarified in such proceedings. Irrespective of the question of whether the plaintiff was of German origin, he had no equalisation claims under the said legislation, which only applied to persons who resided in the Federal Republic of Germany or West Berlin on 31 December 1952. In any event, there was no right to compensation for the loss of works of art (*Kunstgegenstände*).

18. On 9 July 1996 the Cologne Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal. The Court of Appeal confirmed that the applicant's action was inadmissible as German jurisdiction in respect of his claim was excluded under Chapter 6, Article 3 § 1, in conjunction with paragraph 3, of the Settlement Convention.

The Court of Appeal considered that the notion of German jurisdiction included the competence, derived from State sovereignty and generally vested by the State in the courts, to administer justice. German jurisdiction was delimited by international agreements, customary international law and the generally recognised rules of international law. Chapter 6, Article 3 § 3, taken in conjunction with paragraph 1, of the Settlements Convention excluded German jurisdiction in respect of claims and actions against persons, who, as a consequence of reparation measures, had directly or indirectly acquired title to German property confiscated abroad.

The Court of Appeal confirmed that the provisions in question continued to be in force under the Treaty of 12 September 1990 on the Final Settlement with respect to Germany. Article 7 of this Treaty, which provided for the termination of the operation of quadripartite rights and responsibilities with respect to Berlin and Germany as a whole, was amended by the Agreement of 27 and 28 September 1990 according to which the Settlement Convention was suspended and later terminated with the exception of the provisions specified in paragraph 3 of that Agreement, *inter alia*, Chapter 6, Article 3 §§ 1 and 3. That Agreement was valid under public international law and under German constitutional law.

The Court of Appeal further considered that Chapter 6, Article 3 § 3, of the Settlement Convention applied in the applicant's case. In the court's view, this provision was the procedural consequence of the notion that the legal relations resulting from the liquidation of German property abroad by foreign powers for the purpose of reparation were "final and unchallengeable" (*Endgültigkeit und Unanfechtbarkeit*) for the Federal Republic of Germany and the private persons concerned.

According to the Court of Appeal, the applicant's constitutional rights, in particular his right to property, his right of access to a court and his right to a decision by the legally competent court (*gesetzlicher Richter*), had not been infringed. Basic rights protected individuals against acts of domestic public authorities and not against the exercise of public authority by a foreign State abroad. The domestic legislator was therefore not prevented from limiting domestic legal protection against violations of basic rights by a foreign State if this was necessary to attain more important goals.

When applying Chapter 6, Article 3 § 3, of the Settlement Convention, the domestic law of the expropriating State concerning the concrete confiscation measure had to be taken into account, as this provision was aimed at excluding litigation in Germany regarding confiscation measures based on legislation concerning enemy property.

As regards the applicant's objections against the lawfulness, in particular under public international law, of the confiscation and expropriation of his father's property, the Court of Appeal found that by virtue of Chapter 6, Article 3 § 3 of the Settlement Convention, German courts had no jurisdiction. Likewise, this provision did not allow recourse to be had to general rules of public international law or to German *ordre public* when examining the admissibility of the action. The applicant's argument that the provisions of the Settlement Convention and their application to him as a national and head of a neutral State violated the law of peace was accordingly rejected.

According to the Court of Appeal, the painting at issue constituted external assets within the meaning of Chapter 6, Article 3 § 1, of the Settlement Convention, referred to in paragraph 3 of Article 3. The Court of Appeal noted that the applicant's father had indisputably never had German nationality. However, following the case-law of the Federal Court of Justice, it considered that the notion of "German external assets" had to be interpreted in the light of the law of the expropriating State. The confiscation in dispute had been found to be in compliance with the legislation of the expropriating State: the competent Czechoslovakian administrative authorities as well as the Bratislava Administrative Court had found that Presidential Decree no. 12 of 21 June 1945 applied to the applicant's father's confiscated property. Article 1 § 1 (a) of this decree provided for the confiscation of agricultural properties of "all persons of German or Hungarian nationality" irrespective of their citizenship. The

notions of "German nationality", or of "German origin" ("*deutsche Volkszugehörigkeit*"), likewise used at that time, comprised as relevant elements a person's citizenship and nationality, the latter depending on the mother tongue. At the relevant time, the Czechoslovakian authorities indisputably regarded the applicant's father as of German origin in that broader sense.

The Court of Appeal also found that the painting at issue, as part of the confiscated agricultural property, had been subject to the expropriation measure. There were no doubts as to the effectiveness of the expropriation, as it was sufficient under the relevant case-law that such expropriations had been implemented and that the previous owners had been deprived of their factual power of disposition. Furthermore, the painting had been confiscated for the purpose of reparation within the meaning of Chapter 6, Article 3 §§ 1 and 3, of the Settlement Agreement. The limitation of the confiscation measures to persons belonging to enemy States in itself justified such a conclusion. The assets of the persons concerned were confiscated as enemy assets.

Finally, the Court of Appeal considered that both the defendant and the intervener belonged to the group of persons protected by Chapter 6, Article 3 § 3, of the Settlement Agreement. German jurisdiction was excluded whenever the plaintiff intended to challenge measures within the meaning of Chapter 6, Article 3 § 1.

19. On 25 September 1997 the Federal Court of Justice refused to entertain the applicant's appeal on points of law, as the case was of no fundamental importance and, in any event, had no prospect of success.

20. On 28 January 1998 the Third Section of the Second Division (*3. Kammer des zweiten Senats*) of the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to entertain the applicant's constitutional complaint (*Verfassungsbeschwerde*), as it offered no prospect of success.

The Federal Constitutional Court considered in particular that, for the purposes of the civil court decisions, questions as to the existence or non-existence of certain rules of customary international law on the confiscation of neutral assets or on the determination of citizenship were irrelevant as they concerned the issue of the lawfulness of the expropriation by the former Czechoslovakia. The German civil courts had not decided this issue and, under public international law, they had not been obliged to do so. Moreover, to the extent that the civil courts had regarded the expropriation as a measure within the meaning of Chapter 6, Article 3 § 1, of the Settlement Convention, they had expressly refrained from qualifying the applicant's father's nationality. Their interpretation of the terms "measures with regard to German external assets" as comprising any measures which, in the intention of the expropriating State, were directed against German assets, could not be objected to under constitutional law. The bar on

litigation did not constitute an agreement to the detriment of Liechtenstein, as only the Federal Republic of Germany and its courts were under this treaty obligation.

The Federal Constitutional Court further recalled that the exclusion of jurisdiction did not amount to a violation of the right of property as these clauses and the Settlement Convention as a whole served to settle matters dating back to a time before the entry into force of the German Basic Law (*Grundgesetz*) on 23 May 1949.

Finally, there was no indication of arbitrariness or of a violation of other constitutional rights. The Federal Constitutional Court confirmed that Chapter 6, Article 3 §§ 1 and 3, of the Settlement Convention had not been set aside by the Treaty on the Final Settlement with respect to Germany: while Germany obtained full sovereignty, its obligations under treaties with the Three Powers were not affected. This had also been the legal opinion of the Federal Republic of Germany and the Three Powers, which otherwise would not have settled the suspension and termination of parts of the Settlement Convention in a separate agreement.

The decision was served on 2 February 1998.

21. On 9 June 1998 the Cologne Regional Court discharged its interim injunction of 11 November 1991. The bailiff thereupon handed the painting over to the Cologne municipality, which had it returned to the Czech Republic.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Beneš Decree no. 12

22. Beneš Decree no. 12 on the "confiscation and accelerated allocation of agricultural property of German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people" provided for the expropriation, with immediate effect and without compensation, of agricultural property, for the purposes of land reform. It concerned agricultural property, including, *inter alia*, buildings and movable goods on such property, in the ownership of all persons of German and Hungarian nationality irrespective of their citizenship status.

According to Article 2 of the said decree, those persons were to be considered as German or Hungarian nationals who, in any census since 1929, had declared to be of German or Hungarian nationality, or who had become members of national groups, formations or political parties which had been made up of persons of German or Hungarian nationality.

B. The Convention on the Settlement of Matters Arising out of the War and the Occupation

23. After the German capitulation of 8 May 1945, the Four Powers had assumed supreme authority in Germany, as stated in the Allied Declaration of 5 June 1945 (Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, United Nations Treaty Series, vol. 68, pp. 190 et seq.). The supreme military commanders of the four Allied Forces administered their respective zones and dealt jointly, through the Inter-Allied Control Council, with all matters relating to the country as a whole, namely military matters, transport, finance, economic affairs, reparations, justice, prisoners of war, communications, law and order, as well as political affairs.

24. The Convention on the Settlement of Matters Arising out of the War and the Occupation ("the Settlement Convention – see paragraph 17 above) is one of the "Bonn Conventions" (*Bonner Verträge*) signed by France, the United States of America, the United Kingdom and the Federal Republic of Germany at Bonn on 26 May 1952, and designed to end the Occupation Regime.

The other Bonn Conventions were:

– the Convention on Relations between the Three Powers and the Federal Republic of Germany ("the Relations Convention");

– the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany;

– the Finance Convention.

25. The Bonn Conventions as such did not enter into force, but were amended in accordance with the five Schedules to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, one of the "Paris Agreements", which were signed in Paris on 23 October 1954.

26. Article 1 of Schedule I which amends the above-mentioned Relations Convention states that the Three Powers will terminate the Occupation Regime in Western Germany, revoke the Occupation Statute, and abolish the offices of the *Land* Commissioners. The Federal Republic of Germany is accorded "the full authority of a sovereign State over its internal and external affairs". According to Article 2, the Three Powers retain their rights "relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement".

27. The above-mentioned Paris Agreements comprise:

(1) documents signed by France and the Federal Republic of Germany, relating to disputes between the two States (the resolution of cultural, economic and other difficulties) and to the Saar;

(2) documents signed at the so-called Four-Power Conference by France, the United States of America, the United Kingdom and the Federal

Republic of Germany, relating to German sovereignty and including in particular:

– the above-mentioned Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany and the five Schedules thereto (amending the Relations Convention, the Settlement Convention and the other Bonn Conventions), as well as letters dealing with specific points in the Bonn Conventions;

– the Convention on the Presence of Foreign Forces in the Federal Republic of Germany (in this context, mention should be made of the Tripartite Declaration on Berlin);

(3) documents signed by Belgium, the Netherlands, Luxembourg, France, the United Kingdom, the Federal Republic of Germany and Italy, including the

– Protocol Modifying and Completing the Brussels Treaty;

– Protocol on the Forces of the Western European Union;

– Protocol on the Control of Armaments:

– Protocol on the Agency of the Western European Union for the Control of Armaments;

– Resolution on the Production and Standardisation of Armaments;

(4) documents signed by the fourteen countries party to the North Atlantic Treaty:

– Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany;

– Resolution by the North Atlantic Council to implement Section IV of the Final Act of the London Conference;

– Resolution on the results of the Four- and Nine-Power Conferences;

– Resolution of Association taking note of the obligations accepted by the Federal Republic on the signature of the London Agreements and of the declaration relating to such obligations.

28. Under the general provisions of the Settlement Convention (Federal Gazette – *Bundesgesetzblatt II*, 31 March 1955, pp. 405 et seq.), as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime (see paragraph 25 above), the federal and the *Land* authorities were given powers to repeal or amend legislation enacted by the Occupation Authorities.

However, in many other respects, the status quo was confirmed. In particular, rights and obligations created or established by or under legislative, administrative or judicial action of the Occupation Authorities remained valid for all purposes under German law. The same applied to rights and obligations arising under treaties or international agreements which had been concluded on behalf of the three Western Zones of Occupation by the Occupation Authorities or by the governments of the Three Powers. Furthermore, there was a bar on prosecution of persons by action of German courts or authorities on the ground of having sympathised

with, aided or supplied information or services to the Three Powers or their Allies. German courts and authorities had as a rule no jurisdiction in any criminal or non-criminal proceedings relating to an act or omission which had occurred before the date of entry into force of this convention, if immediately prior to such date German courts and authorities were without jurisdiction with respect to such act or omission whether *ratione materiae* or *ratione personae*. The finality (*Rechtskraft*), validity and enforceability of judgments and decisions in criminal or non-criminal matters rendered in Germany by tribunals or judicial authorities of the Three Powers or any of them were confirmed.

29. Chapter 6 of the Settlement Convention concerns reparation issues and the relevant parts of Article 3 provide as follows:

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

C. The Paris Agreement on Reparations

30. At the eighteen-nation Paris Conference on Reparations in November and December 1945, the participating States, including Czechoslovakia, agreed on more detailed policies based upon the Potsdam undertakings (provisions agreed upon at Potsdam on 1 August 1945 between the governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics) in order to obtain an equitable distribution among themselves of the total assets available as reparation from Germany, to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold.

The Paris Agreement (Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency, and on the Restitution of Monetary Gold of 14 January 1946, United Nations Treaty Series, vol. 555, p. 69) established, *inter alia*, the shares which each country was to receive from German reparations. The Inter-Allied Reparation Agency, established in accordance with Part II of the Agreement, charged the reparation account of each signatory government for the German assets

within that government's jurisdiction and maintained detailed accounts of assets available for, and of assets distributed as, German reparation.

D. The Act on Losses due to Reparations

31. The Act on Losses due to Reparations of 12 February 1969 (*Gesetz zur Abgeltung von Reparations-, Restitutions-, Zerstörungs- und Rückerstattungsschäden – Reparationsschädengesetz*, Federal Gazette I, 1969, p. 105) was one of the statutes passed to deal with the consequences of the Second World War and the collapse of the National Socialist regime.

32. Section 2(1) of the Act provided a general definition of losses due to reparations, the relevant parts of which read as follows:

> "A loss due to reparations in the meaning of this Act is any loss, which occurred in the context of the events and consequences of the Second World War, including also the occupation regime, and resulted from the fact that economic goods were taken away
>
> 1. in currently occupied East German territories or in territories outside the German *Reich* on the basis of measures carried out by foreign States with regard to German assets, in particular on the basis of legislation on enemy property,
>
> ..."

33. Sections 11 to 16 laid down the conditions of compensation for losses. The Act was limited to losses suffered by natural persons (section 13(1)). In case of losses which had occurred in the then occupied East German territories or in territories outside the German *Reich*, only German nationals or persons of German origin (*deutscher Volkszugehöriger*) who were, at the time of the occurrence of the loss, stateless or had only the nationality of a State where they had been subjected to expropriation or expulsion measures on account of their German origin could claim compensation (section 13(2)). Section 15 listed works of art and collections among the losses excluded from compensation. The time-limit for filing compensation claims under the Act expired on 31 December 1974 (section 53).

E. Legal materials concerning German unification

34. During 1990, in parallel with internal German developments, the Four Powers (France, the Soviet Union, the United Kingdom and the United States) negotiated to end the reserved rights of the Four Powers for Berlin and Germany as a whole.

The Treaty on the Final Settlement with respect to Germany (the so-called Two-Plus-Four Treaty) was eventually signed in Moscow on 12 September 1990, and published in the Federal Gazette on 13 October 1990 (pp. 1308 et seq.). The Treaty confirms in particular the definite nature

of the borders of the united Germany (Article 1). According to its Article 7, the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole terminated with the result that the corresponding, related quadripartite agreements, decisions and practices were terminated; and the united Germany was given full sovereignty over its internal and external affairs. The Treaty entered into force on 15 March 1991.

35. As regards the above-mentioned Relations Convention and Settlement Convention, as amended, an agreement was reached between the governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, following an exchange of notes on 27 and 28 September 1990, which entered into force on the last-mentioned date (Federal Gazette II, 8 November 1990, pp. 1386 et seq.).

This agreement provides, *inter alia*:

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

36. The political union of the Federal Republic of Germany and the German Democratic Republic occurred on 3 October 1990, with the accession (in accordance with Article 23 of the Basic Law) of the five *Länder* which had been re-established in the German Democratic Republic.

F. German private international law

37. The second chapter of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*), as in force at the relevant time (as amended by the Act on the Reform of Private International Law – *Gesetz zur Neuregelung des Internationalen Privatrechts*, Federal Gazette I, 25 July 1986, p. 1142), contained statutory rules of German private international law relating to the rights of natural persons and the rules on legal transactions, family law and succession law. This legislation did not comprise statutory provisions on property matters and, before the entry into force of the 1999 Act on Private International Law (*Gesetz zum internationalen Privatrecht für ausservertragliche Schuldverhältnisse und für Sachen*, Federal Gazette I, 21 May 1999, p. 1026, amending Chapter 2 of the Introductory Act to the Civil Code), the German courts applied customary law, that is, as a rule the *lex rei sitae*. According to section 6 of the Introductory Act to the Civil Code, the legal provisions of a foreign State shall not be applied if their application would lead to a result incompatible with essential principles of German law (*ordre public*).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

38. The applicant complained of a breach of Article 6 § 1, the relevant part of which reads as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing ... by [a] ... tribunal ..."

39. His complaints concerned his right of access to a court and the alleged unfairness of the proceedings before the Federal Constitutional Court.

A. Applicability of Article 6 § 1 of the Convention

40. The Court notes that the German court proceedings at issue concerned the applicant's claim for restitution of a painting which had belonged to his late father, the former monarch of Liechtenstein, and which had been confiscated by the former Czechoslovakia in 1946. Challenging in particular the validity of the said expropriation, the applicant argued that, as heir, he was the owner of the painting concerned.

The Government did not dispute that these proceedings related to the "determination of his civil rights". In the light of this, and bearing in mind that the parties' arguments before it were centred on the issue of compliance with Article 6 § 1, the Court will proceed on the basis that it is applicable to the present case.

B. The right of access to a court

1. Arguments of those appearing before the Court

(a) The applicant

41. The applicant submitted that the German courts' decisions declaring his action inadmissible under Chapter 6, Article 3 §§ 1 and 3 of the Settlement Convention amounted to a denial of access to a court.

According to the applicant, the interpretation of the Settlement Convention by the German courts in the instant case had been contrary to international law and therefore violated the Convention. In his view, the confiscation of Liechtenstein property by the authorities of the former Czechoslovakia could not possibly be regarded as confiscation of "German external assets" within the meaning of Chapter 6, Article 3 § 1, of the Settlement Convention. In the case of the applicant's father in his capacity as Head of State of the sovereign State of Liechtenstein, the finding of the Bratislava Administrative Court in 1951, according to which his "ethnic German origin" was "generally known", was incomprehensible.

Referring to the sovereignty of Liechtenstein and its neutrality during the Second World War, the applicant further considered that the German courts arbitrarily assumed that the assets owned by the applicant's father had been seized "for the purpose of reparation". Czechoslovakia had never charged its reparation account under the 1946 Paris Agreement on Reparation with the confiscated Liechtenstein assets as "German external assets". There was no indication that the Settlement Convention was intended to cover confiscation measures directed against neutral property and should be interpreted in a way contrary to neutrality law.

Finally, customary international law had prohibited confiscation of works of art.

(b) The Government

42. The Government stated that the provision in the Settlement Convention had been necessary for the purpose of re-establishing the initially partial and later complete sovereignty of Germany and to ensure the recognition of German property. Sovereignty was granted to the Federal Republic *ex nunc* and the exclusion of German jurisdiction was intended to ensure that orders and measures of the Allies dating back to the time of German occupation were not retroactively questioned.

They pointed out that Germany did not have any influence on the deprivation of property or on the organisation of property relations in the former Czechoslovakia and its successor States. The exclusion of German jurisdiction, which had been established in the Settlement Convention and had been maintained in the Agreement of 27 and 28 September 1990 following the Two-Plus-Four Treaty, neither prejudiced nor affected *de facto* the power to dispose of property. This was true at least for the great majority of cases where property had remained within the territory of the former Czechoslovakia. The provision had only consequences of a procedural nature, and no qualification of the individual confiscation measures was involved. Furthermore, only German jurisdiction was excluded, not the possibility of lodging claims in foreign courts. In particular, the applicant was not prevented from instituting proceedings before Czech or Slovak courts, claiming restitution of the property confiscated in 1946. Finally, a statutory regulation and international obligation could only cover the usual course of events and not exceptional situations.

The Government further submitted that the German courts had given extensive and comprehensible reasons for their decisions. The question of whether or not their interpretation of Chapter 6, Article 3, of the Settlement Convention was correct in an individual case was irrelevant. At least, having regard to the reasoning adopted by the Bratislava Administrative Court, the assumption of the German courts that the property had been seized as German property for reparation purposes in a more general sense was not arbitrary, but defendable. The relevant provisions of Beneš Decree no. 12 differentiated between citizenship and nationality or "ethnicity", a criterion also found in the confiscation laws of other East European States or in German legislation.

2. The Court's assessment

(a) General principles

43. Firstly, the Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36, and *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 50, ECHR 1999-I).

44. The right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain

margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy*, cited above, § 59; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 98, ECHR 2001-V; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 93, ECHR 2001-V).

If the restriction is compatible with these principles, no violation of Article 6 will arise.

45. In this context, it should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Waite and Kennedy*, cited above, § 67).

46. Secondly, as regards the responsibility of the High Contracting Parties under the Convention, the Court points out that Article 1 requires them to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention".

Article 1 makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the Contracting States' "jurisdiction" from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 17-18, § 29).

47. Thus the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States (see, *mutatis mutandis*, *Matthews v. the United Kingdom* [GC], no. 24833/94, §§ 29, 32-34, ECHR 1999-I).

48. The Court reiterates in this respect that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the object and purpose of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. In determining whether granting an international organisation immunity from national jurisdiction is permissible under the Convention, a material factor is whether reasonable alternative means were available to protect effectively

the rights under the Convention (see *Waite and Kennedy*, cited above, §§ 67-68).

49. Thirdly, the Court reiterates the fundamental principles established by its case-law on the interpretation and application of domestic law.

While the Court's duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.

50. Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention (see *Waite and Kennedy*, cited above, § 54, and, as a recent authority, *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97, 44801/98, § 49, ECHR 2001-II).

(b) Application of the above principles to the present case

51. In the present case, the applicant based his property claim, as his late father's heir, on the submission that the painting had not been subject to expropriation measures in the former Czechoslovakia and that in any event such measures were invalid or irrelevant on account of violation of the *ordre public* of the Federal Republic of Germany. The German courts did not address these arguments relating to the German rules of private international law and to the merits of his property claim, but concentrated on the preliminary question of whether Chapter 6, Article 3, of the Settlement Convention excluded German jurisdiction and decided that his action was barred by operation of law. The Federal Court of Justice and the Federal Constitutional Court declined to accept his case for adjudication.

52. The Court considers that the applicant was thereby deprived of his right to a determination of his property claim, in application of the rules of private international law. It will have to examine whether the German courts were allowed under Article 6 § 1 of the Convention to limit the applicant's right of access to a court in order to give effect to the rules of an international agreement excluding German jurisdiction concerning "measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution".

53. The Court must first determine whether the limitation as such pursued a legitimate aim.

54. The Court observes at the outset that the Federal Republic of Germany, when ratifying the Convention on 5 December 1952, was still an occupied country under the supreme authority of the Four Powers, France,

the United States of America, the United Kingdom and the Soviet Union. This generally known situation prevailed when the Convention entered into force on 3 September 1953.

The Settlement Convention was one of a series of agreements, signed by France, the United States of America, the United Kingdom and the Federal Republic of Germany in 1952 and amended in accordance with the five Schedules to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed on 23 October 1954 (see paragraphs 24-28 above).

According to Schedule I amending the Relations Convention, the Occupying Powers terminated the Occupation Regime in Western Germany, revoked the Occupation Statute, and abolished the offices of the *Land* Commissioners. The Federal Republic was thereby accorded "the full authority of a sovereign State over its internal and external affairs". Nevertheless, the Occupying Powers retained their rights "relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement" and foreign forces remained present in the Federal Republic of Germany. Specific provision was made for the validity of rights or obligations established by or under the Occupation Authorities and the validity, finality and enforceability of judgments and decisions rendered by them.

55. The Court finds that, when negotiating the terms of the Settlement Convention and the related agreements, the Federal Republic of Germany was not negotiating a transfer of competences or the restriction of sovereignty in matters of jurisdiction which it already possessed. On the contrary, it was negotiating for the transfer to itself of sovereign authority and for the termination of the Occupation Regime (see, *mutatis mutandis*, *Kahn v. Germany*, no. 235/56, Commission decision of 10 June 1958, Yearbook 2, pp. 257 et seq., at p. 300; and *Hess v. the United Kingdom*, no. 6231/73, Commission decision of 28 May 1975, Decisions and Reports (DR) 2, p. 72).

56. The Court accepts that after the Second World War the Federal Republic of Germany was not in a position to argue against the intention of the Three Powers to exclude a review by German courts of confiscation measures against German external assets for reparation purposes or to impose other limitations on German jurisdiction under the Settlement Convention.

In this context, the Court would add that not only Contracting Parties to the Convention were involved in these negotiations. *Vis-à-vis* the United States of America, the Federal Republic of Germany could not invoke any obligations under the Convention.

57. The Court notes that this situation prevailed until 1990 when, in parallel with internal developments towards a unified Germany, the Four Powers started negotiations resulting in the Treaty on the Final Settlement

with respect to Germany, which was signed on 12 September 1990 and entered into force on 15 March 1991. This so-called Two-Plus-Four Treaty provided, in its Article 7, for the termination of the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole, and for the full sovereignty of the united Germany. An additional agreement between the Three Powers and the Federal Republic of Germany of 28 September 1990 dealt with the suspension of the Relations Convention and Settlement Convention and provided that certain provisions of the Settlement Convention, including, *inter alia*, Chapter 6, Article 3, thereof, remained in force.

58. The Court finds that when, half a century after the end of the Second World War, a final settlement with respect to Germany and the unification of the two German States were within reach, the position of the Federal Republic of Germany had not changed. In the negotiations with the Three Powers, the Federal Republic of Germany had to accept that this specific limitation on its jurisdiction was not abolished.

59. In the Court's view, the exclusion of German jurisdiction under Chapter 6, Article 3, of the Settlement Convention is a consequence of the particular status of Germany under public international law after the Second World War. It was only as a result of the 1954 Paris Agreements with regard to the Federal Republic of Germany and the Treaty on the Final Settlement with respect to Germany of 1990 that the Federal Republic secured the end of the Occupation Regime and obtained the authority of a sovereign State over its internal and external affairs for a united Germany. In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective.

60. Having reached this conclusion, the Court will next look at the interpretation and application of the said provision in the applicant's case.

61. The German courts concluded that the conditions under Chapter 6, Article 3, of the Settlement Convention for declaring the applicant's action inadmissible for lack of German jurisdiction were fulfilled.

The Cologne Regional Court considered that the said provision excluded any review, by German courts, of measures carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of specific agreements. In dealing with the applicant's argument that this provision did not apply as it concerned measures carried out with regard to German external assets and his father had never been a German citizen, the Regional Court, accepting that the applicant's father had never had German nationality, regarded the view of the confiscating State as decisive. The authorities of the former Czechoslovakia had expropriated the painting at issue, as part of the inventory of agricultural property, under the provisions of Beneš Decree no. 12, regarding him as a "person of German nationality". The Cologne Court of Appeal confirmed that Chapter 6, Article 3, of the

Settlement Convention, as it aimed at excluding litigation regarding confiscation measures based on legislation concerning enemy property, had to be applied in the light of the law of the expropriating State.

The Federal Constitutional Court found that the civil courts' interpretation was not arbitrary and could not be objected to under German constitutional law.

62. The Court notes that Chapter 6, Article 3, of the Settlement Convention excluded German jurisdiction in respect of litigation concerning "measures ... carried out with regard to German external assets or other property, seized for the purpose of reparation". In the process of terminating the Occupation Regime, the Three Powers thereby upheld a restriction on sovereign rights of the Federal Republic of Germany in restitution matters which were transferred to it under the Settlement Convention. Bearing in mind the object and purpose of the Settlement Convention and its political background, it was not unreasonable for the German courts to assume that the logic of the system excluded any German review of confiscation measures carried out by the Three Powers or other Allied countries for the purpose of reparation.

63. In the instant case, the German courts had elements at their disposal which indicated that the authorities of the former Czechoslovakia, when confiscating the painting at issue as part of the agricultural property of the applicant's father, had carried out a measure with regard to "German external assets or other property, seized for the purpose of reparation". In particular, the property had been confiscated in application of Decree no. 12 on the "confiscation and accelerated allocation of agricultural property of German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people". Moreover, in the proceedings before the Bratislava Administrative Court, the administrative authorities of the former Czechoslovakia had made it clear that they regarded the applicant's father as a person of German nationality within the meaning of this decree.

64. In this connection, the Court observes that the German courts were not required to assess whether the standard of the Bratislava Administrative Court proceedings resulting in the decision of November 1951 was adequate, in particular if seen against the procedural safeguards of the Convention (see, *mutatis mutandis*, *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, p. 34, § 110).

65. In the light of these findings and having regard to the limited power of review exercisable by the Court (see paragraphs 49-50 above), it cannot be said that the German courts' interpretation of Chapter 6, Article 3, of the Settlement Convention was inconsistent with previous German case-law or that its application was manifestly erroneous or was such as to lead to arbitrary conclusions.

66. Furthermore, in examining whether the limitation on the applicant's access to the German courts was compatible with the principles established in the Court's case-law (see paragraphs 44-48 above), the Court attaches particular significance to the nature of the applicant's property claims in respect of the painting at issue. As part of the applicant's father's agricultural property in the former Czechoslovakia, it had been expropriated by the authorities of the former Czechoslovakia in 1946 and had remained within the latter State's territory and later within the territory of the Czech Republic. As the Government pointed out, the exclusion of German jurisdiction did not affect the great majority of such cases where property had remained within the territory of the expropriating State. The genuine forum for the settlement of disputes in respect of these expropriation measures was, in the past, the courts of the former Czechoslovakia and, subsequently, the courts of the Czech or Slovak Republics. Indeed, in 1951 the applicant's father had availed himself of the opportunity of challenging the expropriation in question before the Bratislava Administrative Court (see paragraph 12 above).

67. The Court finds that, for the applicant, the possibility of instituting proceedings in the Federal Republic of Germany to challenge the validity and lawfulness of the expropriation measures, which had been carried out by the former Czechoslovakia at a time prior to the existence of the Federal Republic of Germany under its 1949 Constitution, was a remote and unlikely prospect. It was only when, in 1991, the municipality of Cologne received the painting on loan from the Czech Republic that the applicant brought proceedings before the German courts and that the exclusion of German jurisdiction under Chapter 6, Article 3, of the Settlement Convention became operative. It prevented the applicant from obtaining a decision by the German courts, under the principles of German private international law, on his property claim and especially his argument that the confiscation measures of 1946 constituted a violation of the German *ordre public* (see paragraphs 15 and 34 above).

68. Moreover, the factors referred to above – the particular status of the Federal Republic of Germany under public international law after the Second World War and the fortuitous connection between the factual basis of the applicant's claim and German jurisdiction – distinguish the present case from that in *Waite and Kennedy* (see paragraph 48 above) concerning the transfer of competences to an international organisation, where the Court regarded as a material factor whether there were reasonable alternative means to protect effectively the rights under the Convention.

69. In view of the above, the Court considers that the applicant's interest in bringing litigation in the Federal Republic of Germany was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany. Accordingly, the German court decisions declaring the applicant's ownership action inadmissible cannot be regarded as

disproportionate to the legitimate aim pursued and they did not, therefore, impair the very essence of the applicant's "right of access to a court" within the meaning of the Court's case-law (see paragraphs 43-44 above).

70. It follows that there has been no breach of the applicant's right to a court, as guaranteed by Article 6 § 1 of the Convention.

C. The alleged unfairness of the proceedings before the Federal Constitutional Court

71. The applicant further submitted that he did not have a fair hearing, as guaranteed under Article 6 § 1, in the proceedings before the Federal Constitutional Court.

72. The applicant submitted that before the German courts it was of essential importance to know whether Article 3 of the Settlement Convention had continued to have legal force, taking into account the Two-Plus-Four Treaty and the Agreement of 27 and 28 September 1990. In its decision the Federal Constitutional Court had deviated from the opinion of the Cologne Court of Appeal, by proceeding on an assumption – not previously made in this case – that the occupation treaties of the three Western Allies constituted an original legal regime independent of the law of the Four Powers and invoked a legal position of the Western Allies which had not been discussed.

73. The Government considered that the Cologne Court of Appeal had already dealt in detail with the history and the interpretation of the Two-Plus-Four Treaty and of the Agreement of 27 and 28 September 1990. For them, it was decisive that the Court of Appeal had already argued that the Two-Plus-Four Treaty had not already entailed the abrogation of the Settlement Convention as the law of the Three Powers. The Federal Constitutional Court had only confirmed this legal opinion – which therefore could not have been surprising for the applicant – and developed the legal arguments thereon. Moreover, the Constitutional Court had not made use of comments withheld from the applicant. Rather, in order to ascertain the presumed legal opinion of the acting States, it had interpreted the treaties concerned in order to find therein a confirmation of its own legal view.

74. The Court finds that the applicant had the benefit of adversarial proceedings before the Federal Constitutional Court and that he was able to submit the arguments he considered relevant to his case (see, *mutatis mutandis*, *APEH Üldözötteinek Szövetsége and Others v. Hungary*, no. 32367/96, § 39, ECHR 2000-X).

75. The Court shares the opinion of the Government that the Federal Constitutional Court had drawn inferences from the course of the international negotiations and the contents of international agreements, namely circumstances which had been known to the applicant and which

had been the subject of argument in court, in order to confirm the lower court's finding that Chapter 6, Article 3 §§ 1 and 3, of the Settlement Convention had not been set aside by the Treaty on the Final Settlement with respect to Germany.

76. In conclusion, the Court finds no indication of unfairness in the manner in which the proceedings at issue were conducted.

D. Conclusion

77. There has therefore been no violation of Article 6 § 1 of the Convention in this case.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

78. The applicant complained that the German court decisions declaring his claims for ownership of the painting *Szene an einem römischen Kalkofen* by Pieter van Laer inadmissible and its return to the Czech Republic violated his right of property. He relied on Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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.
>
> 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."

79. In the applicant's submission, the restitution of the painting in question to the Czech Republic amounted to an unlawful interference with his "existing possessions". The confiscation of the painting by the former Czechoslovakia under Beneš Decree no. 12 had been unlawful and void. His father had been neither "German" nor an "enemy of the Czech and Slovak people", as stipulated in that decree. In his view, the confiscation had been contrary to public international law and had, therefore, to remain ineffective. In this respect, he referred to the Court's reasoning in *Loizidou v. Turkey* (merits) (judgment of 18 December 1996, *Reports* 1996-VI). He considered that the Government's arguments giving effect to such an unlawful confiscation contradicted the previous German practice not to recognise confiscation measures under the Beneš Decrees. He also referred to decisions of the Czech Constitutional Court according to which confiscations on the basis of the Beneš Decrees were invalid because the former Czechoslovakian authorities had assumed without good reason that the owner was of "German ethnic origin" at the time.

80. The Government submitted that the confiscation measure and in particular the factual deprivation of the property in question had been carried out by the former Czechoslovakia in 1946. With regard to these and other comparable confiscation measures, the former Czechoslovakia and its successor States had never agreed to discuss the possibility of restitution. Thus in 1991, when the painting concerned came to Germany, the applicant could no longer have had any legitimate expectation of enjoying any property right over it. Furthermore, the unlawfulness of a confiscation under international law did not entail lack of effect and there were no sufficient reasons to question the validity of the confiscation of the painting.

81. The Court notes that the applicant's complaint submitted under Article 1 of Protocol No. 1 does not concern the original confiscation of the painting, which was carried out by authorities of the former Czechoslovakia in 1946. In the present proceedings, the applicant complains that, as in the German court proceedings instituted in 1992 he could not obtain a decision on the merits of his claim to ownership of the painting, it was eventually returned to the Czech Republic. The Court's competence to deal with this aspect of the application is therefore not excluded *ratione temporis* (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII).

82. The applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his "possessions" within the meaning of this provision.

83. The Court notes that, according to the established case-law of the Convention organs, "possessions" can be "existing possessions" or assets, including claims, in respect of which the applicant can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in *Malhous*, decision cited above, with further references, in particular to the Commission's case-law).

84. In the present case, the applicant brought proceedings before the German courts claiming ownership of the painting which had once belonged to his father. He challenged the validity of the expropriation carried out by authorities of the former Czechoslovakia, his main argument being that the measure had allegedly been effected contrary to the terms of Beneš Decree no. 12 and to the rules of public international law.

85. As regards this preliminary issue, the Court observes that the expropriation had been carried out by authorities of the former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the date of entry into force

of the Convention, and before 18 May 1954, the date of entry into force of Protocol No. 1. Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date (see *Malhous*, cited above, and the Commission's case-law, for example, *Mayer and Others v. Germany*, nos. 18890/91, 19048/91, 19049/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, DR 85-A, p. 5).

The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany and which could have effects as to the temporal limitations of the competence of the Court (see, *a contrario*, *Loizidou* (merits), cited above, p. 2230, § 41).

Subsequent to this measure, the applicant's father and the applicant himself had not been able to exercise any owner's rights in respect of the painting, which was kept by the Brno Historical Monuments Office in the Czech Republic.

In these circumstances, the applicant as his father's heir cannot, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained a title to property nor a claim to restitution against the Federal Republic of Germany amounting to a "legitimate expectation" in the sense of the Court's case-law.

86. This being so, the German court decisions and the subsequent return of the painting to the Czech Republic cannot be considered as an interference with the applicant's "possessions" within the meaning of Article 1 of Protocol No. 1 (see paragraph 78 above).

87. The Court thus concludes that there has been no violation of Article 1 of Protocol No. 1.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

88. The applicant complained that he had been discriminated against on the basis of his status as a Liechtenstein national, contrary to Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

89. The applicant submitted that while the German authorities regarded his father's assets in the former Czechoslovakia as "German external assets" for the purposes of the Settlement Convention, the German equalisation legislation did not extend to losses suffered by citizens of neutral States. He considered that no legitimate distinction could be made between German and foreign nationals in respect of compensation for losses due to reparation. Moreover, the Government could not rely on the exclusion of

works of art from claims for compensation after having recognised the confiscation of the painting concerned, which was in his view in breach of public international law.

90. The Government maintained that, as Article 1 of Protocol No. 1 was not applicable to the instant case, there was no room to find a violation of Article 14. In any event, it had not been necessary to include foreign nationals who had been victims of measures directed against German external assets in the legislation on compensation for losses due to reparation etc., as the margin of appreciation permitted the German State to provide particular advantages for its citizens. Other citizens could have resort to legal and diplomatic protection by their country of origin. In any event, the Act on Losses due to Reparation did not provide for compensation in respect of losses of works of art and collections. Moreover, the time-limit for filing claims had expired on 31 December 1974.

91. As the Court has consistently held, Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions - and to this extent it is autonomous - there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, § 86, ECHR 2000-VII).

92. The Court has found above that the facts of which the applicant complained under Article 1 of Protocol No. 1, namely the German court decisions and the return of the painting to the Czech Republic, did not amount to an interference with any of his rights under that provision. He cannot therefore claim that in these respects he had been discriminated against in the enjoyment of his property rights (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 23, § 50).

93. The Court notes that the applicant alleged discrimination under the Act on Losses due to Reparations, which enabled only German nationals or, under specific conditions, persons of German origin, and not foreign nationals to make compensation claims.

However, the Convention does not guarantee any right to compensation for damage the initial cause of which does not constitute a violation of the Convention (see *Mayer and Others*, cited above, p. 18).

94. Article 14 of the Convention does not therefore apply to the present case. Consequently, the Court finds no violation under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 1;
3. *Holds* that there has been no violation of Article 14 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 July 2001.

Elisabeth PALM
President

For the Registrar

Michele DE SALVIA
Jurisconsult

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following concurring opinions are annexed to this judgment:

(a) concurring opinion of Mr Ress joined by Mr Zupančič;
(b) concurring opinion of Mr Costa.

E.P.
M. de S.

CONCURRING OPINION OF JUDGE RESS JOINED BY JUDGE ZUPANČIČ

If the applicant had an arguable claim under Article 6 § 1 of the Convention, then the decision of the German courts not to accept that claim for adjudication, on the ground that his action was barred by operation of Article 3 of Chapter 6 of the Settlement Convention, amounted to a denial of justice (*déni de justice*). That rule in the Settlement Convention infringed the very essence of the right of access to courts, so that the question whether this kind of limitation can be regarded as one in respect of which there is a reasonable relationship of proportionality between the means employed and the aims sought to be achieved does not, in my view, even arise. Under the rule in the Settlement Convention the guarantee of access to a court becomes really theoretical and illusory. Under the Settlement Convention this right has no practical and effective significance. This is so because the three Western Powers wanted in all probability to exclude any measures taken under enemy legislation against German property, be it abroad or be it on German territory, from any scrutiny by the German courts. It does not seem arbitrary to have concluded that those measures, whatever their justification may have been, should not have been called into question, at least not by the German courts, and that this was – and still is – the very significance of Article 3 of Chapter 6 of the Settlement Convention. Since the procedure before the German Courts was one of *rei vindicatio*, the Court is not concerned with the question of access to a court for a claim to compensation for loss of property.

Nevertheless, I am in full agreement with the opinion that there was no violation of Article 6 § 1, but my reasoning would be somewhat different. The Court should have stated that, besides the limitations on the right of access to the courts described in paragraph 44 of the judgment, limitations may also follow from the specific legal status of a Contracting Party implicitly accepted by all other Parties at the time of ratification of the Convention. As the Court has observed in paragraph 54 of the judgment, the Federal Republic of Germany, when ratifying the Convention on 5 December 1952, was still an occupied country and under the supreme authority of the Four Powers, France, the United States of America, the United Kingdom and the Soviet Union. It was far from being a sovereign State and the exclusion of German jurisdiction under the Settlement Convention was, as the Court has shown in paragraph 59, a consequence of the particular status of Germany under public international law after the Second World War. A State under such an occupation regime, which was considered to be *sui generis*, was far from being able to fulfil all the requirements, in particular of Article 6, of the Convention. That must have been obvious not only to the Federal Republic of Germany, when the Convention came into force on 3 September 1953, but also to the other Contracting Parties at that time. The particular status of Germany was so

obvious that no declaration to that effect was made in relation with the deposit of the instrument of ratification. Furthermore, any "reservation" to that effect would not have met the requirements under former Article 64 (now Article 57). A reservation had to be related to specific provisions of the internal law. The particular status of Germany related to its situation under public international law, in which it did not have the full authority of a sovereign State over its internal and external affairs. If Contracting States admit a State with such restrictions as to its statehood to the Convention and if the depository of the Convention, the Secretary General of the Council of Europe, has no objections to its admittance, it can be presumed that they do not have any objections to later treaties by which this restricted legal status in the field of jurisdiction over certain matters is merely confirmed. The Federal Republic of Germany had in fact no choice. To regain the full authority of a sovereign State it had to accept in 1954 as well as in 1990 these restrictions on the jurisdiction of the German courts. This is true even though in 1990 the Federal Republic of Germany fully participated in the prolongation of the Settlement Convention. That limitation on the jurisdiction of its courts cannot be judged according to the principle of proportionality since it was absolute and a kind of *force majeure* for the Federal Republic of Germany.

The Court relies mainly on two further elements in its examination of proportionality. Firstly, that the expropriation in question could have been challenged in the expropriating State, the former Czechoslovakia, and secondly that challenging the validity and lawfulness of the expropriation measure in the Federal Republic of Germany was a remote and unlikely prospect. I think that alternative means in the sense of *Waite and Kennedy v. Germany* ([GC], no. 26083/94, § 68, ECHR 1999-I) cannot be alternative means in a third State, but must be access to the courts of the defendant State (see my dissenting opinion in the case of *Waite and Kennedy*, opinion of the Commission, ibid., p. 462 et seq.). The second argument, namely that the possibility of bringing litigation in the Federal Republic of Germany was remote, is an argument which relates to the nature of the claim itself and would need further examination. It would probably be in the interests of international art exhibitions for States to conclude agreements by which they exclude jurisdiction for such claims during the time of the exhibition. This kind of agreed limitation of jurisdiction, which is related to the remoteness of an eventual claim, could be discussed in the light of a general public interest. Until now, however, such a specific limitation on jurisdiction has not been accepted by the Court and it would not be easy to see this case only in the light of the public interest in art exhibitions.

Regardless of those considerations, the only convincing justification for the exclusion of the jurisdiction of the German courts is the particular international status of the Federal Republic of Germany. In contrast to the opinion of the Court in paragraph 69 of the judgment, this exclusion of

German jurisdiction impaired the very essence of the applicant's right of access to a court and could not be measured according to the principle of proportionality. It is a structural limitation on the right of access to a court under Article 6 § 1.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

I agree with my colleagues that there has not been a violation of Article 6 § 1 of the Convention, but my reasons are different from those set out in the judgment and are fairly similar to those of Judge Ress. To my mind, it is difficult to maintain, as in paragraph 69 of the judgment, that the dismissal of the applicant's action by the German courts was not disproportionate to the legitimate aim pursued and did not *therefore* impair the very essence of the applicant's right of access to a court. That reasoning mixes up two approaches which the case-law of the Commission and of the Court had almost always carefully distinguished as two distinct alternatives: (explicit or implicit) limitations on the right to a court are compatible with Article 6 only if they do not restrict or reduce the access left to the litigant in such a way or to such an extent that the very essence of the right is impaired; furthermore, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, pp. 24-25, § 57, or *Levages Prestations Services v. France*, judgment of 23 October 1996, *Reports of Judgments and Decisions* 1996-V, p. 1543, § 40). I find the reasoning of the present judgment both unorthodox and illogical. The question of proportionality arises only as a subsidiary issue, in the event that the very essence of the right to a court has not been affected. To deduce that there has not been an infringement of that right because there was a satisfactory relationship of proportionality is not at all convincing to my mind.

Furthermore, it is difficult in the instant case to assert that the Prince suffered merely limitations on his right of access to a court. Admittedly, his father had had the opportunity of challenging in a former Czechoslovakian court the application to his case of the Beneš Decree, under which his property had been confiscated. However, that action (which was, moreover, dismissed by that court) had not exhausted his rights under Article 6 in the German courts, not least because the next action was brought against a different defendant and did not concern exactly the same object or cause of action. The adage *res judicata pro veritate habetur* was therefore inapplicable. Again, it is true that the German courts did not refuse to entertain his application to the extent that an interim injunction was granted sequestrating the painting immediately and was not discharged for seven and a half years. However, the German trial and appeal courts all ruled the applicant's claim inadmissible under the "Settlement Convention". It cannot therefore be said that access to the courts enabled the plaintiff to secure a determination of his rights; the courts in question based their decision on

their lack of jurisdiction under an international treaty, and did not examine the merits of the dispute between the applicant, who claimed to be the owner of the painting, and the municipality of Cologne, which had received it on loan from the Brno Historical Monuments Office. Hans-Adam II's access to a court was in fact so limited that "the very essence" of that right was indeed impaired.

If the approach taken by the judgment in concluding that there has not been a violation is unacceptable, what would have been the "correct" reasoning (if my immodesty can be forgiven)? The concept of an arguable claim might give cause for reflection. Having regard to the existence of the Settlement Convention, the applicant did not have a recognised complaint, at least on arguable grounds, under domestic law in Germany. It is not rare to find reasoning of that kind in the case-law of the Convention institutions (see, for example, *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 27, § 52). It might even be feasible, following the same logic, to deny the "genuine and serious" nature of the dispute, which the present judgment seems to imply at paragraph 67 where it refers to the possibility of bringing litigation (in Germany) as a "remote and unlikely prospect". I, for my part, prefer – following reasoning similar to that of my colleague, Judge Ress – to consider that the immunity from jurisdiction created by the Settlement Convention fully excluded the applicant's having a right to a hearing of the merits of his case, given the nature and object of the legal action he had brought and the confiscation measure from which the loss of his title to the painting originated. Such reasoning on the subject of immunities does, moreover, feature in the case-law of the Convention institutions (see, in a case concerning parliamentary immunity, *X v. Austria*, no. 3374/67, Commission decision of 6 February 1969, Yearbook 12, p. 247, or, in one concerning diplomatic immunity, *N., C., F. and A.G. v. Italy*, no. 24236/94, Commission decision of 4 December 1995, Decisions and Reports 84-A, p. 84).

Of course these immunities are and must remain exceptional. Such is the case here, however, for what is at issue? Movable property confiscated fifty-five years ago to which a claim was laid ten years ago (following fortuitous circumstances) before being barred by lack of jurisdiction under a treaty signed in 1952 prior to ratification by the respondent State of the European Convention on Human Rights. It has to be admitted that this type of immunity is infrequent.

I concede that my point of view should, strictly speaking, result in a finding that Article 6 § 1 is inapplicable rather than a finding that Germany has complied with it (but that is a technical point rather than one of principle, and the practical result is the same). I also admit that the reasoning of the judgment, which makes the lack of impairment of the essence of the right to a court dependent on the finding that there were only (not disproportionate) limitations on that right is not completely

unprecedented in the case-law (there is a certain similarity with *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B). All things considered, however, I continue to prefer the line of decisions which seems to me the most orthodox, according to which an impairment of the very essence of the right of access to a court is sometimes not incompatible with Article 6, without it being necessary to review the proportionality aspect. I would add that, on the last point, I prefer the proposition that a treaty (the Settlement Convention) takes precedence over domestic law, or even that this was a case of quasi-*force majeure* (concurring opinion of Judge Ress), or, alternatively, a combination of the two, to bringing into play "the vital public interest in regaining sovereignty and unifying Germany" (paragraph 69 of the judgment). I fully recognise that interest and respect it entirely, but I sincerely doubt that the decisions given by the German courts in this case between 1995 and 1998 were absolutely necessary to make that interest prevail. The proportionality "test" seems to me, to be quite honest, somewhat artificial in the circumstances of the case.

That said, I maintain my opinion that Article 6 of the Convention has not been infringed.