Compensation for Forced Labour in World War II

The German Compensation Law of 2 August 2000

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1. Introduction

On 28 June 2004, a Chamber of the German Constitutional Court decided to not adjudicate constitutional complaints brought before the Court by an association of former Italian military detainees and 942 such former detainees individually.[1] In effect, the Chamber thus upheld as constitutional the provisions of a Statute (the *Stiftungsgesetz* Statute), adopted by the German Parliament on 2 August 2000, according to which the respective detainees cannot claim financial compensation for their detention and forced labour under German law. The Chamber also decided that the Statute does not violate the right of property of the complainants as protected by Article 14 of the German Constitution (Basic Law). The decision of the Chamber is non-appealable.

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1 German Federal Constitutional Court (1st Chamber, 2nd Senate), 28 June 2004. Case 2 BvR 1379/01. Available online at http://www.bverfg.de/entscheidungen/rk20040628_2bvr137901.html (visited 18 November 2004). The complaint was brought in accordance with Art. 93, § 1(4a) of the German Constitution (Basic Law). Sections 93a and 93b of the Statute of the Constitutional Court empower Chambers of three judges unanimously to decide that the Court will not adjudicate a constitutional complaint, provided that the complaint is not of fundamental importance or does not have a chance of succeeding. The Chambers are free to give reasons for such a decision; in the present case, the Chamber chose to do so, 'Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichtsgesetz)', I *Bundesgesetzblatt* (*BGBl.*) (1993) 1474, at 1485.

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2. The Facts behind the Case and the Birth of the *Stiftungsgesetz* Statute

In the complaints submitted to the Court, only the fate of two complainants, both Italian nationals, was described in detail. One complainant, who had served as an officer in the Italian Army, was arrested by the German Wehrmacht in September 1943 after Mussolini was removed from power and the new Italian Government had concluded an armistice with the Allied Powers. In the summer of 1944, the status of the Italian soldiers detained by Germany was changed 'because of foreign policy considerations', as the Chamber said; their prisoner-of-war status was replaced by that of 'civilian workers'.[2] In January 1945, the status of Italian officers detained by Germany was similarly changed. As in the case of most other Italian soldiers and officers, the complainant's status was changed without his consent.

The other complainant was arrested by soldiers of the German Wehrmacht in August 1944 in the course of reprisals against the Italian civilian population. The complainant was subjected to forced labour and mistreated. He has taken legal action in Italian courts against the Federal Republic of Germany, with the aim of receiving compensation and damages for pain and suffering during his detention and forced labour. The court of first instance found that it had no jurisdiction over the lawsuit given Germany's immunity. Subsequently, however, the Italian Court of Cassation (*Corte di Cassazione*) overturned the decision in first instance denying immunity in case of matters involving serious violations of international humanitarian law; nonetheless, the Court concluded, although on different grounds, that Italian courts do not have jurisdiction in this case.[3]

2 Actually, the historical events are more complicated. The Italian soldiers disarmed and detained by the German forces after the Italian–Allied armistice of 3–8 September 1943 had first been treated as prisoners of war. In a second period, from 20 September 1943 onwards, they were classified as 'Italian military internees' (*Italienische Militärinternierte*, *IMI*). Hitler's policy of 'continuing' the German–Italian alliance and his recognition of the fascist government proclaimed on 23 September 1943 as the only legitimate government of Italy was the reason for this change in status. The German propaganda presented the change as a success achieved by Mussolini and emphasized the privileged position of the Italian detainees in comparison with that of other prisoners of war. In fact, however, the living conditions of the Italians were worse than those of the Western Allied soldiers captured by Germany. In particular, Italian detainees suffered from poor nourishment. In a third period, between August 1944 and the end of the war, the detained Italian soldiers were given the status of 'civilian workers' (*Zivilarbeiter*) to both exploit their manpower in a more efficient way, and also to signal support for Mussolini's *Repubblica Sociale Italiana*. In general, living conditions improved under this new status. See G. Hammermann, *Zwangsarbeit für den 'Verbündeten': Die Arbeits- und Lebensbedingungen der italienischen Militärinternierten in Deutschland 1943–1945* (Tübingen: Max Niemeyer Verlag, 2002), 61–64, 461–473 and 583.

3 For more details on the *Ferrini* case, and criticisms of the decision of the Court of Cassation, see, in this issue, A. Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision', 3 *JICJ* (2005), 224–242.

In 1999 and 2000, the German Government conducted diplomatic negotiations with a number of states which were belligerent parties in World War II about a financial compensation for individuals who, during the War, had been subjected to forced labour in German companies and in the public sector. The negotiations were triggered by lawsuits brought against German enterprises in the United States,[4] and resulted in an American–German executive agreement of 17 July 2000,[5] and a Statute (the *Stiftungsgesetz* Statute) adopted by the German Parliament on 2 August 2000, the latter establishing the 'Remembrance, Responsibility and Future' Foundation (*Stiftung 'Erinnerung, Verantwortung und Zukunft'*) under German public law.[6] The purpose of the Foundation is to make available some funds to individuals who had been subjected to forced labour 'and other forms of injustice in the period of National Socialism' (section 2, §1 of the *Stiftungsgesetz* Statute). In addition, the Foundation is responsible for supporting projects in favour of, inter alia, international understanding, social justice, remembering the totalitarian past, and the interests of the survivors of the National Socialist tyranny (section 2, §2 of the *Stiftungsgesetz* Statute). The German private economy and the German State have each provided the Foundation with five billion Deutschmarks. The Foundation does not give money directly to individuals defined by the Statute but instead via so-called 'partner organizations' which receive specified global amounts (see section 9). The partner organization responsible for the claims of non-Jewish individuals in Western European countries is the International Organization for Migration (IOM) — an international governmental organization located in Geneva.[7]

4 See 'List of Known World War II and National Socialist Era Cases against German Companies Pending in U.S. Courts Filed by Plaintiffs' Counsel Participating in the Negotiations', and 'List of Known World War II and National Socialist Era Cases against German Companies Pending in U.S. Courts Filed by Plaintiffs' Counsel Not Participating in the Negotiations', Annexes C and D to the Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Federal Foundation 'Remembrance, Responsibility and the Future', done at Berlin, 17 July 2000, available online at http://www.compensation-for-forced-labour.org/english_home.html (section 'Documents') (visited 18 November 2004). See also S.S. Spiliotis, *Verantwortung und Rechtsfrieden: Die Stiftungsinitiative der deutschen Wirtschaft* (Frankfurt am Main: Fischer Taschenbuch Verlag, 2003).

5 Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America about the Foundation 'Memory, Responsibility and Future' of 17 July 2000, II *BGBl.* (2000) 1373, also available online at http://www.compensation-for-forced-labour.org/english_home.html (section 'Documents') (visited 18 November 2004).

6 'Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" [the abbreviated name of the statute is "Stiftungsgesetz"]', I *BGBl.* (2000) 1263. The Statute was amended by a Statute adopted on 4 August 2001, I *BGBl.* (2001) 2036. For an unofficial English translation of the Statute, see http://www.compensation-for-forced-labour.org/english_home. html (visited 18 November 2004).

7 See P. Van der Auweraert, 'The Practicalities of Forced Labour Compensation: The Work of the International Organisation for Migration as One of the Partner Organisations under the German Foundation Law', in P. Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung — NS-Forced Labor: Remembrance and Responsibility* (Baden-Baden: Nomos, 2002),

The universe of persons entitled to payments according to the Statute is defined in section 11. Individuals 'detained in a concentration camp, or in another prison or camp, or in a ghetto, under similar conditions, and subjected to forced labour' are entitled to compensation (section 11, §1(1) of the *Stiftungsgesetz* Statute), as are individuals 'deported from their home country to Germany in the borders of 1937, or a territory occupied by Germany, and subjected to forced labour in a private company or in the public sector, and (. . .) detained (. . .) or subjected to particularly bad conditions of life' (section 11, §1(2)). However, according to section 11, §1, partner organizations may also provide compensation to individuals who do not belong to one of the two defined groups, provided that such compensation does not impair the claims of those individuals specifically defined in section 11, §1(1).

In the case of the two complainants referred to above, the conditions set out in section 11, §1(1) and (2) were not fulfilled. The complainants did not file an application for payments with the IOM.

Section 11, §3 of the *Stiftungsgesetz* Statute explicitly states that 'the status of a prisoner of war does not give a title to payments or benefits' under the Statute. In the official commentary of the draft Statute, the Federal Government explained the exclusory clause as follows: 'Prisoners of war subjected to forced labour are in principle not entitled to payments because the rules of international law allowed a detaining power to enlist prisoners of war as workers. However, persons released as prisoners of war who were made "civilian workers" (*Zivilarbeiter*) can be entitled under the statute if the other requirements are met.'[8] However, in 'guidelines' adopted in August 2001 in agreement with the Federal Ministry of Finance, the board of the Foundation further limited the exclusionary effect of the clause by determining that 'prisoners of war who have been taken to a concentration camp' are not excluded from benefits under the Statute 'because in this case special discrimination and mistreatment on account of the National Socialist ideology is relevant, and imprisonment in a concentration camp cannot be regarded as a general wartime fate (*allgemeines Kriegsschicksal*)'.[9]

Section 16 of the *Stiftungsgesetz* Statute provides for a preclusion of claims: a person who suffered injustice as defined in section 11 can only seek compensation on the basis of the Statute itself. The Statute precludes all other possible claims arising from that particular suffering against the German State or German enterprises.

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at 301–318. See also the website established by the German Foundation and the IOM at http://www.compensation-for-forced-labour.org/ (visited 18 November 2004).

8 'Entwurf eines Gesetzes zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"', 13 April 2000. *Deutscher Bundestag*, 14. Wahlperiode, Drucksache 14/3206, at 16.

9 See 'Leitlinie zur Leistungsberechtigung und zum Leistungsausschluss ehemaliger Kriegsgefangener nach dem Stiftungsgesetz' of August 2001, partly quoted in the decision discussed in this note (s. I, §6).

3. The Decision

According to German constitutional law, a constitutional complaint filed with the Federal Constitutional Court can only be based on the assertion that a particular fundamental right or freedom of the complainant specified in the Constitution has been violated by the German State (including the *Länder* and the local communities) (Article 93, §1(4a) of the Basic Law). In the present case, the complainants asserted that by adopting the *Stiftungsgesetz* Statute of 2 August 2000, the German legislature violated their right of property (Article 14), right of recourse to the courts (Article 19, §4), right of freedom of the person (Article 104, §1) and right to equality before the law (Article 3, § 1). The Chamber dismissed each of these claims as unfounded and declared the Statute constitutional.

As regards the right to recourse to the courts, the Chamber first noted that this right only protects the access to German courts and that, therefore, one of the complainants' proposition that the *Stiftungsgesetz* Statute renders moot his civil-law claim filed in Italian courts is not pertinent. The Chamber also found that the Statute did not violate Article 19, §4 of the Basic Law by assigning, in the case of the complainants, the individual decisions about payments to the IOM as an organization enjoying immunity under international law, and by exempting the Foundation 'Remembrance, Responsibility and Future' from lawsuits.

The Chamber further held that Article 104 (legal guarantees in the event of detention) cannot be applied to the treatment of the complainants in the time of World War II because this fundamental right only became effective on 23 May 1949.

The Chamber did not acknowledge a violation of the complainants' right of property (Article 14 of the Basic Law). The complainants argued that because they were subjected to forced labour and mistreatment, they are entitled to damages under German law, based on section 839 of the German Civil Code, Articles 2 and 3 of the Hague Convention Relative to the Treatment of Prisoners of War of 27 July 1929,[10] as well as on Article 3 of the Hague Convention Respecting the Laws and Customs of War on Land of 18 October 1907.[11] The complainants further argued that their right to damages was

10 For text in the original French and in German translation, see II *Reichsgesetzblatt* (1934), at 227 and 233. For an English translation, see United States Statutes at Large, 47 Stat. 2021, available online at http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm (visited 18 November 2004).

11 Art. 3 of the 1907 Convention reads as follows: 'A belligerent party which violates the provisions of the said Regulations [respecting the laws and customs of war on land, annexed to the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.' See Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, reprinted in D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (3rd edition, Dordrecht: Martinus Nijhoff Publishers, 1988), at 63 et seq., available online at http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm (visited 18 November 2004).

abolished by section 16 of the *Stiftungsgesetz* Statute of 2 August 2000, in violation of Article 14 of the Basic Law. The Chamber, however, found that Article 3 of the 1907 Hague Convention only establishes the international responsibility of Germany as a state to the other States Parties to the Convention, and does not entitle an individual victim. In the absence of any other rule of domestic German law's granting such state responsibility towards an individual, the Chamber did not recognize an individual right on the part of the complainants under German law, which was protected by Article 14 of the Basic Law and which was allegedly violated by the *Stiftungsgesetz* Statute of 2 August 2000.

Finally, the Chamber held that section 11, §3 of the *Stiftungsgesetz* Statute, which holds that the status of a prisoner of war as such does not provide a right to payments or benefits, does not violate the right to equality before the law (Article 3, §1 of the Basic Law). The Chamber referred to the fact that a state may utilize the labour of prisoners of war (Article 6 of the Hague Regulations concerning the Laws and Customs of War on Land)[12] and to 'the special regime of international legal responsibility provided for by Article 3 of the 1907 Hague Convention'. The Chamber held that these specific rules of international law are sufficiently important and weighty to justify the exclusion of prisoners of war from the beneficiaries of the *Stiftungsgesetz* Statute of 2 August 2000. The Chamber added that Article 3, §1 of the Basic Law does not prevent the legislature from distinguishing between 'a general wartime fate, even if it is characterized by hardships and possibly also violations of international law' on the one hand and 'victims of particularly ideologically motivated persecution by the National Socialist regime' on the other.

4. A Critical Assessment of the Decision and the German Legislation

In essence, the German Parliament decided with its legislation of 2 August 2000 to limit individual compensation for forced labour imposed by the National Socialist German State to persons subjected to the worst and most degrading living conditions, i.e. persons for whom the term 'slave workers' has become common. This is apparent from section 11 of the *Stiftungsgesetz* Statute of 2 August 2000, which, in defining the beneficiaries of the legislation, refers specifically to individuals detained in concentration camps

12 Art. 6, §§1 and 2 of the Regulations read as follows: 'The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war. Prisoners may be authorized to work for the public service, for private persons, or on their own account.' See Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention of 18 October 1907 (*supra* note 11).

and ghettos. The Statute places in the same category those individuals who were detained in detention facilities characterized by 'inhuman conditions of imprisonment, insufficient nutrition, and lack of medical care' (section 12, §1 of the *Stiftungsgesetz* Statute). In addition, the legislature provided for compensation to persons deported from their home country and compelled to work for a German enterprise or the German State in a broad sense (section 11, §1(2) of the *Stiftungsgesetz* Statute). In other words, Parliament's attention focused on persons detained in concentration camps on the one hand and deportees on the other — and not on forced labourers as such.[13] Other persons subjected to forced labour during the time of the National Socialist dictatorship and World War II were not included in the universe of beneficiaries, including, in particular, prisoners of war and persons belonging to the civilian population who were not deported from their home country to Germany or another territory under German occupation.

Among those persons excluded from the benefits of the *Stiftungsgesetz* Statute are the two Italian complainants in the present case (see section 2, above), as one of the complainants was a prisoner of war who apparently was not detained in a concentration camp or a facility with similarly dreadful conditions, and the other complainant belonged to the Italian civilian population and was neither detained in a concentration camp or a similar facility nor was he deported from Italy.

The Chamber of the Federal Constitutional Court did not have to decide whether this legislative restriction was a wise one, one that was politically or morally sound, or one that was necessitated by limited financial resources of the German State. It only had to decide whether the German Constitution (Basic Law) required the German legislature to draw the circle of possible beneficiaries of the *Stiftungsgesetz* Statute wider than it was, and whether to entitle, in particular, 'ordinary' prisoners of war to compensation. The Chamber answered these questions in the negative, and it did so by relying on legal arguments that this commentator cannot find fault with. In the absence of any special constitutional norm addressing the issue of individual compensation for forced labour, the Chamber could only apply the general human-rights provisions of the Basic Law adopted in 1949. Those, however, have no retroactive force. The German legislature must observe, it is true, the fundamental right to equality before the law (Article 3, §1 of the Basic Law). But the respective hurdles of satisfying that right are not very high. As long

13 See the official commentary on the draft statute, *supra* note 8, at 10. For an instructive overview of the development of German law concerning the compensation of victims of National Socialist injustice, and of the War, since 1945, see H.J. Brodesser et al., *Wiedergutmachung und Kriegsfolgenliquidation: Geschichte, Regelungen, Zahlungen* (Munich: C.H. Beck, 2000). For a discussion of the issue of forced labour, see *ibid.* at 192–199. See also K. Barwig, G. Saathoff and N. Weyde (eds), *Entschädigung für NS-Zwangsarbeit: Rechtliche, historische und politische Aspekte* (Baden-Baden: Nomos, 1998) (the volume includes important documents and German judicial decisions concerning forced labour of the years 1996–1998), and the collection of articles edited by P. Zumbansen, *supra* note 7.

as the legislature does not act in an arbitrary way, it can make 'reasonable' distinctions when dealing with similar facts or situations.

The central issue here is whether there is a rule under international law which is presently binding on the Federal Republic of Germany under which Germany is obligated to grant persons subjected to forced labour during the period of National Socialism and World War II a right to individual financial compensation (either against the German State or against German enterprises), irrespective of their living conditions, their status as prisoners of war or the fact of whether they were deported from their home country. If such a rule existed as a 'general rule of international law' (*allgemeine Regel des Völkerrechts*), it would be an integral part of federal German law and would take precedence over statutory law (Article 25 of the Basic Law). If such a rule existed on the basis of an international treaty concluded by Germany, the German legislature would have been obliged to take it into account when drafting the *Stiftungsgesetz* Statute of 2 August 2000.

But neither case is true. A rule with the described contents did not exist under general international law or treaty law in the time of National Socialism and World War II, and it did not come into existence until now (which makes it unnecessary to examine the additional question regarding its retroactivity). German prisoners of war were subjected to forced labour, most notably — and until 1956 — by the Soviet Union.[14] The forced labour of prisoners of war and of civilian persons has remained permissible within the limits defined by the Third and Fourth Geneva Conventions.[15] If a state does not respect these limits, in particular by mistreating a prisoner of war or a civilian person, this constitutes an internationally wrongful act by that state, which triggers that state's international responsibility, which includes the obligation to make full reparation for the injury caused by the wrongful act.[16] But, thus far, there is no rule under general international law which gives rise to an individual reparation claim of the victim against the injurious state, not even in the case of grave violations of human rights.[17] Accordingly, from a legal point of view, the German legislature was free to single out two groups of victims, namely persons detained in concentration camps and similar

14 See A. Hilger, *Deutsche Kriegsgefangene in der Sowjetunion 1941–1956: Kriegsgefangenenpolitik, Lageralltag und Erinnerung* (Essen: Klartext, 2000).

15 See Art. 49 et seq. of Convention (III) relative to the Treatment of Prisoners of War, and Arts 40, 51 et seq. and 95 et seq. of Convention (IV) relative to the Protection of Civilian Persons in Time of War.

16 See ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), Arts 1, 28, 31 and 34 et seq.

17 See C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1999) 1–25, at 22 et seq. See also the 'Symposium on National Courts' Responses to Individuals' Claims against States for Breaches of International Humanitarian Law', 1 *JICJ* (2003) 339–427.

facilities, and civilian persons deported from their home country in violation of the laws of war.[18]

This finding notwithstanding, one wonders whether the Parliament was acting wisely when it excluded generally prisoners of war from compensation (section 11, §3 of the *Stiftungsgesetz* Statute). As the August 2001 'guideline' adopted by the board of the Foundation (and quoted above) demonstrates, it was quickly deemed necessary to qualify this exclusion by acknowledging that it does not apply to prisoners of war detained in concentration camps. In this author's view, this exclusion should also not apply to — and, in consideration of Article 3, §1 of the Basic Law, cannot apply to — prisoners of war subjected to forced labour and detained in 'other facilities' (section 11, §1(1) of the *Stiftungsgesetz* Statute) characterized by inhuman conditions of imprisonment, insufficient nutrition and lack of medical care (section 12, §1 of the *Stiftungsgesetz* Statute). According to historical research, these appalling conditions were predominant for Italian military internees in Germany.[19] Of the many Italian soldiers who were taken prisoner by Germany, somewhere between 20,000 and 25,000 soldiers died. The mortality rate was higher than in the case of the French, British and American prisoners of war detained by Germany, but significantly lower than in the case of the Soviet prisoners. The Italians were not prisoners of war who happened also to be subjected to forced labour. Instead, the exploitation of their labour force was the principal reason for their continued detention in Germany.[20]

For these reasons, the German legislature should amend the *Stiftungsgesetz* Statute of 2 August 2000, and delete the provision of section 11, §3, thereby fully realizing the legislative aim to support 'primarily those groups of victims who have suffered a particularly hard fate in the time of National Socialism'.[21] Such an amendment would also settle the dispute, mentioned in the court decision discussed here, concerning the question of whether or not the Italian 'military internees' and 'civilian workers', respectively, were prisoners of war — a question answered in the affirmative by the German Federal Government for obvious reasons, and with the remarkable argument that under the rules of international law, Germany could not unilaterally terminate the international protection afforded by the prisoner-of-war status.

18 See Art. 49 of Convention (IV) relative to the Protection of Civilian Persons in Time of War.

19 Only the Soviet prisoners of war were treated worse (indeed, their conditions were much worse). See Hammermann, *supra* note 2, at 583 et seq.

20 See Hammermann, *supra* note 2, at 73 et seq. and 564 et seq.

21 See the official commentary on the draft statute (*Begründung, Allgemeiner Teil*), *supra* note 8, at 10. At the same time, s. 14 about application deadlines would have to be amended in order to allow the respective victims to file their applications. According to s. 14, §1, as amended on 4 August 2001 (see *supra* note 6), eligibility pursuant to s. 11 can no longer be determined if an application has not been received by a partner organization by 31 December 2001.

Lastly, one can only deeply regret the tardiness of the legislation passed only in the year 2000, 55 long years after the end of the Second World War. This tardiness was properly recognized by the German Parliament itself when, in the *Stiftungsgesetz* Statute's preamble, it emphasized that 'the law comes too late for those who lost their life as victims of the National Socialist regime, or died in the meantime'.