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A Door into the Dark; Doing Justice to History in the  
Courts of the European Union.

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*A Door into the Dark;  
Doing Justice to History in the Courts of the European Union*

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## **Abstract**

The European Court of Justice in Luxembourg has been issuing judgments since 1954. It is beyond doubt that this body has, in these judgments, influenced the nature of European integration, indeed the nature of Europe itself, in a far reaching manner. Over the years, this Court has been called upon many times to judge in cases and claims originating in wartime Europe. The first of these occurred in 1975 and there are still, in 2008, several cases rooted in the Second World War awaiting judgment. In other words, the legacy of what happened in Europe between 1933 and 1945 is very much a live, if not very well known, issue before the judges of the European Union. This paper examines how the European Court of Justice responds to wartime based claims and how its jurisprudence deals with the history of the Member States of the EU. It is, in other words a specific analysis of the *Vergangenheitsbewältigung* (the management of the past) by one institution of the Union. This analysis is framed within an appreciation of the difficulties inherent in confronting memories within the European Union. The Court of the Union is no different in this respect and it emerges as closed and restrained when faced with wartime narratives. This struggle to judicially handle its own history, and the narratives which are unearthed in individual, isolated, modest cases, collectively expose a European Union still very much required to confront the past.

## **Keywords**

European Court of Justice - confronting the past - polity building - sovereignty - EU citizenship - identity - Europeanization - national interests.

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*A Door into the Dark;*  
*Doing Justice to History in the Courts of the European Union*

Carole Lyons<sup>1</sup>

*All I know is a door into the dark.*  
*...The anvil must be somewhere in the centre*<sup>2</sup>

## 1. Introduction

On Midsummer's Eve 2007, hours before crucial European Council negotiations on the 'Reform Treaty'<sup>3</sup>, the Polish Prime Minister raised a taboo, a rather significant taboo.<sup>4</sup> In the pre-negotiation presentation of inviolable positions and 'red lines', Mr. Jaroslaw Kaczynski, arguing for increased voting rights for Poland, stated that "We are only demanding one thing, that we get back what was taken from us, adding that "If Poland had not had to live through the years of 1939-45, Poland would today be looking at the demographics of a country of 66 million."<sup>5</sup> The "unimaginable injury" which Mr. Kaczynski raised in this blatantly instrumental manner is, to some extent, factually well founded. Poland was the country most affected by civilian and military deaths during the Second World War, losing approximately one fifth of its pre-war population.<sup>6</sup>

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<sup>1</sup> With many thanks to Christian Joerges, Janet McLean, Bert van Roermund, Neil Walker, Bruno de Witte and Mirjam Bruck-Cohen. The usual disclaimer applies.

<sup>2</sup> Seamus Heaney, from 'The Forge' in *Door into the Dark* (London: Faber and Faber, 1969).

<sup>3</sup> The German presidency conclusions from the 21/22 June 2007 European Council are at: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf). The final text of the Treaty, to be known as the Treaty of Lisbon, was agreed on 19 October 2007 and signed in Lisbon on 13 December 2007. Treaty of Lisbon, OJ 2007 C306 and [http://consilium.europa.eu/cms3\\_fo/showPage.asp?id=1296&lang=en&mode=g](http://consilium.europa.eu/cms3_fo/showPage.asp?id=1296&lang=en&mode=g).

<sup>4</sup> "Poles raise war dead before EU Summit" *The Times*, 21 June 2007; see also Mark Mardell, 5 July 2007, discussing the 'Polish Spirit' at <http://www.bbc.co.uk/blogs/thereporters/markmardell/> "Poland is seen as a problem. To put it more crudely, they suffered more than most in World War II but when others gathered round the table to make sure it would never happen again, they were unavoidably delayed. But the Poles are deliberately jabbing at a taboo... Poland was at the centre of the war, but not at the centre of the peace."

<sup>5</sup> "Poles in war of words over voting", BBC News, 21 June 2007 <http://news.bbc.co.uk/1/hi/world/europe/6227834.stm>

<sup>6</sup> T. Judt, *Postwar* (London: Pimlico, 2007) at 18, who adds that this number included "a far higher percentage of the educated population, deliberately targeted for destruction by the Nazis." However, Poles in glasshouses should perhaps also recall that not all population losses were the result of the Nazis (or indeed of the military forces of the USSR who, for example, executed 23,000 Polish officers in the Katyn forest in 1940). Over 63,000 Polish Jews left Poland for Germany in 1946 because of a series of post-war pogroms in Poland (Judt, (2007) at 24).

However, the awkwardness, embarrassment and general political shuffling of feet with which this interjection was greeted by the other Member State leaders<sup>7</sup> gathered in Brussels testified to something more important unraveling here which had little to do with voting rights or the like. The European Union is decidedly uncomfortable with any mention of wartime history, *its* wartime history, and the Polish outburst led to a general disorientation as the messy past became an interloper in the tightly co-coordinated present.<sup>8</sup> The integration pact, hatched in the 1950's, was fundamentally based on the erosion and obliteration of the effects of the Second World War.<sup>9</sup> This new alliance in Europe was to be a cleansed, specifically designed, pre-fabricated entity, sitting not on the bones of 36 million dead Europeans but, instead, upon some imagined, forward looking idea of a new Europe. Indeed, that idea would function only if the onward perspective was maintained and eyes averted from the tragedies of the past. Whatever the Union's flaws and failures over sixty years it has richly succeeded in maintaining high speed, unceasing forward momentum.<sup>10</sup> But the past does not fade away behind a mountain of Directives and Treaties and certainly not a past which includes the Holocaust. Mr. Kaczynski's reference to wartime history may have embarrassed the other Member States playing polite summit games (and none more perhaps than the host state, Germany) but he exposed a raw core of European integration.<sup>11</sup> The 'prefab' edifice could not secrete its foundations forever; the European Union in 2008 is inescapably affected and marked by what happened within its Member States between 1933 and 1945<sup>12</sup> and "for better or for worse the presence of the past is a fact in the construction of Europe".<sup>13</sup>

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<sup>7</sup> Danish Prime Minister Anders Fogh Rasmussen criticised as "absurd" Poland's linkage of EU voting rights to the country's fatalities in the Second World War. Luxembourg's Prime Minister, Jean-Claude Juncker, called the comments "inappropriate". A. Neyts, President of European Liberals and Democratic Reform Party, said that "the whole idea of European Union was to do away with consequences of centuries of war and lay foundations for peace and harmony" and that "We believe it is not wise to bring this up again, the EU is about reconciliation of the past. We should look forward to the future, that is the essence of the EU."

<sup>8</sup> "Want it or not, the history of its Member States and of its peoples is Europe's history... Europe is not only a phenomenon of historical European integration but of an integration of European history." J.H.H. Weiler, 'Europe's Dark Legacy – Reclaiming Nationalism and Patriotism' in C. Joerges and N. Ghaleigh (eds.) *Darker Legacies of Law in Europe* (Oxford: Hart, 2003) 389 at 394.

<sup>9</sup> See further J. Laughland, *The Tainted Source: Undemocratic Origins of the European Idea* (London: Little Brown, 1997).

<sup>10</sup> U. Haltern, 'Pathos and Patina; the failure and promise of constitutionalism in the European imagination' in (2003) 9 ELJ 14 for a critical perspective on this.

<sup>11</sup> On 21 October 2007, 4 months after his comments in Brussels, Mr. Kaczynski and his Law and Justice Party were defeated in the Polish general elections: "Polish PM admits election defeat" <http://news.bbc.co.uk/1/hi/world/europe/7054912.stm>

<sup>12</sup> "The Second World War will never go away. For the Second World War, I believe, remains the foundation of our modern history, the bedrock upon which all our narrative rests - the United Nations, the International Red Cross protocols, international humanitarian law". Robert Fisk in *The Independent*, 2 June 2007, <http://news.independent.co.uk/fisk/article2606407.ece>

<sup>13</sup> C. Joerges, "Constructing Europe in the Shadow of its Pasts' in C. Joerges and P. Blokker (eds.), *Confronting Memories: European "Bitter Experiences" and the Constitutionalisation Process*, Special Issue of the *German Law Journal* (6:2, 2005), 245 at 253.

### ***Mehr Licht?***

The Polish protestations were all the more marked because 2007 was the 50<sup>th</sup> anniversary of the Treaty of Rome, of European integration and of all the ‘closeness’ between Member States that that is supposed to have engendered. In Brussels, the hometown of the Union, they turned on the lights – literally. Installed in the *Rond Point* was a celebratory interactive light sculpture entitled ‘*Mehr Licht/More Light*’.<sup>14</sup> A clever and resonant title for a work of art which had a more than literal significance in many ways for the EU. The Treaty of Rome established a community of states and their peoples and a supranational entity of unknown potential and unlimited duration. The extent to which that process incorporates a concern for the relationship between the European ‘community’ (in the wider sense<sup>15</sup>) and its own past or pasts is the pre-occupation of this paper. It is a process which generally permits with very little space for reflection on the past.<sup>16</sup> It is, however, very clear that political matters rooted in the pre-history of the EU are still prevalent. In Europe generally, there has been a marked rise in anti-Semitic attacks and right-wing extremism in many states of the EU in recent years.<sup>17</sup> In the EU, Romania and Bulgaria’s new membership was accompanied by the formation of ‘Identity, Tradition and Sovereignty’, the new far-right grouping in the European Parliament.<sup>18</sup> The members include anti-Semitic parties and Jean Marie le Pen as well as other members of the French Front National who, until now, did not have a political grouping in the EP. In early 2007 also, the European Parliament reported on the passivity of many of the EU’s Member States in the face of illegal CIA operations in Europe. According to the Report, European countries have been “turning a blind eye” to flights operated by the CIA which, “on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees.”<sup>19</sup> Against this background, the ‘old’ Member States, with their particular history and influence, seek to engender a constitutionally based sense of tolerance<sup>20</sup> and forbearance for the Union

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<sup>14</sup> ‘*Mehr Licht*’, allegedly the last words uttered by J. W. Goethe. For more on the installation by Anny und Sibel Öztürk see: [http://www.eu2007.de/en/News/Press\\_Releases/January/0116AALichtring2.html](http://www.eu2007.de/en/News/Press_Releases/January/0116AALichtring2.html)

<sup>15</sup> In fact, the Community in the narrow sense (that is the legal entity of the European Community) ceases to exist anyway after the ratification of the Lisbon Treaty, which renames the EC Treaty as ‘The Treaty on the Functioning of the European Union’: “Article 2, 2) The title of the Treaty shall be replaced by “Treaty on the Functioning of the European Union”.

<sup>16</sup> Arguably, the Lisbon/Reform Treaty process has (apart from the Polish intervention) engendered even less contemplation of the past than did the Convention Process leading up to the 2004 Constitutional Treaty. The Lisbon Treaty proposes the following changes to the Preamble of the Treaty on European Union at Article I which make no reference to experiences of the past, bitter or otherwise. “Preamble, 1) The preamble shall be amended as follows: (a) the following text shall be inserted as the second recital: “DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”.

<sup>17</sup> “Anti-Semitic attacks at record level.” Reuters, February 1, 2007 <http://uk.reuters.com/article/topNews/idUKL0185094420070201>

<sup>18</sup> The group’s Constitutive Charter is available at: <http://www.its-pe.eu/> *The Guardian*, 8 January 2007, ‘Romania’s first gift to the European Union - a caucus of neo-fascists and Holocaust deniers’ <http://www.guardian.co.uk/eu/story/0,,1984947,00.html>.

<sup>19</sup> [http://www.europarl.europa.eu/comparl/tempcom/tdip/default\\_en.htm](http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm) Final Report, 30 January 2007, of the European Parliament’s Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners.

<sup>20</sup> The Berlin Declaration of 26 March 2007, marking the 50<sup>th</sup> anniversary of integration is available at

despite the presence of far-right thinking within the Union's own institutions. This is Europe's 'heart of darkness', its own history, with which the bureaucratic integration project has never fully engaged. The extensive efforts by Christian Joerges and other in this field have shown to what extent the EU has an institutionalized embarrassment as regards that past.<sup>21</sup>

### *An invocation to remember*

In 2003, Joerges and his colleagues broke a veritable cartel of silence<sup>22</sup> surrounding the subject of the relationship between the study of European integration and what had happened in Europe between 1933 and 1945.<sup>23</sup> From now on, it is unimaginable that European Union law or politics could be taught without proper recall of what passes now under the byword of the 'Darker Legacies' project. This shattering of the 'communicative silence'<sup>24</sup> surrounding the contemporary relevance of the Holocaust and the Second World War is an invaluable contribution to the enrichment of European Union studies. Joerges *et al* were not afraid to pose large questions for fear of obtaining only small answers<sup>25</sup> and in doing so they have opened up the possibility of a far deeper understanding of the pasts of Europe. No longer can there be a valid excuse for a hurry through the first one or two lectures when some rapid, dehistoricised interpretation of the origins of integration is launched upon students. This process of Europeanising the 'dark legacy'<sup>26</sup> is in its infancy but has the potential to fundamentally transform future approaches to EU studies. It was, partially, the process leading to the Constitutional Treaty of 2004 which led to Joerges and others donning an historically reflective hat as if that key moment in Union history gave cause and necessity for reflection on the submerged pasts. The importance of this "constitutionalising moment" within European integration was its perception as a response to "the sum of the atrocities of the twentieth

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[http://www.europa.eu/50/docs/berlin\\_declaration\\_en.pdf](http://www.europa.eu/50/docs/berlin_declaration_en.pdf). It was preceded by a speech by Angela Merkel, Germany's Prime Minister, to the European Parliament on 17 January 2007 when she declared that "Europe's soul is tolerance and that Europe is the continent of tolerance." [http://www.eu2007.de/en/News/Speeches\\_Interviews/January/Rede\\_Bundeskanzlerin2.html](http://www.eu2007.de/en/News/Speeches_Interviews/January/Rede_Bundeskanzlerin2.html).

<sup>21</sup> In 1996, in *A Critical Introduction to European Law* (London: Butterworths, 1996), Ian Ward highlighted the extent to which this deficit of historical appreciation is mirrored in academic analysis of European Union law; "Perhaps because of its relative newness, or perhaps simply because law is too often considered to be a historical entity, it is too easily forgotten that the law and constitution of the European Union is unavoidably historical, and, moreover, should be studied as such. Textbooks on European law are... conspicuously unhistorical. The history of the Union is not taken very seriously at all. This is a regrettable mistake... The law-history-politics nexus is irreducible. To ignore it is, truly, to be ignorant. The law of the European Union is a politics, and any politics is a history."

<sup>22</sup> M. Stolleis, 'Reluctance to glance in the mirror: the changing face of German jurisprudence after 1933 and post-1945' in Joerges and Ghaleigh (eds.) *Darker Legacies of Law in Europe*, (Oxford; Hart, 2003) p. 16.

<sup>23</sup> C. Joerges and N. Ghaleigh (eds.) *Darker Legacies of Law in Europe*, (Oxford: Hart, 2003).

<sup>24</sup> M. Stolleis, 'Reluctance to glance in the mirror: the changing face of German jurisprudence after 1933 and post-1945' in Joerges and Ghaleigh (eds.) *Darker Legacies of Law in Europe*, (2003, Hart, Oxford) 16.

<sup>25</sup> Claude Lanzmann speaks of this fear in the making of *Shoah* (1985): Stuart Liebman, 'An Introduction to Claude Lanzmann's *Shoah*' in *Claude Lanzmann's Shoah: Key Essays*, S. Liebman (ed.) (Oxford: OUP 2007).

<sup>26</sup> J.H.H. Weiler (2003), noted above, at 395.

century in general, and the persecution and extermination of European Jews in particular.”<sup>27</sup> The ‘Constitution’ itself is now history or almost<sup>28</sup>, and in the shadow of all the lost momentum and the minor institutional trauma of the failure of a controversial but fundamental step for the EU, I turn, in this paper, towards the past as it quietly unrolls outside of the political arena. The analysis is based on the judicial reception of history against the background of the work of Joerges and others who created this potential to explore the “Darker legacies” of Europe.<sup>29</sup> Those latter endeavors focused largely on a theoretical appreciation of how the EU is influenced by, and works through, its pasts. This paper specifically responds to this opening up of the ‘lost’ history of the European Union with a focus on judicial praxis, through the tracing of shadows from the past which lie within the case reports.

Adopting an openness to the darker legacy does not have to mean a generalised wallowing in guilt or shame but a recognition of the fact that, as Joerges points out, “this legacy is not merely precious, it is also precarious.”<sup>30</sup> The management of Europe’s past(s)<sup>31</sup>(the *Vergangenheitsbewältigung*<sup>32</sup>) is not a duty falling to one or two Member States but is a generalised responsibility. One unpredictable outcome of a lengthy reflection on the nature of the legacy is that questions of German accountability have been brought into a European context<sup>33</sup>. The Polish Prime Minister, in Brussels in June 2007, may have been attempting to do something similar in a rather crude manner. The analysis in this paper also testifies to the continuing presence of the awkward and sensitive issue of German responsibility. Tracing through the chthonic layer of European integration, modest, half hidden stories of those who lived through war are revealed, exposing the way in which the past is judicially filtered within the Union. Moreover, what is revealed is not merely the past but a present which still lives with an unresolved past.

### ***Bitter experiences and Darker Legacies***

Both of these terms have been used in the influential work of Joerges in his exploration of how Europe may work though, and with, its pasts. In this emergent discrete field of

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<sup>27</sup> C. Joerges, ‘Introduction to the Special Issue: Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts’, *Confronting Memories* (2005) 6 GLJ 245 at 246.

<sup>28</sup> On 19 October 2007, the Lisbon Treaty was agreed, putting an end to what was categorized dismissively as a “phase of institutional navel gazing” by José Manuel Barroso, the President of the European Commission.

<sup>29</sup> C. Joerges and N. Ghaleigh (eds.) (2003).

<sup>30</sup> C. Joerges in C. Joerges and P. Blokker (eds.) (2005) 6 GLJ 245 at 246.

<sup>31</sup> See Christian Joerges on this: “*Was bedeutet: Aufarbeitung der Vergangenheit*” is the title of a famous essay by Theodor W. Adorno, written in 1959, in which he took issue with what the Germans have coined “*Vergangenheitsbewältigung*”: How can Germans ever “come to terms” with Auschwitz – “*Vergangenheitsbewältigung*” is definitely and rightfully resistant against/to translation exercises.” C. Joerges, ‘Constructing Europe in the Shadow of its Pasts’ in C. Joerges and P. Blokker (eds.), *Confronting Memories: European “Bitter Experiences” and the Constitutionalisation Process*, (2005) 6 GLJ Special Issue 245 at 248.

<sup>32</sup> The process of dealing with the past (*Vergangenheit* = past; *Bewältigung* = management, coming to terms with or mastering), which roughly translates as ‘a struggle to come to terms with the past’.

<sup>33</sup> Exchanges with Christian Joerges, August 2007.

the analysis of history and the EU, these phrases have become easily recognizable terms of art which permit easy reference and furtherance of the discussion. However, what precisely lies behind these terms it is not always made explicit. This is understandable; even in the case of the origins of ‘bitter experiences’ in the Polish Constitution of 1997<sup>34</sup> a certain amount of necessary euphemism prevails. In the case of the ‘Dark Legacy’ an actual definition or description is clearly avoided but it is obvious that those writing in the field maintain their own perceptions of what that legacy constitutes. Despite the lack of a direct spelling out of the nature of the legacy there is a clear consensus that the Holocaust and National Socialism is what is largely understood when the ‘darker legacy’ is referred to. Thirty six million people died in Europe during the course of the Second World War. In other words the darkness of the legacy behind integration in Europe is at it most intense and horror full when we consider the Holocaust but the war generally had a very wide ranging impact in Europe as a whole.<sup>35</sup> In a reasonable desire not to actually enter the heart of this legacy, writers in the field may not always explicitly distinguish between war and Shoah and the latter is at times used as a false but convenient point of reference for both. In this paper I explicitly explore cases which evolve from the lesser tragedy behind the horror of the Holocaust, namely that of people trying to live their lives as normally as possible, negotiating the hardship of the war in very different ways and to very different degrees, and largely ignoring or untouched by the terrible reality of the National Socialist ‘final solution’. There are cases discussed in this paper which concern events of the war in a very direct fashion, such as the 1943 Kalavrita massacre,<sup>36</sup> but in large part the narratives emerging from the case studies are those of ordinary Europeans with diverse and not necessarily always ‘bitter’ experiences of the Second World War. Indeed, this examination reveals how ambiguous (rather than necessarily horror full) wartime was from the individual point of view, and this very ambiguity has to be remembered if Europe as whole (and not just Germany) is to confront its pasts. In the Postscript, I do deliberately discuss how Shoah and the Jewish experience of the Second World War are very close to the surface of ordinary wartime. But, for the most part, the ‘dark’ of this paper is largely the darkness of everyday twilight rather than that of the empire of evil.<sup>37</sup>

### ***The past as present before the Court***

The question of *how* to confront the past is not a luxury afforded at the judicial level; here the past itself directly confronts the EU and, for the judges, there is no avoiding the memories of the survivors of the 1943 massacre in Kalavrita, or of slave laborers from

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<sup>34</sup> “Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland...” Preamble to the Polish Constitution, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> or [http://www.servat.unibe.ch/law/icl/pl00000\\_html](http://www.servat.unibe.ch/law/icl/pl00000_html).

<sup>35</sup> The role of the Allied Forces in the large scale destruction of German cities is largely ignored in this context, permitting an undoubtedly skewed perception of innocence and guilt in the context of darker legacies in Europe. Six hundred thousand German civilians died in the bombing of 131 towns and cities yet an “ominous silence” prevails on this subject. See W. G. Sebald, *On the Natural History of Destruction* (London: Hamish Hamilton, 2003).

<sup>36</sup> Case C-292/05 *Lechouritou and others v Germany*, [2007] ECR I-1519.

<sup>37</sup> With many thanks to Bert van Roermund.

Belgium or the nature of the legislation which kept the *volks wagon* German<sup>38</sup>. The pasts which seep through in the analysis are those of ordinary people (typists, miners, factory workers, farmers...), ordinary Europeans caught up in an extraordinary situation without parallel, men and women with lives rocked by the vagaries of war and whose stories would have remained buried and unknown but for the accident of Article 234 of the EC Treaty.<sup>39</sup> Examining the extent to which history infiltrates the EU by means of the judicial process reveals a Union facing issues from its past on a surprisingly frequent basis. Furthermore, while the substantive links in the case studies are all with the wartime past, the judicial resolution of these cases is very current. In December 2006 for example, the Court received Halina Nerkowska's preliminary ruling case, explicitly raising the link between Citizenship and Article 18 EC and a wartime based claim.<sup>40</sup> The case of Irene Werich, lodged at Luxembourg in February 2006<sup>41</sup> raises the compatibility of free movement of persons principles with regulations on pension contributions made under the laws of The Reich. In December 2007, in the cases of Doris Habelt and Martha Moser, the European Court of Justice judges were faced with the legacy of the occupation of the Sudetenland, that quarrel in a far away country still haunting Europe.<sup>42</sup> The continuing and contemporary relevance of this dissection of the past is clearly established; the past is the reference point but the analysis is not solely an historical enquiry.

The EU might aspire, in the name of its citizens, to a non-fixed future, one where all possibilities are open in a never ending integration process. Despite that, the EU will forever, inexorably, be fixed by what happened during the Second World War. Fixed because the culture of rights which underpins modern Europe is based on what happened between 1933 and 1945. Fixed because wartime and its consequences are in the hearts and minds of many EU citizens.<sup>43</sup> Fixed, finally, because like a wartime diary discovered in a lost box in an attic<sup>44</sup> the past cannot be suppressed and obliterated;

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<sup>38</sup> These are just some indicative facts from the cases examined in this paper.

<sup>39</sup> Article 234 EC Treaty, which establishes the preliminary ruling mechanism for the purposes of referral of cases from Member State courts to the European Court of Justice.

<sup>40</sup> Reference for a preliminary ruling from the *Sąd Okręgowy w Koszalinie* (Poland) lodged on 8 December 2006, *Halina Nerkowska v Zakład Ubezpieczeń Społecznych*, Case C-499/06.

<sup>41</sup> Reference for a preliminary ruling from the *Sozialgericht* Berlin lodged on 24 February 2006, *Irene Werich v Deutsche Rentenversicherung Bund*, Case C-111/06.

<sup>42</sup> Joined cases C-396/05, C-419/05 and C-450/05 *Doris Habelt, Martha Möser, Peter Wachter v Deutsche Rentenversicherung Bund*, Opinion of Advocate General Trstenjak, 28 June 2007 and judgment of the European Court of Justice, nyr, 18 December 2007.

<sup>43</sup> 2007 saw the publication of Günter Grass's *Peeling the Onion* (London: Harvill Secker, 2007), a confessional account of his time as member of the Waffen SS during the Second World War. Norman Mailer also published *Castle in the Forest* in 2007 (London: Random House, 2007), a novel based on Hitler's youth and childhood. On 27 June 2007, both Mailer and Grass were interviewed at an event entitled 'The Twentieth Century on Trial' at the New York Public Library: <http://www.nypl.org/research/chss/pep/pepdesc.cfm?id=2678>. Claude Lanzmann's *'Shoah'* (1985) was reissued on DVD in 2007 accompanied by *Claude Lanzmann's Shoah: Key Essays*, S. Liebman (ed.) (Oxford: OUP, 2007). More generally, the widespread and emotive commemoration of Remembrance Day (11 November) in some EU Member States and of Holocaust Memorial Day (27 January) testifies to a real sense of shared respect for the past, for the destruction of European Judaism and for all those who suffered in European wars.

<sup>44</sup> *The Diary of Petr Ginz*, C. Pressburger (ed.) (London: Atlantic Books, 2007) (the wartime diary of a Jewish teenager, who died in Auschwitz, discovered in an attic in Prague in 2003).

everything the EU does is ultimately done in the pale but “persistent shadow of Auschwitz”.<sup>45</sup> Part 2 of this paper introduces wartime<sup>46</sup> based case law before the European Court of Justice, exposing the extent to which Europeans bring their wartime memories and issues to Luxembourg and the relationship between their cases and the development of Community law. It is an examination which shows how, in an historically averse Europe, a fragmented and extended reconciliation process has taken place before the judges. In Part 3, the connections between war cases and EU citizenship are analysed. This analysis traces a trajectory where the developing concept of EU citizenship has proven to be the surprising salvation of some wartime claimants before the Court, albeit only in most recent times. Part 4 focuses on a collection of cases where the legacy of the Second World War is very much to the fore, thus providing the ‘hard evidence’ of the EU’s *acquis historique communautaire*<sup>47</sup>. Part 5 examines European Court of Justice case law which has been confronted with the reality and ramifications of the divided history of Germany. Finally, in Part 6, I examine current and on going case law with a wartime dimension, demonstrating that, despite political desires to put it all behind us<sup>48</sup>, the war continues to be mentioned in Luxembourg. The paper closes with a Postscript which aims to show how the people, the ordinary individuals, behind all these cases, each and every one of them, tells and re-tells the story of modern Europe.

## 2. Processing the past; courts and ghosts

*Old oars and posts  
Over the years  
Harden their grain,  
Incarcerate ghosts*<sup>49</sup>

The dilemma is rendered crystal clear by Weiler; when exploring the subject of the ‘dark legacy’ is it possible to “have a non-instrumental approach to the subject?”<sup>50</sup> Can the issue of the Holocaust or the Second World War ever be raised without a specific end point or purpose? This conundrum is heightened when the focus of the research is the responses of the judges of the European Court of Justice to the legacy of war. What purpose or end can be served by revealing the trail of wartime cases before the Court and the various phases of reactions from generations of judges? This Court is obviously no stranger to controversy and criticism; indeed, they have both inexorably accompanied the Court’s development for over forty years. But what is achieved by

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<sup>45</sup> F. Larat, ‘Present-ing the Past: Political Narratives on European History and the Justification of EU Integration’ in C. Joerges and P. Bokker (eds.) *Confronting Memories* (2005) 6 GLJ 273 at 284.

<sup>46</sup> Throughout this paper the use of ‘wartime’ refers to The Second World War only.

<sup>47</sup> F. Larat, noted above, at 288.

<sup>48</sup> A reference to the other Member State responses to the Polish comments on 21 June 2007.

<sup>49</sup> From ‘Relic of Memory’, S. Heaney, *Door into the Dark*, (London: Faber and Faber, 1969).

<sup>50</sup> J. H.H. Weiler (2003) in C. Joerges and N. Ghaleigh (eds.) *Darker Legacies* (2003) at 391.

highlighting the perceived failures or weaknesses of the Community judiciary when the aim is to explore the presence of the past within the Union? As the analysis in this paper seeks to demonstrate, the judges have been very frequent recipients of the burden of wartime history. However, to focus only on judicial reluctance to face the past, and arguably poor decisions as a result, diverts the discussion away from the real substance, namely, the narratives of those who experienced war and who are still seeking a related resolution. From 1975 until 2006, every case before the European Court of Justice involving a wartime claimant was unsuccessful in terms of a positive resolution from the claimant's perspective. However, a non-instrumental exploration of the past(s) is the primary objective of this paper and not emotionally charged, moralistic appreciation of the Court's decisions. This analysis here is, therefore, influenced by but does not follow precisely the insightful path set by Vivian Curran in her examination of the methodology and approaches of the French and German judges during the Second World War.<sup>51</sup> As she shows us, these judges, with different methodologies, shared and embraced the laws and policies of Vichy and The Reich so as to serve the state fully. A clear distinction must be drawn when it comes to the Luxembourg courts though; the judges there, facing wartime matters, are normally several steps removed from the factual origins of the claims, chronologically, procedurally and institutionally. The events, if not the consequences, are in the past, a past which did not know supranational law, and the legal basis for the claims is usually clearly rooted in the law of a Member State, with the result that the degree of proximity between the judge and past s/he is required to face is low. Luxembourg judges confronted with wartime are not directly part of 'the system' in the manner of Reich or Vichy judiciary. This is why, in as much as it has been possible, what follows in this paper is a presentation of the past, a recounting of the "bitter experiences" of ordinary Europeans without too much judging of the judges. However, the judges of the Court of Justice are not completely exempt from analysis and criticism of their role in this framework. It is a common place, as ever law student on exam induced auto-pilot knows, that these judges been often 'accused' of being overly judicially active in the past, allegedly far exceeding the interpretative role of judges.<sup>52</sup> It is difficult if not impossible, in 2008, with 61 judges and an extremely diverse and varied body of jurisprudence, to 'capture' and categorise the overall nature of judging emanating from Luxembourg. It is, none the less, clear that the judges of the European Court of Justice do have some level of judicial responsibility in relation to the past, a responsibility which arguably exceeds that of their wartime predecessors. The Third Reich and Vichy judges cannot ever be excused their shameful role but the judges in Luxembourg *know* the reality of the past and they bring that hindsight and knowledge with them to every case where they face the Union's history and individual wartime experiences.

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<sup>51</sup> V. Curran, 'Formalism and anti-Formalism in French and German Judicial Methodology' in C. Joerges and N. Ghaleigh (eds.) *Darker Legacies* (2003) at 205.

<sup>52</sup> P. Craig and G. de Búrca, *EU Law* (Oxford: OUP, 2007), pp. 72 – 76, on the role of the Court. For a more general reflection on the role of judges see L. Claus 'Montesquieu's mistake and the true meaning of separation' (2005) OJLS pp. 419 – 451, where the whole basis of the theory of the rule of law and the separation of powers is exposed as being based on an erroneous understanding by Montesquieu of the role of the English judge whose 'judicial power' he underestimated considerably and therefore did not appreciate the extensive common law interpretative powers of English judges and the extent to which they did make law.

This investigation into the lingering reality of wartime within the Union has involved the location of the enduring traces of the past within the core of the judicial architecture of European integration. The research has revealed that these cases occupy a very quiet space within the European judicial environment, one largely untouched and unaffected by major developments in Community law such as fundamental freedoms, human rights and citizenship. This trend, towards the judicial marginalisation of wartime based claims, is observable even in 2007.<sup>53</sup> Furthermore, the sense of the subsidiary importance of wartime cases extends to the academy; very few of the judgments discussed here have merited a published response from those whose vocation it is to critically observe the EU. This neglect might be understood if it were simply one or two pensioners with petty claims but there is a significant body of case law involving claimants with cases rooted in wartime.

There are many ways in which EU citizens (can) participate in the life of the Union; any such participation establishes a real connection with the polity - you cannot easily detach yourself from the mark you place on a voting sheet or a court case in your name. In the wartime cases, Europeans with memories establish their personal link with a political entity that had no life at the time of the origin of those memories. But reciprocity of some sort is necessary for that connection to be in any way meaningful. As Vivian Curran has remarked about judging in another context, "If history has made one case compellingly clear it is that we depend on the right judges being in the right place at the right time and on their courage and vision."<sup>54</sup> The task of adjudicating memories reveals that memory and justice are at times ill served by European Union law. All of the cases examined in this paper, isolated though they are from each other, together constitute a collective picture of a claim to belong, a claim to connect, to further a sense of community by a now fragmented community that was once united through the experience of war. The entrusting of their narratives and experiences, often deeply personal, to the Court of Justice is, in itself, the establishment of an integrative force which links these individual citizens with the European Union and so contributes to the formation of a community, one based on trust in the nature of European justice and on the belief that history can be remedied and rectified in this forum. One could argue generally that all who go to court in Europe<sup>55</sup> constitute such an integrative force or community as each case contributes to the building up of the layers of integration and adds to the nature and extent of the EU legal order. However, the cases which evoke the past, which are grounded in the very *raison d'être* of European integration, do this in a more marked fashion; at one and the same time they do not permit the EU to forget the very foundations of the entire entity and they call, persistently and consistently, for recognition of those foundations and for a modicum and means of reconciliation and remembering. Each case explicitly entreats the European Court of Justice for an EU level remedy and each case thus asserts the sense that the EU has this responsibility, this inchoate obligation. The Court may have, many times over the years, washed its hands

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<sup>53</sup> For example, the lack of any reference to human rights by the European Court of Justice in Case C-295/05 *Lechouritou*, a case where alleged crimes against humanity by the armed forces of The Third Reich were raised by the claimants.

<sup>54</sup> V. Curran 'Law's Past and Europe's Future' in C. Joerges and P. Blokker (eds.) *Confronting Memories* (2005) 6 GLJ 483 at 512.

<sup>55</sup> C. Harding, 'Who Goes to Court in Europe? An Analysis of Litigation against the European Community' (1992) 17 ELRev. 105.

of this unwritten duty by claiming that war was a matter for the Member States but the case studies in this paper show that Luxembourg's bailiwick is not so easily closed off to war tainted cases. The Member States went to war as sovereign states; the supranational solution they fashioned after Auschwitz may have seemed to be immune from the misdeeds of wartime, the Community drawing a convenient line under the pasts. However, the persistent and repeated claims at EU level expose a fundamental gap in this regard; judicial resolution was either not forthcoming or possible at Member State level and resort was had, of necessity, to the EU. The cases thus all tacitly suggest that the EU embrace an as yet undefined level of responsibility for a past with which, on a formal and juridical level, it has no connection.

The manner in which the past is received by the Court in the case law examined here can be seen as being parsimoniously restrictive. In the case of *Jozef van Coile*<sup>56</sup> for example, we obtain from the case report only the smallest glimpse into the reality of one person's Second World War story; with no detail as to his 'work' (that is, forced labour) for Siemens is explored by the Court. This is frustrating from a historical perspective and reflects a pattern seen in all of the other case studies. Of course, European Court of Justice is not an historical archive; it has no function or role in relation to a past which not only preceded its inception but a past with which it, as part of the design of a new Europe, was not concerned. But the Court is repeatedly, by default, made into a site or realm of memory<sup>57</sup> and specifically the memory of the impact of the Second World War. It has become a valuable source of partially preserved, if instrumentally presented, memories of wartime affected Europeans. These pensioners, ex-coal miners, soldiers and resistance fighters, from the whole spectrum of wartime alliances, may never have wished or had occasion to formally record their individual stories in any other context. Now, though, like Jozef van Coile, their testimony is forever preserved (if only in minute and veiled form) in the formal arena of the jurisprudence of one of the most significant judicial bodies in Europe. This Court is indirectly given privileged access to a set of memories that may never be available elsewhere. The EU judges are, therefore, the recipients and guardians of a memory beyond the monument<sup>58</sup> - all the more valuable because of the small scale nature of the narratives which are seemingly treated as unimportant by all concerned in these cases, including the claimants themselves. None of these people's stories would have come to light were it not for their cases before the courts of the EU. Each person who has presented before the judges in Luxembourg with a claim rooted in a wartime event is an EU citizen with an important, individual history which potentially informs and deepens the contemporary meaning of that concept. What does it mean (over and above mere words in the EC Treaty) to be an EU citizen? One response is that it signifies a collectivity united in its sense of a traumatized past and the need to be constantly aware of that past in order to form a new, positive sense of Europeaness. Since its inception, many have bemoaned the impossibility of a well functioning concept of supranational citizenship on the basis of a

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<sup>56</sup> Case C-442/97 *Jozef van Coile v Rijksdienst voor Pensioenen* [1999] ECR I-8093.

<sup>57</sup> See further, *The Work of Memory*, A. Confino and P. Fritzsche (eds.) (Urbana/Chicago: University of Illinois Press, 2002).

<sup>58</sup> *Ibid.* p. 3, "This volume seeks to take memory out of the museum and beyond the monument, into the wider field of social relations, beyond an indication of inadequate moral confrontation."

comparison with its national counterpart.<sup>59</sup> Yet, and we do not need the small voices of pensioners in Luxembourg courts to remind us of this, EU citizens share a very specific past which ties them inexorably in terms of responsibility, culpability and the need for radical reformation in a way in which shared national history does not, in a way in which say, US citizenship, never will. The events of the Holocaust and the Second World War unite Europeans and connect us in a very particular European way. All EU Member States were involved in some manner in the events which unrolled between 1933 and 1945; from the Irish president Éamon de Valera in ‘smugly neutral’<sup>60</sup> Ireland offering condolences to the German representative in Dublin after Hitler’s suicide in 1945<sup>61</sup>, to the Dutch judges who colluded with German enforced law<sup>62</sup>, to the thousands of Jewish children deported from France,<sup>63</sup> to the Polish farmers who made cut throat gestures to the occupants of crowded rail trucks passing by on their way to Sobibor and Treblinka.<sup>64</sup> This is our collective past – and our collective wound - as Europeans. This has to directly contribute to any well formed concept of EU citizenry, for no European can ever say they are not culpable, they were not implicated, they are not touched by this shared past.

The Luxembourg judiciary is exposed to these cases laden with memories, ambiguities and unresolved issues. Court rooms from Nuremberg to Jerusalem<sup>65</sup> have, over the years since the war, faced the unraveling of the legacy of National Socialism but they have been confronted with the guilty and the infamous.<sup>66</sup> It has, ironically, fallen to a judicial forum with no inherent concept of ‘victim hood’<sup>67</sup> to serve as the adjudicator for some of the innocent and the unknown. These modest cases bring us into vicarious contact with victims, their experiences and with the war itself; with executions in a Greek village, with a young soldier on the Eastern Front, with the dangers of being in the Dutch resistance, with Hitler opening the VW factory. Like Roland Barthes, looking on a photograph of Napoleon’s brother and realising with amazement that he was “looking

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<sup>59</sup> For a recent analysis see D. Kostakopoulou, ‘European Union Citizenship – Writing the Future’ (2007) 13 ELJ 623.

<sup>60</sup> T. Judt, *Postwar* (2007), not on Ireland but on Austria: “Austria embodied all the slightly self-satisfied attributes of post-war western Europe...[remaining] smugly neutral”, at p. 2.

<sup>61</sup> On the role of Ireland generally during the Second World War see C. Wills, *That Neutral Island - a cultural history of Ireland during the Second World War* (London: Faber and Faber, 2007).

<sup>62</sup> T. Mertens, ‘Continuity or Discontinuity of Law? David Fraser’s *Law after Auschwitz: Towards a Jurisprudence of the Holocaust* (2007) 8 GLJ 533.

<sup>63</sup> Around 11,000 children were deported to extermination camps from France. See generally, S. Klarsfeld, *French Children of the Holocaust: A Memorial*, (New York: New York University Press, 1997).

<sup>64</sup> *Shoah* (1985) Disc 1, Scenes 21, 36 – 38, 40; “Czeslaw Borowi laughs as he recalls making the throat-slitting sign” (scene 40), as discussed in *Claude Lanzmann’s Shoah: Key Essays*, S. Liebman (ed.) (Oxford: OUP (2007).

<sup>65</sup> H. Arendt, *Eichmann in Jerusalem: A report on the banality of evil* (London: Faber, 1963) and T. Mertens, ‘The Eichmann Trial: Hannah Arendt’s View on the Jerusalem Court’s Competence’ in C. Joerges and P. Blokker (eds.) *Confronting Memories* (2005) 6 GLJ 407.

<sup>66</sup> This high profile focus on Eichmann *et al* can divert attention from the sufferings of their victims.

<sup>67</sup> The ECHR system *is* based on ‘victims’ and it has dealt with many wartime based case law over many years. See, for example, P. Macklem, ‘Rybná 9, Praha 1: Restitution and memory in international human rights law.’ (2005) 16 EJIL 1.

at the eyes that looked at the Emperor”,<sup>68</sup> we are able to ‘see’ Europe’s history, that which constitutes its collective memory.<sup>69</sup> As Joerges reminds us, ‘there is knowledge available’;<sup>70</sup> this paper uncovers some of that knowledge and exposes a small and ignored seam of EU judicial history.

### 3. Tinker, tailor, soldier, citizen...<sup>71</sup>

*Though you walked a straight line  
It might be a circle you traveled*<sup>72</sup>

This part of the paper is directed towards the relationship between the past and citizenship, an issue which “brings law and history and law and bitter memories so intimately together”.<sup>73</sup> At the time of the Maastricht Treaty, the EU<sup>74</sup> gifted a citizenship without real substance and the development of the concept has been almost wholly in the hands of the judges ever since.<sup>75</sup> Over time, the “transformative potential” of European citizenship has emerged as the judges have moved it “from the margins to the centre and it has acquired specificity, substance and increasing complexity.”<sup>76</sup> The

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<sup>68</sup> R. Barthes, *Camera Lucida* (London: Vintage, 1993) at 3. He continues, “Sometimes I would mention this amazement, but since no one seemed to share it, nor even to understand it (life consists of these little touches of solitude), I forgot about it.”

<sup>69</sup> S.J. Wiesen, in *The Work of Memory*, A. Confino and P. Fritzsche (eds.) (2002) at 198, “In employing the concept of “collective memory”, I am drawing upon the work of French sociologist and Durkheim protégé Maurice Halbwachs. Halbwachs articulated memory as conscious, collective, and purposeful. Rather than being a passive, individual phenomenon, memory instead is located within a web of social and performative practices. For Halbwachs, private memories are, in fact, ephemeral and have no lasting life outside the group context. Memory is always embedded in a network of power relations, customs, traditions, and symbols. A group—in this case German industry—sustains itself by manipulating the images of the past for present purposes, and an individual’s personal memories are mediated by broader group narratives. According to Halbwachs, therefore, memory is more appropriately seen as “commemoration”—an exercise of collective agency and rational choice, albeit always constrained by sociohistorical realities.”

<sup>70</sup> C. Joerges ‘Europe a *Großraum*? Shifting legal conceptualizations of the integration project’ in C. Joerges and N. Ghaleigh (eds.) *Darker Legacies* (2003) 167 at 168.

<sup>71</sup> A traditional children’s fortune-telling rhyme used when skipping, for example, the fuller version of which reads: Tinker, tailor, soldier, sailor, rich man, poor man, beggar-man, thief.

<sup>72</sup> S. Heaney, from ‘The Plantation’, *Door into the Dark* (London: Faber and Faber, 1969).

<sup>73</sup> C. Joerges, ‘Working through ‘bitter experiences’ towards a purified European Identity? A critique of the disregard for history in European constitutional theory and practice’ (2006) in *Law and Democracy in the Post-National Union*, E. O. Eriksen, C. Joerges and F. Rödl (eds.) ARENA REPORT 1/2006 335 at 358.

<sup>74</sup> Articles 17 – 20 EC Treaty on EU Citizenship were introduced at the time of the Treaty on European Union.

<sup>75</sup> See P. Craig and G. de Búrca, *EU Law* (2007, OUP, Oxford), chapter 23, for a discussion of the judicial development of EU citizenship and also F. Jacobs, ‘Citizenship of the European Union – a legal analysis.’ (2007) 13 ELJ 591 – 610.

<sup>76</sup> D. Kostakopoulou, (2007) 13 ELJ ‘European Union Citizenship: writing the future’ pp. 623 at p. 635.

relationship between wartime claimants and this citizenship may seem remote initially and hard to envisage. However, in a surprising move in 2006, in the case of *Tas-Hagen*,<sup>77</sup> in the first successful judgment<sup>78</sup> involving wartime claimants, the Court used citizenship to find in favour of the claims of two Dutch nationals whose case was rooted in Second World War related legislation. Up until this point, any hint of a connection between EU citizenship law and wartime narratives had been ignored by the European Court of Justice. The dismissal of citizenship arguments, and the resultant distancing of the individual citizens involved, was most marked in the case of *Josef Baldinger*.<sup>79</sup> It was as if the “destiny” of EU citizens foretold in *Grzelczyk*<sup>80</sup> would be confined to those who presented with shiny futures and not messy pasts. For many years before *Baldinger* of course, the ECJ was “confronted with a particular for which the general did not (yet) exist”<sup>81</sup> as the concept of supranational citizenship had yet to be conceived. Even so, before Article 17 EC, fundamental free movement of persons provisions were also largely ignored by the Court in wartime cases and either Member State provisions or Community secondary legislation were prioritised. In this context, the EU could be accused of giving with the large print but taking away with the small print.<sup>82</sup>

The European Court of Justice, when it considers and assesses EU citizenship, looks resolutely forwards and not backwards.<sup>83</sup> Thus, the commonality of the past, the specific wartime past, and the extent to which it forms, and ought to form, a sense of shared ‘belonging’ or connection is simply not envisaged as part of the future. The crux of EU citizenship, as judicially developed, is its potential and its promise and not its past. This is epitomized in the well known statement from *Grzelczyk*<sup>84</sup> “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”<sup>85</sup> EU citizenship, in other words is a concept with potential for further embellishment and a yet to be fully formulated substance. It is a given that national

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<sup>77</sup> Case C-192/05 *Tas-Hagen and Tas*, 2006 ECR I-10451.

<sup>78</sup> *Tas-Hagen*, like almost all of the cases (bar three) examined in this paper, is a preliminary ruling case (in this instance a referral from a Dutch court) which means that ultimate adjudication takes place in the referring court and not at European Court of Justice level. The suggestion as to ‘success’ of the case here refers to the fact that in *Tas-Hagen*, the European Court of Justice, for the first time since 1975, when dealing with a wartime based claim, found in favour of the arguments put forward by the people who were involved in war.

<sup>79</sup> Case C-386/02 *Baldinger*, 2004 ECR I-8411.

<sup>80</sup> Case C-184/99 *Grzelczyk*, 2001 ECR I-6193.

<sup>81</sup> To slightly paraphrase Thomas Mertens in his discussion of the Eichmann trial in his ‘Memory, Politics and Law. The Eichmann Trial. Hannah Arendt’s View on the Jerusalem Court’s Competence’ (2005) 6 GLJ 407.

<sup>82</sup> “The large print giveth, and the small print taketh away” from the 1976 Tom Waits song, “Step right up”, from the “*Small Change*” album.

<sup>83</sup> For the most recent use of EU citizenship in a case with a ‘youth’ dimension see joined cases C-11/06 and C-12/06, *Morgan and Bucher*, Judgment of 23 October 2007.

<sup>84</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 30 and 31.

<sup>85</sup> Cited most recently by the European Court of Justice on 11 September 2007 in Case C-76/05 *Schwarz*: “It should be recalled, first of all, that the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 30 and 31).” at paragraph 86 of the Judgment.

citizenship harks back to a common history of the state or nation in order to establish a sense of particularized connection with the state. This is not a position endorsed at EU level where the focus is firmly on the future and there have been few institutional attempts to locate a common past for EU citizens. A telling factor in this context is that, curiously, almost all of the cases where judicial advances have been made in the determination and development of the meaning of EU citizenship have been in cases involving, directly or indirectly, young people – students, young job seekers, children....<sup>86</sup> This still relatively new legal concept of supranational citizenship seems to belong to youth and to be the preserve of those with bright prospects and not dark pasts. In the midst of the gradual, uncertain emergence of citizenship of the EU, those with small voices from a time before Rome, before EU history began,<sup>87</sup> are simply not part of the picture. The way in which the European Court responded in the *Baldinger* case, for example, is revelatory. In the very person, and case, of Josef Baldinger, the past and future of the EU collide; this young Austrian, fighting for The Reich on the Eastern Front, meets the futuristic concept of supranational citizenship. In this collision, not only does the future not offer any resolution for his past but the judgment in his case determines, explicitly, that citizenship of the EU has no connection with wartime pasts in general.

Despite this statement, it is, none the less, significant that citizenship law should be formally connected with those who have experienced war in Europe.<sup>88</sup> The National Socialist experiment began with the use, or rather abuse, of citizenship law by the Nuremberg Laws in 1935.<sup>89</sup> The steady emergence of citizenship as a subject for debate, consequential to a period of European history when so many perished because of the lack of it, is highly symbolic. A contemporary anecdote reminds us how vital the preservation of a citizenship link is *in extremis*: after Hurricane Katrina devastated New Orleans in 2005, there was outrage by residents of that city at media designations as of them as ‘refugees’, the convenient casting of them as outsiders by the very use of the term when they were all (tax paying) US citizens.<sup>90</sup> National Socialism’s use of

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<sup>86</sup> For example, cases C-11/06 and C-12/06 *Morgan and Bucher*, Judgment of 23 October 2007

<sup>87</sup> The European Commission (2007) in *European Commission (1958-1972) – History and memories of an institution*: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/874&format=HTML&aged=0&language=EN&guiLanguage=en> asserts that the stepping stones to today’s Europe start in 1958.

<sup>88</sup> As it happens, the claimants in *Tas-Hagen* did not in fact see war in Europe as they were living in Indonesia at the time but the point I make is general, especially so as the national legislation which was at issue in their case pertained to the Second World War.

<sup>89</sup> The Congress of the National Socialist Workers' Party convened in Nuremberg on September 10, 1935. Among the many items of business on the agenda was the passage of a series of laws designed to define the requirements of citizenship in The Reich, to assure the purity of German blood and German honor and to clarify the position of Jews in the state of The Reich. Three pieces of resultant legislation, passed on September 15 1935, are known as the Nuremberg Laws. *The Law for the Protection of German Blood and German Honor*, prohibited marriages and extra-marital intercourse between “Jews” and “Germans” and also the employment of “German” females under forty-five in Jewish households. *The Reich Citizenship Law*, stripped persons not considered to be of German blood of their German citizenship and introduced a distinction between “Reich citizens” and “nationals”.

<sup>90</sup> Another US citizenship story but with a connection with the Second World War: Sayville, N.Y., February 23 2007, “A congressman from Long Island wants the United States government to grant honorary citizenship to Anne Frank, at least in part to atone for having denied her family entry in the years before her arrest and deportation to a Nazi concentration camp. The House of Representatives is

citizenship to create ‘outsiders’ therefore resonates deeply when considering the relevance of EU citizenship in cases from that period. Citizenship was used as a legislative and conceptual weapon against unwanted insiders in order to deny and destroy their connection with their state, The Reich. From that detachment from the state flowed, all the more easily, all the other manifold injustices perpetrated thereafter in the name of National Socialism.

What follows in this part of the paper is a series of case studies exploring in an in depth fashion how the Luxembourg Court came, eventually, to use EU citizenship directly in relation to the wartime past. On that route towards the recognition of a relationship between citizenship and wartime based claims, the Court was not infrequently confronted with situations which raised the question of the applicability of (the pre-citizenship) EC fundamental principles such as nationality discrimination and free movement of persons. It is observable in these cases that the judges persistently resisted the application of this ‘higher Community law’ when the facts were grounded in the Second World War. There is a discernible trend towards the ceding of responsibility for the legacy of war to the Member States, with specific statements to this effect from the Court over many years. This is all the more surprising to the observer of EU law given the strident steps taken in mainstream (that is, non war based) free movement and equality law over the same period of time. Wartime cases were seemingly declared immune from, or an exception to, fundamental Community law.

The legislative vehicle which generally permitted the setting aside of war cases was Article 4 (4) of Regulation 1408/71.<sup>91</sup> This legislative measure has as its purpose the co-ordination of social security payments between the Member States. However, Article 4 (4) of the Regulation specifically excludes ‘benefit schemes for victims of war or its consequences’. Article 4 (4) of 1408/71, when employed in this manner, is, therefore, an institutionalised preservation of Member State competence over war related payments and it acts, effectively, as a ‘wartime exclusion’ measure. This Regulation has been a dominant force for over 30 years in all of the cases discussed here. Not until 2006 did the Court implicitly concede that the provisions of this Regulation should be read in the light of ‘higher Community law’. It was not until Advocate General Ruiz-Jarabo Colomer’s incisive investigation into the negative impact of Article 4 (4) of 1408/71 in *Baldinger*, and his resultant call for EU citizenship to be used as barrier to the “injustice” it caused, that a conceptual space was created which allowed for the long term perception of Member State control over the legacy of war to be challenged and eventually eroded. In other words, Mr. Ruiz-Jarabo is the first voice at the Court to implicitly suggest and formulate a European solution to what was obviously a European war but one which had, in the interpretations coming from Luxembourg, reverted to being a purely national matter.

The case studies below trace this judicial journey from the 1970’s notions of sovereignty over war through to the illuminating employment of supranational

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likely to take up the question this year, yet the proposal is not quite as easy and unobjectionable as it sounds. Only six people in history have been granted the honor, and some of Anne Frank’s relatives are not supporting it.” *The New York Times*, February 23 2007.

<sup>91</sup> Article 4 (4) of Regulation 1408/71, “This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such”. OJ 1971 L 149/2 and English special edition: Series I Chapter 1971(II) p. 416, consolidated version, OJ 1997 L 28/1.

citizenship in *Baldinger* and *Tas-Hagen*. It is a concrete examination of what Dora Kostakopoulou terms “the art of the impossible”.<sup>92</sup> This is an exploration of the mediation and working through of national, post-national and supranational powers over the control of the legacy of the Second World War. It is a long story, beginning in 1978 and still unravelling in 2008.

### **A. Paulin Gillard**

The case of *Gillard*<sup>93</sup> is concerned with the issue of compensation for prisoners of war. Paulin Gillard, a Belgian national (resident at the time of the Court judgment in Nancy, France) was a member of the Belgian armed forces and was imprisoned in Germany for over 60 months during the Second World War, effectively for its entire duration. We learn nothing from the judgment about the circumstances of his imprisonment, nor of its consequences for Gillard.<sup>94</sup> This lack of background information is not surprising given the generally quite sparse nature of European Court of Justice decisions, which was even more marked in the early decades of Community judging. None the less, as we will see throughout this paper, this repeated pattern of the lack of any judicial dissection of the precise pasts of applicants with wartime experiences is regrettable.

Gillard’s claim relates to the applicability to his pension circumstances of Article L 382 (2) of the (French) *Code de la Sécurité Sociale* according to which the pension entitlement of former prisoners of war, whose captivity lasted for at least 54 months, is calculated at a favourable rate (namely 50% of basic wage) when that pension is taken at age 60 or after. In order to benefit from this provision, applicants had to produce evidence of the duration of their captivity in the form of a service record issued by a competent military authority. Gillard had retired at 60 and was in receipt of the standard French old age pension at a rate of 25% of basic wage. His request to benefit from the pension increase, which Article L 382 (2) afforded *French* prisoners of war, was rejected on the basis that the benefit he claimed was covered by the exclusion of compensation to victims of war and its consequences as provided for in Article 4 (4) of EC Regulation No. 1408/71.<sup>95</sup> In other words, the French social security body relied on Article 4 (4) to claim that it was not required to respect the fundamental Community principle of equal treatment of workers when the (social security) benefit claimed was related to the Second World War.

The European Court of Justice stated that the determination of benefits to be included or excluded from the ambit of Regulation 1408/71 rested on the particular facts relating to the contested benefit, especially its purpose and the conditions for its grant. In relation to the contested French pension benefit in this case, the Court interpreted its purpose as being “national gratitude for hardships endured between 1939 and 1945 on behalf of

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<sup>92</sup> D. Kostakopoulou, ‘European Union Citizenship – Writing the Future’ (2007) 13 ELJ 623-646 at 639.

<sup>93</sup> Case 9/78 *Directeur régional de la Sécurité sociale de Nancy v Paulin Gillard et Caisse régionale d’assurance maladie du Nord-Est* [1978] ECR1661.

<sup>94</sup> For a very brief reference to the condition of Belgian prisoners of war see the Avalon Project at Yale Law School: [http://www.yale.edu/lawweb/avalon/imt/document/nca\\_vol4/1514-ps.htm](http://www.yale.edu/lawweb/avalon/imt/document/nca_vol4/1514-ps.htm).

<sup>95</sup> This provision effectively provides an ‘opt out’ to Member States in relation to the applicability of EC/EU law to wartime related benefit schemes.

France and its Allies.”<sup>96</sup> Curiously, the Court does not specifically use or even refer to the words ‘war’ or ‘wartime’ in its judgment (independently of legislative phrases incorporating those words). There is a purely mechanistic and formal use of Regulation 1408/71 here against Paulin Gillard; once the benefit he claimed is interpreted by the Court as having a ‘national gratitude’ objective, then it cannot be classed as a social security benefit under the Regulation and he is, consequently, precluded from claiming the increased pension. The Court does not consider any alternative way in which Community law, particularly the prohibition on nationality discrimination, might have a bearing on this case. Gillard maintained his Belgian nationality but was resident in France and his claim before the referring French court specifically referred to equality of treatment of workers.<sup>97</sup> Article 4 (4) of 1408/71, coupled with the Court’s interpretation of the contested benefit, acted as a cut off which prevented Gillard accessing a remedy in an appropriate forum and pushed the matter of ‘war and its consequences’ firmly outside the doors of the Community’s judicial citadel and subject to domestic control without any interference from Community law. Paulin Gillard specifically availed of the advantages of European integration and moved to work in another Member State and was clearly, therefore, a Community worker who should have benefited from the prohibition on nationality discrimination in order to be treated as equal to French ex-prisoners of war. However, in interpreting the purpose of the contested French benefit as being one for the expression of “national gratitude” the Court firmly designates compensation for war victims as a national matter which trumps Community fundamental principles. In essence, Paulin Gillard did not fight for France so that state, his state of residence but not nationality, according to the European Court of Justice, owed him no form of gratitude or recognition for his wartime experience.

### ***B. Gilbert Even***

In the 1979 case of *Gilbert Even*,<sup>98</sup> another opportunity was given to the European Court of Justice to pronounce on the interpretation of Article 4 (4) of Regulation 1408/71. In doing so, the Court re-asserted its view that compensation or benefit in relation to war time activities is a matter for the Member States in the context of the relationship between the State’s own nationals and the war time service rendered by the latter. There is a very clear statement from the Court in this judgment that Community competence does not arise in the matter of wartime related matters. This preliminary ruling case arose in the context of *Even*, a French national residing in Belgium, and his legal dispute with the Belgian Pension authorities. Mr. *Even* was injured in the course of army service on 13 May 1940.<sup>99</sup> The Court papers are silent as to the nature of the war service record of *Gilbert Even* but, given the outcome of the judgment, it is clear that his military service was not performed for Belgium but for France (from which state he was

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<sup>96</sup> Paragraph 13 of the Judgment. This is, in fact, an inherently discriminatory provision given that Germans and Italians, for example, would automatically be excluded.

<sup>97</sup> See further D. Wyatt, ‘Discrimination on Grounds of Nationality: Schemes for the Victims of War or its Consequences’, (1979) 4 ELRev. 369-371.

<sup>98</sup> Case 207/78 *Gilbert Even v Office national des pensions pour travailleurs salariés (ONPTS)* [1979] ECR 2019.

<sup>99</sup> It is possible that he was involved in the defence of France on the Western Front against the advance of the 7<sup>th</sup> Panzer Division on 13 May 1940.

in receipt of an invalidity benefit in respect of a war injury). The specific issue in the judgment was the applicability or otherwise of a 1969 Belgian Royal Decree which essentially stated that Belgian nationals who had served in the Allied Forces during the war would be able to avail of full pension benefits from age 60 and not have to accept the 5% reduction which would otherwise apply.<sup>100</sup> The fact that this benefit is limited to those who served with the Allied forces only is not discussed by the Court but is, none the less, of some interest. In 1969, after 14 years of closer integration with Germany and Italy, the Belgian legislature deemed it appropriate to still reflect and concretise wartime differences and bias at a legislative level when dealing with pensions. This legislative entrenchment of the notion of still prevailing enmities and animosity belies, to some extent, the surface level presentation of cooperation that the EC Treaties suggest or sought to engender.

Even, like Gillard previously, in his claim before the Belgian Court, specifically raised principles of equality of treatment of workers and non-discrimination based on nationality in order to claim the non-reduced pension. The European Court of Justice, relying entirely on secondary legislation to reach its decision, first considers whether the benefit granted under the 1969 Belgian Decree falls within the scope of Regulation 1408/71. The main purpose of this benefit is categorised by the Court as being for certain categories of Belgian workers based on the service they rendered in wartime to their *own country*.<sup>101</sup> The objective of this benefit, according to the Court, was to give (Belgian) nationals an advantage by reason of the hardships they suffered for their country.<sup>102</sup> However, the 1969 Decree itself, establishing the benefit, makes it clear in fact that it is service by Belgian nationals for Allied forces, and not just for Belgium, which will permit qualification for the benefit.<sup>103</sup> The European Court, therefore, overstates the citizen-state notions of loyalty and reward which it claims underlie the benefit. Furthermore, this concept of a state based, particularised hardship, which runs through these cases, manages to be dismissive of the history of all those who fought and died in the name of a *collective* cause and also suggests the embracing of a somewhat primitive notion of European integration within the judicial corridors in Luxembourg. The Court, in 1979, apparently lacks the vision to see that over twenty years of integration between the Member States might imply that a French national who suffered hardship for the Allied cause was as deserving of Belgian benefits as a Belgian national; after all, the injury was sustained, the cause was the same and united but, it seems, the repercussions and the long term consequences are not. Having categorised the purpose or objective of the benefit, the Court finds that it is, therefore, excluded from the scope of Regulation 1408/71 under the terms of Article 4 (4) which specifically excludes

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<sup>100</sup>The Decree further adds as a condition for the award of the non-reduction benefit that the (Belgian national) recipients must be in receipt of a war service invalidity pension, granted by an Allied nation, for incapacity for work attributable to an act of war. Thus, although this is a benefit confined to Belgian nationals only, there is an overt external dimension to this award in recognition of Belgian participation in Allied forces.

<sup>101</sup>Emphasis added, Paragraph 23 of the Judgment.

<sup>102</sup>The 1969 Belgian Decree makes the award dependant on very specific dates namely, between 10 May 1940 (when Belgium declared its neutrality and refused to allow the British Expeditionary Force to enter the country (Belgium formally surrendered on May 27 1940)) and 8 May 1945, the day of ceasefire by Germany and the official end of the war.

<sup>103</sup>T. Judt *Postwar* (London: Pimlico, 2007) on the role of Belgians at time of occupation, "In occupied Belgium, some Flemish speakers... welcomed German rule" at 33.

‘benefit schemes for victims of war or its consequences’. The European Commission, intervening in the case, suggested that the benefit claimed might be classed instead as a social and tax advantage under the terms of Article 7 (2) of Regulation 1612/68. However, the Court, asserting the need for such an advantage to be linked to the objective status of ‘worker’, clearly differentiates the pension benefit as being based on services rendered in wartime (termed by the Court as ‘a scheme of national recognition’) and not on worker status and, therefore, in its view it also falls outside the scope of Regulation 1612/68.

This repeated judicial reliance on Article 4(4) of 1408/71 sits oddly at the centre of the European Union’s relationship with wartime; it acts as the determining factor of competence division in relation to some of the consequences of war and makes the latter solely a Member State issue. Certainly, in the 1970’s and 80’s, its wording was crucial to the closing off by the Court of any avenues of exploration of Community concern with the enduring consequences of war. It is clearly established by the Court in *Even’s* case that he does not have the right to an enhanced pension from his country of residence and that the payment or benefit which he claimed was for injured Belgians only. The Court does not even refer to Article 7 (1) EC (now Article 12 EC) and the prohibition on nationality discrimination.<sup>104</sup> Thus, Gilbert *Even’s* personal contribution to European history meets with the formality of Community law in a conflict which is resolved to his disadvantage. His case foreshadows that of Josef Baldinger before the European Court of Justice some years later. There is a purely formal justification in the Court’s line of reasoning; the relevant provisions of EEC law at the time are non-applicable given the overall objective of the award as interpreted by the Court (hardship caused to Belgians being compensated by their own country). But this case, like so many others in this framework, leaves a sense of justice not properly done and also the somewhat sad image of a former soldier who, in unknown circumstances, fought to help bring about a Europe as we know it today.

The sense that the Second World War was a war of united allies in the name of explicitly European values becomes lost in this line of case law where distinctions are clearly drawn based on individuals’ relationships with their state of origin (or at least the state to which they were affiliated during wartime). Ever before Monnet, Schuman and the road to Rome, a large part of Europe had clearly established a very specific politicised form of closer union for the purposes of war. To observe the Court’s jurisprudence at this distance, however, is to believe that that the Second World War was fought by individual states with no obvious connections with each other. The other consequence of this tacit judicial reconstruction of wartime history is that the role of the individual citizen, whether they be war hero or merely forced participant, is subjugated to the prior consideration of Member State interests and competences. There is some sense of distortion here in terms of the European Court of Justice’s own case law; the defence of individual legal rights in *Van Gend*<sup>105</sup> *et al* does not extend to the particularity of wartime involvement. The various claimants whose cases are rooted in wartime experiences appear therefore as disembodied representatives of an awkward or uncomfortable link with the past which supranationality is ill equipped to deal with. The

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<sup>104</sup> See further A. Stroobants, (1980) *Revue belge de sécurité sociale* 260-262 and D. Wyatt, ‘Contrasting Cases on Non-Discrimination’, (1981) 6 *ELRev.* 42-47.

<sup>105</sup> Case 26/62 *Van Gend en Loos* [1963] ECR English special edition, 1.

culture of the recognition of trauma and post-traumatic disorders had of course yet to emerge in any real way yet, still, the effacing of individual wartime narratives in the case law of the Court does a disservice, indirectly, to the collective memory of war in Europe. The lack of any investigation or enquiry into the nature of the wartime memories of the various claimants before the Court over the years from the 1970's onwards contributes to a sense of a negation of the commonness of the experiences of Europeans during the Second World War.<sup>106</sup> This very fact of the lack of detail, coupled with the repeated insistence by the Court of Justice that the primary wartime relationship is the one between the state and its own nationals, conveys a false and slanted impression of Europeans' engagement with war. These omissions and pronouncements by the Court in war related cases are an expression of an unconscious Union embarrassment with its history and of its inability to engage appropriately with the past.

### ***C. Albert Hoorn***

Wartime experiences arise again in the case of Albert Hoorn.<sup>107</sup> Mr. Hoorn, was a Dutch citizen who had been forced to work in a factory in Dortmund, Germany, during the Second World War, from 31 July 1943 to 31 March 1945. Another important narrative therefore unravels before the EU courts, which is that of the many hundreds of the thousands of people subjected to forced labour during the Second World War.<sup>108</sup> Hoorn was claiming pension benefits in relation to wartime work or activities. There may be only a small number of such claimants who pursue a claim all the way to Europe (to use the jargon) but they offer a glimpse into a tenacious class of litigant, all the more surprising given their personal histories and experiences. The case report does not reveal what Albert Hoorn laboured on in the factory in Dortmund nor any of the circumstances surrounding his forced labour. How was he deported to Germany, why was he selected, in what conditions did he live, when and why was he released? The silence of the judgment on these matters is telling in itself. An opportunity presents itself before the European judges to hear more about a valuable piece of the EU's own history but it is an opportunity wasted. By 2007, there is some indication of a willingness to acknowledge the individual dimension of wartime cases (at least from the Advocates General<sup>109</sup>) but from the 1970's to the 1990's we do not observe a judicial body ready to investigate personal narrative.

*Hoorn* is a preliminary ruling referral from the *Sozialgericht* (Social Court), Muenster, in the context of the proceedings between Albert Hoorn and the *Landesversicherungsanstalt Westfalen* (Regional Insurance Office for Westphalia). The question referred to the European Court of Justice essentially turned on whether a complementary agreement to the Convention on Social Insurance of 29 March 1951 between the Federal Republic of Germany and the Kingdom of the Netherlands was compatible with Articles 48(2) and 51 of the EEC Treaty (now Articles 39 and 42 EC Treaty) and with

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<sup>106</sup> See, for the opposite, the thousands of wartime records on <http://www.bbc.co.uk/ww2peopleswar/>.

<sup>107</sup> Case C-305/92 *Albert Hoorn v Landesversicherungsanstalt Westfalen* 1994] ECR I-1525.

<sup>108</sup> See further, B. Fassbender, "Compensation for Forced Labour in World War II: The German Compensation Law of 2 August 2000" (2005) 3 *Journal of International Criminal Justice*, 243-252.

<sup>109</sup> Case C-292/05 *Lechouritou and others v Germany* 2007 ECR I-1519.

Regulation (EEC) No 1408/71. More particularly, the case concerns Complementary Agreement No 4 of 21 December 1956 on the settlement of rights acquired between 13 May 1940 and 1 September 1945 by Dutch workers under the German social insurance scheme. These dates refer to the wartime experience of the Netherlands itself.<sup>110</sup> History is written into *Hoorn*, and the other wartime cases, but in invisible ink so to speak. You can read a sort of history of Europe from the pages of the European Court Reports but only as a stitched together reconstruction, a fragmented tapestry of tiny, collated bits and pieces. The history, in other words, is there but it is very well hidden – or suppressed? The “absolutely special nature of the [wartime] situation”<sup>111</sup> appears to justify an absolutely special kind of judicial reception and response.

In a decision in November 1989, the *Landesversicherungsanstalt*, under Article 2(1) of the 1956 Complementary Agreement, dismissed the request for an old-age pension submitted by Albert Hoorn who had been forced to work in a factory in Dortmund from 31 July 1943 to 31 March 1945. The judgment does not reveal anything further about these specific dates. None the less, it is well known that throughout March 1945 Dortmund was subjected to very heavy Allied bombing<sup>112</sup> and obviously Albert Hoorn was fortunate enough to survive this. As for the summer of 1943, whatever the circumstances of Hoorn’s own forced transport to Germany, in the background, many of his co-citizens were being taken in their thousands to the Dutch concentration camp, Westerbork, the first stage in transport to extermination for most of them.<sup>113</sup>

Advocate General Tesauro places this claim in the context of Articles 48(2) and 51 of the EEC Treaty and Regulation (EEC) No 1408/71 and its compatibility with the Complementary Agreement 1956 on the settlement of rights acquired between 13 May 1940 and 1 September 1945 by Dutch workers under the German social insurance scheme. It is apt to highlight briefly at this stage the existence of this settlement and how it resonates in the context of the European integration project. In 1956, plans were well underway for the Treaty of Rome yet, in other bureaucratic corridors, the consequences of war were still being mediated and worked through by the very same countries planning their future together. This bureaucratically named Agreement

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<sup>110</sup> On Monday 13 May 1940, Queen Wilhelmina of The Netherlands and the Dutch Government are taken to London at different times during the day. The Dutch army capitulated the following day. The Netherlands was a neutral state at that time. However, after the Venlo incident on 9 November 1939 (a Gestapo engineered spy mission which, under the guise of an anti-Hitler plot, resulted in the capture of British intelligence officers in the Dutch border town of Venlo; the British agents were accompanied by a Dutch intelligence officer who was shot during the incident), The Reich claimed collaboration between the Dutch and the British as a so-called justification for the invasion of The Netherlands.

<sup>111</sup> Opinion, at paragraph 11.

<sup>112</sup> “1,108 aircraft - 748 Lancasters, 292 Halifaxes, 68 Mosquitos - attacked Dortmund. This was another new record to a single target, a record which would stand to the end of the war. Another record tonnage of bombs - 4,851 - was dropped through cloud on to this unfortunate city. The only details available from Dortmund state that the attack fell mainly in the centre and south of the city. A British team which investigated the effects of bombing in Dortmund after the war says that, 'The final raid... stopped production so effectively that it would have been many months before any substantial recovery could have occurred'. <http://www.raf.mod.uk/bombercommand/mar45.html>.

<sup>113</sup> Dutch Jews suffered *pro rata* more than any others in Europe apart from those in Poland; over 105,000 Dutch Jews (that is over 78% of the total Jewish population of that country) were exterminated.

obscures a multitude of facts, faces and memories. It does not even mention ‘forced labour’ or indeed German occupation but, rather, conceals the reality of wartime in The Netherlands beneath legalistic and technical language. The very premise (later referred to as a ‘legal fiction’ by the Advocate General) of the Agreement, “that periods of insurance completed between 13 May 1940 and 1 September 1945 by Dutch workers under the German pension insurance scheme are to be taken into account as if they had been completed under the legislation of the Netherlands” itself, consciously and deliberately, obliterates the nature of that work which was forced, involuntary labour (slave labour in other words) in an enemy state with the aim of contributing to the war effort of that state.

As regards the refusal of the pension award to Albert Hoorn, the latter maintained that the provisions of the bi-lateral Agreement conflicted with Article 3 of Regulation No 1408/71, inasmuch as he was suffering discrimination in contrast to *inter alia* German forced workers and Dutch frontier workers for whom access to the German insurance scheme was possible whereas his claim underwent a *renvoi* to the Netherlands scheme and a resultant reduction.<sup>114</sup> Mr. Tesouro was of the opinion that this was clearly a Member State matter which fell outside the competence of the Court as the Agreement was a bilateral one between two states.<sup>115</sup> His analysis is confined to the issue of compatibility with 1408/71 in which context he finds no conflict. This Regulation, we are reminded, enshrines the fundamental principle of non-discrimination based on nationality laid down in Article 48 EC (now Article 39).<sup>116</sup> In similar cases in the run up to *Hoorn*, none of the judgments, as we saw, referred to this fundamental principle. Indeed, it seemed in most instances as if the fundamentals of the Community legal order were suspended in wartime based case law. That was made possible because reliance was on the exception in Article 4(4) and also on the special provisions laid down in the Regulation itself which include social security conventions concluded between Member States. In Annex III of this complex piece of legislation, particular mention is made of Articles 2 and 3 of Complementary Agreement No 4 to the Convention of 29 March 1951 between Germany and The Netherlands. According to the Advocate General, any conflict between the provisions of the Regulation and the Agreement had therefore been resolved in advance.<sup>117</sup>

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<sup>114</sup> The relevant provision of the Agreement is: “Periods of insurance completed by Dutch nationals under the German pension insurance scheme for employees between 13 May 1940 and 1 September 1945 on the basis of paid employment shall be deemed to have been completed under the Dutch insurance system against financial consequences of invalidity, old-age and death, if the employee ceased working before 1 September 1945 and returned to the Netherlands by not later than 31 December 1945. 3. No claims may be made against the German pension insurance scheme for workers and the analogous scheme for employees on the basis of periods of insurance deemed under paragraph 1 to have been completed under the Netherlands insurance system against the financial consequences of invalidity, old-age and death.”

<sup>115</sup> “That having been said, it should be stated that to the extent to which the question raised by the Sozialgericht, Muenster, turns on the validity and interpretation of Complementary Agreement No 4 to the Convention between Germany and the Netherlands, it falls outside the competence of the Court.” Paragraph 5 of the Opinion.

<sup>116</sup> Article 3 of Regulation 1408/71, Equality of treatment, “Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.”

<sup>117</sup> Paragraph 8 of the Opinion.

However, stepping back momentarily from the legal formalities, Mr. Tesauro does recall

“the specific situation of Netherlands nationals engaged as forced labour during the Second World War” and the fact that the aim of the contested legislation was “to mitigate the unfavourable consequences for those concerned of events connected with that conflict”.<sup>118</sup>

While this may seem to be an opener for a more sympathetic or open approach towards Albert Hoorn it is in fact occasion to recall that the Court has previously asserted a hands off approach as regards the application of equal treatment to events before 1945.<sup>119</sup> This is because of “the special nature of those situations” which Regulation No 1408/71 itself, in Article 4(4), excludes from its sphere of application, referring to “benefit schemes for victims of war or its consequences”. The complexity and ambiguity underlying all of these cases is apparent here when the only legislative measure permitting a possible claim for unfair treatment in war based cases itself contains the provision which deliberately excludes them from its field of application. Such cases, of people whose lives were altered irredeemably by the war,<sup>120</sup> are apparently too special to merit a judicial or legislative solution at a European level. Thus, the Advocate General concludes, stating that the contested bi-lateral Agreement is not contrary to the “principles and ... spirit of [the] Regulation”.

The essential basis of Albert Hoorn’s claim is that he maintained that the Complementary Agreement discriminates against Netherlands nationals on the grounds that their pension entitlement under Dutch legislation is less than that paid by the German pension insurance scheme to its own nationals who were compelled to perform forced labour in Germany during the Second World War in similar circumstances. In other words, German forced labourers benefited more in old age than other European (or at least Dutch) workers forced to work in the same conditions, because of the terms of the bi-lateral Agreement. The Court found that that Agreement remained fully applicable notwithstanding Regulation No. 1408/71 and that it applied to the situation of Albert Hoorn. Hoorn’s claim and case, therefore, go further to the root of Community law than many other previous cases of this type. He maintained that the difference between the amounts of pension to which Dutch and German nationals compelled to perform forced labour were entitled under their respective old-age schemes gives rise to discrimination contrary to Article 7(1) (now Article 12) of the EEC Treaty.<sup>121</sup> This provision, and the principle it posits, ought to have been to the fore in previous cases but, as was observed, were not even referred to by the Court. However, in *Hoorn*, the Court deemed that the alleged difference of treatment to forced labourers did not stem from the Agreement, which merely determined the law applicable to the workers

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<sup>118</sup> Paragraph 9 of the Opinion.

<sup>119</sup> Case 79/76 *Fossi v Bundesknappschaft* [1977] ECR 667, Case 9/78 *Directeur Régional de la Sécurité Sociale de Nancy v Gillard* [1978] ECR 1661, and Case 207/78 *Ministère Public v Even* [1979] ECR 2019.

<sup>120</sup> Young lives from which were “burgled [the] bank of youth” Patrick Kavanagh, ‘Stony Grey Soil’ from *Collected Poems* (London: Norton Library, 1964). During an earlier European conflict, Wilfred Owen wrote of this loss of young lives in his ‘Anthem for Doomed Youth’ (1917) in *The Poems of Wilfred Owen* (London: Chatto and Windus, 1990).

<sup>121</sup> “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

concerned, but rather from the fact that The Netherlands legislature laid down, for the pensions for which it is responsible under the Agreement, an amount different from that laid down by the German old-age insurance scheme for pensions payable by it.<sup>122</sup> It was for each Member State to determine the amount of the pensions to be paid by it, as long that such amount does not entail any discrimination based on nationality. As the Netherlands legislation did not accord different treatment on account of their nationality to different categories of Community nationals who were compelled to perform forced labour it was therefore deemed to be compatible with Community Law.

This is a surface level appreciation of the situation and of the legislation; the reality was that the Agreement was designed to cater for Dutch forced labourers only, labourers who had worked at a specific time and in specific place only, that is in Germany. In other words, the net result of the Agreement was that it catered only for the claims of Dutch forced labourers and any claims they may make on the German social security system. On the face of it, the Dutch pension legislation may not have discriminated on the grounds of nationality but that was only because it was aimed at one nationality only. The result was that Dutch forced labourers who were paid, under the Agreement, by The Netherlands, end up poorer in old age than their German co-workers. The Agreement, therefore, promoted an indirectly discriminatory pension regime. There is a strange irony to this whole situation; Albert Hoorn, after a presumably difficult period of his life in a factory in Dortmund, was claiming that he would in fact be better off if he were German rather than a national of The Netherlands, which did not treat former forced labourers so generously. He desired, in his claim for a fair old age pension, to be treated as well as a German, in short to be treated as if he *were* German.

Albert Hoorn's other arguments (as to discrimination between two categories of Dutch forced labourer and the relevance of 1408/71) are dismissed with by the three judges who conclude that "it is compatible with Community law for forced labour performed by Netherlands nationals in Germany during the Second World War to confer no entitlement under the German pension insurance scheme, but to be accounted for under the Netherlands scheme as if it had been performed in the Netherlands".<sup>123</sup> This is a somewhat harsh judgment; it is hard not to see Hoorn as having been hung out to dry by the two Member States concerned. Forced to serve National Socialism against his will in his youth,<sup>124</sup> he then has to undergo the indignity of discovering in old age that his past had been neatly carved up by Dutch and German bureaucrats in the 1950's. One feels like scouting around for somebody to blame, but who and for what exactly? National Socialism certainly, maybe even Dutch bureaucrats, but his case ends up before three judges in Luxembourg instead and they blame nobody.

The legal fiction that young Albert Hoorn had passed a normal early adulthood cycling the lanes of Holland, instead of working as a slave labourer far from home in challenging circumstances, is perhaps just too attractive a view of the past for the Court to delve deeper and expose it for what it really was. The bi-lateral Agreement itself works a kind of bureaucratic madness in its formal pretence that 'nothing happened' and

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<sup>122</sup> Paragraph 12 of the Judgment.

<sup>123</sup> Paragraph 20 of the Judgment.

<sup>124</sup> The judgment does not give his date of birth but one can surmise that he was born in 1924 or 1925 (thus making a pension claim at age 65 in 1989) and, therefore, would have been a young man of 18 or 19 when he was forcibly taken to Dortmund.

the Court colludes with that, gliding over all the background to this case as if it had never occurred, as if indeed the war itself had never been. Hoorn's case is portrayed as a somewhat petty inconvenience to be rapidly dismissed so that the future, the new (legal) order, can be developed without too much interference from the complex, problematic past.

#### ***D. Josef Baldinger***

Advocate General Ruiz-Jarabo Colomer makes a significant contribution in this case in beginning to break the mould of Member State exclusive control over the legacy of war.<sup>125</sup> This is a reference for a preliminary ruling from Vienna which concerns the fact that the award of compensation to Austrian ex-prisoners of war<sup>126</sup> is refused where such persons have since adopted a different nationality. The referring court raised the question of whether that condition amounted to a restriction on freedom of movement for workers within the Community and also raised the issue of the prohibition of discrimination on the grounds of nationality.<sup>127</sup>

Josef Baldinger was born on 19 April 1927 as an Austrian national. From January 1945 to May 1945, he fought as a soldier in The Reich's armed forces. He was a prisoner of war in Russia from 8 May 1945 until 27 December 1947. He subsequently worked in Austria until 1954 and, thereafter, in Sweden until 1964. He then returned to work in Austria for a year after which, in April 1965, he emigrated permanently to Sweden where, in 1967, he became a Swedish citizen, thereby losing his Austrian citizenship. Here we have the case of a young seventeen year old Austrian boy serving as a soldier in the German armed forces in the difficult, final days of the war and subsequently imprisoned until age twenty in a Russian POW camp.<sup>128</sup> Since 1 May 1986, Josef Baldinger has been drawing invalidity benefit and an old-age pension from the Austrian social security fund. In 2000, Paragraph 1 of the Austrian Law on Compensation for Prisoners of War (The *Kriegsgefangenenentschädigungsgesetz*) (the 'Federal Law') introduced compensation for former prisoners of war. Baldinger applied for an award under this legislation but the application was refused by a decision in March 2002 from the *Pensionsversicherungsanstalt der Arbeiter*, the body responsible for processing these payments, because he did not hold Austrian nationality at the time of his application.

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<sup>125</sup> Case C-386/02 *Josef Baldinger v Pensionsversicherungsanstalt der Arbeiter* [2004] ECR I-8411.

<sup>126</sup> The *Kriegsgefangenenentschädigungsgesetz*, (the Federal Law) provides that: 'Austrian nationals who: 1.became prisoners of war in the course of the First or Second World War; or 2.were taken into custody and detained by a foreign power for political or military reasons in the course of the Second World War or during the period when Austria was occupied by the allied forces; or 3.were outside the territory of the Republic of Austria as a result of political persecution or the threat of political persecution within the meaning of the Law on Victim Welfare (*Opferfürsorgegesetz*; *Bundesgesetzblatt* I, No 183/1947), and for the reasons referred to in subparagraph 2 above were taken into custody by a foreign power and detained after the start of the Second World War, shall be entitled to a payment in accordance with the provisions of this Federal Law.'

<sup>127</sup> Article 12 EC Treaty, the first paragraph of which provides that 'Within the scope of application of [the EC Treaty], and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

<sup>128</sup> A more (in) famous Austrian, former President of that state, Kurt Waldheim, was also a serving member of the German army during the Second World War.

As befitting a certain reputation for generosity of approach throughout his involvement in war related jurisprudence, the Advocate General commences this Opinion by underlining in the very first sentence the potential “manifest injustice” which this case implicates. He begins his analysis, however, by explicitly referring to previous decisions of the Court where, arguably, injustice had resulted. Relying on *Gillard*,<sup>129</sup> the Advocate General makes it clear at the outset that his view is that, under benefit schemes for victims of war, “the relevant State’s responsibility for paying the benefits does not stem from circumstances that arise as a result of the exercise of the right to free movement; instead, the benefits are paid in order to compensate the victim on the basis of the particular interests of the State which makes the award. The essential purpose of the benefit granted is to give former prisoners of war who underwent a long period of captivity a testimony of national gratitude for the hardships endured, thus granting them a financial *quid pro quo* for the services rendered to [that] State.”<sup>130</sup> This is an endorsement of the judicial position adopted in *Gillard* and *Even* as to the need for national interests to be protected in context of wartime compensation. The Advocate General proceeds to make it clear that payments of a compensatory type arising from people’s experiences during the Second World War are *sui generis* and not be classed as social security. This means, in his view, that Regulation 1408/71 has, therefore, no applicability to the *Baldinger* claim.<sup>131</sup> Furthermore, Regulation 1612/68, on freedom of movement for workers within the Community, equally does not apply to Josef Baldinger’s claim according to the Advocate General. This is because “the social and tax advantages referred to are generally granted to national workers primarily because of their objective status as workers or by virtue of the fact of their residence on the national territory. On the other hand, a benefit based on a scheme of national gratitude for suffering endured during armed conflict by, for example, prisoners of war, does not correspond to the essential characteristics of the advantages set out in Article 7(2) of Regulation No 1612/68, from which it follows that it does not fall within the material scope of that measure.”<sup>132</sup>

According to Mr. Ruiz-Jarabo’s analysis there is, therefore, seemingly *no* provision of Community Law which applies to the situation in which Josef Baldinger finds himself. Such a “literal approach” would have the Court simply declare that Community law does not preclude a national rule which makes the award of compensation to former prisoners of war conditional on such persons holding the nationality of the awarding Member State at the time of application. Indeed, this was the judicial approach adopted in previous similar case law. However, in an implicit criticism of those decisions, Mr. Ruiz-Jarabo finds that such a formal approach is “difficult to countenance” as it gives rise to a “manifest injustice”.<sup>133</sup> This is a far more open assessment of the relationship

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<sup>129</sup> Case 9/78 *Directeur régional de la Sécurité sociale de Nancy v Paulin Gillard et Caisse régionale d'assurance maladie du Nord-Est*, [1978] ECR 1661.

<sup>130</sup> Paragraph 12 of the Opinion. *Fossi* is discussed in detail below.

<sup>131</sup> “In addition, it is not disputed that Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (3) does not apply to the proceedings, since, under Article 4(4) thereof, benefit schemes for victims of war or its consequences are excluded from the scope of the regulation.” Paragraph 12 of the Opinion.

<sup>132</sup> *Ibid.* paragraph 13.

<sup>133</sup> *Ibid.* paragraph 16.

between EC law and wartime experiences than that found in earlier cases. A complete dismissal of the applicability of Community law to the situation in the *Baldinger* case would be a clear indication of the non-engagement with the wartime facts by the judicial benches of the EU. Ruiz-Jarabo agrees as he, with some compassion, appeals for the employment of “good nature in the face of harsh laws”. The impenetrable judicial formality of *Gillard*, *Even* and *Hoorn* in the face of wartime claims is countered as Ruiz-Jarabo highlights the necessary engagement with the past. It is somewhat ironic that the judges of the 70’s, who lived through wartime experiences themselves, could not have found a way to perform their function in the empathetic manner that the Advocate General was able to do in 2003.

In the light of all the complexities and limitations (themselves merely a reflection of the myriad, unexcavated intricacies underlying European integration itself), lucidly portrayed by Ruiz-Jarabo, he can only conclude that “It is therefore appropriate to consider whether, owing to the manifest injustice to which all those circumstances would give rise, the Court may approach the question in terms different to those used by the national court.”<sup>134</sup> Despite the relatively scant case law at the time of *Baldinger* on the subject of citizenship, the Advocate General is of the view that “the creation of citizenship of the Union... represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.”<sup>135</sup> Having dismissed the potential applicability of Article 12 EC to *Baldinger*’s case on the basis that the award claimed did not fall within the scope of the EC Treaty (specifically the provisions on the free movement of workers), the Advocate General looks instead to the potential of Articles 17 and 18 *et seq.* on EU citizenship. In invoking these provisions, Ruiz-Jarabo emotively reminds the Court of the foundations and principles of Union citizenship: “the desire to endow the construction of the European Union with real political ambition became evident, and aroused a feeling of belonging to a community with shared values and ideals.”<sup>136</sup> His argument is for the recognition of EU citizenship as an independent right in itself. This, of course, goes against the express wording of the Treaty which declares that EU citizenship is an ancillary concept.<sup>137</sup> None the less, an analysis of the existing case law on EU citizenship, particularly *Garcia Avello*,<sup>138</sup> leads Mr. Ruiz-Jarabo Colomer to conclude that “the rules governing the award of compensation laid down in the Austrian Federal Law of 2000 must conform to the fundamental principles of Community law, in the same way as the rules governing people’s surnames were required to do so in *García*

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<sup>134</sup> Typically for this Advocate General, whose eloquent and lyrical style is unique at the Court, this conclusion, based on the need to see justice done, is accompanied by a literary reference; “It would be appropriate to heed the maxim of the 17th century Spanish writer Baltasar Gracián, who appealed to ‘good heart in the face of fickle fortune, good nature in the face of harsh laws, good art in the face of imperfection, and good sense in all things’”. Paragraph 19 of the Opinion.

<sup>135</sup> *Ibid.* paragraph 25.

<sup>136</sup> *Ibid.* paragraph 24.

<sup>137</sup> Article 17 (1) EC Treaty: “Citizenship of the Union shall complement and not replace national citizenship.”

<sup>138</sup> Case C 148/02 *Carlos Garcia Avello v Belgian State*, [2003] ECR I-11613.

*Avello*.”<sup>139</sup> Therefore, it is not possible for the Austrian Federal Law to treat Josef Baldinger less favourably because he has the nationality of another Member State. The Austrian Government had put forward no justification for the difference in treatment of a non-national in respect of the award of the POW payment, which it had characterised as “a benefit designed to express national homage”<sup>140</sup>. This restrictive provision of the Federal Law produced the very outcome which Article 12 EC seeks to avoid. As the Advocate General explains, “For the purposes of the gratitude they deserve, there is no distinction whatsoever between persons who were prisoners of war based on the fact that some of them retained their nationality while others, like the applicant in the main proceedings, settled in another country and chose to adopt another nationality. On the contrary, to exclude those who are no longer Austrian nationals, without any other reasonable justification, may be regarded as an affront to the dignity of people who are in the same position as Mr. Baldinger.”<sup>141</sup> The Advocate General sees this unjustified restriction, favouring prisoners who maintained Austrian nationality and citizenship, as offending those who happened to move to another Member State. The latter category of people are just as deserving of the gratitude and homage which are the underlying basis of the financial compensation in the Federal Law. Thus, Mr. Ruiz-Jarabo effectively finds the Federal Law to be contrary to Article 12 EC. He also, however, concludes with a plea to see an enhanced notion of the concept of EU citizenship in this instance. The latter may not be equal to Member State citizenship but, in his view, “it must at least guarantee that it is possible to change nationality within the European Union without suffering any legal disadvantage.”<sup>142</sup> Thus, the Opinion concludes that Articles 12 and 17 together should operate to prevent the discrimination inherent in the contested Austrian Federal Law.

The emotive and complex background to the case, and the repeated assertions by the Advocate General of the hardships endured by prisoners such as Josef Baldinger (without, however, any specific evidence of this being referred to), take this case to a much more human level than previous expressions from the Court in this area. There is a direct recognition that participants in the Second World War and its fallout (whatever their politics and affiliations) are persons deserving of respect and dignity and, therefore, according to the Advocate General, the benefit of EC law protection. The situation in which Josef Baldinger, former soldier of The Reich and former prisoner of the Russians, found himself was, fundamentally, one which could not be fully resolved by national law. In other words, Community law, and Community law alone, provided both the opportunity for an alteration in his life circumstances and also the only solution to the consequences of those changes. When the benefit application was rejected, Austrian domestic law offered him no remedy. Furthermore, though he served The Reich, apparently no similar ex-prisoner compensation was available to him from Germany. Thus, only EU law provided, literally, a potential for a resolution for the harm suffered as a consequence of his wartime experiences. If we recall the vexed issue in previous case law in this context, namely the overt statements that war is a matter for the Member States and the EU has no role here, this Opinion concludes by stating specifically to the contrary; the Union *has* competence in relation to matters arising

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<sup>139</sup> Paragraph 35 of the Opinion.

<sup>140</sup> *Ibid.* paragraph 45.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.* paragraph 47.

from wartime. The general tenor or message from the Advocate General is one of support for citizens with memories and for individual wartime experiences. We, EU citizens and subjects of EU law, are required to accept that this young German soldier was wounded by war, that he suffered because of the war and that the political entity which arose, indirectly, from that war does carry some legal responsibility in relation to his experience.

The position of the Austrian Government in this case highlights all the awkwardness surrounding this issue. The Government did not put forward any reasons capable of justifying the difference in treatment meted out to Josef Baldinger, broadly acknowledging only that the anomaly was probably the result of an “oversight” on the part of the legislature. Is this really credible given the extent to which Austrian politics were, and still are, affected by the relationship with The Third Reich? Erroneously or otherwise, Austria had as recently as 2000, chosen to create this new payment for those affected by wartime in respect of events in the past. To give this some background context, 2000 was also the year in which Rachel Whiteread’s Holocaust Monument was unveiled in the *Judenplatz* Vienna, accompanied by much local protest and controversy. The fact that many non-Austrians might potentially be excluded from the compensation scheme would, I suggest, have been easily conceivable by the Austrian legislature. Despite this apparent legislative oversight, Mr. Ruiz-Jarabo finds, none the less, that that there is nothing in the provision to suggest that persons who were Austrian nationals while they were held captive should be excluded from receiving the compensatory payment. But, there is a further complication here: Austrian nationality did not exist under Reich annexation which is why Baldinger, born Austrian, was fighting as a young German for the army of The Reich.<sup>143</sup> Josef Baldinger did not serve the *Austrian* state before and during his captivity but in rather the state of the Reich so ‘national gratitude’ might be more appropriately claimed from Germany and not from Austria. This is just another example of the omnipresence of the complexities and legacies of wartime as they arise before the Union’s courts. Each one might simply be classed as a plea by those individuals to the effect that ‘I was affected by war in some way and I bring my claim now to the European Union’. Taken in isolation, each of these small claims can be seen as insignificant, politically redundant and legally limited in terms of what they contribute to the canon of EU law. As a result, they have therefore attracted little doctrinal interest. Considered globally though, the effect is more significant; these claimants and their experiences make, or compel, the Union to be a remedying force, render it the forum of reparation that their Member States cannot offer, rendering the wartime past very distinctly a matter of concern for European integration.

The European Court of Justice does not view matters in quite the same manner: in its judgment in *Baldinger* in 2004, the five judges return to familiar territory, namely Article 4 (4) of Regulation 1408/71 which we are reminded, “does not apply to benefit schemes instituted in favour of victims of war or its consequences. In such schemes, benefit is granted in order to compensate victims on the basis of the particular interest of

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<sup>143</sup> The Austrian Government, in justification of a restrictive interpretation of the compensation provision, stated that such an approach was necessary because, during the period in question – in other words, during the German annexation – Austrian nationality did not exist as such, so that legislative texts tend to use an indirect term to describe Austrian nationals during that period, but such an expression does not appear in the Federal Law - paragraph 18 of the Opinion.

the paying State.”<sup>144</sup> The operative part of this judgment, one of the shortest to emerge from the European Court of Justice in recent years, effectively consists of seven sparse sentences (excluding one at the outset which deals with the division of jurisdiction between national courts and EU courts in Article 234 EC cases). However short, it still manages to convey an incorrect statement as to the origins of Josef Baldinger’s claim when it states that “An allowance such as that at issue in the main proceedings... is provided to former prisoners of war, who prove that they underwent a long period of captivity, in testimony of national gratitude for the hardships they endured and is thus paid as a *quid pro quo* for the service they rendered to their country.”<sup>145</sup> As discussed above, Josef Baldinger served in the *Wehrmacht*; he did not ever serve Austria or the Austrian state specifically. Despite this confusion and the lack of full appreciation of the precise historical connotations of the Federal Law, the message from the Court is none the less ruthlessly clear; this is a national matter and dealing with war is a domestic issue. Relying on *Gillard* and *Even*,<sup>146</sup> the Court speedily makes it clear that Regulation 1408/71 is to determine the relationship between EU law and the benefit claimed. As Article 4 (4) specifically excludes such benefits, the matter does not, according to the Court, fall within the scope of application of EU law. Furthermore, the benefit claimed is not connected to a claimant’s status of ‘worker’ so worker related aspects of Community law equally do not apply to “compensatory allowances which are linked to service rendered in wartime by citizens to their own country and whose essential aim is to provide those citizens with a benefit because of the hardships they endured for that country.”<sup>147</sup> The judges thus make it very clear that Member States may deal with the consequences of war as they see fit and their citizens will have no recourse to Union law in this context.

This 2004 judgment is surprising, to say the least, in terms of its ahistorical nature and in its complete dismissal of fundamental Union principles of non-discrimination based on nationality. It contains precisely the kind of literal and formal approach which the Advocate General had warned would lead to a “manifest injustice”. A judgment from any court, but particularly one at this high level, serves many functions, one of which is the need to educate and enlighten the legal community which it serves. This judgment does neither; in a restricted manner it confines its reasoning to three provisions of EC law (Regulations 1612/68 and 1408/71 and Article 39 EC)<sup>148</sup> to find in favour of the nationality restriction contained in the Austrian Federal Law. It does not give any consideration whatsoever to the potential applicability of EU Citizenship in this case. Although dating from as recently as 2004 this judicial tract seems outdated, archaic and extremely limited in the manner of the 1970’s judgments upon which it relies. Regulation 1408/71 and its ‘war exception’, a classic piece of Member State protectionist 1970’s legislation, is relied upon despite obvious advances in EU law since then as regards discrimination and citizenship. By 2004, the way in which the people (and not just the ‘workers’) of the Member States relate to the Union is very different

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<sup>144</sup> Paragraph 11 of the Judgment.

<sup>145</sup> *Ibid.* paragraph 17.

<sup>146</sup> Case 9/78 *Gillard and Caisse régionale d’assurance maladie du Nord-Est* [1978] ECR 1661, paragraph 13, and Case 207/78 *Even and ONPTS* [1979] ECR 2019, paragraphs 12 to 14.

<sup>147</sup> Paragraph 20 of the Judgment.

<sup>148</sup> The referring Vienna Court refers, in its questions to the European Court of Justice, to Articles 48 and 39 EC.

and they have, legitimately, different expectations of its judicial bodies. Was Josef Baldinger so very different from other claimants so as to be found by the Court to be unable to benefit from the general scheme of EU law as enhanced and altered by EU citizenship? If he is different in some respect it is only in relation to the fact that the nature of his claim is war related. In the 1970's, the Member States carved out a convenient line in the sand as regards competence and control over war related benefits and even in 2004 this was still respected and upheld by the Court despite having heard an Opinion which suggested that EU Citizenship could have a transformative potential here. Nowhere in the judgment is there a suggestion that this young soldier, imprisoned for over two years in the USSR, deserves any kind of special recognition. Nowhere do we see the acknowledgement, at the root of Ruiz-Jarabo's sense of underlying injustice, that young Josef Baldinger is disadvantaged by the very nature of the European integration (that is by the very specific facilitation and encouragement of young men like him to move in order to seek work) and its legal system. Nowhere here, in short, is there any appreciation or acknowledgement of the role played in the past by this one young soldier.

### *E. Tas-Hagen and Tas*

The need to reconcile claims rooted in the past with the modern reality of the EU legal order is finally furthered in a positive manner in *Tas Hagen*<sup>149</sup> when Article 18 (1) EC (Citizenship of the EU) is employed in the case of civilian war victims. The Court finds that "Article 18(1) EC must be interpreted as precluding legislation of a Member State under which it refuses to grant to one of its nationals a benefit for civilian war victims solely on the ground that, at the time at which the application was submitted, the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State." With that conclusion it is apparent that, finally, a more open approach has been adopted towards the use of citizenship principles to resolve the complex legal maze in which previous wartime claimants had found themselves. Indeed, this case is, from the outset, seen as a significant contribution to emergent citizenship law rather than as a murky, indelicate remnant of the past dwelling beneath the Byzantine complexities of Regulation 1408/71. Advocate General Kokott, for example, specifically opens her Opinion with the view that "the present case provides an opportunity to define further the scope of Article 18(1) EC. Can a Union citizen always rely on this provision where he exercises his right to free movement or is an additional link with Community law required?"<sup>150</sup>

The facts in *Tas Hagen* recall a different level of reality of those with wartime experiences; after enduring the Second World War, they live normally, apparently, until retirement and then they move to sunny Spain. Mr. Tas was born in the Dutch East Indies in 1931 and Mrs. Tas-Hagen in the same place in 1943. They came, separately, to live in The Netherlands, he in 1947 and his (future) wife in 1954. They both acquired Dutch nationality and lived and worked in The Hague until 1987 when, after they had

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<sup>149</sup> *K. Tas-Hagen, R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, Case C-192/05, [2006] ECR I-10451. The case is discussed by F. Pennings (2006) 8 *European Journal of Social Security* 398-400, D. Martin (2007) 9 *European Journal of Migration and Law* 141-157 and M. Cousins, 'Citizenship, residence and social security' (2007) 32 *ELRev.* 386-395.

<sup>150</sup> Paragraph 1 of the Opinion.

both been declared incapable of work, they moved to Spain. In 1986, Mrs. Tas-Hagen had earlier applied for a compensation payment as a civilian war victim from The Netherlands but this was rejected on the ground that she had not sustained any injury resulting in permanent disability and therefore she could not be regarded as a civilian war victim under the relevant Dutch legislation. She re-applied, along with her husband in 1999 while they were living in Spain and, on this occasion, the application was rejected because of their residency in Spain even though they were both now recognized as a civilian war victims. In other words, they were refused the benefits solely on the ground that they were resident in Spain and not in The Netherlands at the time when they submitted their application.

Under the relevant Dutch legislation on Benefits for Civilian Victims of the 1940-1945 War<sup>151</sup> ('the WUBO'), civilian war victims<sup>152</sup> and their dependants can apply *inter alia* for a periodic benefit and allowance to improve their living conditions. The aim of the benefit is to compensate for the loss of income resulting from disability caused by injury sustained during wartime. The legislation makes the award of the benefit conditional on Dutch nationality and residence. These conditions are based on the idea that solidarity towards war victims is founded on reciprocity, that is, that the victims/claimants are connected in some way with The Netherlands.<sup>153</sup> This notion of state affiliation, loyalty to or connection with your state, before wartime injuries may be compensated is by now familiar to the observer of the regime of wartime compensation. The Second World War was no respecter of nationality or territory, yet, remedying its consequences has become very statist and nationalistic. It is a peculiar remnant of Member State power and sovereignty within the supranational legal order. In the case of the WUBO however, once that Dutch loyalty has been established (by residence at the time of application) the claimant is free to take up residence abroad without losing the benefit.<sup>154</sup>

Examining Member State management of the wartime past, via their pension or compensation regimes, consistently reveals a restricted view of how wartime victims should be treated. The legislation from The Netherlands, Belgium, France and Austria which has been exposed through cases in this paper evidences a common approach towards compensating one's own nationals only. This approach belies the integration endeavour quite overtly; think back to the significant case of Ian Cowan, proto-citizen,<sup>155</sup> the Metro mugging victim who was held by the European Court Justice to be

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<sup>151</sup> *Wet Uitkeringen Burger-Oorlogsslachtoffers 1940-1945* (the WUBO).

<sup>152</sup> Under Article 2 of the WUBO, they are defined as persons who, as civilians, sustained physical or mental injury as a result of or in connection with the German or Japanese occupation or during disturbances in the post-war years (up to 27 December 1949) in the former Dutch East Indies and who have become permanently disabled or have died as a result.

<sup>153</sup> Paragraph 8 of the Opinion: "This nationality and territorial criterion stems from the idea that the special obligation of solidarity towards civilian war victims on the part of the Netherlands people has a scope which is restricted by nationality and country of residence."

<sup>154</sup> However, in order to prevent persons resident abroad from taking up only brief residence in the Netherlands to acquire benefits under the WUBO, provision is made for the loss of acquired rights for persons who do not take up residence in the Netherlands until after the date on which the WUBO entered into force and take up residence abroad again within a period of five years (Article 3(3) of the WUBO).

<sup>155</sup> *Ian William Cowan v Trésor public*, Case 186/87, [1989] ECR195. This case does not even refer to the (then non-existent) concept of EU citizenship being based as it is on free movement (provision of services) but its rationale and its reasoning can be seen as a precursor to the later emergence of

treated as if French.<sup>156</sup> This comparison suggests that a victim of a mugging incident is more deserving of the protection of Community law than a Second World War victim. Extrapolating from *Cowan* it is clear that, while you do not have to be able to hum the *Marseillaise* to be compensated for a mugging, you do, on the other hand, have to wear your clogs (so to speak) to be recompensed in Holland for a wartime injury. This is not the result of Member State preferences (they, if left free of the shackles of supranationality, would undoubtedly exercise protectionist policies and pay outs in many areas) but, rather, a product of EU law, and specifically EU case law, itself. Ever since *Gillard* and up until *Tas-Hagen*, the European Court of Justice has consistently ceded to Member State preferences when it comes to wartime based claims. It is as if a polite veil has been drawn across these embarrassing cases where determined, elderly Europeans persist in gaining monetary recognition for wartime experiences. In all of the wartime cases examined in this paper there has been a cross border (that is, not purely internal) element (even if that may have dated from the time of war itself<sup>157</sup>) and, therefore, a link with Community law, so the *possibility* of a radical application of free movement law, and later citizenship law, was always there but never utilised. Instead, the Court has routinely relied on Regulation 1408/71 to exclude the matter from the scope of Community law. This was an easy, non-reflective ‘cop out’ because benefits for victims of war are expressly excluded from the scope of that Regulation (Article 4(4) thereof) as we have seen in *Gillard*, *Even* and *Baldinger*. Yet, the dichotomy of Member State control over compensation for war victims, as opposed to the application of Community law in the case of mugging victims, stands as a curious insight into the disjointed nature of the EU legal order.

In *Tas-Hagen*, the claimants themselves, and subsequently the referring court, specifically raise the potential applicability of EU citizenship.<sup>158</sup> In determining the

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citizenship (in 1993, under the Treaty on European Union) and the development of that concept by the European Court of Justice, with the emphasis on strict accordance with free movement laws gradually ceding to the suggestion of a more generalised notion that mere nationality of a Member State should lead to assimilated treatment within the EU. “The prohibition of discrimination laid down in particular in Article 7 of the EEC Treaty must be interpreted as meaning that in respect of persons whose freedom to travel to a Member State, in particular as recipients of services, is guaranteed by Community law that State may not make the award of State compensation for harm caused in that State to the victim of an assault resulting in physical injury subject to the condition that he hold a residence permit or be a national of a country which has entered into a reciprocal agreement with that Member State.” “A difference in treatment of Community citizens, on the basis of nationality, under a compensation scheme for victims of crime can constitute a discriminatory obstacle, contrary to Community law, to a right of temporary residence extended under Community law. It must be borne in mind in that regard that a recipient of services also has a primary right of residence. A person's capacity as a recipient of services is to be assessed on the basis of the services of which he will avail himself during his period of residence.” Paragraph 57 of the Opinion of AG Lenz in *Cowan*.

<sup>156</sup> *Ian William Cowan v Trésor public* Case 186/87 [1989] ECR 195.

<sup>157</sup> Because there has never been any in depth judicial examination of the potential applicability of Community law to the wartime cases, the issue of whether free movement law needs to be rooted in movement, or a cross border element, which occurred *after* the entry into force of the EEC Treaty (that is, not *during* the war) is not resolved.

<sup>158</sup> The question sent by the *Centrale Raad van Beroep* to the Court was “Does Community law, in particular Article 18 EC, preclude national legislation under which, in circumstances such as those in the main proceedings, the grant of a benefit for civilian war victims is refused solely on the ground that the person concerned, who holds the nationality of the relevant Member State, was resident, not

extent to which EU citizenship is applicable to the Tas-Hagen couple it is clear firstly that there is a cross border element given their domicile in Spain and therefore an established link with EU law. On the other hand, free movement law does not apply to them as they are not economically active in Spain and, because of their permanent residence there, they cannot be classed as mere recipients of services; it is clearly established that “According to settled case-law, the right to free movement laid down in Article 18(1) EC applies only where no more specific rights, such as those arising from Articles 39 EC, 43 EC and 49 EC, are relevant.”<sup>159</sup> But, as the Advocate General makes clear, the issue is instead whether as Union citizens the Tas Hagen couple can rely on Article 18(1) EC because of having exercised rights to free movement or whether, in addition, there must also be a substantive connection with Community law. It was this hurdle which help maintain the judicial distance in *Baldinger* where reliance was placed solely on the exclusion in Regulation 1408/71 to find that there was no connection with Community law.

In *Tas-Hagen*, the need to limit the concept citizenship is put forward by the United Kingdom Government (as intervener), which states that reliance on Article 18(1) EC “presupposes that the situation concerned relates to a matter covered by Community law and that Community law is also applicable in that respect ‘*ratione materiae*’.”<sup>160</sup> If that view were accepted, the Tas-Hagens could not plead an infringement of Article 18(1) EC as the social benefits for civilian war victims claimed are not covered either by primary or secondary Community law but rather expressly excluded from the scope of Regulation No 1408/71 (Article 4(4) thereof). In other words, this view would clearly have the Court follow the line established in *Gillard*, *Even* and *Baldinger*<sup>161</sup> and deny wartime claimants the benefit of a relationship with the EU. I have observed above the tendency of the Court to favour youth in citizenship cases<sup>162</sup> and the Court has done so even in cases in which the exercise of the right to free movement or the status of the

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in the territory of that Member State, but in the territory of another Member State at the time when the application was submitted?” It is notable that a question referred in a pending case, which was lodged a month after the decision in *Tas-Hagen*, also refers specifically to citizenship: “Does Article 18 EC, which guarantees citizens of the European Union the right to move and reside freely within the territory of the Member States, preclude the binding force of the national rules laid down in Article 5 of the *Ustawa o zaopatrzeniu inwalidów wojennych i wojskowych oraz ich rodzin* (Law on provision for war and military invalids and their families) of 29 May 1974 (*Dziennik Ustaw* (Journal of Laws) of 2 September 1987, as subsequently amended) in so far as they make payment of a pension benefit for incapacity for work that is linked to a stay in places of isolation subject to fulfilment of the condition that the person entitled be resident in the territory of the Polish State?” Reference for a preliminary ruling from the *Sąd Okręgowy w Koszalinie* (Poland) lodged on 8 December 2006 - *Halina Nerkowska v Zakład Ubezpieczeń Społecznych* (Case C-499/06), OJ 2007 C 20/14.

<sup>159</sup> Paragraph 23 of the Opinion, relying on Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22); Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26; Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraph 18; Case C-293/03 *My* [2004] ECR I-12013, paragraph 33; and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 37.

<sup>160</sup> Paragraph 28 of the Opinion.

<sup>161</sup> See also Case 9/78 *Gillard* [1978] ECR 1661, paragraphs 13 to 15; Case 207/78 *Even* [1979] ECR 2019, paragraphs 12 to 14; and Case C-386/02 *Baldinger* [2004] ECR I-8411, paragraphs 16 to 18.

<sup>162</sup> Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 28, 45, 57 and 61 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 27; *D’Hoop*, paragraphs 17 and 32; and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 38 to 43. Outside the field of social benefits see, for example, Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 44.

person concerned as a Union citizen are the only links with Community law.<sup>163</sup> The Advocate General here suggests that the fact that the matter concerned, or the social benefit claimed, are also governed by Community law or serve the aims of the Community can be at most an *additional factor* in the appraisal of a particular case.<sup>164</sup> Her conclusion therefore is that “the scope of the fundamental freedoms cannot be restricted merely to matters in respect of which the Community has already exercised its powers, in particular by adopting harmonisation measures. On the contrary, the fact that it can produce its effects primarily in fields which are not (yet) harmonised is consistent with the *spirit and purpose of the fundamental freedoms* and precisely an expression of their direct applicability.”<sup>165</sup> Such a trend has been observed in the areas of direct taxation, criminal legislation and the rules of criminal procedure, and the organisation of social security schemes, and in a case relating to the rules governing a person’s surname. According to Advocate General Kokott, Article 18(1) EC *should* be applied in cases in which a Union citizen, who transfers her place of residence to another Member State, applies for benefits for civilian war victims to the competent authorities of her own Member State. In the past we have seen clearly that the fact that such social benefits are not governed by Community law meant that Member States had a broad margin of discretion in organising the system of such benefits. Distinguishing *Baldinger*, Advocate General Kokott is of the view “the Court merely held that benefits for victims of war do not fall within the scope of Regulation No 1408/71... that they do not fall under the category of social advantages to which migrant workers are entitled under Article 7(2) of Regulation No 1612/68.”<sup>166</sup> As discussed above, the Court in *Baldinger* did not even refer to Article 18 (1) EC,<sup>167</sup> however, Advocate General Ruiz-Jarabo Colomer discussed at length the potential applicability of Article 18 (1) to Baldinger’s circumstances and concluded that citizenship should be used in his case. In her Opinion in *Tas Hagen*, his colleague Ms. Kokott appears guided by his persuasive reasoning and feels that “there is no reason to interpret [the Court’s] mere silence in *Baldinger* as a conclusive indication that Article 18(1) EC is not applicable.”<sup>168</sup> This comment, more generally, is an interesting insight into the state of EU law and particularly, the extent of legal certainty which prevails within its order; how are litigants to proceed with any assurance if they have to be skilled in the interpretation of judicial silence? On the substance however, this is indeed a relatively accurate assessment of the state of citizenship law; it has an emergent status, developing from case to case and it is impossible to determine its limits. This legal limbo did not benefit Josef Baldinger but Ms. Kokott argues strongly for the tables to be turned for the *Tas-Hagens*. After lengthy analysis of the applicability of Article 18 (1)<sup>169</sup> to the residence

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<sup>163</sup> *García Avello* (paragraphs 23 and 24), *Pusa* (paragraphs 16 and 17), and *Schempp* (paragraph 13 et seq.), cited above.

<sup>164</sup> Paragraph 32 of the Opinion.

<sup>165</sup> *Ibid.* paragraph 36.

<sup>166</sup> *Ibid.* paragraph 45.

<sup>167</sup> The Advocate General excuses the Court in this regard by surmising that “It did not necessarily have to do so because the referring court had not requested an interpretation of that provision.” Paragraph 43 of the Opinion.

<sup>168</sup> *Ibid.*

<sup>169</sup> There is no temporal impediment to the application of Article 18 (1) to these circumstances as the Court states, relying on *D’Hoop* (Case C-224/98 *D’Hoop* [2002] ECR I-6191), paragraph 25; “there is also nothing to preclude the application of Article 18(1) EC in temporal terms. Although Mrs. Tas-

requirement placed upon them by the Netherlands pension award body, the Advocate General concludes that “Article 18 EC precludes national legislation under which a Member State refuses to grant one of its nationals a benefit for civilian war victims – which is basically transferable abroad – solely on the ground that the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State at the time when the application was submitted.”<sup>170</sup> Ms. Kokott argues convincingly in this regard, recalling some first principles of EU law which were seemingly forgotten in earlier wartime cases, namely that “A Union citizen who has exercised his right to free movement under Article 18(1) EC falls within the scope of the Treaty and consequently may rely on the general principle of non-discrimination laid down in the first paragraph of Article 12 EC, under which any discrimination on grounds of nationality is to be prohibited.”<sup>171</sup> Even though the Tas-Hagen couple were not directly or indirectly discriminated against on the basis of nationality (as the benefit in question was available to Dutch nationals only) it falls to be asked how EU citizens who have exercised their right to free movement can be afforded less favourable treatment than if they had not exercised that right? This was the persistent, nagging frustration at the root of the sense of injustice perpetrated in the earlier wartime cases analysed above. Time for a revision? Yes, according to the Advocate General, who suggests that the issues must be assessed in the light of Article 18(1) EC and it is irrelevant for these purpose that the unequal treatment emanates from the Member State of which the EU citizens are nationals.<sup>172</sup> Having so surmised, “It follows, that all measures which *obstruct* the right of Union citizens to move and reside freely in other Member States or which otherwise constitute an *obstacle* which might deter Union citizens from exercising this general right to free movement must be assessed by reference to Article 18(1) EC.”<sup>173</sup> Furthermore, it is very clear that Member States may not prevent their own nationals from exercising the freedom of movement conferred by Article 18(1) EC by attaching to it disadvantageous consequences (such as the residence requirement attached to the WUBO) that would not arise if they remained within their own Member State.

When pondering the question of a possible objective justification of the restriction imposed by The Netherlands on the Tas-Hagens (and ultimately locating none), the Advocate General takes us towards territory familiar from other wartime claims cases, namely the notion put forward by Member States, and embraced by the Court, that issues of solidarity and loyalty underlie States’ relationships with war victims, persons who are distinguished by a “particular connection with Netherlands society.”<sup>174</sup> However, Advocate General Kokott interestingly differentiates in this context between

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Hagen and Mr. Tas transferred their residence to Spain in 1987, that is to say before the provisions on Union citizenship introduced by the Maastricht Treaty entered into force, these provisions must be applied in any event to the present effects of situations which had arisen previously. Consequently, they can also be applied in assessing the effects of Mrs. Tas-Hagen’s and Mr. Tas’ move to Spain, which took place earlier, on their present entitlement to benefits for civilian war victims under the WUBO.”

<sup>170</sup> Paragraph 72 of the Opinion.

<sup>171</sup> *Ibid.* paragraph 47.

<sup>172</sup> *Ibid.* paragraph 49.

<sup>173</sup> *Ibid.* paragraph 50.

<sup>174</sup> *Ibid.* paragraph 57.

civilian war victims and prisoners of war<sup>175</sup>; the latter, in her view, are entitled to compensation because of services rendered to the state but as for civilians, “because the suffering they endured is not connected with war service or military service they rendered for their country” then the connection with the State cannot be equally insisted upon. While I might not agree fully with the distinction between the suffering of a prisoner of war and a civilian war victim, we are at the very least, touching the heart of the matter here more concretely than in most other wartime cases. The mere fact that the Advocate General is willing to look behind a Member State’s wartime compensatory regime without the usual dismissal though rote reliance on Regulation 1408/71 takes this Opinion in the *Tas Hagen* case one moral step forwards towards a recognition of the European wide importance of the Second World War and its consequences, and a recognition that it is not just a matter for the Member States to resolve.

Even though considerable advances were made in Advocate General Kokott’s Opinion in *Tas-Hagen* in terms of a positive application of EU citizenship, the Opinion is still bereft of any details about the Tas-Hagen couple’s wartime experiences. It is yet another example of reasoning *in abstractio*, of an implicit distancing of the EU judicial machinery from the chaos and complexity of war. In the judgment, a little more detail is provided as to the genesis of the Tas-Hagen claim; “This application was based on health problems resulting from the events that [Mrs. Tas-Hagen] had experienced in the Dutch East Indies during the Japanese occupation and during the Bersiap period following that occupation.”<sup>176</sup> No information at all is provided as to Mr. Tas’s categorisation as a civilian war victim. Born in 1931, he would have experienced the war in Indonesia as a teenager (unlike his wife who was a very young child at that stage) so we can merely speculate as to what injury and suffering he sustained, though we do know that he was required to cease employment in The Hague, aged 52, for mental health reasons. These bare facts in *Tas-Hagen* do distinguish the case in two ways from other wartime claims; firstly, we have here, for the first time, an extra-European dimension to the war and, secondly, the claimants, particularly Mrs. Tas-Hagen, are amongst the youngest to have made war based claims which reached the European Court of Justice. It is notable that this case, which essentially involves the direct wartime experiences of no EU Member State, should be the one where advances are made in the judicial appreciation of the consequences of war.

The five judges in *Tas-Hagen*, first of all, do not even utter the oft relied upon words ‘Regulation 1408/71’, that stubbornly persistent legal instrument which for so long served as the convenient barrier behind which the Court could and did hide from any engagement with those who came to it bearing wartime memories and experiences. This is, *tout court*, treated an EU citizenship case from the outset and is thus a sign of progress and maturity in the EU judicial system as regards relationships between the past and present. The judges plant this claim firmly within the field of citizenship and do not cast around for any competence based avoidance techniques. We are reminded immediately that, first and foremost, all persons holding the nationality of a Member State are citizens of the Union. This is a commonality from the domain of citizenship

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<sup>175</sup> “Compensatory allowances for former *prisoners of war*, who prove that they underwent a long period of captivity, are commonly acknowledged as constituting testimony of national gratitude for the hardships they endured and thus paid as a quid pro quo for the service they rendered to their country during the war.” Paragraph 59 of the Opinion.

<sup>176</sup> Paragraph 8 of the Judgment.

law but which was never seen in *Baldinger et al* where, first and foremost, claimants were defined not as EU citizens but by their connection (or lack of it) to matters of war controlled at national level. There still remains the fact that, even though acknowledged primordially as EU citizens, the *Tas-Hagens* must establish (additionally) a connection to a matter covered by Community law. Their claim does not do this as benefits for civilian war victims do not come within the scope of Community law but are within the competence of the Member States according to the Court. However, in an illuminating mode, the Court announces that “Member States must exercise that competence in accordance with Community law, in particular with the Treaty provisions giving every citizen of the Union the right to move and reside freely within the territory of the Member States.”<sup>177</sup> It is a shame that but for such a change in perspective, this approach could have, and arguably should have, benefited Josef Baldinger and others. But let not any thunder be stolen from this significant recognition in *Tas-Hagen* which, in essence, amounts to a clarification that even matters within the exclusive competence of the Member States (such as their ability to deal with wartime claims) must be exercised in accordance with EU law. Otherwise expressed, the war is finally, if indirectly, treated as being connected to the European Union. After this, as the Court states, “the unavoidable conclusion” was that the *Tas-Hagen*’s residence in Spain directly affected their prospects of receiving the benefit claimed and this consequence, flowing from Dutch legislation, was a restriction on the freedoms conferred by Article 18(1) EC.<sup>178</sup> In considering (and rejecting) the possibility of an objective justification, the Court acknowledged that the restriction in the present case was based on the need to establish a degree of attachment to Dutch society which, in the payment of the benefit, demonstrated its solidarity with the claimant. In other words, the Court conveys the sense that wartime compensation is still an intimate matter based on the relationship between Member States and their own nationals and this will be respected – as long as the State respects EU law in dealing with it.

*Tas-Hagen* has considerably advanced EU citizenship in its application to economically non-active EU nationals, in a non purely internal situation where the substantive issue is a matter of exclusive Member State competence.<sup>179</sup> However, it is the impact of the case within the regime of wartime compensation which is most remarkable. Victims of war and people affected by the Second World War have, for the first time ‘won’ a case before the European Court of Justice. Furthermore, these elderly claimants, wounded by war, have been expressly recognized as full citizens of the EU. From that recognition flows the ability to resolve their wartime experience in an entirely different light; gone, as if miraculously dissolved, is the rooting of their complaints in an overly restrictive 1970’s legal instrument which completely dominated the Court’s reception of war claims for so many years. Gone too, is the persistent insistence on sole Member State control of their own wartime victims. The Court has entered a new era, an era where the

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<sup>177</sup> *Ibid.* paragraph 22.

<sup>178</sup> *Ibid.* paragraph 31.

<sup>179</sup> The Court concluded thus: “In the light of the foregoing considerations, the answer to the question must be that Article 18(1) EC is to be interpreted as precluding legislation of a Member State under which it refuses to grant to one of its nationals a benefit for civilian war victims solely on the ground that, at the time at which the application was submitted, the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State.” Paragraph 40 of the Judgment. See further, M. Cousins, ‘Citizenship, residence and social security’, (2007) 32 *ELRev.* 386-395.

war is no longer hidden away in opaque judicial corners but, instead, openly part of contemporary developments within EU law.

This part of the paper has revealed how national control ceded eventually to supranationality in the matter of dealing with some of the consequences of the Second World War. It is a narrative dominated by the Court's interpretation of Regulation 1408/71 but one with a 'happy ending' in that the benefits of European integration are ultimately brought to bear on the wartime past. Nobody can deny that the post national specificity of EU citizenship won the day in *Tas-Hagen* as the judges departed from the entrenched pattern of a 'hands off' approach in wartime related cases. Perhaps *Tas-Hagen* was an easy case in which to do so (it did not involve Germany directly in any way, not even Europe so to speak) but the principle of Community law applicability to wartime issues is established none the less. There are several cases in waiting before the Court which will fully determine the precedent potential of *Tas-Hagen*. There is little doubt, though, that it was the highly influential Opinion of Mr. Ruiz-Jarabo Colomer in *Baldinger* which paved the way for this breakthrough; in raising the possibility of "manifest injustice" in this area of EU law he altered entirely the register of appropriate response to wartime within the European Union.

#### 4. And we had war<sup>180</sup>

*You can still feel the community pack  
This place: it's like going into a turfstack,  
A core of old dark walled up with stone*<sup>181</sup>

In February 2007, the European Court of Justice was faced with a question as to the lawfulness or otherwise of the actions of the armed forces of the Reich in occupied Greece during the Second World War.<sup>182</sup> This part of the paper explores this proximity between the European Union and the complex legacy of wartime in Europe. It is an exploration which reveals that the *acquis historique communautaire* is not confined to the realm of historical analysis; the manifestations and consequences of war require constant confrontation in the European present. This section of the paper examines case

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<sup>180</sup> "A united Europe was not achieved and we had war". Robert Schuman, Schuman Declaration, 9 May 1950 [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm)

<sup>181</sup> S Heaney, 'In Gallarus Oratory' from *Door into the Dark* (London: Faber and Faber, 1969).

<sup>182</sup> Case C-292/05 *Lechouritou*. The Court did not ultimately rule on this issue of lawfulness. However, it did, implicitly make a connection between the Federal Republic of Germany and the armed forces of The Reich; "The legal action for compensation brought by the plaintiffs in the main proceedings against the Federal Republic of Germany derives from operations conducted by armed forces during the Second World War... there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy. It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings... must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated." Paragraphs 36 -38 of the Judgment in *Lechouritou*, [2007] ECR I-1519.

law where the war itself is to the fore. It is an heterogeneous body of cases, connected mainly by the way in which they relate to specific wartime events. The question of the competence of the Court to deal with such events is obviously a necessary line of inquiry here. In many of the judgments discussed in this paper, it is seemingly taken for granted by the Court that war related matters are a matter of state sovereignty but this borderline between national and Community competence in war and military matters is very far from being clearly defined. This was evidenced most recently in *Lechouritou* where the Court assessed German military matters, an assessment which exposed the ambiguity with which the European Court of Justice faces such issues.<sup>183</sup> The 1957 Rome Treaty was not conceived to deal with matters arising before its entry into force. However, the numerous, complex situations which are explored below operate against a simplistic temporal closing off of the relationship between the EU and the wartime past.

All of the cases analysed in this section have a factual background rooted in wartime, ranging from the actions of the *Wehrmacht* in Greece through to those of a Dutch resistance activist. The extent to which the specific wartime events are legally relevant varies widely but all of these cases directly confronted the Court of Justice with the enduring reality of war in Europe. They are not presented as a connected body of case law but rather as an exploration of how historical events, sometimes very minor, other times not, are dealt with by the Court. From the child of communists, to resistance activists, to Greek villagers and Italian miners, some of the hidden history of integration is exposed here.

#### **A. Tamara Vigier**

The case of *Tamara Vigier*<sup>184</sup> is one which directly connects the European Union with the persecution and suffering that took place in Europe in the 1930's. Tamara Vigier was born in Germany in 1923 and left there at the age of 10. At the time of the judgment she was resident and working in France and had acquired French citizenship. She had been formally recognized as 'a victim of persecution' within the meaning of Article 1 of the German Federal Compensation Law<sup>185</sup> under the terms of which she received compensation from Germany for loss of educational opportunities. The conditions under which Vigier and her family left Germany in 1933 are not mentioned in the judgment. Furthermore, as the classification of 'victim of persecution' is not at issue in the case before the Court, there is no enquiry into the nature of that persecution. However, some speculative research suggests that her family may have been amongst the first to be targeted by the National Socialist regime as they were prominent, active communists<sup>186</sup>.

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<sup>183</sup> See further C. Lyons, 'The persistence of memory' (2007) 32 ELRev. 563.

<sup>184</sup> *Tamara Vigier v Bundesversicherungsanstalt für Angestellte*. Case 70/80 [1981] ECR 22.

<sup>185</sup> The *Bundesentschädigungsgesetz* of June 1956

<sup>186</sup> There is a possible link here to communism, to Soviet spy activities and to the *Rote Drei* Soviet Spy Ring which operated out of Switzerland during the war. There are several sources available on the wartime activities of a French physicist named Jean-Pierre Vigier who is reported to have met his future wife, Tamara, in Geneva during the Second World War :<http://redshift.vif.com/JournalFiles/Miscellaneous/Vigier%20note%20Jeffers.htm>.

See also the files at the UK National Archives on Soviet intelligence and Suspected Agents during the Second World War which record, in summary, that: "Tamara Vigier was the daughter of Rachel Duebendorfer, a prominent member of the Rote Drei ring of Soviet spies in Switzerland. Tamara was an agent and courier for her mother and probably recruited her fiancé Jean-Pierre to the ring as an

In 1975, Tamara Vigier made an application under German legislation wishing to avail of the opportunity presented under Article 10 A of the Reparation Law of 1970<sup>187</sup> which provided for retroactive payment of social security contributions to people who (under Article 1 of the Reparation Law) are a) victims of persecution (as defined by the Federal Compensation Law) and b) have suffered prejudice in the field of social insurance as a result of that persecution. However, to qualify for such a payment under the Reparation Law, the applicant, in addition, had to have made at least one payment within the German social insurance system. Tamara Vigier was a young child when she left Germany and she never had the status of an insured person while resident in Germany.<sup>188</sup> Her application, therefore, for the retroactive payment under the Reparation Law was rejected. In litigation related to that rejection before the German courts, Vigier invoked Article 9 (2) of Regulation 1408/71, arguing that, under that provision, her period of time as a social insurance contributor in France should be taken into account as if completed in Germany.<sup>189</sup> The questions raised by the referring German court bring Regulation 1408/71 directly into conflict with National Socialist injustice with the *Bundessozialgericht* expressing doubt as to whether the scheme for reparation of injustice perpetrated by the National Socialist regime comes within the scope of the Regulation. We have already seen, from cases such as *Gillard* and *Even*, that the Court relied on the so-called ‘war exception’ in Article 4(4) of 1408/71 to find for the non-applicability of Community law to war related compensation schemes. However, in *Vigier*, it finds, to the contrary, that the payment provided for under the Reparation Law *does* come within the framework of 1408/71: “it is clear from the papers in the case that although the Reparation Law has the appearance of a *lex specialis* it does not seek to establish an independent scheme of compensation [and its] provisions merely constitute rules supplementing or adjusting general provisions in the field of social security”.<sup>190</sup> This constitutes an interesting, indirect, distinguishing of *Gillard* and *Even* and potentially provides some further clarification as to the precise extent of the ‘war exclusion’ in Article 4 (4) of the Regulation. However, the applicability of Article 9 (2) of 1408/71 to the facts in *Vigier* remain to be decided and, ultimately, the decision of the Court here is to the claimant’s disadvantage.

In reaching its decision as to whether or not the German social insurance scheme should treat Vigier’s time as a worker in France as equivalent to periods of work (and allied contributions) required under the Reparation Law, the Court relies exclusively on its previous case in *Coonan*.<sup>191</sup> Without distinguishing the very different factual situations (Una Coonan was an Irish national, resident in the UK, who attempted to claim pension

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agent and informant.” <http://www.nationalarchives.gov.uk/catalogue/displaycataloguedetails.asp?CATLN=6&CATID=8424337&SearchInit=4&CATREF=KV+2%2F1622>.

<sup>187</sup> *Gesetz zur Regelung der Wiedergutmachung Nationalsozialistischen Unrechts in der Sozialversicherung*.

<sup>188</sup> It is not made apparent in the ECR report of the case but it seems that Vigier never returned to live or work in Germany after her departure from there in 1933.

<sup>189</sup> Article 9(2) of Regulation 1408/71 provides that where, under the legislation of a Member State, admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first state.

<sup>190</sup> Paragraph 13 of the Judgment.

<sup>191</sup> Case 110/79 *Una Coonan v Insurance Officer* [1980] ECR 1445.

related benefits in the UK) nor expanding upon the limited reasoning found in *Coonan* itself, the Court concludes in *Vigier* as follows: “where national legislation makes affiliation to a social security scheme conditional on prior affiliation by the person concerned to the national social security scheme, Regulation 1408/71, does not compel Member States to treat as equivalent insurance periods completed in another Member State and those which must have been completed previously on national territory.”<sup>192</sup> In *Coonan*, from which this pronouncement derives without much alteration, it was in fact Articles 1 (A) and 3 of 1408/71 which were at issue and not Article 9 (2) as in *Vigier*. The very wording of that latter provision where compulsion is implied, “...the periods of insurance or residence completed under the legislation of another Member State *shall* be taken into account...” would suggest that the Court’s interpretation in *Vigier* is incorrect. What purpose does Article 9(2) serve if it does not ‘compel’ mutual recognition? Furthermore, a vital element of the *Coonan* decision which was very relevant in *Vigier*, is ignored by the Court. Tamara Vigier was a French national, resident in France, claiming a German social insurance payment. In *Coonan*, the Court made it quite clear that, while it respected Member State freedom under Articles I (A) and 3 of 1408/71 to determine the conditions of access to a social security scheme, there must in this connection be “no discrimination between nationals of the host state and nationals of the other Member States”.<sup>193</sup> The German Reparation legislation provides a special benefit for people persecuted in the past but those people must have maintained some link as a ‘worker’ with Germany in order to get this benefit. Germany, according to the European Court of Justice, is not required to look to the victim’s social insurance situation in another Member State. Effectively, therefore, the Reparation Law should be read as stating that the benefit will be made available if you have been persecuted by Germany *and* you also maintained a sufficient link with that country. On the face of it, the Reparation Law appears to apply equally to German and non-German nationals. However, in requiring the payment of social insurance contributions (and, therefore, by implication usually work and residence) within Germany, this legislation is clearly open to an interpretation of being indirectly discriminatory as it favours persecuted German resident workers over persecuted claimants from or residing in other Member States. There is an obvious potential oversight or injustice here; many people who were officially recognized as having been persecuted by Germany (that is, recognized as such under the 1956 Federal Compensation Law) may understandably, in many cases, have severed links with that country. The Court in *Vigier* does not even refer to the potential of discrimination in the Reparation Law. Given the specific historical and political background in this case, this lacuna is surprising. It would not be conceptually inconceivable to envisage that those officially recognised as having been persecuted under National Socialism within Germany might have an inclination to lead their lives outside that state and would thereby automatically fall outside the provisions of the Reparation Law. That Law, deconstructed, is effectively favouring German residents and nationals over the undoubted millions of people persecuted under Nazism who could not, or would not, return to Germany to live and work after the war.<sup>194</sup>

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<sup>192</sup> Paragraph 19 of the Judgment.

<sup>193</sup> Paragraph 12 of the Judgment in *Coonan*.

<sup>194</sup> “Everything was taken away from them, things I don't have to enumerate, plenty of lists. Everything from the beginning. Now they come here, white-haired, wrinkled, to pick up a printed leaflet with the latest news on their first love: Deutschland-Berichte. Sandwiches brought in plastic bags, their old bare feet in sandals, they shamble over the solid floor.” J.Herzberg ‘In het Goethe Instituut in Tel

When the European Court of Justice considers her case there is no analysis of the nature or the extent of Tamara Vigier's particular persecution and, generally, the Court deals with this matter as if the persecution perpetrated under National Socialism were a relatively mundane matter. It does not take an extensive extrapolation from an analysis of *Vigier* to guess at some of the political, but especially economic, arguments which may have been fermenting in the background to this judgment. If all those people who can be officially classed as 'persecuted' by National Socialism under the Federal Compensation Law (and one assumes this runs easily into many millions) could claim retroactively applied social insurance payments from the Federal Republic then the financial cost to that state would undoubtedly be significant. It would seem that this rather weakly argued, relatively unknown case in Luxembourg may have had an importance not immediately apparent on first perusal in its potential to expose much of the continuing complexities of responsibility and accountability for war. This is not an issue which has gradually eroded over time; as we shall see in the 2007 case of *Habelt* discussed further below the question of the extent of Germany's financial responsibility for events in the past is still a live issue.

This paper is not directly concerned with the lapses and gaps in the Court's development of Regulation 1408/71 law but rather with the manner in which the Court responds to claims rooted in Europe's past. On the face of it, the *Vigier* case offers skimpy but none the less important historical facts; this person was persecuted in Germany 1933.<sup>195</sup> Even if my speculation is incorrect and she did not later become a (spied upon) spy in Switzerland this persecuted person is nonetheless uniquely placed in the history of Europe, that is, as somebody who as a child was forced to leave the country of her birth because of political events which shaped the twentieth century. The myriad complexities of wartime Europe unravel in this case before rational eyes in the Grand Duchy. There is something of a tragic dimension to witnessing Tamara Vigier, once (perhaps) fighting National Socialism from Geneva, reduced in her old age to struggling for a payment from the state which was once her homeland but which alienated her and forced her to leave. This *mise en scene* takes place in the bureaucratically complex and confined conditions of a Regulation 1408/71 case. The actual 'processing' of Vigier's past by the Court is negligible; there is no enquiry into the nature of what she may have suffered or experienced as a child<sup>196</sup> nor is there any acknowledgment of the significant wider background to the case. The past remains effectively non-processed and unexplored. It is true that that her particular past was not germane to the up front facts in *Vigier* but, none the less, a sense of closedness prevails in the judgment with the Luxembourg judges in 1981 maintaining a very clear distance from the events of 1933.

Ultimately, this is a poor decision in law, with incorrect reliance on *Coonan* and a

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Aviv' from *Het Vertelde* (Amsterdam: De Harmonie, 1997) (Translation by Bert van Roermund).

<sup>195</sup> "First they came for the Communists but I was not a Communist so I did not speak out; Then they came for the Socialists and the Trade Unionists but I was not one of them, so I did not speak out; Then they came for the Jews but I was not Jewish so I did not speak out. And when they came for me, there was no one left to speak out for me." (attributed to) Martin Niemöller (originally an anti-Semite who, as a pastor in the 1930's, preached against Jews) (1892-1984), this version was published in *Time Magazine*, 28 August 1989.

<sup>196</sup> See, generally, N. Stargardt, *Witness of War: children's lives under the Nazis*, (London: Jonathan Cape, 2005) and M. Zusak, *The Book Thief*, (London: Doubleday, 2007) for some related background from a literary perspective.

resultant erroneous interpretation of Regulation 1408/71, and which also ignores the potential applicability of fundamental Community discrimination law. But, over and above this narrow appreciation of the case, the judgment as a whole stands as a testimony to the way in which National Socialist injustices are received, and ignored, by the judiciary of the European Union.

### **B. Renzo Tinelli**

Unlike Tamara Vigier, who left Germany before the Second World War began, Renzo Tinelli<sup>197</sup> entered this state during wartime. His case is a reference from the *Landssozialgericht* (the Regional Social Court) at Baden-Württemberg, in proceedings between Renzo Tinelli and the *Berufsgenossenschaft der Chemischen Industrie* (the German Social Insurance fund for the Chemical Industry). The words “chemical industry” in the context of a wartime case naturally raise some curiosity. The extent to which the chemical industry sector of The Reich’s economy was implicated and involved in the Holocaust is obviously well known.<sup>198</sup> However, little or no background information as to the nature of the chemical industry work undertaken by Tinelli is provided in the European Court of Justice papers.

The case concerns the compatibility of German pension and invalidity legislation with Article 51 (now Article 42) of the EC Treaty and with Regulation 1408/71 in the context of the right to the payment of a work related invalidity pension. Renzo Tinelli, an Italian national, was employed at Stassfurt (which, at the time of this judgment, in 1979, was located in the GDR) during the Second World War. He had an accident at work on the 27<sup>th</sup> of September 1944. This mundane, quotidian reality of wartime Germany seems too ordinary an intrusion into ‘darker legacies’ yet, obviously, daily work (and work accidents) was the wartime reality for many millions of Europeans. There is no detail offered on the nature of the work done by Tinelli in Stassfurt; indeed the only clue is the identity of the defendant (that is, the Social Insurance Fund for the Chemical Industry). We do not learn any more about what an Italian was doing working in a German factory during wartime<sup>199</sup> nor on what basis did this movement of workers between states operated under National Socialism. It is not even clear whether Renzo Tinelli was a voluntary or slave labourer in the chemical works in Germany.<sup>200</sup>

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<sup>197</sup> *Renzo Tinelli v Berufsgenossenschaft der Chemischen Industrie*, case 144/78, [1979] ECR 757.

<sup>198</sup> See, for example, *Nazi Mass Murder: A Documentary History of the Use of Poison Gas*, E. Kogon, H. Langbein, and A. Rueckerl (eds.) (New Haven: Yale University Press, 1993).

<sup>199</sup> Contrast his situation with that of Primo Levi, his compatriot (and a chemist) who, in September 1944, was incarcerated in Auschwitz.

<sup>200</sup> For some recent, related background see Application no. 45563/04 by *ASSOCIAZIONE NAZIONALE REDUCI DALLA PRIGIONIA DALL'INTERNAMENTO E DALLA GUERRA DI LIBERAZIONE* and 275 Others against Germany, The European Court of Human Rights (Fifth Section), Inadmissibility Decision, sitting on 4 September 2007: “Italy had first been an ally of the German *Reich*, but after Mussolini's fall the new Italian Government concluded a truce with the allied forces on 3 September 1943. As of 9 September 1943, the German armed forces disarmed and captured Italian soldiers. The German army offered those captured Italian soldiers the choice of either joining the German armed forces or becoming prisoners of war. The latter were detained in labour camps and used as labourers in the German industry. As of 20 September 1943, those detainees were called “Italian Military internees” (“*Italianische Militärinternierte*”). On 13 October

However, Italy was at war with Germany from 1943 onwards and it is very likely, therefore, that Tinelli's 'employment' was of a forced nature. Twenty five years after his work accident Tinelli made an application for a pension from the Social Insurance Fund for the Chemical Industry ("the Fund"). This was turned down on the basis that he did not reside within the territory of the Federal Republic of Germany. In 1976, Renzo Tinelli then altered his application status by moving to Germany. As a result of this he was granted, in 1977, a partial invalidity pension, but only as from the date of his move to Germany. When he sought to challenge this partial payment, the defendant Fund relied *inter alia* on Regulation 1408/71 to justify this decision, as well as on a 1960 Law on Substitute Pensions. The latter provision was designed to cater for refugees and deportees who may not be able to prove insurance entitlements either because the competent institutions were no longer in existence or were outside the territory of the FRG. It apparently applied irrespective of nationality but was conditional upon residence. This is a small insight into the turbulent state of Germany in the 1950s and 1960s with millions of people dispossessed and deported during the war supplemented by all the movement chaos caused by the creation of the GDR<sup>201</sup> and the occupation of East European states. The clear subtext of this piece of legislation suggests a state (Germany) protective of those who are within its territory but unwilling to accept responsibilities beyond its borders. There is little need to speculate very much as why this would be economically preferable for a Germany in the throes of reconstruction.

The complexity and detail of the legislation governing Renzo Tinelli's attempt to be compensated for his accident in 1944 are matched only by the dearth of substance as to a proper appreciation of the factual background. The German Government, in Observations submitted to the Court, made the instrumental and protective nature of the challenged legislation very clear. It was stressed that the purpose of the legislation on Substitute Pensions was to facilitate 're-integration, following events connected with the National Socialist Regime and the Second World War, of exiles and refugees who contribute by their work to reconstruction in [Germany].'<sup>202</sup> In other words, the primary motivation lay not in making good for the events of the past but, rather, with providing for the future of the new Germany. A reward if you like and not a reparation. Furthermore, Germany makes it clear that the benefits envisaged by the legislation are discretionary (where claimants are residing 'abroad'<sup>203</sup>) and are, therefore, not social security entitlements.<sup>204</sup> There is a certain disregard for the past discernible in this

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1943 Italy declared war against Germany. Beginning in the summer of 1944 the internees were transferred from war captivity (*Kriegsgefangenschaft*) to so-called "civilian employment" (*Ziviles Arbeitsverhältnis*). At first, the internees were asked to sign an according declaration consenting to the change of their status. Despite pressure exercised by the German authorities, only few internees agreed to the transfer of their status. The Government of the German *Reich* then abstained from obtaining those declarations and transferred the internees to civilian status without any formal declaration. They were subsequently registered as civilian forced labourers. The working conditions and the detention in labour camps, however, did not change. The internees had to carry out physically hard work without receiving adequate nutrition and many of them died as a consequence."

<sup>201</sup> For extensive discussion on this see T. Judt *Postwar* (London: Pimlico, 2007) Chapter 2.

<sup>202</sup> Paragraph 7 of the Judgment.

<sup>203</sup> The rest of the EEC is seen as 'abroad'. It is interesting to observe how, in these 1980's cases, EEC Member States viewed each other and how, within twenty years or less, the whole culture of appreciation of 'otherness' (that is *within* the EC/EU and leaving aside the complex question of otherness as regards so called outsiders and aliens) had altered.

<sup>204</sup> Paragraph 7 of the Judgment.

submission from the German Government; as this case shows, but as is more than well documented elsewhere,<sup>205</sup> wartime in Europe was a time of mass movement of Europeans. The logical extension of accepting that reality is that, clearly, not all Europeans, whether initially in German territory voluntarily or not, will have opted to reside in that area once the turbulence of wartime subsided. In other words, the challenged legislation coupled with the German government's interpretation of it, looks remarkably like a form of indirect discrimination, particularly so in circumstances which would justify a more open and generous approach.

Relying on *Fossi*<sup>206</sup> the judges state that the provisions on equality of treatment of Member State nationals in Regulation 1408/71 do not apply to benefits of the kind being claimed by Renzo Tinelli "in respect of insurance periods completed before 1945 outside the territory of the Federal Republic of Germany."<sup>207</sup> The Court views such benefits (that is, explicitly, wartime related payments by Germany) as not falling within the sphere of social security.<sup>208</sup> In making this assertion the Court specifically relies on the fact that the competent awarding institution (in this instance not named but presumably a social security institution responsible for the Stassfurt/Magdeburg<sup>209</sup> region) is no longer in existence or is outside the FRG. The Court proceeds to justify its view of the payment claimed by Tinelli as being outside the social security framework by having regard to its purpose, namely, the alleviation of "certain situations which arose out of events connected with the National Socialist Regime and the Second World War".<sup>210</sup> Finally, in closing off all possible avenues of any potential claim in these circumstances, the Court excludes this type of financial benefit from the social security field (and as a consequence from the need to have regard to equality of treatment) by virtue of the fact that the payments are of a discretionary nature when the claimant is resident abroad (that is, outside Germany). These exclusionary arguments are deemed to apply in the same way to an invalidity pension whatever its origins, whether that is an accident at work or not.<sup>211</sup>

The referring Court had anticipated a potentially more open response from the European Court of Justice when it referred to a "superior rule of law" possibly overriding the restrictions in the Annexes to Regulation 1408/71 which are relied upon by the Court to exclude the application of this measure. This superior rule is not identified but the Luxembourg Court does refer to Article 51 (now Article 42) EC (as regards social security payments to migrant workers resident in the EC) before dismissing its relevance to the case at hand.<sup>212</sup> This is because Article 51 EC refers only to social security benefits; as the Court has already interpreted Mr. Tinelli's claim as not being for such a benefit then Article 51 is not applicable.<sup>213</sup> It is somewhat surprising why

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<sup>205</sup> T. Judt (2007).

<sup>206</sup> Case 76/76 *Fossi* [1977] ECR 667, discussed further below.

<sup>207</sup> Paragraph 8 of the Judgment.

<sup>208</sup> *Ibid.* paragraph 9.

<sup>209</sup> After Dresden, this city on the Elbe (close to where Renzo Timelli worked in Stassfurt) suffered the most as a result of Allied bombing raids when it was bombed extensively on 16 January 1945.

<sup>210</sup> Paragraph 8 of the Judgment.

<sup>211</sup> *Ibid.* paragraph 9.

<sup>212</sup> *Ibid.* paragraph 10.

<sup>213</sup> *Ibid.* paragraph 11.

another ‘superior’ rule of Community law, namely the prohibition on nationality discrimination, is not at least considered in relation to Tinelli’s claim. The disputed German legislation appears to specifically breach this principle in its reference to people who ‘live abroad’ and Tinelli loses out on the benefit claimed only for the period of time that he does live aboard. There is a rectification of his invalidity pension for the period of time after he goes live in Germany which means that, despite the various reasons for the benefit’s negative classification by the Court (the extra territoriality etc.), the issue which affected him in the negative was his ‘living aboard’ status. The Court appears to suggest that the discretionary nature of the payment permits Germany to indirectly discriminate against other EC nationals as regards this invalidity pension.

In one short paragraph of the judgment, which is devoid of any reasoning and which simply restates the position of the German Government tailed onto a repeat of *Fossi* (which in itself was lacking in substantive analysis), the Court overtly distances the new Europe (the EEC) and its laws and principles from events in Germany before 1945. This is not a ‘processing’ of the past but rather a suppression of same. There is an explicit line drawn between Germany’s control of, and responsibilities for, all events before 1945 and the consequences of wartime. Furthermore, the approach of the Court is alienating to the claimant himself and to all others (many millions) affected by the war (in territory that was then under Reich control) and who live now outside present day Germany. The fact that Tinelli’s claim was rooted in a workplace context as opposed to a military one was not taken into account in the designation of the payment he was claiming as being outside the social security regime. Given the range of reasons put forward to deny this social security classification it is clear that there was no proper focus on the fact that this was not a war based claim as such but rather a work based claim which happened to originate at time of war. Unlike some of the other cases studied in this paper (for example *Baldinger*), with explicit links to the events of wartime, Renzo Tinelli was a worker who happened to be injured at work in 1944 in a place which was then controlled by a state which no longer exists. In other words, there is no positive indication that the “events of National Socialism” cite by the Court had any bearing on his circumstances.<sup>214</sup> In other words, the Court (and indeed the German

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<sup>214</sup> It is pure speculation but it is possible that Renzo Tinelli was involved in the manufacture of chemical weapons, and specifically mustard gas, at the Ergethan factory near Stassfurt. See, with reference to an environmental risk assessment carried out many years at the site: “The Ergethan Second World War chemical weapons production site contains a complicated cocktail of contaminants (mustard gas, tear gas, arsenic, trichloroethane and zinc), which are present within the soil, soil gas and groundwater phases. Arsenic was the main raw material used, with values of up to 5% being found on the waste dumps, up to 800ppm found in the production area, and with local crops containing up to 3mg/Kg. Risk assessment was carried out by stereoscopic interpretation of RAF wartime reconnaissance photography... the Ergethan chemical weapons factory... produced “arsenic-oil” (from arsenic and phenol) during World War Two (“WW2”). The Ergethan site lies in the state of Saxony-Anhalt in what was East Germany (“DDR”), it occupies an area of approximately 5 hectares lying three Km to the NNW of the town of Stassfurt. The site (a former salt mine) has had varied usages during the 20th century, ranging from the manufacture of chemical weapons to the dry cleaning of carpets. The site was originally a pre-war potash mine and was used during WW2 to manufacture 12,600 tonnes of chemical weapons. After the reunification of Germany in 1990, an environmental assessment programme was initiated to assess potential contamination in the area.” [http:// www.contaminatedland.co.uk/case-stu/erg-finy.htm](http://www.contaminatedland.co.uk/case-stu/erg-finy.htm). From this rather prosaic source, comes a metaphorical observation on the persistent presence of the past within the EU: “The Rustungsaltslasten (Military Hazardous Waste) programme was initiated by the state of Lower Saxony in 1987, with the aim of assessing the extent of contamination still present from the military activities

Government too) inappropriately evokes the war here as one form of ‘defence’ against the award of work based compensation to this chemical industry worker. Tellingly, the judges in Luxembourg do not even use their own words or expressions to refer to the past; they adopt the precise words of the German Government instead. Ultimately, this is a judgment which cedes complete authority and control over this payment to the Federal Republic of Germany; the latter is explicitly excluded from responsibility for claims rooted outside its borders; its discretionary control over who should be entitled to wartime based pay outs is endorsed; and, finally, the fundamental principle of equality of treatment underlying the then emergent supranational legal order is not to be permitted to interfere with Germany’s assessment of wartime claims. Underlying this judgment is the complex issue of the scope of the FRG’s territorial responsibilities<sup>215</sup>; in 1944, Renzo Tinelli worked and was injured in an area governed and administered by the Third Reich and which at the time of his case was governed by the GDR. Are we to assume from the Court’s arguments that that mere territorial fact alone would have prevented him from claiming under the West’s legislative regime? That his only option was to seek to claim compensation from the GDR... in 1979? Effectively, that is the only logical conclusion and one with presumably little chance of success.

This trend towards the respect of Member State competence is one we have observed before in these cases involving the ‘little’ man or woman caught up in wartime events seeking some form of financial redress. The European Court of Justice is reluctant or unwilling to adopt an open line of reasoning when presented with these awkward cases. Awkward because they draw attention all too accurately to the reality and enduring effects of the Second World War; awkward because they directly pit the competences of the new Europe against a Germany dealing with its past; awkward because to delve in any depth into the reality of Renzo Tinelli *et al* would force the Court of Monnet and Schuman’s great edifice to acknowledge that the ‘problem of Germany’ still visibly haunts the integration process.<sup>216</sup>

### ***C. Gaetano d'Amico***

Renzo Tinelli was not the first person to attempt to rely on periods working in Germany (or occupied Germany) during the Second World War in order to claim retirement related benefits. In 1975, in *Gaetano d'Amico v Landesversicherungsanstalt Rheinland-*

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of the Third Reich. ...After the war... the Allies occupied a number of military facilities and initially destroyed large quantities of explosive by burning it. However the sheer volume of material meant that large quantities of munitions were either landfilled or dumped at sea in the Baltic. In the DDR there was a concerted effort between 1946 and 1952, to destroy all military facilities, either by dismantling, demolishing or by blowing them up. However it was not realised until 1989 that quite often *there were deep underground tanks that had been missed, which still held reactive ingredients*, at some of the sites that had been used to manufacture chemical weapons.” (emphasis added).

<sup>215</sup> This is explored further below.

<sup>216</sup> Declaration by Robert Schuman, French Foreign Minister, 9 May 1950; “A united Europe was not achieved and we had war. Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.” [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm).

*Pfalz*<sup>217</sup> the *Bundessozialgericht* referred to the Court in Luxembourg a question relating to Regulation 1408/71, asking whether account is to be taken under that Regulation of insurance periods completed in another Member State. Mr. d'Amico, an Italian national, had worked in the German Reich from June 1941 until July 1943, the first three months of this period being within the territory of what is now the Federal Republic of Germany. Silence prevails in the judgement as to the circumstances of d'Amico's working conditions in The Reich but it would appear that it was as part of a voluntary flow of labour between the two Axis powers rather than as forced labour.<sup>218</sup> Unlike Renzo Tinelli, d'Amico worked in Germany while Italy supported The Reich. Since 1947, he worked in France where he became unemployed in 1968. He subsequently claimed an early retirement benefit from Germany in relation to employed time spent in the territory of the then West German state (and not in relation to work in other parts of the territory of The Reich). Given that Mr. d'Amico was unemployed at the time of making the claim, Germany refused his request as, under German law, he was not actively available for work in Germany. In the litigation and preliminary ruling pursuant to this refusal, the question arose before the Court as to whether there could be an aggregation of benefits based on d'Amico's time working in Germany, a question answered, ultimately, in the negative by the Court.

Under the relevant German legislation it was provided that somebody who had been continuously unemployed for at least one year would be entitled to an early retirement benefit. D'Amico, who had been officially unemployed since 1968, sought to receive a retirement benefit from Germany on a proportional basis referring to his three months work there and his allied membership of the social insurance scheme in Germany. This claim was countered by the German benefit award body which argued firstly, that the unemployment had to have been within Germany and, secondly, that, relying on Articles 69 and 71 of 1408/71, d'Amico failed to satisfy the need for a territorial link in relation to claiming unemployment benefit. The Luxembourg judgment focuses solely on the demands of the German legislation as regards the qualifying conditions for the award of the unemployment related benefits. According to the Court, these are compatible with Regulation 1408/71.

This case is the very first case where somebody's wartime experiences are raised before the ECJ. It is of minor curiosity only that it should involve an Italian voluntarily working in Nazi Germany and, presumably voluntarily serving the war effort there. The judgment is, in fact, laudable relative to later judgments in that it specifically discusses the meaning and requirements of free movement of person provisions under Articles 48 and 51 EC Treaty in a way in which subsequent wartime related cases do not. However, it does raise some natural curiosity as to nature of the judging and judges who had all lived through the war themselves and yet appear to be so distant from it.

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<sup>217</sup> Case 20-75 Gaetano d'Amico v Landesversicherungsanstalt Rheinland-Pfalz [1975] ECR 891.

<sup>218</sup> In September 1943, the Italian Government under Marshal Pietro Badoglio signed an armistice with the Allied forces.

#### **D. Hartog Cohen**

The issue of pension benefits in relation to a wartime experience arises in a different context in the case of Hartog Cohen. In this case<sup>219</sup>, Mr. Cohen, a former official of the European Commission, challenged the refusal of an invalidity pension benefit by the Commission. The refusal was based on the fact that Mr. Cohen's invalidity was not the result of a "public spirited act" as defined in Article 78 of the Commission's Staff Regulations.<sup>220</sup> Hartog Cohen, a Dutch national, was born in 1917 and worked at the Commission from 1970 onwards. After he was invalided out of his employment in 1981, a decision was taken by an Invalidity Committee at the Commission that Mr Cohen's invalidity did not meet the conditions laid down in the Staff Regulations for the award of a higher level of pension benefit. This was because, according to his employer, the invalidity in question (the precise details of which are not made clear in the case report) did not arise from a public spirited act or from a risk to life in saving another human being. Mr. Cohen complained about the lower level of pension awarded to him and claimed that his invalidity was the direct consequence of his activities in the Dutch Resistance during the Second World War, in other words, clearly a public spirited act. The Commission countered, however, that any such alleged act must have been performed while in the service of the Commission in order to be the basis of the benefit claimed. The case turned, therefore, on the issue of the timing of the alleged 'public spirited act' and to what extent that could be inferred from an interpretation of the Staff Regulations. Despite a claim by Cohen that there was a causal connection between the harm caused by his Resistance activities (which are not detailed) and his invalidity, a connection which did not emerge until he was in the service of the Commission, the Court of Justice finds against him and narrowly interprets the Staff Regulations.

For the purposes of the investigation in this paper what is of interest is that this case directly connect the Court of Justice, and the Community itself, with what must undoubtedly have been the extremely precarious position of a Jewish member of the Dutch Resistance during the Second World War.<sup>221</sup> This is also a direct action before the Court (as opposed to a preliminary ruling) which links a Community institution with the background of the Second World War.<sup>222</sup> In other words, this case presented the Court with the immediate means and the opportunity to face the past in some way. Furthermore, Hartog Cohen's appeal against the decision of the Commission not to award him the invalidity claimed specifically requested the Court (before deciding on the substance of the case) to order an enquiry to establish whether the Invalidity Committee had considered the question of the connection between Cohen's invalidity and his activities in the Dutch Resistance during the war.<sup>223</sup> In fact, Cohen appears to suggest that the Invalidity Committee did not even consider the relationship between his claimed "public spirited act" and his invalidity.<sup>224</sup> Cohen makes an express request to

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<sup>219</sup> *Hartog Cohen v Commission of the European Communities*. Case 342/8 [1983] ECR 3829.

<sup>220</sup> "Where the invalidity arises from an accident in the course of or in connection with the performance of his duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being, the invalidity pension shall be 70% of the basic salary of the official."

<sup>221</sup> T. Judt, *Postwar* (2007) Chapter 1.

<sup>222</sup> There is some brief consideration below of another staff case, *X and the ECB*, but that case is incidental to wartime.

<sup>223</sup> Paragraph 8 of the judgment.

<sup>224</sup> *Ibid.* paragraph 9.

the Court that a Community institution should investigate wartime events in The Netherlands between 1940 and 1945. This is a very specific and clear confrontation with the wartime past of Europe; to fully investigate how, where and when Cohen was injured would naturally have exposed the core of the Community to all the wider implications of wartime in Holland.

The European Court of Justice does not respond to this request to ‘lift the veil’ of the institutional enquiry into Cohen’s injury. The focus of the judgment is on the interpretation of paragraph 78 of the Staff Regulations. Cohen puts forward the view, *contra* the Commission, that this provision does not specify that the public spirited act must have been performed while a claimant was in the service of the Commission. He adds that to interpret this provision restrictively would be contrary to its spirit and would be unjust as it is intended to reward “conduct demonstrating admirable human qualities and the merits of such conduct do not vary according to date at which the act in question is performed”.<sup>225</sup> This is further insistence by Mr. Cohen that the European Community directly address the nature of the activities of the Dutch Resistance during the war. It is a trite observation, but the Resistance movement was, of course, illegal under the legislation in force in occupied Holland and Cohen was effectively a criminal at the time of his injury. Thus, any investigation by the Commission in 1983 into conduct carried out 40 years earlier would naturally have to acknowledge that criminal conduct in 1943 would have to be recognised as admirable conduct by 1983, by virtue of the complete reversal of the definition and appreciation of criminality in occupied Holland.

None of this is explored by the Luxembourg judges; they emphasise, firstly, the “exceptional” nature of the cases where the higher rate invalidity benefit claimed by Cohen is awarded and the need to approach the contested Staff Regulations with “caution”.<sup>226</sup> This guarded approach by the Court results in a rejection of Cohen’s view about the absence of any indication in the Regulations as to the date upon which the act must have been performed. The judges instead attempt to interpret the objectives of the provision and, in doing so, they rely exclusively on the Commission’s view that there was an intention to prevent the award of unjustified benefits. From that perspective, the Court is able to conclude that events which occurred exclusively before the claimant entered into the service of the Communities should be excluded from the scope of the Regulations. The injustice claimed by Cohen in this regard is specifically denied as the Court makes it very clear that compensation for acts carried out in time of war is governed by legislation of the Member States.<sup>227</sup> In this case, the Court did not, arguably, have to extend its reasoning this far; once it had adopted a narrow interpretation of the Staff Regulations as to the timing of public spirited acts it had given a sufficient response to Cohen’s claim. Unlike in *Gillard, Vigier* and other similar cases where there was clear involvement of Member State legislation and also free movement elements, *Cohen* was concerned exclusively with Community regulations. In other words, there was no necessity whatsoever for the judges to insist that war and its consequences is a Member State matter. Therefore, not only does the Court pay no heed to the particular wartime background in this case it seeks further to explicitly distance

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<sup>225</sup> *Ibid.* paragraph 11.

<sup>226</sup> *Ibid.* paragraph 13.

<sup>227</sup> *Ibid.* paragraph 18.

the Community from the war. The manner in which this is done in *Cohen* does appear to be especially harsh; in order to help establish the causal connection between his invalidity and his work with the Dutch Resistance, Hartog Cohen had produced papers from The Netherlands' pension award body as to a special pension granted to him by that state because of his involvement in the Resistance. The European Court, rather than feed that information into its dealing with the interpretation of the Staff Regulations, uses his own evidence against Cohen to state that it would therefore be difficult to justify an additional benefit to him from the Community.<sup>228</sup> In other words, he should not, according to the European Court of Justice, be doubly rewarded for a Resistance injury.

This judgment sits as an indicator of the way in which the day to day act of judging a mundane pension benefit case is only one small step removed from the harrowing experience of the Jewish population in the Netherlands during the German occupation.<sup>229</sup> The European Court of Justice judges (who would clearly have known this history from their own lifetimes) do not dwell on this background. This short, well buried judgment<sup>230</sup> begs many questions not least the issue of how much financial compensation is too much for somebody whose life experiences must have encompassed dangerous events in the direct service of European liberal democracy. Over and above the more pragmatic aspects of the judgement lies the impression of a judicial body very much wishing to distance itself from this wartime based case. Considering that Cohen was an employee of the Commission and that the basis of the challenge was the Community's own Staff Regulations, the leap to assert a competence divide here is illogical and unreasoned. It is not, however, the first time that this suggestion appears in the analysis of how wartime history is approached by the Court, which might be colloquially summarised as 'the European Community does not 'do' war'. In other words, the EU courts, not shy usually of asserting competence for the institutions, demonstrate a clear reluctance in this case to deal with, or even refer to, the repercussions of European wartime history.<sup>231</sup>

### ***E. X***

The only judgment before the European Courts of Justice<sup>232</sup> which refers directly to Adolf Hitler is a staff case, *X and the European Central Bank*.<sup>233</sup> This is a minor case in many ways but one which does highlight the legacy of Europe's fascist past and the latent nature of right wing extremism, even within the confines of the EU itself.

X, a resident of Germany, was employed by the European Central Bank (the ECB) from July 1998 in its documentation service. In October 1999, disciplinary proceedings were commenced against him and he was suspended from his employment. One particular

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<sup>228</sup> *Ibid.*

<sup>229</sup> Even cursory research throws up vast information about all the other Cohens from The Netherlands who met their deaths in Sobridor and Auschwitz.

<sup>230</sup> There is no previous doctrinal analysis of this case.

<sup>231</sup> In the Postscript to this paper, there is a further discussion of some of the people in the hinterland of the *Hartog Cohen* case.

<sup>232</sup> This is a judgment of the Court of First Instance as opposed to the European Court of Justice.

<sup>233</sup> *X v European Central Bank*, Case T-333/99 [2001] ECR II-3021.

allegation against X was that he harassed one of his colleagues by repeatedly sending him, despite the latter's protests, electronic mail messages of a sexual nature or containing biographies or photographs of the leaders of the Nazi regime. After an internal investigation within the ECB the conclusions reached were, *inter alia*, that the applicant had harassed this colleague. X was, as result of the investigation, in November 1999, dismissed from his post.<sup>234</sup>

The length of any judgment is not any particular indication in itself of its significance and, after all, a person's career and livelihood was on the line in this instance. However, the judicial time and attention accorded to the detail of this case of an harassing, allegedly right wing ECB employee does contrast remarkably with cases of the many old age pensioners who underwent severely traumatic experiences only to have their claims dealt with judicially in a matter of paragraphs. This may reflect the date of the case (that is, 2001 as opposed to say 1983 or 1993) and it is also the only Court of First Instance Judgment in this paper's analysis. None the less, the difference in treatment is striking; an employee who thinks it is appropriate to propagate Nazi symbols and writings is dealt with far more attentively than all of those who suffered directly as a result of the Nazi regime itself. The harassment of which X was accused was characterised, in particular, by the repeated despatch to the victim, on at least 19 occasions, of provocative electronic mail messages including a message containing biographies of Adolf Hitler and Joseph Goebbels and also one containing a photograph of a Nazi officer.<sup>235</sup>

This is a serious case which received appropriate attention from the Court. Within the privileged environment of the EU's own institutions in 1999, an employee repeatedly sent Nazi material and images to a colleague with an intent to threaten that person. This small case reveals a multitude about the EU, about Europe and about the lingering menace of Nazi ideology. Encapsulated within the framework of this anonymous insignificant staff case is a telling message as to how the darkness of the Nazi past of Europe rests concealed behind the surface of even the EU's own efficient edifices. What this judgment shows us is that the racist past has not been obliterated and that its effects might be submerged or rendered invisible but the traces will out even in unexpected quarters, such as the documentation service of the ECB. It is just a shame that this person's perverse and threatening behavior should be accorded more time in the Courts than the narratives of all the other people we have observed in this paper who experienced Nazism in its raw and original horror rather than through some impoverished and malicious attempt at a joke.

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<sup>234</sup> A minor language related peculiarity of this case is that X's legal representatives communicated with the ECB on his behalf in German when the official language of the ECB is English and this was objected to by the ECB administration. The lawyers resisted this compulsory use of English and insisted on continuing communication in German. This matter was later raised by X in his case against the ECB but rejected: "That chronology of the facts shows that the ECB merely pointed out that English was its working language. It did not refuse to accept the letters in German sent by the applicant's lawyer. It even stated that it would accept them despite the fact that they should in principle be drafted in English. The applicant's argument must therefore be rejected." Paragraph 186 of the Judgment.

<sup>235</sup> Paragraph 223 of the Judgment.

## **F. Irimi Lechouritou**

In *Lechouritou and Others v Germany*<sup>236</sup>, the European Court of Justice was required to deal with claims made under the Brussels Convention emanating in events which took place in Greece in December 1943. The case turned on the interpretation and definition of what constitutes a “civil or commercial matter” under Article 1 of the Convention. Over and above this formality, this case was also the first time the European Court of Justice had been faced so directly with claims rooted in the traumas of the Second World War. On 13 December 1943, a mass execution took place in the remote mountain village of Kalavrita in the Peloponnesian region of Greece.<sup>237</sup> The Reich’s military occupation force, in retaliation for an attack by resistance fighters, executed between 700 and 1000 men and boys (accounts vary as to the numbers killed) and burned the village to the ground.<sup>238</sup> Irimi Lechouritou and other descendants of some of the victims of the executions were seeking compensation from Germany before the Greek courts for financial loss, nonmaterial damage and mental anguish. Their claims for compensation began in 1995.<sup>239</sup> A reference for a preliminary ruling was made<sup>240</sup> by the Efetio Patron (the Court of Appeal of Patras, Greece) to the European Court of Justice (based on the Protocol of 3 June 1971<sup>241</sup>). The reference concerned, primarily, the issue of whether an action for compensation brought by individuals against Germany, before the referring Court, fell within the scope *ratione materiae* of the Brussels Convention of 1968<sup>242</sup>

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<sup>236</sup> *I. Lechouritou, V. Karkoulis, G. Pavlopoulos, P. Bratsikas, D. Sotiropoulos, G. Dimopoulos v Dimosio tis Omospondiakis Demokratias tis Germanias (the State of the Federal Republic of Germany)* [2007] ECR I-1519.

<sup>237</sup> Allegedly, Dr. Kurt Waldheim, a former secretary General of the UN and later president of Austria, was present in Kalavrita as a German army staff officer when the massacre was carried out.

See <http://www.bbc.co.uk/ww2peopleswar/stories/37/a3206837.shtml>

<sup>238</sup> See the website of the Kalavrita region for more details about the executions: <http://kalavrita.gr/DynSITE/index.php?contentID=29&cMode=vMode&AID=368>

<sup>239</sup> In 2000, the then German President, Johannes Rau, visited Kalavrita and issued an apology. He also said there was “no possibility” for Germany to pay compensation on legal grounds, but added that he would encourage a “symbolic contribution” in response to Greek reparation demands.

<sup>240</sup> The referring Greek Court made the preliminary reference based on Article 234 EC Treaty but, as the Advocate General pointed out in his Opinion, “Those questions were referred incorrectly under Article 234 EC, since the jurisdiction of the Court to interpret the Brussels Convention is derived not from that provision but from the Protocol of 3 June 1971. However, that error is not important because, as the German Government points out, Article 2 of the Protocol provides that the [referring court] may seek preliminary rulings on the interpretation of the Brussels Convention.” Paragraph 6 of the Opinion,

<sup>241</sup> Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ 1975 L 204 /28.

<sup>242</sup> Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters (known as the Brussels Convention) – OJ 1998 C 27/1 (consolidated version). Article 54 of the Convention states that “The provisions of the Convention shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after its entry into force in the State of origin and, where recognition or enforcement of a judgment or authentic instruments is sought, in the State addressed.” Therefore, despite the date of the events giving rise to this case, the Brussels Convention was applicable based on date of the institution of the judicial proceedings. The Polish Government, in its written Observations in this case, noted that the referring court explicitly cites acts and omissions which took place between 1941 and 1944, i.e. before the entry into force of the Brussels Convention. However, neither the Advocate General nor the Court raised objections based on this temporal element.

(‘the Convention’). The referring Court, in its first question to the European Court of Justice, requested a resolution of whether Germany (as a Brussels Convention contracting state) could be liable under civil law for acts or omissions of its armed forces where those acts or omissions occurred during a military occupation of Greece “following a war of aggression on the part of Germany, [and which acts were] manifestly contrary to the law of war and [could] also be considered to be crimes against humanity?” Secondly, the referring Court also asked a question as to compatibility with the system of the Convention for Germany to put forward a plea of immunity.

The Opinion of Advocate General Ruiz-Jarabo Colomer immediately places this case in the context of a discussion about the evils of war; he opens his Opinion by recalling the miseries, torture and suffering caused to individuals at times of war.<sup>243</sup> His sympathetic and literary opening is unusual and takes the European Court of Justice, and with it the Union itself, into new territory, that of its own past. An EU Member State is being called to account for its actions 64 years ago before the courts of the European Union. This Opinion from Advocate General Ruiz-Jarabo is the element of the case which comes closest to respecting the myriad sensitivities which lie at the root of the case and which are of vital significant in terms of an appreciation of the depth and importance of history within the EU. The extent to which the Advocate General acknowledges that, whatever his eventual conclusion on the substance, is respectful of the complicated, tragic and deeply personal (but, of course, also highly political) issues which lie beneath the judgment, and indeed beneath the whole of European integration itself.

The first question which the Advocate General addresses is whether the actions of a state’s armed forces during time of war can be classed as a civil and commercial matter under Article 1 of the Brussels Convention for the purposes of a claim against the defaulting state.<sup>244</sup> The case turns essentially on a terminological interpretation; although the Convention itself does not provide a definition of “civil and commercial matters” there is established precedent before the European Court of Justice that acts done in the exercise of public authority do not fall within the scope of Article 1 of the Brussels Convention.<sup>245</sup> Mr. Ruiz-Jarabo identifies the main question as being whether the conduct of armed forces in wartime involve the exercise of powers going beyond the

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<sup>243</sup> In fact, he opens with a sympathetic description of the Peloponnesian War in the fifth century BC “The War was a prolonged struggle during the course of which an unparalleled number of misfortunes befell Hellas... never before had there been so much banishing and slaughter...” Paragraph 1 of the Advocate General’s Opinion.

<sup>244</sup> The Advocate General notes that Council Regulation (EC) 44/2001 of 22 December 2000 (on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters) (OJ 2001 L 12/1) has replaced the Brussels Convention of 1968 but that the Regulation is not applicable to this case. Article 66 of the Regulation states as follows: “This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.” The *Lechouritou* case was instituted in Greece in 1995, that is, before the entry into force of Regulation 44/2001.

<sup>245</sup> Article 1 of the Brussels Convention states as follows “This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.” The Advocate General refers to the list of authorities from the ECJ on the interpretation of civil and commercial matters under the Brussels Convention and the exclusion of acts *iure imperii*: case 29/76 *LTU* [1976] ECR 1541, case 814/79 *Rüffer* [1980] ECR 3807, C-172/91 *Sonntag* [1993] ECR I-1963, C-167/00 *Henkel* [2002] ECR I-8111, C-271/00 *Baten* [2002] ECR I-10489 and C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867.

general law.<sup>246</sup> Arguments and Observations presented in this case, as well as precedents from elsewhere,<sup>247</sup> were strongly in favour of acts carried out by armed forces (within and out with their State territory) being classed as an exercise of State sovereignty and, therefore, not encompassed by Article 1 of the Convention.<sup>248</sup> However, as against that position, the plaintiffs and the Polish Government argued that the concept of acts *iure imperii* does not include wrongful acts of armed forces.<sup>249</sup> This was countered by the Advocate General who believes that the wrongfulness of a state act (even extending to a crime against humanity) does not affect its classification<sup>250</sup> as, if wrongfulness were to affect the classification of a state act, then it “would mean that authorities exercise public powers only when they do so in an irreproachable manner which would ignore the fact that, on occasions, they may not act in that way.”<sup>251</sup> A further argument by Poland as to the nature of acts carried out outside a State’s territory also met with a negative response from the Advocate General.<sup>252</sup> Territory does delimit the sphere of the application of sovereignty but the Advocate General identifies two special case exceptions to this, namely armed invasion of, and armed intervention in, another state.<sup>253</sup> Armed invasion, despite being reprehensible, entails an extension of the invader’s territory and sovereignty and therefore does not affect acts *iure imperii*. However, this is not elaborated upon by the Advocate General and the connections between human rights breaches, state immunity and the Brussels Convention are not sufficiently excavated.<sup>254</sup> As regards the assertion of crimes against humanity, it is

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<sup>246</sup> Paragraph 52 of the Opinion in *Lechouritou*.

<sup>247</sup> *Ibid.* paragraph 56, with reference to *McElhinney v. Ireland* [GC] no. 31253/96, § 38, ECHR 2001-XI.

<sup>248</sup> *Ibid.* paragraph 57.

<sup>249</sup> *Ibid.* paragraph 63, “... military operations which are in breach of the law do not fall within that category.”

<sup>250</sup> *Ibid.* paragraph 64, “The fact that conduct may be wrongful does not affect its classification but rather its consequences, in so far as it is a condition for the creation of liability or, where applicable, for the restriction of liability.” And paragraph 66, “... the fact that the acts are wrongful does not cast doubt on the view I have put forward, whatever the degree wrongfulness, including where such acts constitute crimes against humanity.”

<sup>251</sup> *Ibid.* paragraph 65 of the Opinion.

<sup>252</sup> *Ibid.* paragraph 67. The Polish Government argued that public authority is exercised only *within* the territorial boundaries of a State and that, therefore, operations by armed forces outside State boundaries may not be regarded as the exercise of public authority.

<sup>253</sup> *Ibid.* paragraph 69. As regards this second, special case exception to the extra territorial application of sovereignty, the Advocate General states “The second situation... gives rise to particular difficulties of great relevance today, which call for solutions involving the possible consent of the attacked state and the fulfilment of the international community.” This cannot but be a reference to the current situation in Iraq. As regards that issue, see *R (on the application of Al-Skeini) v. the Secretary of State for Defence* (Court of Appeal, 21 December 2005 - the case is currently before the House of Lords). The Court of Appeal found that the Human Rights Act 1998 and the ECHR applied in some circumstances to British troops in Iraq. On 13 June 2007, in *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellant)* the Law Lords ruled that the HRA does apply to a man who dies while in British custody during the occupation of Iraq.

<sup>254</sup> When considering the issue of state responsibility under international law, Mr. Ruiz-Jarabo acknowledges that the concept of State Immunity underwent changes in the second half of the 20<sup>th</sup> century with its limitation to acts *iure imperii* and that there is evidence of a tendency to even lift State Immunity in respect of acts *iure imperii* where human rights are breached: paragraph 60 of the Opinion. However, the Advocate General does not take account of that tendency when considering

reasonable to ask, if a legal order, such as the European Union with such an overtly strong commitment to human rights<sup>255</sup> can be complacent or silent about breaches of human rights in the past while it so openly preaches from that hymn book today? It may be the case that human rights principles developed for the European Union by the Court cannot specifically be used to re-interpret the wording of the Brussels Convention but the absence of some acknowledgement of the human rights dimension of the actions of the *Wehrmacht* in Greece in 1943 is more than puzzling.

From the Court comes a relatively brief and succinct judgment on what constitutes civil and commercial matters under Article 1 of the Brussels Convention. It concludes that actions for compensation in respect of the acts of armed forces in the course of warfare do not fall within the Convention. Relying on its own previous case law, the Court states there that not all actions by a public authority are excluded from the scope of the Convention but only where that authority is acting in the exercise of its public powers.<sup>256</sup> Following the Advocate General, the Court finds there is “no doubt” that acts of armed forces are clearly to be classed as “emanations of State sovereignty”<sup>257</sup> as they are “inextricably linked to States’ foreign and defence policy”.<sup>258</sup> Therefore, the Kalavrita massacre is to be classed as the exercise of public powers on the part of The Reich and any legal action based on those acts will fall outside the scope of the Convention.<sup>259</sup> As to, finally, the possible impact of the lawfulness or otherwise of the acts giving rise to the claim the Court makes it clear that this would affect only the nature of those acts but not the field in which they fall.<sup>260</sup> There is a troubling and unconvincing circularity to the argument here; the judges delimit the field by reference to the nature of the act but then state that, even though the lawfulness of the act may affect its nature, it cannot influence the determination of the field. In the context of the authoritative presentation of Brussels Convention case law this statement may seem logical and rational. As a judicial assessment from the European Union on a tragic, deeply contested aspect of its own history this is deficient. The plaintiffs’ attempt to argue or suggest that what The Reich’s armed forces did was illegal or wrongful and that, therefore, the Convention’s classifications and exclusions<sup>261</sup> should be re-considered, is summarily dismissed by the judges with no comment on the potential

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whether wrongfulness in the form of crimes against humanity may affect an act *iure imperii* classification.

<sup>255</sup> Article 6 TEU and Article 49 TEU.

<sup>256</sup> Paragraph 31 of the judgment. See further, V. Gärtner, ‘The Brussels Convention and reparations – remarks on the judgment of the European Court of Justice in *Lechouritou and others v the State of the Federal Republic of Germany*’ (2007) 8 GLJ 417.

<sup>257</sup> The European Court of Justice has had occasion in the past to rule on matters which touch upon the German armed forces; see Case C-285/98 *Tanja Kreil and Bundesrepublik Deutschland* [2000] ECR I-69 and case C-186/01 *Alexander Dory and Bundesrepublik Deutschland* [2003] ECR I-2479.

<sup>258</sup> Paragraph 37 of the Judgment.

<sup>259</sup> *Ibid.* The language of the Court is neutral: “... acts which are at the origin of the loss and damage pleaded by the plaintiffs... must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated.”

<sup>260</sup> “Finally, the question as to whether or not the acts carried out in the exercise of public powers... are lawful concerns the nature of those acts, but not the field within which they fall. Since that field as such must be regarded as not falling within the scope of the Brussels Convention, the unlawfulness of such acts cannot justify a different interpretation.” Paragraph 43 of the Judgment.

<sup>261</sup> The plaintiffs claimed that acts *iure imperii* should not include illegal or wrongful actions.

illegality of the Kalavrita executions. It is the “broad logic and objective” of the Convention which is stated to be at issue in this case and that is based on “mutual trust of the Contracting states in their legal systems and judicial systems”.<sup>262</sup> The assertion or suggestion here seems to be that to attempt to claim, as the plaintiffs did, that the operation of the Convention be affected by the illegality or wrongfulness of a State’s actions would cause a *bouleversement* inappropriate to the Brussels Convention system. Furthermore, the Court does not even refer to the possibility of the impact of crimes against humanity in this case, which issue was raised specifically by the referring Greek court as well as by the Dutch and Polish governments. The Court concludes, in answering the first question of the Efetio Patron, that civil matters under Article 1 of the Convention do not cover legal actions brought in respect of acts perpetrated by armed forces in the course of warfare.<sup>263</sup>

There are two distinct and divergent ways in which this case may be perceived; it is, on the one hand, a relatively straightforward Brussels Convention case where the European Court of Justice takes the opportunity to further refine its case law on what constitutes the exercise of public authority and, in doing so, places the emphasis on the legal relationship between the parties and not on the nature of the proceedings.<sup>264</sup> However, there are, even within this framework, lacunae and curiosities in this judgment. One of the latter is the Court’s reference to Regulation 805/2004<sup>265</sup> to justify its interpretation of what constitutes civil and commercial matters, particularly as regards the impact of the lawfulness of the act.<sup>266</sup> In previous Convention case law the Court has referred to EC secondary legislation, in particular in *Luc Baten*<sup>267</sup> where the Court stressed the link between the Brussels Convention and Community law in order to interpret the concept of social security.<sup>268</sup> This coherence between the Convention system and the Community one seems therefore well established and is certainly reinforced by the Court in *Lechouritou*. But coherence is, in essence, based on consistency and cannot operate selectively; if the two legal systems are in a state of semi unity as regards interpretative guidance it is therefore difficult to see why principles of human rights

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<sup>262</sup> Paragraph 44 of the Judgment “mutual trust... in legal systems and judicial systems...”.

<sup>263</sup> The Court did not deem it necessary to answer the second question of the Greek referring court as regards state immunity.

<sup>264</sup> See further V. Gärtner (2007), noted above, for an analysis in this framework.

<sup>265</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims – OJ 2004 L 143/15.

<sup>266</sup> Paragraph 45 of the judgment: referring to the reference to civil and commercial matters in Article 2(1) of 805/2004, which specifies that it shall not extend to the liability of the State for acts and omissions, the Court remarks that no distinction is drawn according to whether the acts or omissions are lawful. The Court substantiates its reasoning further here by referring to Article 2 (1) of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for payment procedure (OJ 2006 L 399/1). Article 2 (1) of this Regulation reads: This Regulation shall apply to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority (“*acta iure imperii*”).

<sup>267</sup> Case C-271/00 *Gemeente Steenbergen and Luc Baten*, [2002] ECR I-10489.

<sup>268</sup> Paragraph 43 of case C-271/00 *Luc Baten*: “In view of the link between the Brussels Convention and Community law (see Case C-398/92 *Mund & Fester* [1994] ECR I-467, paragraph 12, and Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 24), regard must be had to the substance of that concept [of social security] in Community law.”

which underpin the Community system<sup>269</sup> are not even referred to by the Court in its treatment of the lawfulness or otherwise of the Kalavrita executions. Another ghost lurking at the table when reading this judgment is the handling of the issue of State sovereignty: the case essentially turns on an appreciation of what constitutes the exercise of public authority and what boundaries there are to State sovereignty. The EU legal order itself is based on conceptions of sovereignty and competence which are not fully defined<sup>270</sup> but in *Lechouritou* the Court resorts to interesting language to deal with this. Actions by a State's armed forces are stated to be "one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy."<sup>271</sup> This Court has not had many opportunities to rule specifically on the concept of sovereignty except in the areas of taxation and fisheries.<sup>272</sup> It has, however, previously considered the application of EU law to the German armed forces (in the context of both recruitment and military service) finding that "Measures taken by the Member States in this domain are not excluded in their entirety from the application of Community law solely because they are taken in the interests of public security or national defense."<sup>273</sup> Recalling, once again, the Court's own insistence on coherence between the Convention and Community law there appears to be a definite disparity here; for Brussels Convention purposes, actions of armed forces are classic emanations of state sovereignty and therefore not subject to interpretation by the European Court of Justice but, under the Community system, the Court may examine the nature of actions by Member State's armed forces. It's the competence question, stupid,<sup>274</sup> which is at issue here, concealed in an ostensibly bland Brussels Convention judgment.

Casting aside the surface level appreciation of this judgment, the other way in which this case may be perceived is as one going deeply to the root of the nature and purpose of European integration itself. Closer union<sup>275</sup> cannot sustainably co-exist with democratic amnesia; let us remember that the claimants are seeking compensation *inter alia* for mental anguish and they have pursued this claim for 12 years in relation to a traumatic event which took place over 60 years ago. At one level it seems obvious, given this determined pursuit, that these claimants could never be satisfactorily financially compensated for their painful memories whatever legal basis they may opt

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<sup>269</sup> See generally D. Chalmers et al, *European Union Law* (Cambridge: CUP, 2006), chapter 6, on the role and place of fundamental rights within EU law.

<sup>270</sup> *Ibid.* chapter 5.

<sup>271</sup> Paragraph 37 of the Judgment.

<sup>272</sup> Since 1960, there have been 88 European Court of Justice judgments where the issue of (Member) state sovereignty has been discussed, with fisheries and tax cases dominating in this list.

<sup>273</sup> Case C-186/01 *Alexander Dory v Bundesrepublik Deutschland* [2003] ECR I-2479. In C-285/98 *Tanja Kreil and Bundesrepublik Deutschland* [2000] ECR I-69, the Court stated similarly: "...it is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions are bound to fall entirely outside the scope of Community law." (Paragraph 15 of the judgment in *Kreil*).

<sup>274</sup> 'The economy, stupid' – campaign phrase used by the Clinton team during the 1992 US presidential election campaign.

<sup>275</sup> Article 1, Treaty on European Union, "This Treaty marks a new stage in the process of creating an ever closer union amongst the peoples of Europe...."

for. Law, in other words, seems to be particularly impotent here and even if the Court had adopted a more generous and open approach to the claim, it may still have failed the citizens of Kalavrita. However, the closed, restricted nature of the judgment sits as an indictment on the nature and scope of EU law. These claimants sought, quite simply, a measure of justice in the court of the EU, a court which would not even exist were it not for events like those in a small Greek village and many more millions of similar villages across the continent of Europe. This justice was not forthcoming. Why not? The strict application of the Brussels Convention, the limited acceptance of the impact of unlawfulness, the final insistence that the Convention is an instrument founded on mutual trust and to simplify formalities<sup>276</sup> all stand as legally acceptable reasons. Perhaps there are, however, more covert and unspoken political reasons in the background which relate to the stability of the integration pact and the fear of opening compensatory floodgates. Whatever the reasons, the result is the same for Kalavrita but the implications for European justice and for the respect of heritage and history are not. The Court's unwillingness to respond to the suggestion of crimes against humanity, its non-reference to human rights and the protective definition of state power (albeit applied retrospectively) all sit uneasily in the context of closer union in Europe and they defy the legitimate expectations one has of an evolved post-national legal order.

Indeed, to conclude this part of the paper, the legitimate expectations that may be claimed from the post-national EU when it comes to wartime matters might be proposed as the over arching question dominating this range of case where European Courts, from 1975 to 2007, were required to confront litigants whose narratives were rooted in wartime. From the mundane to massacres, from chemical workers to communists, the Court has been faced over the years with a veritable kaleidoscopic insight into the enduring consequences of the Second World War. The stated aim of this paper lies in the illumination of the complexity and range of wartime pasts to which the Court is exposed and not necessarily in the adoption of a moral critique of the Court's responses. It is impossible, in any case, to put forward any kind of globalised summary of the Court as a processing unit of the past given the vast time scale over which the exposure has occurred. However, a few thematic observations do emerge at this stage of the analysis, namely:

- The European Court of Justice has consistently reserved the matter of the consequences of war as a Member State matter;
- This Court has failed over the years to fully incorporate fundamental principles of Union law in cases with a wartime dimension;
- The Court displays a consistent reluctance to enquire in any depth into the wartime situations with which it has been faced;
- Finally, the range and extent of experiences which are unearthed in this examination constitute a valuable source of wartime memories.

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<sup>276</sup> Paragraph 44 of the Judgment.

## 5. Germany, what Germany?<sup>277</sup>

*Terrible history and protected joys*<sup>278</sup>

The memory of war may manifest differently in each Member State and in each individual court case but all such memories inevitably and unavoidably spin around the axis of Germany's role in, and its accountability for, the Second World War. The seemingly minor cases involving pensioners and others who won't forget the war which dominate in this paper demonstrate that not only is Germany's accountability still on the table but that it is re-worked on a regular basis within the European Union. Joerges and others may have opened up the possibility for an appreciation of the theoretical Europeanisation of Germany's wartime role but the case law analysed here proves that confronting this issue is a regular reality for the European Court of Justice. Should the European judge's role even extend to this or should it be confined to a German judge? Whatever the theoretical response to this, the very fact that these cases reach the Union's judicial organs make it impossible for the European Court of Justice to completely avoid the issue of German accountability. Nevertheless, as we have observed throughout this paper, the Court rarely directly engages with the difficult and sensitive issue of the burden of responsibility borne by one Member State. However, in case law which directly involves that state it is more difficult for the Court to shy away from facing the continuing nature of German accountability. One of the primary elements dominating any appreciation of that liability is the question of what actually constitutes the German state in wartime cases. Otherwise phrased, how is Germany to be defined for the purposes of particular applications of wartime responsibility? In this part of the paper, I examine the way in which Germany, as a statal entity (or entities), has been dealt with by the European Court of Justice in cases rooted in wartime.

### A. Jozef Van Coile

The case of *Jozef van Coile*<sup>279</sup> is a pension claim which involves issues of the limits of German territorial responsibility. Jozef Van Coile was employed in Germany from the end of March 1943 to the beginning of May 1945. He worked for Siemens, initially in Nuremberg and afterwards in the Dresden area.<sup>280</sup> Siemens was the major supplier of

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<sup>277</sup> “‘What and where is Germany?’ the writers J. W. von Goethe and Freidrich Schiller asked in 1797... over the last 200 yeas the Germans have tried time and again to provide answers to the question...[they] have found that their answer cannot be given in a vacuum. In other words, the German Question has never been of concern to the Germans alone.” P. Alter, *The German Question and Europe, A History* (Oxford: OUP, 2000), p. 2.

<sup>278</sup> S. Heaney, ‘Settings’ from *Seeing Things* (London: Faber and Faber, 1991)

<sup>279</sup> Case C-442/97 *Jozef van Coile v Rijksdienst voor Pensioenen*, [1999] ECR I-8093.

<sup>280</sup> On the role of Siemens, forced labour and the National Socialist regime, see S.J.Wiesen, ‘Public Relations as a Site of Memory; the case of West German Industry and National Socialism’, Chapter 9 in A. Confino and P. Fritzsche (eds.), *The Work of Memory: New Directions in the Study of German Society and Culture* (Urbana/Chicago: University of Illinois Press, 2002), at 199: “Among its activities during the war, Siemens had manufactured the majority of the electrical components used by the German military, and it had also run a network of forced and slave labor camps, including a factory at the Auschwitz subcamp Bobrek and a women's work installation at Ravensbrück. [After the war] Siemens claimed it had had no choice but to contribute to the war effort and to make use of

the electrical components used by the German military during the Second World War, and it also ran a network of forced and slave labour camps, including a factory at the Auschwitz subcamp Bobrek and a women's work installation at Ravensbrück. The case report does not record any detail as to what Jozef van Coile did in their factories, nor is it ever made clear whether he was a voluntary or forced labourer there.<sup>281</sup> We obtain from the court case only the merest glimpse into the reality of one person's very personal wartime narrative. This narrative directly connects the contemporary European Union with three phases of European history. Van Coile's 'employment' during the war years was partially completed in the territory of what was (before 1990) the GDR. After the unification of Germany in 1990, van Coile applied for a pension from Germany, effectively seeking a (marginally) increased pension which would take account of the period of time he worked in the (former) GDR in Dresden. It is made clear (in the Opinion) that van Coile was already in receipt of a partial pension from Germany and the larger part of his pension came from his own state, Belgium. What emerges in *van Coile* is an insight into the complex environment within which EU Member States handle the implications of the Second World War via the means of their pension schemes. For example, Belgium (at the time of this case) had institutionalized a "war years presumption" whereby, if evidence is provided of employment (and related social security contributions) for at least one year between 1938 and 1945, those contributions will be deemed to have been paid in respect of employment for the remainder of that period.<sup>282</sup> There is a second element to this presumption which provides that it "is rebutted in respect of periods of employment for which the person concerned can claim a pension, under a foreign pension scheme for example"<sup>283</sup>. This set of pension arrangements, dating from 1967, suggests that somebody whose wartime experiences were so disrupted that they can point to one year only of social security contributions

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forced and slave labor. When the Nazis demanded compliance, the company complied. Moreover, Siemens, which the Berlin press was accusing of having embraced the Nazis' political and racial aims, argued that it had in fact opposed the Nazis from start to finish, by helping Jews to emigrate or by banning the "Heil Hitler" greeting on the factory floor. In response to reports of the horrifying conditions in the forced labor camps, subsequent company reports not only denied that the workers were treated badly but, in fact, paid tribute to the firm's historically progressive track record vis-à-vis its employees. Like every major firm, Siemens had immersed itself inextricably, and often willingly, in the Nazi economy, even if there had been isolated instances of insubordination."

<sup>281</sup> The main female character in B. Schlink's *The Reader* (London: Phoenix House, 1997) is described as having worked at Siemens before becoming a concentration camp worker.

<sup>282</sup> This is the fifth paragraph of Article 32b of the Royal Decree of 21 December 1967, as amended by the Royal Decree of 5 April 1976, *Moniteur belge* of 8 April 1976. Article 32b (which was repealed by Article 50 of the Royal Decree of 4 December 1990, but remained applicable to pensions which - as in the present case - actually became payable before 1 June 1991) reads, in the version applicable to the present dispute, as follows: "An employed person who was in employment during the period between 1 January 1938 and 1 January 1945 in respect of which a contribution was paid of an amount equivalent to the annual amount referred to in the second paragraph shall be deemed to have paid sufficient contributions to establish that he was normally and principally employed throughout the period between the date on which the period of employment established came to an end and 1 January 1946."

<sup>283</sup> The sixth paragraph of Article 32b, which provides as follows: "The presumption laid down in the two previous paragraphs may be rebutted only in respect of periods of employment for which the person concerned can claim a pension under another Belgian scheme, with the exception of the scheme for self-employed persons, or under a scheme of a foreign country. It may also be rebutted where the person concerned provides evidence of employment as a mineworker, seaman or fisherman."

will be relieved of the need to prove the nature of their time spent otherwise during the war. However, somebody like van Coile, whose disruption was so great, and their research post-war so diligent as to investigate pension rights in another country will, effectively, be penalised and not be compensated by the tax payers of Belgium.

The question raised before the European Court of Justice concerned the relationship between this Belgian pension legislation and EC Regulation No 1408/71. The case arose when Jozef van Coile sought to have the years 1943 and 1944 taken into account *pro rata* in the determination of his Belgian pension. The *Rijksdienst voor Pensioenen* (Belgian National Pensions Office) refused to do so because he was employed in Germany during that period of time. His initial application for a (Belgian) state pension had been made in September 1988. In his application he stated that he had been employed in Germany from the end of March 1943 to the beginning of May 1945 in Nuremberg and, later, Dresden. In March 1989, he was awarded a Belgian pension calculated on the basis of a fraction of 42/45. Subsequently, (and after liaison between the Belgian and relevant German pension award bodies), in January 1990, the *Landesversicherungsanstalt Rheinprovinz* (Regional Insurance Office for Rhine Province, Germany), acknowledged liability for payment of a pension benefit for a period of employment of eight months being the period in which the plaintiff had worked in Nuremberg. However, it specifically disregarded the subsequent periods of employment on the territory of the future (now former) GDR. The Belgian pension institution then took a final decision in April 1990, awarding a pension to van Coile on the basis of 41/45 (being for 41 years of the 45 which would normally have been awarded to somebody who had worked in Belgium all her/his life).

This is a curious state of affairs; one small man caught up in all the major events in the course of European history since 1938. It does affect our appreciation of the case within the general scheme of this paper not to know exactly on what basis this person 'worked' in Siemens in Dresden. To have been forced to work there in some form and then not to have that labour acknowledged in the penury of old age due to the altered political map of Europe would be an especially harsh double misfortune to befall somebody. Yet, unsurprisingly, none of this background mosaic is discussed before the European Court of Justice. Another curiosity in this saga is the way in which the power, authority and extent of the state is implicit in the pension decisions made. Germany (that is, the Federal Republic of Germany) accepts no financial responsibility for events which occurred within its former statal incarnation, the Third Reich. Should one surmise that these limits apply only to financial matters or is there some implication that the Federal Republic's territorial limitations apply to all of the consequences of The Reich and its regime?<sup>284</sup>

Through this cursory exposure of Jozef van Coile's life circumstances, an insight is gained into the banal, bureaucratic treatment of the consequences of the Second World War. Each little detail of his wartime experience is picked over by pension bodies in two EU states with a seemingly rather petty aim, namely to ensure that he does not

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<sup>284</sup> All of the extermination camps operated by the National Socialist regime were located outside the territorial boundaries of the Federal Republic, the vast majority of them being in Poland. Several of the concentration camps were located in the future/former GDR, for example, Ravensbrück and Sachsenhausen. Concentration camps were also situated within the current territorial borders of six other EU Member States; France, The Netherlands, Latvia, Austria, Slovakia and the Czech Republic.

receive too many DM or francs for what ever he did in Dresden during the war. The magnitude of the events giving rise to, and which still lie close behind, this bureaucratic hyper critical examination is directly opposed by the banality with which it is treated by Germany and Belgium. It is, I suggest, as if the super bureaucracy and pseudo-normalization which permitted and managed mass extermination in Europe is still prevailing and resonating even in the post 1989 European Union. Political events, however, did not cease to shape the life and fortunes of this one Belgian. In 1990, the once future GDR became the now former GDR and Dresden, therefore, a part of the Federal Republic.<sup>285</sup> Following German unification, van Coile applied for review of the previous decision by the German pension institution seeking to have the insurance periods completed in East Germany taken into account for pension purposes. In 1995, the German pension institution acknowledged that Germany was liable for payment of a benefit of DM 903.12 with effect from 1 January 1995, calculated on the basis of a period of employment of 29 months (26 months of employment from 30 March 1943 to 30 April 1945, plus three months added by way of a fixed supplement). Following the pattern of to and fro between the two states (in relation to this very minor amount of money), the Belgian pension body then recalculated its award to van Coile. His entitlement with effect, from 1 January 1995, was to be on a reduced basis, namely 40/45, that is he lost one year of entitlement as compared to the award made in April 1990. Van Coile's persistent demands to have a full pension finally reach a consideration by the European Court of Justice which is asked this question by the referring court in his dispute with the *Rijksdienst voor Pensioenen*; "Does the sixth paragraph of Article 32b of the Royal Decree of 21 December 1967, which provides for the rebuttal of the war years presumption in case of pension received from another source, comply with Article 46b(2) of Regulation No 1408/71?"

In response, the Advocate General surmises that, essentially, what needed to be determined was whether the rebuttal circumstances of the war years presumption were to be qualified as a 'provision on reduction' under Regulation 1408/71.<sup>286</sup> It had clearly been established that van Coile was first awarded a Belgian pension which was then reduced on account of the German pension granted subsequently, in other words a reduction had *de facto* occurred. Advocate General Alber here turns to the political events underlying this narrative recalling that "it should not be forgotten that the sequence of events [in 1989/90] was an inevitable consequence of the political developments associated with the reunification of Germany."<sup>287</sup> Mr. Alber is of the view that the incorporation of Dresden into the Federal Republic was the factor leading directly to van Coile's reduced pension. This seems to be a somewhat skewed version of events; van Coile had suffered financial loss because of the location of Dresden (and the consequential territorial limits set by the FRG) and he actively sought to have that loss

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<sup>285</sup> See, generally, W. G. Sebald, *On the Natural History of Destruction* (London: Hamish Hamilton, 2003) on the impact of Allied bombing in Dresden. As a co-incidental aside it is of interest to note that a soon to be famous young German was also in Dresden at the same time as young Jozef van Coile. As Günter Grass (born 1927, (three years after van Coile) reveals in *Peeling the Onion* (London: Harvill Secker, 2007) he was beginning his training in the Waffen SS in (a fire bombed) Dresden in 1944. Their very different paths crossed in that blighted city. Grass went on to become the 'moral conscience' of the new Germany; unknown van Coile ended up fighting for a few DeutschMarks from that same state. □

<sup>286</sup> Paragraph 24 of the Opinion.

<sup>287</sup> *Ibid.* paragraph 27.

redressed himself in 1990. In a somewhat perverse interpretation of the influence of political events, Mr. Alber suggests that the 29 months' employment validated by the German pension fund after unification would have been taken into account by Belgium from the outset (from 1989) were it not for the division of Germany so that the war years presumption contained in the Belgian rule would not have been applicable to these definable periods of time.<sup>288</sup> As to the nature of that presumption<sup>289</sup> itself, it is deemed to be “to the worker's advantage which is designed to establish an insurance record as free from gaps as possible and which is necessitated by the difficult conditions prevailing during the war.”<sup>290</sup> Despite the generosity of this provision it is to be dispensed with if it can be shown that the worker has completed relevant periods of employment for pension insurance purposes, under another national or foreign scheme, which itself gives rise to a pension entitlement. In other words, if the “difficult conditions” of wartime resulted in some pensionable employment in another country then the charitable spirit underlying the war years presumption vanishes and, with it, full entitlement to a Belgian state pension. Distinguishing ECJ precedents (relating to Belgian mine workers), the Advocate General concludes that the contested Belgian provision does not contravene Regulation 1408/71 as it is a rule of evidence which is required to mitigate “the problems of maintaining regular employment in the difficult social and political conditions which prevailed during the war”, on the one hand, and providing evidence of such regular employment, on the other.

This is a mild admission, but an admission none the less, as to the impact of the Second World War. That conflict and its consequences are still being worked through in judicial *fora* on the eve of the Millennium.<sup>291</sup> In *Van Coile*, the Advocate General skirts around the past, seeing and acknowledging its impact but not fully respecting the effects at a personal level in what is, after all, a very concrete case of one man's encounters with European history. The Belgian legislation is implicitly lauded as taking into account the interruptions and difficulties of wartime but, in this abstract appreciation, no account is taken of a 75 year old man battling events bigger than him, bigger than Europe itself, in an attempt to get a fair pension. The judgment that follows is succinct and very short; as regards the war years presumption, the Court briefly elaborates on its purpose as being for the benefit of workers who, having worked in Belgium, are not in a position to provide evidence of having paid sufficient contributions during all the years at issue “because of the destruction or loss of documents... as a result of the events of the War,” and who could not, therefore provide evidence of continuous employment in Belgium. The contested Belgian legislation is viewed as a mere pragmatic solution of a practical problem with no acknowledgment of the monstrous proportions of the latter. The war,

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<sup>288</sup> *Ibid.* paragraph 28, “A fraction of only 40/45 would then have been taken as a basis for the Belgian pension from the beginning and no reduction, even of a purely computational kind, would have been made in the amount of pension initially fixed.”

<sup>289</sup> If the worker is unable, for various reasons which may be factual or administrative, to furnish evidence for all the war years of periods of employment that are relevant for pension insurance purposes, as long as a minimum period of employment has been completed the worker will be deemed in accordance with the war year presumption to have been in employment covered by a compulsory social security scheme for the duration of the war – Paragraph 30 of the Opinion.

<sup>290</sup> *Ibid.* paragraph 31.

<sup>291</sup> The *Van Coile* judgment from the European Court of Justice issued in November 1999, more than a decade after this (by then) 75 year old former Siemens labourer had first applied for his old age pension. The matter, of course, still remained to be finally decided by the referring Belgian tribunal.

put simply, caused bureaucratic disruption (loss of documents etc.) for which Belgium has provided a bureaucratic solution – *tout court*. Relying on its previous case law, the Court states that, generally, provisions for reduction of benefits cannot be rendered exempt from the conditions and limits of application laid down in Regulation No 1408/71 by categorising them as rules of evidence. However, in the present case, the war years presumption is to be classed as part of legislation whose purpose is to reduce the “damaging effects of the Second World War” on the pension rights of workers subject to Belgian legislation.

Submerged within the all complexities of the political events and the minutiae of pension calculations in this case is the fact of the (pre 1990) Federal Republic of Germany and its unwillingness to acknowledge financial responsibility in relation to a few months work at Siemens in Dresden in 1944. This limitation is apparently based on a purely literal conception of the territorial extent of Germany’s accountability for the events of the Second World War. However, if *van Coile* is contrasted with *Lechouritou*, the difficulties inherent in establishing territoriality based culpability are exposed; in the latter case, the German Government made no attempt to argue that the Federal Republic (in 2007) was an inappropriate defendant to claims based on the actions of The Reich’s armed forces which were responsible for the executions in Greece. Furthermore, the Court in *Lechouritou* did not make any distinction between the powers of the occupying Reich state and those of the defendant, present-day Germany. On a more general level, it has never been suggested by contemporary (West or united) Germany that it has no responsibility in relation to the many extermination camps operated by The Reich which were located outside the territorial confines of the (current) FRG. Against this background it is all the more puzzling that, in a modest and mundane pension case such as *van Coile*, Germany would explicitly establish a limit to the extent of its liability. This limit is ostensibly solely a territorial one but it would seem that economic arguments are likely to be more to the fore. However, should contemporary Germany have to accede to pension claims from all those millions who lived or worked within the territorial limits of The Third Reich then the financial incentives for resisting Jozef van Coile and his small case become a lot clearer. As we will see in further cases discussed below, this lack of a clear legal appreciation of *what Germany is* for the purposes of war based claims still presents problematically before the European Court of Justice. This forum has stalked gingerly around *Kompetenz-Kompetenz* issues with German constitutional law in the past; it is all the more ironic therefore that it should serve as the locale for the potential determination of a much fundamental issue, namely, what is the German state?

## **B. Georges Platbrood**

On 18 November 1999, the Court of Justice ruled in the case of Georges Platbrood.<sup>292</sup> This case also involves a Belgian national affected by the ‘war years presumption’ in Belgian pension legislation. Mr. Platbrood’s case is very similar to that of Jozef van Coile and, indeed, was treated as such by the Court.<sup>293</sup> This case concerned the

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<sup>292</sup> Case C-161/98 *Georges Platbrood v Office National des Pensions* (ONP) [1999] ECR I-8195.

<sup>293</sup> The cases were not formally joined and they originated in two separate Article 234 referrals (Van Coile’s from the *Arbeidsrechtbank*, Bruges and Platbrood’s from the *Tribunal du Travail*, Mons) but they share the same Advocate General, who issued a more or less identical Opinion in both cases on

calculation of a retirement pension and the interpretation of Article 46b(2) and Article 46(1)(a)(i) of Regulation (EEC) No 1408/71. Mr. Platbrood was already in receipt of a partial German pension in respect of periods of employment between 1938 and 1945. Subsequent to the award of that German pension by the German institution, his Belgian pension was recalculated by the Belgian pension award body. As in *Van Coile*, the provision underlying the recalculation was the so-called 'war years presumption'.

Georges Platbrood was born in 1922 and worked as in Belgium in 1941 and 1942. He was deported from German occupied Belgium in 1943 and forced to work from 29 March 1943 to 30 April 1945 in Luckenwalde in the future, now former, GDR.<sup>294</sup> Having returned to Belgium at the end of the war, he then completed his military service from December 1945 to December 1946<sup>295</sup> before working, from October 1947, in the Belgian public sector. The judgment does not record the nature of his forced labour in Luckenwalde. That city, south of Berlin, was the location of Stalag IIIA, a prisoner of war camp where two hundred thousand prisoners passed through during the Second World War. Those remaining in the camp at the close of the war were liberated by the Russian army in April 1945. Approximately 5,000 people died from disease, starvation, cold, brutality and neglect in this camp.<sup>296</sup> It is highly likely that Platbrood was interned there and forced to provide labour in the camp and in Luckenwalde itself. This story of this young man who spent two formative years as a slave labourer alights ever so briefly on the larger map of European history; his is the experience of many millions of other such young men and, were it not for five minutes of 'fame' in a few formal paragraphs in the case reports, his experience too would fade and disappear like that of all the others. It is the mere happenstance of an ECJ court referral that his plight is recorded in any way and, even then, the manner of the recording does a disservice to the nature of the experience. This paper has exposed the many narratives of people like Georges Platbrood, Albert Hoorn and others; lumped together, so to speak, in this fashion we get a glimpse of lives, from all across Europe, disrupted during wartime, in extreme ways. Yet, as these people are paraded, one by one, before the Court in Luxembourg in preliminary ruling cases, their backgrounds receive cursory treatment compared to most other types of matters before that Court.<sup>297</sup> There is a proven, well established pattern of lack of attention to wartime details before the Court, which is not to impute a motive of any sort by generations of ECJ judges but which does beg the question as to why so little in depth interest and investigation occurs repeatedly in these cases.

For Georges Platbrood, the judgment baldly records that because "the former GDR did not award pensions in such cases he did not apply for one". This simple utterance hides

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the same day, as well as the same judges (and Rapporteur). Both of these cases also share doctrinal neglect; *Platbrood* has never been academically noted and *Van Coile* is the subject one short note only (L.Bakers, (1999) *Nederlandse staatscourant* 4).

<sup>294</sup> Typical of the hands-off approach of the European Court of Justice in wartime cases, the case Report does not even record 'who' deported him (even if it is obviously the German occupying authorities) and certainly not any of the circumstances behind the deportation.

<sup>295</sup> This is an interesting minor insight in its own right into a lost generation of European men who suffered in many diverse ways during the war only to, in some cases, have to undertake military service at its end.

<sup>296</sup> <http://www.stalag3a.com/>

<sup>297</sup> Contrast, for example, any average competition law judgment with most of these sparsely worded wartime related judgments.

a multitude of factual and personal information, in fact, the whole of European post-war history. It is hard to recall, almost twenty years since the fall of the Berlin Wall, that the idea of a so-called ordinary Belgian pensioner attempting to get a pension payment from the authorities in the (former) GDR is laughable, let alone a payment related to forced labour during wartime from a state which did not even exist at the time of the so-called work. What this nicely phrased little understatement does not draw attention to, however, is the accountability of the state which did exist at the time of Georges Platbrood's imprisonment, the state which brought that about, namely The Third Reich. As this paper has shown, the Federal Republic of Germany has, before the European Court of Justice, an ambivalent attitude towards the legacy of the Third Reich. In a case like *Lechouritou*, there is an acceptance by the defendant German state in 2007 of the actions of the *Wehrmacht* in Greece in 1943. However, in *Platbrood* and *Van Coile*, responsibility for the statal acts carried out by Nazi Germany, in an area which was actually part of that state (as opposed to an occupied territory like Greece) is denied on territorial grounds only. There is an obvious inconsistency here; it is suggested that there are a few possible answers to this riddle of the complex statal legacy of The Third Reich:

- a) in 2007, it would be deemed diplomatically unacceptable for the FRG to attempt to deny responsibility for the 1943 massacres in Greece;
- b) the very facts of the high profile Greek case (which had been on-going for over 12 years) made it impossible for contemporary Germany to deny its accountability for this particular past, despite its territorial location;
- c) Georges Platbrood and Jozef van Coile were, in comparison, so-called small 'nobodies' claiming insignificant monetary sums in ignored cases;
- d) The FRG has always, in every sphere, denied responsibility for wartime actions which took place on territory which later became part of the (former) GDR (though this clearly is not so);
- e) There is solid legal (for example, a Treaty) basis for the division of (financial and other) responsibility between West and (the former) East Germany (yet, if there is, no mention is made of it in any of the ECJ case law);
- f) Why is it that it was following unification only that pension contributions become payable by (the united) Germany to Platbrood? The non-contested location and dates of the forced labour have not altered since 1989 but what has changed is the territory of the German state. In other words, it seems to be the case that the FRG would not pay a pension because the 'work' had not been carried out in its territory but once Luchenwalde (the location of that forced work) became part of the FRG, then responsibility appeared to flow from the mere fact of territorial re-assignment of that city. This appears to be a convenient but shallow basis for the determination of the statal responsibilities of Germany; the forced labour was inflicted by a Germany but the politics of the Cold War permitted *two* Germanys to evade (financial) responsibility for it.

In 1986, Platbrood was awarded a Belgian retirement pension calculated on the basis of a representative fraction of his employment record of 6/45 for the years 1941 to 1946. The statutory presumption established in the first paragraph of Article 32 of the 1967 Royal Decree covered the years 1943 to 1945. In 1994, after German unification, Georges Platbrood lodged an application for the award of a German pension. In July

1995, the competent German institution, the *Landesversicherungsanstalt Rheinprovinz* (Regional Insurance Office for Rhine Province), acknowledged a German pension entitlement in the amount of DEM 465.12 a year, covering the period from 29 March 1943 to 30 April 1945. This German award led the Belgian authority to recalculate and reduce the pension it had earlier given Mr. Platbrood. It transpired, however, that the effect of this double pension award was in fact an overall reduction in payments to Georges Platbrood. He suffered, therefore, firstly because of his forced labour in The Reich and then as an individual disadvantaged directly by German unification. The pension deficit was rectified by a supplement from the Belgian pension authorities but Platbrood's application for a review of this decision (based on Regulation 1408/71) was denied with the Belgian authorities refusing to recognise the war years presumption for the years 1943 and 1944. It was against that decision that Platbrood took legal action resulting in the preliminary ruling case before the European Court of Justice. The referring court makes it clear that "the advantages granted to the plaintiff by Germany represent not reparation in respect of the plaintiff's deportation and forced labour but, rather, a retirement pension in respect of contributions made in Germany."<sup>298</sup> It is curious that the court should specifically draw attention to this fact of lack of reparation from Germany for Georges Platbrood but. Perhaps, even more curious is the fact that this former slave labourer seemingly did not seek such reparation (for suffering) but, instead, claimed what he regarded as rightly due to him in relation to work undertaken. In respect of the dispute over the pension, the referring court essentially asked the European Court of Justice to clarify the issue as to whether the provision that the war years presumption could be rebutted by evidence of an insurance period completed in another state represented 'an anti-overlapping provision' within the meaning of Regulation No 1408/71.

The Opinion of Advocate General Alber largely confines itself to a rational assessment of the pension dispute and does not stray into political events of the past, neither of wartime nor of the Cold War era. However, he does observe that "it should not be forgotten that the sequence of events [behind the dispute] was an inevitable consequence of the political developments associated with the reunification of Germany."<sup>299</sup> Later, he also acknowledges that the Belgian war years presumption was "required to mitigate the problems maintaining regular employment in the difficult social and political conditions which prevailed during the war, on the one hand, and providing evidence of such regular employment, on the other."<sup>300</sup> Finally, with a brief acknowledgement of the sad irony of a wartime forced labourer having to fight for his pension rights, Mr. Alber states that "Considerations of justice likewise favour the interpretation [that] neither the Belgian nor the Community legislature can have intended workers who had been obliged to work as forced labour in another Member State during the war, to be worse off as a result of that circumstance, when the time came to calculate their old-age pension, than they would have been had they been in employment which was not subject to compulsory social security contributions, or which they could not substantiate."<sup>301</sup> Such "considerations of justice" rarely prevail in wartime cases at the Court. This Kafkaesque nightmare scenario of a 77 year old man

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<sup>298</sup> Paragraph 13 of the Opinion.

<sup>299</sup> *Ibid.* paragraph 28.

<sup>300</sup> *Ibid.* paragraph 37.

<sup>301</sup> *Ibid.* paragraph 38.

battling in the courts of the Member States and the EU simply because he had the double misfortune to be forced to work in the ‘wrong’ part of Germany, and was thus a victim of both the war and the Cold War, is hard to countenance. It is, therefore, all the more surprising that there is no exposure at all in the judgment or the Opinion of the conditions of Georges Platbrood’s forced labour; it is referred to as ‘work’ by the Court, and indeed by the plaintiff himself,<sup>302</sup> and is used as the basis of a pension payment but it is quite extraordinary to think that such an abnormal form of ‘work’ in Luchenwalde, in 1943, can be processed in Luxembourg, in 1999, in such a perfunctory manner.

The Court, largely relying on its own previous pension case law, focuses mainly on the categorisation of national provisions for the reduction of pension benefits. However, it does distinguish this mainstream pension jurisprudence to some extent in recalling that “in the present case, the war years presumption is part of legislation whose purpose is to reduce the damaging effects of the Second World War on the pension rights of workers subject to Belgian legislation.”<sup>303</sup> The judges, however, treat the circumstances of Georges Platbrood’s ‘work’ as if it had occurred in unremarkable, indifferent conditions. The tone of the judgment is neutral and detached (“by the mere fact that he had worked in Germany for a certain time”).<sup>304</sup> In the view of the Court, the payment of a pension by (united) Germany in respect of “the periods of employment” there meant that the Belgian war years presumption could no longer be applied to Georges Platbrood. In other words, this statutory presumption was intended to benefit those whose wartime employment circumstances were unclear or impossible to establish. As long as this presumption operated in favour of Platbrood he had no dispute as to his pension; once Germany had agreed to pay a pension, clarity was established and overrode the application of the Belgian presumption. The net result, therefore, according to the Court, was that the disputed Belgian provision could not be categorized as “a provision on ‘reduction’ within the meaning of Regulation No 1408/71.”<sup>305</sup> With this, the Court closed the case, and the tale, of one unknown, Georges Platbrood, former forced labourer and loyal Belgian citizen whom fate had placed at the wrong side of the European political divide. Simply put, Community law did not apply to his situation. To this reader, the Platbrood narrative calls out for a European solution to a fundamentally European problem. The EU was not devised as a repository for the injustices of the past (in contrast to the organs of the Council of Europe which were, to some extent) but this case presents with an injustice of the *present* which happens to be directly connected to the whole course of European and German history since 1939. The rigid formalities of Regulation 1408/71 cannot provide any formal resolution, but considerations of justice above and beyond an outdated and confined 1970’s piece of legislation would suggest the Court had the capacity (if not the will) to address this situation in a more involved and engaged manner.

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<sup>302</sup> On 30 January 1996, referring to Regulations No 1408/71 and 1248/92, Mr. Platbrood claimed, with effect from 1 June 1992, the retention of the full German pension in addition to his Belgian pension, since he had worked for a German employer for at least one year during the Second World War. That application was rejected by the ONP on 16 April 1996.

<sup>303</sup> Paragraph 28 of the Judgment.

<sup>304</sup> *Ibid.* paragraph 32.

<sup>305</sup> *Ibid.*

### C. *Carlo Fossi*

We return to the 1970's with this next case study which raises similar concerns to *Platbrood* but from a different political perspective. Again, the legal context is the relationship between Regulation 1408/71 and employment within German territory during the Second World War. This is a reference from the *Bundessozialgericht* (the Federal Social Court) in the case of *Carlo Fossi*<sup>306</sup> where a question is raised as to the interpretation of Article 3 of Regulation 1408/71. Mr. Fossi, an Italian national, worked from June 1942 until July 1943 as a miner in the Sudetenland, an area which was at that time part of The Reich<sup>307</sup>. He had paid the compulsory invalidity and pension payments required at the time under Reich legislation governing social security for mineworkers. These details offer a small insight into the quotidian reality of wartime Europe. First, they suggest that there was apparently some free movement of workers between politically allied Member States (namely The Reich and Italy) and, also, that The Reich, despite wartime disruptions in 1942 and 1943, continued to manage the administration of its industries in an efficient manner. In 1958, Fossi was awarded an invalidity pension in Italy and, in 1970, he applied to the German Mineworkers insurance fund for a pension based on his compulsory payments during 1942/3. The Insurance Fund made the award in principle but refused to pay it on the basis that the work had not been completed within the territory of the Federal Republic of Germany. This territorial argument has clearly been running for quite a time, from 1977 until 2007 in fact, when claims for pensions from Germany are still being denied by the (or a different) German State on the basis of no accountability for work done in German occupied territories.<sup>308</sup> Taken to its logical conclusion, the suggestion in this persistent statement of territorial limitations to the responsibility of the Federal Republic has wide ranging connotations. The majority of the concentration camps operated during the National Socialist regime, and the totality of what are termed 'extermination camps', are located outside the territory of what is now Germany. There has never been any suggestion by the Federal Republic of Germany that its current state borders should limit culpability in relation to the genocide carried out within the territory of The Third Reich. Furthermore, in *Lechouritou*, the defendant Germany made no attempt to suggest that the massacre of civilians in Greece in 1943 was not its responsibility and, indeed, though the European Court of Justice is equivocal on the extent and effects of that responsibility, it is very clear from the judgement that the Court sees Germany as having jurisdiction over its occupied territories at the time of The Reich. How, therefore, can a denial of a pension benefit be based on a territorial limit, and more importantly why? The potential economic consequences are obviously a major factor here but it is surprising that practical considerations should be permitted to trump such a crucial principle underlying the integration process, namely the 'problem of Germany'. It is apparent from these cases that even after 60 years this is still an issue for the construction of closer union in Europe.

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<sup>306</sup> *Carlo Fossi v Bundesknappschaft* Case 79/76, [1977] ECR 667.

<sup>307</sup> As is well known, The Munich Agreement of 30 September 1938 (between Italy, France, The Reich and the UK), authorised the immediate occupation by The Reich of that part of Czechoslovakia known as The Sudetenland. The Czechoslovak government was not invited to participate in the Munich talks.

<sup>308</sup> See case C-396/05 *Habelt et al v Deutsche Rentenversicherung Bund*, judgment of 18 December 2007, discussed below.

What might have inspired a man such as Fossi to take this action in this first place? One assumes that, unlike Platbrood and van Coile, his employment in the Sudetenland was voluntary and, therefore, that his work directly supported the regime of The Third Reich. To attempt to gain compensation from that work thirty years later may seem inappropriate but no more so perhaps than Josef Baldinger's claim. The European Court of Justice confines itself to considering whether the relevant provision in the German legislation prevailing at the time of Fossi's work is covered by Regulation 1408/71. In a move that goes further than the judgment in *d'Amico*, the Court acknowledges the precarious insurance/pension position of many refugees and deported persons affected either by the non-existence of the competent institution at the time of their claim or by the fact that such institution was situated outside the territory of the current German state. German legislation of 1953<sup>309</sup> took responsibility for rights of such people whether or not they were German nationals. That legislation, as amended in 1960, provided for the suspension of pension/insurance payments in the circumstances covered if the claimant (though proved to have an entitlement) is habitually resident outside the territory of the Federal Republic. The Court acknowledges the legacy of wartime but uses it negatively against the claimant. Referring to the purpose of the 1953 legislation which is "to alleviate certain situations which arose out of events connected with the national socialist regime and the second World War", together with the fact that the competent awarding institution no longer exists or is outside the Federal Republic, the social security nature of the award claimed by Carlo Fossi is denied and, therefore, Regulation 1408/71, and Community Law in general, has no applicability to his case. This constitutes a clear statement from the Court that the Federal Republic should have no economic responsibilities arising from the occupied territories of the National Socialist era. The European Court of Justice upholds the view that Germany (of 1977), for the purpose of any such wartime related claim, is not required to look back to a Germany of the past. Given this precedent, it remains to be seen how the Luxembourg Court, in 2007 and 2008, deals with Irene Werich, Doris Habelt and Martha Moser who are all effectively making the same claims today which Carlo Fossi did 30 years ago.

## **6. Vorsprung durch Vergangenheitsbewältigung<sup>310</sup>**

*Useless to think you'll park and capture it  
More thoroughly. You are neither here nor there...*<sup>311</sup>

The pasts of Europe are very obviously still part of its present. In this paper's analysis of the history within the EU it has proven impossible to close with any finality because that history resists categorisation as such given that the legacy of wartime is a reality before the judicial branch of the Union. This part of the paper casts an eye over what the

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<sup>309</sup> The *Fremdrenten-und-Auslandsrentengesetz* of 1953.

<sup>310</sup> Which might roughly be translated as 'Forward through glancing backwards'.

<sup>311</sup> S. Heaney, "Postscript" from *The Spirit Level* (London: Faber and Faber, 1996).

future potentially holds for Europe's diverse pasts as they unravel before the Court. Wartime cases awaiting judicial assessment are briefly analysed here with a view to locating the past in a potential future. The type of situations which are before the Court are generally similar to the majority of those explored above, namely, individual, elderly Europeans seeking financial compensation of some sort in relation to their wartime experiences. One case study departs from that rubric in that it involves German legislation governing the management and control of the VW car company. Each of these cases gives a small insight into the twilight legacy and residual presence of wartime which is intertwined fundamentally with integration in Europe. This closing section of the paper carries perhaps a particular resonance as it is obviously a matter of not very much time before the Court ceases to be the recipient of such cases given the age of the individuals involved. Finally, it is also notable that all the claimants in these current and ongoing cases are women; the voice of the European carrying memories has become a noticeably female one.

#### **A. *Krystyna Zablocka-Weyhermüller***

The most recent reference to the Court on a wartime matter occurred on 2 May 2007 when Krystyna Zablocka-Weyhermüller lodged a case<sup>312</sup> before the European Court of Justice which makes direct connections between EU free movement principles and the legacy of wartime. The legal issues and the questions she raises are by now rather familiar to the reader of wartime cases, namely the compatibility of German pension legislation with "higher-ranking European law, in particular the principle of freedom of movement". The case may specifically require the Court to revisit, once again, the issue of the territorial limitations of the Federal Republic. This is because the case has a Polish element which suggests that the claimant, Zablocka-Weyhermüller, is resident in Poland but is either in receipt of or is claiming a pension under German war pension legislation. What is interesting, however, merely from the short question submitted to the Court, is that the referring Court (the *Sozialgericht* Stuttgart) specifically bypasses the 'wartime exclusion provision' namely Article 4 (4) of Regulation 1408/71. The referring Court's question directly pits German war pension legislation against Community law. It obviously remains to be seen how the European Court of Justice will respond to the question of this potential conflict. In a small way, judicial advances in approaches to wartime are reflected in this immediate placing of how one Member State deals with the consequences of war within the framework of fundamental Community law without relying on a wartime 'opt out'. The *Tas-Hagen* judgment signaled a potential change of perspective in this regard when it made clear that fundamental EU law does have a role to play in wartime related cases. A reasonable extrapolation from

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<sup>312</sup> *Krystyna Zablocka-Weyhermüller v Land Baden-Württemberg* (Case C-221/07) where the question referred is: "Are the benefit restrictions laid down in German social compensation law under Paragraph 64e of the Bundesversorgungsgesetz (Federal Law on war pensions - BVG) for those entitled to pensions who have their residence or habitual abode in Poland as a new EU accession state consistent with higher-ranking Community law, in particular from the point of view of freedom of movement?" Interestingly, this case is classed on the Court's records, along with *Tas-Hagen*, under the 'European Citizenship' heading whereas *Werich*, with an almost identical subject matter, appears under 'Social Security for migrant workers' and *Van Coile* and *Baldinger* under 'Free Movement of persons'. This shift in the European Court of Justice's own formal categorisation of these similar wartime cases is a small indicator of an altered perception of the past and the relevance of emergent citizenship law to that past.

*Tas-Hagen* is that the Court has acknowledged a role for the European Union and its law in the management of Europe's pasts and one would legitimately expect this to be reflected in future cases.

### **B. Halina Nerkowska**

Also pending before the European Court of Justice is a reference for a preliminary ruling from the Regional Court, Koszalin, Poland which links a pensions issue with European Union Citizenship.<sup>313</sup> The question referred is "Does Article 18 EC, [...] preclude the binding force of the national rules (laid down in Article 5 of Law on provision for war and military invalids and their families 1974) in so far as they make payment of a pension benefit for incapacity for work that is linked to a stay in places of isolation subject to fulfillment of the condition that the person entitled be resident in the territory of the Polish State?" In other words, Poland's 1974 law on the payment of war pensions is contingent on the recipient being resident in Poland and this residence requirement may conflict with EU citizenship and its fundamental free movement dimension. A curious aspect of this case is the concept of a pension or invalidity benefit 'linked to a stay in places of isolation'; this Polish legislation dating from the Communist era, is somewhat ambiguous but appears to be designed to cater for the practice of internal exile within the Soviet bloc.

Halina Nerkowska's case specifically refers to EU Citizenship<sup>314</sup>. The fact that her case deliberately refers to citizenship offers the potential for a direct connection between the past and one of the major innovations of European integration. Intellectually, her case is an acknowledgement of the rightful place of such claimants within the broad spectrum of the EU legal order. Morally and emotionally the message is more complex but might be summarized as: are those who suffered in the name of an abstract concept of 'Europe' to be rewarded by Europe? Should her case be successful then it does not remedy those earlier cases decided by as if by rote under Regulation 1408/71, nor would it serve to make up for injustices meted out to Josef Baldinger and others. But, in no small way, the advances in citizenship and its potential to be employed towards this category of people who literally built Europe is an enlightening.

On 28 February 2008, the Advocate General Opinion in *Nerkowska*<sup>315</sup> followed the *Tas-Hagen* precedent and asserted the applicability of EU citizenship law to the contested 1974 Polish legislation. This legislation was used to prevent the Polish claimant receiving a full invalidity benefit (in respect of her time in exile in Siberia as a child)

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<sup>313</sup> Lodged on 8 December 2006, *Halina Nerkowska v Zakład Ubezpieczeń Społecznych* (Case C-499/06).

<sup>314</sup> Case C-499/06 reference from the Sąd Okręgowy w Koszalinie, *Halina Nerkowska v Zakład Ubezpieczeń Społecznych*. Question referred: Does Article 18 EC, which guarantees citizens of the European Union the right to move and reside freely within the territory of the Member States, preclude the binding force of the national rules laid down in Article 5 of the Ustawa o zaopatrzeniu inwalidów wojennych i wojskowych oraz ich rodzin (Law on provision for war and military invalids and their families) of 29 May 1974 (*Dziennik Ustaw* (Journal of Laws) of 2 September 1987, as subsequently amended) in so far as they make payment of a pension benefit for incapacity for work that is linked to a stay in places of isolation subject to fulfilment of the condition that the person entitled be resident in the territory of the Polish State? OJ 2007 C20/14.

<sup>315</sup> Opinion of Advocate General Poirares Maduro in *Halina Nerkowska v Zakład Ubezpieczeń Społecznych* (Case C-499/06) 28 February 2008.

because she was resident in Germany. Building upon the principle established in *Tas-Hagen*, Mr. Póiaros Maduro acknowledged Member State competence in this area as reflected in Article 4 (4) of Regulation 1408/71. However, as he concludes, developments in citizenship have effectively ensured that Member States must exercise that competence in the light of EU citizenship. It is not possible, he suggests, for Poland to refuse to offer the benefit claimed by Nerkowska solely on the basis that she was not resident in Poland. Such a refusal is, according to this Advocate General, contrary to the free movement principles inherent in EU Citizenship. Citizenship, in essence, trumps Member control and competence in relation to war related payments and benefits.

### ***C. Irene Werich***

The case of Irene Werich,<sup>316</sup> also currently awaiting judgment, tells another story of the Union's past through the claims of a pensioner. Born in Hungary, she worked during the war in a town which is now in the Czech Republic but which was then under German occupation. She is now a Swedish national (having lived there since 1948) and is 87 years old having been born in 1920 in Kecskemet, Hungary. She worked from 1 April 1939 to 21 June 1945 in the border town of Tetschen (now Decin), a town now located in Bohemia in the Czech Republic (and formerly in the area known as the Sudetenland). She worked first as a secretary and then from November 1940 as a manager in the firm of Hugo Kraus. Her wartime experience, therefore, was a genteel one presumably, of regular, voluntary employment in a lovely town on the Elbe, seemingly untouched by any of the travails of war. She made obligatory contributions to the German pension system until 30 April 1945 to the body established for such purposes (the *Reichsversicherungsanstalt für Angestellte* (RfA)) after the annexation and occupation of the Sudetenland by The Reich. This is an insight into a normalized wartime experience; no forced labour, no guns, no camps, just a young Hungarian women working in the heart of wartime Europe. It reveals how normality in wartime Europe contrasted with the bitter experiences of so many millions of others. Irene Werich first applied for a pension from Germany in 1988 but was refused. She resurrected the claim in 2002 after the political events which altered the map of Europe. The basis of the refusal of the second claim was the fact that she had not made any pension contributions in/to the Federal Republic of Germany. An incidental dispute arose as to contributions between 1 May 1945 and 21 June 1945 as no proof was provided, nor could be, for that period of time. Werich pursued her claim for the "*Reichgebiets-Beiträge*"<sup>317</sup> on the basis, *inter alia*, of nationality discrimination as the refusal was based on her residence and domicile in Sweden. This was countered by the German pension authorities claiming that the only reason she was not entitled to a pension was that contributions were never been paid by her within the territory of the FRG. In other words, the new Germany is not the old Reich and is not to be bound by obligations rooted in the era of that state. Under current pension regulations, no payments can be made abroad if the claim is based on wartime contributions as they are classed as being paid not in the FRG but as having been made in the Czech Republic.

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<sup>316</sup> Case C-111/06 *Werich*. JO 2006 C 326/24.

<sup>317</sup> That is based on contributions made before 9 May 1945 in that part of The Reich's territory which do not form part of the current territory of the Federal Republic of Germany.

Irene Werich's narrative is that of the EU itself; 60 years of Europe's complex, interconnected history encapsulated in this effort to get a pension payment from the state which has dominated European history over that period of time. This case is a reference for a preliminary ruling from the *Sozialgericht* Berlin and the question being posed by the Berlin Tribunal is "whether the provision in point (1) of Annex VI. D to Regulation (EEC) No 1408/71 is compatible with higher-ranking European law, in particular the principle of freedom of movement". The case turns mainly on the fact that the place where Werich worked during the war is now not in Germany, therefore (as the German pension awards body argues), she has no claim against Germany. Furthermore, the matter is squarely one of EU law given that the terms of an EC Regulation seem to explicitly suggest (at least according to the referring Court) that the nature of the German state and its activities during the war should not lead to pension payment obligations by Germany. This is a political and economic Pandora's box; the massive scale of territorial disturbance and military occupation between 1939 and 1945 would potentially implicate many non-German residents in claims similar to that made by Werich. But even more striking is the possibility that Germany would seek to deny responsibility in relation to its past with the Germany of 2008 not accepting responsibility for the people governed by The Reich during wartime. This case, like the many others in this paper, is an untapped reservoir of forgotten lives, experiences and histories.

#### ***D. Doris Habelt and Martha Moser***

EC Regulation 1408/71 has arisen again recently in an Opinion delivered in June 2007 in the case of *Habelt*<sup>318</sup>. The case joins together the claims of two pensioners with similar narratives. This case neatly exposes the plight of those with German nationality living outside Germany who found themselves unwanted and resented in their countries of residence after the war. Doris Habelt was born in January 1923 in the (former) Sudetenland, in Jilové (Eulau), now in the Czech Republic. She worked there from January 1939 until May 1946, paying (until April 1945) obligatory pension contributions to the *Reichversicherungsanstalt für Angestellte*, the pension body established by The Reich after the occupation and annexation of the Sudetenland. She was expelled from Czechoslovakia in 1946 (at age 23) and lived thereafter in the Federal Republic. Neither the context of the expulsion, nor the work undertaken by the young Doris Habelt are detailed in the Opinion. However, an assumption can reasonably be made that Mrs. Habelt was one of the more than three million ethnic Germans in the area which had been assigned to Czechoslovakia under the Treaty of Saint-Germain in 1919 and whom, under the Potsdam Conference of 1945, were authorized to be expelled.<sup>319</sup> From 1988 onwards Doris Habelt received a German pension which took

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<sup>318</sup> Advocate General Trstenjak's Opinion of 28 June 2007 in joined case C-396/05, C-419/05 and C-450/05 *Doris Habelt, Martha Möser, Peter Wachter and Deutsche Rentenversicherung Bund*.

<sup>319</sup> After the end of the Second World War, the 1945 Potsdam Conference determined that Sudeten Germans would have to leave Czechoslovakia. As a consequence of the hostility against Germans that had grown within Czechoslovakia during Nazi occupation, the overwhelming majority of Germans were expelled. The number of expelled Germans in 1945 is estimated to be around 500,000 people. There were about 24,000 known deaths directly related to the expulsions (this includes murders as well as suicides or deaths from disease, old age, etc.). The property of Sudeten Germans, claimed to be part of war reparations, was confiscated by Czechoslovakia pursuant to the Beneš

into account periods of employment (and pension contributions) between 1939 and 1946. In 2001, however, she moved to Belgium which resulted in a recalculation of her pension which meant she received about 200 Euros less a month. This was due to the recalculation being based on contributions made while she lived in the territory of the Federal Republic. The contributions made between 1939 and 1945 were therefore not taken into account once she ceased German residency and moved to Belgium. The German legislative provision governing this recalculation referred to contributions made in “on the national territory” which phrase does not encompass the territory of The Reich but referred only to the FRG. In Habelt’s legal dispute with the defendant pension authority the referring court asked a question which essentially raised the compatibility of Regulation 1408/71 with EU free movement law.

In the second set of facts in this joined procedure, Martha Möser, who was also born in January 1923 but in Pniewo, Poland, fled from the Soviet occupation of the area in 1946 and took up residence thereafter in the Federal Republic. No historical detail is provided but the presumption is that Martha Moser was one of the many Germans who escaped or were expelled from Poland after the Second World War.<sup>320</sup> Since 1988 she was in receipt of a German pension which took account of contributions made between April 1937 (when she would have been just 14) and February 1945 for her work undertaken in Pomerania, part of the territory of The Reich (and now in Poland). Martha Möser moved to Spain in 2001 (and in 2004 to the UK) and her pension suffered the same fate as that of Doris Habelt, namely a recalculation and reduction on the basis of contributions made in the territory of The Reich not being taken into account once she moved away from the FRG.

As a preliminary observation on the applicability of Regulation 1408/71, the Advocate General remarks that it is intended to permit the FRG to maintain its pension legislation for those of German origin who lived in the eastern territories of the former Reich, effectively classed as refugees under Article 1 of the *Bundesvertriebenengesetz* (the BVFG) which provides that pensions rights accrued there under cannot be paid abroad.

However, the issue is, how does this national provision fare when it potentially conflicts with Community free movement law? The German government is of the view that the disputed pension in this case ought to be classed as war victim payments which therefore would not fall within the ambit of Regulation 1408/71 (because of the Article 4 (4) exclusion). However, it is not at all certain that Doris Habelt and Martha Möser were war ‘victims’ – in fact they seem to have led so called ordinary lives for the duration of the war and experienced expulsion or voluntary exit from their homelands only after the war because (it is assumed) they were of German origin. In asserting this competence issue, the German government relies on the Court’s case law, in particular *Fossi* and *Tinelli* in which it claims that the Court stated that ‘benefits’ arising from or relating to a period before 1945 outside of the territory of the FRG are not be classed as social security benefits. These rarely cited cases from the 1970’s suddenly emerge as significant in 2007. It is a matter of EU judicial history in its own right that such old and insignificant case law should be called to the fore by a Member State intervention in a

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decrees. During 1946, a total of 2,232,544 people were transferred to Germany: two-thirds of them to the American sector, and one-third to the Soviet sector. Approximately 244,000 Germans were allowed to remain in Czechoslovakia.

<sup>320</sup> T. Judt *Postwar* (2007).

seemingly minor case. The German Government outlines in detail the reasoning of the seventies judges but, just as the flares of the Seventies might have a certain kooky cuteness in fashion terms, these judicial pronouncements and the reliance on 1408/71 with its restrictive and outdated tone appear out of place and out of time. A Union which has, whatever its many political flaws and turbulences, demonstrably made huge strides forwards in the conceptual development of the issues underlying the European legal order does not sit easily with this reliance on retro reasoning.

The discrepancy between the amount of, or the economic significance of, the claim is very much at odds with the extent of the defence mounted by the defendant (a federal body) and the German state itself. Why would a few euros a month to an 84 year old Sudeten German, a symbolic relic as it were of Europe's dark days now living (also symbolically) at the heart of the EU, become in 2007 a matter of defence by the German state. This is a curious anomaly which has been observed in several instances of wartime claims; the small request of David is batted back with relative ferocity by Goliath, a Goliath seemingly defending economic interests but with little overt justification.

Advocate General Ruiz Jarabo Colomer's impassioned pleas for citizen Baldinger marked a watershed in the mood of European justice for those with wartime claims. This was followed expressly by Ms. Kokott in *Tas-Hagen* where both Court and Advocate perceive the need to input citizenship thinking into wartime related cases. In *Habelt*, the Advocate General follows suit; in denying the special payment categorisation under the German legislation, the Advocate General draws attention to the fact that the contributions made by Habelt and Möser during the era of The Reich were made in good faith to a legally operating German insurance award body.<sup>321</sup> Free movement should not engender a loss of benefits as it had done *de facto* in the cases of Doris Habelt and Martha Möser. Distinguishing previous case law such as *Baldinger*, the Advocate General is of the view that the close relationship between the events of the war (Baldinger was a German soldier) justified the Court's (restrictive) classification of the disputed payments as discretionary national payments. This is pure semantics as well as a convenient re-writing, narrow interpretation of the case law; the lengthy exposure of case law in this paper has shown that the tendency of the Court to favour national control over war based payments and to set aside (or not even mention) Community 'higher' law has arisen in many circumstances even when the 'close relationship' with wartime was not as marked as it was in the case of Baldinger. The Advocate General makes an interesting distinction between contributions made in a foreign regime, that is to say 'non-German' as opposed to those made on the territory of The Reich which were governed by a German pension body. This is an explicit statement or opinion as to German (that is the FRG) responsibility for activities which occurred during the period of The Reich.<sup>322</sup> As has been many times observed in this paper, this is not a view endorsed or supported by previous similar case law. There is a very explicit drawing of a connection between the FRG and The Reich in this Opinion, exactly the type of link denied or not made in many other cases. Germany of 2007 cannot rely (as it may have done in earlier decades) on an explicit distinction between The Third Reich and the FRG. Germany is still responsible, according to this Advocate

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<sup>321</sup> Paragraph 52 of the Opinion.

<sup>322</sup> *Ibid.* paragraph 58.

General. Germany is Germany, despite all the territorial and political changes and upheavals. Reframing German responsibility in this vein means that the justification for the payment of an old age pension cannot lie in a purely arbitrary or discretionary decision of the FRG authorities which may see itself as historically responsible for victims of National Socialism but, rather, in a legally established right under German pension regulations. To sum up; the German government sought to remove this dispute and the payments from the scope of Community law by classing them as discretionary war victim payments (that is, by explicitly referring to the war but using it to assert sole German competence over the dispute) and by also explicitly distancing the FRG from The Reich regime. In contrast, the Advocate General's perspective is that The Reich's bodies and institutions were 'German' (in other words linking the FRG with The Reich) and pension contributions made to them should be recognized as equivalent to payments made within the German territory of The Reich and treated as such, that is as ordinary pension payments not affected by wartime turbulences and thus not permitting the FRG to treat wartime claims such as this as being within the preserve of some specifically German form of (discretionary) 'guilt' payment. Essentially, Germany is using the war as an excuse not to have to pay pensions to those not residing within the FRG but the Advocate General does not see the war as in any way affecting Doris Habelt and Martha Möser (or rather not any more than it obviously did at the time).

This case presents the opportunity to examine the compatibility of the German pension legislation with 'higher' Community law, including Article 18 on citizenship of the Union. This was raised in *Baldinger* in directly related war circumstances and used by the Court in *Tas-Hagen* but otherwise these war cases, with old people, old facts and old stories, have remained a progress free zone in terms of the applicability of new legal concepts. Quite simply, it is clear from the facts that the mere fact that Doris Habelt and Martha Möser moved to another Member State resulted directly in a loss of pension, clearly constituting an impediment to their free movement rights. By logical extension, their rights as EU citizens under Article 18 EC have been infringed.<sup>323</sup> Germany, however, is asserting the competence to adopt special legal rules for groups of people who acquired contributory rights in the territory of The Reich. One consequence, because of the extent of territory of The Reich, is the presence of a group of unmanageable or unknowable people having potential rights because of wartime events during which large parts of Eastern Europe were under German occupation.<sup>324</sup> The fear of the FRG is to be inundated with pension claims from those who lived in and were governed by the National Socialist regime and the only way of limiting such a potentially large group of people is to impose residence restrictions. This line of argument takes the *Habelt* case to the forefront of the covert sensitivities which still linger as regards Second World War consequences and effects. Essentially, Germany is making the argument that if *all* the people who were exposed to Reich institutions (especially pension insurance bodies) were to make financial claims upon Germany that would impose an impossible economic burden on that state. This takes us not only to the core of this case and the vigilant German government defence but directly to the heart of the reality of wartime in Europe. The National Socialist regime annexed or occupied very large parts of Europe and the logical extension of that territorial control is

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<sup>323</sup> The Advocate General specifically relies on the *Elsen* case here; *Elsen*, C-135/99 [2000] ECR I-10409.

<sup>324</sup> Paragraph 72 of the Opinion.

economic responsibility. But that is precisely what Germany is seeking to avoid by attempting to distance itself (legally) from the old regime and its institutions.

But if Germany is not responsible then which state is? Furthermore, there are larger issues at stake here; pushing away, on economic grounds, people who were subject to Nazi governance implies an allied alienation of those who were subject to Nazi brutality and evil. A Gordian knot for Germany? It would be unacceptable and impossible for the Federal Republic to distance itself from the brutal manifestations of the National Socialist regime but it clearly wishes to do so as regards all other aspects of the Nazi state. This is why the Federal Republic's lawyers are out in force in *Habelt*; Doris Habelt and Martha Möser represent the tip of a potential economic nightmare for Germany. If all non-residents who were subject to Reich pension regimes were to make similar claims then what would be the cost to Germany? To the extent that the German government refers to these financial risks, insufficient proof of this is provided. In particular, it did not produce evidence as to the precise numbers of people which might be involved nor the estimated costs to the FRG in the case of a payment of old age pensions to these people. This conclusion of the Opinion is that Article 18 EC is "manifestly breached" by national legislation such as that in this dispute which guarantees the social integration (in the home state) of a certain category of persons but which at the very same time works to prevent their social integration in other Member States.<sup>325</sup> It is ironic indeed that Doris and Martha in their youth should encounter citizenship issues of one sort (namely being citizens of one country but nationals of another), a set of circumstances which determined their lives and place of residence, and seventy years later, the double nature of another kind of citizenship potentially steps in to assist them.

This Opinion, and the arguments submitted by Germany, will ensure that *Habelt* marks a significant turning point in the treatment of, and approaches to, wartime cases in Luxembourg. Whatever the eventual result before the Court, this case has neatly rounded off all the others which went before for over thirty years. It is ironic that, just as the generation of people who can be potential wartime claimants is decreasing, a more just and humane approach is emerging from the EU. Ultimately, the Union is acknowledging a role in the unraveling of wartime in Europe. Too late for Paulin Gillard and Josef Baldinger *et al* but not too late for justice in Europe and for a sense of same emanating from the EU. If the EU is seen to be unwilling to engage with the horror and inhumanity in its own past how, legitimately, can it extend a trustworthy humanitarian arm towards the rest of the world? If the EU, at least in one of its institutional manifestations, separates itself so efficiently from the events of the past how can it preach a different message externally? This paper has shown that, for many decades, the air conditioned, *salon climatisé* Community did not permit the legacy of war to enter. *Habelt* has potentially altered that and it remains to be seen how open the Court is now prepared to be.

On 18 December 2007<sup>326</sup>, a Grand Chamber of the European Court of Justice had the opportunity to consider the Regulation 1408/71 exception established for Germany to the principle that old-age pensions acquired under the legislation of a Member State

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<sup>325</sup> Paragraph 81 of the Opinion.

<sup>326</sup> Judgment of the Court of Justice in Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt, Möser and Wachter v. Deutsche Rentenversicherung Bund*, 18 December 2007.

must not be affected by the fact that the recipient lives in the territory of another Member State. This exception provided for, *inter alia*, the inclusion of contribution periods completed outside the territory of the Federal Republic of Germany to be made subject to the condition that the recipient reside in Germany. The Court rejected the argument that old-age benefits in respect of contribution periods completed between 1937 and 1945 must be considered to be benefits for victims of war or its consequences. Secondly, the Court found that the situation of Doris Habelt and Martha Möser *did* fall within the scope of Regulation 1408/71. The pension due to them represented the counterpart of contributions which they paid to insurance bodies of The Reich and subsequently of the Federal Republic. The refusal to take account of the contributions paid between 1937 and 1945 was found to constitute an obstacle to their right to freedom of movement within the Union. In the absence of any objective justification for that obstacle, the Court concluded that the contested German legislation which made it possible to make the inclusion of contribution periods completed outside the territory of the Federal Republic to be subject to the condition that the recipient reside in Germany was incompatible with free movement law.

#### *E. VW*

Advocate General Ruiz-Jarabo's assessment of wartime events arises again in the rather different case of *Commission v Germany*<sup>327</sup> where a question of company law and free movement of capital leads to an analysis of the position of the Volkswagen company in Germany during the Second World War. The legislation relating to shareholdings in the VW company is deemed by Mr. Ruiz-Jarabo to strengthen the position of the German Federal Government and that of the Land of Lower Saxony by preventing any effective intervention in the management of the company. Furthermore, as regards the justification of restrictions on the free movement of capital being based on the historical background to the legislation at issue, the Advocate General concluded that the German Government's approach was too "wide and too far removed from reality and is not based on overriding reasons relating to the public interest."

This narrative is dissimilar to the individual stories explored above but it, none the less, explicitly summons up another aspect of the Union's proximity to the past. The "National Socialist origin" of the Volkswagen car company is recalled in the very first line of the Opinion. At issue is the Volkswagen Law of 1960 which transformed the company from a 100% state-owned enterprise to a limited company with certain rights and privileges reserved for both federal and state (*Land*) entities in the ownership and control of the company. The Advocate General believes that it is impossible to understand the nature of this case (an Article 226 EC enforcement against Germany by the European Commission) without appreciating the historical context of Volkswagen.<sup>328</sup> This appreciation brings us immediately to the rise to power of Adolf Hitler in January 1933 and the launch of the competition to design a 'people's car'. The history of VW is intimately connected with the National Socialist regime; it involved the plan to produce a simple, accessible and affordable car, the production of which was

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<sup>327</sup> C-112/05 *Commission v Germany*, judgment of 23 October 2007.

<sup>328</sup> A small curiosity; of the three times the word 'Hitler' appears in an ECJ document since 1952, two of these are in Opinions from Mr. Ruiz Jarabo Colomer (the third is in the case of *X and ECB* discussed above).

financed largely by the federal state, supplemented by a scheme whereby German citizens paid by installments and in advance for one of the cars.<sup>329</sup> The production took place in the then largest factory in the world especially built and designated for that purpose. The car was renamed by Hitler himself as the '*Kraft durch Freude-Wagen*' (*KdF Wagen*) ('Power by joy' vehicle). At the unveiling of the first vehicles, Hitler, surrounded by military personnel, enthusiastically endorsed the cars by getting into one driven by the son of the designer, Ferdinand Porsche. There was, from the outset of the VW initiative, a clear and direct connection between the National Socialist political regime and indeed with Adolf Hitler himself. Full time production was due to begin in September of 1939 and as result the initiative gave way to different concerns and the VW factory was used instead for munitions manufacture. During the war, the VW factory was subjected to more than a 1000 tons of Allied high explosive bombs. Having been such a potent symbol for the Hitler regime the remarkable story of VW is that it became in the 50's the noticeable symbol of the re-generation of the new post-war Germany. It was as a result of the need to foster production of the car and handle all the various interests which had originally been involved in financing it in the past that the disputed 1960 legislation at issue in this case came into being after the war.

According to the Commission, that legislation (the Volkswagen Law of 1960) infringes Articles 43 and 56 EC Treaty<sup>330</sup>. Advocate General Ruiz-Jarabo agrees. The 1960 VW Law granted a 20% holding in the company to both the Federal State and the Land of Lower Saxony. In the Opinion, he argues that the 1960 legislation dissuades those wishing to acquire a significant number of shares in the company, given that, amongst the ten members assigned on the basis of capital to the supervisory board, there would be four representatives of a public authority, owning a marginal number of shares. Anyone wishing to acquire a sufficient number of shares in the company to sit on the management bodies would have serious doubts about acquiring more than 20% of the capital because they would have no voting rights above that ceiling. Even if such an investor would succeed in mobilising every small shareholder, there would be no real possibility of achieving any change with more than four fifths of the company capital in the shareholders' meeting because the Federal Government and the Land could block it with their minority holding. The Volkswagen Law of 1960 thus prevents any intervention in the management of the VW company and only strengthens the position of the Federal Government and the Land, thereby restricting free movement of capital. A picture emerges of the VW company, a high profile symbol of Germany itself, still effectively being controlled by the state, just as it has been since its inception under National Socialism.

In The Report of the Hearing for the case<sup>331</sup> the position of the defendant German government is outlined. It refers specifically to the "special rights" of the State in this case asserting that any alleged infringements in the 1960 VW Law are justified by reason of the "particular historical context" of VW and that the Law respects and promotes regional, social and economic policy objectives. This historical context is not detailed by Germany but raising this past as an argument constitutes an attempt at an

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<sup>329</sup> Money confiscated from workers unions (banned under National socialism) was also used to help build the VW factory.

<sup>330</sup> Freedom of establishment and free movement of capital provisions under the EC Treaty.

<sup>331</sup> With many thanks to Dr. Siófra O'Leary.

'excuse' for a potential infringement of fundamental Community Law. For over 40 years, the Federal Republic maintained a legislative provision which, by its own admission, is specifically rooted in the past. The German legislature must, therefore, be presumed to have had a longstanding preference for the maintenance of State and Land control over the *KdF* and its legacy.

The Opinion concludes on the substantive company law that the Federal Republic of Germany is in breach of its obligations under Article 56 EC in maintaining in force the 1960 VW Law. However, it is the Commission attack on the unique position of the VW company and its precise history within modern Germany which renders this case of wider interest. As the Advocate General points out, no one would deny the tenacious success of VW given all the conditions of its origins and early years, but it is precisely because of the demands of European integration that VW has to adapt and leave its past (ownership structure) behind.<sup>332</sup> The VW story and its political connotations are connected very directly with the rise of National Socialism. That story now potentially meets an end point in the courts of the European Union, terminating the relationship between the German state and that evocative little vehicle. Hitler's legacy of control over 'his' *KdF Wagen* thwarted by the European Commission... some confrontations could never be foretold.

In a Grand Chamber judgment on 23 October 2007, 13 European Court judges unequivocally announce the demise of the special relationship between the German state and the VW<sup>333</sup>. This is one of only two judgments analysed in his paper which is a direct action before the Court as opposed to a preliminary ruling referral.<sup>334</sup> The Advocate General's Opinion is not referred to in the judgment and there is no focus by Court on any historical considerations underlying the disputed VW Law. The fact that the Federal State and the Land of Lower Saxony are both granted a special and dominant position in the governance of VW means that the VW Law constitutes a restriction on the movement of capital within the meaning of Article 56 (1) EC. The Court further finds that there are no justifications relating to "a particular historical context"<sup>335</sup> which would justify the maintenance of the VW Law within the German legal order. The German past confronted the European present; the latter prevailed.

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<sup>332</sup> Paragraph 97 of the Opinion.

<sup>333</sup> Judgment of the Court of 23 October 2007 in Case C- 112/05 *Commission v Germany*. For an in depth analysis of the judgment see P. Zumbansen and D. Saam, 'The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism', (2007) 8 GLJ 1027 who observe, at 1036, that "The historical events that gave rise to Germany's argument concerning the 'national measure', however, lend the dispute a highly symbolic dimension. In 1959, an agreement between the workers and trade unions of Volkswagen on the one hand and the Federal State and the state of Lower Saxony on the other concluded an ongoing dispute about the ownership of the then legally ownerless but flourishing Volkswagen undertaking."

<sup>334</sup> The other case being that of *Hartog Cohen v The European Commission* discussed above.

<sup>335</sup> Paragraph 70 of the judgment in Case C-112/05.

## 7. Concluding remarks

*Every contact leaves a trace*

The first law of forensic science otherwise, known as Locard's exchange principle is that "every contact leaves traces".<sup>336</sup> This paper's primary objective has been to expose those 'contacts' which generations of Europeans made with the European Court of Justice, and to analyse the nature and extent of the traces they left behind. It is an examination which has revealed that the judicial history of the Union has confronted the 'dark legacy' on a frequent basis over many years. Why locate these traces? Ultimately, they serve to increase our understanding of the vital relationships upon which integration in Europe is constructed; those of states with states, of states with the Union, citizens with their states and with other citizens and even, or especially perhaps, citizens with the Union. Providing a little historical substance upon which these relationships may rest helps render them more secure even if many larger aspects remain unknown and unknowable. Working through the, or a, past in this fashion serves to connect the Union more concretely with what went before.

In exploring the means to "work through the past" Joerges and his colleagues "hit a nerve" and raised very "unsettling questions".<sup>337</sup> As I have shown, these were questions which had been before the Community judges since 1975, even if they were not phrased so obviously or so elegantly. The questions might have been there but the answers were rarely forthcoming from the Court. Is this a sign of the shallow and superficial Europe<sup>338</sup> which, after Auschwitz, was all we got or deserved to get? The privileging of the commercial,<sup>339</sup> identified by Haltern as the saving grace of the EU denies any deeper significance for integration. Yet, his questions lead to the same kind of reflection which Joerges urges: how can Europeans sustain a shared belief that this is our law, our polity? How can we imagine ourselves as part of one trans temporal Community?<sup>340</sup> After the trail through the past in this paper, it is clear that by facing up the divided past(s) of Europe we will at least start this process and perchance alight upon a less commercial motivation for continued integration, one which sees more innate potential in the 'shopper citizen' than Haltern does.

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<sup>336</sup> Essentially Locard's principle is applied to crime scenes in which the perpetrator(s) of a crime comes into contact with the scene, so he will both bring something into the scene and leave with something from the scene. Every contact leaves a trace: "Wherever he steps, whatever he touches, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints, but his hair, the fibers from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects. All of these and more, bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be wrong, it cannot perjure itself, it cannot be wholly absent. Only human failure to find it, study and understand it, can diminish its value."

<sup>337</sup> C. Joerges, 'Introduction to the Special Issue: Confronting Memories: European "Bitter Experiences" and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts', *Confronting Memories* (2005) 6 GLJ 245 at 247.

<sup>338</sup> U. Haltern, 'Pathos and Patina; the failure and promise of constitutionalism in the European imagination' (2003) 9 ELJ 14.

<sup>339</sup> *Ibid.* p.19.

<sup>340</sup> *Ibid.* p. 24.

This paper had a specific interest in understanding the influence of what the European judges do when meeting history head on. So much of the output, the ‘product’ of integration so to speak, is dense Directive or flamboyant facade so that the much more friable and delicate aspects of integration in Europe which are bonded inexorably with what went before are lost. The European Union, as the TEU blandly reminds us, is about ‘closer union’ but the very notion of achieving ‘closure union’ in a place riven with the memories and consequences of evil and human suffering is far from obvious or mundane. The Union, at a superficial level, represents a vast, fast, gaudy effort in forgetting its history, its histories. The quieter, smaller moments of a court case, where a woman tells her story about the Sudetenland or a man reminds us what it was like to bear arms on the Eastern front, bring the past sharply and shockingly into focus. They prick directly through to the immense burden of a past which the EU covertly carries as it attempts to mediate the relationships of half a billion people. There is no space for clichéd ‘closure’ in the super shiny and efficient EU<sup>341</sup> but I, the citizen, still need to be able to understand that the water I drink is clean because freight trains rolled across Europe transporting millions of people to their deaths a mere 60 years ago. It is hard to avoid emotionally charged rhetoric here but there is a vital connection between the two and therein lies the essence and origin (and future) of integration. The cases discussed in this paper demonstrate that the past is far from being invisible in that process. It is perhaps only the collective perception of that past which is at fault, a convenient blindness which permits the EU to function, but just that, merely function, not ‘work’. If the past can be rendered so easily and readily visible it may be time for a conscious re-positioning of history at the centre, so that memory and responsibility can be reconciled in the right locale. The urgency of this is stressed by Joerges: “What seems indispensable and even urgent in view of the many problems that Europe is exposed to is that our memories, their divergencies and collisions, become an integral part of the European project.”<sup>342</sup>

A final word: Tony Judt reminds us that the Second World War was “primarily a civilian experience”.<sup>343</sup> This paper recalls and recognises some of those civilians, Europeans, whose voices were rarely heard or recorded and to whom we, Europeans of today, are deeply indebted.

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<sup>341</sup> *ibid.*

<sup>342</sup> C. Joerges, ‘Introduction to the Special Issue: Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts’, *Confronting Memories* (2005) 6 GLJ 245 at 253.

<sup>343</sup> T. Judt, *Postwar* (London: Pimlico, 2007) at 13, “Indeed, in those countries occupied by Nazi German, from France to the Ukraine, from Norway to Greece, World War Two was *primarily* a civilian experience. Formal military combat was confined to beginning and end of the conflict. In between, this was a war of occupation, of repression, of exploitation and extermination in which soldiers, storm-troopers and policemen disposed of the daily lives and very existence of tens of millions of imprisoned peoples. In some countries, the occupation lasted most of the war; everywhere, it brought fear and deprivation.”

## 8. Postscript: *Lagol Sipur*<sup>344</sup>

“The memory of the Holocaust is the strongest conceivable *raison d’être* for the integration project.”<sup>345</sup>

Of all the cases and stories revealed in this examination of European Court of Justice jurisprudence with a Second World War dimension I was most struck by the 1983 case of Hartog Cohen.<sup>346</sup> This Jewish Dutchman was involved in the Dutch Resistance during the war. His case before the Court was arguably the one which displayed the most disjunction between his personal ‘bitter experiences’ and the banal facts of a court case and the summary dismissal by the Court.<sup>347</sup> Mr. Cohen’s case (against the European Commission) is, apparently, the only wartime case before the European Court of Justice involving a Jew<sup>348</sup> and it is certainly the only one where such direct involvement in wartime resistance work is mentioned. The case does not concern Mr. Cohen’s religion and indeed the judgment barely dwells upon his work in the Dutch Resistance<sup>349</sup>. However, I found it impossible for some reason to forget about the wartime narrative of this Dutch Jew; the Jewish population of The Netherlands suffered more pro rata than those in any other European country apart from Poland during the Second World War. Over 105,000 Dutch Jews (that is over 78% of the total Jewish population of that country) were murdered. To know that Hartog Cohen, whose story comes to light only very indirectly on the pages of the European Court case reports, was in the Dutch Resistance against the background of the plight of Dutch Jewry, emphasised for me the complex traumas which lay just one small step, one tiny remove, behind the pages of European Court judgments.

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<sup>344</sup> *Legollel Sipur* or *Lagol Sipur* translates roughly as unrolling the past or the unrolling of a story (Sipur). Ancient scriptures were written on scrolls which were literally unrolled on special or ceremonial days so that the story within might be told. With many thanks to Mirjam Bruck-Cohen and Uri Bruck.

<sup>345</sup> C. Joerges, ‘Introduction to the Special Issue: Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts’, *Confronting Memories* (2005) 6 GLJ 245 at 247.

<sup>346</sup> *Hartog Cohen v Commission of the European Communities*, Case 342/82, ECR 1983 at 3829.

<sup>347</sup> Briefly, his case involved his claim, as a former Commission employee, for a special type of invalidity benefit (related to ‘public spirited acts’) under the EEC’s Staff Regulations. The invalidity which forced him to leave his Commission employment in 1981 was a direct result of an injury which he received while working with the Dutch Resistance. This fact was accepted by the Court. Furthermore, Mr. Cohen was (and still is) in receipt of a special Netherlands pension which is related to his injury and his Resistance work. The European Court of Justice rejected his request for the Commission invalidity benefit (partly) because it expressed the view that he should not be doubly rewarded for the wartime injury. The case is discussed in detail above.

<sup>348</sup> In general, there has been a very small number of cases only involving Jewish claimants before the European Court of Justice. The most well known, but now quite old, case which dates from 1976 is, *Vivien Prais v Council of the European Communities*, Case 130/75, [1976] ECR 1589 which was directly connected with the claimants religion and religious obligations. See further; I. Pernice, ‘Religionsrechtliche Aspekte im europaischen Gemeinschaftsrecht’, (1977) *Juristenzeitung* 777-781 and T. Hartley, ‘Religious Freedom and Equality of Opportunity’, (1977) *ELRev.* 45-47.

<sup>349</sup> Mr. Cohen’s father, Philip Cohen, was also in the Dutch Resistance. As is well known, involvement in the Resistance in any occupied state during the Second World War was punishable by death. The position of a Jewish Resistance activist in wartime Holland was even more dangerous and precarious.

Thanks partly to the minor magic of Google<sup>350</sup>, I managed, after many searches, to locate Mr Hartog (Harry) Cohen. The process of finding him, and the deeply affecting and sad family connections which the search revealed, demonstrated how easily the lost history of the European Union is exposed.<sup>351</sup> What I discovered is there already for anybody who cares to even glance in that direction, namely that the traumatic legacy of the Holocaust touches so many people still in a profound manner. My minor obsession with this one judgment and the facts, people and events uncovered during an excavation of the case, turned this paper, for me at least, from being a dry, impersonal examination of case law to something which was deeply implicated in readily identifiable people's traumas, wounds and losses. All it took to 'touch', to speak to even, survivors of the Holocaust, and to be reminded of those many millions of people who did not survive, was simply an over inquisitive reading of one short Luxembourg judgment. In other words, if we are all so close to Shoah, if the EU itself is so proximate to it, then why is this traumatic legacy not more visible?<sup>352</sup>

All knew for certain (from the judgment itself) was that Hartog Cohen was born on 17 December 1917. A further search on him had led me to believe that he was born and lived in the Dutch border town of Venlo. Further research somehow led me to Sophie Cohen-Kleermaker from Venlo who survived over two years (from 1943 to 1945) in the concentration camp at Theresienstadt.<sup>353</sup> She is Hartog Cohen's mother. I discovered her existence through searches which revealed, firstly, his daughter, Mirjam Bruck-Cohen, granddaughter of Sophie. Mirjam Bruck-Cohen, a survivor of the Holocaust herself as a very young child, lives in Israel and is fiberartist whose work whose work is deeply connected with memory and loss.<sup>354</sup> Sophie Cohen-Kleermaker (in Dutch this

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<sup>350</sup> Many thanks to Bert van Roermund who managed to locate a number of Hartog Cohens in The Netherlands.

<sup>351</sup> As Joseph Weiler pertinently states, "So now, in a field, European Union studies, that seemed not to have a history, we have the Dark Legacy and *Europe!*", 'Europe's Dark Legacy, Reclaiming Nationalism and Patriotism' in C. Joerges and N. Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, (Oxford: Hart, 2003) 389 at 389.

<sup>352</sup> "And it's as good as if it never happened," which comes from Goethe but, at a crucial passage in *Faust*, is uttered by the devil in order to reveal his innermost principle, the destruction of memory. The murdered are to be cheated out of the single remaining thing that our powerlessness can offer them; remembrance." T. Adorno, in R. Tiedemann (ed.) *Can one live after Auschwitz? A Philosophical Reader* (Stanford: Stanford University Press, 2003), 5, referring to Mephistopheles saying "It is as if it had not come to be" in J M von Goethe, *Faust* (New York: Doubleday, 1961 at 468).

<sup>353</sup> Sophie Cohen-Kleermaker was transported to Theresienstadt, from Westerbork (the Dutch concentration and transit camp) on the 26 of February 1944: from the official central card index at Beit Theresienstadt, Israel. See further: <http://www.fibersiv.israel.net/bahdim/sophie/sophie.html>. For more general information on the plight of Dutch Jewry see <http://www.cympm.com/> and the Centre for Research on Dutch Jewry, Hebrew University, Jerusalem <http://www.isragen.org.il/ROS/ARCHIVES/archive-DutchJ-2.html>.

<sup>354</sup> Mirjam Bruck-Cohen is a Holocaust survivor and fiber artist who lives in Haifa. She responds to the events of the Holocaust by working with fiber, unique works that cannot be reproduced or replicated. From a discussion of one of her exhibitions: "The artists, who participate in this exhibition, are artists who inherited table-cloths, napkins, pillows, aprons and paintings from their families. The touching and observation of those fabric objects summoned within them stories, memories and interpretations, and even lead them to an exploration which is either favorable, or crushing, separating between the purifying and the bitter portions of the cultural-social fabric in which they were created. For the

latter word means tailor, or one who sews) and her husband Philip Cohen made handmade umbrellas in Venlo before the war. These connections seemed somehow like a modest destiny (the nice Yiddish term, *bashert*,<sup>355</sup> might be apt here) achieved by means of unexpected links to the tragedy of the past. The working title for this paper had been 'Invisible threads..' and so it seemed that, through the means of the very fabric of the Cohen family, that which may have seemed to be once invisible was rendered visible. Mirjam Bruck-Cohen was kind enough to enter into several warm and helpful exchanges with me about the many 'threads' which were connected behind her father's European Court of Justice case. Mirjam's mother, Ida Klein, survived the war but she "lost not only her sisters (Mirjam and Betty Klein) and her parents (Regina and David Klein), she lost also her whole world; her aunt [twin sister to her father] and uncle and baby cousin, Jacobous, another uncle with five of his children, another aunt and four of her children, aged three to ten, all of whom were gassed on one day and one of her grandmothers; she never spoke about any of these losses".<sup>356</sup> All of this extended Klein family were gassed and murdered in Auschwitz and Sobibor in 1943 and 1944. This is just one narrative of the potential millions of similar narratives all of which remind us of the bitter intimacy we have with the violence of this past. However much we all know, or should know,<sup>357</sup> about the Holocaust and the millions who were exterminated, making it personal, seeing the faces of the murdered, cannot but fail to remind us both how 'present',<sup>358</sup> that horror still is and how we are all, us Europeans<sup>359</sup>, still responsible.<sup>360</sup>

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participants, the exhibition serves as a motion picture screen projecting their reactions. It is fascinating, that a single two-syllable word, fabric, carries all those implications. I chose the word 'remember' because it is an on- going process, which takes place in different times, and varying manners, and it does not have, the ceremonial, almost official-impersonal burden that the word 'memory' carries." See further, <http://fibersiv.israel.net/bahdim/mirjam/curatore.html>.

<sup>355</sup> In Yiddish, "*bashert*", means fate or destiny. The word "*bashert*" can be used to refer to any kind of fortuitous good match, such as finding the perfect job or the perfect house though it is usually used to refer to the location of one's soul mate.

<sup>356</sup> From Mirjam Bruck-Cohen, 29 July 2007.

<sup>357</sup> "Shoah fatigue is a widespread and understandable condition." J.H.H.Weiler (2003) 389, noted above. Weiler begins the piece with this statement but it is clear that his own committed stance exceeds any such weariness.

<sup>358</sup> "The worst moral and artistic crime that can be committed in producing a work dedicated to the Holocaust is to consider the Holocaust as past. Either the Holocaust is legend or it is present; in no case is it a memory." Claude Lanzmann (1981) cited in Stuart Liebman, 'An Introduction to Claude Lanzmann's *Shoah*' in *Claude Lanzmann's Shoah: Key Essays*, S Liebman (ed.) (Oxford: OUP, 2007).

<sup>359</sup> Habermas and Derrida, in their 2003 manifesto, recall that "Europe today is characterized by the experience of the totalitarian regimes of the 20th century and by the experience of the Holocaust – the persecution and annihilation of the European Jews, in which the National Socialist regime also involved countries that it had conquered." J. Habermas and J. Derrida, "Nach dem Krieg: Die Wiedergeburt Europas" 31 May 2003, *FRANKFURTER ALLGEMEINE ZEITUNG*. Robert Schuman makes no reference to the Holocaust or to the murder of European Jews in his 1950 Declaration: "A united Europe was not achieved and we had war." is the perfunctory, and only, way in which he refers to the Second World War, [http://europa.eu/abc/symbols/9-may/decl\\_en.htm](http://europa.eu/abc/symbols/9-may/decl_en.htm).

<sup>360</sup> In his controversial memoir, *Peeling the Onion*, (London: Harvill, 2007) Günter Grass recalls that all of his life he had a burden which could not be alleviated; he was part of a system which has a large residue of joint responsibility. "For decades after, I refused to admit anything to do with its name or the SS symbol. In my after-the-fact shame, I wanted to keep silent about what I had welcomed in the stupid pride of my youth. The burden (of conscience) remained, and no one could relieve me of it.

Christian Joerges<sup>361</sup>, Michael Stolleis<sup>362</sup>, Ingo Muller<sup>363</sup>, Thomas Mertens<sup>364</sup>, Vivian Curran<sup>365</sup> and David Fraser<sup>366</sup> amongst others have all turned a head towards this past, raising questions *inter alia* about the nature of law after Auschwitz. It is fitting and entirely expected that the academy should maintain an appropriate, unsentimental distance from the subject matter. However, it is in this case impossible to always do so; where there has been no *life* after Auschwitz<sup>367</sup> for so many it can seem wrong that we should clinically analyse and safely ponder the nature of the laws which authorized the abomination that is Auschwitz.<sup>368</sup> Yet, as we know well, it was the very mechanisms, people and procedures of a legal order of an internationally recognized state which facilitated the implementation of the politics of brutality and inhumanity.<sup>369</sup> For the victims, for the millions of victims, there were no semantics, no law journals, no reviews, no courts, and no lawyers, just the extremely efficient application of the rule of law of The Reich, using the full apparatus of the state.

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Even if you could have talked me out of feeling shared guilt in its acts, a remainder that I have not erased to this day remains, which would mostly be called shared responsibility."

- <sup>361</sup> C. Joerges, 'Constructing Europe in the Shadow of its Pasts' in C. Joerges and P. Blokker (eds.), *Confronting Memories: European "Bitter Experiences" and the Constitutionalisation Process*, Special Issue of the *German Law Journal* (6:2, 2005) 245, C. Joerges 'Continuities and Discontinuities in German Legal Thought' in C. Joerges (guest ed.) *The Darker Side of a Pluralist Heritage: Anti-liberal Traditions in European Social Theory and Legal Thought*, Special Issue of *Law and Critique* 14:3 (2003) 297, C. Joerges, 'Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project', in C. Joerges and N. Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford, Hart Publishing, 2003) 167, C. Joerges, 'Working through 'bitter experiences' towards a purified European Identity? A critique of the disregard for history in European constitutional theory and practice.' in "Law and Democracy in the Post-National Union" E. O..Eriksen, C.Joerges and F. Rödl (eds.) ARENA REPORT 1/2006 335.
- <sup>362</sup> M. Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998).
- <sup>363</sup> I. Muller, *Hitler's Justice: Courts of the Third Reich* (Cambridge, Mass., Harvard University Press, 1991).
- <sup>364</sup> T. Mertens, 'Continuity or Discontinuity of Law? David Fraser's Law after Auschwitz: Towards a Jurisprudence of the Holocaust' (2007) 8 GLJ 533, T. Mertens, Carl Schmitt and Nazism. Some Legal Aspects, in M. Heinz & G. Greti'c (Eds.), *Philosophie und Zeitgeist im Nationalsozialismus*, (Würzburg: Königshausen & Neumann (2006), 125, T. Mertens, 'Memory, Politics and Law. The Eichmann Trial. Hannah Arendt's View on the Jerusalem Court's Competence' (2005) 6 GLJ 407.
- <sup>365</sup> V. Curran, 'Formalism and anti-Formalism in French and German Judicial Methodology' in C.Joerges and N.Ghaleigh (eds.) *Darker Legacies* (2003) at 205; 'Law's Past and Europe's Future' (2005) 6 GLJ 483.
- <sup>366</sup> D. Fraser, *Law after Auschwitz: Towards a Jurisprudence of the Holocaust*, (Durham, North Carolina: Carolina Academic Press, 2005).
- <sup>367</sup> T. Adorno, in R. Tiedemann (ed.) *Can one live after Auschwitz? A Philosophical Reader* (Stanford: Stanford University Press, 2003).
- <sup>368</sup> It is impossible to even begin to list appropriate material here. For just one, see C. Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy September 1939-March 1942* (London: Arrow Books (2005).
- <sup>369</sup> What began with 'The Law for the Protection of German Blood and German Honor' and 'The Reich Citizenship Law', both of 1935 (The Nuremberg Laws), coupled with the administrative "solutions" discussed at The Wannsee Conference in 1942, ended *inter alia* with the pushing of freight trains into Treblinka extermination camp between 1942 and 1943 when at least 900 000 people were murdered. Henrik Gawkowski, a driver of the Treblinka trains, tells Claude Lanzmann how the trains were pushed rather than pulled into the camp; *Shoah* (1985), disc 1, scene 41.

My prosaic and instrumental examination of Harry Cohen's case led, very unexpectedly, to a photograph of two young women wearing smiles and yellow stars.<sup>370</sup> When such an image is made known in personal circumstances, when you know what the eyes you look at had to endure, then the brutality and inhumanity that underlies Europe hits hard. It is without embarrassment that I admit I am no longer a detached observer then but just a deeply affected and privileged recipient of the story of these two young girls. As Christian Joerges has presciently remarked "The glance in the mirror tends to have unsettling effects both in one's own life world and beyond."<sup>371</sup> Give every teacher of European Union studies one similar face, just one photograph, with a name, and a back story, and see what might happen.

Mirjam Klein was born in Breslau on 17 May 1924 and murdered in Auschwitz on 30 November 1943. Betty Klein, her younger sister, was born in Antwerp on 30 October 1926 and murdered in Auschwitz on 30 November 1943. They were deported from Amsterdam to Westerbork<sup>372</sup> on 26 May 1943, and to Auschwitz, in the *Judentransport aus den Niederlanden*, on 7 September 1943.<sup>373</sup>

This paper is dedicated to their memory - and to the memory of all the other Europeans who were never seen again.

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<sup>370</sup> Photograph of Mirjam and Betty Klein very kindly shown to me by Mirjam Bruck-Cohen, their niece, whom they never lived to see.

<sup>371</sup> C. Joerges, 'Working through 'bitter experiences' towards a purified European Identity? A critique of the disregard for history in European constitutional theory and practice' in "Law and Democracy in the Post-National Union", E.O. Eriksen, C. Joerges and F. Rödl (eds.) ARENA REPORT 1/2006 (noted above) at 362.

<sup>372</sup> A concentration camp and transit camp in north eastern Holland (where Anne Frank also spent two months before being transported to Auschwitz); <http://www.jewishgen.org/Forgottencamps/Camps/WestEng.html>

<sup>373</sup> From Mirjam Bruck-Cohen, July 2007. Their parents (her grandparents whom she never saw), David and Regina Klein, were born in Poland and they too, Europeans before the fact of 'Europe', who had lived and worked in Paris, Antwerp and Amsterdam, were transported all the way back to Poland to be murdered in Auschwitz. There is no space or justification here for a detached contemplation of their terrible fate. It is a fate which offers a heartbreaking insight into the phase of horror and death which deprived Europe of so many good people.