# The Sudeten German Question after EU Enlargement

By *Jakob Cornides**

## I. Is there a "Sudeten Exception" to the "Law of the Holocaust"?

In a recently published paper[1], *Timothy W. Waters* has commented on the controversy in the EU when Sudeten Germans demanded that the Czech Republic, prior to being admitted to the EU, apologize for having expelled them after World War II. According to Waters, the expulsion of ethnic Germans from Czechoslovakia and Poland after the war was, objectively speaking, "ethnic cleansing"[2], but paradoxically all relevant participants in the recent debate quickly "decided that it did not constitute ethnic cleansing" and "reconfirmed the legality of the expulsions". He concludes that the rejection of claims made

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* The views expressed in this paper are those of the author, and are not in any way attributable to the institution in which he is employed.

[1] *Timothy W. Waters*, "On the Legal Construction of Ethnic Cleansing", Virginia Journal of International Law, Vol. 47, No. 63, 2006.

[2] It should be noted that the term "ethnic cleansing", which *Waters* uses to characterise both the Holocaust and the expulsion of the Sudeten Germans, is of very recent origin: it made its grand entry into English and international usage during the Balkan Wars the early 1990s. Its typical usage was developed in the Balkans, to be a less objectionable code-word meaning genocide. The notion of "cleansing" presupposes that the perptrators consider the minority concerned as "dirt", which definitely reminds of the Nazi-jargon that termed cities from which Jews had been deported as "judenrein". Nevertheless, using the term "ethnic cleansing" to describe the events before or immediately after 1945 appears somewhat anachronistic; it would be better to use the term genocide, although the ECtHR, in the case *Jorgić vs. Germany* (Appl. 74613/01), selectively quoting from a ruling of the ICJ, found that not every case of ethnic cleansing was tantamount to genocide. According to the ECtHR, genocide aims at the physical destruction of a group, whereas ethnic cleansing aims only at its dissolution. According to this theory, the Holocaust could be described as "genocide", whereas the expulsion of the Sudeten Germans (with ca. 3 million deported, but, according to varying estimates, "only" between 40.000 and 250.000 dead) would constitute "ethnic cleansing". Such differentiation is in reality an attempt to narrow the scope of the UN Genocide Convention and carries the risk of banalising (and, to some extent, legitimizing) facts that "only" correspond to the criteria for "ethnic cleansing". Whatever the difference, it should be clear that both genocide and ethnic cleansing are universally recognized to constitute severe violations of human rights, and that there are no circumstances that would be apt to justify either of them.

by Sudeten Germans has consequences for what he calls the "Law of the Holocaust", namely: "that despite our otherwise absolute commitment against ethnic cleansing, the Sudeten case identifies a Corollary, an identifiable and predictable limit on our willingness to oppose ethnic cleansing; and that the same case establishes limits on our commitment to restitution for mass violence."

*Waters* then sets the general acceptation of claims for restitution and/or compensation made by Holocaust victims into a contrast with the general rejection met by the claims of the expelled Germans and finds that, while other rationales (such as the antiquity of the facts giving raise to such claims, or institutional limitations on competence, e.g. of the European Court of Human Rights) provide no convincing reason for such difference in treatment (the "antiquity" of the Holocaust, for example, being greater than that of the expulsion of the Sudeten Germans), the difference lies in the "cause-and-effect"-argument, i.e. in the fact that the Sudeten Germans are collectively identified as collaborators with the Nazi occupation regime, and the retributions against them therefore considered as legitimate or, at least, acceptable in the specific ambiance of the time.

Which implications, asks *Waters*, does this have on the international ban against ethnic cleansing? Do we have to conclude that there is an exception in the otherwise general agreement on ethnic cleansing being inadmissible under all circumstances? And, most importantly: does this exception solely apply to the case of the expulsion of Germans from Central and Eastern Europe, or could it apply to other cases as well, possibly even to cases lying in the future? Waters clearly argues in favour of considering the case of the Sudeten Germans as a singular case, the moral implications of which cannot and must not be transferred to any other historic or contemporary circumstance, like many guardians of contemporary political correctness insist on the singular character of the Nazi Holocaust, forbidding any parallel to be drawn between the crimes of the Nazi Regime and those of *Stalin, Mao, Pol Pot*, and other perpetrators, or between the claims of Holocaust victims and those of other victims of crimes against humanity. Indeed, the theory of the singularity of the Sudeten ethnic cleansing seems to directly depend on the theory of the singularity of the Holocaust: the Sudeten Germans are portrayed as a specifically horrible and morally contemptible ethnic minority who, having thrown in their lot with the Nazis[3], were themselves responsible for what subsequently happened to them.

Certainly, the seemingly condoning attitude of the international community, including the Governments of Germany and Austria (who are assumed to represent the "victims" in this instance of ethnic cleansing), invite such conclusions.

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[3] MEP *Philip Whitehead*, quoted in Waters' paper at FN 228. However, such views seem to be those of an isolated minority, alien to the general moral sentiment.

However, if universally accepted, they could be used to justify future cases of ethnic cleansing, on the grounds that the victims, in one way or the other, deserve what is done to them. Was not already the Armenian genocide of 1915 carried out under the pretext that the Armenians were collaborating with Russia, then at war with the Ottoman Empire? And in the context of the recent ethnical cleansing in former Yugoslavia, was it not always accompanied by allegations that the victims had themselves committed similar crimes, Croats being portrayed as "Ustashi", Serbs as "Chetniks", and Bosniak Muslims as "Djihadists"? How can we, if we assume that – alleged or real – guilt can justify ethnical cleansing, expect that such justifications will not be always be available to whoever needs them?

The assertion made by *Waters* that "all relevant participants ... decided that (the expulsion of the Sudeten Germans) did not constitute ethnic cleansing" and "reconfirmed the legality of the expulsions" is somewhat too far-reaching. There is a need to carefully differentiate between, on the one hand, the issue of mass expulsions (or, in the case of the Holocaust, mass murder), and, on the other hand, the issue of claims for restitution or compensation made by victims. While ethnic cleansing and genocide are, as such, universally condemned, that does not mean that, under the current status of international law, restitution or compensation claims are universally recognised. But this applies equally to the victims of the Nazi Holocaust and to the Sudeten Germans. The difference lies in the attitude of the former "perpetrators" (with Germany, for example, being more generous than the Czech Republic), and, beyond this, in the political clout the victims have managed to mobilise.

A further differentiation must be made with regard to the Jewish victims of the Holocaust. Only those Jews who, before the war, lived in Germany and were German citizens can be said to have been persecuted by *their own* state (therefore, only the case of these "German" Jews is comparable to that of the Sudeten Germans); all other Holocaust victims were persecuted by what for them was an occupying power. And even if the Holocaust was unprecedented as a crime both regarding size and quality, it is not new that a war-faring country, after having lost the war, is forced to pay compensation to their "victorious" adversaries. So Germany paid compensation to the Allied Powers (and the annexation of German territory by Poland and the USSR was, inter alia, understood to be part of this compensation). But a new "Law of the Holocaust", obliging a state to pay compensations to the victims of ethnic cleansing, could therefore only have arisen with regard to the compensation paid to German Jews. However, such compensation to its own (former) citizens would appear to be an internal affair of Germany. And indeed, the first and foremost concern of the Federal Republic was to compensate Jews originating from Western

Germany, whereas Jews stemming from the GDR received compensation only after the reunification of Germany[4].

Has Germany finally paid full compensation to all Holocaust victims? Not even this is sure. The point of view of survivors' organisations seems to be very different: they claim that the compensation granted was far from satisfactory, and that many victims still have not received any compensation.[5] Yet if this should be true, how can it be said that there is a universally accepted "Law of the Holocaust", obliging Germany to compensate the victims of ethnic cleansing? Instead, we must conclude that either such law does not exist at all, or, if it exists, neither is it respected by Germany, nor do third countries undertake any significant effort to enforce it.

Insofar as Germany has compensated Nazi victims, she did so on the basis of her own domestic legislation, not on the basis of any general obligation enshrined in international law. The compensation provided for by Germany for Holocaust victims is in part based on bilateral agreements between Germany and the State of Israel[6], in part on domestic legislation adopted by the German Bundestag[7]. But this alone is not sufficient to establish that there was now an internationally recognised principle that all victims of all historical injustice had to receive compensation – at best, this was a starting point from which such a principle could develop. But there still are many historical wrongs for which the "responsible" people or their governments have never made any excuses, let alone paid any compensation. The slave trade of the eighteenth and nineteenth centuries has at least been acknowledged to have been a crime, but when Brit-

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[4] The reason for this was that the GDR consistently refused to consider itself a legal successor of the Third Reich – instead, East Germany pretended to be the state founded by those Germans who had fought against and overcome Nazi fascism.

[5] This appears to be the view of both the Jewish Claims Conference and State of Israel, both of which continue addressing Germany with requests for more compensation payments. See for example the section on negotiations on the JCC's website, http://www.claimscon.org.

[6] The most important of these agreements is the Luxemburg agreement of 1952. Given that the victims of the Holocaust, while alive, had never been Israeli citizens, whereas of the survivors only a part settled down in Israel, the legitimacy for Israel to make claims on behalf of Holocaust survivors had to be based on the assumption that Israel had absorbed and resettled roughly 500,000 Holocaust survivors (and therefore was entitled to cash in their part of the compensation). Besides that, Israel received payments from Germany as hypothetical 'legal successor of Jewish Holocaust victims without heirs', an assumption that also may seem questionable. At the time, these compensation payments were of great importance for financing the creation of the new Jewish state – but, consequently, not much of it was actually paid out to individual Holocaust victims.

[7] The restitution of property stolen by the Nazis was mainly based on statutes adopted by the Allied Powers occupying Germany between 1947 and 1949. The bulk of compensation payments (44.5 billion €) was made on the Basis of the Bundesentschädigungsgesetz (Federal Compensation Act).

ain abolished it, it was the slaveholders, not the slaves, who received financial compensation. The Turkish government still refuses to acknowledge any historic responsibility for the Armenian genocide, let alone to compensate the victims or their descendants. Russia has never compensated the victims of the GULAG, be they Russian or foreign, or to persons deported from the Baltic countries, nor have those Poles who were, after 1945, expelled from their homes in contemporary Belarus and Ukraine (and who were re-settled in areas cleansed of their former German inhabitants) received any compensation. More recently, there does not seem to have been any compensation for the survivors of the genocides in Cambodia or Rwanda. And, of course, Israel has never compensated expelled Palestinians, but cynically points to the example of the Sudeten Germans, saying that the Palestinians, too, should stop considering themselves as refugees, but integrate themselves (and be integrated) into the societies of the countries to which they have fled. (This integration into a different society would of course mean for the expelled to give up their identity – whereby the purpose of genocide or ethnic cleansing, the disappearance of a nation or ethnic group, would finally be achieved.)

Against this background, I fail to understand what *Waters* means when he speaks of a "Law of the Holocaust". If he says that there is universal consensus on ethnical cleansing being a crime, it is not probable that anyone will contradict him (even if such crimes, often government-sponsored, continue to occur with deplorable frequency). If he means to say that there is a consensus that victims of past mass violence are entitled to compensation, then, I am afraid, reality disproves him. It is the treatment of the Holocaust victims, not that of the German victims of post-war expulsions from Czechoslovakia or elsewhere, which is exceptional.

Of course, no decent person will object to a government compensating victims of mass violence for which, given the historic context, it recognises to have a moral responsibility.[8] On the contrary, many will find it highly desirable that all victims of historic injustices should receive compensation.[9] But the decisive question is not whether or not a government commits itself to pay such

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[8] At least not when compensation is paid to the actual victims. By contrast, there are good reasons to question the idea of settling "historic injustice" through lump sum payments to persons or groups that are neither identical with the historic victims, nor their legal successors: this practice carries the risk of encouraging the rent seeking of "professional victims".

[9] Cf. Resolution 1096 (1996) adopted by the Parliamentary Assembly of the Council of Europe (quoted below) or US House of Representatives Resolution 562 dated October 13, 1998, which calls upon "countries which have not already done so to return wrongfully expropriated properties to their rightful owners or, when actual return is not possible, to pay prompt, just and effective compensation, in accordance with principles of justice...to remove restrictions which limit restitution or compensation ...to persons who reside in or are citizens of the country...".

compensation, but whether or not the international community is willing to impose such obligation on the government at question. And while the Allied Powers, after World War II, tried to obtain from Germany compensation for damages inflicted to themselves and their own citizens, the compensation of Holocaust victims (at least if these had been of German origin) was not really on top of their agenda.

The current state of international law is that a claim for compensation can only be brought against a state if that state itself, prior to the facts, has subscribed to an obligation not to deprive without compensation a person of its rightful possessions, as it is, for example, foreseen in Article 1 of the 1st Supplementary Protocol of the European Convention on Human Rights. Today, such respect for property is, at least in Europe, a Human Rights standard – but it was neither in 1933, when the Nazis started stripping German Jews of their property and driving them out of the country, nor in 1945, when ethnic Germans and Hungarians in Czechoslovakia were collectively expropriated. For Czechoslovakia, the European Convention on Human Rights (ECHR) entered into force only in 1992, wherefore all claims relating to expropriations prior to that date are ratione tempore excluded from the scope of application of the Convention, and from the jurisdiction of the European Court of Human Rights (ECtHR). But obviously, the absence of an obligation to pay compensation does not, in itself, legitimise the historic facts.

## II. The European Union and the Beneš-Decrees

### 1. The Contribution of the EU Integration Process to Reconciliation

At this point, it is necessary to do justice to the European Union, to (former Enlargement) Commissioner *Verheugen*, and to the Governments of Germany and Austria: by accepting the Czech Republic and Slovakia as new Member States of the EU, they have by no means "confirmed the legality" of the post-war expulsion of ethnic Germans and Hungarians, nor have they said that the victims should not be compensated. They only decided not to make the accession of the Czech Republic and Slovakia depend on a formal repeal of the Beneš-Decrees (some of which still are in the statute books). They did so bona fide under the assumption that these Decrees, albeit theoretically still in force, were extinct, i.e. that they could not be used as a basis for new expulsions or new expropriations.[10] The three experts on whose legal opinion[11] this decision

[10] The Commission relied on the statements made by the Czech Republic in this regard. In April 2002, the Czech Parliament stated that the Decrees are not currently applicable, indicating that they "were implemented in the period after they had been issued and no new legal norms can be established on their basis today." In May 2002, Prime

was based, have found that the continuing existence of the Decrees, under these conditions, was not in contradiction with the obligations of the new Member States arising from their accession to the EU – but at the same time, the three experts have firmly condemned the ethnic cleansing of the post-war years as such[12], and there can be no doubt that their verdict reflects a general sentiment not only in the EU, but world-wide.

For people valuing principles higher than political interest, the decision not to insist on a formal repeal of the Beneš-Decrees and on a compensation for the victims of the expulsion may seem regrettable. But they should see that the EU, including the German and Austrian Governments, made that decision in full conscience and on the basis of their (perceived) self-interest: integrating the Czech Republic and Slovakia as new Member States of the EU, with all the benefit of political and economic integration, free movement of goods and services, of persons and capital, was of greater benefit than any compensation to the victims granted by unwilling governments. And indeed, even if it is very likely that the Czech Republic and Slovakia would have given in to pressure (rather than paid the price of staying outside the EU), their respective governments could have claimed to be victims of "extortion", which would certainly not have helped the task of re-conciliation. On the whole, the policy of not in-

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Minister *Zeman* asserted that "[o]ur analysis shows there is no discrimination today" and that consequently the Czech Republic considers the Decrees "extinct" an interpretation deriving from a ruling of the Czech Constitutional Court (Dreithaler, 8 March 1995). In a joint statement, Zeman and EU Commissioner for Enlargement Günter Verheugen likewise declared that the "Decrees are not part of the Accession Negotiations and should have no bearing on them" because they "no longer produce legal effects."

[11] Legal Opinion concerning Beneš-Decrees and related issues prepared by Prof. Dr. Dres. h.c. *Jochen A. Frowein*, Prof. *Ulf Bernitz*, The Rt. Hon. *Lord Kingsland QC*.

[12] *Frowein*, op.cit., § 16 (with further references): "It is open to doubt whether in 1945 and 1946 confiscations in the context of a forcible transfer of populations were justifiable under public international law, even taking into account the specific nature of reactions to the German actions during World War II". *Bernitz* (sec. 4, 5): "From the viewpoint of modern standards of humanitarian law, this legislation (i.e. the Beneš-Decrees) and its application deserves harsh criticism. (...:)the ways in which the execution of the confiscations and the physical expulsion of the people were conducted seem to have been particularly harsh and radical in many instances. The measures taken show the characteristics of collective punishment. Presumably, they hit many individuals who were innocent. It is unclear to what extent, if at all, the individuals were given the possibility to defend their particular case and have it investigated impartially, preferably by the courts. (...) The United Nations Charter, proclaiming a number of very important principles of international humanitarian law in the Charter´s first Articles on fundamental aims and principles, had taken effect on October 24, 1945, i.e. before the full enforcement of the Decrees. The provisions of this Charter was an expression of the revival and nearly universal recognition of international law which took place already immediately after the War. The Rt. Hon. *Lord Kingsland QC* (§ 23): "the expropriation of property by virtue of the Beneš-Decrees, if done today, would probably constitute a breach of the European Convention on Human Rights."

sisting on the repeal of the Beneš-Decrees may have been the best choice available.

The Czech Government itself, as *Waters'* paper does not fail to mention, expressed regret over the post-war expulsions.[13] And while it is true that the wording of the relevant parts of this declaration sounds like the mumbled apologies of a bashful adolescent who must still learn how to present his excuses graciously, it would be unfair to the Czech Government to interpret their declaration, as Waters does, in the sense that it regretted only certain crimes committed in the context of the expulsions, but not the ethnic cleansing as such. Even if the wording may indeed be somewhat blurred, the benefit of doubt compels us to assume that the Czech Government, like that of any civilised country, condemns ethnic cleansing under all circumstances, and to read its statement in that way. Indeed, a common statement with the government of Germany would be a strange place to assert the legality of ethnic cleansing.

Concerning the situation of the "victims" (i.e. the expelled Sudeten Germans and their descendants), it should be noted that, consequent to the EU enlargement, they enjoy full freedom to travel to their former homes, to settle down there, to acquire immovable property, etc. In addition, I personally know many persons expelled in 1945 (or descendants of such persons) who have reacquired the Czech citizenship after 1989. This does not appear to have been difficult – on the contrary, the Czech(oslovak) authorities appear to have acted quite generously in that regard. All this has been achieved through the process of EU accession, which once more proves the value of the EU as a mechanism for reconciliation.

## 2. Only the Property Issue Remains Unresolved

Compensation/restitution is thus the *only* major issue where the victims of the post-war expulsions (or their descendants) may find the current situation unsatisfactory. Maybe, this should be seen as a good rather than a bad sign.

While the EU enlargement has been helpful in all other contexts, it has not helped in resolving this particular problem. Also, Sudeten Germans' hopes that international conventions like the European Convention on Human Rights could provide a remedy have been disappointed: their restitution claims are

[13] In the 1997 Czech-German Declaration, the Czech side "regrets that, by the forcible expulsion and forced resettlement of Sudeten Germans from the former Czechoslovakia after the war as well as by the expropriation and deprivation of citizenship, much suffering and injustice was inflicted upon innocent people, also in view of the fact that guilt was attributed collectively. It particularly regrets the excesses which were contrary to elementary humanitarian principles as well as legal norms existing at that time ...".

routinely rejected by the ECtHR as inadmissible ratione temporis. And, feeling completely unrestrained in its freedom to decide whether or not to compensate, the Czech Republic, despite the regrets it expressed over the expulsion of Sudeten Germans, exhibits resolute unwillingness to offer even a symbolic compensation.

What has created additional bitterness is the fact that restitution/compensation has been provided to the Czech victims of expropriations that took place after the 1948 communist putsch, whereas the overwhelming majority of ethnic Germans and Hungarians driven out of the country after 1945 received no compensation[14]. Both waves of expropriation are nearly equally distant in time, and the victims of the 1948 expropriations outnumbered those of 1945. It seems thus quite implausible to argue that a compensation/restitution for all victims of the 1945 compensations would be technically impossible, or that by correcting old wrongs, it would create new ones, given that the same argument is not made with regard to the victims of the post-1948 expropriations. In addition, as *Christopher Kutz* has lucidly pointed out, if a legal and/or moral difference is to be made between the 1948 expropriations and those of 1945, the former could be described as "failed and humanly costly political mistakes, but not as crimes", whereas the expropriation and expulsion of the Sudeten Germans doubtlessly was a crime even by the low standards of the time.[15] Under that perspective, there are good reasons to argue that, if any differentiation between the treatment of victims of the 1945 expulsion and the 1948 expropriations had to be made, priority should have been given to the victims of ethnic cleansing, rather than to the victims of the failed socialist experiment.

The Czech Republic, however, rather than treating all victims of confiscations equally, has adopted a *selective* policy with regard to the restitution of confiscated property, and it does not seem unfair to say that the one decisive criterion employed here is *ethnicity*: Czech or Slovak victims have received compensation, others not. It is this differential treatment, which, in the view of some observers, undermines the credibility of the official expressions of regret over the past. Without any acts following the words, the Czech government remains vulnerable to the reproach of having paid mere lip-service to the moral rejection of ethnic cleansing, while at the same time trying to secure the booty acquired through the crimes of its predecessors.

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[14] Act 243/1992 has created the possibility to obtain restitution for ethnic Germans who had stayed in Czechoslovakia after 1945 and subsequently re-obtained the Czechoslovak citizenship. In this context, it must be noted that not all Germans were driven out of the country. Some of them were allowed to stay – not because they were considered less 'guilty' than the others, but because they (a) were married to ethnic Czechs or Slovaks or (b) disposed of specific skills needed to re-build the Czechoslovak economy.

[15] *Christopher Kutz*, "Justice in Reparations: The Cost of Memory and the Value of Talk", Philosophy and Public Affairs 32, No. 3 (2004): 285-6.

Not in the relationship between states, but in the relationship between peoples, the compensation/restitution issue is thus likely to remain a bone of contention. There is, however, some reason to question the economic rationale of this dispute: for even if they were offered full restitution, it is very unlikely that many Sudeten Germans (even less the second or third generations) would actually give up their lives in Germany or elsewhere in order to settle in Bohemia. Indeed, much of Northern Bohemia, which (before the war) was not only the wealthiest part of the country, but also the part where most of the ethnic German population lived, has been completely devastated under communist rule, and transformed into an ecological and social disaster zone.[16] There is not much left to be given back to former owners, except destroyed homes in a destroyed landscape (not to mention the inhabitants[17]), and settling back there would, for many nostalgic Sudeten Germans, quickly turn out be a nightmare rather than a dream. It may thus be asked whether Sudeten Germans should not, rather than making claims, accept that their home is lost forever, and that the fairy country of their childhood remembrances simply does not exist anymore. Inversely, one would suppose that the Czech Government, following its pure self-interest, should be keen to invite former owners back into the country, especially in view of their emotional attachment to a region that, due to its saddening state, seems no more capable to attract any stranger's attachment. It is very unlikely that any other investor would take the same risks and make the same sacrifice to rebuild the country than a former owner returning to his home. The Czech Republic's decision not to provide restitution to the Sudeten Germans, even assuming it is not in violation of international law, appears thus unwise.

### 3. Property Restitution and Economic Transition

If a state does not want to restitute confiscated property to former owners, two alternatives are available: either the state can keep the property, or it can try to privatize it through methods other than restitution, for example by selling it.

Both alternatives have disadvantages. The state usually is less capable than a private owner to use property efficiently. If, by contrast, state-held property is privatised through other methods than restitution to prior owners, it is not

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[16] Cf. *Eagle Glassheim*, "Ethnic Cleansing, Communism, and Environmental Devastation in Czechoslovakia's Borderlands, 1945–1989", The Journal of Modern History 78 (March 2006): 65–92.

[17] *Glassheim*, op.cit., p. 65, quoting a study by *Tomáš Kostelecký*, Regionální diferenciace sociálních problémů vs..České Republice (Prague, 1994): "North Bohemia had Czechoslovakia's highest mortality rates and ranked at or near the top in alcoholism, crime, and suicide."

unlikely that the best pieces will be sold at "special conditions" to the cronies of the political nomenklatura.

It was for these reasons that the Council of Europe, in a Resolution adopted in 1996[18], advised

> "that property, including that of churches, which was illegally or unjustly seized by the state, nationalized, confiscated or otherwise expropriated during the communist totalitarian regimes in principle be restituted to its original owners in integrum, if possible, without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, fair compensations should be given".

In the same Resolution, the Council of Europe warned against the dangers of a failed transition process:

> "At best, oligarchy will reign instead of democracy, corruption instead of the rule of law and organized crime instead of human rights. At worst, the result could be the 'velvet restoring' of a totalitarian regime, if not a violent overthrow of democracy."

## III. The Practical Implications of the Beneš-Decrees for the Legal Order of Today

Such warning should not be shrugged off carelessly. While it would, of course, be an exaggeration to say that the Czech Republic was facing the imminent threat of falling victim to a new totalitarianism, the apparent unwillingness to repeal the Beneš-Decrees does set a question-mark behind the country's professed eagerness to build its future on the values of human rights and democracy. And while such repeal was neither technically nor politically a precondition for acceding to the EU, there is an evident self-contradiction between the Czech assertions that (a) the Decrees are "extinct" and that (b) they are the foundation of the Czech legal order, wherefore it is impossible to repeal them. This raises a serious question: what are the practical implications of such legislation for the legal system of the country keeping them in its status books? Is it possible to be a civilised nation and, at the same time, not repeal legislation that clearly is un-civilised? In other words, what does Europe accept by accepting the Beneš-Decrees?

In order to answer this question, it is necessary to understand that the seeming "acceptance", by the international community, of the expropriations effected by the Beneš-Decrees, combined with the seeming "admissibility" of a

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[18] Parliamentary Assembly of the Council of Europe, Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems, §§ 3 and 10.

selective and discriminatory approach towards restitution, creates a situation of moral hazard. If restitution was granted either to all or to no one, the scope for arbitrary legislative or administrative decisions would be much smaller – the intermediate option of granting restitution to *some* (but not all) former owners, is the approach with the greatest risk of generating legal uncertainty: if restitution is not a right, it quickly is turned into a favour[19]. The power to grant or to deny such favours is controlled not only by the legislative branch (i.e. the politicians carving the restitution laws according to the needs and wishes of the political parties), but also by the executive branch (i.e. the government agencies applying such legislation, who can use wide margins of interpretation).

It is, of course, legitimate for a public authority dealing with claims for restitution to avoid exposing itself to the reproach of carelessly giving away state-owned property; therefore it is clear that the competent authorities must verify carefully whether a claimant has a solid legal entitlement. However, the manner in which the Czech judiciary and administrative authorities handle restitution claims in some cases appears to go far beyond such commendable caution.

Under the current legal situation, Sudeten Germans wishing to recover their confiscated property must either show that they had retained or re-acquired their Czechoslovak citizenship before 1953, or, alternatively, that the confiscation had not been carried out on the basis of a correct application of the Beneš-Decrees and therefore was invalid. In the first case, they may claim restitution by virtue of Act 243/1992, in the latter case their remedy is the rei vindicatio, through which the rightful owner obtains restitution of his property from someone whose claim is based on a weaker title or no title at all.

When taking decisions on such claims, the Czech authorities of today face the task of applying the historic Decrees to the historic circumstances according to the criteria of the time. This is in itself problematic, given that, in the meanwhile, the Czech Republic is undoubtedly bound to respect the human rights standards of today, to which the Beneš-Decrees stand in radical contradiction. The fact that Czech administrative and judiciary authorities today still make decisions on the basis of the Decrees is like if Germany still used the criteria of the Nuremberg Laws to find out who was a Jew and who was not. But even if we frown at the idea, this "historic" application of the Beneš-Decrees is proba-

[19] On the restitution policy adopted by the Czech Republic cf. *Rhodri C. Williams*, The Contemporary Right to Property Restitution in the Context of Transitional Justice, International Center for Transitional Justice (ed.), New York 2007: "expatriates are excluded for failure to return, Sudeten Germans are excluded despite their stated intent to return (...) The apparent arbitrariness of Czech restitution highlights the challenges posed by intergenerational restitution, particularly where the unclear status of the underlying confiscations invites political criteria for the admissibility of claims...the lack of clear procedure and political consensus around restitution enable restitution and denial of claims to be based on truly flexible readings of the laws, or even upon no laws at all".

bly a necessity – it could only be avoided by annulling the Decrees with ex-tunc-effect; the mere repeal ex nunc would not be sufficient.

However, in a number of cases this leads to a bizarre situation: rather than retracing what had been decided by historic decision-makers, the competent authorities make *new* decisions[20], based on assumptions on what *should* have been decided at the time. And when it comes to making such new decisions, the dilemma arises how the Decrees should be interpreted: according to the human rights standards of today (but how can one apply such standards to the Beneš-Decrees, except by saying that both are incompatible?), or according to the wrathful spirit of the time? Accepting the latter would mean to give licence (even oblige) the administrative and judicial authorities of today to adopt decisions that deliberately violate human rights.

The Czech authorities of today appear to give to the Decrees the widest possible interpretation, confirming the validity of denaturalisations and confiscations even in questionable cases. Examples for such 'wide interpretation' (historical and contemporary) include cases where the Beneš-Decrees were used to confiscate the property of persons who were no Germans or Hungarians[21], or the property of one of the most outspoken opponents of the Nazis[22], or of Jews

[20] One such case is the case of (Count) *Hugo Salm*, who owned large estates in Moravia. When Decree 33/1945 was issued deprive ethnic Germans and Hungarians of their Czechoslovak citizenship, he introduced an application under § 2 of that Decree, requesting the confirmation that he was not affected by that measure. He died in 1946 before his application had been decided upon. Today the restitution claim of his successors depends on the question whether or not he lost his citizenship in 1945. And instead of deciding the case favorably on the formal grounds that, given that his application had not been rejected and the legal base for the procedure had fallen away in the meantime, the Czech authorities of post-1990 have started a new procedure based on Decree 33/1945 (never minding the fact that the Decree had been abrogated in 1949). In this procedure, the burden of proof is put on the successors, who have been requested to supply proofs that Hugo Salm had remained loyal to the Czechoslovak State (i.e. that he had actively participated in the struggle for liberation), so that the authorities may assess whether he *merited* to retain his citizenship. Technically, this means that it is the public authority of today that applies the Decree in a *new* decision. Cf. the statement made by Commissioner *Verheugen* in reply to a Written Question (P-0721/04) from a Member of the European Parliament, which directly refers to the Salm case and indicates that today the task of judges should be to "establish certain historical facts, not order a new withdrawal of citizenship, let alone a new expropriation" (Official Journal of the EU, C 88 E/709).

[21] One case is that of the *Prince of Liechtenstein*, who, as the Sovereign of the Principality situated between Austria and Switzerland, was of course neither German nor Hungarian (and had never in his life possessed any of these two citizenships). This did not prevent the Czech authorities to confiscate his properties on the basis of a Decree that foresaw the confiscation of property owned by (only) Germans and Hungarians.

[22] During the years of occupation, *Prince Adolph Schwarzenberg* had publicly exhibited such a strong attachment to the Czech nation, and such contempt for the Nazi ideology, that the idea of applying the Beneš-Decrees against him and his family was impos-

who had actually themselves been persecuted by the Nazis.[23] In some cases, confiscations appear to have been tainted with such severe procedural errors that it is impossible to consider them as valid legal acts[24] – what remains then is that the state grabbed the property concerned without any legal base at all, an act that, even under the low standards set by the Beneš-Decrees (and even if the legality of the Decrees were beyond doubt), cannot be described otherwise than as armed robbery. Given the chaotic political situation and the general atmosphere of lawlessness immediately after the war, it is not surprising that many of the confiscations of former Sudeten German property were affected by such procedural vices: property was confiscated from a person who was not (and never had been) the owner, or from a deceased person, or from a hereditas iacens[25], or without respecting the procedural requirements (for example, the

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sible. This did not prevent the State from confiscating his property – not under Decree 12/1945 (under the pretext that he had sympathised with the German occupiers), but under a special law (Act No. 143/1947) called the "Lex Schwarzenberg", without even an attempt of a justification. Contrary to Decree 12/1945, this law is not covered by any of the restitution laws enacted in the Czech Republic since 1990. Absurdly, therefore, his property can today not be returned to his successors precisely because he was never suspected of collaboration. In other cases, known (ethnic German) opponents of the Nazis were expropriated and expelled on the grounds that their opposition to the Nazi regime was not 'sufficient', i.e. that it did not involve active participation in armed resistance. The application of the relevant provisions in the Beneš-Decrees was arbitrary and self-contradictory at the time, and it remains so today. Even today, the Czech authorities issue decisions in which they explicitly acknowledge the "courage", "bravery", etc. of individual German victims of expulsion, but nevertheless refuse to give back their confiscated property, using a standard of 'proven loyalty' to the Czechoslovak Republic that hardly any Czech or Slovak, if put under the same scrutiny, would have been able to fulfil. This rigorist posture gives a strange impression, given that the judges making such decisions on other person's loyalty and bravery can know the occupation period only from hearsay. Of those having started their careers in the communist era, many seem to have missed their own occasion to show bravery in opposing a totalitarian regime.

[23] An example is the case of *Robert Brok*, decided by UN Human Rights Committee in *Brok vs. The Czech Republic*. Robert Brok was a Jew and the only member of his family surviving the Holocaust. Upon returning from Auschwitz, he found that the house formerly owned by his family had been confiscated by the Czechoslovak States on the basis of the Beneš-Decrees: it was considered 'German Property' because the Nazis had taken it from the Brok family and transferred it to a German company. Despite the UN Committee ruling in Brok's favour, the house has not been restituted until today, nor has any compensation been paid. For details see *Patrick Macklem*, "Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law", European Journal of International Law, Vol. 16 No. 1, 1–23.

[24] In one case, the public authority in 1945 had addressed deeds of confiscation to a person that had (1) never owned the property at question, and (2) died already in 1919! It should be obvious that, even in the Czechoslovak Republic of 1945, it was not possible to confiscate from deceased persons a property they had never owned. The act of confiscation is therefore void. Nevertheless the property at question has not been given back to the family.

[25] As a successor state of the Austro-Hungarian Empire, Czechoslovakia applied the (Austrian) General Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB). Under

owner was not notified). Yet even in these cases, where it is impossible to imagine by virtue of which legal title the state might have acquired the property at question, demands for restitution are rejected.

While it would seem obvious that the owners of property that was not validly confiscated, instead of having to rely on specific legislation providing for restitution (making it depend on a number of conditions, such as nationality, residence, and the filing of a claim within a tight deadline), must have the possibility to get their property back through a rei vindicatio (the legal action used by a legitimate owner to re-obtain his property from a person having no entitlement to it, which is not subject to any of these conditions), a recent decision of the Constitutional Court[26] deprives them of that possibility. According to this decision, which has been described as a "Copernican turnaround" in the history of law, the Restitution Act must be understood as excluding all other laws, and specifically the Civil Code, from serving as a basis for claims regarding property in state possession, irrespective of the (absence of a) title of possession.[27] This means that henceforth all claimants for restitution must first prove that their property has been validly confiscated – if, by contrast, the confiscation turns out to have been invalid, there can be no claim for restitution either! By

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the ABGB, the property of a deceased man is a separate legal person, described as hereditas iacens. Such hereditas iacens belongs neither to the deceased (who, being dead, is considered unable of "owning" anything, hence also unable of being expropriated), nor to his heirs (who acquire the property only following a decision by a law court, which transfers the property from the hereditas iacens to the presumptive heir). It is not itself a property, but it is a legal person sui generis that is capable of owning property. Not being a natural person, a hereditas iacens could not have a German, or Czech, or other nationality. Nor was it able of having committed any act that merited retribution. In view of the wording and the ratio legis of Decree 12/1945 (which is a punitive measure, addressing natural persons and their property) it seem absurd to apply that Decree to property owned by a hereditas iacens: the former owner, even supposing he merited retribution, was dead and could not be punished any more; the confiscation of property owned by the hereditas iacens was therefore at the expense of the presumptive heirs. Ironically, it occurred more than once (for example in the case of *Karl Des Fours Walderode*, cf. ECtHR, Appl. 40057/98) that these heirs were of Czech or Slovak nationality, which, following the logic inherent in Decree 12/1945, meant that the wrong "targets" were hit.

[26] Plenary of the Constitutional Court (Pl. ÚS – st. 21/05): Findings of the Constitutional Court of 1 November 2005 on property acquired by the State prior to 1948 - Stanovisko Ústavního Souda z 1. listopadu 2005, ve věci majetku zabaveného státem před r. 1948, available on the Courts website (http://www.concourt.cz). A summary of this Legal Opinion (in German) is found in an article in the Frankfurter Allgemeine Zeitung, edition of 26 November 2005, p.3: „Dies wird auf der ganzen Welt Diebstahl genannt."

[27] This interpretation, which is in contradiction to previous findings of the same Constitutional Court, was not based on the wording either of the Restitution Act or of the Civil Code. Instead, the Constitutional Court based its reasoning solely on the title of the Restitution Act: if a law was called "Restitution Act", it argued, this meant that all claims to recover property from the state must exclusively be made on the basis and following the procedures foreseen in that law.

this opinio legis, which is of *general* application, the Restitution Act, in absurd contradiction to its name, is, in fact, itself turned into an act of confiscation. Or in other words: the confiscation of the property at question has taken place not in 1945, but either at the moment when the Restitution Act was enacted, or on the day when the Constitutional Court issued its "creative interpretation" of that Act.[28] Here, at the latest, a point is reached where the situation becomes worrying not only for the holders of historical claims, but also for contemporary property owners: if taken at face value, the decision means that the state may grab property without even carrying out any confiscation procedure at all, and keep it as long as it does not adopt any specific law to restitute it. What will come next? And who can be sure that he could not be the next victim?

Such appears to be the state of the law in the Czech Republic today. But, as if this were not sufficient, there also have been numerous reports about the wiretapping of the offices of advocates representing persons who claimed restitution of confiscated property, the involvement of the Secret Services in procuring information that the State could use against such claimants[29], or even the use of false documents in court to evidence "confiscations" that, as it seems, had not actually taken place.[30] At the same time, former owners have found it difficult to obtain access to relevant documents if these are in state possession:

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[28] Two Constitutional Court Judges, *Eliska Wágnerová* and *Miloslav Výborný*, submitted a Dissenting Opinion, in which they commented: "Oproti tomu z žádného citovaného rozhodnutí Evropského soudu pro lidská práva nelze dovodit, že by tento soud přiznal státu možnost zákonem legalizovat vlastnictví státu k věci, kterou získal bez právního důvodu, což je akt, který v případě obdobného jednání ze strany fyzických osob je v celém civilizovaném světě nazýván krádeží." (Transl.: In contradiction to all of the quoted case-law of the ECHR, this Court has recognised to the State the possibility of legalising the appropriation to itself of property, which it possesses without any legal title – which act, if it is committed by physical persons, is called "theft" throughout the entire civilized world.)

[29] Cf. Frankfurter Allgemeine Zeitung (edition of 3 April 2007, p.3): „Verletzung der Privatsphäre, Telefonabhörung, Überwachung von Anwälten, polizeiliche Verwendung nachrichtendienstlicher Erkenntnisse sind anderswo in der EU auch dann heftig umstritten, wenn es um die Abwehr von Terroranschlägen und den Kampf gegen das organisierte Verbrechen geht. In der Tschechischen Republik werden sie eingesetzt, um rechtmäßigen Eigentümern den Zugang zu ihrem Vermögen zu versperren." (Transl.: violation of the private sphere, wiretapping, surveillance of attorneys, the police making use of the findings of secret services – in other countries of the EU, such practices are heavily disputed even when their purpose is the prevention of terrorist attacks or the combat against organised crime. In the Czech Republic, they are used to prevent rightful owners from getting access to their property).

[30] In one case, the Office for the Defence of State Property allegedly submitted to the court a "deed of confiscation" dated 1946, which, as it turned out, stemmed from a local authority that had been set up 3 years later, in 1949(!!). A photograph of the (false?) document was reproduced in a widely reputed newspaper, the Frankfurter Allgemeine Zeitung (edition of 3 April 2007, p.3). Unfortunately, the Czech authorities have not yet identified the origin of the document.

often, the files are "lost", or have "disappeared" in the state-owned archives – and yet it is not the state, but the claimant, who carries the burden of proof.

There have also been reports on cases where law courts and administrative bodies have simply not taken account of documentary evidence that was submitted to them by applicants seeking restitution. For example, in one case recently brought before the European Court of Human Rights, an applicant, in order to prove his grandfather's loyalty to the Czechoslovak Republic during the war, had submitted to the court the affidavit of an eyewitness who testified that the grandfather had hidden arms and radio equipment for Czech resistance fighters in his house. The court passed over this testimony in complete silence. When the applicant appealed against this decision, the Supreme Administrative Court decided that the court had not committed any fault, because the affidavit was not in the file any more (no explanation was given, and no attempt was made to find out, when and by whom it had been removed). When the applicant made a last appeal to the Constitutional Court (the highest instance in the Czech Republic), that appeal was rejected[31] on the ground that the affidavit had been taken into account by an administrative body before the case had been brought to the courts. If the document had left no trace in the file of that administrative body, this was because that body had considered it irrelevant. In any case, the failure to deal with one such piece of evidence was, according to the Constitutional Court, "outweighed by the overall quality of the procedure"(!). Strangely, what had escaped from the Constitutional Court's attention was that (1) the affidavit had never been submitted to the administrative body that had (allegedly) taken it into account in its decision, and that (2) that decision had indeed been issued by the administrative body (in January 2003) long before the affidavit had been drawn up and signed (in November 2003) – which, evidently, is a logical impossibility.

In short, it is not only the material law, but also the way in which applications for restitution handled procedurally, which creates an (extremely) uneven playing ground. The question is, whether such procedural practices, if accepted in the context of restitution claims, will not ultimately also be used in other contexts, thereby undermining the entire administrative and judicial system as such?

The unwillingness of Czech law courts and administrative authorities to adjudicate restitution of confiscated property (and, inversely, their willingness to rely even on the most extravagant legal doctrines in order to prevent restitution) must to some extent be attributed to a public opinion that is generally hostile to claimants dubbed as "foreign" or "rich", or both. The political class of the country is not ashamed of inciting and exploiting this sentiment. For example,

[31] The Constitutional Court's decision carries the reference IV. ÚS 1658/07.

when nobleman *František Oldřich Kinský* was accorded restitution of a small plot of land by a subordinate law court in 2003, uproar went through the country and the Czech government held an emergency meeting[32], discussing possible measures to "ensure that the Beneš-Decrees be henceforth applied correctly"(!). Likewise, when (Count) *Karel Des Fours Walderode* obtained restitution of his estate in 1993, it was Prime Minister *Václav Klaus* in person who picked up his pen and wrote a letter to the competent district authorities in Semily, in which he stated that the restitution, even if it should be "legal", was "unacceptable". These words were followed by facts: the decision that had been issued in favour of Mr. Des Fours was annulled, the law on which it had been based was modified with retroactive effect, and the claim for restitution was rejected.[33]

In the meanwhile, the independence of the judiciary has also been put at question by attempts of the political class to gain control over it. In clear violation of the principle of separation of powers, President *Václav Klaus* issued a decision to remove of Supreme Court Chief Justice *Iva Brožová* from office in February 2006. The Constitutional Court (despite its willingness, shown at other occasions, to faithfully execute the will of the government) subsequently invalidated Klaus' directive, but, far from respecting this judgment, the government makes attempts to circumvent it. The very day the Constitutional Court invalidated the removal of Brožová, Justice Minister *Jiří Pospíšil* announced that his ministry would propose a new statute allowing for the removal of chief

[32] The meeting was held in Prague on 9 July 2003 (participants included State President *Klaus*, Prime Minister *Špidla* the Presidents of both Chambers of Parliament, *Zaoralek* and *Pithart*), as an immediate reaction to a decision of a local law court in Ústí nad Orlicí (of 24 June 2003), by which a plot of land had been returned to *Kinský*. The fact was widely reported in Czech (for example, the Prague Post, 10 July 2003) and foreign newspapers (for example, the Neue Zürcher Zeitung of 9 July and the Frankfurter Allgemeine Zeitung of 11 July 2003). Prior to the meeting, Czech Minister for Culture *Pavel Dostal* proposed an amendment to the Constitution that would explicitly forbid all further restitutions.

[33] A full account of these events is given in: UN Human Rights Committee, Communication No. 747/1997, *Des Fours Walderode vs. Czech Republic*, paragraph 2.4 and following. The Committee, on 30 October 2001, found a violation of the ICCPR and requested the Czech Republic to "provide (the complainant) with an effective remedy, entailing in this case prompt restitution of the property in question or compensation therefor, and, in addition, appropriate compensation in respect of the fact that the author (was) deprived of the enjoyment of their property since its restitution was revoked in 1995. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law." Nothing of this has happened. Today, in 2008, the complainant's surviving widow is still waiting to obtain restitution.

judges by the justice minister, a plan that was blatantly at odds with the constitutional reasoning the court had just announced.[34]

The independence of the judiciary is further weakened by the nomination of high-ranking politicians to become judges of the Supreme Court or the Constitutional Court. For example, the man selected to replace Mrs. *Brožová* was *Jaroslav Bureš*, former Minister of Justice. The current President of the Constitutional Court, too, is a former politician: prior to assuming this office, *Pavel Rychetský* served as Minister of Justice. His views on restitution of property to former owners, especially members of the former nobility, can be deduced from a statement he made to the press in 2003[35], shortly before his nomination: "The aristocracy in this country is basically an occupying force. They all arrived after the battle of Bílá Hora."[36] Such statements may provide some explanation for the strange decisions made by the court over which Mr. Rychetský presides: there seems to be a social and ethnic prejudice against some of the former landowners.

From all this, it must be concluded that, even if there is currently no political pressure from outside, the successor states of Czechoslovakia would be well advised to reconsider the issue of the Beneš-Decrees. Albeit "extinct", the Decrees appear to have the potential of slowly and surreptitiously transforming these countries into a sort of legal no-go-zone, where the rule of law and the independence of the judiciary are weak and unreliable, and where property owners face considerable uncertainty. The detriment caused by this development would be much greater for the Czech Republic itself than for the handful of Sudeten Germans who are discouraged from returning to their former homes and from contributing to the reconstruction of a devastated region. So far, the state has succeeded in fending off the vast majority of the claims, – but was this really a victory? And is it going to last?

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[34] *Mark Gillis*, "A Delicate Balance", The Prague Post 19 September 2007, commented: "To find another country where similar steps have been taken against a judicial official of that stature, one has to look to Pakistan. Pakistani President *Pervez Musharraf*, a man who came to power in a military coup, recently "suspended" the country's chief justice. But, even in a military dictatorship, the rule of law prevailed. When the Pakistani Supreme Court ruled that his decision was illegal, Musharraf accepted the ruling. Not so in the Czech Republic...".

[35] *Marek Tomin*, "Nobility on Trial", The Prague TV Zine 20 June 2003, http://prague.tv/articles/zine/nobility-on-trial.

[36] The battle of Bílá Hora (the "White Mountain", a hill on the western edge of Prague), which took place in 1620, during the Thirty Year War, was a dire blow to the Czech landed gentry. While many of them lost their property and had to leave the country, the Czech lands were divided up amongst those favoured by the new rulers and, for many of these, Bohemia became a new home.

## IV. Sudeten Claims for Compensation and the Case-Law of International Human Rights Institutions

While it is true that the attempts of former property owners to obtain restitution through international courts and quasi-adjudicative bodies have so far not been successful, it is not excluded that this situation could change in the future.

There are two main reasons why, until now, such claims were rejected. One is that the right to property, contrary to what many non-lawyers believe, enjoys a rather low standard of protection. Neither the Universal Declaration of Human Rights nor the International Covenant on Civil and Political Rights (ICCPR) recognise property as a "human right", and even classical doctrine on natural law considers the right to property to constitute only a secondary directive of the natural moral order: property is never an absolute right, but always subject to and limited by societal purposes. It is therefore, in principle, admissible for a state to order expropriations even without compensation (in fact, every tax that is levied is nothing else than this: an expropriation). The only limitation is that the institution of property should as such be recognised, and that expropriations should not be arbitrary.

The European Convention on Human Rights, in Article 1 of the 1st Supplementary Protocol, does recognise a Right to Property, but the interpretation given to that right by the European Court of Human Rights is rather narrow: protection is granted only where the person making the claim had actually possessed the property at question, or where it had a "legitimate expectation" to acquire property. Such "legitimate expectation" is not recognised where the claimant is, in fact, asking for the law to be changed in his favour (i.e. a restitution law to be enacted).[37] In other words, the Convention does not oblige a state to return property confiscated prior to the entry into force of the Convention in the country at question, even if that confiscation was manifestly unjust, or if it was carried out for such despicable motives as ethnical hatred or racism. But that approach follows a purely legal reasoning, and I would be surprised if it were different for Holocaust victims than for Sudeten Germans.

The second reason to reject Sudeten claims is that the relevant provision of international law (i.e. the 1st Supplementary Protocol to the ECHR) entered into force in Czechoslovakia only in 1992, long after the expropriations had taken place. Claims based on an alleged violation of the right to property are thus inadmissible at least ratione temporis (with regard to the Convention[38]), but also

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[37] ECtHR, *Gratzinger and Gratzingerová vs. the Czech Republic* (Appl. 39794/98), §§ 72, 73.

[38] Cf. ECtHR, *Malhous vs. Czech Republic* (Appl. 33071/96); *Des Fours Walderode vs. Czech Republic* (Appl. 40057/98), *Prince Hans Adam II of Liechtenstein vs. Ger-*

*ratione materiae* (if they are based on any other legal text, such as the ICCPR[39]).

However, if the confiscations of 1945 and 1948 as such are exempt from judicial review, the same is not necessarily true of the legislation adopted since the downfall of Communism, including the legislation on restitution, and decisions implementing or applying such legislation.

As we have seen, besides (and maybe even more than) with the right to property, confiscations often come into conflict with the principle of equality before the law. The same conflict arises where confiscated property is restituted to certain former owners, but not to others. It appears worthwhile to briefly consider the relevant case-law of competent international judiciary bodies, i.e. the UN Human Rights Committee (which receives complaints on a state's failure to comply with the ICCPR) and the ECtHR.

Both the ECHR (in its Article 14) and the ICCPR (in its Article 26), contain provisions prohibiting discrimination. In the context of legislation on restitution, this raises the question whether, once a country has decided to adopt such legislation, it is admissible to discriminate between different groups of victims.

### 1. The Case-Law of the UN Human Rights Committee

The Czech Republic, as we have mentioned, has adopted such a selective approach. In a first step, it was decided to provide restitution only to the victims of the post-1948 expropriations, and, within this group, only to persons who were Czechoslovak citizens at the time they applied for restitution. This excluded many persons who had fled from communist rule and who, as a consequence, had been deprived of their citizenship.

The UN Human Rights Committee decided that this discrimination between citizens and non-citizens was in violation of Article 26 of the ICCPR: "Taking into account that the State party itself is responsible for the author's ... departure, it would be incompatible with the Covenant to require the author ... to obtain Czech citizenship as a prerequisite for the restitution of [his] property or, alternatively, for the payment of appropriate compensation."[40] In the meantime, the Czech Republic had (retroactively!) further restricted the requirements,

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*many* (Appl. 42527/98), *Harrach vs. Czech Republic* (Appl. 77532/01), and for the ICCPR: Communication No. 520/1992, *E. and A.K. vs. Hungary.*

[39] Communication No. 566/1993, *Somers vs. Hungary.*

[40] See Communication No.586/1994, *Adam vs. Czech Republic*, paragraph 12.6; Communication No.857/1999, *Blazek vs. Czech Republic*, Views adopted on 12 July 2001, paragraph 5.8, and Communication No. 1463/2006, *Peter and Eva Gratzinger vs. Czech Republic*, views adopted on 25 October 2007.

granting restitution only to persons who had never lost or given up their Czechoslovak citizenship between 1948 and 1990, which resulted in another condemnation[41] by the UN Human Rights Committee.

The findings of the UN Human Rights Committee do not seem to have helped any of the successful complainants to re-obtain their confiscated property. Given the fact that the findings of the Committee cannot be enforced against a state, the Czech Republic turns a blind eye on them. Nevertheless, the Committee's findings have clearly established that it is inadmissible to discriminate *within* one and the same group of victims, e.g. within the group of those affected by the post-1948 confiscations. The question remains whether it remains admissible to discriminate between two different groups of victims, i.e. those expropriated before and those expropriated after 1948.

The Committee's case-law is somewhat ambiguous in this regard: while in *Des Fours Walderode* the Committee had ruled in favour of a complainant whose property had been confiscated under Decree 12/1945[42], it noted in the case of *Schlosser vs. the Czech Republic*[43] that "in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate the victims of that regime does not appear to be prima facie discriminatory ... merely because ... it does not compensate the victims of injustices allegedly committed by earlier regimes".

Not prima facie. But what if we take a second look?

The reference to "injustices allegedly committed by earlier regimes" makes believe that the confiscations under the Beneš-Decrees and those following the communist putsch of 1948 have nothing to do with each other, or that they took place in completely different historical circumstances – as if there were a gap of three centuries, rather than two and a half years, between them. This, however, has little to do with reality. The rationale behind the 1945 confiscations was not only ethnic cleansing, but also the furthering of the strategic aims of the Communist Party, which, even before the 1948 putsch, had already taken control over the key posts in the Czechoslovak Government. The communists' purpose was to seize as much property as possible (irrespective of whether the former owners were Germans/Hungarians or not, whether they had shown sympathies for the Nazis or not, etc.), to appropriate it to the state and, subsequently, to such persons who would then become supporters of the Communist Party – either out of gratitude for such patronage, or because they knew that

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[41] Communication No. 747/1997, *Des Fours Walderode vs. Czech Republic*, Views adopted on 30 October 2001.

[42] Cf. Communication No. 747/1997, paragraph 2.2.

[43] Communication No. 670/1995, *Schlosser vs. Czech Republic*, Views adopted on 3 November 1998.

only communist rule, rather than integration into the free world, would permanently secure their ownership in the possessions confiscated from the expelled Sudeten Germans. (This gratitude expressed itself in votes: in the democratic elections of May 1946, the Communist Party obtained between 50 and 60% of the votes in the circumscriptions of Northern Bohemia, and even today electoral support for the Communist Party is still by far superior here than in other regions of the Czech Republic.) In short, by expelling Germans and Hungarians from Czechoslovakia, *Edvard Beneš* threw himself and his country into the arms of Soviet communism, and his correspondence with *Stalin* provides ample proof that he made this choice consciously: it is amazing to see how ethnical hatred can lead a person or even an entire nation to inflict immeasurable damage on itself.[44] Clearly, the confiscation of German and Hungarian property through the Beneš-Decrees was a first and decisive step towards the communist seizure of power. Thus, from any other than a legalistic point of view, the confiscations of 1945-1948 and those after 25 February 1948 are two chapters of one and the same story.[45]

Setting aside these historical issues, it must also be noted that, of the two decisions, *Des Fours Walderode* is posterior to *Schlosser*. In addition, the Schlosser decision was based on the factual assumption[46] that "whereas a law has been enacted to provide compensation to Czech citizens for properties confiscated in the period from 1948 to 1989, no compensation law has been en-

[44] In 2004, as part of a political effort to fend off criticism against the Beneš-Decrees, the Czech National Assembly adopted a law to honour President *Edvard Beneš*. It consisted of only one sentence: "President Edvard Beneš has acquired merits for the state." Given the factual, and not normative, character of this sentence, one is tempted to wonder whether this law could actually be considered a law and, if so, what its legal effects would be: would it be illegal, in the Czech Republic, to publish an article like the present one? If so, how would this be compatible with elementary freedoms guaranteed by the Czech constitution, such as the freedom of expression? It was probably due to such considerations that President *Václav Klaus* refused to sign this law, which he considered to be "strange and unnecessary" (source: "Die Presse", 22 June 2008). Even if the law has thus not entered into force, this episode does raise concerns with regard to the political and legal culture of the country from which it originates, and the values that, by such actions, are inculcated into the minds of the next generation. If Beneš is honoured as a national hero, does this not create a risk that, should situations like in 1938 or 1945 ever occur again, his successors might draw inspiration from his actions, which consisted in (1) not ordering military resistance against the Nazi invasion, (2) after the war expropriate and expel a defenceless national minority, and (3) handing his own country over to the Soviets, again without any attempt of self-defence?

[45] This connectivity is further corroborated by the fact that the Beneš-Decrees were used not only against Germans and Hungarians, but also against persons not pertaining to either of these nationalities (such as the *Prince of Liechtenstein*), and that already prior to 1948 specific legislation was adopted to expropriate the *Schwarzenberg* family, despite their pronounced anti-Nazi stance. Cf. supra notes 21, 22 and 23.

[46] Cf. paragraph 6.4 of the Committee's views.

acted for ethnic Germans for properties confiscated in 1945 and 1946 following the Beneš decrees". This assumption is erroneous: the Czech legislation *does* grant restitution to *some* of the victims of the Beneš-Decrees, namely to those who had stayed in Czechoslovakia and, between 1945 and 1953, re-acquired the Czechoslovak citizenship[47]. The application in Des Fours Walderode was based on precisely that provision, and the Committee found that the applicant had been discriminated against on the grounds of his citizenship.

The question whether it is admissible to provide restitution to the one group (i.e., victims of post-1948 confiscations) and to withhold it from the other (i.e., victims of earlier confiscations) remains thus theoretical. There is actually no need for Sudeten Germans in quest of restitution to compare themselves with the victims of the communist nationalisations. For if it has been established, with regard to the post-1948 victims, that discrimination within that group is prohibited, such prohibition within the group of the victims of the 1945 confiscations must be equally inadmissible – this is the true significance of the *Des Fours Walderode* decision. As we have seen, Act 243/1992 foresees compensation for some dispossessed Sudeten Germans, but not for all. What is the decisive criterion here? Once again, it is citizenship and residence, this time in a law stemming from 1992. It clearly results that the UN Human Rights Committee has already resolved the question (albeit in a different way than *Waters*[48] appears to believe): if some Sudeten Germans have received restitution, which indeed they have, all others must have the same entitlement.

## 2. The Case-Law of the European Court of Human Rights

As I mentioned, the views of the UN Human Rights Committee, even if they give a hint on what is conform to Human Rights and what is in violation of them, do not necessarily help the applicants: they cannot be enforced. Let us

[47] Cf. Act 243/1992, § 2 (1): "Entitled [to restitution] are citizens of the Czech and Slovak Federal Republic, who have their residence on the territory of the Czech Republic, and who lost their property under [Decree 12/1945 or Decree 108/1945 – (i.e. the relevant Beneš-Decrees)], and who have never committed any crimes against the Czechoslovak State, and who re-acquired their citizenship under [Act 245/1948, Act 194/1949 or Act 34/1953], if they had not already retained it by virtue of [Decree 33/1945 – i.e. another of the Beneš-Decrees]." Through an amendment passed in 1996, the condition of permanent residence was removed (following a judgement of the Constitutional Court, holding the residence requirement to be unconstitutional), but a new condition was added, of uninterrupted Czechoslovak/Czech citizenship from the end of the war until 1 January 1990.

[48] Op.cit. (Fn.1), p. 45: "the Committee based this view on its objection to the requirement in the legislation that claimants currently be Czech (or Slovak) citizens, and it has never extended that logic to the massive denaturalizations prior to 1948."

therefore turn to the case-law of the ECtHR, the role of which is to interpret the European Convention on Human Rights.

Article 14 of the Convention prohibits discrimination not in general, but only regarding the "enjoyment of the rights and freedoms set forth in this Convention". The Convention recognises a Right to Property – but this, in principle, does not include a right to obtain restitution of a property confiscated prior to the entry into force of the Convention in the country at question. However, if a state legislator enacts legislation on compensation/restitution for victims of confiscations, ethnic cleansing or other historical misdeeds, such legislation *does* create a "legitimate expectation" to acquire property, i.e. a property right in the sense of the Convention[49], at least for those to whom such entitlement is explicitly accorded.

The question remains whether persons who, despite having suffered exactly the same injustice at exactly the same time through exactly the same measure, but to whom discriminatorily no entitlement is given, have not the same "legitimate expectation". In other words, does Article 14 of the Convention protect only those against discrimination who are not victims of discrimination? This would not make much sense. And indeed, recent case-law of the ECHR shows that Article 14 of the Convention can be used by citizens to obtain rights that for some reason the domestic legislator did not intend to give them. One example is the recent decision in the case of *E.B. vs. France*[50], where the ECHR condemned France for not having granted permission to adopt a child to an unmarried lesbian person. Although the Convention does not guarantee to anyone the right to adopt children, a country explicitly foreseeing in its legislation the possibility for single (i.e. unmarried) persons to adopt could not, according to the Court, withhold this right from certain persons because of their sexual orientation. In that context, the Court explicitly highlighted that "the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the

[49] "Once a Contracting State has enacted legislation for the restitution or compensation of property expropriated under the previous regime, and it has remained in force after the State ratified the Convention, including Protocol No. 1, that legislation may be regarded as having created a new property right protected by Article 1 of Protocol No. 1 for those persons satisfying the legislative conditions" (ECtHR, *Bergauer and 89 Others vs. Czech Republic*, no. 17120/04). The Court has therefore competence to examine "whether Article 1 of Protocol No. 1 was violated by reason of the (...) State's acts and omissions in relation to the implementation of the applicant's entitlement to (...) property, which was vested in him by (that State's) legislation on the date of the Protocol's entry into force and which subsisted on 12 March 1996, the date on which he lodged his application with the Commission." (ECtHR, *Broniowski vs. Poland* [GC], no. 31443/96, § 125).

[50] ECtHR, *E.B. vs. France* (Appl. 43546/02).

Articles of the Convention" and that "prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide."

There is good reason to believe that the right to obtain restitution, if granted to one group of potential applicants, falls "within the ambit" of the right to property, and that, therefore, such a right must not be handed out discriminatorily.

In another case[51], Austria was condemned for having provided, in its legislation, to the surviving partner of an unmarried male/female couple to take over the apartment rental contract concluded by his/her deceased partner, without foreseeing the same possibility for same-sex partners. Again, the Convention itself does not guarantee to anyone such a right to step into the deceased partner's rental contract – yet if a national legislator foresees such a right, he must do so, says the Court, without discrimination. This case is of specific interest here because the right to take over an ancient rental contract can be of considerable economic value (especially in Austria, where tenant-friendly legislation prevents landlords from raising rents according to the laws of the market) – in true fact, therefore, this right is a "property" in the economic sense, which the claimant had not been deprived of before filing his complaint with the ECtHR, but which he had never possessed and could acquire only as a consequence of the Court's ruling. The real interest of the applicant was therefore not, as the reference to Article 8 of the ECHR might suggest, to defend his right to private life (in fact, he himself disclosed his homosexual relationship to the deceased tenant in order to draw a benefit from it), but to obtain an economic advantage. To some extent, this departs from the ECtHR's prior case-law according which property was only protected if it had already been in the possession of the applicant at the time the Convention entered into force, and subsequently withdrawn from him. As it seems, the Convention *can* be used to obtain new property.

Now, it would surely be very strange if the ECtHR were to use Article 14 of the Convention only in order to help homosexuals acquire new possessions, but not to help the victims of ethnic cleansing recuperate what once was theirs. So far, only one application to the ECtHR raised the issue of discrimination between different groups of persons expropriated under the Beneš-Decrees, some of which received compensation whereas others did not. But that application, *Bergauer and 89 others vs. The Czech Republic*, was declared inadmissible due to the applicants' failure to exhaust domestic remedies, so that the fundamental

[51] ECtHR, *Karner vs. Austria* (Appl. 40016/98).

issue was not examined. The court's curt remark "that Article 1 of Protocol No. 1 (cannot) be interpreted (...) as imposing any restrictions on their freedom to determine the scope and conditions of any property restitution to former owners", and that "given the absence of any general obligation to restore property which was expropriated before ratification of the Convention (...) it cannot be argued that the Czech Republic is obliged under the Convention to restore the property confiscated under the Presidential Decrees to the former owners", is a mere obiter dictum, and was apparently not the result of a thorough examination of the case.[52] If the Court really believed a state to enjoy completely unrestricted freedom to provide restitution to some victims, and not to others, the consequences would be absurd, and the Court would deprive itself of the possibility of condemning even the most blatant cases of discrimination. For the same would have to apply to any kind of benefit handed out by a state, not only to restitutions: nothing would then prevent a state from handing out higher salaries to male than to female public servants, or free medical treatment to tall and curly-haired, but not to chubby and bold men. After all, a salary not yet paid out, or a medical treatment not yet received are no "property" – at least not if there is no legal entitlement to them. The result would be that discrimination is prohibited only when the state is taking, not when it is giving.

Given that recent ECtHR case-law rejects such arbitrary approaches, it appears that it might be not the right to property as such, but the ban against discrimination, which could become the main tool for Sudeten German to obtain compensation. This would reflect what *Rhodri C. Williams*[53] has found to be a general principle in transitional justice: "clearly governed by contemporary human rights law is the requirement of fairness and equal treatment in any contemporary restitution procedures that governments voluntarily provide."

## V. Conclusion

Be that as it may, the interpretation that by accepting the Czech Republic and Slovakia as new members the EU has "reconfirmed the legality" the expulsion of the Sudeten Germans, or considered it as a "righteous retribution for collective guilt", is clearly mistaken. On the contrary, it may safely be assumed that the international community rejects "ethnic cleansing" under all circumstances, irrespective of an alleged or real "guilt" of the victims. And this is, of course, good so.

The only – the real – issue here is the claims for restitution made by some Sudeten Germans. While it remains open whether these claims will ultimately

[52] Cf. ECtHR, *Bergauer and 89 Others vs. Czech Republic*, no. 17120/04.

[53] Op.cit. (Fn. 19), p. 15.

be satisfied, it is clear that neither the EU, nor Germany, nor Austria have "rejected" these claims. They only decided that the satisfaction of these claims should not be made a pre-condition for the EU accession of the Czech Republic. Should such claims remain unsuccessful before the competent international judiciary bodies, this will be due to their falling outside the temporal and/or material scope of the relevant international conventions on human rights, and would in no way prove that "ethnic cleansing" was, in the case of the Sudeten Germans, legitimate.

The dangerous implications of a theory according which our absolute commitment against ethnic cleansing would suddenly be subject to exceptions are self-evident; there is no reason why the case of the Sudeten Germans should remain the only and last such exception. Unfortunately, the theories developed by peaceful intellectuals can have awful consequences when they are put into practice by more practically-minded people.[54]

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## Abstract

*Jakob Cornides:* The Sudeten German Question after EU Enlargement, In: Law of Property and Injustice of Expropriation. Coming to terms with the past. Vol. II. Ed. by Gilbert H. Gornig, Hans-Detlef Horn and Dietrich Murswiek (Berlin 2009) pp. 213-241.

The decision of the European Union not to make the accession of the Czech Republic and Slovakia dependent on a formal repeal of the Beneš-Decrees and restitution and/or compensation to dispossessed and expelled Sudeten Germans does not mean that there is now an exception to the prohibition of ethnic cleansing. Instead, the EU's decision is based on a pragmatic approach to the delicate task of correcting wrongs of bygone days: after EU enlargement, Sudeten Germans are free to return to Bohemia, settle down there, and acquire land property or set up businesses. Restitution and/or compensation is therefore the only remaining issue. By not making the fulfilment of restitution claims a pre-

[54] Incredibly, not even the Nazi Holocaust is a taboo anymore: On 29 February 2008, *Matan Vilnai,* Israel's deputy defence minister, told army radio that "the more Qassam [rocket] fire intensifies and the rockets reach a longer range, they [i.e. the Palestinians] will bring upon themselves a bigger shoah because we will use all our might to defend ourselves". What is underlying these threats is the assumption that the Palestinians, by firing Qassam rockets on Israeli civilians, *deserve* such a treatment, i.e. that a "bigger shoa" would be justified in their case.

condition of EU enlargement, the EU has neither confirmed nor rejected the validity of these claims.

More generally, while international law forbids ethnic cleansing under whatever circumstances, it does not usually foresee an obligation for states to provide reparation to individual claimants with regard to past suffering. However, if a state adopts measures to provide such reparation to the victims of historic injustice, it must do so without discrimination.

Die Entscheidung der Europäischen Union, den Beitritt der Republik Tschechien und der Slowakei nicht von der formellen Aufhebung der Beneš-Dekrete und von der Restitution oder Entschädigung der enteigneten und vertriebenen Sudetendeutschen abhängig zu machen, bedeutet nicht, dass nun eine Ausnahme vom Verbot ethnischer Säuberungen geschaffen wurde. Durch die Entscheidung wollte man sich stattdessen pragmatisch der sensiblen Aufgabe nähern, vergangenes Unrecht wieder gutzumachen: Nach der EU-Erweiterung dürfen die Sudetendeutschen in ihre Heimat zurückkehren und sich dort niederlassen, Eigentum erwerben und Geschäfte machen. Eigentumsrestitution oder Enteignungsentschädigung sind daher die einzigen noch verbliebenen Problemfelder. Damit, dass die EU-Erweiterung nicht von der Erfüllung entsprechender Forderungen abhängig gemacht worden war, hat die EU deren Berechtigung weder bestätigt noch bestritten.

Allgemeiner gewendet: Obwohl das Völkerrecht ethnische Säuberungen unter welchen Umständen auch immer verbietet, sieht es in der Regel keine Pflicht der Staaten vor, individuellen Klägern eine Entschädigung für vergangenes Leid zu gewähren. Allerdings, wenn ein Staat Maßnahmen zur Entschädigung der Opfer historischen Unrechts ergreift, muss er dies ohne jede Diskriminierung tun.