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HUMAN RIGHTS COMMITTEE
Ninety-first session
15 October–2 November 2007

DECISION

Communication No. 1516/2006

Submitted by:	Herbert Schmidl (not represented)
Alleged victim:	The author
State Party:	Germany
Date of communication:	4 January 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 November 2006 (not issued in document form)
Date of adoption of decision:	31 October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: State party failure to "legally protect" the author in relation to his restitution claim before the Czech Republic

Procedural issues: Admissibility; reservation to the Optional Protocol; non substantiation

Substantive issues: Discrimination on the basis of Sudeten German descent

Articles of the Covenant: 2; 6; 7; 8; 9; 10; 12; 13; 14; 17; 26

Articles of the Optional Protocol: 2; 5, paragraph 2 a)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Ninety-first session

concerning

Communication No. 1516/2006[*]

Submitted by:	Mr. Herbert Schmidl (not represented)
Alleged victim:	The author
State Party:	Germany
Date of communication:	4 January 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 2007,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Herbert Schmidl, born in 1923 in former Czechoslovakia, now residing in Germany. He claims to be a victim of a violation by Germany[1]

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

[1] The Optional Protocol entered into force for Germany on 25 November 1993. Germany entered a reservation to article 5, paragraph 2 a), of the Optional Protocol "to the effect that the competence of the Committee shall not apply to communications
a) which have already been considered under another procedure of international investigation or settlement, or
b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;
c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."[The Committee members should note that the author has also

of article 2, read in conjunction with article 26, of the International Covenant on Civil and Political Rights. The author is not represented by counsel. The Committee's Special Rapporteur on new communications decided that the question of the communication's admissibility should be considered separately from the merits.

Factual background

2.1 The author's uncle owned agricultural real estate in the region of the Sudetenland, which between 1938 and 1945 was incorporated into the territory of the German Reich. In May 1945, the estate was occupied by the Red Army and subsequently confiscated by the post-war Czechoslovak administration. In 1946, the author and his family were expelled from Czechoslovakia. The author's family had to perform forced labour on the farm before they were expelled, and no compensation was paid for the lost property by Czechoslovakia or the Czech Republic. The author claims to be the sole heir of the expropriated property.

2.2 On 3 June 1971, the author received DM 40,000 under the German Compensation Act (*Lastenausgleichsgesetz*) for losses suffered in the Second World War. However, this payment should, in the author's view, be regarded as social and economic assistance rather than as compensation for lost property, for the following reasons: the amount paid equalled the profits generated by the agricultural estate for one year only; the money has to be paid back to the State in the event that the former owner either has his or her property returned or receives adequate compensation; and the preamble of the Compensation Act clearly states that the payment of compensation does not constitute a waiver of the right to restitution of property.

2.3 On 6 May 1993, the author filed a complaint with the District Administrative Court (*Verwaltungsgericht*) of Köln, claiming a violation by the German government of his constitutional right to effective diplomatic protection against the Czech Republic. On 31 January 1995, the Court dismissed the complaint on the ground that the Government has broad discretion in matters of foreign policy. The author appealed this decision to the Upper Administrative Court (*Oberverwaltungsgericht*) of Münster which, on 26 September 1996, confirmed the judgment of the District Court and refused leave to appeal to the Federal Administrative Court (*Bundesverwaltungsgericht*). The author argues that he has therefore exhausted domestic remedies[2].

2.4 The author submits that in a 23 January 1997 Joint Declaration of Germany and the Czech Republic, the State party refused to clarify political and legal questions of the past with the Czech Republic, to avoid straining political relations. Further, in a letter dated 12 April 1999, the Federal Government of Germany confirmed that it was not willing to comply with the author's request to lodge – by way of diplomatic protection – claims against the Czech Republic on account of the expulsion and uncompensated expropriation. Finally, the author submits that in 1999, the newly elected German government revised Germany's policy regarding restitution of

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submitted a case against the Czech Republic which has been registered as Communication No. 1515/2006.]

[2] He also states that "a review by the Constitutional Court was left undone because the request for the exercise of diplomatic protection was left by that instance at the discretion of the defendant FRG."

property formerly owned by *Sudeten* Germans. While it had previously left the question open[3], it now declared that henceforth, the Federal Republic of Germany would "neither today nor in the future raise any questions related to property or make any claims."[4]

2.5 On 10 April 1997, the author filed a complaint before the European Court of Human Rights (Application No. 38252/97), claiming a violation by Germany of his right to life (article 2), freedom from torture and ill-treatment (article 3), freedom from slavery (article 4), right to liberty and security (article 5), right to a fair trial (article 6) and right to an effective remedy (article 14) of the European Convention on Human Rights, as well as of his right to property (article 1 of the First Protocol) and of his rights to be protected against an expulsion of nationals (article 3) and the collective expulsion of aliens (article 4) of the Fourth Protocol to the Convention, alleging that Germany had failed to espouse his restitution claim against the Czech Republic by exercising its diplomatic protection. On 13 June 2000, the Court declared his application inadmissible under article 35(4) of the European Convention, arguing that it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols."

2.6 In January 2005, the author submitted that the German government continued to utter "discriminations and the detrimental utterances" with regard to his ethnic minority. He argues that the German Chancellor discriminated against the *Sudeten* Germans, "humiliating them as an unimportant marginal group of Germany" and as referring to their claims for restitution as "being without legal ground".[5] The author further submits that the German Chancellor thus denied the "genocide" committed against the *Sudeten* Germans, an estimated 241,000 of whom died in the course of their expulsion, according to the author. He further alleges that the Chancellor and others denied the *Sudeten* Germans their right to restitution and that they aided and abetted genocide.

2.7 In various submissions, the author replied to correspondence from the Secretariat reminding him of the German reservation to article 5, paragraph 2 a) of the Optional Protocol. He argues that the reservation is in principle not permissible since, according to international law experts, the Czech expropriation and expulsion of the Sudeten Germans constituted genocide. He claims that the reservation made by Germany preserves impunity for this genocide and is thus in violation of the principle of *jus cogens*. He also states that according to article 25 of the Basic Law (*Grundgesetz*) the Covenant is superior law, granting rights to citizens, which could not be repealed by way of a reservation. Regarding the consideration of his case by the European Court of Human Rights, the author underlines that the Optional Protocol prohibits *simultaneous* review of the same case, but not subsequent review and states that this "minor German reservation" cannot prevent the application of international law which supersedes German national law.

[3] The author submits that the German-Czech Declaration of 21 January 1997 left the matter open.

[4] Statement made by Chancellor Schröder on the occasion of a visit by the Czech Prime Minister on 8 March 1999. The author argues that Chancellor Schröder was duly authorized to make such statements pursuant to article 7 of the Vienna Convention on the Law of Treaties, 23 May 1969.

[5] Author's translation of press clippings of 2004.

2.8 Regarding the lack of admissibility of his complaint *ratione temporis*, the author claims that his complaint against Germany dates back to 8 March 1999 when Chancellor Schröder said that he considered the wrong done to the Sudeten German expellees to be "irreversible", contradicting what all German governments had stated up to that date, *i.e.* that the question of Sudeten German properties was open and still to be settled. Therefore, the Optional Protocol was in force and his complaint is admissible *ratione temporis*.

2.9 On 6 January 2006, the author submitted that the current Chancellor has continued to discriminate against the *Sudeten* German ethnic group by stating repeatedly that her government would not support complaints concerning the return of expellees' properties by the Czech Republic. The author affirms that Sudeten Germans are being humiliated as their State does not fulfil its duty to provide them with the same protection as other citizens. He refers to a press clipping which indicates that the Federal Government intervened in favour of reparation claims of Germans who had remained in Romania[6]. The author states that excluding *Sudeten* Germans from access to diplomatic protection to assert their legal claims is contrary to article 26.

The complaint

3.1 The author alleges a violation of his right under article 26 "to equal and effective legal (diplomatic) protection against discrimination", based on his *Sudeten* German descent. He claims that the State party is obliged to take protective steps for all ethnic groups and is not allowed to discriminate against certain groups and refuse to protect them on account of their race, colour or membership of a particular ethnic minority. He refers in particular to the decision of the Münster Upper Administrative Court, which was confirmed by the statements made by Chancellor Schröder in 1999, the text of the 1997 Joint Declaration, and the letter from the Federal Government received in 1999. In the author's view, these statements prevent him from exercising his economic, social and cultural rights, as mentioned in the Covenant's Preamble, by rejecting his claim for property in the Czech Republic.

3.2 He also alleges a violation of article 2 since the State party refused to afford him protection against a violation of his fundamental human rights by another State party. Finally, he refers to violations of articles 6, 7, 8, 9, 10, 12, 13, 14 and 17 of the Covenant for his family, in light of their expulsion due to their national descent, although he does not bring the communication in their name. The author argues that as a result of the acts of genocide committed during the expulsion, the State party is obliged to support the claims of restitution of the Sudeten German expellees against the Czech State.

The State party's admissibility submission

4.1 On 18 January 2007, the State party contested the admissibility of the communication on several grounds. It invokes the reservation made by Germany in relation to article 5, paragraph 2 a) of the Optional Protocol, to the effect that;

> "the competence of the Committee shall not apply to communications

[6] Press clipping dated 15 March 2002.

a) which have already been considered under another procedure of international investigation or settlement, or

b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany, or

c) by means of which a violation of article 26 of the [Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

4.2 The State party submits that the communication is inadmissible by virtue of the reservations, as the case has already been considered by another international instance (the European Court of Human Rights), and the author complains of a violation of article 26 but does not refer to any rights protected by the Covenant. On the validity of the reservation and the author's claim that article 25 of the German Basic Law renders it invalid, the State party submits that this provision provides that the common rules of international law are part of German Federal Law and take precedence over ordinary laws. The objective of the article is to make sure that customary international law can be invoked in the German courts. The reservation does not deal with the question of applicability of the Covenant but only with the question of jurisdiction, *i.e.* the competence of the Committee to consider individual communications.

4.3 The State party submits that the individual complaints procedure under the European Convention on Human Rights is a procedure within the meaning of the reservation and article 5, paragraph 2 a), of the Optional Protocol. The subject matter of the proceedings and the facts of the case before it were identical to the present communication, i.e. that Germany should have taken action on the author's claim against the Czech Republic with respect to his alleged property rights. The author's argument on the political speech made by Federal Chancellor Schröder on 8 March 1999, does not add any new aspect to the facts which were presented to the European Court of Human Rights. As to the suggestion that the alleged failure of the State party is a continuous violation of his rights and can therefore be raised again under the Optional Protocol, even after the European Court of Human Rights has decided on his claim, is a misinterpretation of the term "the same matter".

4.4 According to the State party, the Chancellor's statement in 1999 was political in nature and has not changed the author's position as regards his claims. The State party had not taken any legal action against the Czech Republic before this statement and did not intend to do so. This was made clear in the proceedings before the administrative courts. The Federal Foreign Office declared in the proceedings before the Cologne Administrative Court that the State party would continue to make political representations, in order to bring an adequate solution for the persons concerned, but that it regarded any legal action as detrimental. This is precisely the point which the author claimed the State party had breached in his application to the European Court. If a "new matter" arose every time the State party confirms its position, the author could bring a

communication on the same grounds repeatedly.[7] Such a construction of the Optional Protocol and the State party's reservation cannot be correct.

4.5 With regard to the examination of the same subject matter, it is not a prerequisite to an examination within the meaning of the reservation that the European Court of Human Rights first declares an application to be admissible and initiates an examination of the merits in a technical sense. An "examination" requires that the concrete case has previously undergone a certain consideration of the merits. This can be assumed if, in the course of the examination of admissibility, the relevant circumstances of the case were clarified and a summary examination of the complaint in terms of substantive law in respect of the provisions of the European Court of Human Rights invoked has been made[8]. The European Court can review issues relating to the merits in advance, and consider them in the course of the examination of admissibility, which according to the State party the Court did in fact do in the present case. The decision of the European Court makes it clear that it examined the facts of the case, and having examined the complaint and all the material before it, concluded that the facts "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention". Therefore, the State party's reservation applies.

4.6 In addition, the State party submits that the communication should be inadmissible as it does not disclose a violation of rights protected by the Covenant. The author alleges a violation of article 26, but fails to show with respect to which right the State party is supposed to have acted in a discriminatory way. The State party refers to part c) of its reservation, and states that the Covenant does not require – as a matter of principle – any State party to take legal action against another State party, and there is no right to "diplomatic protection" in the Covenant in the sense of the communication. As such, and in light of the reservation, the communication is inadmissible. Even if the complaint had been made in relation to another article of the Covenant, the author has not been able to show that the State party has offered support to other Germans with regard to alleged property claims in other countries, and he has failed to show that he has been treated in any way differently compared to other citizens. He has therefore not substantiated any claim of discrimination.

4.7 Finally, the State party submits that the event on which the communication is based occurred long before the Covenant came into force for the State party. The real cause of the dispute is the expropriation of the author's alleged property under the 1945 Beneš decrees, at a time in which the Covenant had not even been drafted. The author cannot rely on the rights set

[7] In this regard, the State party refers to the decision of the International Court of Justice (ICJ) in a case concerning property: *Liechtenstein v. Germany*, decision of 10 February 2005. Liechtenstein claimed that Germany had in 1998 changed its position with regard to certain property which had been confiscated in the aftermath of the Second World War. The ICJ held that it could only have jurisdiction in this case if Germany had departed from its previous legal position after the State party had accepted the ICJ's jurisdiction. As Germany had only confirmed its former position, there was no "new situation" and therefore no jurisdiction of the ICJ.

[8] The State party refers to Communication No. 808/1998, *Rogl v. Germany*, inadmissibility decision of 25 October 2000.

out in the Covenant to claim compensation for any damage he may have suffered prior to its entry into force. Thus, his claim is also inadmissible *ratione temporis*.

Author's comments on State party's submission

5.1 On 13 March 2007 and 30 August 2007, and as to the State party's objections based on the fact the same "subject-matter" has been examined, the author claims that different arguments were made before the European Court of Human Rights and the Committee. Whereas the case brought to the European Court raised issues based on "article 2 of the good-neighbour agreement as well as article 33 of the Charter of the UN", on violations of the German *Grundgesetz* and the provisions of the European Convention on Human Rights, and on the peaceful settlement of the dispute; the communication before the Committee is based on article 26 of the Covenant. Therefore, the two disputes were based on a different legal basis and on the ground of different legal demands. Whereas before the European Court he was asking for an international agreement between the State party and the Czech Republic relating to the compensation for the expulsion, before the Committee he raises the issue of a violation of individual rights. The author argues that a new matter arose after the European Court decision, in light of the declarations of the Chancellor in 1999: prior to this point, an amicable settlement was considered possible, and this was the aim of the complaint before the European Court. He also reiterates his arguments before the Committee on the expulsion of *Sudeten* Germans as a form of genocide, which were not part of his complaint to the ECHR, to demonstrate that the issues are not the same. Finally, he states that the scope of review of the European Court is different in light of the restrictions contained in article 14 of the European Convention, compared to article 26 of the Covenant.

5.2 As to the State party's interpretation of article 5, paragraph 2 a), of the Optional Protocol, the author claims that it is incorrectly interpreted. He submits that his case to the ECHR is "not being examined" under that organ, but in fact has already been examined. Thus, this article should not preclude the Committee from considering his current communication on the merits. He claims that the State party's observations of 18 January 2007 use "unlawful re-wording of the tense prescribed for the inadmissibility of a complaint". Article 25 of the Basic Law expressly states that international law creates its own rights and obligations for residents of Germany. Therefore, residents can rely on the rights contained in the Covenant without reservation. In the author's opinion, the communication concerns a breach of the State party's obligation to protect in cases of genocide or crimes against humanity. In such cases, State parties cannot abstain from their obligation in any way: if the practicability of the Covenant for the purpose of the Committee's jurisdiction were left to the discretion of States parties, by way of reservations, rules of public international law and the Convention on Genocide[9] would no longer be of *cogen* character. Consequently, the reservation is without legal effect.

5.3 The author alleges that the State party has also violated article 2 of the Covenant by refusing him protection and discriminating against him in relation to his property. He refers to a press release dated 15 March 2002, according to which the State party's Federal Minister of the Interior intervened successfully to obtain restitution for German nationals who remained in Romania. Further, he claims that the communication refers to the inherent dignity and equality of

[9] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

all members of the human family mentioned in the Preamble to the Covenant. Finally, he claims that articles 6, 7, 8, 9, 10, 12, 13, 14 and 17 of the Covenant were violated as the State party's rejection of protection means the crimes of expulsion are "irreversible", which amounts to another act of discrimination and aiding and abetting genocide.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has invoked its reservation to article 5, paragraph 2 a), of the Optional Protocol, which precludes the Committee from considering claims that: (a) have previously been "examined" under another procedure of international investigation or settlement; (b) are precluded *ratione temporis*; or (c) relate to a violation of article 26 insofar as the alleged violation refers to rights other than those guaranteed under the aforementioned Covenant. The Committee notes that the author claims a violation of article 26 of the Covenant, based on a free-standing claim of discrimination, as the State party failed to grant him what he refers to as 'equal and effective diplomatic protection against discrimination', based on his *Sudeten* German descent. The Committee recalls that the right of diplomatic protection under international law is a right of states, not of individuals. States retain the discretion as to whether or not and in which circumstances to grant and exercise this right. Whilst the Committee does not preclude that a denial by a State party of the right of diplomatic protection could amount, in very exceptional cases, to discrimination, it recalls that not every differentiation of treatment can be considered discrimination within the meaning of article 26, and that this provision does not prohibit differences of treatment which are based on objective and justifiable criteria. In this instance, the author has not shown that persons of *Sudeten* German descent have been treated in a discriminatory or arbitrary manner incompatible with the legitimate exercise of State discretion in espousing claims under the State party's right of diplomatic protection. In particular, he had failed to show that the decision of the State party not to exercise its right to diplomatic protection in his case was based not on legitimate considerations of foreign policy but exclusively on his *Sudeten* German descent. The Committee concludes that the author has not sufficiently substantiated, for purposes of admissibility, his claim that he was a victim of prohibited discrimination based on his *Sudeten* German descent. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol. In these circumstances, the Committee need not address the issue of applicability of part c) of the State party's reservation related to article 26.

6.3 The Committee has noted the author's reference to articles 2, 6, 7, 8, 9, 10, 13, 13, 14 and 17 of the Covenant. He refers to alleged violations of these provisions in relation to his family, although he does not advance claims on behalf of members of his family. The Committee considers that the author has not invoked these provisions as free-standing violations of the Covenant, but merely by way of background to his claim of his claim under article 26. Even if they were to be considered as free-standing claims, they have not been substantiated, for purposes of admissibility, and would be inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
