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International Covenant on Civil and Political Rights

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Decision

Communication No. 1748/2008

Submitted by:	Josef Bergauer et al. (represented by counsel Thomas Gertner)
Alleged victims:	The authors
State party:	The Czech Republic
Date of communication:	5 October 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 January 2008 (not issued in document form)
Date of adoption of decision:	28 October 2010

* Made public by decision of the Human Rights Committee.

Subject matter:	Discrimination with respect to restitution of property and absence of an effective remedy
Procedural issues:	Abuse of the right of submission, preclusion *ratione temporis*, *ratione materiae*, failure to exhaust domestic remedies
Substantive issues:	Equality before the law; equal protection of the law without any discrimination; effective remedy
Articles of the Covenant:	26; 2, paragraph 3
Articles of the Optional Protocol:	3, 5, paragraph 2 (b)
	[Annex]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (one hundreth session)

concerning

Communication No. 1748/2008

Submitted by:	Josef Bergauer et al. (represented by counsel Thomas Gertner)
Alleged victims:	The authors
State party:	The Czech Republic
Date of communication:	5 October 2007 (initial submission)

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

Meeting on 28 October 2010,

Having concluded its consideration of communication No. 1748/2008, submitted to the Human Rights Committee on behalf of Mr. Josef Bergauer under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Decision on Admissibility

1. The authors of this communication, dated 5 October 2007, are the following 47 persons: Mr. Josef Bergauer (born in 1928); Ms. Brunhilde Biehal (born in 1931); Mr. Friedebert Volk (born in 1935); Mr. Gerald Glasauer (born in 1969); Mr. Ernst Proksch (born in 1940); Mr. Johann Liebl (born in 1937); Mr. Gerhard Mucha (born in 1927); Mr. Gerolf Fritsche (born in 1940); Ms. Ilse Wiesner (born in 1920); Mr. Otto Höfner (born in 1930); Mr. Walter Frey (born in 1945); Mr. Herwig Dittrich (born in 1929); Mr. Berthold Theimer (born in 1930); Ms. Rosa Saller (born in 1927); Mr. Franz Penka (born in 1926); Mr. Adolf Linhard (born in 1941); Ms. Herlinde Lindner (born in 1928); Ms. Aloisia Leier (born in 1932); Mr. Walter Larisch (born in 1930); Mr. Karl Hausner (born in 1929); Mr. Erich Klimesch (born in 1927); Mr. Walther Staffa (born in 1917); Mr. Rüdiger Stöhr (born in 1941); Mr. Walter Titze (born in 1942); Mr. Edmund Liepold (born in 1927); Ms. Rotraut Wilsch-Binsteiner (born in 1931); Mr. Karl Röttel (born in 1939); Mr. Johann Pöchmann (born in 1934); Ms. Jutta Ammer (born in 1940); Ms. Erika Titze (born in 1933); Mr. Wolfgang Kromer (born in 1936); Mr. Roland Kauler (born in 1928); Mr. Johann Beschta (born in 1933); Mr. Kurt Peschke (born in 1931); Mr. Wenzel Pöhnl (born in 1932); Ms. Marianne Scharf (born in 1930); Mr. Herbert Vonach (born in 1931); Mr. Heinrich Brditschka (born in 1930); Ms. Elisabeth Ruckenbauer (born in 1929); Mr. Wenzel Valta (born in 1936); Mr. Ferdinand Hausmann (born in 1923); Mr. Peter

Bönisch (born in 1971); Mr. Karl Peter Spörl (born in 1932); Mr. Franz Rudolf Drachsler (born in 1924); Ms. Elisabeth Teicher (born in 1932); Ms. Inge Walleczek (born in 1942); and Mr. Günther Karl Johann Hofmann (born in 1932). They claim to be victims of a violation by the Czech Republic of articles 26 and 2, paragraphs 3 (a) and (b), of the International Covenant on Civil and Political Rights.[2] They are represented by counsel, Mr. Thomas Gertner.

The facts as submitted by the authors

2.1 The authors, or their legal predecessors, are Sudeten Germans who were expelled from their homes in former Czechoslovakia at the end of the Second World War, and whose property was confiscated without compensation. The authors state that 3,000,400 of the 3,477,000 Sudeten Germans were expelled from former Czechoslovakia and 249,900 died and that they were collectively punished without trial and expelled on the basis of their ethnicity. Sudeten Germans still feel discriminated against by the Czech Republic, as it refuses to provide them with appropriate indemnities in accordance with international law[3]. The authors underline that Sudeten Germans have been treated differently to victims of Communist persecution holding Czech or Slovak nationality, who were rehabilitated and granted restitution claims for injustices of less serious nature than the ones suffered by the authors.

2.2 The authors review various decrees of 1945 and 1946, which remain valid as "fossilized rights", to show that property of Sudeten Germans was confiscated, and that Czechoslovakian citizens of German or Hungarian origin were deprived of their Czechoslovak citizenship:

a) Presidential decree of 19 May 1945 (No. 5/1945): which ordered the sequestration of private and business properties of Germans and Hungarians and administration of the property by the State ;

b) Constitutional decree of the President of 2 August 1945 (No.33), Benes Decree: by which Czechoslovakian citizens of German or Hungarian origin were deprived of their Czechoslovak citizenship, whether they had involuntarily acquired German or Hungarian citizenship, or whether they had "confessed to their nationality". The authors or their legal predecessors all 'confessed' to their nationality, and they therefore have no possibility of regaining Czech or Slovak citizenship;

c) Presidential decree of 25 October 1945 (No. 108): which ordered the confiscation of property owned by persons of German or Hungarian nationality previously sequestrated, with the exception of "persons who demonstrate their loyalty to the Czechoslovak Republic, have never committed any offence against the Czech or Slovak nations, and who either actively participated in the fight for the liberation of the country, or have suffered under Nazi or fascist terror";

[2] The Covenant was ratified by Czechoslovakia in December 1975 and the Optional Protocol in March 1991. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

[3] The authors refer to articles 35 in conjunction with articles 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts.

d) Law of 8 May 1946 (No. 115)[4]: by which all acts of violence or other criminal actions were retroactively declared legal, if they had been committed prima facie as "a contribution to the fight for the regaining of freedom for Czechs and Slovaks or as a just retaliation for actions of the occupants and their accomplices".

2.3 Due to the fact that all legal predecessors of the authors had lost their citizenship, they could not apply for restitution of their property under Law No 87/1991 of 21 January 1991 on extrajudicial rehabilitation or under Law No. 229/1991 of 21 May 1991 on the return of agricultural property. In addition to that, both Laws were limited to restitution of property that had been confiscated during the Communist regime between 1948 and 1991. On 15 April 1992, the State party passed Law No. 243/1992, which provides restricted restitution possibilities for agricultural property of German and Hungarian minorities, if the person is a Czechoslovak citizen and has not committed any offence against the Czechoslovak state. This law however is not applicable to the authors, as they or their predecessors had lost their nationality on account of the Benes presidential decree No. 33/1945. Furthermore, Law No. 30/1996 amended Law No. 243/1992 on restitution of agricultural property and introduced the requirement of continued possession of Czechoslovak citizenship.

2.4 On 13 December 2005, the European Court of Human Rights dismissed the authors' (and others) application as inadmissible[5]. The Court deemed that the authors' assertion on the absence of domestic remedies was unsubstantiated and it could not anticipate the outcome of proceedings brought by the applicants before the Czech courts, had such proceedings been pursued. However, even assuming that the applicants had complied with the criteria of the exhaustion of domestic remedies, the application remained inadmissible, as the applicants had no "existing possessions" within the meaning of article 1, of Protocol No. 1 to the European Convention on Human Rights (ECHR), at the time of the entry into force of the ECHR or when they filed their application. The fact that the property had been confiscated under decrees which continue to be part of the national legal system did not alter this position. Secondly, the Court held that, in absence of any general obligation to restore property which was expropriated before the ratification of the ECHR, the Czech Republic is not obliged to restore the applicants' property, and therefore this aspect of the case was deemed incompatible ratione materiae with the provisions of the Convention. In any event, the ECHR noted that the case-law of the Czech courts made the restitution of property available even to persons expropriated contrary to the Presidential decrees, thus providing for reparation. The allegations of genocide were deemed incompatible ratione temporis. As to the allegations of discrimination, the ECHR held that article 14 of the Convention does not have an independent existence and declared this part of the case also inadmissible.

The complaint

3.1 The authors submit that the State party continues to violate article 26 of the Covenant by maintaining the discriminatory laws of 1945 to 1948, and the confiscation decree. The State party, by not passing any property restitution law applicable to Sudeten Germans, is depriving the victims of their right to restitution and rehabilitation, in contrast to the rights granted to persons whose property was confiscated under the Communist

[4] The authors explain that this law is still part of the Czech legal system, and therefore violates article 41(2) of the Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts.

[5] European Court of Human Rights, App. No. 17120/04, Bergauer and 87 others v. the Czech Republic.

regime. The authors claim that the Czech courts only apply international law that the State party has ratified, whereas they claim that all persons must be able to rely on the rules of *ius cogens* in international law, including the ILC Articles on State Responsibility. Their right to equality before the law is also violated as no laws exist which would enable them to bring their restitution claims before domestic courts.

3.2 The authors further argue that they have been collectively punished for crimes committed by Nazi Germany against Czechoslovakia and had been expelled from their homeland on account of their ethnicity. The measures taken against the Sudeten Germans amount to 'composite actions' under article 15, of the ILC Articles, and have continuing effect if these actions were already prohibited by *ius cogens* at the time when the first action was committed. This is undoubtedly the case for crimes against humanity committed against Sudeten Germans.

3.3 With regard to the exhaustion of domestic remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol, the authors submit that they have not initiated the "futile attempt to assert rehabilitation and restitution" in Czech courts, given the clear jurisprudence of the Constitutional Court and the absence of any restitution legislation applicable to Sudeten Germans. On 8 March 1995, the Constitutional Court, in the case of Dreithaler, established that the confiscation decree No. 108 of 25 October 1945 (see 2.2), on the basis of which the authors had lost their property, is part of the Czech legal system and does not breach any constitutional principles. The authors argue that re-submitting the question for examination would not lead to any different result. In another judgment of 1 November 2005 (in the case of Count Kinský), the Constitutional Court held that it was not possible to examine the lawfulness of the confiscation decree No. 108/1945.

3.4 The authors further argue that they could not invoke before domestic courts any breach of a higher norm of law, such as the Articles on Responsibility of States for Internationally Wrongful Acts, as the Constitution only recognises treaties which have been ratified, and therefore excludes claims based on rules of ius cogens. The authors submit that they are deprived of an effective remedy against the discrimination they suffered and that this constitutes a violation of article 2, paragraph 3, of the Covenant.

The State party's submission on admissibility and merits

4.1 On 3 July 2008, the State party submits its comments on admissibility and merits of the communication. It highlights that, with the exception of the municipality in which the property was situated, the authors have not provided any details on the characteristics of the property. With regard to the historical information submitted by the authors, the State party disagrees with their assertions. Referring to the findings of the Czech-German Commission of Historians, the State party corrects the figures of Sudeten Germans victims of the transfer to a maximum of 30,000 casualties.

4.2 The State party recapitulates the relevant international agreements, domestic legislation and practice. It cites the Agreements of the Berlin (Potsdam) Conference of 1 August 1945, in particular Article XIII, which regulates the transfer of German populations from Czechoslovakia to Germany. It further refers to the Czech-German Declaration, regarding Mutual Relations and their Future Development of 21 January 1997, and qualifies it as a political document that asserts that injustices of the past belong to the past but does not create any legal obligations. The State party further provides the official text of the following relevant domestic legislation:

a) Presidential Decree No. 5/1945 on the Invalidation of Certain Property Transactions during the Period of Lack of Freedom and on the National Administration of the Values of Germans, Hungarians, Traitors and Collaborators, and Certain Organisations and Institutes;

b) Presidential Decree No. 12/1945 (not cited by the authors) on the Confiscation and Accelerated Allocation of Agricultural Property of Germans, Hungarians, Traitors and Enemies of the Czech and Slovak nations;

c) Presidential Decree No. 108/1945 on the Confiscation of Enemy Property and the National Restoration Funds;

d) Constitutional Presidential Decree No. 33/1945 on the Adjustment of the Czechoslovak Citizenship of Persons of German and Hungarian Nationality;

e) Act No. 194/1949 on the Acquisition and Loss of Czechoslovak Citizenship;

f) Act. No. 34/1953 on Certain Person's Acquisition of Czechoslovak Citizenship.

4.3 The State party further refers to the laws aimed at mitigating the property injustices caused during the Communist regime, from 1948 to 1989, such as Act No. 87/1991 on Extra-judicial Rehabilitation and Act No. 229/1991 on Ownership of Land and other Agricultural Property, which provide that persons who are Czech citizens and have been expropriated under Presidential Decree No. 5/1945 and Act No. 128/1946 on the Invalidation of Certain Property Transactions during the period of Lack of Freedom and Claims Arising from this Invalidation and from other Infringements of Property, may be considered entitled persons if their claim, due to political persecution, had not been settled after 25 February 1948.

4.4 With regard to the admissibility of the communication, the State party submits that the communication should be declared inadmissible as incompatible with the Covenant pursuant to article 3, of the Optional Protocol. It considers the communication inadmissible ratione temporis, as the events occurred after the Second World War and thus a long time prior to the entry into force of the Covenant and the Optional Protocol, on 23 December 1975 and 12 March 1991 respectively. With regard to the authors' claim that they are victims of a continuing violation, the State party argues that confiscation is an instantaneous act and the fact that the effects of the expropriation of 1945 can still be brought before a court today, does not change the character of the initial confiscation. It further highlights that the confiscation legislation was based on an international agreement adopted by the Allies at the Potsdam conference and was considered a right of the Allies in retaliation for international responsibility by Germany for crimes committed against the Czechoslovak people. The State party further submits that even if the events of 1945 could be examined on the basis of the Articles on Responsibility, the element of unlawfulness would be missing. It concludes that the communication should only be examined as it relates to the alleged discrimination contained in restitution laws adopted after the entry into force of the Optional Protocol on 12 March 1991.

4.5 The State party further submits that the Committee should declare the communication incompatible ratione materiae, as the authors claim relates to the right to property, which is not protected by the Covenant.

4.6 With regard to the exhaustion of domestic remedies, the State party submits that the authors have not exhausted any domestic remedies. The State party's courts have therefore not been able to examine the authors' claims with regard to discrimination and could not make a legal assessment on the facts and evidence related to the authors' property confiscation. The State party further underlines that the findings by its Constitutional Court in the case Dreithaler, date from 1995 and since then certain constitutional developments have taken place, which would require that the authors bring the matter before domestic courts. While admitting that it does not have knowledge of a case, in which property was restituted for claims lodged by Sudeten Germans on confiscations that took place before 1945, the State party argues that it could not predict if its domestic courts would not extend

the restitution laws, given that the authors did not raise this question before them. It further cites the decision by the European Court of Human Rights in the application Bergauer and 89 others v. the Czech Republic, which declared the case inadmissible for non-exhaustion of domestic remedies, as it could not anticipate the outcome of proceedings brought before Czech courts, had such proceedings been pursued. Referring to Presidential and Constitutional Decrees No. 5/1945, 12/1945, 33/1945 and 108/1945, the State party asserts that persons concerned could file remedies, including judicial ones.

4.7 The State party further argues that it considers it an abuse of the right to submit a communication, as the Covenant neither provides for a right to property nor for a right to compensation for past injustices. In addition to that, the time limits to submit claims under the restitution legislation expired on 1 April 1995 under Act No. 87/1991, on 31 December 1996 under Act No. 229/1991 and on 15 July 1996 under Act No. 243/1992. The authors however only approached the Committee in October 2007, more than ten years after the expiry of national restitution legislation, without providing any reasonable explanation to justify this delay. Moreover, the State party argues that the distortion of historical facts to the authors' benefit also constitutes an abuse of the right to submit a communication.

4.8 The State party recalls the Committee's jurisprudence on issues of compensation for property seizure prior to 1948[6], according to which not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26 of the Covenant. The State party highlights that there is a fundamental difference between persons whose property was confiscated because they were considered as war enemies and property confiscation during the Communist regime. It further underlines that confiscation of enemy property was based on international agreements, in particular the Potsdam Agreement, while property confiscation during the Communist regime had its grounds in domestic legislation. In this context, the State party refers to article 107 of the UN Charter, and the impediment to unilaterally and retroactively revoke measures approved in the Potsdam agreement, including enemy property seizure. The State party further submits that the communication before the Committee differs greatly from other communications, in which the Committee had found that the citizenship requirement for restitution of property seized during the Communist regime violated article 26, in as much the legislator differentiated between situations that it considered injustices of the Communist past with the aim of mitigating them feasibly.

The authors' comments to the State party's observations

5.1 On 4 November 2008, the authors comment on the State party's submission and argue that the State party had acknowledged in the German-Czech Declaration regarding Mutual Relations and their Future Development of 21 January 1997 that "much suffering and injustice was inflicted on innocent people due to their expulsion after the war with expropriation and withdrawal of citizenship and the forced resettlement of the Sudeten Germans from the then Czechoslovakia". Nonetheless, the State party still considers the collective persecution at the time legitimate. The authors reiterate that they were punished by denaturalisation, expulsion and violence, including killings on grounds of their ethnicity. The authors consider that, in violation of article 26, of the Covenant, they were victims of ethnic cleansing and made globally responsible for all crimes committed by the authorities of National Socialist Germany.

[6] See communication No. 643/1995, *Drobek* v. *Slovakia*, Inadmissibity decision adopted on 14 July 1997, paras. 6.4, 6.5; communication No. 669/1995, *Malik* v. *the Czech Republic*, Inadmissibility decision adopted on 21 October 1998; communication No. 670/1995, *Schlosser* v. *the Czech Republic*, Inadmissibility decision adopted on 21 October 1998.

5.2 The authors explain that the aim of their communication is to induce the State party to pass a restitution law enabling Sudeten Germans and their legal successors to bring property claims before domestic courts. The State party has not made any attempt to start judicial, political and social rehabilitation for Sudeten Germans. Instead, on 24 April 2008 the Parliament passed a resolution confirming that the post-war Presidential Decrees (Benes-Decrees) were "undisputable, sacrosanct and unchangeable". In the absence of any legislation applicable to their situation, they are not able to exhaust domestic remedies. They submit that entitlement to rehabilitation could not be based on article 26, of the Covenant but needed domestic legislation for its assertion.

5.3 With regard to the State party's submission that the communication should be declared inadmissible ratione temporis, the authors maintain that ethnic cleansing is not an instantaneous act but a continuous situation. Furthermore, they consider the State party's refusal to accord restitution on the basis of Article 35 of the Articles on State Responsibility and ius cogens as one aspect of their discrimination. Referring to communication No. 1463/2006, *Gratzinger* v. *the Czech Republic*, they claim that, as victims of crimes against humanity, were not rehabilitated while victims of the Communist regime, who had been sentenced in absentia and had their property seized which they deliberately left behind, were rehabilitated.

5.4 The authors also submit additional information and clarification on historical facts and assert that the expulsion of Sudeten Germans began on 15 May 1945, thus months before the Potsdam conference. They further argue that the Potsdam agreement cannot be called an international treaty, as it has never been published in the UN Treaty Series.

Additional submissions by the parties

6. On 21 May 2009, the State party submits additional observations and reiterates that it does not consider the post-war transfer of Sudeten German inhabitants to be a crime against humanity. It further finds it inappropriate to compare the situation of the Sudeten Germans with the victims of the Communist regime, as the property of the Sudeten Germans was considered by the Allies as enemy property and therefore usable for reparations.

7. On 29 June and 24 November 2009, the authors reiterate their comments and highlight that the Sudeten Germans were collectively blamed for all atrocities committed by the German Reich on Czechoslovak territory, and that this fact has never been acknowledged by the State party.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 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.

8.2 The Committee notes that certain facets of the same matter have already been considered by the European Court of Human Rights, which declared the application on 13 December 2005 inadmissible. The Committee observes that the present case is not being examined under another procedure of international investigation or settlement and, therefore, concludes that article 5, paragraph 2 (a), of the Optional Protocol is not an obstacle in the present case.

8.3 The Committee notes the State party's argument that the communication should be declared inadmissible *ratione temporis* pursuant to article 1 of the Optional Protocol, because the events occurred a long time prior to the entry into force of the Covenant and the

Optional Protocol and confiscation is an instantaneous act. It also notes the authors' claim that they are victims of a continuous violation. With regard to the application *ratione temporis* of the International Covenant on Civil and Political Rights and the Optional Protocol for the State party, the Committee recalls that the Covenant entered into force on 23 December 1975 and the Optional Protocol on 12 March 1991. It observes that the Covenant cannot be applied retroactively. The Committee observes that the authors' property was confiscated in 1945, at the end of the Second World War. It further observes that this was an instantaneous act without continuing effects. Therefore, the Committee considers that, pursuant to article 1, of the Optional Protocol, it is precluded *ratione temporis* from examining the alleged violations that occurred prior to the entry into force of the Covenant and the Optional Protocol for the State party.[7]

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 1, of the Optional Protocol;

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

[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.]

[7] See Communication No. 275/1988, *S.E. v. Argentina*, Inadmissibility decision adopted on 26 March 1990, para. 5.2; Communication No. 573/1994, *Atkinson et al. v. Canada*, Inadmissibility decision adopted on 31 October 1995, para. 8.2; Communication No. 579/1994, *Warenbeck v. Australia*, Inadmissibility decision adopted on 27 March 1997, paras. 9.2, 9.3; Communication No. 601/1994, *Drake and Drake v. New Zealand*, Inadmissibility decision adopted on 3 April 1997, paras. 8.2, 8.3.