

Legal Opinion

concerning Beneš-Decrees and related issues

prepared by

Prof. Dr. Dres. h.c. Jochen A. Frowein

former Director of the Max-Planck-Institute for Comparative Public Law
and International Law, Heidelberg, Germany

former Vice-President of the European Commission of Human Rights

September 12, 2002

Table of Contents

1. The Mandate	p. 1
2. The interpretation of Article 49 TEU	p. 2
3. The so-called Beneš-Decrees	p. 3
4. Preliminary remarks	p. 5
5. The issue of confiscations in 1945/1946	p. 7
6. The decision of the European Court of Human Rights in the case brought by the Prince of Liechtenstein	p. 10
7. A possible discrimination in restitution	p. 13
8. Issues of citizenship	p. 18
9. The Decrees on criminal law and proceedings	p. 19
10. The exclusion of criminal responsibility on the basis of Law No. 115 of 8 May 1946	p. 20
11. Minority protection	p. 28
12. Conclusions	p. 30

1. The Mandate

1) I have received the mandate to prepare a study on the question to what extent the so-called Beneš-Decrees may be of relevance in the context of Article 49 of the Treaty on the European Union (TEU) for the accession of the Czech Republic to the European Union. The mandate formulated by the Presidency of the European Parliament is worded as follows:

- “- focus on today’s validity and legal effects of the so-called Beneš-Decrees and the restitution laws related to them, and on their status in the context of compliance with EU law, with the criteria of Copenhagen and international law relevant for accession;
- give due consideration to available legal opinions, in particular of the legal services of the European institutions;
- indicate whether any action from the candidate countries concerned ought to be taken in view of their accession.”

2) The following legal opinion is based on a careful evaluation of the legal opinions presented to me by the European Parliament and by the Legal Service of the European Commission as well as of other material I could take into consideration.¹ I am not able to read documents in the Czech language and have to rely on translations for that reason.

¹ Documents: *Legal Service of the European Parliament*, Legal Opinion on the legal effect and on certain legal implications of the so-called „Beneš-Decrees“, Brussels, 24 April 2002, SJ-0071/02; *Legal Service of the European Commission*, The so-called „Beneš-Decrees“ and their relevance under Community Law, informal copy of the analysis by the Legal Service of

2. The interpretation of Article 49 TEU

3) According to Article 49 TEU “Any European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union”. Article 6 § 1 TEU reads: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.

4) The principle of homogeneity in the fundamental constitutional structure of Member States of the European Union enshrined in these provisions refers to the present conditions prevailing in the Member States of the Union. It is clear from the context and the history of the European integration that these rules do not exclude former fascist or communist countries from becoming members of the European Union.

5) Indeed, it should be kept in mind that the structure of the integration of Europe was first developed with the European Coal and Steel Community, negotiated only six years after World War II, among six Member States, five of which had been at least partly occupied by Germany during World War II.² The populations of these occupied countries had suffered severely during the occupation period.

the European Commission on the Beneš-Decrees, confidential and restricted, no document number.

² The preamble reads in part: “[...] Resolved to substitute for age old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared, have decided to create a European Coal and Steel Community [...]”

6) It is beyond doubt, therefore, that provisions as Articles 49 TEU and 6 TEU must be interpreted in a manner which looks to the future and not to the past. On the other hand, it cannot be excluded that provisions having been adopted in earlier periods may have legal effects which must be evaluated as to their compatibility with Articles 49 and 6 TEU. This is the issue which has arisen around the so called Beneš-Decrees.

7) The European Parliament's resolutions of 15 April 1999 and 5 September 2001 are important in this context. In the latter resolution the European Parliament welcomed "the Czech government's willingness to scrutinise the laws and decrees of the Beneš government, dating from 1945 and 1946 and which are still on the statute books, to ascertain whether they run counter to EU law in force and the Copenhagen criteria".³

3. The so-called Beneš-Decrees

8) The notion of Beneš-Decrees refers to a number of acts of President Edward Beneš who, on the basis of a constitutional decree of 15 October 1940, exercised emergency powers after having left the territory of Czechoslovakia from London. These powers were also exercised after President Beneš returned to Czechoslovakia.⁴ After the legislative power for Czechoslovakia was transferred to the provisional National Assembly on 28 October 1945 a

³ European Parliament resolution on the Czech Republic's application for membership of the European Union and the state of negotiations (Official Journal C 72 E of 21 March 2002).

⁴ According to my information a total of 143 decrees were adopted, 98 of which after the return of President Beneš at the end of World War II. Cf. *Legal Service of the European Parliament*, *ibid.*, para. 16; *H. Slapnicka*, *Osteuropa Recht* 1999, p. 512. For an unofficial translation of some of the most important Beneš-Decrees into German, see <http://www.mittleeuropa.de/benesch-d01.htm>.

specific constitutional law of 28 March 1946 confirmed all Beneš-Decrees with retroactive effect as to their legal validity.⁵

9) In the present context only a limited number of decrees and laws is of relevance because they could raise issues in the context of accession of the Czech Republic to the European Union. Those are the following decrees and laws:

a) Decree of 21 June 1945 (No. 12) and Decree of 20 July 1945 (No. 28) concerning confiscation without compensation of property, particularly of people belonging to the German or Hungarian people. These confiscation decrees were supplemented by Decree of 25 October 1945 (No. 108) according to which all property rights of people of German or Hungarian nationality were confiscated except of those who had remained loyal to Czechoslovakia.

b) Decree of 2 August 1945 (No. 33) concerning Czechoslovak citizenship. Through that decree Czechoslovak citizens belonging to the German or Hungarian nationality who had received German or Hungarian citizenship lost their Czechoslovak citizenship retroactively with the date of acquiring German or Hungarian citizenship. All the other Czechoslovak citizens of German or Hungarian nationality lost their Czechoslovak citizenship with the date of the coming into force of the decree. Exceptions were made for those persons who had acted loyally towards Czechoslovakia.

c) Specific decrees on criminal law and procedure made it possible that persons could be tried in absentia because of a lack of loyalty towards the Czechoslovak State during the

⁵ Constitutional Law of 28 March 1946 (No. 57); for the German translation, see *H. Slapnicka*, *ibid.*, p. 520.

occupation period. Decree No. 16/1945 provided for the death penalty in certain cases and also for severe and long term prison sentences. While these provisions are no longer in force it is not fully clear to what extent judgments rendered on the basis of these decrees are still operative.

d) On 8 May 1946 the provisional National Assembly passed legislation “concerning the legality of actions connected to the struggle to recover the liberty of the Czechs and Slovaks” (Law No. 115). Article 1 of that law states as follows:

“Any act committed between September 30, 1938 and October 28, 1945 the object of which was to aid the struggle for liberty of the Czechs and Slovaks or which represented just reprisals for actions of the occupation forces and their accomplices, is not illegal, even when such acts may otherwise be punishable by law”.⁶

The present legal opinion will address the different issues arising in the context of these provisions.

4. Preliminary remarks

10) It is necessary to clarify the scope of the present legal opinion as to two matters to avoid possible misunderstandings. This is on the one hand the position as to the Slovak Republic and it concerns on the other hand the legal status of all European Union citizens after accession.

⁶ Translation in: *Legal Service of the European Parliament*, *ibid.*, para. 60. Sometimes “just retribution“ is used for “just reprisals“.

11) When the State of Czechoslovakia, by a procedure based on the agreement of the Czech and the Slovak side, ceased to exist, the two new republics, the Czech Republic and the Slovak Republic came into being.⁷ In both republics the Beneš-Decrees remain part of the legal order. Although many of the matters being discussed in the following legal opinion will also be applicable for the Slovak Republic the opinion is limited to the situation in the Czech Republic. The reason for this limitation is that the materials available, including the opinions by the European Parliament and by the European Commission, mainly concern the Czech Republic. Since the accession of the Czech Republic is expected to come first it is justifiable to limit the present opinion to the situation for the Czech Republic.

12) No specific information has been provided to me as to the state of negotiations concerning accession between the European Union and the Czech Republic. In particular, there is no information available on possible transitory provisions which might be agreed upon concerning the acquisition of property by European Union citizens on the territory of the Czech Republic. The questions put in the mandate formulated by the European Parliament do not in any way indicate that the accession negotiations could envisage any distinction among citizens of the European Union after accession. Indeed, it should be stressed that this would be a fundamental breach with European Union traditions and might even give rise to legal challenge as a discriminating treaty provision not in line with the general constitutional principles on which the European Union has been established.

13) Therefore, the present opinion is based on the understanding that with accession all European Union citizens will have the same right to acquire property on the territory of the Czech Republic. This does not exclude that specific transitory provisions may be adopted and

⁷ For a detailed account see *Eric Stein, Czecho/Slovakia, Ethnic Conflict, Constitutional Fissure, Negotiated Breakup, 1997.*

it does not exclude that provisions concerning secondary residences could be agreed upon. It is well-known that Protocol No. 16 of 1992 protects the Danish legislation concerning the acquisition of secondary residences against challenges under European Union law.

14) However, what has to be stressed, because of the misunderstandings sometimes prevailing in the present context: it is excluded that a discrimination between different categories of European Union citizens could be laid down in an additional protocol. This means that Germans, Hungarians or Austrians who were, or whose ancestors were, former inhabitants of the Sudeten territories cannot have less rights under the European Union system than other European Union citizens.

5. The issue of confiscations in 1945/1946

15) The confiscation without compensation of property of former Czechoslovak or other citizens considered to belong to the German and Hungarian people is a matter fully concluded in 1945 and 1946. For this reason the Czech Constitutional Court, in a ruling of 8 March 1995, argued that Decree No. 108 of 25 October 1945 should be seen to be “extinct” as a source of law.⁸ However, it is clear that the Decree was considered to have been validly adopted and having had the legal effect of transferring property originally held by those against whom the measures of confiscation were taken. Therefore, it has relevance for the present legal status of the property concerned in the Czech legal order.

⁸ Czech Constitutional Court ruling of 8 March 1995 - *Dreithaler* (Pl. ÚS 14/94, Sb. n. u. ÚS 3 (1995 – Vol. I), 73 et seq.); for the German translation, see *G. Brunner/M. Hofmann/P. Holländer, Verfassungsgerichtsbarkeit in der Tschechischen Republik*, 2001, p. 151 et seq.

16) 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.⁹ But it cannot be doubted that these confiscations have nothing to do with the rules included in Articles 49 and 6 TEU. Neither of these articles refers to the past and could reopen confiscation issues long ago concluded in the legal system of an accession country.

17) Art. 295 TEC confirms that the treaty does not affect the rules governing the system of property ownership in all Member States. This rule is applicable for all property, including property acquired through or after confiscation, lawful according to the legal order of the Member State concerned and acquired long before accession. It is true that the European Court of Justice has clarified that Art. 295 cannot limit the freedoms enshrined in the treaty.¹⁰ But the freedoms under the treaty do not in any way refer to confiscations in 1945/46.

⁹ This issue could not be discussed limited to the actions by Czechoslovakia but it would be necessary to address the decisions taken by the allied powers at the Potsdam Conference in 1945. According to the Protocol of that Conference: “The transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken.” It was added that transfers “should be effected in an orderly and humane manner”. It is common knowledge that this condition was widely disregarded before and after the Potsdam Conference. By this decision of the allied powers confiscation of the property remaining in the countries from where the people were transferred was apparently accepted as a consequence. A recent Czech publication includes statements by the ambassadors of Russia, the United States and the United Kingdom in Prague confirming the Potsdam decisions. They show that any discussion of the transfer of the German population from the territory of Czechoslovakia and the confiscation of the property remaining there would involve the powers having participated in the decision at Potsdam. The Czech publication is: “Právní aspekty odsunu sudetských Němců, 1996, p. 103”. For a discussion of the Potsdam Conference see *J. A. Frowein*, *Potsdam Agreements on Germany*, *Encyclopedia of Public International Law* (ed. *R. Bernhardt*), Vol. III, 1997, p. 1087-1092. For a critical discussion of the transfer in particular, *C. Tomuschat*, *Die Vertreibung der Sudetendeutschen – Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 56 (1996), p. 1-69. It must also be kept in mind, in the present context, that Germany had started to forcibly transfer populations. This was not limited to Jews but concerned Poles and others. Cf. *G. Aly*, *Endlösung*, 1998.

18) It must be taken into account as well that the TEC does not directly lay down requirements for expropriation. Certainly Art. 6 TEU must be interpreted as referring to the requirements of the European Convention on Human Rights in that context. Thereby Art. 1 First Protocol to the Convention, which in principle requires compensation for expropriation, is applicable in the law of the European Union.¹¹ But this rule has no retroactive effect and does not regulate confiscations in 1945/46.

19) The view that the confiscations in 1945/46 cannot be challenged on the basis of EU-law is correctly expressed in the analysis of the Legal Service of the European Commission¹² as well as in the opinion of the Parliament¹³. This is also the position of authors who have expressed an opinion on this matter.¹⁴ In the German-Czech-Declaration of 1997 the Czech side regrets that the confiscations inflicted injustice upon innocent people but no consequences follow therefrom.¹⁵

20) It should also be mentioned, in the present context, that Germany, after reunification, did not restitute property confiscated between 1945 and 1949 on the basis of Soviet decisions. The German Federal Constitutional Court confirmed in several judgments that this practice

¹⁰ Case C-350/92 Spain/Council, ECR 1995 I, 1985.

¹¹ Compare *J. A. Frowein/W. Peukert*, EMRK-Kommentar, 2nd ed. 1996, 809-817; the principle of compensation was established in the judgments *James and Lithgow* in 1986, ECHR 98, 66 et seq.; 102, 89 et seq.

¹² *Legal Service of the European Commission*, *ibid.*, p. 4.

¹³ *Legal Service of the European Parliament*, *ibid.*, para. 165 et seq., p. 24 s. The opinion of the Parliament refers to the decision of the European Court of Human Rights of 12 July 2001 in the case “*Prince Hans-Adam II of Liechtenstein*“. However, in this judgment the Court does not deal with the issue of confiscation in the present context. (See p. 10).

¹⁴ *C. Tomuschat*, in: *A. von Bogdandy/P. Mavroidis/Y. Mény*, European Integration and International Co-ordination, 2002, p. 451.

does not violate the guaranty of property in the constitution.¹⁶ This example shows that a member state of the European Union did not restitute property confiscated under the very special circumstances after World War II.

21) For these reasons I come to the conclusion that the confiscations on the basis of the so-called Beneš-Decrees do not raise an issue in the context of the accession of the Czech Republic to the European Union.

6. The decision of the European Court of Human Rights in the case brought by the Prince of Liechtenstein

22) The judgment rendered by the European Court of Human Rights on 12 July 2001 in the application brought by the Prince of Liechtenstein¹⁷ is quoted by the Legal Opinion of the Parliament.¹⁸

23) The European Court of Human Rights had to decide whether a violation of the European Convention on Human Rights followed from the refusal of German courts to decide on the compatibility with international law of Czechoslovak confiscations based on the Beneš-Decrees. The Prince of Liechtenstein had argued that this refusal was a violation of his rights under the Convention. The European Court of Human Rights held that the application,

¹⁵ See Annex, Declaration, III.

¹⁶ Bundesverfassungsgericht, BVerfGE 84, 90, 122-128; 94, 12.

¹⁷ ECHR, Judgment of 12 July 2001, *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98.

by the German courts, of an international treaty preventing German courts from evaluating any confiscation measures after World War II was fully compatible with the European Convention on Human Rights. This shows that the Court did not in any way decide on the confiscation measures.

24) As far as the allegation of a violation of the right to property under Art. 1, First Protocol to the ECHR was concerned, the Court concluded that there was no violation. The Prince of Liechtenstein had argued that he was still the owner of the painting concerned and the confiscation, which had been contrary to public international law, had to remain ineffective. The Court found that the applicant had no “possession” in the sense of Art. 1. The Court held as follows:

“85. As regards this preliminary issue, the Court observes that the expropriation had been carried out by authorities of former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the entry into force of the Convention, and before 18 May 1954, the entry into force of Protocol No. 1. Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present date (see *Malhous v. the Czech Republic* (dec.), cited above, and the Commission’s case-law, for example, *Mayer and Others v. Germany*, applications no. 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, pp. 5-20).

The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of

¹⁸ *Legal Service of the European Parliament*, *ibid.*, par. 81-86, p. 12/13, and par. 166-169, p. 24/25.

Germany and which could have effects as to the temporal limitations of the competence of the Court (see, *a contrario*, the *Loizidou v. Turkey* judgment (*merits*), quoted above, p. 2230, § 41).

Subsequent to this measure, the applicant's father and the applicant himself had not been able to exercise any owner's rights in respect of the painting which was kept by the Brno Historical Monuments Office in the Czech Republic.

In these circumstances, the applicant as his father's heir cannot, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained a title to property nor a claim to restitution against the Federal Republic of Germany amounting to a "legitimate expectation" in the sense of the Court's case-law.

86. This being so, the German court decisions and the subsequent return of the painting to the Czech Republic cannot be considered as an interference with the applicant's "possessions" within the meaning of Article 1 of Protocol No. 1 (see paragraph 78 above).

87. The Court thus concludes that there has been no violation of Article 1 of Protocol No. 1."

25) While one may see a confirmation in that part of the judgment, of the validity of the confiscation measures in the international legal order, the Court underlined that it could not, *ratione temporis*, evaluate the confiscations in 1945/1946. But the judgment clearly confirms the view expressed here that confiscations in 1945/46 do not raise an issue under the European Convention on Human Rights.

7. A possible discrimination in restitution

26) According to the Law of 15 April 1992, No. 243/1992, a possibility of restitution was introduced for certain persons who had lost their property on the basis of the Beneš confiscation decrees. This restitution was limited to citizens of the Czech Republic. According to Article 11 a, § 3, of the Law 243/1992 “persons entitled pursuant to Article 2 (2) may assert claims for the restitution of non-movable property pursuant to this Law not later than 30 June 2001”. This means that the deadline for restitution claims has expired long before the accession process can come to an end.

27) The question which arises is whether a restitution procedure for which applications could only be introduced before the accession of the Czech Republic to the European Union could trigger an issue under the discrimination provisions of Article 12 of the Treaty on the European Community which prohibits discriminations based on nationality among citizens of the European Union.

28) The discrimination prohibition as all rules of European Union law can only operate from the moment of accession to the European Union. This is confirmed by the jurisprudence of the European Court of Justice.¹⁹ It follows that a restitution procedure completed before accession cannot be put into question by the discrimination provisions of the treaty. The legal consequences of a restitution process completed before accession cannot be reopened after accession on the basis of Article 12 TEC.²⁰ Even where restitution procedures are still pending, accession would not have the consequence of reopening the deadline for restitution.

¹⁹ See, for example, Case C-464/98 *Friedrich Stefan*, ECR 2001 I, 173.

29) However, it must be taken into account that the Committee established under the United Nations Covenant on Civil and Political Rights has found in several cases submitted to it that the restitution procedure as practised by the Czech Republic is in violation of Article 26 of the Covenant on Civil and Political Rights which protects equality also as to legislation.²¹ Under those circumstances it should be discussed whether a discrimination in the restitution law, established by a competent human rights organ, could have some bearing on the accession procedure even if the restitution itself could only be applied for at a time when accession has not yet taken place. One could, for instance, imagine the reopening of the time limit on the basis of the accession negotiations. It is, therefore, of importance to discuss the views of the UN Human Rights Committee.

30) The Human Rights Committee has first decided in several cases that a restitution procedure adopted by the Czech Republic for those who had lost their property by communist measures of confiscation was discriminatory because it was based on the double requirement of Czechoslovak citizenship and permanent residence in the territory of the State. The Human Rights Committee concluded that the double requirement must be seen as arbitrary since the requirements had no connection with the original rights of ownership and furthermore were contradictory insofar as the former Czechoslovak State itself had driven the authors of the communication from the country by measures of persecution.²²

²⁰ This is probably the view behind the formulation in the *Opinion of the Legal Service of the European Parliament*: “Doubts exist as to whether these laws would still create new rights and obligations after accession.” Conclusions, par. 171b, p. 26. Restitution legislation the time limit of which has expired before accession, cannot create new rights or obligations after accession.

²¹ Art. 26 reads: „All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.“

31) In several cases concerning former Sudeten German property the Committee decided that it was not arbitrary and discriminatory to limit the restitution to the confiscations effected by the communist regime and not to extend them to confiscations under the so called Beneš-
Decrees.²³

32) In 2001 the Committee had to deal with restitution under Law 243/1992 concerning confiscations under the Beneš-
Decrees. The case De Fours Walderode²⁴ is characterised by very specific facts. The author of the communication, K. De Fours Walderode, was a citizen of the newly created Czechoslovak State since 1918. His estate was confiscated in 1945. However, on account of his proven loyalty to Czechoslovakia during the occupation he retained his Czechoslovak citizenship.

33) In 1992 the Czech authorities took the view that he had lost his Czechoslovak citizenship in 1949, when he left the country. In 1996 the condition of uninterrupted citizenship was introduced in Law 243/1992 as a requirement for restitution. The Committee

²² UN Human Rights Committee, Communication No. 516/1992, *Simunek et al. v. The Czech Republic*, final views, 19 July 1995, UN Report of the HRC, Vol. II, GA Official Records, 50th Session, Supplement No. 40 (A/50/40); Communication No. 586/1994, *Adam v. The Czech Republic*, final views, 23 July 1996, UN Report of the HRC, Vol. II, GA Official Records, 51st Session, Supplement No. 40 (A/51/40); Communication No. 857/1999, *Blazek et al. v. The Czech Republic*, final views, 12 July 2001, UN Report of the HRC, Vol. II, GA Official Records, 56th Session, Supplement No. 40 (A/56/40). It should be underlined that the mandate for this legal opinion is limited to the restitutions as related to confiscations under the Beneš-
Decrees.

²³ UN Human Rights Committee, Communication No. 643/1994, *Drobek v. Slovakia*, final views, 14 July 1997, UN Report of the HRC, Vol. II, GA Official Records, 52nd Session, Supplement No. 40 (A/52/40); Communication No. 669/1995, *Malik v. The Czech Republic*, final views, 21 October 1998, and Communication No. 670/1995, *Schlosser v. The Czech Republic*, final views, 21 October 1998, UN Report of the HRC, Vol. II, GA Official Records, 54th Session, Supplement No. 40 (A/54/40); Communication No. 807/1998, *Koutny v. The Czech Republic*, final views, 20 March 2000, UN Report of the HRC, Vol. II, GA Official Records, 55th Session, Supplement No. 40 (A/55/40).

held that it was discriminatory to require continuous Czechoslovak and Czech citizenship for somebody who, under the legislation 243/1992, otherwise had the right to claim restitution of property confiscated on the basis of the decrees directed against German and Hungarian nationals.

34) The question arises whether in the view of the Human Rights Committee the Czech restitution legislation as regards confiscations under the Beneš-Decrees is in general discriminatory and should be amended before accession, because it does not provide for restitution to people who have today German, Hungarian or any other citizenship.

35) There are decisive arguments against such a view. Nobody has so far argued that the Czech Republic should reconstitute all property confiscated under the Beneš-Decrees to former owners. It is beyond question that this would exceed the financial and legal possibilities of any state in a comparable situation. But it would also raise an issue as to the background of the confiscation, i. e. the transfer of the German and Hungarian populations, confirmed at the Potsdam Conference.²⁵ As already explained, this decision has been recently confirmed by the powers which were parties to the Potsdam agreements.²⁶

36) The Human Rights Committee did not expressly address the issue whether the Czech legislation is justifiable where it limits restitution to people who have shown loyalty to Czechoslovakia. In the case decided by the Committee it was not in dispute that the person had shown loyalty. It seems clear, therefore, that the Committee based its analysis on this

²⁴ UN Human Rights Committee, Communication No. 747/1997, *De Fours Walderode v. The Czech Republic*, final views, 30 October 2001, UN Doc. CCPR/C/73/D/747/1997.

²⁵ See above p. 8 with note 9.

²⁶ Comp. p. 8, note 9.

established fact. It considered the introduction of the requirement of continuous citizenship for somebody who had shown this loyalty as being discriminatory. It cannot be deduced from that view of the Committee that all others who do not fulfil the requirement of loyalty must have a right to restitution.

37) This shows that a proper analysis of the view expressed by the United Nations Committee concerning the case De Fours Walderode does not put into question the general system of restitution as applied by the Czech Republic on the basis of Law 243/92. Therefore, there is no reason to question the compatibility of that procedure with the principle of nondiscrimination in the context of the accession process. Properly analysed the distinction operated by the Czech restitution legislation in Law 243/92 is one between persons who had shown loyalty to the State of Czechoslovakia during occupation and others. It is not correct to deduce from the view of the Committee the understanding that there should be a general claim for restitution introduced for all those belonging to the German or Hungarian people and having suffered confiscations in 1945 and thereafter. Rather, the distinction made must be seen as a reasonable one.

38) This brings me to the conclusion that even an extended view of the rule of non-discrimination in Article 12 of the TEC and Article 6 TEU does not permit to question the procedure laid down in the Czech restitution legislation which, because of the time limit of 30 June 2001, is no longer applicable when accession takes place. Therefore, the limited system of restitution concerning confiscations under the Beneš-Decrees does not raise an issue in the context of accession.

8. Issues of citizenship

39) On the basis of the Decree on Citizenship (No. 33/1945) many former Czechoslovak nationals who were considered to belong to the German or Hungarian people lost their Czechoslovak citizenship. For those who had acquired German or Hungarian citizenship on the basis of the different treaties or regulations this loss was determined to occur retroactively. It is clear that the operation of these provisions was limited to the period at stake. No other cases can arise under this decree. Even if procedures of that sort would raise issues under present rules of international law these rules do not regulate matters in 1945/46. It should be added here that the loss of citizenship for people who were forcibly transferred followed a clear logic. Unless they were deprived of the citizenship of the state from the territory of which they were transferred, they would, at least in theory, be able to claim reentry.

40) The Federal Republic of Germany, when negotiating the Treaty of Prague of 11 December 1973²⁷, was very careful not to put into question the German citizenship of those Sudeten-Germans who had acquired it on the basis of the Munich-Treaty.²⁸ The declaration, in the Treaty of Prague, as to the nullity of the Treaty of Munich is qualified so as not to permit any consequences for nationality, this term being here used in the sense of citizenship.²⁹ This must be taken into account in the present context. It shows that the Czechoslovak measures, as far as these people are concerned, were, unfortunately, a consequence of the historical developments.

²⁷ Bundesgesetzblatt 1974 II, 990; english translation: International Legal Materials 13 (1974), 19.

²⁸ Reichsgesetzblatt 1938 II, 853; english translation: British and Foreign State Papers 142 (1938), 438.

41) However, what is most important in the context of accession is the clear national competence for matters of citizenship and nationality. As Article 17 of the TEC shows nationality and citizenship in the Member States is a matter only for regulation by the State concerned. Therefore, the issue of citizenship is not an issue which raises any problems in the context of the accession procedure.

9. The Decrees on criminal law and proceedings

42) In particular Decrees No. 16 and 137 of 1945 provided for criminal sanctions against people who had collaborated with the occupation authorities or for similar behaviour. Extraordinary tribunals were established which tried people in summary procedures, frequently in absentia. It seems that a considerable number of people who had fled or were driven from Czechoslovak territory were convicted by such tribunals. It is not clear to what extent judgments of these courts are still valid and enforceable in the Czech legal order.³⁰ The Decrees were apparently repealed beginning 1948.³¹

43) Assuming that such judgments could still be executed this would raise an issue under Articles 45 and 6 TEU. A possible arrest and detention of people entering the Czech Republic, on the basis of in absentia convictions in summary procedures in 1945 or 1946, would run counter to the fundamental rights and rule of law guarantees which must be applicable as from

²⁹ Art II par. 2 stated: “The present Treaty shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties.”

³⁰ The opinion of a Czech lawyer comes to the following conclusion: “Sentences imposed under Great Retributions Decree No. 16/1945 are not enforceable today, for legal and factual reasons. The Decree itself was repealed and cannot conflict with the *acquis communautaire*.”

³¹ *Opinion of the Legal Service of the European Parliament, Conclusions*, par. 171k, p.27.

the date of accession. The European Court of Human Rights has found in absentia criminal procedures in principle to violate fundamental human rights under Article 6 of the European Convention on Human Rights.³²

44) It is therefore of importance to verify whether enforcement of these judgments is precluded by prescription under the provisions of the Czech Penal Code in force or on the basis of any other legal rule. This must be clarified during the accession procedure.³³ Legal certainty requires that nobody should have any doubts here. The Czech Government must take a clear position. If necessary legislation must be enacted.

10. The exclusion of criminal responsibility on the basis of Law No. 115 of 8 May 1946

45) Law No. 115 of 1946 provides: “Any act committed between September 30, 1938 and October 28, 1945, the object of which was to aid the struggle for liberty of the Czechs and Slovaks or which represented just reprisals for actions of the occupation forces and their accomplices, is not illegal, even when such acts may otherwise be punishable by law”.³⁴ This legislation still has legal effects. It precludes possible criminal investigations, charges, and convictions of people who have acted during the defined period in the way circumscribed by the rule.

³² Judgment of 12 February 1985, *Colozza v. Italy*, Series A, No. 89; Judgment of 13 February 2001, *Krombach v. France*, Application no. 29731/96; ECHR, Judgment of 11 July 2002, *Osu v. Italy*, Application no. 36534/97.

³³ The legal opinion of the Parliament comes to the conclusion that “it would be useful to verify whether the right of enforcement is precluded by prescriptions under the provisions of the Czech Penal Code in force”, (par. 171k, p. 27). This must be seen as a condition for accession.

46) While it seems easy to understand that actions directed at aiding the struggle for liberty of the Czechs and Slovaks was being exempted from any possible sanction this is less easy to understand for the second category. This second category refers to “just reprisals for actions of the occupation forces and their accomplices”. It is not doubtful that during the compulsory transfer (*Vertreibung*) of large numbers of Germans and Hungarians many people lost their lives on the basis of arbitrary actions by guards, militias or violent members of the population.³⁵ The Law No. 115 has been used to exempt acts from criminal sanctions which violated elementary humanitarian principles as has been recognised in the German-Czech Declaration of 1997.³⁶ Such a legislation is, applying the standards of Art. 6 TEU, a blatant violation of the guaranty of human rights, the rule of law and the obligation of the State to protect all individuals on its territory against violence.

47) It should of course be added immediately that this legislation was adopted after a long period of harsh occupation during which many civilians had been brutally murdered or injured. Many if not most of the actions by Germans during the occupation were never investigated by prosecutors or courts. It could not be established whether, to take one of the most infamous examples, any German trials ever took place concerning members of the German armed forces who had been involved in the Lidice murders committed as reprisals after the attack on Heydrich, the highest German official in the occupied territory of Czechoslovakia (*Reichsprotektorat Böhmen und Mähren*).³⁷ According to reports, at Lidice 199 male inhabitants were killed immediately, 184 women were deported to the concentration

³⁴ Translation in the *Opinion of the Legal Service of the European Parliament*, par. 60, p. 9.

³⁵ See the citations in *C. Tomuschat, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1996), p. 1, 5.

³⁶ See III of the Declaration, Annex.

³⁷ No Lidice trials are listed in *C. F. Rüter/D. W. De Mildt, Die westdeutschen Strafverfahren wegen nationalsozialistischer Tötungsverbrechen 1945-1997*, 1998.

camp of Ravensbrück where 52 died, more than 80 children were killed in the gas chambers of Chelmno.³⁸

48) As far as it could be established there were no other laws in European states which were under German occupation which resemble the Law of 1946. The French legislation 46/729 of 16 April 1946 provided for an amnesty concerning all those criminal acts which had the aim of liberating France.³⁹ This may be interpreted in a similar manner as the Law No. 115. However, the formal exclusion from criminal sanctions of acts which represented “just reprisals for actions of the occupation forces and their accomplices” seems to be unique.

49) It is not generally known that Law No. 115 of 8 May 1946 was apparently influenced by a Decree of Hitler of 7 June 1939, which exempted all those from criminal responsibility who had committed crimes in the battle for “preservation of the German element in the Sudeten German territories or for the coming home of these territories into the empire before 1st December 1938.”⁴⁰ Czech authors explain that Law No. 115 was in fact drafted after the model of the German Decree of 7 June 1939. They also indicate that Law No. 115 was not

³⁸ See *M. Kárný*, in: *L. Droulia/H. Fleischer*, *Von Lidice bis Kalavryta*, 1999, p. 61.

³⁹ The text is as follows: “Art. 6. – Pendant un délai de six mois à compter de la promulgation de la présente loi pourront demander à être admises, par décret, au bénéfice de l’amnistie, les personnes poursuivies ou condamnées pour toutes infractions pénales, quelle qu’en soit la juridiction appelée à en connaître, civile ou militaire, commises antérieurement au 8 mai 1945 pour l’ensemble du territoire, ou à la date du 18 août 1945 pour les départements du Haut-Rhin, Bas-Rhin et Moselle, à condition que les actes reprochés aient été accomplis avec l’esprit de servir la cause de la libération définitive de la France.”

⁴⁰ Reichsgesetzblatt 1939 I, 1023. The German text is: “Darüber hinaus gewähre ich für Straftaten und Verwaltungsübertretungen, die im Kampfe für die Erhaltung des Deutschtums in den sudetendeutschen Gebieten oder für ihre Heimkehr ins Reich vor dem 1. Dezember 1938 begangen wurden, Straffreiheit mit folgender Maßgabe: Straftaten, die beim Inkrafttreten dieses Erlasses rechtskräftig erkannt und noch nicht vollstreckt sind, werden ohne Rücksicht auf ihre Höhe erlassen. Anhängige Verfahren werden eingestellt, neue Verfahren werden nicht eingeleitet.”

applied in practice in cases where only personal motives existed, as for instance for robberies. This was apparently confirmed by decisions of the Supreme Court of Czechoslovakia in 1947 and 1949.⁴¹ It is also stated by at least two authors that the Law would not apply to crimes against humanity.⁴² But apparently no charges have been brought.

50) Christian Tomuschat, a former member of the United Nations Committee under the Covenant for Civil and Political rights, has proposed that this legislation would have to be repealed by the Czech Republic to make criminal investigations possible.⁴³ Tomuschat argues on the basis of decisions by the European Court of Human Rights, views of the Human Rights Committee of the United Nations and several other international developments which show that criminal actors must be brought to justice in principle.⁴⁴ He does not in detail discuss what possible reasons could militate against a repeal of legislation after more than 50 years with the consequence that people could be brought to justice now.

51) One may doubt whether a removal of the legislative barrier against investigation and possible trial would run counter to Article 7 of the European Convention on Human Rights according to which no one shall be held guilty of any criminal offence on account of any act which did not constitute a criminal offence under national or international law at the time

⁴¹ *V. Pavlicek*, in: *Právní aspekty odsunu sudetských Němců*, 1996, p. 69 et seq.

⁴² *J. Hon/J. Šitler*, Law no. 115/46, dated 8 May 1946, its genesis and implementation and criticism. According to the text communicated to me the manuscript was published in 1996 and edited in 2002. The authors explain in detail the discussions around Law 115 including the criticism expressed at the time by Czechoslovak politicians and other citizens. They describe several cases where the Law was not applied to acts called “Gestapoism”.

⁴³ *C. Tomuschat*, in: *A. von Bogdandy/P. Mavroidis/Y. Mény*, *European Integration and International Co-ordination*, 2002, p. 451, 470 et seq.

⁴⁴ *C. Tomuschat*, *ibid.*, p. 471 et seq.

when it was committed.⁴⁵ Since the legislation of 8 May 1946 was retroactive, limiting the exclusion from criminal sanction until 28 October 1945, it could be argued that Article 7 of the European Convention on Human Rights is at least not directly applicable. What would happen by a repeal would be a removal of a normative exclusion from criminal responsibility.

52) But this argument does not really address the fate of the person concerned by such a repeal. It cannot be overlooked that criminal investigations and prosecutions after more than 50 years raise very difficult problems. According to the information given by Czech lawyers most crimes fall under prescription rules and can therefore no longer be prosecuted.⁴⁶ Even if prescription is excluded it is very doubtful whether it could be argued that it is a necessity, under the fundamental principles applying for the Union, that people who have committed crimes more than 50 years ago should now stand trial after they have had the confidence throughout their life that they could not be prosecuted for such crimes.

53) Christian Tomuschat mentions correctly that in Germany people do stand trial for war crimes which they have committed during World War II even if they have been discovered very late.⁴⁷ However, it would not be correct to judge by the same standards these developments in Germany and those at issue here. After 8 May 1945 and the occupation of Germany there was no question that Germans would have to take responsibility for the many terrible crimes they had committed during the national socialist period and particularly from 1939 to 1945. This was not only something implemented by the allied occupation authorities

⁴⁵ For details of that provision *J. A. Frowein*, in: *J. A. Frowein/W. Peukert*, *Europäische Menschenrechtskonvention*, 2nd ed. 1996, Art. 7, p. 321 et seq.

⁴⁶ *J. Hon/J. Šitler*, as note 42.

but very soon also fully adopted by the German judicial system, even if not always carried out with great vigour. Nobody in Germany could rely on any principle of legitimate expectation that he would not have to stand trial if discovered as a criminal concerning these acts.⁴⁸

54) This was completely different in Czechoslovakia and in the Czech Republic until now. One may argue that it is not convincing to treat persons having committed severe criminal acts differently under those circumstances. However, in that respect a consideration must be of relevance which has already been mentioned earlier. The actions referred to in the Czechoslovak legislation of 8 May 1946 were actions in reaction to what had happened to the Czechoslovak population by Germans between 1938 and 1945. Although most of the victims were innocent it cannot be overlooked that the violence committed against Germans at that time was in particular a reaction to what had happened during German occupation.

To quote Ian Kershaw, in his recent biography on Hitler:⁴⁹

“The raw brutality with which the Germans had treated those whose countries, particularly in Eastern Europe, they had occupied now backlashed against the whole German people. During the last months of the war the Germans harvested the storm of unlimited barbarity which the Hitler regime had sowed.”

55) Although the present opinion relates to the issue whether there is a need for action in the context of the accession of the Czech Republic to the European Union it seems also of particular importance to take into consideration the development of German-Czech relations

⁴⁷ In 2002 a former officer, 93 years of age, was convicted for killing hostages in Italy.

⁴⁸ A general description of German trials is to be found in *C. F. Rüter/D. W. de Mildt, Die westdeutschen Strafverfahren wegen nationalsozialistischer Tötungsverbrechen 1945-1997, 1998.*

as to the present issue. In the German-Czech Declaration of 1997 the difficult history of German-Czech relations at the end and after World War II is directly addressed. Under III of this declaration the Czech side regrets the suffering and injustice inflicted upon innocent people by the forcible transfer of the Sudeten Germans and the confiscation of their property. The Czech side regrets the excesses which were contrary to elementary humanitarian principles and legal norms. The Czech side in addition regrets formally that on the basis of Law No. 115 of 8 May 1946 these excesses were not seen as unlawful and were not punished. The Declaration states under III:⁵⁰

“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, and it furthermore regrets that Law No. 115 of 8 May 1946 made it possible to regard these excesses as not being illegal and that in consequence these acts were not punished.”

56) This statement by the Czech side, and the fact that Germany accepted it, is of importance in our context. It must be seen as a clear expression of the German position according to which Germany will not ask for prosecution of those falling under Law No. 115. Otherwise the language could not be understood and the balance of the Declaration would be disturbed. In section II it contains a statement according to which Germany accepts

⁴⁹ *I. Kershaw*, *Hitler 1936-1945*, 2000, p. 986, (German edition).

⁵⁰ See Annex.

responsibility for the developments from 1938 onwards.⁵¹ But again no legal consequences are envisaged.

57) This shows as well that within the accession process it would be difficult to ask for the repeal of the legislation concerned since Germany, the country most directly affected by these developments, did not insist that Law No. 115 must be partly repealed in the negotiations leading to the Declaration of 1997. The Declaration is not a treaty. But it is a carefully worded text, negotiated in detail, which, on the basis of the principles of good faith and estoppel in international law, is of relevance in German-Czech relations.

58) For all the reasons stated above, but in particular because of the effect the repeal would have for individuals, I come to the conclusion that a repeal of Law No. 115 cannot be required. It should be expressly noted that the Czech Republic has regretted the consequences of the Law as far as excesses contrary to elementary humanitarian principles as well as legal norms are concerned. It would seem appropriate that a confirmation of that attitude is shown during the accession procedure. It is, however, a different matter whether the position expressed by Czech lawyers, according to which crimes against humanity were never covered by the provisions of the statute, should give rise to some action by the competent Czech authorities in particularly severe cases.⁵²

⁵¹ “The German side acknowledges Germany's responsibility for its role in a historical development which led to the 1938 Munich Agreement, the flight and forcible expulsion of people from the Czech border area and the forcible breakup and occupation of the Czechoslovak Republic. It regrets the suffering and injustice inflicted upon the Czech people through National Socialist crimes committed by Germans. The German side pays tribute to the victims of National Socialist tyranny and to those who resisted it. The German side is also conscious of the fact that the National Socialist policy of violence towards the Czech people helped to prepare the ground for post-war flight, forcible expulsion and forced resettlement.”

11. Minority protection

59) In June 1993 the European Council has fixed in Copenhagen some of the standards which should be respected in the context of Articles 6 and 49 of the TEU. In that context “respect for and protection of minorities” is expressly mentioned.⁵³

60) The Czech Republic is a member of the Framework Convention of the Council of Europe on the Protection of Minorities.⁵⁴ The Czech Republic formally recognises the existence of a German minority of about 38.000 people.⁵⁵ The Czech Republic is also bound by a treaty with Germany concerning the rights of the German minority. According to Article 20 of the Treaty of 27 February 1992, concluded with the Czech and Slovak Federal Republic but continued by the Czech Republic, the members of the German minority have full rights to identify themselves and to express their traditions. They may not be discriminated against on the basis of belonging to the minority.⁵⁶

⁵² Comp. p. 24, note 46.

⁵³ “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.” (Copenhagen European Council, 21-22 June 1993, Presidency Conclusions).

⁵⁴ International Legal Materials 34 (1995), p. 353.

⁵⁵ In the Czech census of March 2001 38.000 Czech citizens described their nationality as German, a little under half a percent of the population. For the results of the census see <http://www.czso.cz/cz/sldb/2001/pvysled/text.htm>.

⁵⁶ Vertrag zwischen der Bundesrepublik Deutschland und der Tschechischen und Slowakischen Föderativen Republik über gute Nachbarschaft und freundschaftliche Zusammenarbeit, Bundesgesetzblatt 1992 II, 463. For the unofficial English-language translation see *de Vareennes*, Language, Minorities and Human Rights, 1996, p. 368. Art. 20 reads in part: “[...] (2) Accordingly, members of the German minority in the Czech and Slovak Federal Republic, which means persons having Czechoslovak citizenship, who have a

61) It has not been alleged that the Czech Republic does not comply with the obligations existing concerning minority protection. In that respect one must assume that the standards also enshrined in Articles 49 and 6 TEU are complied with.

German background or identify themselves with the German language, culture, or traditions, have in particular the right, individually or in association with other members of their group, to free speech, preservation and development of their ethnic, cultural, linguistic, and religious identity free from any attempts to assimilate them against their will. They have a right to exercise their human rights and basic freedoms fully and effectively without any discrimination and in complete equality under law. (3) The affiliation to the German minority in the Czech and Slovak Federal Republic is a personal decision of each individual, which must not be detrimental to that person. [...]“.

Conclusions

- 1) The confiscation of property in 1945/46, of people considered to be Germans and Hungarians, does not raise any issue in the context of accession because the conditions for accession in the Treaty on the European Union do not refer to the past.

- 2) The limited Czech rules concerning restitution as to property confiscated under the Beneš-Decrees cannot be put into question on the basis of European Union law because application for restitution is no longer possible today and European Union law applies only from the date of accession.

- 3) Even if one takes into account the views expressed by the United Nations Human Rights Committee, the Czech legislation, distinguishing as to restitution between those having shown loyalty to Czechoslovakia and therefore retaining citizenship, and others, cannot be put into question under European Union law, because the distinction is based on reasonable grounds.

- 4) The regulations concerning citizenship in 1945/46 do not raise any issue in the context of accession because matters of national citizenship are generally outside European Union law.

- 5) It must be ensured that in absentia judgments on the basis of the specific Decrees adopted in 1945 and thereafter cannot be enforced against persons who enter the Czech Republic after accession. If necessary, legislation must be adopted in that context.

- 6) Law No. 115 of 1946 is still in force and prevents criminal proceedings against persons who have taken “just reprisals” for actions during the occupation. Although this has included crimes against innocent people during the forced transfer, a repeal of the law would not seem

to be mandatory in the context of accession. The reason is that a repeal would violate the expectations people could have over more than 50 years. It is of legal relevance that Germany, the country most directly affected, did not insist on a repeal when the German-Czech Declaration of 1997 was negotiated. It would be appropriate that the Czech Republic confirms that it regrets specific consequences of Law No. 115, as it has done in the German-Czech Declaration of 1997.

7) As to the German minority remaining in the Czech Republic, the European standards concerning minority protection are clearly laid down in multilateral and bilateral treaties. One must assume that these standards are being complied with.

8) The Czech accession to the European Union does not require the repeal of the Beneš-Decrees or other legislation mentioned in that context. But this opinion is based on the understanding that from accession all European Union citizens have equal rights in the territory of the Czech Republic.

Heidelberg, 12 September 2002

J. A. Frowein