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Legal Opinion on the Beneš-Decrees and the accession of the Czech Republic to the European Union

prepared by

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COMMON CONCLUSIONS

by Prof. U. Bernitz, Prof. J. A. Frowein, Lord Kingsland Q.C.

We have reached the following common conclusions:

1. The confiscation on the basis of the Benes-Decrees does not raise an issue under EU-law, which has no retroactive effect.

2. The Decrees on Citizenship are outside the competence of the EU.

3. The Czech system of restitution, although in some respects discriminatory as held by the UN-Human Rights Committee, does not raise an issue under EU-Law.

4. It must be clarified during the accession procedure that criminal convictions on the basis of the Benes-Decrees cannot be enforced after accession.

5. A repeal of Law No. 115 of 1946, exempting "just reprisals" from criminal responsibility, does not seem to be mandatory in the context of accession. The reason is that individuals have relied on these provisions for over 50 years and as such have a legitimate expectation that they will not now be prosecuted for these actions. However, as we find this law repugnant to human Rights and all fundamental legal principles, we are of the opinion that the Czech Republic should formally recognise this.

6. We have based our opinions on the understanding that from accession all EU-citizens will have the same rights on the territory of the Czech Republic.

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Prof. Frowein

Legal Opinion

concerning Beneš-Decrees and related issues

prepared by

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September 12, 2002

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.

2. The interpretation of Article 49 TEU

[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

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.[1] The populations of these occupied countries had suffered severely during the occupation period.

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

analysis by the Legal Service of the European Commission on the Beneš-Decrees, confidential and restricted, no document number.

[1] 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 [...]"

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".[1]

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.[2] After the legislative power for Czechoslovakia was transferred to the provisional National Assembly on 28 October 1945 a specific constitutional law of 28 March 1946 confirmed all Beneš-Decrees with retroactive effect as to their legal validity.[3]

[1] 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).

[2] 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.mitteleuropa.de/benesch-d01.htm.

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

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 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".[1]

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.

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.[2] 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

[1] Translation in: *Legal Service of the European Parliament*, ibid., para. 60. Sometimes "just retribution" is used for "just reprisals".

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

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 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.[1] 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.

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.[2] But it cannot be

[1] 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.

[2] 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

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.[1] But the freedoms under the treaty do not in any way refer to confiscations in 1945/46.

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.[2] But this rule has no retroactive effect and does not regulate confiscations in 1945/46.

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participated in the decision at Potsdam. The Czech publication is: "Právní aspekty odsunu sudetských Nemcu, 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.

[1] Case C-350/92 Spain/Council, ECR 1995 I, 1985.

[2] 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.

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 Commission[1] as well as in the opinion of the Parliament [2]. This is also the position of authors who have expressed an opinion on this matter.[3] In the German-Czech-Declaration of 1997 the Czech side regrets that the confiscations inflicted injustice upon innocent people but no consequences follow therefrom.[1]

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 does not violate the guaranty of property in the constitution.[2] 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

[1] *Legal Service of the European Commission*, ibid., p. 4.
[2] *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).
[3] *C. Tomuschat*, in: *A. von Bogdandy/P. Mavroidis/Y. Mény*, European Integration and International Co-ordination, 2002, p. 451.

22) The judgment rendered by the European Court of Human Rights on 12 July 2001 in the application brought by the Prince of Liechtenstein[3] is quoted by the Legal Opinion of the Parliament.[4]

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, 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

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[1] See Annex, Declaration, III.
[2] Bundesverfassungsgericht, BVerfGE 84, 90, 122-128; 94, 12.
[3] ECHR, Judgment of 12 July 2001, *Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98.
[4] *Legal Service of the European Parliament,* ibid., par. 81-86, p. 12/13, and par. 166-169, p. 24/25.

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 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.[1] 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.[2] Even where restitution procedures are still pending, accession would not have the consequence of reopening the deadline for restitution.

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.[3] 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

[1] See, for example, Case C-464/98 *Friedrich Stefan*, ECR 2001 I, 173.
[2] 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.
[3] 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."

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.[1]

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.[2]

32) In 2001 the Committee had to deal with restitution under Law 243/1992 concerning confiscations under the Beneš-Decrees. The case De Fours Walderode[3] 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.

[1] 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.

[2] 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 Republik*, 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).

[3] 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.

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 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 restitute 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.[1] As already explained, this decision has been recently confirmed by the powers which were parties to the Potsdam agreements.[2]

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

[1] See above p. 8 with note 9.
[2] 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 1973[1], 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.[2] 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.[1] 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.

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

[1] Bundesgesetzblatt 1974 II, 990; english translation: International Legal Materials 13 (1974), 19.
[2] Reichsgesetzblatt 1938 II, 853; english translation: British and Foreign State Papers 142 (1938), 438.

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.[2] The Decrees were apparently repealed beginning 1948.[3]

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 the date of accession. The European Court of Human Rights has found in absentia criminal

[1] 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."
[2] 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."
[3] *Opinion of the Legal Service of the European Parliament*, Conclusions, par. 171k, p.27.

procedures in principle to violate fundamental human rights under Article 6 of the European Convention on Human Rights.[1]

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.[2] 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".[3] 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.

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

[1] 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.
[2] 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.
[3] Translation in the *Opinion of the Legal Service of the European Parliament*, par. 60, p. 9.

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.[1] 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.[2] 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).[3] According to reports, at Lidice 199 male inhabitants were killed immediately, 184 women were deported to the concentration camp of Ravensbrück where 52 died, more than 80 children were killed in the gas chambers of Chelmno.[1]

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

[1] See the citations in *C. Tomuschat*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1996), p. 1, 5.
[2] See III of the Declaration, Annex.
[3] No Lidice trials are listed in *C. F. Rüter/D. W. De Mildt*, Die westdeutschen Strafverfahren wegen nationalsozialistischer Tötungsverbrechen 1945-1997, 1998.

of 16 April 1946 provided for an amnesty concerning all those criminal acts which had the aim of liberating France.[2] 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."[3] 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 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.[4] It is also stated by at least two authors that the Law would not apply to crimes against humanity.[5] But apparently no charges have been brought.

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

[2] 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."

[3] 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."

[4] *V. Pavlicek*, in: Právní aspekty odsunu sudetských Nemcu, 1996, p. 69 et seq.

[5] *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".

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.[1] 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.[2] 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 when it was committed.[3] 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.[4] Even if

[1] *C. Tomuschat*, in: *A. von Bogdandy/P. Mavroidis/Y. Mény*, European Integration and International Co-ordination, 2002, p. 451, 470 et seq.
[2] *C. Tomuschat*, ibid., p. 471 et seq.
[3] 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.
[4] *J. Hon/J. Šitler*, as note 42.

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.[1] 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 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.[1]

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.

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

To quote Ian Kershaw, in his recent biography on Hitler:[2]

> "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 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:[3]

> "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

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[1] 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.
[2] *I. Kershaw*, Hitler 1936-1945, 2000, p. 986, (German edition).
[3] See Annex.

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 responsibility for the developments from 1938 onwards.[1] 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.

[1] "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

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.[1]

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.[2]

60) The Czech Republic is a member of the Framework Convention of the Council of Europe on the Protection of Minorities.[3] The Czech Republic formally recognises the existence of a German minority of about 38.000 people.[4] 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

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the National Socialist policy of violence towards the Czech people helped to prepare the ground for post-war flight, forcible expulsion and forced resettlement."

[1] Comp. p. 24, note 46.

[2] "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).

[3] International Legal Materials 34 (1995), p. 353.

[4] 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.

identify themselves and to express their traditions. They may not be discriminated against on the basis of belonging to the minority.[1]

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.

[1] 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 Varennes*, 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 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. [...]".

12. 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

ANNEX: GERMAN-CZECH DECLARATION ON MUTUAL RELATIONS
AND THEIR FUTURE DEVELOPMENT

The Governments of the Federal Republic of Germany and the Czech Republic,

Recalling the Treaty of 27 February 1992 on Good-neighbourliness and Friendly Cooperation between the Federal Republic of Germany and the Czech and Slovak Federal Republic with which Germans and Czechs reached out to each other,

Mindful of the long history of fruitful and peaceful, good-neighborly relations between Germans and Czechs during which a rich and continuing cultural heritage was created,

Convinced that injustice inflicted in the past cannot be undone but at best alleviated, and that in doing so no new injustice must arise,

Aware that the Federal Republic of Germany strongly supports the Czech Republic's accession to the European Union and the North Atlantic Alliance because it is convinced that this is in their common interest,

Affirming that trust and openness in their mutual relations is the prerequisite for lasting and future-oriented reconciliation,

jointly declare the following:

I

Both sides are aware of their obligation and responsibility to further develop German-Czech relations in a spirit of good-neighborliness and partnership, thus helping to shape the integrating Europe.

The Federal Republic of Germany and Czech Republic today share common democratic values, respect human rights, fundamental freedoms and the norms of international law, and are committed to the principles of the rule of law and to a policy of peace. On this basis they are determined to cooperate closely and in a spirit of friendship in all fields of importance for their mutual relations.

At the same time both sides are aware that their common path to the future requires a clear statement regarding their past which must not fail to recognize cause and effect in the sequence of events.

II

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.

III

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.

IV

Both sides agree that injustice inflicted in the past belongs in the past, and will therefore orient their relations towards the future. Precisely because they remain conscious of the tragic chapters of their history, they are determined to continue to give priority to understanding and mutual agreement in the development of their relations, while each side remains committed to its legal system and respects the fact that the other side has a different legal position. Both sides therefore declare that they will not burden their relations with political and legal issues which stem from the past.

V

Both sides reaffirm their obligations arising from Articles 20 and 21 of the Treaty of 27 February 1992 on Good-neighborliness and Friendly Cooperation, in which the rights of the members of the German minority in the Czech Republic and of persons of Czech descent in the Federal Republic of Germany are set out in detail.

Both sides are aware that this minority and these persons play an important role in mutual relations and state that their promotion continues to be in their common interest.

VI

Both sides are convinced that the Czech Republic's accession to the European Union and freedom of movement in this area will further facilitate the good-neighbourly relations of Germans and Czechs.

In this connection they express their satisfaction that, due to the Europe Agreement on Association between the Czech Republic and the European Communities and their Member States, substantial progress has been achieved in the field of economic cooperation, including the possibilities of self-employment and business undertakings in accordance with Article 45 of that Agreement.

Both sides are prepared, within the scope of their applicable laws and regulations, to pay special consideration to humanitarian and other concerns, especially family relationships and ties as well as other bonds, in examining applications for residence and access to the labour market.

VII

Both sides will set up a German-Czech Future Fund. The German side declares its willingness to make available the sum of DM 140 million for this Fund. The Czech side, for its part, declares its willingness to make available the sum of Kc 440 million for this Fund. Both sides will conclude a separate arrangement on the joint administration of this Fund.

This Joint Fund will be used to finance projects of mutual interest (such as youth encounter, care for the elderly, the building and operation of sanatoria, the preservation and restoration of monuments and cemeteries, the promotion of minorities, partnership projects, German-Czech discussion fora, joint scientific and environmental projects, language teaching, cross-border cooperation).

The German side acknowledges its obligation and responsibility towards all those who fell victim to National Socialist violence. Therefore the projects in question are to especially benefit victims of National Socialist violence.

VIII

Both sides agree that the historical development of relations between Germans and Czechs, particularly during the first half of the 20th century, requires joint research, and therefore endorse the continuation of the successful work of the German-Czech Commission of Historians.

At the same time both sides consider the preservation and fostering of the cultural heritage linking Germans and Czechs to be an important step towards building a bridge to the future.

Both sides agree to set up a German-Czech Discussion Forum, which is to be promoted in particular from the German-Czech Future Fund, and in which, under the auspices of both Governments and with the participation of all those interested in close and cordial German-Czech partnership, German-Czech dialogue is to be fostered.

Prague, January 1997

For the Government of the Federal Republic of Germany
Dr. Helmut Kohl
Dr. Klaus Kinkel

For the Government of the Czech Republic
Prof. Václav Klaus
Josef Zieleniec

Unofficial translation provided by the Press Section of the Embassy of the Federal Republic of Germany, Washington, D.C.

Prof. Bernitz

LEGAL OPINION

On the Study by Professor Dr Jochen A. Frowein, Heidelberg of September 12, 2002
Called Legal Opinion concerning

Benes-Decrees and Related Issues

Prepared by

Professor Dr Ulf Bernitz

Professor of European Law at Stockholm University
Senior Research Fellow, Balliol College, Oxford

September 30, 2002

1. The Mandate

The European Parliament, Directorate General for Research, has given me the mandate to submit my legal opinion on the compliance of certain aspects of the legislation of the Czech Republic with the *acquis communautaire*.

The Parliament has given Professor Dr Jochen Abr. Frowein, Max Planck Institute for Foreign Public Law and International Law, Heidelberg the task to elaborate a basic study on the subject. I have been asked to submit my opinion on this study. Another person, Lord Kingsland, London has been given a similar task.

The mandate for Professor Frowein´s study and my opinion has been defined as follows:

- focus on today´s validity and legal effects of the so-called Benes 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.

In the end of August 2002 I received a draft version of Professor Frowein´s study. In a letter to Professor Frowein of early September I raised a couple of important points. These points were clarified between Professor Frowein and me via telephone and E-mail and are covered in the final version of Professor Frowein´s study.

2. Scope and Limitations of my Opinion

What I have been asked to do is to submit my opinion on the study prepared by Professor Frowein. Thus, this study constitutes the background for my opinion and I have based my conclusions on the documentation presented in the study.

During recent months letters and documentation related to the Benes Decrees and their application has been sent to me from different persons and organisations, primarily in Germany and Hungary, all previously unknown to me. However, I have chosen not to take any contact with these persons or organisations until my opinion has been submitted to the Parliament.

Like Professor Frowein, I find the scope of the subject we have been asked to study to be limited to problems related to the forthcoming EU accession of the Czech Republic. Thus, problems related to the Slovak Republic, which primarily concern relations to Hungarians, have been left out. However, these problems seem largely to be of a very similar nature. Thus, most of the discussion and conclusions in Professor Frowein´s study would seem to be applicable to the Slovak/Hungarian situation *mutatis mutandis*. Naturally, this does not apply to special Czech-German agreements.

I would also like to point at another limitation. The Europé Agreement between the EU and the Czech Republic, presently in force, seems to fall outside the mandate of the study and has in any case not been touched upon by Professor Frowein. Thus, I will not discuss the situation under the Europé Agreement. However, in short I would like to mention that the European Court of Justice (ECJ) has found certain provisions in the Europé Agreements to have direct effect within the EU and, consequently, possible to invoke by private individuals and undertakings in court proceedings in the Member States. These provisions having direct effect concern, i.a., freedom of establishment and free movement of workers.[1] Whether or not the Czech Republic applies the Europé Agreement in a similar way and thus permits individuals and firms to invoke the Agreement before the Czech courts is not fully known to me. This issue is related to the general status of international treaties in Czech internal law. However, to the extent such direct effect is recognised by the Czech courts, there should be a possibility already today for, e.g., Germans having a Sudeten background, to have issues related to economic and personal interests in the

[1] Case C-63/99, Gloszczuk, [2001] ECR I-6369 (recognition of the right of a Polish contractor to conduct business in the United Kingdom), case C-268/99, A.M.Jany et al v. Staatssecretaris van Justitie, [2001] ECR I-8615 (recognition of the right of a Czech prostitute to work professionally in Amsterdam).

Czech Republic tried before the Czech courts on the basis of the provisions of the Europé Agreement.

3. The Fundamental EU Law on Citizenship, Discrimination and Minorities

Before commenting specific points, I find it important to recall the fundamental EU law on citizenship, discrimination and minorities. These principles should form the fundamental basis for the assessment of the problems treated.

When studying the problems and discussions related to the subject of the Benes Decrees it is obvious that this topic still is particularly sore, considering that the events took place more than 55 years ago. The atrocities of the Nazi time should certainly be remembered and in no way excused, but on the other hand we are since long building for the European future in peace and it is most important that accession of new Member States takes place in an atmosphere of reconciliation and trust.

It should be recalled that the very basic aim of the European Union, according to Article 1 of the EU Treaty, is to create an ever closer union between the *peoples* of Europé. Also, every person holding the nationality of a Member State is a citizen of the Union, a European citizen. Basically, according to Article 18 of the EC Treaty every European citizen has been given the right to move and reside freely within the territories of all the Member States. In its recent landmark decision in the *Baumbast* case,[1] the European Court of Justice has clearly stated that Article 18 has direct effect. Thus, a person can base individual rights directly on his/her European citizenship.

Further, as discussed by Professor Frowein in his study, Article 12 of the EC Treaty contains a general prohibition of a constitutional nature of any discrimination on grounds of nationality. In its case law, the European Court of Justice has developed this non-discrimination principle into a general principle of equal treatment and applied it to a great variety of measures having indirect discriminatory effects. Recently, the Council, acting after consulting the Parliament, has

[1] Case C-413/99, Baumbast and R, decision 17 September 2002.

used its powers under Article 13 of the EC Treaty to take appropriate action against, i.a., discrimination based on ethnic origin, by issuing special equal treatment directives.[1]

These principles are also enshrined in the new Charter of Fundamental Rights of the European Union. In particular, Article 21 of the Charter prescribes: "Any discrimination based on any ground such as … ethnic or social origin,… language,… membership of a national minority,… shall be prohibited".

In short, the European Union is not only a union of national states, it is also a union of all the different peoples living within the Union including all its ethnic and linguistic minorities, offering every individual being a citizen of a Member State the special status of a European citizen. However, also such transitory provisions should not have discriminatory effects for minorities or other special groups of European citizens.

Thus, the Union is based on fundamental values which are completely different from nationalistic ideologies of Europé of the past. It is of paramount importance that these core values are fully respected in relation to the new Accession Treaties with, i.a., the Czech Republic, albeit transitory provisions might be necessary for a limited time period.

4. General Assessment of the Study

As a general statement, I find the study by Professor Frowein admirably clear and very well written. However, his treatment of the relevant Czech legislation (the Benes Decrees) is very cautious, perhaps too tactful. From the viewpoint of modern standards of humanitarian law, this legislation and its application deserves harsh critizism.

I appreciate the ambition in Professor Frowein´s study to reach firm conclusions, taking into regard the difficulties involved. On most issues, I find the reasoning and the conclusions convincing.

On certain points, however, I find it proper to make some comments and reservations.

[1] Directive 2000/43/EC, OJ 2000 L 180/22 and directive 2000/78/EC, OJ 2000 L 303/16.

5. The Legality of the Benes Decrees

Professor Frowein´s study clearly demonstrates the well-known fact that there is a very close link between the developments in and around Czechoslovakia shortly before and during the second World War and the Benes Decrees and the expulsion of the Sudeten in 1945-1946. As is pointed out by Professor Frowein, the expulsion was accepted by the occupation powers in Germany and, basically, was regarded at the time as a consequence of what had taken place previously. The confiscations were closely linked to the expulsion.

However, the ways in which the execution of the confiscations and the physical expulsion of the people were conducted seem to have been particularly harsh and radical in many instances. The measures taken show the characteristics of collective punishment. Presumably, they hit many individuals who were innocent. It is unclear to what extent, if at all, the individuals were given the possibility to defend their particular case and have it investigated impartially, preferably by the courts.

In his study, Professor Frowein comments on the legality of the Benes Decrees under the international law of its time (para 16 and foot-note 9). Personally, I have very strong doubts on this point. Truly, many of the most basic principles of international law had been manifestly set aside during the Second World War. On the other hand, the United Nations Charter, proclaiming a number of very important principles of international humanitarian law in the Charter´s first Articles on fundamental aims and principles, had taken effect on October 24, 1945, i.e. before the full enforcement of the Decrees. The provisions of this Charter was an expression of the revival and nearly universal recognition of international law which took place already immediately after the War.

However, in relation to the present EU accession issue one has to accept Professor Frowein´s point of departure that we have to look at the present situation at hand. In this context, the Benes Decrees, evaluated as a historic event, can be left aside. I will come back to the question of possible remaining effects of the Decrees. For the EU, created and successively reshaped at a later date, the developments of the 1940s belong to Europé´s historic background which the EU

was never able to influence and for which it carries no responsibility. Also, the European Convention of Human Rights was concluded and started to take force at a later date.

Thus, the view of Professor Frowein that Articles 49 and 6 of the EU Treaty should be interpreted in a manner which looks to the future and not the past can be accepted (paras 6 and 16). I also support Professor Frowein´s conclusion number 1 that the Czech confiscations in 1945/46 cannot be challenged on the basis of present EU law.

6. The Restrictive Czech Rules on Restitution

After the fall of the communist system, a possibility of restitution of non-movable property, primarily land, was introduced in 1992 for certain persons who had lost their property on the basis of the Benes confiscation decrees (para 26 in Frowein´s study). However, the restitution was limited to citizens of the Czech Republic and the deadline for restitution claims lapsed on June 30, 2001. In 1996, the legislation was changed, retroactively, to require uninterrupted citizenship as a requirement for restitution. Thus, many persons who remained loyal to the state of Czechoslovakia during the War but fled abroad during the War years or soon afterwards as a consequence of the events in the early post-War years, seem to have been denied their right of restitution. As is pointed out by Professor Frowein (paras 29 and following) the restrictive Czech legislation on restitution has been severely criticized by the UN Human Rights Committee in a number of cases. Surprisingly, the Czech Republic does not seem to have honoured the views of the UN Human Rights Committee and has not changed its legislation.

It is well-known that a different approach to the issue of restitution of land ownership has been taken in other post-communist countries. E.g., a comparison can be made with the situation in Estonia and Latvia, two countries from which many citizens fled during and immediately after the War. After the fall of the communist system, the ambition of these countries has been to restore the land ownership situation of 1939 as part of the restoration of a society based on the market economy system. Thus, Estonians and Latvians who had been living in other countries (e.g. Canada or Sweden) since the mid 1940s and their descendants have been offered the right to reclaim their property. This right seems to have been widely used in practice. The difference in comparison to the Czech situation is striking.

In his analysis of the views taken by the UN Human Rights Committee, primarily in the De Fours Walderode case, Professor Frowein finds that a distinction can be drawn between persons who have shown loyalty to the state of Czechoslovakia during occupation and others. He does not find it correct to deduce from the view of the Committee that there should be a general claim for restitution for the latter, in reality the Germans and Hungarians who were forced to leave in 1945-46 (para 37). Obviously, a different view taken on this point would have far-reaching consequences.

In his conclusion nr 3 Professor Frowein states:

"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."

In my opinion, a few points should be added to this conclusion. Firstly, the cases on Czech restitution issues dealt with in international organs, e.g. the UN Human Rights Committee and the European Court of Human Rights, are quite recent and do not clarify all the issues involved. It seems very likely that new cases will come up in the future, possibly also in Czech courts, which will contribute to further clarification of the issues involved. Thus, I do not find it necessary, or even recommendable, for political institutions of the EU, to take any firm view on the reasonableness of the Czech restitution legislation.

Secondly, I would like to draw the attention to a particular point. Even if one accepts the distinction between those who showed loyalty to the Czechoslovak state during the War and others as a valid one in relation to restitution claims, the question remains if it possible under human rights law in force to accept the summary procedures practiced in Czechoslovakia in 1945 as the final word in all circumstances. As I have indicated in section 5 of my Opinion, *supra*, the harsh and radical enforcement of the Benes Decrees makes it very likely that persons, who did not fulfil the requirements to be covered by the decrees, also were hit by the confiscations and the expulsion.

EU law, as underlined in section 3, *supra*, is based on the rule of law and respect of the individual and his/her rights and access to courts. In the present context, it is not clarified if, and if so to what extent, there is or have been established in the Czech Republic adequate possibilities for individuals, who claim the Benes Decrees should not have been applied to their situation, to have their case impartially reexamined, preferably by courts. However, the general information on the Czech restitution legislation of the 1990s, available to me, seems to indicate that there has not been established any such procedures. Rather, the ambition seems to have been to retain the full effects of the execution of these Decrees. I find this situation unsatisfactory.

In his conclusion nr 2 Professor Frowein states:

"The limited Czech rules concerning restitution as to property confiscated under the Benes-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".

In my opinion, this conclusion would need some qualification. Certainly, in line with previous accession treaties, the Accession Treaty with the Czech Republic will not give retroactive effect to the EU Treaties and the secondary acquis communautaire. However, the European Convention on Human Rights is fully applicable already today to the EU and the Member States as well as to the Czech Republic. In addition, fundamental humanitarian law is also embodied in the UN system (as demonstrated in the cases already heard by the UN Human Rights Committee, mentioned above) and in the common legal heritage of the European states. Thus, I cannot see that the forthcoming Accession Treaty would exclude the possibilities to put forward restitution claims based on human rights principles.

To conclude, in my opinion there is no need to link the forthcoming Accession Treaty to the restitution issues as a condition. I recommend the Treaty should neither exclude, nor affirm the existence of remaining restitution claims.

7. The Decrees on Criminal Law and Procedures

Based on the reasoning in paras 42-44 in his study Professor Frowein draws the conclusion nr 5 that:

"It must be ensured that in absentia judgements 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."

I fully support this view for the reasons given. In addition to the obvious fundamental rights problems involved one can point at the fact that the rules function as an obstacle to free movement of persons. Also, they lack proportionality.[1]

8. The Exclusion of Criminal Responsibility on the Basis of the 1946 Law

In the Czech Republic there is still in force a law of 1946 which prevents criminal proceedings to be taken against persons who have taken "just reprisals" for actions during the occupation. After careful consideration Professor Frowein comes to the conclusion that it would not be necessary for the EU to demand the repeal of the law as a condition for accession (conclusion nr 6).

According to the study it seems disputed within Czech legal circles whether the statute would cover crimes against humanity, e.g. especially brutal violations. However, as far as I can find from the information available, no cases of prosecution of such violations have been reported.

The very existence today of such a law in the statute book demonstrates the same hesitation to clean up the past as does certain aspects of the restitution legislation of the 1990s. This makes the situation unnecessarily sore. However, I am willing to accept the reasoning of Professor Frowein that there would not be necessary, 56 years later, to link firm demands for repeal of the law to the Accession Treaty as a condition.

[1] In case C-348/96, Donatella Calfa, [1999] ECR I-11, the ECJ has found Greek legislation non-acceptable under which expulsion for life followed automatically (except where there were strong family reasons) from the

9. Minority Protection

Within EU law and different international treaties standards of minority protection are clearly laid down. As Professor Frowein states in his conclusion nr 7, the Czech Republic as a member of the EU has to comply with these standards.

In my opinion, it is absolute obvious that this is the case. I refer to what I have written in section 3, *supra*, about the fundamental EU law on citizenship, discrimination and minorities.

It should be added that in case of accession to the EU of the Slovak Republic, that country will be under the same obligations, e.g. in relation to its Hungarian minority.

10. Right to Return

Expulsion in the proper sense includes not only a duty to leave but also a prohibition to return. Obviously the expulsion in 1945-46 was based on the principle that the people who were forced to leave should not be permitted to return. The harsh way in which the expulsion was executed and the following transition of Czechoslovakia into a communist state situated behind the "iron curtain" certainly reduced the interest in returning greatly. However, under present conditions and in the light of the forthcoming accession, it is an important issue whether or not the Benes Decrees still have remaining effects, restricting the possibilities for individuals belonging to the relevant groups or their descendants to return to the Czech Republic in order to settle there, work there, purchase real property in the country or etablish business activity.

On this important point, the study by Professor Frowein does not contain information about the present situation. Most probably, it has not been available to him, as he states in his study that he has not had access to specific information about the state of the accession negotiations (para 12). However, I find it very important to stress that this matter must be fully investigated before

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conviction of a non-national of a drugs offence, without any account taken to personal circumstances or the offenders´ possible danger to public policy.

an accession treaty is concluded. In this context I want to underline that discriminatory measures do not need to have the shape of outright prohibitions but also can find their expression in different restrictive measures taken. As is well-known there is full freedom within the EU to move between the Member States and to work, purchase real property and set up business activities in the other Member States.

In para 12 of his study Professor Frowein writes:

"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 discriminatory provision not in line with the general constitutional principles on which the European Union has been established."

In conclusion 8 Professor Frowein states that his opinion is based on the understanding that from accession all European Union citizens have equal rights in the territory of the Czech Republic.

I share these conclusions. It is possible to agree on proportionate transitory provisions in the Accession Treaty on limitations in the rights of EU citizens from other Member States to settle, work, conduct business and purchase real property in the Czech Republic. However, it is absolutely necessary that these provisions are non-discriminatory, e.g. do not put any particular group of European citizens in a special, unfavourable position.

11. Conclusions

In my opinion I give a very favourable general assessment of Professor Frowein´s study (section 4).

I recall that the study and my opinion do not cover the Europé Agreement presently in force.

I also recall the fundamental EU law on citizenship, discrimination and minorities and its importance in the present context (section 3).

I strongly question the legality of the Benes Degrees under international law but support Professor Frowein´s basic conclusion (nr 1). See Section 5.

I discuss the restrictive Czech rules on restitution. I make certain additions, which I find important, to Professor Frowein´s conclusions n:ris 2 and 3. My viewpoints relate primarily to the relation to fundamental humanitarian law. I refer to section 6 of my opinion. I see no need to link the forthcoming Accession Treaty to the restitution issues as a condition. I recommend the Treaty should neither exclude, nor affirm the existence of remaining restitution claims.

I support Professor Frowein´s conclusion nr 5 on the decrees on criminal law and procedures and his conclusion nr 6 on the exclusion of criminal responsibility on the basis of the 1946 law.

I support his conclusion nr 7 on minority protection.

I want to draw special attention to Professor Frowein´s final conclusion nr 8 and what I have written in my opinion on this point in section 10. The provisions of the forthcoming Accession Treaty have to be non-discriminatory, e.g. must not put any particular group of European citizens in a special, unfavourable position.

Stockholm, Oct. 1, 2002

Ulf Bernitz

The Rt. Hon. Lord Kingsland Q.C.

OBSERVATIONS ON THE BENES DECREES AND THE ACCESSION OF THE CZECH REPUBLIC TO THE EUROPEAN UNION

prepared

by

The Rt. Hon. Lord Kingsland Q.C.

1. The Benes Decrees are a series of decrees that were issued during World War II and the period immediately following liberation by the then President of Czechoslovakia, Edvard Benes.

2. The question to be considered is whether the Benes Decrees could prevent the accession of the Czech Republic to the European Union.

The Benes Decrees

3. There are nine decrees which have been highlighted as potential obstacles to the Czech Republic's accession to the EU. These are as follows:

Decrees relating to property and its confiscation

(a) Decree 5/1945 (19.5.45) – Invalidity of certain property-related acts effected in the period of non-freedom
(b) Decree 12/1945 (21.6.45) – Confiscation and expedited distribution of agricultural properties of Germans, Hungarians, traitors and collaborators and certain organisations and institutes
(c) Decree 28/1945 (20.7.45)
(d) Decree 108/1945 (25.10.45) – Confiscation of enemy property and the national renewal funds

Decree relating to citizenship

(e) Decree 33/1945 (2.8.45) – Citizenship of Persons of German and Hungarian Nationality

Decrees relating to criminal law and procedure

(f) Decree 16/1945 (19.6.45) – "Great Retributions Decree" – Punishment of Nazi criminals and their accomplices and concerning extraordinary people's courts
(g) Decree 138/1945 (27.10.45) – "Small Retributions Decree" – Punishment of certain offences against the national honour
(h) Decree 71/1945 – Forced labour for persons who had lost Czechoslovakian citizenship as a result of Decree 33/1945
(i) Act No. 115/1946 (8.5.46) – "The Amnesty Act" – Exclusion of criminal responsibility for acts committed as reprisals against occupation forces

The validity of the Benes Decrees

4. Questions have been raised as to the validity of the Benes Decrees. Some critics have argued that they were issued by an executive authority (the President) whose exercise of power conflicted with the constitutional legislation that was operative at the time.

5. The Munich Agreement of 1938 and the invasion and subsequent occupation of Czechoslovakia in 1939 brought about a political state of affairs that had not been envisaged by, or legislated for, in the Czechoslovakian Constitution. Following an initial period of uncertainty from July 1940, the Czechoslovakian Government was recognised by the British Government by July 1941 as being the Government in exile that was operating in London by presidential decree.[1] Whilst the view taken by the British Government at the time is not conclusive on the validity of the decrees, it is representative both of a common sense view and the view of the allied powers on the legitimacy of the Czechoslovakian government in exile.

6. During war-time, the Heads of State for other occupied territories were governing through similar mechanisms. Examples are the Queen of the Netherlands, the King of Norway or the King of Yugoslavia.[2] In Poland, where the constitution did provide powers for governing in war-time, similar measures were utilised.[3] As mentioned previously, the fact that similar mechanisms of government were employed by the Heads of State of other occupied territories does not validify the mechanisms used by Czechoslovakia. However, it demonstrates that rule by decree is considered a viable mode of ruling where a Head of State is faced with trying to rule whilst in exile.

7. After the war, the Benes Decrees were ratified by Constitutional Act No. 57/1946 of 28 March 1946.

> **"The Provisional National Assembly passed this Act to approve and declare as law the presidential decrees, thus finally sanctioning the *rathabitio*. Article 1 of this Act provides that the Provisional National Assembly approves and declares as law the constitutional and presidential decrees issued on the basis of the Constitutional Decree on the Provisional Exercise of Legislative Power of 15 October 1940, including the said decree. All presidential decrees were to be regarded as laws from the very beginning and constitutional decrees were to be regarded as constitutional acts."**[4]

8. Further, it should be noted that the government of the Czech Republic view the Benes Decrees as the basis of post-war Czechoslovak legislation:

> **"With regard to the successful *ratihabitio*, the debate surrounding the decrees, their potential declaration null and void from the very beginning or their amendment or repeal, in effect questions the very foundations of post-war Czechoslovak legislation."**[5]

9. The Constitutional Court of the Czech Republic ("CCCR") is the final, determinative tribunal on matters of constitutional law in the Czech Republic. Its opinion is binding on

[1] The opinion on the Benes Decrees drafted by the Czech Foreign Office, page 10.
[2] Ibid, page 9.
[3] Ibid, page 10.
[4] Ibid, page 9.
[5] Ibid, page 9.

all people and authorities in Czechoslovakia. This is clearly established by Article 89 of the Constitution of the Czech Republic:

> **"Article 89**
> **(1) A ruling of the Constitutional Court shall become effective as soon as it has been promulgated in the manner prescribed by law, unless the Constitutional Court has decided otherwise about its effectiveness.**
> **(2) Effective rulings of the Constitutional Court shall be binding for all authorities and persons."**

10. The CCCR found that the Benes decrees were valid and constitutional. In its opinion stated in Finding No. 55/1995 of 8 March 1995 it states:

> **"…since the enemy occupation of the Czechoslovak territory by the armed forces of the Reich had made it impossible to assert the sovereign state power which sprang from the Constitutional Charter of the Czechoslovak Republic, introduced by Constitutional Act No. 121/1920, as well as from the whole Czechoslovak legal order, the provisional Constitutional Order of the Czechoslovak Republic, set up in Great Britain, must be looked upon as the internationally recognised legitimate constitutional authority of the Czechoslovak state. In consequence thereof and as a result of their ratification by the Provisional National Assembly by Constitutional Act No 57/1946 of 28 March 1946, all normative acts of the Provisional Constitutional Order of the Czechoslovak Republic are expressions of legal Czechoslovak (Czech) legislative power, so that as a result thereof the striving of the nations of Czechoslovakia to restore the constitutional and legal order of the Republic was achieved."**[1]

11. In my view, it is for the CCCR to determine whether the Benes Decrees were valid when they were issued and what their status is today. In light of the ratification of the Benes Decrees by a properly constituted parliament shortly after the war and the finding of the CCCR that the Decrees are valid, I consider these Decrees to be valid and I do not consider that any other Member State has jurisdiction to challenge or determine their validity.

Criteria for accession to the EU

12. Article 47 of the Treaty on European Union [YEAR] ("TEU") states the criteria for accession to the EU:

> **"1. Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act**

[1] Ibid, page 3.

unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members."

"2. …the conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the Applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

13. Article 6(1) of the TEU states:

"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."

14. Additional requirements for accession, known as the Copenhagen Criteria, were established by the Copenhagen European council of June 1993. These provide:

"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…".[1]

15. In its paper "Making a success of enlargement" [SEC (2001) 1744 to 1753], the European Commission states at page 5:

"The conditions for membership, set out by the Copenhagen European Council in 1993 and further detailed by subsequent European Councils, provide the benchmarks for assessing each candidate's progress. These conditions remain valid today and there is no question of modifying them."[2]

16. It is clear therefore that these are the principles on which accession should be determined.

Decrees relating to property and its confiscation

17. Decree 5/1945 annulled certain property transactions made by Nazi Germans during the period of occupation. It provided:

"any form of property transfer and transaction affecting property rights in terms of movable and immovable assets and public and private property shall be invalidated, if it was

[1] Opinion by the Legal Service of the European Parliament: Harry Tebbens, Antonio Caiola and Gregorio Clariana, page 7.

[2] Making a success of enlargement – Strategy Paper and Report of the Eurpeam Commission on the progree towards accession by each of the candidate countries [SEC (2001) 1744 to 1753] /* COM/2001/0700 final */, page 5.

adopted after September 29, 1938, under pressure of the Nazi occupation or national, racial or political persecution"[1]

"The property of persons upon whom the country cannot place reliance, being within the territory of the Czech Republic will be placed under national administration in accordance with the further provisions of this edict."[2]

18. Decree 12/1945 related to **"the confiscation and accelerated allocation of agricultural property of the German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people"**. It provided for the expropriation, with immediate effect, and without compensation, of agricultural property, for the purposes of land reform. It concerned agricultural property, including *inter alia* buildings and movable goods on such property, in the ownership of all persons of German and Hungarian nationality irrespective of their citizenship status.[3]

19. Decree 108/1945 related to the confiscation of property of Germans, Hungarians, traitors and collaborators and **"persons with an unreliable attitude to the state"**. However, the properties of people (including Germans and Hungarians) who **"took an active part in the fight for the preservation of territorial integrity and liberation of the Czechoslovak Republic"** were not confiscated.[4]

20. These decrees were directly linked to the retributions decrees and decisions on the retention of Czechoslovakian citizenship under Decree 33/1945 were to be taken into account.[5] Further exemptions to these decrees related to the majority of persons returning from concentration camps and persons who demonstrably provided active support to the Czech nation in the fight against Nazism. The decrees only applied to a specified time period. The CCCR is of the opinion that as this time period has expired and no new legal relations can be created, these decrees cannot be reviewed.

21. In particular, the CCCR notes the following regarding Decree 108/1945:

"In view of the fact that this normative act has already accomplished its purposes and for a period of more than four decades has not created any further legal relations, so that it no longer has any constitutive character, in the given situation its inconsistency with constitutional acts or international treaties…cannot be reviewed today."[6]

22. It is important to note that whilst the CCCR is of the opinion that this Decree is no longer applicable in establishing legal relations, it does not state that the Decrees are no longer effective today. In fact, these Decrees were the basis on which new property rights were established and have subsequently been relied on by individuals for over 50

[1] The Presidential Decrees of 1945, further information on the Benes decrees by the Czech Foreign Office, 14/06/2002.
[2] Opinion by the Legal Service of the European Parliament, at page 9, op.cit. footnote 7.
[3] Case of Prince Hans-Adam II of Liechtenstein v. Germany, application number: 42527/98, 12/07/2001
[4] Opinion on Benes Decrees by Czech Foreign Office, at page 12.
[5] Op.Cit. footnote 12, page 12.
[6] Op.Cit. footnote 12, page 5.

years. In my view, to seek to alter this position would be contrary to principles of legitimate expectation and legal certainty.

23. It may be true that the expropriation of property by virtue of the Benes Decrees, if done today, would probably constitute a breach of the European Convention on Human Rights ("ECHR"). However, the CCCR makes the following point:

> **"…it is true in principle that that which emerges from the past must, face to face with the present, pass muster in respect to values; nevertheless, this assessment of the past may not be merely the present passing judgment upon the past. In other words, the present order, which has been enlightened by subsequent events, draws upon those experiences, and looks upon and assesses a great many phenomena with the advantage of hindsight, may not sit in judgment upon the order which has prevailed in the past."[1]**

24. I agree with the view of the CCCR. These Decrees may seem nationalistic and/or discriminatory when viewed in the current political climate. However, these Decrees must be understood in the context of the aftermath of World War II. They should not affect accession as they have no effect on rights today.

25. Further, the expropriation of property under these decrees was part of an internationally approved scheme. Firstly, it was closely linked to the transfer to Germany of German populations. This transfer was expressly provided for by the Allies as documented in the Protocol of the Potsdam Conference, 1 August 1945.[2] Secondly, it was consistent with the Allied international agreements relating to reparations after the war. The Agreement on Reparation from Germany of 1946 had 18 signatories including Czechoslovakia and Great Britain. Article 6 of this agreement relates to German external assets. It states the following:

> **"A. Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets…**
>
> **"E. The German enemy assets to be charged against reparation shares shall include assets which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy."[3]**

26. Under Article 6A of the Agreement, Czechoslovakia had a duty under an international agreement endorsed by the Allies to expropriate German enemy assets within its jurisdiction. Under Article 1 of the Agreement, Czechoslovakia is entitled to a shares in German reparation. The Czechoslovak government accepted its expropriation of

[1] Op.Cit. footnote 12, page 4.

[2] The Berlin (Potsdam) Conference, July 17-August 2, 1945, (a) Protocol of the Proceedings, August 1, 1945, XII

[3] Agreement on Reparation From Germany, on the Establishment of an Inter-allied Reparation Agency and on the Restitution of the Monetary Gold, Paris 14/01/1946.

German enemy property as being in lieu of any reparation shares and so never enforced this right.

27. In addition, it should be noted that that the government of the Czech Republic accept that immediately after the war there incidences of violence, damage to property and transfers of assets without proper legal grounds. It admits that there is no legal justification for such actions. This is a point that has been made recently in the German-Czech Declaration on Mutual Relations and their Future Development of 21 January 1997. The following Articles are particularly relevant:

> **"Article II: 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."[1]**
>
> **"Article III: 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."[2]**

28. This agreement, at the very least, implies acceptance by Germany of the expropriation of property under the Benes Decrees.

29. In any event, Article 295 of the Treaty of the European Community ("TEC")provides:

> **"This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."**

30. This expressly excludes the expropriation of property from the jurisdiction of Europe. These issues remain the jurisdiction of individual Member States insofar as they are not inconsistent with the attainment of the objectives of the TEC or the ECHR.

31. For all the above reasons, I do not consider that the decrees relating to expropriation of property should form any obstacle to the Czech Republic's accession to the EU.

Case of Prince Hans-Adam II of Liechtenstein v Germany (12 July 2002, Application No. 42527/98)

32. In this case, the applicant initiated a claim in the German courts for restitution of property, namely a painting confiscated by the former Czechoslovakia in 1946 under Decree 12/1945 from his father, the former Monarch of Liechtenstein. The German courts ruled that they did not have jurisdiction to hear his case so the applicant applied to the ECHR. He alleged that he had been deprived of his right to a fair trial and of his right to access to a court in the determination of his property rights. He also claimed that his right to property had been violated. In particular, he invoked Article 6(1) of the ECHR and Article 1 of the First Protocol.

[1] German-Czech Declaration on Mutual Relations and their Future Development, 21/01/1997, at page 1.
[2] Ibid, at page 2.

33. The ECtHR pointed out that the right of access to the courts secured by Article 6(1) is not absolute but subject to limitations. To be compatible with Article 6(1), a limitation must pursue a legitimate aim and be proportionate. The ECtHR found that, in the circumstances of World War II and Germany's resulting particular status under public international law, the limitation on access to a German court, as a result of the Settlement Convention, had a legitimate objective. Thus, the ECtHR accepted the finding of the German courts that they had no jurisdiction to hear the claim and found that this was not in breach of the Article 6(1) of the ECHR.

34. In so finding, the ECtHR noted that:

> **"66. … The genuine forum for the settlement of disputes in respect of these expropriation measures was, in the past, the courts of former Czechoslovakia and, subsequently, the courts of the Czech or of the Slovak Republic. Indeed, in 1951 the applicant's father had availed himself of the opportunity of challenging the expropriation in question before the Bratislava Administrative Court."[1]**

35. The ECtHR also dismissed the applicant's argument that his property rights under Article 1 of the First Protocol had been violated, the ECtHR stated:

> **"83. …the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in the…Malhous decision…)"[2]**
>
> **"85. …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), no. 33071/96, 13 December 2000, ECHR 2000-XII and e.g. *Mayer & Others v Germany* (application no.s 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, pp 5-20)."**

[1] Op.Cit. footnote 11, at page 23.
[2] Op.Cit. footnote 11, at page 27.

36. The ECtHR thus determined that this expropriation of property that had taken place under the Benes Decrees was not and could not be in violation of the ECHR. It held that expropriations made in 1945/1946 under the Benes Decrees cannot be subject to challenge on the basis of Article 6(1) of the ECHR or Article 1 of the First Protocol. In light of this decision, it seems unlikely that future challenges to the Benes Decrees relating to expropriation of property on the basis that they breach the ECHR will be successful.

37. Unfortunately, I have been unable to locate the case of *De Fours Walderode v The Czech Republic*. In any event, I do not think that it is directly relevant as it determines whether or not restitution measures are compatible with the CFRF. As the CFRF is not incorporated into EU law and as the *Prince of Liechtenstein v Germany* has ruled that the expropriation measures were not in breach of the ECHR, I do not consider that the decision in *De Fours Walderode* will be of direct relevance to the Czech Republic's accession to the EU.

Citizenship

38. Section 1, paragraph 1 of Decree 33/1945 provides that:

> **"Czechoslovak citizens having German or Hungarian nationality who have acquired German or Hungarian nationality under the regulations of a foreign occupying power, have lost their Czechoslovak citizenship with effect from the date of acquisition of such citizenship."[1]**

39. However, citizenship would be retained by persons who had demonstrated "their loyalty to the Czechoslovak Republic, had never committed any offence against the Czech and Slovak nations, and who had either actively participated in the struggle for the liberation of the country, or had suffered under Nazi or fascist terror".[2] Citizenship was also retained by Germans and Hungarians who "in the period of increased threat to the Republic officially registered as Czech or Slovaks".[3] A further category provided for people who could apply to recovery of citizenship within 6 months from the date of the publication of the relevant Interior Ministry regulation. This group included German "opponents of Nazism and Fascism".[4] Applications for recovery of Czechoslovak citizenship were to be filed with the district National Committee between 10 August 1945 and 10 February 1946.[5]

40. Decree 33/1945 is to be understood in the context of the transfers of minority German and Hungarian populations that took place following the end of the war. The decree was not signed by Benes until the conclusion of the Potsdam Conference to ensure that it was in line with the Allies decision.[6]

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[1] Op.Cit. footnote 1, at page 5.
[2] Op.Cit footnote 10, at page 4
[3] Ibid at page 35.
[4] Ibid.
[5] Ibid at page 36.
[6] Ibid at page 33.

41. This decree, in the same way as those decrees relating to expropriation, has a limited applicability. It deprived certain people of Czechoslovak citizenship at a certain time. This decree cannot operate to deprive people who currently have citizenship of the Czech Republic of their citizenship. Nor does it prescribe who can obtain citizenship or how citizenship can be obtained in the Czech Republic today.

42. Further, nowadays, express protection is given to those who have Czech citizenship under Article 12 of the Constitution of the Czech Republic:

> **"Article 12**
> **(1) The ways of acquiring and losing the state citizenship of the Czech Republic shall be regulated by law.**
> **(2) Nobody may be deprived of the state citizenship against his will."**

43. In any event, Article 17 of the TEC states:

> **"1. Citizenship of he Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship."**

44. It is therefore for each individual Member State to decide who is eligible for national citizenship and how such citizenship is to be obtained. In my view, the decree on citizenship is irrelevant in the context of the Czech Republic's accession to the EU.

The Decrees relating to criminal acts and procedure

45. Act No. 115/1946 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."[1]**

46. This Act clearly still has legal effects today as it prevents the investigation or trial of certain criminal acts, many of which may also have been inhumane. Whilst this may be justifiable and reasonable where such acts were done in the struggle for liberty from occupation, I do not think this can be justified or reasonable where such acts were reprisals. The word "just" in this context seems to me to be arbitrary and contrary to principles of legal certainty. However, the repeal of a law that has exonerated people from criminal consequences for over 50 years with the result that these people may now be prosecuted could also be criticised as being contrary to principles of legitimate expectation and legal certainty.

[1] Legal opinion concerning Benes Decrees and relating issues prepared by Prof. Dr. Dres h.c. Jochen A. Frowein, at page 19.

47. Act No. 115/1945 is viewed as one of the key problems in the context of Czechoslovakian post-war legislation impeding or preventing the Czech Republic's accession to the EU. The key proponent of this view is Professor Christian Tomuschat, a former member of the United Nations Committee under the Covenant for Civil and Political Rights, but as his writing is in German, I am unable to comment on it first hand. Professor Tomuschat proposes that this Act would have to be repealed by the Czech Republic.[1] He points out that in Germany, people do stand trial for war crimes which they committed during World War II, even if they are not discovered until many years later.[2] Professor Frowein draws attention to the difference between Germany, where there was never any question that the Germans would have to take responsibility for the crimes committed during the war and where no legitimate expectation that they would be precluded from responsibility could have arisen, and the Czech Republic.

48. The Czech government makes the point that, as a matter of fact, many perpetrators of post-war crimes against persons belonging to the German minority were convicted, although not all offenders were tried and punished and not all sentences may seem adequate today.[3] Further, many administrative decisions and general legal standards were amended in the following period by subsequent legislation as well as through administrative and judicial proceedings in which bodies such as the Supreme Administrative Court often had the last word. Guidelines instructing the Czechoslovakian population to "respect those German citizens who remained loyal to the Republic, took an active part in the fight for the liberation of the Republic or suffered under the Nazi and Fascist terror" were adopted by the Government as early as 15 June 1945.[4]

49. In the Czech-German Declaration 1997, formal expressions of regret for Act 115/1945 were made :

> **"III. The Czech side…particularly regrets the excesses which were contrary to elementary humanitarian principles as well as legal norms existing at that time, and it furthermore 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 the these excesses as not being illegal and that in consequence these acts were not punished."**

50. This declaration indicates acceptance by Germany of the effects of Act 115/1945 and strongly implies that a repeal is not considered necessary by Germany.

51. The effect of the remaining decrees; 16/1945, 137/1945 and 71/1945 is more difficult to assess. In the opinion of the European Parliament Legal Service at paragraph 62, all three of these decrees have now been repealed by virtue of Act 33/1948 of 25 March 1948; Act 87/1950 of 1 August 1950 and Act 65/1966 of 1 January 1966 respectively.[5] With regard to 71/1945, this decree will no longer have any legal effect. However, with

[1] Ibid at page 23.
[2] Ibid at page 24.
[3] Op.Cit. footnote 1, at page 28.
[4] Ibid at page 28.
[5] Op.Cit. footnote 10, at page 10.

regard to 16/1945 and 137/1945, this is not necessarily the case. Professor Frowein makes the valid point that it is not clear to what extent convictions made on the basis of these decrees will still be valid and enforceable in the Czech legal order. Professor Frowein cites the provisional opinion of a Czech lawyer who states that:

> **"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."**[1]

52. The European Commission makes reference to a radical reform of the Criminal Proceedings Code[2] which has been adopted by the Czech Republic. This Code may have provisions that affect this issue. Unfortunately, I do not have this Code available to me.

53. The Charter of Fundamental Rights and Freedoms ("CFRF") is incorporated into the Constitution of the Czech Republic by virtue of Constitutional Act of 9 January 1991 and by virtue of Article 3 of the Constitution which provides:

> **"Article 3**
> **The Charter of Fundamental Rights and Freedoms shall form part of the Czech Republic's constitutional order."**

54. Article 40(6) of the CFRF provides:

> **"The question whether an act is punishable or not shall be considered and penalties shall be imposed in accordance with the law in force at the time when the act was committed. A subsequent law shall be applied if it is more favourable for the offender."**

55. It seems to me that by virtue of Article 40(6) of the CFRF, even if the decrees 16/1945 and 137/1945 have been repealed, any convictions based on those decrees will still be valid and enforceable. Therefore, clear evidence that convictions established under these decrees are not enforceable would be required to meet EU requirements.

56. I note that Articles 62 and Articles 87 of the Constitution could provide ways of removing the effect of these decrees:

> **"Article 62**
> **The President of the Republic shall:**
> **g) forgive and mitigate sentences imposed by courts, order that criminal proceedings should not be instituted, or if they have been instituted, that they should be discontinued, and allow judicial sentences to be deleted from personal records…"**

[1] Op.Cit. footnote 28, at page 19.
[2] Op. Cit. footnote 8, at page 5.

1.1.1. "Article 87

(1) The Constitutional Court shall decide

b) about the annulment of laws or of their individual provisions, if they are in contradiction with a constitutional law or with an international treaty according to article 10…"

57. In my view, the President could use his power under Article 62 to pardon anyone convicted under the relevant Benes Decree. Alternatively, any such conviction could be challenged in the Constitutional Court who could exercise their power under Article 87 to annul the relevant decree if it conflicted with either the CFRF or the ECHR.

58. Notwithstanding my comments in paragraph 57 above, the Czech Republic should ensure that there is a clear and unequivocal means of ensuring that any unsound convictions made under the Benes Decrees cannot be enforced.

The supremacy of EU law

59. It is worth noting the decision of the European Court of Justice in the Case of *Amministrazione della Finanze dello Stato v Simmental SpA* [1978] 3 CMLR 263 (Case 106/77) which establishes the supremacy of EU law. In particular, the following paragraphs are of relevance:

"17. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law…"

"21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

60. Following this decision and given well established principles regarding the supremacy of EU law, even if the Czech Republic should have Decrees in place that are inconsistent with EU law, these will be rendered ineffective by the application of EU law.

61. Article 10 of the Constitution of the Czech Republic provides:

"Article 10
The ratified and promulgated international treaties on human rights and fundamental freedoms, by which the Czech Republic is bound, shall be directly binding regulations having priority before the law."

62. By virtue of Article 10 of the Constitution of the Czech Republic, on its accession to Europe, the ECHR would be directly binding law in the Czech Republic and so any inconsistent law would cease to have application.

The estoppel argument

63. I consider that there is a strong argument that Germany is estopped from questioning the Benes Decrees both in the public international forum and, more pertinently, in relation to the accession to Europe.

64. In the case of *Prince of Liechtenstein v Germany,* the German courts cited Chapter 6, Article 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation of 23 October 1954 ("the Settlement Convention"). Chapter 6, Article 3 provides as follows:

> **"1. The Federal Republic of Germany shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany."**
>
> **"3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1…of this Article, or against international organisations, foreign governments or persons who have acted upon instructions of such governments."[1]**

65. In my view, Germany's agreement to these terms estops it from raising issues related to the Benes Decrees on expropriation.

66. The Czech-German Agreement of 1997 strengthens an argument based on estoppel and extends such an argument to cover the other Decrees and war-related acts:

> **"IV Both sides agree that injustice inflicted in the past belongs in the past, and will therefore orient their relations towards the future. Precisely because they remain conscious of the tragic chapters of their history, they are determined to continue to give priority to understanding and mutual agreement in the development of their relations, while each side remains committed to its legal position and respects the fact that the other side has a different legal position. Both sides therefore declare that they will not burden their relations with political and legal issues which stem from the past."[2]**

[1] Op.Cit. footnote 20, at page 12.
[2] Op.Cit. footnote 18, at page 2.

67. With regard to the EU in particular, it must be remembered that the fundamental and underlying principle of the EU was the unification of Europe following World War II. Any attempt by Germany to preclude the Czech Republic from membership based on actions taken in the immediate aftermath of the war is clearly contrary to the whole basis on which the EU was founded and to its continuing aims and obligations.

68. In particular Article 307 of the TEU provides:

> **"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand and one or more third countries on the other, shall not be affected by the provisions of this Treaty.**
>
> To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph , Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

69. The Czech-German Declaration of 1997 should be read as an agreement to eliminate incompatibilities. Germany should be estopped from preventing the Czech Republic from accession for reasons which might equally have applied to Germany had they been raised prior to the accession of Germany.

Conclusions

70. The Decrees relating to the expropriation of property and to citizenship are no longer capable of creating new legal relations. Their effect has been established and property rights have been based on these Decrees for over 50 years. A legitimate expectation has arisen that these Decrees are good law and rights to property which would now be protected by the ECHR have been established. In any event, they are irrelevant in the context of the Czech Republic's accession to the EU.

71. The Decree relating to forced labour has no legal effect today and so should not affect the Czech Republic's accession to the EU.

72. The Decrees precluding liability for crimes committed by Czechoslovakians as reprisals against Germans after the war are unfortunate. However, individuals have relied on these provisions for over 50 years and as such have a legitimate expectation that they will not now be prosecuted for these actions. In my view, these provisions should not operate as an obstacle to accession.

73. The Decrees enabling arbitrary or *in absentia* trials for crimes committed during the war may well still have effect in the sense that convictions on this basis could still be enforced. The Czech Republic should ensure that there is legal provision for ensuring that any convictions made under these Decrees cannot be enforced today without a proper and sound trial that conforms with modern day principles of legal procedure and human rights.

74. Any question of incompatibility of the Benes Decrees with modern day EU law and principles should not prevent accession as any incompatible legal provisions will be rendered inapplicable on the basis of the supremacy of EU law once the Czech Republic has acceded to the EU.

75. There is a strong argument that any country is estopped from raising issues relating to legislation that arises out of the particular circumstances of World War II and which has the approbation of international agreements. In particular, it should be estopped from using these issues to prevent accession to the EU as this would undermine the whole basis on which the EU is founded.

The Rt. Hon. Lord Kingsland Q.C.
1 October, 2002