Mrs. Alzbeta Pezoldova v. The Czech Republic, Communication No. 757/1997, U.N. Doc. CCPR/C/75/D/757/1997 (2002).

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil

and Political Rights

- Seventy-sixth session -

Communication No. 757/1997

Submitted by: Mrs. Alzbeta Pezoldova (represented by counsel Lord Lester of Herne Hill, QC)

Alleged victim: The author

State party: The Czech Republic

Date of communication: 30 September 1996 (initial submission)

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

Meeting on 25 October 2002,

Having concluded its consideration of communication No. 757/1997, submitted to the Human Rights Committee by Mrs. Alzbeta Pezoldova under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

Views under article 5, paragraph 4, of the optional protocol

1. The author of the communication is Mrs. Alzbeta Pezoldova, a Czech citizen residing

in Prague, Czech Republic. She claims to be a victim of violations of articles 26, 2 and 14, paragraph 1, of the International Covenant on Civil and Political Rights by the Czech Republic. She is represented by counsel. The Covenant entered into force for Czechoslovakia in March 1976, the Optional Protocol in June 1991. (1)

The facts as submitted by the author

2.1 Mrs. Pezoldova was born on 1 October 1947 in Vienna as the daughter and lawful heiress of Dr. Jindrich Schwarzenberg. The author states that the Nazi German Government had confiscated all of her family's properties in Austria, Germany, and Czechoslovakia, including an estate in Czechoslovakia known as "the Stekl" in 1940. She states that the property was confiscated because her adoptive grandfather Dr. Adolph Schwarzenberg was an opponent of Nazi policies. He left Czechoslovakia in September 1939 and died in Italy in 1950. The author's father, Jindrich, was arrested by the Germans in 1943 and imprisoned in Buchenwald from where he was released in 1944. He went into exile in the United States and did not return to Czechoslovakia after the war.

2.2 After the Second World War, the family properties were placed under National Administration by the Czechoslovak Government in 1945. Pursuant to the Decrees issued by the Czechoslovak President Edward Benes, No. 12 of 21 June 1945 and No. 108 of 25 October 1945, houses and agricultural property of persons of German and Hungarian ethnic origin were confiscated. These Decrees were applied to the Schwarzenberg estate, on the ground that Schwarzenberg was an ethnic German, notwithstanding the fact that he had always been a loyal Czechoslovak citizen and defended Czechoslovak interests.

2.3 On 13 August 1947, a general confiscation law No. 142/1947 was enacted, allowing the Government to nationalize, in return for compensation, agricultural land over 50 hectares and industrial enterprises employing more than 200 workers. This law was, however, not applied to the Schwarzenberg estate because on the same day a lex specialis, Law No. 143/1947 (the so-called "Lex Schwarzenberg"), was promulgated, providing for the transfer of ownership of the Schwarzenberg properties to the State without compensation, notwithstanding the fact that the properties had already been confiscated pursuant to Benes' Decrees 12 and 108. (2) The author contends that Law No. 143/1947 was unconstitutional, discriminatory and arbitrary, perpetuating and formalizing the earlier persecution of the Schwarzenberg family by the Nazis. According to the author, the Law did not automatically affect the previous confiscation under the Benes' Decrees. However, on 30 January 1948, the confiscation of the Schwarzenberg agricultural lands under Decrees Nos. 12 and 108 was revoked. Schwarzenberg's representative was informed by letter of 12 February 1948, and the parties were given the possibility to appeal within 15 days. The author submits therefore that the revocation only took effect after 27 February 1948 (two days after the qualifying date 25 February 1948 for restitution under law 229/1991).

2.4 According to the author, the transfer of the property was not automatic upon the coming into force of Law No. 143/1947, but subject to the intabulation (writing into the register) in the public register of the transfer of the relevant rights of ownership. In this context, the author states that National Administration (see paragraph 2.2) remained in force until June 1948, and that intabulation of the properties by land offices and Courts shows that, at the time, Law No. 143/1947 was not considered as having immediately transferred title.

2.5 Following the collapse of communist administration in 1989, several restitution laws were enacted. Pursuant to Law No. 229/1991, (3) the author applied for restitution to the regional land authorities, but her applications for restitution were rejected by decisions of 14 February, 20 May and 19 July 1994.

2.6 The Prague City Court, by decisions of 27 June 1994 (4) and 28 February 1995, (5) refused the author's appeal and decided that the ownership of the properties had been lawfully and automatically transferred to the State by operation of Law No. 143/1947, on 13 August 1947. Since according to restitution Law No. 229/1991 the qualifying period for claims of restitution started on 25 February 1948, the Prague City Court decided that the author was not entitled to claim restitution. (6) The Court refused the author's request to suspend the proceedings in order to request the Constitutional Court to rule on the alleged unconstitutionality and invalidity of Law No. 143/1947.

2.7 On 9 March 1995 the author's application before the Constitutional Court concerning the City Court's decision of 27 June 1994 was rejected. The Court upheld the City Court's decision that ownership had been transferred to the State automatically by operation of Law No. 143/1947 and refused to consider whether Law No. 143/1947 was unconstitutional and void. The author did not appeal the City Court's decision of 28 February 1995 to the Constitutional Court, as it would have been futile in light of the outcome of the first appeal.

2.8 According to the author, the interpretation by the Courts that the transfer of the properties was automatic and not subject to intabulation is in blatant contradiction with the contemporary records and with the text of the law itself, which show that intabulation was a necessary condition for the transfer of the property, which in the instant case took place after 25 February 1948.

2.9 The author's application to the European Commission of Human Rights on 24 August 1995 concerning her claim to restitution for the "Stekl" property and the manner in which her claim had been dealt with by the Czech Courts was declared inadmissible on 11 April 1996. The author states that the Commission did not investigate the substance of her complaint, and adds that her communication to the Human Rights

Committee is different and broader in scope than her complaint to the European Commission of Human Rights.

2.10 As far as the exhaustion of domestic remedies is concerned, the author states that there are no other effective domestic remedies available to her in respect of the denial and exclusion of her claim to a remedy, whether by way of restitution or compensation, for the unlawful, arbitrary and discriminatory taking of her property and for the denial of justice in relation to her claim for such a remedy.

2.11 It appears from the submissions that the author continues to apply for restitution of different parts of her family's property, under law No. 243/1992 (7) which provides for restitution of properties confiscated under the Benes' Decrees. Such a claim was rejected by the Prague City Court on 30 April 1997, on the ground that her family's property had not been confiscated under the Benes' Decrees, but rather under Law No. 143/1947. According to counsel, the Court ignored thereby that the property had in fact been confiscated by the State under the Benes' Decrees in 1945 and that it had never been returned to the lawful owners, so that Law No. 143/1947 could not and did not operate to transfer the property from the Schwarzenberg family to the State. The Court refused to refer the issue of the constitutionality of Law No. 143/1947 to the Constitutional Court, as it held that this would have no influence upon the outcome of the case. On 13 May 1997, the Constitutional Court did not address the author's argument that Law No. 143/1947 was unconstitutional, since the Court considered that she lacked standing to submit a proposal to annul this law.

The complaint

3.1 The author claims that the continuing refusal by the Czech authorities, including the Czech Constitutional Court, to recognize and declare that Law No. 143/1947 is a discriminatory lex specialis, and as such null and void, constitutes a continuing arbitrary, discriminatory and unconstitutional interference with the author's right to the peaceful enjoyment of her inheritance and property, including the right to obtain restitution and compensation. Moreover, the restitution Law No. 229/1991 violates article 26 of the Covenant because it provides for arbitrary and unfair discrimination among the victims of prior confiscations of property.

3.2 In this context, the author explains that the effect of Law No. 143/1947 in conjunction with Law No. 229/1991 discriminates against her arbitrarily and unfairly by excluding her from access to a remedy for the confiscation of the property. She states that she is a victim of arbitrary differences of treatment compared with other victims of prior confiscation. In this context, she refers to the perverse interpretation of Law No. 143/1947 by the Czech courts as having effected the automatic transfer of the property to the Czech State, the refusal by the Constitutional Court to examine the constitutionality of Law No. 143/1947, the arbitrary and inconsistent interpretation of Law No. 142/1947 and Law No. 143/1947, the arbitrary choice of the qualifying date of

25 February 1948, and the confirmation by post-1991 Courts of the arbitrary distinction for the restitution of property between Law No. 142/1947 and Law No. 143/1947.

3.3 Counsel refers to a decision by the Constitutional Court, on 13 May 1997, in which it addressed the constitutionality of Law No. 229/1991 and held that there were reasonable and objective grounds for the exclusion of all other property claims simply by virtue of the fact that the law was a manifest expression of the legislator's political will to make restitution claims fundamentally conditional on the existence of the said decisive period and that the legislator intended clearly to define the time limit.

3.4 With regard to her claim that there is arbitrary and unfair discrimination between herself and the victims of confiscations of property under Law No. 142/1947, counsel explains that according to section 32 (1) of Law No. 229/1991, the taking of property under Law No. 142/1947 is invalidated, but the Czech legislator has failed to invalidate the taking of property under Law No. 143/1947. Moreover, it is said that, in respect to Law No. 142/1947, intabulation or effective taking of possession is considered by the Constitutional Court as the material date in order to establish eligibility for compensation, whereas in respect of Law No. 143/1947 the date of promulgation of the Law is taken as the material date. In this context, the author states that the county of Bohemia did not take possession of the properties before May 1948.

3.5 She also claims an arbitrary and unfair discrimination between herself and other victims of confiscations of property under the Benes' Decrees of 1945, because such victims are eligible for restitution under those Decrees and under Law No. 87/1991 and Law No. 229/1991, in conjunction with Law No. 243/1992 in respect of property taken whether before or after 25 February 1948, if they can demonstrate their loyalty to the Czech Republic and their innocence of any wrong-doing against the Czechoslovak State, whereas the author is denied this opportunity, because according to the post-1991 judgements, the expropriation under the Benes' Decrees was superseded by the enactment of Law No. 143/1947.

3.6 It is submitted that the author's denial of and exclusion from an effective remedy for the arbitrary, illegal, unfair and discriminatory taking of her property under the Benes' Decrees and under Law No.143/1947, constitutes continuing, arbitrary, unfair and unconstitutional discriminatory treatment of the author by the public authorities of the Czech Republic - legislative, executive, and judicial - which is contrary to the obligations of the Czech Republic under articles 2 and 26 of the Covenant. In this connection, the author states that the Human Rights Committee's considerations in the Simunek (8) case are directly relevant to her complaint.

3.7 As regards her claim under article 14, paragraph 1, of the Covenant, the author states that she has been denied the right to equality before the Czech Courts and to a fair hearing by an independent and impartial tribunal, including effective access thereto. In

this context, she refers to the manner in which the Courts rejected her claim, to more favourable jurisprudence of the Constitutional Court in comparable cases, and to the Constitutional Court's refusal to decide on the constitutionality of Law No. 143/1947.

3.8 In this context, the author points out that it was inherently contradictory to logic and common sense for the Constitutional Court to have confirmed the legal effects of Law No. 143/1947 while at the same time declaring the question of the constitutional validity of the Law to be irrelevant to the determination of the author's rights. The Court's decision was moreover inconsistent with its own jurisprudence and constitutional functions in annulling discriminatory legislation.

State party's observations

4.1 By submission of 4 December 1997, the State party argues that the communication is inadmissible ratione temporis, as manifestly ill-founded, and for failure to exhaust domestic remedies. In explaining the background of the restitution legislation, the State party emphasizes that it was designed to deal with the after-effects of the totalitarian communist regime and that it was logically limited by the date when the communists took power, and that it is an ex gratia act which never intended to provide for global reparation.

4.2 According to the State party, the communication is manifestly ill-founded since it is clear from the text of Law No. 143/1947 that the property in question devolved from Dr. Adolf Schwarzenberg to the State by virtue of this Act, before the qualifying date of 25 February 1948 contained in Law No. 229/1991. The State party explains that intabulation was only required for property changes by way of transfer (requiring the consent of the former owner) and not for property changes by way of devolution (not requiring the owner's consent). In the latter cases intabulation is but a formality, serving to safeguard the ownership of the State against third persons. Also, Law No. 243/1992 does not apply to the author's case, since it is explicitly limited to expropriations carried out under the Benes' Decrees.

4.3 The State party argues that the Committee is incompetent ratione temporis to examine the author's claim that Law No. 143/1947 was unlawful or discriminatory. The State party acknowledges that the Committee would be competent ratione temporis to assess cases covered by either Law No. 229/1991 or 243/1992, including cases which originated in the period preceding the date of entry into force of the Covenant for the Czech Republic. However, since neither Law applies to the author's case, the sphere of legal relations established by Law No. 143/1947 is ratione temporis outside the scope of the Covenant.

4.4 Finally, the State party argues that the communication to the Committee is wider in scope than the author's complaint to the Constitutional Court and is therefore

inadmissible for non-exhaustion of domestic remedies. In this connection, the State party submits that 27 complaints presented by the author are still pending before the Constitutional Court.

Author's comments

5.1 In her comments to the State party's submission, the author does not challenge the State party's explanation that the legislation never intended to provide global reparation, but submits that the complaint in the present case concerns the way this legislation has been applied to the author's case, resulting in discriminatory denial and exclusion from an effective remedy of restitution or compensation for the unlawful taking of her family's property, in violation of her right to equality before the law and equal protection by the law. The complaint also concerns the denial of her right to equality before the Czech courts and of a fair hearing.

5.2 As regards the State party's argument that the communication is manifestly ill-founded, counsel refers to the legal regime for restitution and compensation, which consists of different laws and lacks transparency. The author contests the version of the facts presented by the State party and maintains that her family's property was taken unlawfully by the State under Benes' Decrees Nos. 12/1945 and 108/1945, and that Law No. 143/1947 did not take property away from the family. If, however, which the author denies, the Law No. 143/1947 did deprive the author's family of their property as suggested by the State party, then the author challenges the State party's statement that the property was taken before the qualifying date of 25 February 1948. In this context, the author refers to her earlier submissions and argues that the Courts have failed to recognize the arbitrary, unfair and unconstitutional nature of the provision of the qualifying date of 25 February 1948.

5.3 The author notes that the State party has not addressed the complaint that the Constitutional Court denied her a hearing concerning the constitutionality of Law No. 143/1947 by declaring her complaint inadmissible.

5.4 Concerning the State party's argument that the communication is inadmissible ratione temporis, the author points out that she does not complain that law No. 143/1947 was in violation of the Covenant, but that the acts and omissions of the State party's public authorities after the entry into force of the Covenant and Optional Protocol, denying her an effective remedy of restitution and compensation in a discriminatory manner, violate the Covenant.

5.5 With regard to the State party's argument that her communication is wider in scope than her appeal to the Constitutional Court, and that several constitutional complaints are still pending before the Constitutional Court, she states that this is due to the failure

of the courts to deal with the substance of her case, and the lack of cooperation by the authorities to investigate and to assist the author to clarify the matters at issue.

5.6 In a further submission, dated 12 January 1999, the author informs the Committee about developments in her case. She refers to decisions taken by the Constitutional Court on 4 September 1998, in which the Court decided that her claims for restitution under Law No. 243/1992 were outside the time limit prescribed for claims under that Law. She explains that the time limit for filing complaints was 31 December 1992, and for entitled persons who as of 29 May 1992 were not residing in the Czech Republic, 15 July 1996. The author, having become a Czech citizen and resident in 1993, made her claim on 10 July 1996. The Court, however, rejected her claim since she had not been a citizen on 29 May 1992, and therefore was not an entitled person as defined by the law.

5.7 The author claims that the requirement of Czech citizenship constitutes a violation of her rights under articles 2 and 26 of the Covenant. In this context, she refers to the Committee's Views in Simunek (case No. 516/1992).

5.8 Counsel further submits that, in a decision of 26 May 1998, the Constitutional Court, concerning the Salm palace in Prague, decided that the author's restitution claim was inadmissible for being out of time and that it therefore need not decide whether or not the author had a title to the property. According to the author, in refusing to decide her title claim, the Court denied her justice in violation of article 14, paragraph 1, of the Covenant.

Admissibility considerations

6.1 At its sixty-sixth session in July 1999, the Committee considered the admissibility of the communication.

6.2 It held that the author's claims concerning Law No. 143/1947 were outside the Committee's competence ratione temporis and thus inadmissible under article 1 of the Optional Protocol.

6.3 With regard to the author's claim that she was denied a fair hearing because of the manner in which the courts interpreted the laws to be applied to her case, the Committee recalled that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned and declared this part of the communication inadmissible under article 3 of the Optional Protocol.

6.4 The Committee also considered inadmissible the author's claim that she is a victim of a violation of article 14, paragraph 1, of the Covenant, because the courts refused to

determine whether she had a legal title to property. The Committee found that the author had not substantiated her claim, for purposes of admissibility, that the failure of the courts in this respect was arbitrary, or that the Government's failure to examine the constitutionality of Law No. 143/1947 constituted a violation of article 14 (1).

6.5 With regard to the State party's objection that the communication was inadmissible for non-exhaustion of domestic remedies, the Committee noted that all the issues raised in the present communication have been brought before the domestic courts of the State party in the several applications filed by the author, and have been considered by the State party's highest judicial authority. The Committee considered therefore that it was not precluded from considering the communication by the requirement contained in article 5, paragraph 2 (b), of the Optional Protocol.

6.6 The Committee noted that a similar claim filed by the author had been declared inadmissible by the European Commission of Human Rights on 11 April 1996. However, article 5, paragraph 2 (a), of the Optional Protocol would not constitute an obstacle to the admissibility of the instant communication, since the matter was no longer pending before another procedure of international investigation or settlement, and the Czech Republic had not made a reservation under article 5 (2) (a) of the Optional Protocol.

6.7 On 9 July 1999, the Committee decided that the author's remaining claims, that she has been excluded from access to a remedy in a discriminatory manner, are admissible as they may raise issues under articles 2 and 26 of the Covenant.

The State party's and author's submissions on the merits

7.1 By submission of 23 March 2002, the author refers to the Committee's Views in case No. 774/1997 (Brok v. The Czech Republic), and, with respect to the issue of equal access, within the limits of the admissibility granted for issues under articles 2 and 26 of the Covenant, alleges that the Ministry of Agriculture and various State archives, until the year 2001, consistently denied to the author and to all land authorities access to the complete file on the confiscation procedures against her grandfather Dr. Adolph Schwarzenberg and his appeals lodged in due course (see paragraph 5.5 above). In particular, it is stated that as late as 2001 author's counsel was denied the inspection of the Schwarzenberg file by the director for legal affairs in the Ministry, Dr. Jindrich Urfus, and only when the author had found other relevant documents in another archive, was counsel informed by the Ministry, on 11 May 2001, that the file indeed existed and he was allowed to inspect it. Moreover, it is stated that on 5 October 1993 the head of the State archive in Krumlov, Dr. Anna Kubikova, had denied the author the use of the archive in the presence of her assistant Ing. Zaloha, dismissing her with the words "All Czech citizens are entitled to use this archive but you are not entitled to do so." The author complains that such denials of access illustrate the inequality of treatment to which she has been subjected by the Czech authorities since 1992.

7.2 The documents suppressed prove that, in fact, the Schwarzenberg estate was confiscated pursuant to Presidential Decree No. 12/45. The authorities of the State party not only prevented the author from detecting and reporting the complete facts of her case to the land authorities and courts and to meet the deadlines for lodging claims according to laws 87/91 and 243/92, but also wilfully misled all land authorities and the Human Rights Committee.

7.3 On 29 November 2001, the Regional Court of Ceske Budejovice (15 Co 633/2001-115) as court of appeal confirmed that the Schwarzenberg estate was indeed confiscated pursuant to Section 1, par. 1, lit (a) of Decree No. 12/45, thus underlining the inapplicability of Law 143/47. However, the Court granted no redress to the author, because according to the author, there was no remedy available for anybody deemed to be of German or Hungarian stock.

7.4 The Ministry of Lands also rejected the author's appeals against the refusal by all land authorities to reopen various restitution procedures in the light of the crucial information that had been suppressed and which the author had finally been able to obtain. It is assumed that the uniform negative decrees from various land authorities were issued on instruction from the Ministry itself, as the Ministry has instructed the land authorities on other procedures concerning the author.

7.5 It is further stated that the Prague City Court ignored the relevant findings of the Czech Constitutional Court in not applying the restitution Law No. 243/92. It is alleged that this denial of justice constitutes unequal treatment because of the author's language, national and social origin and property.

8.1 By note verbale of 7 June 2002 the State party made the following observations on the merits. With regard to the author's challenge to the interpretation of Act No. 143/1947 by the Czech courts, the State party submits that "the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the present case, unless it is established that they have not interpreted and applied it in good faith or it is evident that there has been an abuse of power. The proceedings of the courts of the Czech Republic in the case in question are described in detail in the Observation of the Czech Republic on the admissibility of the communication, which confirms the legality of the court proceedings. On the other hand, the author did not substantiate the allegation of the perverse interpretation of Act No. 143/1947."

8.2 With regard to the author's claim of discrimination between the interpretations of Act No. 142/1947 and Act No. 143/1947, the State party refers to its observation on the

admissibility of the communication which contains the quotation of the relevant provisions of Act No. 143/1947 and explanation of their interpretation by administrative and judicial authorities of the Czech Republic.

8.3 With regard to the author's challenge of the choice of the qualifying date of 25 February 1948 as arbitrary, the State party observes that "the question of compliance of the qualifying date of 25 February 1948 in the restitution law of the Czech Republic with articles 2 and 26 of the Covenant were repeatedly considered by the Committee. In connection to this, the Czech Republic refers to the decisions of the Committee in cases Ruediger Schlosser v. Czech Republic (communication No. 670/1995) and Gerhard Malik v. Czech Republic (communication No. 669/1995). In both of these cases, the Committee concluded that 'not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the Communist regime ...' The purpose of the restitution legislation was to redress the property injustices caused by the Communist regime in the period 1948-1989. The stipulation of the qualifying date by the legislator was objective due to the fact that the Communist coup took place on 25 February 1948 and justified with regard to the economic possibilities of the State in transition from totalitarian to democratic regime. The non-existence of the recognition of the right to restitution in international law should be also taken into account in this respect."

8.4 With respect to the author's challenge of the distinction for the restitution of the property between Act No. 142/1947 and Act No. 143/1947 and the arbitrary and unfair discrimination between the author and other victims of confiscations of property under Presidential Decrees of 1945, the State party observes that "the restitution legislation is not related to transfer of the property carried out before 25 February 1948, in conformity with the laws implementing a new social and economic policy of the State. These laws were not instruments of Communist persecution. While the Act No. 229/1991 refers to Act No. 142/1947 (art. 6, para. 1 (b)) it also stipulates that the transfer of the property had to be made in the qualifying period from 25 February 1948 till 1 January 1990. Through this cumulative condition the Act No. 229/1991 observes the above-mentioned purpose and philosophy of the restitution legislation and represents the objective criteria for the entitlement to the restitution of property. The property of the grandfather of the author of the communication was transferred to the State before 25 February 1948 and therefore does not fall within the restitution of the property caused by the Communist regime. The restitution of property due to the injustices caused by the incorrect application of the Presidential Decrees is stipulated by Act No. 243/1992 and it relates to totally a different situation than that of the author's grandfather and therefore is irrelevant in this case."

9.1 In her comments of 24 June 2002, the author reiterates that the essence of the complaint is that the Czech authorities have violated her right to equal treatment by

arbitrarily denying her right to restitution under Act No. 243/1992, which extended eligibility for restitution of property to a citizen of the Czech Republic (like the author) who is descended from someone (Dr. Adolph Schwarzenberg) who lost his property as a result of Presidential Decree No. 12/1945 or Presidential Decree No. 108/1945. Provided that the property was taken under either of the Benes' Decrees, there is no requirement under Czech law that it was taken within the qualifying period prescribed by Act No. 87/1991 and Act No. 229/1991, beginning on 25 February 1948.

9.2 It is stated that the Czech authorities have arbitrarily ignored the clear and unambiguous evidence produced by the author from the contemporary official records that the property was taken by the Czechoslovak State from Dr. Adolph Schwarzenberg under Decree No. 12/1945, and that they have denied her any remedy on the false basis that the property was taken under the so-called "Lex Schwarzenberg", Act No. 143/1947, rather than under Benes' Decree No. 12/1945. In their observations the Czech Government focuses only on justifying the "cut-off" date of 25 February 1948, provided for in restitution Acts Nos. 87/1991 and 229/1991. The State party fails to address the essence of the author's case, that the relevant property was taken pursuant to the Benes' Decrees, and that it is therefore entirely irrelevant that the taking occurred before 25 February 1948. The State party dismisses the author's reference to her right to restitution pursuant to Act No. 243/1992 in one sentence, merely stating that "it relates to a totally different situation than that of the author's grandfather and therefore is irrelevant in this case". No evidence or reasoning is provided to substantiate this bare assertion, which is contradicted by the decision of the Regional Court in Ceske Budejovice, sitting as an appellate court, dated 29 November 2001. That decision found that Dr. Adolph Schwarzenberg's property was transferred into the ownership of the State pursuant to Decree No. 12/1945. The court stated that it "has no doubts that the property of Adolph Schwarzenberg was transferred into the ownership of the State with immediate effect in full accordance with Decree No. 12/45". Not only does the State party in its Observations ignore the Regional Court's finding, but it also fails to address the other facts and arguments brought to the attention of the Committee by the author in its submission of 23 March 2002 (see above paragraphs 7.1-7.5).

9.3 The author refers to the evidence placed before the Committee showing that the Czech authorities have until 2001 systematically denied her access to the documents that proved that the confiscations had taken place pursuant to Benes' Decree No. 12/1945. By suppressing this evidence, the authorities wrongly prevented the author from detecting and reporting the true facts of her case to the land authorities and courts.

9.4 Moreover, the author argues that for the purposes of this case, the Committee's obiter dicta in its decisions concerning the admissibility of cases Schlosser and Malik against the Czech Republic, on which the State party relies, are irrelevant. The author accepts that not every distinction in treatment amounts to discrimination, but the facts of her case are entirely different from the circumstances of the Schlosser and Malik cases. The author's case concerns the arbitrary denial of access to information crucial to exercising her rights to restitution, and the arbitrary denial of a remedy pursuant to Act

243/1992, which was enacted to redress injustices in the application of the Benes' Decrees, such as were endured by Dr. Adolph Schwarzenberg.

10. The author's submission was transmitted to the State party on 24 June 2002. No further comments have been received.

The examination of the merits

11.1 In conformity with article 5, paragraph 1, of the Optional Protocol, the Committee proceeds to an examination of the merits on the basis of all the information submitted by the parties.

11.2 The question before the Committee is whether the author was excluded from access to an effective remedy in a discriminatory manner. According to article 26 of the Covenant, all persons are equal before the law and every person has the right to equal protection of the law.

11.3 The Committee notes the statement of the author that the essence of her complaint is that the Czech authorities have violated her right to equal treatment by arbitrarily denying her right to restitution on the basis of Laws Nos. 229/1991 and 243/1992 with the argument that the properties of her adoptive grandfather were confiscated under Law No. 143/1947 and not under Benes' Decrees Nos. 12 and 108/1945 and therefore the restitution laws of 1991 and 1992 would not apply. The Committee notes further the author's argument that the State party constantly, until the year 2001, denied her access to the relevant files and archives, so that only then could documents be presented that would prove that, in fact, the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947, with the consequence that the author would be entitled to restitution under the laws of 1991 and 1992.

11.4 The Committee recalls its jurisprudence that the interpretation and application of domestic law is essentially a matter for the courts and authorities of the State party concerned. However, in pursuing a claim under domestic law, the individual must have equal access to remedies, which includes the opportunity to ascertain and present the true facts, without which the courts would be misled. The Committee notes that the State party has not addressed the allegation of the author that she was denied access to documents which were crucial for the correct decision of her case. In the absence of any explanation by the State party, due weight must be given to the author's allegations.

11.5 In this context, the Committee also notes that by decision of 29 November 2001, the Regional Court of Ceske Budejovice recognized that the taking of Dr. Adolph Schwarzenberg's property had been effected pursuant to Benes' Decree 12/1945. The Committee further notes that on 30 January 1948 the confiscation of the Schwarzenberg

agricultural lands under Benes' Decrees Nos. 12 and 108/1945 was revoked, apparently in order to give way for the application of Law 143/1947. The point in time when the revocation became effective seems not to have been clarified, because the courts proceeded from the premise that Law No. 143 was the only applicable legal basis.

11.6 It is not the task of the Committee but of the courts of the State party to decide on questions of Czech Law. The Committee finds, however, that the author was repeatedly discriminated against in being denied access to relevant documents which could have proved her restitution claims. The Committee is, therefore, of the view that the author's rights under article 26 in conjunction with article 2 of the Covenant were violated.

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it reveal a violation of article 26, in conjunction with article 2 of the Covenant.

12.2 In accordance with article 2, paragraph 3 (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including an opportunity to file a new claim for restitution or compensation. The State party should review its legislation and administrative practices to ensure that all persons enjoy both equality before the law as well as the equal protection of the law.

12.3 The Committee recalls that the Czech Republic, by becoming a State party to the Optional Protocol, recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Furthermore, the Committee urges the State party to put in place procedures to deal with Views under the Optional Protocol.

12.4 In this connection the Committee wishes to receive from the State party, within 90 days following the transmittal of these Views to the State party, information about the measures taken to give effect to the Views. The State party is also requested to publish the Committee's Views.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mrs. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, and Mr. Maxwell Yalden.

** The text of two individual opinions by Committee members Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati is appended.

APPENDICES

Partly concurring individual opinion by Committee member Mr. Nisuke Ando

As for my own view on the restitution laws enacted after 1991, reference is made to my individual opinion appended to the Committee's Views in Communication No. 774/1997: Brok v. The Czech Republic.

As for the Committee's Views in the instant case, I must first point out that the Views contradicts the Committee's own admissibility decision. In its admissibility decision of 9 July 1999, the Committee clearly held that the author's claim concerning Law No. 143/1947 were outside the Committee's competence ratione temporis and thus inadmissible under article 1 of the Optional Protocol (6.2). And yet, in its examination of the merits, the Committee goes into the details of the author's claims and states that on 30 January 1948 the confiscation of the properties in question under Benes' Decrees Nos. 12 and 108/1945 were revoked in order to give way for the application of Law 143/1947 (11.5), that on 29 November 2001 the Regional Court of Ceske Budejovice recognized the confiscation as effected pursuant to Benes' Decree No. 12/1945 (11.5), that the author was denied access to the relevant documents which were crucial for the correct decision of her case (11.4), and that only those documents could prove that the confiscation occurred on the basis of the Benes' Decrees of 1945 and not of Law No. 143/1947 (11.3).

Secondly, I must point out that, in these statements as well as in its conclusion that the State party violated the author's right to the equal protection of the law under articles 26 and 2 by denying the author's access to the relevant documents (11.6), the Committee has deviated from its established jurisprudence that it should not act as the court of fourth instance to any domestic court. True, the Committee indicates that the interpretation and application of domestic law is essentially a matter for the courts and the authorities of the State party concerned (11.4 and 11.6). However, while the Czech courts have decided that the properties in question were transferred to the State before 25 February 1948 and thus do not fall within the restitution of the property caused by the Communist regime (8.4), the Committee concludes that the author was denied access to the relevant documents in violation of articles 26 and 2 of the Covenant (11.6) and that the State party is under an obligation to provide the author with an opportunity to file a new claim for restitution on the basis of the relevant documents (12.2).

Thirdly, I must point out that, on 11 May 2001, the author's counsel was not only informed by the Czech Ministry of Agriculture of the existence of the relevant documents but also was allowed to inspect them (7.1). From this date onward, in my opinion, it seems impossible to maintain that the State party continued to violate the author's rights under articles 26 and 2 by excluding her from access to the documents in question.

(Signed): Mr. Nisuke Ando

Partly concurring individual opinion by Committee member Justice Prafullachandra Natwarlal Bhagwati

I agree with the Committee's conclusion that the facts before it reveal a violation of articles 26 and 2 of the Covenant. However, I am persuaded that there is also a violation of article 14, paragraph 1, of the Covenant, which stipulates that all persons shall be equal before the courts and tribunals and be entitled to a fair and public hearing of their rights and obligations in a suit at law. As a prerequisite to have a fair and meaningful hearing of a claim, a person should be afforded full and equal access to public sources of information, including land registries and archives, so as to obtain the elements necessary to establish a claim. The author has demonstrated that she was denied such equal access, and the State party has failed to explain or refute the author's allegations. Moreover, the protracted legal proceedings in this case, now lasting over 10 years, have not yet been completed. In the context of this particular case and in the light of previous Czech restitution cases already adjudicated by the Committee, the apparent reluctance of the Czech authorities and of the Czech courts to process restitution claims fairly and expeditiously also entails a violation of the spirit, if not the letter of article 14. It should also be remembered that, subsequent to the entry into force of the Optional Protocol for the Czech Republic, the State party has continued to apply Law No. 143/1947 (the "law Schwarzenberg") which targeted exclusively the property of the author's family. Such ad hominem legislation is incompatible with the Covenant, as a general denial of the right to equality. In the light of the above, I believe that the appropriate remedy should have been restitution and not just the opportunity of resubmitting a claim to the Czech courts.

In 1999 the Committee had declared this communication admissible, insofar as it might raise issues under articles 26 and 2 of the Covenant. I do not think that this necessarily precluded the Committee from making a finding of a violation of article 14, since the State party was aware of all elements of the communication and could have addressed the article 14 issues raised by the author. Of course, the Committee could have revised its admissibility decision so as to include the claims under article 14 of the Covenant, and requested relevant observations from the State party. This, however, would have further delayed disposition of a case which has been before the Courts of the State party since 1992 and before the Committee since 1997.

(Signed): Prafullachandra Natwarlal Bhagwati

Notes

1. The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the new Czech Republic notified its succession to the Covenant and the Optional Protocol.

2. The law reads:

"1 (1) The ownership of the property of the so-called primogeniture branch of the Schwarzenberg family in Hluboká nad Vlatavou - as far as it is situated in the Czechoslovak Republic - is transferred by law to the county of Bohemia ...
"4 The annexation of the property rights as well as all other rights according to paragraph 1 in favour of the county of Bohemia will be dealt with by the courts and offices, which keep public records of immobile property or other rights, and that following an application by the National Committee in Prague.

"5 (1) The property is transferred into the ownership of the county of Bohemia without compensation for the former owners …"

3. Act no. 229/1991 enacted by the Federal Assembly of the Czech and Slovak Federal Republic came into force on 24 June 1991. The purpose of this Law was "to alleviate the consequences of some property injuries suffered by the owners of agrarian and forest property in the period from 1948 to 1989". According to the Act persons who are citizens of the Czech and Slovak Federal Republic who reside permanently on its territory and whose land and buildings and structures belonging to their original farmstead devolved to the State or other legal entities between 25 February 1948 and 1 January 1990 are entitled to restitution of this former property inter alia if it devolved to the State by dispossession without compensation under Law No. 142/1947, and in general by expropriation without compensation. By judgement of 13 December 1995 the Constitutional Court - held that the requirement of permanent residence in Act no. 229/1991 was unconstitutional.
4. Concerning the "Stekl" property.

5. Concerning properties in Krumlov and Klatovy.

6. The Prague City Court decided that the author was not an "entitled person" under section 4 (1) of Act No. 229/1991 on the ground that the transfer of the Schwarzenberg property to Czechoslovakia occurred immediately upon the promulgation of Act No. 143/1947 on 13 August 1947, before the qualifying date of 25 February 1948 prescribed by section 4 (1) of Act no. 229/1991. However, before the judgement by the Prague City Court, the interpretation had been that the material date was the date of intabulation of the property, which in the instant case occurred after 25 February 1948. In this context, the author states that the Constitutional Court, by judgement of 14 June 1995, concerning Act No. 142/1947 recognized that until 1 January 1951 intabulation had been necessary for the transfer of property.

7. Law No. 243/1992 provides for restitution of property which was expropriated under Benes Decrees Nos. 12/1945 and 108/1945, provided that the claimant is a Czech citizen and did not commit an offence against the Czechoslovak State.

8. Simunek et al. v. Czech Republic, case No. 516/1992. Views adopted on 17 July 1995.