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Communication No. 1967/2010

Decision adopted by the Committee at its 113th session (16 March–2 April 2015)

Submitted by:	B and C (represented by counsel, Jaroslav Capek)
Alleged victims:	The authors
State party:	Czech Republic
Date of communication:	18 September 2009 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 11 February 2011 (not issued in document form)
Date of adoption of decision:	2 April 2015
Subject matter:	Restitution of property
Procedural issues:	Substantiation of claims; *ratione materiae*; *ratione temporis*
Substantive issues:	Discrimination; right to an effective remedy
Articles of the Covenant:	2 and 26
Articles of the Optional Protocol:	2 and 3

GE.15-10014 (E)

Annex

Decision of the Human Rights Committee under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights (113th session)

concerning

Communication No. 1967/2010 *

Submitted by:	B and C (represented by counsel, Jaroslav Capek)
Alleged victims:	The authors
State party:	Czech Republic
Date of communication:	18 September 2009 (initial submission)

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

Meeting on 2 April 2015,

Having concluded its consideration of communication No. 1967/2010 submitted to the Human Rights Committee by B and C 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 authors of the communication and the State party,

Adopts the following:

Decision on admissibility

1. The authors of the communication are B and C, German nationals born on 21 June 1933 and 20 December 1936 respectively and residing in the Czech Republic. They claim to be the victims of violations by the Czech Republic of their rights under articles 2 and 26 of the Covenant.[1] The authors are represented by counsel, Jaroslav Capek.

* The following members of the Committee participated in the examination of the present communication: Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. Pursuant to rule 90 of the Committee's rules of procedure, Committee member Anja Seibert-Fohr did not participate in the consideration of this communication.
The text of an individual opinion by Committee members Olivier de Frouville, Mauro Politi and Víctor Manuel Rodríguez-Rescia is appended to the present views.

[1] The Optional Protocol entered into force for the Czech Republic on 1 January 1993 as a consequence of the notification by the Czech Republic of its succession to the international obligation of the Czech and Slovak Federal Republic, which had ratified the Optional Protocol in March 1991.

The facts as submitted by the authors

2.1 The authors are the heirs of their parents, who were "Czech citizens of German nationality". The authors' parents were farmers; their father died in 1944. The authors' father owned a farm in the town of Horní Jindrivhoc, in the Sudetenland region of the Czech Republic. During the Second World War, several French and Polish prisoners of war were assigned to work at the farm in order to help produce food for the German Reich. The authors' parents treated the prisoners well and offered them as much food as they had themselves, even though it put them at risk. In 1943, a neighbour denounced the authors' parents to the German police. They were then convicted by a German court of "economic sabotage" against the Third Reich and of favouritism towards prisoners. The authors' mother was sentenced to 18 months in a concentration camp, but her sentence was postponed because she had four small children. The authors' father was initially sentenced to 24 months in a concentration camp, but was subsequently ordered to join a "disciplinary punishment troop" on the Eastern front instead. He left home on 27 June 1944 and never returned. He was declared dead as at 27 July 1944, after which his property was confiscated by the State owing to his German nationality.[2] The authors assert that, when confiscating the property, the Czech authorities did not take into account the fact that their parents had behaved humanely towards the prisoners of war who worked on their farm and that that behaviour was the basis of their conviction by the German Reich.

2.2 In 1992, the authors' mother and B filed restitution claims in respect of the farm before the Decin District Authority, which rejected the claims on the ground that the authors' father was not a Czech citizen. The authors maintain that the District Authority did not take into account the fact that the authors, their mother and their sisters all became Czech citizens after the war. The authors also state that although Presidential Decree No. 33/1945 retroactively stripped Czech citizens of German origin of their Czech citizenship, the authors' father was already deceased when that law came into effect on 10 August 1945 and could not have been affected by the Decree, which required a number of actions that could not have been undertaken by a deceased person.

2.3 The authors filed a claim for renewal of the restitution claim procedure, in order to prove that their father was a Czech citizen and would therefore have been eligible for restitution of the property had he been alive. That claim was rejected and the authors filed a claim before the District Court for the determination of their late father's dormant inheritance (a quasi-entity to which their father's property had been transferred upon his death). In their claim, the authors emphasized that the confiscation procedure had not been properly carried out because it had not been authorized by an individual administrative act. The authors argued that ownership of the property had therefore not been transferred to the State. However, the District Court ruled that the farm had been properly confiscated by the State. The authors' subsequent appeals before the Court of Appeal and the Constitutional Court were unsuccessful, on the ground that the authors had "insufficient legal interest".

[2] The authors do not state exactly when the State confiscated the property, or the decree under which the confiscation was made. The translation of the Regional Court decision provided by the authors (dated 29 June 2007) indicates that the State party believes the property to have been confiscated under Presidential Decree No. 12/1945 of 23 June 1945. It is further stated in the decision that the authors contested that finding and sought to determine whether the confiscation had actually and correctly taken place in accordance with an individual legal act. It is stated in the decision that the authors recognized that, under the provisions of the Constitutional Court Opinion of 1 November 2005, they could not claim restitution for property that had been seized before 25 February 1948 (or after 1 January 1990). Lastly, it is stated in the decision that, according to the authors, the property was not properly confiscated and therefore was part of their father's dormant inheritance, such that they were entitled to the property as their father's heirs. According to the decision, the authors also stated that the restitution laws were being used by the State party to justify wrongful possession of property.

The courts' reasoning was based on the Constitutional Court Opinion of 1 November 2005, published under file No. 477/2005.

The complaint

3.1 The authors state that the State party's refusal to acknowledge their right to restitution of their deceased father's property constitutes a violation of article 26 of the Covenant. The authors maintain that the Opinion was discriminatory in that it prevented persons whose property had been confiscated by the State before 1 January 1990 from filing a restitution claim under ordinary civil regulations. The authors therefore argue that the Opinion prevented them from having access to a fair and just court procedure concerning the merits of their cases, whereas persons whose property was expropriated after 1 January 1990 had access to such a procedure. The authors state that it is possible that the reason for this discrimination is that the State party considers persons of German origin to be "enemies of the Czechs".[3] The authors also submit that they were discriminated against in that they did not have access to an independent judge, as the judges who rely on the Opinion do so without examining the legal interest of the claimants.

3.2 The authors further allege that the State party violated article 2 of the Covenant. The authors maintain that their father's property was unlawfully expropriated because the confiscation was not authorized by an individual administrative act and that the courts that relied on the Opinion deprived them of the possibility of succeeding in their claim for restitution of the property. The authors maintain that, until 1 November 2005, the Constitutional Court held that property restitution laws did not preclude restitution claims for property seized by the State before 1 January 1990 where the State did not properly acquire ownership. The authors argue that, when adopting the Opinion, the Constitutional Court reversed that practice in the absence of any amendment to restitution legislation, thereby violating article 11 (4) of the Declaration of Basic Rights and Freedoms.[4] The authors submit that, according to the Declaration, it is possible to expropriate property "on a legal basis and for compensation". The authors state that the Opinion violated the Declaration and the Covenant by allowing the State party to forego compensating persons whose property was expropriated without a legal basis prior to 1 January 1990. The authors emphasize that, while the restitution regulations are not in breach of the Covenant, the political interpretation of these regulations contained in the Opinion amounts to such a breach. They also argue that anyone whose property has been seized is entitled to restitution of that property, regardless of the lapse of time since the seizure.

3.3 The authors state that they have exhausted domestic remedies and maintain that they have not submitted the matter for consideration by another international body.[5]

State party's observations on admissibility and on the merits

4.1 In its observations dated 22 April 2011 and 27 September 2011, the State party sets forth the relevant laws and notes that Presidential Decree No. 12/1945 generally allowed for confiscation of agricultural property from all persons of German and Hungarian nationality, irrespective of their citizenship. Act No. 229/1991 allowed for restitution of agricultural property if it passed to State ownership between 25 February 1948 and 1

[3] The authors cite an interview with the Prime Minister of the Czech Republic, Mirek Topolánek, published in the newspaper *MF DNES* on 3 January 2007, in which the Prime Minister allegedly stated "We, the Czechs, carry in us a certain feeling that our enemies are, in order: Germans, the nobility, priests, emigrants."

[4] It appears that the authors intended to refer to the Czech Charter of Fundamental Rights and Basic Freedoms.

[5] However, the authors have provided a copy of a complaint that they filed before the European Court of Human Rights.

January 1990.[6] Act No. 243/1992 expanded the scope of Act No. 229/1991 and allowed restitution of property to citizens of the Czech Republic who lost their property under Presidential Decrees Nos. 12/1945 or 108/1945, who did not commit any offence against the Czechoslovak State and who reacquired citizenship under laws from 1948 to 1953 (unless citizenship was reacquired under Constitutional Presidential Decree No. 33/1945).[7] Under section 80 of the Rules of Civil Procedure, an action can be brought to seek a decision on a declaration as to whether a legal relationship or right exists, provided that an "urgent legal interest" exists in such a declaration. The 2005 Opinion provided that, under restitution legislation, it is not possible to seek to protect an ownership right that was extinguished before 25 February 1948, unless a separate law allows for restitution of such property.

4.2 The State party adds to the factual background of the communication and observes that, in 1992, B and his mother filed a claim for the surrender of the farm under Act No. 229/1991 with the Land Office of the District Authority in Decin. That claim, filed against the legal persons under whose name the property was registered, was denied on 7 September 1993 because the authors' mother, who was the sole heir of the authors' father, had not acquired the property. The property had been confiscated *ex lege* as at the date of entry into force of Decree No. 12/1945. Under Act No. 243/1992, the requirements for restitution of property must be met by the original owner and claims of other entitled persons are derived from the original owner's claims. The authors' father met only the requirement of confiscation under Decree No. 12/1945; he did not meet the other requirements. Although the authors themselves met the remaining requirements (their citizenship was restored to them under Decree No. 33/1945; they had not committed an offence against the State; and they were Czech citizens and permanent residents), they did not meet the confiscation requirement, because they did not own the property. They were therefore not entitled to restitution of the property. The authors' mother filed a constitutional appeal on 22 September 1994, arguing that her late husband had been a Czech citizen. The appeal was denied on 5 October 1994, on the ground that it was manifestly ill-founded, as there was no evidence that the authors' father had been a Czechoslovakian citizen or that he had acquired that citizenship. Thereafter, the authors' mother died and her four children were designated as heirs with equal shares. Their motion to renew proceedings was denied on 30 August 1996, on the ground that they had not established their father's Czech nationality. Their appeal was denied by the Ministry of Agriculture Central Land Office on 31 January 1997, on the ground that the authors' father had acquired German citizenship on 10 October 1938 under the regulations of foreign occupation forces and had died a German citizen. The authors then filed an appeal before the Prague High Court, which discontinued proceedings on 29 May 1997 on a procedural ground.[8] The State party observes that the authors do not appear to have filed a Constitutional appeal of the High Court decision. In 2002, they brought several claims against legal entities before the Decin District Court, seeking a declaration that the farm was still the dormant inheritance (*hereditas iacens*) of their father. Those claims were based on identical legal arguments (namely, that the confiscation was unlawful since an individual act of the application of the confiscation decree could not be found and since it was not possible to confiscate *hereditas iacens*) and most were rejected by application of the Opinion on the ground that the authors had no legal interest in the declaration sought

[6] Act No. 229/1991 was enacted by the Federal Assembly of the Czech and Slovak Federal Republic on 21 May 1991 and came into force on 24 June 1991.

[7] Restitution Act No. 243/1992 entered into force on 15 April 1992. It provides for the restitution of property that was confiscated as a result of Benes decrees Nos. 12/1945 and 108/1945. One of the conditions to be eligible for restitution is that the claimant must have been granted Czech citizenship by Presidential Decree No. 33/1945 or by Acts Nos. 245/1948, 194/1949 or 34/1953.

[8] The State party cites section 248 (2) (e) of the Rules of Civil Procedure, read in conjunction with section 250 (d) (3).

because it was an attempt to circumvent restitution legislation. However, two such claims have not yet been heard owing to a stay of proceedings that the authors themselves requested. After gathering substantial evidence and searching historical records, the District Court rejected the first claim, which the authors had filed against the State company Lesy Ceske republiky. The District Court established from those records that the farm had been subject to confiscation and that the original claimants themselves had noted in restitution proceedings that the property had been confiscated under Decree No. 12/1945. The District Court held that, if an individual administrative act of confiscation cannot be located long after it was issued, it does not necessarily follow that the act did not exist at the relevant time or that the confiscation was not valid. On 20 December 2007, the Regional Court upheld the judgement of the District Court, concluding, in compliance with the Opinion, that the authors lacked an "urgent legal interest" in the declaration of ownership. The authors' appeal before the Constitutional Court was rejected on 7 July 2008. The Constitutional Court found that the authors' claim of discrimination by the courts lacked serious factual and constitutional arguments and was therefore manifestly ill-founded. The authors' constitutional appeals of their second, third and fourth claims against legal entities were similarly found to be manifestly ill-founded in 2008.[9]

4.3 The State party considers that the authors have failed to exhaust domestic remedies as they did not file a constitutional appeal of the Prague High Court decision of May 1997 denying their claim for restitution of the farm under Act No. 243/1992. The authors' actions for declaration that the disputed real properties remained part of their father's *hereditas iacens* do not constitute domestic remedies since those actions could not have resulted in a reversal of the original restitution decisions or their consequences. Moreover, although the authors argue that they did not file a constitutional appeal as the Constitutional Court was concerned only with confiscations that took place between 1948 and 1989, it is clearly stated in Act No. 243/1992 that this time limit is not applicable to the operation of the Act. The State party also notes that B filed an application before the European Court of Human Rights in 2008 and that, on 3 March 2009, the Court found the application to be inadmissible as being manifestly ill-founded.

4.4 The State party also considers that the authors' claims are unsubstantiated and are manifestly ill-founded for purposes of admissibility and on the merits. There is no fundamental right to a new decision on an unsuccessful property claim, and legislative time limits for restitution claims (for example, those contained in Act No. 243/1992) do not constitute, per se, a violation of the Covenant. Moreover, the fact that the authors were not able to prove that they met the requirements for restitution under Act No. 243/1992 is not attributable to the State party. It is not possible for an international body to interpret national law differently from domestic authorities or to conclude that irregularities in the restitution legislation (such as the citizenship requirement) can be contested entirely outside proceedings stipulated by the restitution laws themselves. Under the Committee's jurisprudence, different treatment is not discriminatory if it is based on reasonable and objective criteria. The authors' property was not expropriated, since the authors neither owned the property nor had a sufficiently supported legitimate expectation that some of their property claims would be satisfied, given that no authority had ever decided in their favour. The authors' situation differs significantly from that of persons whose ownership rights were interfered with after the fall of the communist regime and whose existing and exercised rights to properties were expropriated owing, for example, to public works. The authors did not exercise their ownership right for decades. The difference in treatment was

[9] The State party observes that the second claim was filed against the Land Fund of the Czech Republic and that the third claim was brought against V.H., who acquired the disputed real properties in restitution in 1997. Her parents owned the properties from 1946 to 1965, when they were forced to donate them to the State. V.H. claimed positive prescription of the real properties by her parents. The authors' fourth claim was brought against five natural persons.

therefore directly linked to the fact that entirely different groups of persons were concerned. The State party notes the Committee's finding that "legislation adopted after the fall of the communist regime in Czechoslovakia to compensate the victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because it does not compensate the victims of injustices allegedly committed by earlier regimes".[10] The Constitutional Court, in issuing the Opinion, did not issue any new rules on property restitution, but merely interpreted the existing restitution legislation, and did so before the authors raised their claims. The State party argues that claims excluded by the Opinion are not supported by domestic law. Both the legislature and the Constitutional Court found, with due regard to the public interest, that it was necessary to limit the scope of restitution legislation as it was possible to mitigate only a certain number of past injustices. The authors' lack of success in benefiting from restitution legislation was the result of various circumstances, rather than the inevitable consequence of the legislation itself.

4.5 In response to the authors' claim that the property was not lawfully expropriated because no confiscation warrant was found in the State archives, the State party considers that no confiscation warrant was necessary under Presidential Decree No. 12/1945, which provided for confiscation *ex lege*. The State party further observes that the authors' counsel has unsuccessfully "resorted to this argument very often in various proceedings" and that the authors do not support the argument by any reference to relevant national legislation or legal practice. The State party further considers that the Committee is not in a position to reassess the interpretation and application of domestic law, especially in relation to legal regulations that produced effects several decades ago.

4.6 In response to the authors' argument regarding the independence of the Czech judiciary, the State party notes that all judges of the Constitutional Court are appointed in accordance with the Constitution adopted after the end of the communist regime, by democratically established State organs. Specifically, the Constitutional Court judges have been appointed by Presidents who have no links with the Communist Party and who reject the Party's ideology. Further, the appointment of the judges by the President must be approved by the Senate, in which the Communist Party has always been only marginally represented.

Authors' comments on the State party's observations

5.1 In their comments dated 1 July 2011, the authors reiterate that their father's property was not lawfully confiscated because no confiscation warrant was ever found in the State party's archives. The authors assert that they discovered the absence of a warrant only when they personally searched the archives and maintain that the State party has failed to produce this warrant. They further argue that the property was taken owing to their father's German nationality, which constitutes discrimination. They also argue that the State party discriminated against them as compared with persons whose property was confiscated before 25 February 1948 (and was later returned to them). The authors maintain that the Opinion contravenes the basic principle that a person who holds property illegally is required to return such property regardless of the lapse of time. The authors submit that they did not have a real chance to contest the confiscation after 1945 because no one was willing to contest confiscations in an increasingly communist country and that the first opportunity they had to do so was after the communists were removed from power in 1990. The authors refute the State party's argument that they are trying to circumvent restitution legislation and assert that they merely attempted to obtain a declaration concerning the existence of a dormant inheritance.

[10] See communication No. 643/1995, *Drobek* v. *Slovakia*, Views adopted on 14 July 1997, para. 6.5.

5.2 Concerning the exhaustion of domestic remedies, the authors maintain that they did not file an appeal of the Prague High Court decision of 1997 before the Constitutional Court because they discovered that the Constitutional Court was systematically denying remedies for restitution wrongdoings that took place before 1948 and that such an appeal would therefore not have been an effective recourse. The authors also state that, during the adoption of the Opinion, four Constitutional Court judges were former members of the Communist Party and should have recused themselves from the decision-making in the matter, which relates to crimes committed by that Party. The authors maintain that had that recusal taken place, the Opinion would not have been adopted, as the Court would not have had the requisite nine-member quorum.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement and therefore concludes that article 5 (2) (a), of the Optional Protocol is not an obstacle in the present case.[11]

6.3 The Committee notes the authors' claims under article 2 of the Covenant that the property in question was not lawfully confiscated owing to the absence of an individual administrative act; that the Opinion interprets restitution legislation in such a way as to allow the State to forego compensating persons whose property was expropriated without a legal basis prior to 1 January 1990; that the Czech courts, by relying on the Opinion, deprived them of the possibility of obtaining restitution; and that they are entitled to restitution of, or compensation for, the property. The Committee recalls that the right to property is not protected by the Covenant[12] and that it is thus incompetent *ratione materiae* to consider any alleged violations of that right. Moreover, while the Committee deplores the alleged circumstances surrounding the confiscation of the property, it observes that the Covenant cannot be applied retroactively and that the confiscation occurred in 1945, prior to the entry into force of the Covenant and of the Optional Protocol.[13] Lastly, the Committee recalls that article 2 (3) of the Covenant can be invoked by individuals only in conjunction with other articles of the Covenant and cannot, in and of itself, give rise to a claim under the Optional Protocol.[14] Accordingly, these claims are inadmissible under articles 2 and 3 of the Optional Protocol.

6.4 The Committee also notes the authors' allegation under article 26 of the Covenant that the Czech judiciary discriminated against them on account of their German origin by applying the Opinion, which restrictively interprets restitution legislation and thereby treats claimants differently according to the date on which their property was confiscated. In that

[11] The Committee notes that the same matter was previously considered by the European Court of Human Rights, which declared the authors' application inadmissible as manifestly ill-founded on 3 March 2009.

[12] See communications No. 724/1996, *Mazurkiewiczova v. Czech Republic*, decision of inadmissibility adopted on 26 July 1999, para 6.2; No. 544/1993, *K.J.L. v. Finland*, decision of inadmissibility adopted on 3 November 1993.

[13] See communication No. 1748/2008, *Bergauer et al. v. Czech Republic*, decision of inadmissibility adopted on 28 October 2010, para. 8.3.

[14] See, inter alia, communication No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility adopted on 23 July 2012, para. 8.5.

regard, the Committee notes the authors' argument that such temporal restrictions constitute discriminatory treatment as they prevent persons whose property was confiscated outside of the prescribed time period from obtaining restitution. The Committee observes that the time limitations set forth in the Constitutional Court Opinion, which prevented the authors from seeking restitution of the property because it was confiscated prior to 25 February 1948, were applicable to all equally. The Committee notes that the authors have not explained how the time limitations were linked to national or ethnic origins. The Committee therefore considers that the information provided by the authors does not support their argument that the Czech courts, by applying the Opinion in cases involving property restitution, discriminated against them on the basis of national or ethnic origin. Accordingly, the Committee considers that the authors have failed to substantiate, for purposes of admissibility, that the application of the Opinion was discriminatory within the meaning of article 26. This claim is therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee further notes the authors' assertion under article 26 of the Covenant that they did not have access to an independent judge as, when judges apply the Opinion, they decline to examine the issue of the claimants' legal interest. The Committee further takes note of the authors' assertion that several members of the Constitutional Court that issued the Opinion were members of the Communist Party and should have recused themselves, in which case the Opinion would not have been issued and the authors' restitution claims would not have been time-barred. As it has repeatedly held, the Committee recalls that it is not a final instance competent to re-evaluate findings of fact or the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice.[15] In the instant case, the Committee considers that the authors contest the substance of domestic jurisprudence but have failed to substantiate for the purpose of admissibility that the issuance and application of the Opinion by the Czech courts amounted to arbitrariness or a denial of justice. This claim is therefore inadmissible under article 2 of the Optional Protocol.[16]

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) This decision shall be transmitted to the State party and the authors.

[15] See communications No. 541/1993, *Simms* v. *Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2; No. 1138/2002, *Arenz et al.* v. *Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6; No. 917/2000, *Arutyunyan* v. *Uzbekistan*, Views adopted on 29 March 2004, para. 5.7; No. 1528/2006, *Fernández Murcia* v. *Spain*, decision of inadmissibility adopted on 1 April 2008.

[16] In the light of its findings, the Committee does not deem it necessary to examine the State party's assertion that the authors did not exhaust domestic remedies for purposes of admissibility.

Appendix

[Original: French]

Individual opinion of Committee members Olivier de Frouville, Mauro Politi and Víctor Manuel Rodríguez-Rescia (partly dissenting)

1. In its Views on the case concerning B and C, the Committee found that the authors' claims under articles 2 and 26 were inadmissible.

2. We concur with the Committee that the claim under article 2 is inadmissible, but believe that, while the Committee lists several grounds of inadmissibility in paragraph 6.3 of its Views, only the first of those grounds was decisive, namely, that article 2 may be invoked only in conjunction with another article of the Covenant. In particular, there seems to be little justification for placing reliance on a lack of jurisdiction *ratione temporis*, for at least two formal reasons: first, as the State party did not rely on those grounds, it was not for the Committee to bring them up of its own motion (see communication No. R.10/44, *Pietroroia v. Uruguay*, Views adopted on 27 March 1981); second, the Committee applied those grounds only to the claim based on article 2, but not to the claim based on article 26, which is inconsistent. Moreover, the Committee refers explicitly to its views in *Bergauer et. al. v. Czech Republic* in order to make an exception of this kind. The reasoning in this case is far from flawless. There is, however, no need to dwell on this point since, in our opinion, the Committee should not have taken these grounds into consideration in this case.

3. We also agree with the Committee's finding in paragraph 6.5 with regard to the second part of the applicants' argument under article 26; this argument does indeed seem to be insufficiently substantiated and may therefore be dismissed as manifestly ill-founded.

4. However, we respectfully disagree with the Committee's finding that the first part of the applicants' argument may also be dismissed as ill-founded, the argument being that the Czech judiciary discriminated against them on account of their German origin when it applied the Opinion in which the Constitutional Court restrictively interpreted restitution legislation, thereby treating claimants differently according to the date on which their property was confiscated (Views of the Committee, para 6.4). The Committee responded to this by stating that the time limits set under the restitution law of 1991 and restated by the Constitutional Court and courts that have rendered decisions in the authors' case were applicable "to all equally". It also considers that the "authors have not explained how these time limitations were linked to national or ethnic origin" (see para. 6.4).

5. We believe that the authors' claim was sufficiently substantiated to deserve consideration on the merits. Initially, the confiscation of property occurred on the basis of Presidential Decree No. 12/1945, which "generally allowed for confiscation of agricultural property from all persons of German and Hungarian nationality, irrespective of their citizenship". However, the restitution law of 1991 "allowed for restitution of agricultural property if it passed to State ownership between 25 February 1948 and 1 January 1990" (see para. 4.1). It was therefore clear that the temporal scope of the law excluded any restitution claim for confiscations that occurred in 1945 against the persons of German or Hungarian nationality referred to in the 1945 Decree.

6. Furthermore, in the present case, the Government itself seemed, at the very least, to acknowledge the existence of a "difference in treatment" between different categories of persons: "The authors' situation differs significantly from that of persons whose ownership right was interfered with after the fall of the Communist regime" and who "were expropriated owing, for example, to public works. The authors did not exercise their

ownership right for decades. Accordingly, the difference in treatment was directly linked to the fact that it was related to entirely different groups of persons" (see para. 4.4).

7. It would have been appropriate for the Committee to give further attention to the merits of this complaint by asking the State party to clarify its position on this matter.

8. The Committee criticizes the authors for failing to explain the link between the time limit under the law and alleged discrimination based on the authors' national or ethnic background. In other words, it places the burden of proof entirely on the authors, whereas they presented evidence of the link between the time limits under the 1991 law, and its subsequent restatements, and potential discrimination against a group of persons. In the light of that evidence, the Committee should have stated during its consideration of the merits that it was for the State party to show not only that the time limit was not discriminatory in itself but also that it did not bring about indirect discrimination, in other words, that it did not have detrimental effects that "exclusively or disproportionately affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, financial status, birth or other status".[a] In the present case, the question was whether the German nationals were the only ones affected by the time limit or whether they were disproportionately affected in comparison with other categories of persons. If the Committee had reached such a conclusion, the State party would still be given an opportunity to show that such a breach of the right to equality before the law within the meaning of article 26 had a legitimate purpose and was based on objective and reasonable grounds. By considering that the authors did not sufficiently "explain" their allegation of discrimination, the Committee has placed an undue burden on them, even though the State party has not clearly explained what justified the difference in treatment, the existence of which is recognized by the State party itself.

[a] See communication No. 998/2001, *Althammer et al.* v. *Austria*, Views adopted on 8 August 2003, para. 10.2.