

On the Legal Construction of Ethnic Cleansing

AUTHOR INFORMATION DELETED *

. . .

I. TO BEGIN: SOMETHING UNINTERESTING, AND SOMETHING NEW	1
A. AIMS OF THE ARTICLE	2
II. AN ATTEMPT AT AN UNCONTROVERSIAL HISTORICAL PRIMER.....	5
1. Czechoslovakia and Munich	6
2. The Beneš Decrees	7
3. The expulsions or transfers	9
4. The Potsdam Declaration	11
5. The Cold War	12
6. 1989 and the EU accession process.....	14
III. THE CONSENSUS REJECTING SUDETEN CLAIMS AND ITS RATIONALES.....	17
A. THE CONSENSUS FOR REJECTION – THE VIEWS OF RELEVANT SOURCES	17
1. The Czech Republic	19
2. European Union Members States and Institutions.....	27
3. The Legal Opinion	35
4. The Potsdam Powers	41
5. International Courts and Quasi-Adjudicative Bodies	43
6. Legal Scholars and Publicists.....	51
B. THE FOUR RATIONALES OF THE CONSENSUS – WHY REJECTION IS PREFERRED	53
1. Antiquity	54
2. Subsequent state action	57
3. <i>Post facto</i> and institutional limitations on competence	60
4. “Cause and effect:” Retribution for collective guilt	62
IV. A MODEST OBSERVATION: FOUR CURIOUS IMPLICATIONS OF REJECTING SUDETEN CLAIMS	65
A. IS THERE A SUDETEN COROLLARY LIMITING THE LAW OF THE HOLOCAUST?	65
B. HOW DO WE UNDERSTAND THE RELATIONSHIP OF SUDETEN AND HOLOCAUST CLAIMS?	68
C. WHAT ARE THE COROLLARY’S IMPLICATIONS FOR CUSTOMARY INTERNATIONAL LAW?	73
D. WHY ISN’T A SUDETEN COROLLARY ACKNOWLEDGED?	78
V. FINALLY: LOOKING FORWARD, WHAT IS REMEMBERED.....	81

. . .

* AUTHOR INFORMATION AND ACKNOWLEDGEMENTS DELETED.

I. To Begin: Something Uninteresting, and Something New

Who still talks nowadays
of the extermination
of the Armenians?
– *Adolf Hitler*¹

. . .after all, present-day European integration is a reflection
of the experiences of the Second World War,
linked with the resistance to Nazism.
– *Ministry of Foreign Affairs,
Czech Republic*²

Let us concede that there is nothing fundamentally objectionable about stripping millions of people of citizenship, seizing their homes, and expelling them from the country, all in peacetime, given the right circumstances. To be sure, this should all be orderly and humane, killing no more than, say, every seventh person; perhaps too one would wish to limit the scope, emptying no more than a quarter of any country. But that this can be, on balance, a necessary, just, legitimate, and legal policy to undertake: yes, let us concede the truth of that.

For that is the law today, and the position of the powers that oversaw the expulsion of 14 million Germans from Eastern Europe after the Second World War, in which perhaps two million died and the eastern fourth of Germany was entirely depopulated – the largest single instance in history of what we now call ethnic cleansing.³ That position was recently tested in

¹ Adolf Hitler, Speech to General Staff, Obersalzberg, 22 August 1939. I.M.T., Nuremberg, Doc. L-3 (US-28); BRITISH DOCUMENTS, Series Three, Vol. VII, No. 314, giving the original as “Wer redet heute noch von der Vernichtung der Armenier?”. See notes 286 *et seq.*, below.

² Ministry of Foreign Affairs of the Czech Republic (website)(section “The Presidential Decrees of 1940-1945”), http://www.mzv.cz/_dokumenty/edekrety.html (last changed 18 December 2003)(“Czech Foreign Ministry website”).

³ The Final Report of United Nations Commission of Experts to the Security Council (S/1994/674, 27 May 1994)(“UN Final Report”), at III.B (incorporating the First Interim Report, S/25274 at 55-6) notes that “[t]he expression ‘ethnic cleansing’ is relatively new. . . . ‘[E]thnic cleansing’ means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. . . carried out by means of [*inter alia*]. . . forcible removal, displacement and deportation of civilian population. . . .” The expulsion of the Germans would seem to qualify.

a controversy over the accession of the Czech Republic to the European Union, which was contested by Germans who had been expelled from what was once, to some, the Sudetenland. But that position, and our resolve, has been found as firm as ever.

It was a minor controversy, in truth, a contretemps on the path to EU membership that, though longer than some imagined, long had seemed assured; and in the end, the Sudeten controversy, though good for headlines, did not alter that course. The Union expressed its clear conviction: the past is past, the German question is answered, and Europe's future must not be held ransom by the dead hand of history. On 1 May 2004, to the music of *An die Freude*, the Czech Republic became a member of the EU without making any of the changes expellee advocates had demanded. For Europe and the legal order, the Sudeten issue is no longer interesting. And that, as a matter for law, is fascinating.

A. Aims of the Article

What is the true shape of our commitment to prohibit ethnic cleansing? This Article explores that question by considering a case observers have universally decided does *not* constitute ethnic cleansing. As we shall see shortly, almost all analyses of this issue demonstrate that Sudeten Germans have no claim. This is all quite obvious, quite uncontroversial, and quite right, but we must go further. What is the consequence, not for a few Germans but for the European order and international law of saying that these kinds of claims are not valid? Does the rejection of Sudeten claims – precisely because it is justified, and in the way it is – define any limits to what we are prepared to count as ethnic cleansing or unjustifiable human suffering? For make no mistake: the expelled Germans suffered; it is

simply that we say their suffering, so long ago, was regrettable but not wrong, and most assuredly not compensable.

The natural assumption of many readers will be that this has nothing to do with ethnic cleansing, that Sudeten claims have been universally rejected because they are ancient or otherwise fail some technical hurdle; certainly that is how most analyses dispose of the matter. This might be right except that we shall see how other claims, equally defective in this way, have not been rejected. And so we are compelled to recognize a different, explicitly moral calculus to distinguish Sudeten claims from those cases. This is acceptable to most observers, just as rejecting Sudeten claims is acceptable; they were after all collaborators with Nazism, were they not? The interesting point, however, is that this calculus – which we must employ because it is the only way to distinguish the Sudeten case – creates a predictable potential for similar responses in the future. If this is accurate (and right), then our commitments against ethnic cleansing are much more complex and qualified than we currently admit. This leads to a final question: why does our law not acknowledge this?

As so often seems necessary, first what this Article is *not*: It is not a critique of actions undertaken by the victorious powers and their allies in the 1940s – not, in other words, an argument that the expulsion of millions of people in peacetime was a wrong law ought to reconsider (as if to say that if only we knew the truth, we would treat the matter differently). Nor is it a critique of the European Union and its member states' rejection of Sudeten claims' normative force. On the contrary, this Article is a description of the rules we can observe precisely because states and societies have *accepted* the expulsions. It is about how we

will form law in the wake of great violence – about our plausible, even predictable response to the weight, and the lightness, of all that.

More precisely, this Article describes the customary legal norms logically arising from the observation that all relevant actors have rejected Sudeten claims in the context of the Czech Republic’s EU candidacy and instead continue to assert the legality and rightness of the expulsions – and in doing so have consistently relied on a limited number of identifiable rationales. The Article also asks why those norms do not appear as acknowledged doctrine: Why is it that international law’s mechanisms for deriving norms about ethnic cleansing, especially those for deriving customary international law, do not seem to draw conclusions from an obviously important case such as this? The inquiry, then, is not simply into the rules as such, but into law’s construction of the rules.

By the end, this Article will make two specific claims about that construction as it relates to what we may call the Law of the Holocaust – that gradual crystallization out of Nuremberg, the Genocide and Geneva Conventions, and the Yugoslav and Rwanda Tribunals of rules prohibiting and punishing ethnic violence: 1) that despite our otherwise absolute normative commitment against ethnic cleansing,⁴ the Sudeten case identifies a Corollary, an ‘unthinkable potential’ our law retains under specific, identifiable conditions; and 2) that the same case establishes limits on our commitment to *post hoc* restitution for mass violence.⁵

⁴ There is no specific international crime termed ‘ethnic cleansing.’ See Roger Cohen, “Ethnic Cleansing,” CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 136 (Roy Gutman and David Rieff, eds.) (1999) (“CRIMES OF WAR”). Yet the various actions which constitute ethnic cleansing – including deportation – are all war crimes or crimes against humanity. *Cf.* UN Final Report, at III.B. (“‘Ethnic cleansing’ is contrary to international law.”) For convenience, this Article will use that term.

⁵ This Article uses ‘restitution’ to identify a range of claims. Sudeten groups have variously called for a right to return, restoration of citizenship, property restitution or other compensation, or a formal apology. *See, e.g.*, Jan

As to the progress of this Article towards those claims: First, the historical context now fading into memory; then an explication of the consensus rejecting Sudeten claims and its rationales; the implications of those rationales for our commitments on ethnic cleansing and restitution (including an intervention concerning the interaction with Holocaust claims); comment on how unsatisfying this may seem, and why; and reflection on how the obvious, uninteresting conclusions we have reached on the Sudeten question reveal something troubling about law's sense of memory and its construction of itself.

And throughout: a reflection on the responsibility of the present to order itself in light of the past. What is the proper moral and legal response to actions that implicate a bygone age and the suffering of another century? There is a hidden trick in law's response to memory that makes it seem profoundly irrational and unpredictable – but which may be hard to justify if not kept hidden. It may be enough simply to describe the Sudeten Corollary in its fullness.

II. An Attempt at an Uncontroversial Historical Primer

Although this is not an Article about the expulsions and does not rely on any particular history of the expulsions or their aftermath,⁶ some agreed background is necessary solely to locate us in the contemporary problem:⁷

Pauer, *Moral Political Dissent in German-Czech Relations*, 6 CZECH SOC. REV. 173 (1998)(Jiří Sirotek, Ondřej Formánek, and John Comer, trans.) For the most part, however, these distinctions do not produce differences in the underlying debate about whether or not the Czech Republic had any obligation linked to EU accession.

⁶ Consistent with the aims above, this Article does not require readers to embrace any particular view of historical events; it does rely on what relevant actors *believe* about history. This section describes events relating to the departure of the German population from Czechoslovakia in terms most scholars and observers could agree on (if grudgingly) as being accurate, if not necessarily complete or 'true.' There are numerous points of contention: whether Germans fled or were expelled, under what conditions; how many died; and what the causal relationships among these contested processes were. It is expected – practically hoped – that polemicists on each side will be equally discomfited by this summary.

1. Czechoslovakia and Munich: Speakers of German and Czech lived in Bohemia and Moravia for centuries under the dynastic rule of the Habsburgs. Whatever history one wishes to remember about the late Austro-Hungarian Empire and the peoples living within it, the Empire's dissolution presented a political problem almost all observers acknowledged, despite their disagreements about how to resolve it: the presence of a large ethnic German population within the borders of the new Czechoslovak state. The very identification of 'Sudetenland' as a political concept (as opposed to simply 'areas in which Germans live')⁸ was practically synonymous with the failure of Czechoslovakia as a state project. Of course there was nothing inevitable about Czechoslovakia's sharply divided ethnic politics, but then evidently multicultural harmony was not inevitable either.⁹

With the rise of Adolf Hitler, Sudeten Germans (as they had come to call themselves) gained a powerful ally¹⁰ and their dissatisfactions with their position in Czechoslovakia became, if anything, more pronounced. Attempts to craft an internal solution failed to achieve a satisfactory outcome, and at the Munich Conference in 1938 Hitler demanded the

⁷ See generally ALFRED M. DE ZAYAS, *NEMESIS AT POTSDAM: THE EXPULSION OF THE GERMANS FROM THE EAST* (1989) ("DE ZAYAS") (an authoritative survey of the expulsions and Cold War diplomacy); TIMOTHY BURCHER, *THE SUDETEN GERMAN QUESTION AND CZECHOSLOVAK-GERMAN RELATIONS SINCE 1989* (RUSI Whitehall Paper Series 1996) ("BURCHER").

⁸ Unlike Bohemia, Sudetenland is not an ancient political unit. See JÜRGEN TAMPKE, *CZECH-GERMAN RELATIONS AND THE POLITICS OF CENTRAL EUROPE: FROM BOHEMIA TO THE EU* (2003), at xiv; see also Elizabeth Wiskemann, *CZECHS AND GERMANS* 97 (1938).

⁹ See, e.g., Roman Szporluk, *War by Other Means*, 44 *SLAVIC REVIEW* 20 (April 1985).

¹⁰ Jaroslav Kučera, "Between Wilhelmstraße and Thunovská: Financial Support from the Reich for the Sudeten-German Party, 1935-1938," *PRAGUE YB OF CONTEMP. HIST.* 1998, at 18, 33-4 (Derek Paton, ed.) (1999).

annexation of the Sudetenland to Germany,¹¹ a move broadly supported by Sudeten Germans. The remainder of the Czech lands soon became a protectorate, occupied and absorbed into the Third Reich.¹²

2. The Beneš Decrees: The contemporary debate centers on the so-called Beneš Decrees, emergency wartime decrees issued by Czechoslovak President Edward Beneš from exile in London or shortly after the end of the war,¹³ and confirmed with retroactive effect by the reconstituted National Assembly in a constitutional law in 1946.¹⁴

Beneš issued roughly 143 decrees, some fifteen of which relate to the status of ethnic Germans and Hungarians and individuals disloyal to Czechoslovakia. There is polemical controversy about what exactly the Decrees provided – expulsion is never authorized, for example¹⁵ – but unquestionably, individual Decrees or other legislation provided for:¹⁶

¹¹ See Treaty of Munich, REICHSGESETZBLATT 1938 II, 853, and 142 BRIT. & FOR. ST. PAP. 438 (1938), and Agreement concluded at Munich, September 29, 1938, between Germany, Great Britain, France and Italy, <http://www.mzv.cz/wwwo/mzv/default.asp?id=26351&ido=14086&idj=2&amb=1>.

¹² Prior to the war, therefore, the entire state was dismembered; Czechoslovakia formally acceded to these changes, but under tremendous pressure. The major powers recognized these changes – Great Britain and France were parties to the Treaty of Munich – but subsequently declared these changes illegitimate, a view that has been generally accepted ever since. Perhaps half a million Czechs left the Sudetenland when Germany annexed it, and the German protectorate imposed brutal rule on the rest of the Czech lands.

¹³ See Constitutional Decree on the Provisional Exercise of Legislative Power of 15 October 1940, cited in Czech Foreign Office Opinion 9, in Frowein, Prof. Dr. Dres. h.c. Jochen A., Prof. Dr. Ulf Bernitz, and the Rt. Hon. Lord Kingsland Q.C., Legal Opinion on the Beneš-Decrees and the accession of the Czech Republic to the European Union, Luxembourg, European Parliament, Directorate-General for Research Working Paper, 10-2002 (September-October 2002) (“Legal Opinion”)(Kingsland section).

¹⁴ CzSl. Const. Law of 28 March 1946, No. 57. Thus the original *Decrees* have no legal force; their *content* incorporated into Czechoslovak law is a different matter. Thus in this Article ‘Decrees’ generally means the incorporated legislation unless specified or clear from context. Quotations do not carry this proviso – it is by no means clear that all authors or actors understand the distinction.

¹⁵ See, e.g., George Anthony, “What’s Behind the Fuss Over the Benes Decrees?” POSTMARK PRAGUE, <http://www.spectrezone.org/global/Benes.htm>. The Czech Republic’s position is that the Decrees deal only with citizenship and property, and that the Powers conducted the expulsion. See Czech Foreign Ministry website.

¹⁶ See *inter alia* Legal Opinion (Frowein, Sec. 3(9)).

- confiscation of ethnic Germans and Hungarians' property without compensation;¹⁷
- loss of citizenship for ethnic Germans and Hungarians, with retroactive effect for those who had taken German or Hungarian citizenship, except those who had demonstrated loyalty to Czechoslovakia;¹⁸
- forced labor for those deprived of citizenship;¹⁹
- trial in absentia for disloyalty to Czechoslovakia during the occupation, with penalties including death and imprisonment;²⁰
- amnesty legalizing “[a]ny 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. . .even when such acts may otherwise be punishable by law.”²¹

And controversy notwithstanding, on the core questions of loss of citizenship, confiscation, *and* expulsion, this formulation is defensible: any Czechoslovak proven to have collaborated could be stripped of citizenship, property and other civic protections, but ethnic Germans and Hungarians had to affirmatively prove that they had *not* collaborated. The Decrees deprived large numbers of ethnic Germans and Hungarians of Czechoslovak citizenship, expropriated their property, and provided for, facilitated, or confirmed their expulsion.²²

¹⁷ Pres. Decree No. 12 of 21 June 1945 on the Confiscation and Expedited Allocation of the Agricultural Property of Germans, Hungarians, Traitors and Enemies of the Czech and Slovak Nations; Pres. Decree No. 28 of 20 July 1945; Pres. Decree No. 108 of 25 October 1945 on the Confiscation of Enemy Property and National Restoration Funds; Pres. Decree 5 of 19 May 1945 (invalidating certain property transactions during the occupation).

¹⁸ Pres. Decree No. 33 of 2 August 1945. Sudeten Germans had been granted citizenship in the Reich, but also notionally retained Czechoslovak citizenship. Charles A. Schiller, *Closing a Chapter of History: Germany's Right to Compensation for the Sudetenland*, 26 CASE W. RES. J. INT'L L. 401, 419 (1994) (“Schiller”). Unsurprisingly, the reassertion of Czechoslovakia’s legal continuity meant that Sudeten Germans were, once again (or rather still), citizens – thus the need to denaturalize them.

¹⁹ Pres. Decree 71 of 1945 (applying to those deprived of citizenship under Decree 33).

²⁰ Pres. Decree No. 16 of 19 June 1945 and Pres. Decree 138 of 27 October 1945. A “considerable number” of such convictions were secured, Legal Opinion (Frowein, Sec. 9 (42)). These Decrees were repealed in 1948. Opinion of the Legal Service of the European Parliament, Conclusions, par. 171k, at 27, *cited in* Legal Opinion (Frowein, Sec. 9, footnote 31)).

²¹ Provisional National Assembly Law No. 115 of 8 May 1946 Concerning the Legality of Actions Connected to the Struggle to Recover the Liberty of the Czechs and Slovaks, Art. 1. The Provisional National Assembly assumed legislative authority on 28 October 1945.

²² “[L]oss 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.” Legal Opinion (Frowein, Sec. 8(39)).

Certain of the relevant Decrees were repealed by the Czechoslovak legislature;²³ others never were, and their continuing validity or effect has been at the heart of the controversy.

3. The expulsions or transfers:²⁴ Soviet forces occupied some Czech territory, and at the end of the war Czech partisans were in control of other areas. Yet significant portions of Czech territory remained in German hands or were occupied by American forces at the cessation of hostilities in May 1945, and very few Germans in those areas had fled or been displaced by fighting, unlike the areas of eastern Germany incorporated into postwar Poland. Czechoslovak authorities therefore took possession, after hostilities ended, of territories with a population of three million Germans, concentrated in predominantly German districts in the Sudetenland.

The expulsions took place in several phases: so-called ‘wild’ expulsions before the Potsdam conference; sanctioned but unregulated expulsions in late 1945; and expulsions under a regulated regime from 1946, ending by 1950. Most were expelled into the Soviet sector of Germany but ultimately settled in the American sector, in the circumstances of extreme deprivation prevailing in postwar Germany. Estimates of the number who died en route – of exposure, starvation, malnutrition and direct violence – vary widely,²⁵ but the deportation

²³ Act 33/1948 of 25 March 1948 (repealing Decree 16 of 1945); Act 87/1950 of 1 August 1950 (repealing Decree 137 of 1945); Act 65/1966 of 1 January 1966 (repealing Decree 71 of 1945). See Opinion of the European Parliament Legal Service, para. 62, cited in Legal Opinion (Kingsland).

²⁴ Terminology is freighted in this debate. In Czech, ‘odsun’ is standard and in the former GDR ‘Umsiedlung,’ whereas in the FRG it was more common to refer to ‘Aussiedlung’ and ‘Vertreibung.’ It is perfectly possible to refer to morally and legally acceptable *expulsions* or to immoral and illegal *transfers*. I use ‘expulsion’ as a convenient word to describe the removal of persons from a territory against their will; the argument works with any other term.

²⁵ Estimates range from 20,000 to 200,000 deaths among Sudeten Germans from violence or proximate causes during deportation. See P. Wallace, “Putting The Past To Rest: The Sudeten question is still causing trouble in Central Europe,” TIME EUROPE, 18 March 2002 (“TIME EUROPE (2002)”).

was thorough: there were some three million Germans in Czechoslovakia in 1938; today there are 38,000 Germans in the Czech Republic,²⁶ and just over 5,000 in Slovakia.²⁷

Germans were expelled not only from Czechoslovakia, but also from Poland, the Soviet Union,²⁸ Yugoslavia, Hungary, and Romania – nearly 14 million.²⁹ Other peoples were expelled too: Poles (to lands emptied of Germans), Ukrainians (to lands emptied of Poles), Hungarians,³⁰ Romanians, etc. – in the tens of millions. And during the war, before all this occurred, massive deportations had been carried out by the Nazis, leading to the mass extermination of Jews, Gypsies, Slavs, slave workers and others,³¹ and by the Stalinist regime which internally deported Chechens, Meshketian Turks, Tatars and other Soviet peoples

²⁶ Data from March 2001 Census of the Czech Republic, *cited in* Legal Opinion (Frowein, Sec. 11, n. 55). As many as 200,000 Germans may have remained after the expulsions, but although loyal, antifascist Germans were exempted, these too were subjected to discrimination and most emigrated. See “Czech government issues apology to ethnic Germans who actively opposed Nazism but were persecuted after WWII,” AP, 23 August 2005, <http://www.bhhrg.org/mediaDetails.asp?ArticleID=455>. There were very few trials to establish loyalty during the period of expulsions. *But see, e.g.*, *Koutny v. Czech Republic*, decision on admissibility, Communication No. 807/1998, 20 March 2000, UN Report of the HRC, Vol. II, GA Official Records, 55th Session, Supplement No. 40 (A/55/40) (“*Koutny v. Czech Republic*”), para 2.1 (noting a case of restored citizenship, although confiscated property was not returned).

²⁷ The smaller German population of Slovakia was also subject to the Decrees. *See* MS, “Slovakia Has Just One Vestige Left of German Minority Presence,” RFE/RL NEWSLINE, Vol. 7, No. 222, Part II, 25 November 2003.

²⁸ That is, areas of interwar Germany later annexed to Poland and the Soviet Union; these include much of western and northern Poland and the Kaliningrad *oblast*.

²⁹ DIE BETREUUNG 8-9 (Bundesministerium für Vertriebene, Flüchtlinge und Kriegsgeschädigte, 1966) (“DIE BETREUUNG”) (giving German population in the affected areas at war’s end as 16.6 million; total expelled as 11.73 million, killed or missing in the expulsion process as 2.111 million; and remaining or returned as 2.717 million). These figures are contested in part because the proper assignment of cause of death is controversial. One source notes that “[a]n estimated 2 to 3 million died as a result of the expulsions. Roy Gutman, “Deportation,” CRIMES OF WAR 124.

³⁰ The Beneš Decrees also sanctioned expulsion of Hungarians from southern Slovakia; approximately 80,000 Hungarians were expelled. Géczi Mária, “Prágai szobor Benesnek A bajor miniszterelnök családott,” Magyar Rádió Online, 16 May 2005, 18:39, http://www.radio.hu/index.php?cikk_id=136939. However, comprehensive expulsion was never attempted, and today Hungarians constitute around ten percent of Slovakia’s population.

³¹ *See* Roy Gutman, “Deportation,” CRIMES OF WAR 123.

both during the war and before.³² Such acts – especially those the occupying Germans committed – had prepared the way psychologically for the postwar expulsions,³³ although these latter were far larger and occurred in a time of peace, in the context of total victory.

4. The Potsdam Declaration: Whatever the Beneš Decrees provided, the victorious Powers sanctioned the population removals. At the first postwar conference in Potsdam in August 1945, the three Powers issued a Declaration providing for a process of ‘orderly and humane’ transfers of an unspecified portion of the German population.³⁴ The Potsdam Declaration suggests the Powers did not object to expulsions they knew were occurring, but rather considered them necessary and materially supported the process. Although the British and Americans expressed reservations about the manner and timing of expulsions,³⁵ nothing in the Declaration they signed suggests any fundamental opposition to the expulsions as such, or any belief that the sovereigns then engaged in expelling Germans should be compelled to stop.

This much is evident, even uncontroversial, from the text of the Potsdam Declaration. If in making a legal assessment we consider the broader context, we note that all the supposedly separate sovereigns to whom that portion of the Declaration was addressed were in fact

³² On pre-war Soviet deportations, see Terry Martin, *The Origins of Soviet Ethnic Cleansing*, 70 J. MODERN HISTORY 813 (Dec 1998).

³³ See German-Czech Declaration on Mutual Relations and Their Future Development, signed at Prague, January 1997, at II (“1997 Czech-German Declaration”) (“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.”).

³⁴ See Report on the Tripartite Conference of Berlin, Babelsberg (Cäcilienhof), 2 August 1945, in DOKUMENTE ZUR DEUTSCHLANDPOLITIK. II. REIHE, BAND I. DIE KONFERENZ VON POTSDAM (vol. 3) (Bundesminister des Innern, FRG, 1992), 2102 ff., esp. Art. XIII, at 2121-2 (“Potsdam Declaration”).

³⁵ See DE ZAYAS 90-102.

under the influence of the Powers, and that expulsions were also carried out by forces controlled by the Soviet Union (and in Hungary, under the aegis of a Control Commission on which the western Allies were represented). The Powers were fully aware of this; in signing the Potsdam Declaration, they had all this in mind. So, the lines of real power prevailing at that time suggest the Czechoslovaks were hardly acting in a fully independent fashion: for example, Beneš signed the Decree stripping Germans and Hungarians of citizenship on 2 August 1945 – the same day the Potsdam Declaration was issued.³⁶

5. The Cold War: Little change in the political dispensation affecting expellees occurred during the Cold War. The Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) regained sovereignty, although the Powers retained certain rights. In Czechoslovakia, where a Communist regime consolidated power in 1948, the content of the Decrees remained valid law, although after 1950 there was no further occasion for their application. As noted above, certain of the Decrees were rescinded over time.

The GDR recognized the expulsions as “irrevocable, just and final” in 1950,³⁷ but the FRG conducted a rejectionist policy, maintaining claims to occupied territory and representing the

³⁶ Legal Opinion (Kingsland) (“The decree [on citizenship] was not signed by Benes until the conclusion of the Potsdam Conference to ensure that it was in line with the Allies decision.”); *see also* Czech News Agency, “Czech Press Survey,” FINANCIAL TIMES INFO. LTD., 9 April 2002 (calling the Decrees “a practical reaction to decisions made in Potsdam.”). Subsequent international agreements arguably obliged Czechoslovakia to seize expellees’ property. *See* Agreement on Reparation From Germany, on the Establishment of an Inter-allied Reparation Agency and on the Restitution of the Monetary Gold, Paris, 14 January 1946, Art. 6(A) (“Each Signatory Government shall. . .hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control. . .”)

³⁷ SUDETENDEUTSCHER RAT E.V., THE SUDETEN GERMAN PROBLEM IN INTERNATIONAL POLITICS 33 (1971) (“THE SUDETEN GERMAN PROBLEM”).

interests of expellees.³⁸ However, this support was largely domestic, for in 1954 the FRG signed the Settlement Convention providing an effective quitclaim against any past or future measures taken by France, Great Britain, or the United States or their Allies with regard to “German external assets or other property, seized for the purposes of reparation or restitution, or as a result of the state or war[.]”³⁹ West German *Ostpolitik* after 1969 led to a series of treaties and declarations with states to its east from which Germans had been expelled, but no returns and no final peace treaty. In 1973 the FRG and Czechoslovakia concluded a treaty nullifying the Treaty of Munich but preserving citizenship changes effected by Munich⁴⁰ – confirming their mutual recognition of Sudeten Germans’ citizenship in the FRG and, implicitly, their loss of Czechoslovak citizenship.

³⁸ THE SUDETEN GERMAN PROBLEM 33 (reproducing Bundestag Declaration of 14 July 1950 on Protection of Sudeten German Interests, protesting the decision of the GDR to recognize the expulsion of Sudeten and Carpathian Germans and rejecting the authority of its “sham government” to conclude such an agreement: “The Prague Agreement is incompatible with the inalienable right of man to his homeland. The German Bundestag, therefore, solemnly protests against the surrender of the right to their homeland of those Germans from Czechoslovakia whose interests are now under the protection of the German Federal Republic, and declares the Prague Agreement to be null and void.”) The Allied High Commissioners also rejected the Prague Agreement. *Id.*

³⁹ Convention on the Settlement of Matters Arising out of the War and the Occupation, *signed at Bonn*, 26 May 1952 (by USA, UK, France, and FRG)(as amended by *Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris*, 23 October 1954), *entry into force* 5 May 1955 (“Settlement Convention”), Ch. 3, Art. 6(1), and providing at (3):

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 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments.

The Settlement Convention was supposed to be temporary pending a final peace treaty or other agreement (Settlement Convention, Ch. 6, Art. 1). ‘German external assets’ contemplated the property of ethnic Germans in other countries as well as German citizens; in any event, Sudeten Germans under the (subsequently annulled) wartime regime would have met either definition.

⁴⁰ Treaty of Prague, Art. II (2), BUNDESGESETZBLATT 1974 II, 990, and 13 I.L.M. (1974)(“Treaty of Prague”) at 19. *See also* Legal Opinion (Frowein, Sec. 8 (40)).

The Sudeten Germans and the even larger populations of Germans from the eastern Reich and other areas of East Central Europe integrated into the two Germanys,⁴¹ where they received citizenship. Many expellees formed *Landsmannschaft* associations to press for recognition of their cause and compensation (and less frequently for return or revision of the borders, given the political circumstances of the Cold War).⁴² The expellees became an important political force on the right, with Sudeten Germans particularly strong in Bavaria and within the conservative CDU and CSU.⁴³ However, expellees did not succeed in achieving recognition for any of their claims outside the domestic West German context.

6. 1989 and the EU accession process: With Communism's collapse, Germany was reunited and a peace treaty signed in 1990, confirming Polish and Soviet title to territories those countries had administered since the end of the war; no provisions for return of expellees or compensation accompanied the treaty.⁴⁴ The final treaty kept the quitclaim provisions of the 1954 Settlement Convention concerning external German assets in effect.⁴⁵

⁴¹ See, e.g., DIE BETREUUNG, Anlage 1 (after p. 80)(showing expellees in each *Land* as percentage of the population, ranging from 1.7 percent in Saarland to 27.2 percent in Schleswig-Holstein).

⁴² Today, German irredentist sentiment is extremely marginal. Cf. MS, "German Irredentist Posters in Karlovy Vary," RFE/RL NEWSLINE, Vol. 6, No. 53, Part II, 20 March 2002 (noting appearance of posters in Prague and Karlovy Vary declaring "The Sudetenland was German and will be German again").

⁴³ THE SUDETEN GERMAN PROBLEM 33-8 (reproducing texts of declarations made by various West German political parties and the Sudeten German Association).

⁴⁴ Treaty on the Final Settlement with Respect to Germany (FRG-GDR-France-USSR-US-UK), *done at* Moscow, 12 September 1990, 29 I.L.M. 1186 (1990)("Final Treaty"); Agreement between the Federal Republic of Germany and the Republic of Poland in Relation to the Ratification of the Border Between Them, *signed in* Warsaw, 14 November 1990, 31 I.L.M. 1292 (1992). Germany's recognition of the transfer of territory undercut one of the expellee groups' standard arguments. See PHILLIP A. BÜHLER, THE ODER-NEISSE LINE: A REAPPRAISAL UNDER INTERNATIONAL LAW 135-6 (1990). The restoration of the pre-war border between Czechoslovakia and Germany had already been confirmed (*see* Treaty of Prague, Art. II (2)).

⁴⁵ Exchange of Notes between France, United Kingdom, and United States and the Federal Republic of Germany, 27 and 28 September 1990 (providing for the termination of the Settlement Convention

In 1992, reunited Germany and the Czech and Slovak Federal Republic, both now free of Soviet influence, signed a Treaty on Good-Neighbourliness and Friendly Cooperation.⁴⁶ Also in 1992, the Czech Republic enacted a property restitution law covering expropriations after 1948 but exempting Decree-related confiscations;⁴⁷ a Czech constitutional court decision subsequently reaffirmed the validity of the Decrees as a constitutional foundation of the state,⁴⁸ a view confirmed by the government.⁴⁹ In 1993 the Czech and Slovak Republics became separate states; each maintained the continuity of its legal system and thus of the Decrees regime.⁵⁰

In 1997, Germany and the Czech Republic signed an extremely cautiously worded Declaration in which, depending on one's view, the Czech side either does or does not express regret for aspects of the expulsions. While the measure of apology may be ambiguous, the absence of obligation arising from the expulsions is clear:

Both sides agree that injustice inflicted in the past belongs in the past, and will therefore orient their relations towards the future. . . . [E]ach 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.⁵¹

simultaneously with the entry into force of the Final Treaty, but providing that Chapter 6, Art. 1 and 3 [and therefore apparently Article 2 by incorporation] pertaining to the quitclaim “shall, however, remain in force.”)

⁴⁶ Vertrag zwischen der Bundesrepublik Deutschland und der Tschechischen und Slowakischen Föderativen Republik über gute Nachbarschaft und freundschaftliche Zusammenarbeit, BUNDESGESETZBLATT 1992 II, 463.

⁴⁷ See Keith B. Richburg, “Close to Joining EU, Czechs Confronted With Darker Past: Reparations Sought for Treatment Of Ethnic Germans After WWII,” WASH. POST, 19 November 2002, A16 (“Richburg, WASH. POST”).

⁴⁸ See Finding No. 55/1995 of 8 March 1995 – Dreithaler, Const. Court Czech Rep., (Pl. ÚS 14/94, Sb. n. u. ÚS 3 (1995 – Vol. I) (“*Dreithaler (Czech Rep.)*”).

⁴⁹ “[T]he 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.” Czech Foreign Office Opinion 9, *in* Legal Opinion (Kingsland).

⁵⁰ See Legal Opinion (Frowein 4(11)).

⁵¹ 1997 Czech-German Declaration, at IV.

The Declaration also provided for the creation of several joint commissions and funds to support research and exchange, but none of these provided restitution to Sudeten expellees.⁵² From then on, Czech politicians resisted calls from Sudeten groups and certain politicians for further gestures; and although public debate in Germany about how to remember the war has intensified,⁵³ neither Germany nor Austria pressed the matter in an official forum again.

In 1997, the EU entered accession negotiations with the Czech Republic; the Sudeten question, although peripheral to the larger accession process, nonetheless proved a persistent and troubling issue, especially in relations with Germany and Austria.⁵⁴ In 2001 and 2002, the issue achieved prominence in elections in Germany, Austria and Hungary, where right-wing parties championed calls for apology, reparations or repeal, and the European Parliament commissioned a report, but the controversy receded after all these parties suffered electoral setbacks.

Thus when the Czech Republic became a full member of the EU on 1 May 2004, none of its institutions had repudiated the Decrees or engaged in any act of restitution; since that time, the Czech government has issued an expression of appreciation to Germans who had

⁵² See 1997 Czech-German Declaration, at VII-VIII.

⁵³ See JÖRG FRIEDRICH, *DER BRAND: DEUTSCHLAND IM BOMBENKRIEG 1940-1945* (2002); W.G. SEBALD, *ON THE NATURAL HISTORY OF DESTRUCTION* (2003)(Anthea Bell, trans.); VOLKER HAGE, *ZEUGEN DER ZERSTÖRUNG: DIE LITERATEN UND DER LUFTKRIEG. ESSAYS UND GESPRÄCHE* (2003); GÜNTER GRASS, *IM KREBSGANG* (2002); “Kann man den Deutschen trauen?,” *DIE ZEIT*, Nr. 60/19, 4 May 2005 (multiple article special section); Jacques Rupnik, *The Other Central Europe*, 11 *EAST EUR. CONST. REV.* 68, 69 (2002)(noting “a new German fascination with the ‘lost provinces’ of the East” and the popularity of Grass’ novel).

⁵⁴ Pavla Kozakova, “Benes Decrees Confirmed,” *TOL*, 30 April 2002, http://www.ocnus.net/artman/publish/article_448.shtml (“Kozakova, ‘Benes Decrees Confirmed’”).

actively opposed Nazism and regretting that “some of these people did not receive the appreciation they deserved.”⁵⁵ Although the controversy continues to surface in the news, the impetus of the debate faded with the *fait accompli* of accession. So: what have consequences of that been for the shape of our law?

III. The Consensus Rejecting Sudeten Claims and its Rationales

One of the many weighty, non-existent problems which trouble us, is the Sudeten question. It doesn't exist, because the Sudetenland as a legal concept no longer exists; it doesn't exist, because there is nothing to solve; it doesn't exist because it was laid to rest by official documents signed by long-dead men of power. There is nothing to solve but there is much to think about.

– O. Neff⁵⁶

A. The Consensus for Rejection – The Views of Relevant Sources

This section assesses the sources of legal argument about accession and the Sudeten controversy from 1997, when the EU opened negotiations, until accession in 2004. A number of actors weighed in: EU institutions, states (and officials), international and domestic courts, scholars, activist groups, and individuals. These actors in turn produced or interpreted a variety of textual sources: treaties and agreements,⁵⁷ declarations,⁵⁸ officials' statements,⁵⁹ court judgments,⁶⁰ resolutions of the European Parliament⁶¹ and the Legal

⁵⁵ “Czech government issues apology to ethnic Germans who actively opposed Nazism but were persecuted after WWII,” AP, 23 August 2005, <http://www.bhrg.org/mediaDetails.asp?ArticleID=455> (noting the government's commitment of 30 million koruna to “document the fate of Sudeten German antifascists over the next couple of years”, but also Paroubek's response to concerns about compensation that “[i]t's a gesture of appreciation and apology and it does not mean any risk for us”).

⁵⁶ O. Neff, ‘Dialog open na pevnou hranici,’ Mladá Fronta Dnes, 26 March 1993, *in* BURCHER 1.

⁵⁷ See, e.g., Agreement Concerning the Foundation “Remembrance, Responsibility and the Future, 17 July 2000, U.S.-FRG, 39 I.L.M. 1298 (2000).

⁵⁸ See, e.g., 1997 Czech-German Declaration.

⁵⁹ Günter Verheugen, Speech at the Faculty of Social Sciences, Charles University, 11 April 2002, <http://www.evropska-unie.cz/eng/speech.asp?id=1332> (updated 6 May 2002)(“Verheugen 2002 Speech”).

Opinion commissioned by it, views of the ICCPR Human Rights Committee,⁶² advocacy by non-governmental organizations,⁶³ and academic commentary⁶⁴ – in short, all the materials from which claims about customary international law are constructed.⁶⁵

Depending on one's preferred theory of customary international law, one might give greater or lesser priority to these actors in deriving legal norms:⁶⁶ The most dominant theories adopt an exclusively statist view of customary law's creation;⁶⁷ while a minority advocates

⁶⁰ Both Czech and international tribunals: *Dreithaler (Czech Rep.)*; Prince Hans-Adam II of Liechtenstein v. Germany, ECHR, Judgment of 12 July 2001, Application No. 42527/98 (“*Prince Hans-Adam v. Germany, ECHR*”); Case Concerning Certain Property (Liechtenstein v. Germany), Preliminary Objections, 10 February 2005, International Court of Justice, General List No. 123 (“*Liechtenstein v. Germany, ICJ*”).

⁶¹ See, e.g., Resolution on the Czech Republic's application for membership of the European Union and the state of negotiations, European Parliament (COM(2000) 703 - C5-0603/2000 - 1997/2180(COS))(Official Journal C 72 E of 21 March 2002)(“European Parliament Resolution”).

⁶² See, e.g., Des Fours Walderode v. Czech Republic, Views, Communication No. 747/1997, 30 October 2001, UN Doc. CCPR/C/73/D/747/1997 (“*Des Fours Walderode v. Czech Republic, CCPR*”).

⁶³ “Otto Habsburg, chairman of the Pan-European Association and a direct descendant of the last Austrian emperor, recently repeated his criticisms of the Benes decrees.” Kozakova, “Benes Decrees Confirmed.”

⁶⁴ MS, “Czech News Agency Says Reports on Benes Decrees Contradict One Another...” RFE/RL NEWSLINE, 3 October 2002, <http://www.rferl.org/newsline/2002/10/031002.asp> (discussing various scholars' views).

⁶⁵ See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 39 (1997)(“MALANCZUK”)(listing as sources “newspaper reports of actions taken by states, and [] statements made by government spokesmen. . . laws and judicial decisions. . . extracts from [Foreign Ministry] archives. the writings of international lawyers. . . judgments of national and international tribunals. . . treaties. . . non-binding resolutions and declarations”); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981)(identifying “international and national officials, the elites of multinational enterprises, the media, many interest and pressure group leaders, and most human beings” as legal “communicators”).

⁶⁶ MALCOLM N. SHAW, INTERNATIONAL LAW 107 (2003)(“SHAW”)(noting “confusion between law-making, law-determining and law-evidencing. . .[in] methods”); Anne-Marie Slaughter and Steven R. Ratner, *The Method Is the Message*, 93 AJIL 410, 419 (1990)(discussing various approaches); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 758-9 (2001).

⁶⁷ See Statute of the ICJ, Art. 38(1)(b); AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (“RESTATEMENT”) § 102(2)(customary law “results from a general and consistent practice of states followed by them from a sense of legal obligation”); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 16-28 (1997); Detlev F. Vagts, *International Relations Looks at Customary Law: A Traditionalist Defense*, 15 EUR. J. INT'L L. 1031 (2004); *The Paquete Habana*, 175 U.S. 677 (1900) and *North Sea Continental Shelf (FRG v. Den/FRG v. Neth.)* 1969 ICJ 4 (“*North Sea Continental Shelf*”)(classic statements of customary law). “The Court has, however, often been criticized for not doing the kind of systematic analysis of practice and *opinio juris* that. . .*North Sea Continental Shelf* recommended.” W. MICHAEL REISMAN, MAHNOUSH H. ARSANJANI, SIEGFRIED WIESSNER, AND GAL S. WESTERMAN, INTERNATIONAL LAW IN CONTEMPORARY

identifying a broader range of actors in a dynamic conversation.⁶⁸ But regardless of one's approach, the outcome in this instance is the same: *no* model of customary law yields an outcome favorable to Sudeten claims. For at the level of law-making authority all these actors reveal a decisive consensus around four core rationales for rejecting Sudeten claims. First we will examine the views of some representative actors – the Czech Republic, EU states and institutions, the Legal Opinion, the Potsdam powers, international adjudicative bodies, and the writings of publicists – before turning in sub-section B to the four underlying rationales for rejecting Sudeten claims that they share.

1. The Czech Republic

As successor to the state from whose territory the Sudeten Germans were expelled, the Czech Republic has a natural interest in any connection between the accession process and restitution.⁶⁹ Any indication that it believed itself to be under an obligation concerning restitution to the expellees could constitute powerful evidence for a claim of customary legal obligation.⁷⁰ However, the Czech Republic has consistently opposed any repeal of the Decrees or other form of restitution and has rejected any connection between these matters and its accession to the EU.

PERSPECTIVE 15 (2004); *see also* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000) (“Kelly, *Twilight*”) (criticizing lack of consistent norms for assessing state action and *opinio juris*).

⁶⁸ *See, e.g.*, Myres S. McDougal, W. Michael Reisman and Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101 (1981) (criticizing law's “myth[ic]” reliance on traditional sources); Siegfried Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT'L L. 96 (2001) (criticizing positivism for “its common focus on ‘existing’ rules, emanating solely from entities deemed equally ‘sovereign,’ [that] does not properly reflect the reality of how law is made, applied and changed.”).

⁶⁹ Many of the issues discussed here would also apply to Slovakia as the other legal successor to Czechoslovakia. *See* Legal Opinion (Bernitz, Sec. 2, 3rd para.). Poland also has related or parallel issues regarding postwar expulsions and relations with EU member states.

⁷⁰ *See* SHAW 80-4 (discussing the concept of *opinio juris* – the role of states' sense of legal obligation in constructing customary law claims); *see also* Section IV.C, below.

For the Czech Republic, the 1997 Czech-German Declaration constitutes a definitive closure to the question of expellees' claims as a matter of law or inter-state relations.⁷¹ In the Declaration, the Czech Republic defined its historic role in these terms:

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.⁷²

This expression of regret – which as a matter of language does not actually regret the expulsions as such – was made in the context of Germany's acceptance that the Declaration would close the matter. Nonetheless, in the face of repeated attempts by political actors in Germany and Austria to link the expulsions to accession, the Czech government did engage further on the issue, though largely to reaffirm a solid front rejecting any further steps.

In the run-up to elections in Germany, Austria and Hungary in 2002, rhetorical assaults on the Decrees by politicians in those countries increased, and with them opportunities for the Czech Republic to clarify its position.⁷³ Czech officials and politicians were largely

⁷¹ See, e.g., MS, "Czech Foreign Minister Rules out Negotiations on Benes Decrees," RFE/RL NEWSLINE, Vol. 7, No. 208, Part II, 3 November 2003, <http://www.tol.cz/look/wire/>.

⁷² 1997 German-Czech Declaration, at III.

⁷³ For example, in response to then Prime Minister Viktor Orban's call for the repeal of the Decrees, the prime ministers of the Czech Republic, Poland and Slovakia cancelled a summit meeting. "Enlargement News in Brief – Benes decrees 'should be no obstacle'", EUROPA – ENLARGEMENT WEEKLY, 18 March 2002, http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_180302.htm.

unanimous in resisting calls for restitution,⁷⁴ with most opposing even symbolic gestures beyond those already made.⁷⁵ More broadly, the Czech government insisted that the Decrees were not only compatible with a just legal order, but synonymous with it: “[T]he 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.”⁷⁶

In April 2002 Parliament unanimously approved a joint resolution declaring that the Decrees are part of the post-war settlement and the state’s legal history and that “legal and property relations” arising from them are “unquestionable, inviolable, and unchangeable[.]”⁷⁷ a view President Havel publicly supported.⁷⁸ Some Czech politicians interpreted the Resolution as the Czech Republic’s final position on the matter; Vaclav Klaus of the Civic Democratic Party declared that he would advise his (generally pro-EU) party to oppose Czech

⁷⁴ See MS, “...While Parties Agree on the Text of Envisaged Declaration.” RFE/RL NEWSLINE, Vol. 6, No. 75, Part II, 22 April 2002 (noting broad agreement among Czech parties about the Decrees).

⁷⁵ BW, “Klaus Opposes Czech Compensation for Sudeten Germans,” RFE/RL NEWSLINE, Vol. 6, No. 71, Part II, 16 April 2002 (noting Klaus’ rejection of “symbolic compensation” as an attempt to revise the postwar settlement; noting also a “Stop Nationalism” petition organized by Bishop Vaclav Maly to oppose political exploitation of the Decrees, and Klaus’ criticism of it).

⁷⁶ Czech Foreign Office Opinion 9, *in* Legal Opinion (Kingsland).

⁷⁷ MS, “Czech Lower House Approves Resolution on Benes Decrees,” RFE/RL NEWSLINE, Vol. 6, No. 77, Part II, 24 April 2002; *see also* MS, “Text of Czech Resolution on Benes Decrees Made Public,” RFE/RL NEWSLINE, Vol. 6, No. 76, Part II, 23 April 2002 (noting that the draft resolution ‘rejects attempts to open issues connected with the end and with the results of World War II.’, and declares that property restitution is ‘the exclusive prerogative of Czech constitutional bodies.’).

⁷⁸ “President Havel supports Parliament’s resolution on Benes decrees,” RADIO PRAHA, 23 April 2002. <http://www.radio.cz/en/news/27207>. Havel has on expressed regret regarding the expulsions, and in particular for application of a collective guilt principle; his comments have “provoked waves of protests on the Czech scene[.]” CTK Czech News Agency, “Appeals for reconciliation sometimes give way to strong words,” FINANCIAL TIMES INFO. LTD., 24 August 2005 (“CTK, ‘Appeals for reconciliation,’ 24 August 2005”).

membership if the EU itself did not give “legal guarantees” that the Decrees would not be questioned after accession.⁷⁹

The Resolution also noted, however, that the Decrees are not currently applicable, indicating that they “were implemented in the period after they had been issued and no new legal norms can be established on their basis today[.]”⁸⁰ As the Resolution suggested by simultaneously defending the Decrees’ inviolability and acknowledging their current non-applicability, the Czech position centered on the Decrees’ lack of contemporary legal effect as the reason for their irrelevance in the accession process. In May 2002, for example, Prime Minister Zeman asserted that “[o]ur analysis shows there is no discrimination today” and that consequently the Czech Republic considers the Decrees “extinct[.]”⁸¹ an interpretation deriving from a 1995 ruling of the Czech Constitutional Court.⁸² In a joint statement at that time, Zeman and EU Commissioner for Enlargement Günter Verheugen likewise declared that the “Decrees are not part of the Accession Negotiations and should have no bearing on them” because they “no longer produce legal effects.”⁸³

⁷⁹ MS, “Czech Lower House Approves Resolution on Benes Decrees,” RFE/RL NEWSLINE, Vol. 6, No. 77, Part II, 24 April 2002; *see also* Kozakova, “Benes Decrees Confirmed.” Neither the EU nor its member states ever gave such guarantees.

⁸⁰ BBC Monitoring Europe, “C. European/Baltic media roundup on EU-related issues 18-24 Apr 02,” BBC INT’L REPS. (EUROPE), 25 April 2002 (summarizing CTK news agency, 1026 gmt, 24 April 2002). *See* MS, “Text of Czech Resolution on Benes Decrees Made Public,” RFE/RL NEWSLINE, Vol. 6, No. 76, Part II, 23 April 2002.

⁸¹ MS, “EU Urges Calm In Czech-German Dispute Over Benes Decrees...” RFE/RL NEWSLINE, Vol. 6, No. 97, Part II. 24 May 2002.

⁸² *Dreithaler (Czech Rep.)*, 73 et seq.(ruling on Decree No. 108 of 25 October 1945), cited in Legal Opinion (Frowein, Sec. 4 (15)). The ICCPR Committee has noted that “following the Court’s judgment. . ., the Benes’ [*sic*] decrees have lost their constitutional status.” *Malik v. Czech Republic*, decision on admissibility, Communication No. 669/1995, 21 October 1998, UN Doc. CCPR/C/64/669/1995 (“*Malik v. Czech Republic*”), para. 6.2. This seems to be at variance with Czech interpretations of the Court’s logic about ‘extinction.’

⁸³ Miloš Zeman and Günter Verheugen, Joint Press Statement, April 2002, <http://www.mzv.cz/www/mzv/default.asp?id=11188&ido=1&idj=1&amb=1> (“Zeman-Verheugen Joint Statement”).

Thus the official Czech position has been more nuanced than simply completely rejecting claims for restitution on any grounds. Official Czech pronouncements do not insist on the absolute righteousness of all actions at the time or their continued correctness without any scruple or modification. In negotiating with Germany in 1997 about the wording of the Declaration, for example, or with the EU in 2002 about the wording of the Joint Press Statement, the Czech side doubtless had to compromise on its preferred position. Czech willingness to characterize the Decrees as ‘extinct’ logically allows the possibility that ‘non-extinct’ Decrees with continuing legal effects might create obligations in relation to EU law. Indeed, the Joint Press Statement refrained from comment on whether the amnesty provisions might still have continuing legal effects, therefore leaving open the question of whether those Decrees might be relevant to the accession process – a view to which some Czech politicians subsequently registered their opposition.⁸⁴ Czech courts have also granted restitution to a small number of claimants, albeit in extremely limited rulings in highly particular circumstances.⁸⁵

In addition, Czech politicians and observers have distinguished between legal and moral or political claims arising from the expulsions. Foreign Minister Cyril Svoboda noted in late 2002 that “Strictly from the legal point of view, we have no problems. . . .But we still have

⁸⁴ MS, “Czech Politicians Reject Verheugen's Questions about Amnesties Granted under Benes Decrees,” RFE/RL NEWSLINE, Vol. 6, No. 75, Part II, 22 April 2002 (noting Czech politicians’ opposition to Verheugen’s comments about clarifying amnesty provisions).

⁸⁵ *See, e.g.*, MS, “Czech Supreme Court Makes Milestone Ruling in Restitution Controversy,” RFE/RL NEWSLINE, 3 September 2003 (noting that former nobleman Frantisek Oldrich Kinsky has received certain properties, but also that a Supreme Court ruling recognizing the precedence of restitution legislation over the Civil Code would have detrimental effects on lawsuits by other expellees); *see also* Marcia Christoff Kurapovna, “Revenge of Old Europe/Czech policy under fire : Nobility seeks to win back seized property,” INT’L HER. TRIB., 9 December 2003, http://www.iht.com/articles/2003/12/09/empire_ed3_.php.

the problem of political or moral gestures.”⁸⁶ Michael Zantovsky, Chair of the Foreign Affairs, Defense and Security Committee of the Czech Senate, noted that

‘There is no question of any official repeal of the decrees. . . Legally, we’re off the hook. . . Morally, I think there is a sense that during the Second World War, atrocities were committed by the Nazis for which Germany and Austria took responsibility, and after the war, acts were committed by the newly liberated countries, including Czechoslovakia, which were morally indefensible, and that any decent person should say ‘I’m sorry’ for.’⁸⁷

In 2002, then Labor and Social Affairs Minister Vladimir Spidla suggested compensation for expellees who had been active anti-fascists, a proposal supported by Zeman.⁸⁸ And other prominent Czechs have issued expressed various views on compensation and apology; for example, Roman Catholic Bishop Frantisek Radkovsky of Plzen issued an apology on behalf of the Czech nation in 1997.⁸⁹

But these modifications are only partial. ‘Extinction’ seems clearly different from complete repudiation or abrogation, and Czech pronouncements on extinction invariably insist on the continuity of the Decrees in the legal system. Indeed, extinction appears to be compatible with the absence of relevant *facts* as much as with *legal* inoperability.⁹⁰ The extinction argument may moderate Czech rejection of restitution claim, but is still radically different

⁸⁶ Richburg, WASH. POST.

⁸⁷ Richburg, WASH. POST (citing Svoboda).

⁸⁸ CTK, “Appeals for reconciliation,” 24 August 2005. Spidla suggested compensation would affect “several dozen” or “several hundred” people, while Zeman indicated it might apply to those Germans who had actively resisted or been placed in concentration camps. “Czech politicians don’t rule out compensation for some Sudeten Germans,” CZECH BUSINESS NEWS, 20 May 2002 (“CZECH BUSINESS NEWS, 20 May 2002”).

⁸⁹ CTK, “Appeals for reconciliation,” 24 August 2005. There is no indication that Radkovsky was speaking on behalf of the Holy See, and his position within, though prominent, is that of a private citizen.

⁹⁰ That is to say, an absence of Germans rather than an absence of legal force. There is absolutely no suggestion in any of the sources, nor in this Article, that any Czech official believes the Decrees could be invoked against the remaining German population.

from acknowledging an obligation vis-à-vis the expellees as a group, or from conceding any international or European aspect of the question.

As for moral and political arguments, these by their very construction do not give rise to a *legal* obligation – Frowein notes that “[i]n the German-Czech-Declaration of 1997 the Czech side regrets that the confiscations inflicted injustice upon innocent people but no consequences follow therefrom[]”⁹¹ – and the Czechs successfully resisted making any additional gesture in any event. In addition, although the comments by Svoboda, Zantovsky and others might be construed as distancing the Czech Republic from the expulsions and thereby delegitimizing them, on a close reading no official Czech position contemplated apology for the expulsions as such but only for excesses and crimes in the course of them. Nothing in the Czech view contemplated a fundamental revision of official memory of the expulsions as legal and legitimate or any consequences for them in the present.⁹²

In the final months before accession, the Czech government maintained its position. In September 2003, for example, on the occasion of Chancellor Gerhard Schröder’s visit to Prague, Prime Minister Vladimir Spidla noted that relations with Germany “are now better than ever” – partly because of compensation paid by Germany to Czech forced laborers – and that “disputes between the Czech Republic and Germany over the deportation of the

⁹¹ Legal Opinion (Frowein, Sec. 5(19)).

⁹² *Cf.* this view of Interior Minister Stanislav Gross: “In cases of obvious and provable injustice we are not against holding talks on these issues but it is impossible to link them with the issue of the deportation of Sudeten Germans. . .because we think that the deportation of Sudeten Germans after World War Two was a right solution and was adequate to that period.” CZECH BUSINESS NEWS, 20 May 2002 (*ellipsis original*).

Sudeten Germans after World War II are a thing of the past.”⁹³ On 2 November 2003, Foreign Minister Svoboda

ruled out any political negotiations with Germany on the expulsion from Czechoslovakia of the Sudeten Germans at the end of World War II. . . . Svoboda said the government stands by the joint 1997 German-Czech declaration aimed at the reconciliation of the two neighboring countries. . . . It is possible to debate what happened, but in no way to negotiate,’ [Svoboda] said.⁹⁴

Thus none of the Czech Republic’s institutions had repudiated the Decrees⁹⁵ or engaged in any other act of restitution by the time it became a member of the EU. Equally importantly, the Czech Republic had not in any fashion conceded the right of the EU or other member states to intervene in the matter, whether as a condition of accession or in any other way. To the degree any other relevant actor continued to press claims that it had an obligation to make restitution – and as we shall see, such claims were very few – the Czech Republic has consistently maintained a position as a persistent objector to those claims.⁹⁶

⁹³ MS, “Czech Premier Says Relations with Germany ‘Better Than Ever Before.’” RFE/RL NEWSLINE, Vol. 7, No. 169, Part II (5 September 2003)(paraphrasing Spidla and also noting his opposition to plans by the German Expellees Association to establish a ‘Center against Expulsion in Berlin, on grounds that “it would take the expulsion out of the historical context that triggered it[.]”’).

⁹⁴ MS, “Czech Foreign Minister Rules out Negotiations on Benes Decrees,” RFE/RL NEWSLINE, Vol. 7, No. 208, Part II, 3 November 2003 (citing Svoboda’s comments on TV Prima; insertion of “[current]” original).

⁹⁵ The President can “forgive and mitigate sentences. . . , order that criminal proceedings should not be instituted. . . and allow judicial sentences to be deleted from personal records[.]” Const. Czech Rep., Art. 67 (g), while the Constitutional Court can “decide. . . about the annulment of laws or of their individual provisions, if they are in contradiction with. . . an international treaty. . .” Const. Czech Rep., Art. 87 (1)(b). *See also* Legal Opinion (Kingsland). Neither the President nor the Court has exercised these powers to void the Decrees or convictions under them; this suggests they do not believe themselves obligated to do so.

⁹⁶ *See, e.g.*, MS, “Sudeten Germans Call on Czech President to Hold Talks on Compensation,” RFE/RL NEWSLINE, Vol. 7, No. 77, Part II, 23 April 2003 (arguing that “Prague has consistently rejected efforts to orchestrate anything but token compensation for the expulsions”). In the run-up to accession, the Czech Foreign Ministry website included these comments:

The decrees dating from 1940-45 are historical acts, which for their most part lack any significance today. They reflect the continuity of Czechoslovakia’s legal status during the period of its struggle against Nazism and form a part of a complex of wartime and post-war events and approaches. On the bilateral, Czech-German level, this question was resolved by way of the Czech-German Declaration adopted in 1997. . . . [A] discussion of those decrees lacks any legal significance or meaning; it can be nothing more than a historical debate. Such a ‘screening’ of the history of individual candidate states for membership in the EU seems quite unprecedented. . . .

In August 2005, the Czech government issued a unanimous declaration expressing appreciation for the loyalty of antifascist Germans and regretting their mistreatment, in highly general terms:

The government of the Czech Republic expresses its profound appreciation to . . . German nationals living on the Czech territory before World War II who during the war remained faithful to the (then) Czechoslovak republic and actively participated in the struggle for its liberation, [and regretting that some of these people did not receive the appreciation they deserved].⁹⁷

Even this formulation was highly contested within the Czech government,⁹⁸ and any connection to compensation, revocation of the Decrees, or – most importantly for our question – to the treatment of the Sudeten Germans as a whole or a legal obligation to engage in restitution has been rejected.⁹⁹

2. European Union Members States and Institutions

Several EU member states addressed the Sudeten controversy.¹⁰⁰ As sovereign states, the EU members are core actors in customary international law, possessing the standard tools for generating claims in the customary legal calculation. Each of the then fifteen EU member states had to agree to the accession of the Czech Republic; their decision to grant

. . . The Decrees. . . form a part of the Laws of the Czech Republic although they are now operationally outworn.

⁹⁷ “Czech government issues apology to ethnic Germans who actively opposed Nazism but were persecuted after WWII,” AP, 23 August 2005, <http://www.bhrg.org/mediaDetails.asp?ArticleID=455> (ellipsis original).

⁹⁸ President Vaclav Klaus termed the proposal “exceptionally dangerous” and commented that Paroubek “has taken leave of his senses[.]” CTK, “Appeals for reconciliation,” 24 August 2005. Klaus also called the declaration “an empty gesture because. . . it is impossible to track down most of those the apology addresses, and in many respects they are part of a problematic group.” Jan Velinger, “Government apologises for Czech victimization of loyal, anti-Nazi Sudeten Germans after WWII,” CZECH RADIO 7, 22 August 2005, <http://www.radio.cz/en/article/69979>.

⁹⁹ See “Czech government issues apology to ethnic Germans who actively opposed Nazism but were persecuted after WWII,” AP, 23 August 2005, <http://www.bhrg.org/mediaDetails.asp?ArticleID=455>.

¹⁰⁰ Great Britain is discussed below with the Potsdam powers, but comments here also apply to it.

membership necessarily suggests a belief that the candidate respects the principles in the Treaty of European Union, including respect for human rights.¹⁰¹ Any member state could have vetoed accession if it believed the Czech Republic was in violation of EU law or fundamental human rights or otherwise obliged to offer restitution. None did so, nor did any member lodge a formal demand for restitution even when the Sudeten issue was explicitly raised in EU institutional fora. On the contrary, member states favored delinking the Sudeten controversy from the accession process. France, for example, consistently supported Czech membership, rejecting any claim that the controversy was relevant to accession.¹⁰²

Germany, the member state with the strongest historical and demographic links to the expellee population, likewise did not raise any ultimate objection. Sudeten groups in Germany expressly called on the government to link restitution to accession; Erika Steinbach, the head of the Association of Displaced Persons, protested

Who in the year 2002 cannot distance himself from a political event that contradicts all norms of international law and questions the E.U. suitability of his country? Chancellor Schröder is urgently called upon to link the question of Czech E.U. entry to the abandonment of the Benes Decrees.¹⁰³

Steinbach's views represented those of a powerful constituency within Germany, but not of a law-generating actor. Had her view been adopted by Germany, it would have constituted an indicia of possible obligation in international law; Schröder, of course, did not at any

¹⁰¹ Only states that respect the Union's foundational principles – “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law” – may apply for membership. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 25 Mar. 1957, 298 UNTS 11, *as amended by* TREATY OF NICE, 26 Feb. 2001, 2001 O.J. (C 80) 1, consolidated version, 24 Dec. 2002 O.J. (C 325) 33 [“EU Treaty”], Art. 6 § 1 and Art. 49.

¹⁰² *See, e.g.*, Statement by the Ministry of Foreign Affairs Deputy Spokesperson (excerpt), Paris, 19 April 2002, <http://www.france.diplomatie.fr/actu/article.gb.asp?ART=24148>.

¹⁰³ TIME EUROPE (2002).

point assert such a linkage. Rather, Germany approved the Czech Republic's accession without requiring any restitution for Sudeten claims.

German politicians on the right raised strong objections to Czech membership linked to the Sudeten issue, and raised the issue in European institutions. Yet even these advocates for Sudeten restitution limited the scope of their objections. For example, Edmund Stoiber, Prime Minister of Bavaria and candidate for Chancellor for the CDU-CSU in 2002, frequently condemned the expulsions and called for restitution.¹⁰⁴ Yet he also advocated keeping calls for the repeal of the Decrees separate from accession: "For me these issues represent no condition for the admission of the Czech Republic to the EU, but the Czech Republic has to know that if it does not make a clear line, the theme will continue in Europe."¹⁰⁵ And, of course, these were only the views of opposition politicians, never those of the German state.

According to some observers Germany had declared the matter settled when it signed the Czech-German Declaration. As noted above, the Czech expression of regret in the Declaration was made in the context of Germany's acceptance, in the same Declaration, of the existing Czech legal system, the absence of any obligation to make changes to it, and commitment to the Czech Republic's accession. As the Legal Opinion notes,

This statement by the Czech side [in the Declaration], and the fact that Germany accepted 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 [the amnesty law]. . . .

¹⁰⁴ *See, e.g.*, TIME EUROPE (2002)(noting Stoiber's comment that "[t]he expulsion of the Sudeten Germans cannot be justified under any circumstances.").

¹⁰⁵ CZECH BUSINESS NEWS, 20 May 2002 (quoting Stoiber at a Sudeten German rally in Nuremberg).

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 [the amnesty law] 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.¹⁰⁶

As Kingsland notes, “[t]his agreement, at the very least, implies acceptance by Germany of the expropriation of property under the Benes Decrees[,]”¹⁰⁷ and the Declaration “indicates acceptance by Germany of the effects of Act 115/1946 [regarding amnesty for acts against expellees] and strongly implies that a repeal is not considered necessary by Germany.”¹⁰⁸

Austria, the other state with a significant expellee population, had not raised the expellee issue in the same manner as Germany during the Cold War period. Nonetheless, in the late 1990s the level of rhetorical and diplomatic dispute between Austria and the Czech Republic over the expulsions was as inflamed as between Germany and the Czech Republic – and after its own admission to the EU, Austria had the right to veto accession. However, although Austrian officials and politicians frequently expressed dissatisfaction with the Czech Republic’s position,¹⁰⁹ Austria never declared that failure to repudiate the Decrees or to otherwise undertake restoration constituted a violation of any international or EU norm

¹⁰⁶ Legal Opinion (Frowein, Sec 10 (56-7)).

¹⁰⁷ Legal Opinion (Kingsland).

¹⁰⁸ Legal Opinion (Kingsland).

¹⁰⁹ See, e.g., MS, “Czech President Sends Mixed Signals in Vienna. . .” RFE/RL NEWSLINE, Vol. 7, No. 78, Part II, 24 April 2003 (noting Austrian President Thomas Klestil’s statement that “the Sudeten German question had not yet been solved ‘in a satisfactory manner.’”). Austrian Chancellor Wolfgang Schüssel called on the Czech Republic to voluntarily compensate Sudeten expellees – implying that, his sympathies aside, he did not believe the Czech Republic was necessarily obliged to do so. TIME EUROPE (2002). Jörg Haider, governor of Carinthia and leader of the Freedom Party, called for abolition of the Decrees. See *id.*; Rob Cameron, “Freedom Party furious over Benes decrees resolution,” CZECH RADIO 7, 25 April 2002, <http://www.radio.cz/en/article/27283>.

or a reason, on any grounds whatsoever, to oppose accession. Austria approved Czech accession without requiring any restitution for Sudeten claims.

Indeed, in both Germany and Austria – as well as in Hungary – rightist politicians raised the question of the expulsions and restitution, but felt constrained by their conceptions of the EU process to limit the scope of linkage between accession and restitution; whatever their sympathies, they were not prepared to insist on formal linkage.¹¹⁰ And in all three countries, those politicians lost, and therefore did not form state policy in the run-up to Czech accession in 2004; their objections remained peripheral and private.

EU institutions likewise raised no ultimate objection. The Union does not possess a formal international legal personality, and EU institutions' formal authority in customary law creation is therefore questionable. Yet although its powers are highly dependent on and derivative of the member states, it has a separate institutional structure, and its actions are routinely considered in scholarship and advocacy. It is difficult to imagine making a successful customary law argument that ran directly contrary to the expressed view of what is casually but increasingly called 'Europe.'

Accession requires actions by the European Council, the European Commission, and the European Parliament, as well as individual member States.¹¹¹ Before the Union could open accessions negotiations, the Council and Commission had to confirm that the Czech Republic had fulfilled the so-called Copenhagen criteria as a minimum basis for

¹¹⁰ See TIME EUROPE (2002)(quoting analyst Jonathan Stein saying “Politicians are trying to show they are capable of defending national identity, but E.U. integration limits the scope of this to symbolic battles.”).

membership.¹¹² These criteria, though highly general, require candidates to respect basic human rights and respect for minorities,¹¹³ and so the assessment of a candidate's fitness for accession necessarily represents an indirect indication of EU institutions' (and member states') views on their compliance with human rights norms.

Thus in declaring that the Czech Republic had met the criteria, the Commission necessarily was declaring either that the Decrees were no longer valid, or that, even if valid, they did not constitute a violation of human rights norms.¹¹⁴ The Commission and Council approved and later revised an Accession Partnership with the Czech Republic, which established the conditions under which accession would be granted;¹¹⁵ none of these documents mentions the Sudeten issue or in any way conditions progress towards membership on restitution. The Council did not take any specific action in connection with the Sudeten controversy,¹¹⁶ while later, during the height of the controversy, Commissioner for Enlargement Verheugen

¹¹¹ EU Treaty, Art. 47(1-2).

¹¹² EU Treaty, Art. 47(1).

¹¹³ "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. . . . Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political . . . union." Copenhagen European Council, 21-22 June 1993, Presidency Conclusions.

¹¹⁴ I do not mean to suggest that the Commission's determination was legalistic; the accession process – including the Commission's deliberations – is a highly political process. I only note the *absence* of any opinion that there might be a legal(istic) obstacle: by failing to raise such an objection, the Commission necessarily implied that there was not one. As a thought experiment, imagine the Commission were to reject a candidate's application and specify human rights violations as the reason: this would surely constitute a datum in a claim that the applicant state was violating human rights. Such a datum is entirely absent in the Czech case.

¹¹⁵ See Regulation (EC) No. 622/98 of 16 March 1998 (OJ L 85, 20.3.1998, at 1)(revised Dec. 1999 and 2001).

¹¹⁶ See "Draft Reply to Written Question E-0574/02 put by Nelly MAES on 5 March 2002," Council of the European Union, Brussels, 17 June 2002 (19.06), 10115/02, PE-QE 241 (English, French original)(noting in reply to an MEP question that the Council "has not discussed the question whether the Beneš decrees in the Czech and Slovak Republics are compatible with Community law[.]") and "Corrigendum to Draft Reply to Written Question E-0574/02 put by Nelly MAES on 5 March 2002," Council of the European Union, Brussels, 1 July 2002 (02.07), 10115/02 COR 1, PE QE 241 (English, French original)(changing "are" to "**might be**")(emphasis original).

declared the Czech Republic in compliance with EU law¹¹⁷ and expressly disassociated the Sudeten issue from accession, noting

it is to be hoped. . .the Czech Republic, Germany and Austria. . .can reach an understanding about how to deal with their own past. . . . It is. . .desirable for this to happen before the Czech Republic joins. But it is not a condition[.]¹¹⁸

The European Parliament¹¹⁹ was perhaps the only EU institution to evince even guarded support for Sudeten claims and for the view that restitution might be obligatory. In a Resolution of 5 September 2001, 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[.]¹²⁰

This suggests Parliament believed the Decrees were still law and might violate EU norms, although it leaves the determination of this issue up to the Czech government. Furthermore, Parliament may have contemplated that the Decrees would have to be abolished prior to accession if indeed they contradicted EU law, although the Resolution does not explicitly indicate this.

Outside the frame of the Resolution, individual MEPs took public positions on the controversy, inserting views in the official record, creating a legislative and contextual history

¹¹⁷ “The European Commission has always maintained the view that the legal order of the Czech Republic meets the Copenhagen accession criteria. . . .I no longer see any insurmountable barriers that would prevent negotiations from being concluded at the end of this year. . . .” Verheugen 2002 Speech (adding immediately that “I say this quite deliberately, aware that only very recently, the past has cast a shadow over the accession negotiations.”).

¹¹⁸ Verheugen 2002 Speech.

¹¹⁹ Parliament must assent to accession by majority vote. EU Treaty, Art. 47(1).

¹²⁰ European Parliament Resolution, Pt. 41.

relevant (in some models) to determining customary law. Some MEPs argued that failure to revoke the Decrees should bar the Czech Republic from membership:

[A]t a meeting of the joint Czech-EU accession committee in Prague, some deputies of the European Parliament expressed the view that although controversy over the Benes decrees should not disrupt the accession process the Czech Republic should not be allowed to join the EU until it had revoked the decrees. The co-chairwoman of the committee Ursula Stenzel, said she hoped that the resolution which the Czech Parliament is planning to approve will not close the door to further negotiations.¹²¹

This formulation suggests that even members who claimed the Czech Republic had a legal obligation were concerned to minimize the potential obstacles to accession. On balance, however, this view clearly prioritizes obligation, demoting a smooth accession process to the level of political preference.

However, other MEPs strongly opposed any linkage of the Sudeten controversy to accession. The Party of European Socialists (PES), while calling the Decrees “repressive[,]” also declared that they “are not part of the accession negotiations and should have no bearing on them[,]” and noted that “[t]he PES underlines once more that the enlargement of the EU is a forward-looking process that should not be hampered by reliving past battles. Our history should, of course, not be ignored but it must be put in the right context.”¹²²

The objections and defenses individual MEPs raised give texture and complexity to the legislative history, though it is not clear that their views contribute much to the elaboration or identification of customary legal norms. Even if they did, they would not alter the core

¹²¹ “EP deputies say Benes decrees may be an obstacle to Czech EU accession,” RADIO PRAHA, 23 April 2002, <http://www.radio.cz/en/news/27207>.

¹²² “PES Rejects Link between Benes Decrees and Czech EU Accession,” NEWSL. PARTY EUR. SOCIALISTS, 16 April 2002, at http://www.eurosocialists.org/scripts/NewsEvents/pressarchive_detail.asp?lang=EN&ID=94 (quoting PES Vice-President Jan Marinus Wiersma and Parliamentary group vice-president Simon Murphy).

assessment: In the end, despite the tentative concerns indicated in its Resolution, the European Parliament approved the Czech Republic's accession without raising any objections or proposing any conditions that might have suggested a legal obligation on the Czech Republic, the member states, or the Union.

3. The Legal Opinion

The European Parliament took one other significant step suggesting it considered the possibility that the Decrees might create legal obstacles to accession: it commissioned an external Legal Opinion on the Sudeten question.¹²³ The mandate given by the Presidency of the European Parliament to three recognized legal experts was to:

- 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; [and]
- indicate whether any action from the candidate countries concerned ought to be taken in view of their accession.¹²⁴

This mandate focused on the relationship to EU law in terms of Union competences. But as the last part makes clear, the Legal Opinion also contemplated whether or not the Czech Republic would need to make changes to its laws before the member states and the EU should or even could grant it membership. As one of the authors put it, “[t]he question to be considered is whether the Benes Decrees could prevent the accession of the Czech Republic to the European Union.”¹²⁵

¹²³ Legal Opinion, *supra*.

¹²⁴ Legal Opinion 5 (Frowein, Sec. 1(1)).

¹²⁵ Legal Opinion (Kingsland).

The resultant Legal Opinion, with a brief set of Common Conclusions and a separate exposition by each author,¹²⁶ is not binding on the Parliament, the EU, or the member and candidate states, but does represent the foremost legal scholarly views on the matter, and carries the imprimatur of the Parliament. For those who take a broad view of customary law's formation, it is clearly of consequence in the debate – indeed, it is exactly the sort of document upon which customary law's glossators often rely.

The Legal Opinion's Common Conclusions are that

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, . . . 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 [the 1946 law] 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.¹²⁷

Although we will consider some complexities, it seems accurate to say that the Common Conclusions largely reject the claim that the expulsions or their effects raise legal obstacles to accession. The *only* modification to the existing legal regime which the Conclusions consider mandatory – that is, the only point on which the Czech legal system is incompatible with EU

¹²⁶ Frowein's is evidently the principal opinion, as, for example, Bernitz's opinion is called "On the Study by Professor Dr Jochen A. Frowein. . ." Legal Opinion (Bernitz, Title).

¹²⁷ Legal Opinion, Common Conclusions.

or human rights norms – is enforcement of criminal convictions arising from the Decrees. The Conclusions also note two points of moral and political concern – “discriminatory” elements in the Czech Republic’s property restitution system and the fundamental ‘repugnancy’ of the criminal amnesties – but then confirm that these do *not* raise issues under EU law. Likewise, individual authors note that “[f]rom the viewpoint of modern standards of humanitarian law, this legislation and its application deserves harsh criticism [*sic*][.]”¹²⁸ and that “[i]t 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[.]”¹²⁹ but again these views do not lead the authors to find any actual incompatibility with EU law.

The one issue on which the Legal Opinion finds a clear contradiction of EU norms concerns enforcement of *in absentia* convictions. Relying on ECHR rulings, the Opinion finds that “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[.]”¹³⁰ it also suggests that this would violate EU norms on freedom of movement.¹³¹ In keeping with its focus on present-day effects, the Opinion calls on the Czech government to investigate whether or not any such possibility actually exists today:

¹²⁸ Legal Opinion (Bernitz, Sec. 4, para. 1).

¹²⁹ Legal Opinion (Kingsland).

¹³⁰ Legal Opinion (Frowein, Sec. 9 (43) and footnote 32)(reading *Colozza v. Italy*, Judgment of 12 February 1985, ECHR, Series A, No. 89; *Krombach v. France*, Judgment of 13 February 2001, ECHR, Application no. 29731/96; *Osu v. Italy*, Judgment of 11 July 2002, ECHR, Application no. 36534/97).

¹³¹ Legal Opinion (Bernitz, Sec. 7, para. 2)(discussing, at n. 60, ECJ case C-348/96, *Donatella Calfa*, [1999] ECR I-11).

It is therefore of importance to verify whether enforcement of these judgments is precluded. . . . This must be clarified during the accession procedure. Legal certainty requires that nobody should have any doubts here. The Czech Government must take a clear position. If necessary legislation must be enacted.¹³²

Interestingly, the Opinion suggests that “[t]his must be seen as a condition for accession[]”¹³³ – which is as much an admonition to the member states about their obligations in extending membership as it is to the Czech Republic about undertaking reforms.

The Legal Opinion also considers the amnesty for acts against Germans. This amnesty encompassed both resistance during the war and “just reprisals” against the occupation “and their accomplices” up to 28 October 1945.¹³⁴ The Opinion notes that this amnesty, which it calls “unique” in postwar Europe for excusing reprisals,¹³⁵

still has legal effects [and]. . . 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. 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.¹³⁶

The Opinion notes arguments that the amnesty might not have applied to crimes against humanity, but also that no such trials have ever been brought.¹³⁷

¹³² Legal Opinion (Frowein, Sec. 9 (44)). Kingsland would allow retrials according to accepted procedure. Legal Opinion (Kingsland).

¹³³ Legal Opinion (Frowein, Sec. 9, footnote 33).

¹³⁴ Law No. 115 of 1946, Czechoslovak Provisional National Assembly.

¹³⁵ Legal Opinion (Frowein, Sec. 10 (48)).

¹³⁶ Legal Opinion (Frowein, Sec. 10 (45-6)).

¹³⁷ Legal Opinion (Frowein, Sec. 10 (49) and footnote 42)(noting work by J. Hon and J. Šitler, Law no. 115/46, dated 8 May 1946, its genesis and implementation and criticism, giving publication as 1996 and edited version as 2002); Legal Opinion (Bernitz, Sec. 8, para. 2).

Nonetheless, having asserted that the amnesty violates human rights and EU law, the Opinion raises a ‘settled expectations’ objection to lifting the amnesty, and thus exposing individuals to criminal prosecution, 50 years after the fact; more precisely, the Opinion notes that settled expectations argue against making revocation of the amnesty an obligation in the accession process:

[I]t 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.¹³⁸

Lastly, we may read some implied legal standards in the assumption that all EU citizens will have the same rights after accession – which suggests that deviation from that standard might violate EU norms – and in the comment that confiscations arose in “the very special circumstances after World War II[.]”¹³⁹ which suggests that comparable discriminatory confiscations might raise a legal issue if they happened today.

Taking all its arguments together, what the Legal Opinion clearly prohibits is any possibility that expellees could suffer any *additional* disability (such as having a lesser right to acquire Czech citizenship or property, or having an *in absentia* criminal judgment enforced against them) after accession. Such a differentiation “would be a fundamental breach with European Union traditions and might even give rise to legal challenge as a discriminating treaty

¹³⁸ Legal Opinion (Frowein, Sec. 10 (52)). *See also* Legal Opinion (Bernitz, Sec. 8, para. 3) (“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. . . . However. . . [it] would not be necessary, 56 years later, to link firm demands for repeal of the law to the Accession Treaty as a condition.”).

¹³⁹ Legal Opinion (Frowein, Sec. 5(20)).

provision not in line with the general constitutional principles on which the European Union has been established.”¹⁴⁰

On the Legal Opinion’s view, therefore, an expelled German would have to have the same right to acquire property as any other EU citizen.¹⁴¹ However, this does not necessarily proscribe all continuing disability, broadly understood. Any claim that the property confiscations constitute a *continuing* harm that might violate EU norms is rejected:

[I]t is clear that the [confiscation] Decree [No. 108] 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.¹⁴²

And the assumption of obligatory equality – “the understanding that from accession all European Union citizens have equal rights in the territory of the Czech Republic[]”¹⁴³ – on which the Legal Opinion’s view is based is a sub-text to its core finding, that “[t]he Czech accession to the European Union does not require the repeal of the Beneš-Decrees or other legislation[.]”¹⁴⁴ In reaching that view, the Legal Opinion logically rejects any legal relationship between restitution of citizenship or property and EU law; claims for restitution for the actual expulsion are not addressed at all.

¹⁴⁰ Legal Opinion (Frowein, Sec. 4(12)).

¹⁴¹ Provided, of course, he is also a citizen of another EU state – nothing in the Legal Opinion contemplates that the Czech Republic would need to treat expellees who citizens of a non-member state equally on questions of citizenship, property, or admission to its territory.

¹⁴² Legal Opinion (Frowein, Sec. 4(15)).

¹⁴³ Legal Opinion (Frowein, Sec. 12(8)).

¹⁴⁴ Legal Opinion (Frowein, Sec. 12(8)).

The Legal Opinion declares that, owing to the supremacy of EU law, any Decrees incompatible with that law would be “automatically inapplicable.”¹⁴⁵ But it does not itself actually definitively identify any such Decrees. And since, as we have seen, no EU institution has ever asserted any incompatibility, and no domestic Czech court has found any incompatibility,¹⁴⁶ the inference must be that the Decrees (or more precisely the broader set of legal norms rejecting restitution claims) are compatible with EU law and with the fundamental norms underlying that law. Even the two points which the non-binding Legal Opinion indicates might violate EU law – the amnesty and *in absentia* convictions – were in the event not repealed prior to accession, and no objection was raised to this.

4. The Potsdam Powers

The states involved in the original expulsions rejected any link to accession. The Soviet Union, the United States, and the United Kingdom were all signatories to the Potsdam Declaration and were in actual and legal control of Germany and Austria during the expulsion period.¹⁴⁷ The Soviet Union was in effective control of much of Poland, Czechoslovakia and eastern Germany during the expulsions. The United States was in control of portions of western Bohemia at the end of the war. The United Kingdom was not in occupation of any expulsion source territory. Russia, as successor to the Soviet Union, is

¹⁴⁵ *Amministrazione della Finanze dello Stato v Simmental SpA* (ECJ, 1978) 3 CMLR 263 (Case 106/77), at 17 (“*Amministrazione d. Finanze v. Simmental*”) (“[I]n 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. . .render automatically inapplicable any conflicting provision of current national law...”)

¹⁴⁶ *Amministrazione d. Finanze v. Simmental* 21 (“[E]very national court must. . .apply Community law in its entirety. . .and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.”).

¹⁴⁷ France, although an occupying power, was not signatory to Potsdam.

also an expulsion source country, being possessed of Kaliningrad *oblast*, formerly part of East Prussia, its title to which was confirmed in the 1990 peace treaty.¹⁴⁸

Of course the Potsdam powers' role and rights had been entirely extinguished by the 1990s, and therefore by the time the controversy arose they were in the same formal position as any other state. However, it is generally conceded that actors with an immediate stake in a controversy have greater salience in the construction of customary law, and to the degree the controversy involved the contemporary evaluation of historical actions, the views of the participants who were directly implicated carries the greatest weight.¹⁴⁹ Repudiation of the historical or contemporary effects of the Potsdam Declaration by its own signatories would surely have greater weight than that of any three states chosen at random.

After it came under attack from German, Austrian and Hungarian politicians concerning the expulsions, the Czech Republic solicited reconfirmation of the Potsdam Declaration's validity from the three Powers.¹⁵⁰ At the time of the Czech Parliament's Resolution, British Prime Minister Tony Blair publicly supported the Czech position, declaring "the results of the war could not be brought into question."¹⁵¹ At a press conference in Prague in April 2002, Blair reportedly "adhered to the British cabinet's stand of 1996 which declared World War II results unchangeable and the Potsdam conference. . .unchallengeable[.]" and further indicated that the "decrees were an issue ensuing from the past, which should not influence

¹⁴⁸ Final Treaty, Art. 1 § 1, 3.

¹⁴⁹ Recall the Czech Republic's formal position that the Potsdam powers authorized the expulsions.

¹⁵⁰ See Legal Opinion (Frowein, Sec. 7(34-5)). See also World News Connection (Newswire), "Izvestiya Interviews Czech Premier Zeman on Russian Visit," NTIS, US DEPT. OF COMMERCE, 16 April 2002 (quoting Zeman stating that "[i]n my opinion it is essential to get the support of all powers which signed the Potsdam treaty in 1945. That is not only in the interests of the Czech Republic, it is in the interests of these powers.").

the EU enlargement process.”¹⁵² Russian President Vladimir Putin expressed clear support for the Czech position when Zeman visited him the following week.¹⁵³ Shortly thereafter, United States Undersecretary of State Marc Grossman joined Blair’s statement.¹⁵⁴

Presumably a desire to reconfirm the postwar order and their own role in it, as well as a desire to ensure the smoothness of the accession process, led these states to prefer the Czech position over the potentially disruptive Sudeten claims. But whatever the reasons, none of the Potsdam powers has ever repudiated its role in the expulsions or accepted that the expulsions require restitution; Article XIII of the Potsdam Declaration retains its unchallenged, quasi-constitutional role in the postwar European order.

5. International Courts and Quasi-Adjudicative Bodies

The Human Rights Committee of the International Covenant on Civil and Political Rights¹⁵⁵ (the Committee), like similar international institutions, plays an important if subsidiary role in shaping human rights law. Its review of states’ reports as well as its interpretative function in

¹⁵¹ Kozakova, “Benes Decrees Confirmed.”

¹⁵² CTK news agency, “Blair tells Czech premier postwar decrees no obstacle to Czech EU entry,” BBC INTERNATIONAL REPORTS (EUROPE), 8 April 2002 (quoting Zeman as saying he “highly esteem[s]” Blair’s reassertion of the 1996 cabinet declaration and “the validity of the Potsdam conference conclusions”). *See also* Czech News Agency, “Czech Press Survey,” FINANCIAL TIMES INFO. LTD., 9 April 2002 (surveying article of same date by Jan Kovarik in *Pravo*).

¹⁵³ World News Connection (Newswire), “Czech PM Zeman Obtains Russian President’s Assurance Over Postwar Benes Decrees,” NTIS/U.S. DEPT. OF COMMERCE, 18 April 2002 (reporting on Jan Horak, “Putin: War Results Cannot Be Changed,” *Pravo*); Czech News Agency, “Russia fully supports CzechRep’s [*sic*] position on Benes decrees,” FINANCIAL TIMES INFO. LTD., 17 April 2002 (spokesman Sergei Prichodko quoting Putin as saying that “Attempts by some forces to reverse the results of World War Two and to question the laws issued in this respect are ungrounded and have nothing in common with reality”).

¹⁵⁴ BBC International Reporting (Europe), “US official backs Blair’s standpoint on Czech postwar decrees,” BBC MONITORING SERVICES, 18 April 2002; Czech News Agency, “U.S. Grossman sides with Blair on Benes decrees,” FINANCIAL TIMES INFO. LTD., 18 April 2002. I have found no text or report of the U.S. position being expressed at any higher or more definitive level, to which the Legal Opinion apparently alludes.

generating General Comments help define the content of human rights obligations.¹⁵⁶ In particular, its quasi-adjudicatory decisions in response to individual communications brought under the First Optional Protocol to the Covenant,¹⁵⁷ though not formally binding or enforceable, can establish “a duty to provide individual reparation and take preventive measures for the future[.]”¹⁵⁸ which in turn indicates the shape of legal norms.

The Committee has considered a number of individual communications relating to the Sudeten controversy; these concerned not the expulsions as such but post-communist Czech and Slovak property restitution laws, which provided compensation for expropriations after 1948. That year marked the Communist seizure of power, but it also marked the end of the major phase of expulsions; as a date selected in the early 1990s to demarcate the legal and historical landscape, 1948 surely relates at least as much to that equally momentous episode. And indeed the complaints brought before the Committee alleged discrimination on the grounds that the Czech (or Slovak) authorities had excluded them from compensation because of their German ethnicity.¹⁵⁹ Thus the complaints did not technically concern the actual expulsions and confiscations, but decisions to deny compensation in 1991 and 1992.¹⁶⁰

¹⁵⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976 (“ICCPR”).

¹⁵⁶ See Thomas Buergenthal, “The Human Rights Committee,” THE UNITED NATIONS AND HUMAN RIGHTS (Philip Alston, ed.)(2000), *cited in* HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 711, 732 (2000)(“STEINER AND ALSTON”)(discussing the “lawmaking process of the Committee”).

¹⁵⁷ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* 23 Mar. 1976.

¹⁵⁸ Torkel Opsahl, “The Human Rights Committee,” THE UNITED NATIONS AND HUMAN RIGHTS 412 (Philip Alston, ed.)(1992)(noting that “as a source of case law, the material is less developed than in, for instance, the European system, because the Committee does not go to the same lengths in its published reasoning.”).

¹⁵⁹ Various communications alleged violations of ICCPR, Art. 2, 12, 14, 17, 26, and 27. See, e.g., Drobek v. Slovakia, Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein, Communication No. 643/1994, 14 July 1997, UN Doc. CCPR/C/60/D/643/1995 (“*Drobek v. Slovakia*”), para. 1 (alleging re Art. 2, 17 and 26); Schlosser v. The Czech Republic, decision on admissibility, Communication

In certain of those cases the Committee found a violation of ICCPR Article 26,¹⁶¹ allowing a narrow class of expellees who had retained their citizenship after 1948 to claim recovery for confiscated property.¹⁶² But the Committee based this view on its objection to the requirement in the legislation that claimants currently be Czech (or Slovak) citizens,¹⁶³ and it has never extended that logic to the massive denaturalizations prior to 1948. In no case has it found that it was discriminatory for the Czech Republic or Slovakia to limit restitution to the post-1948, communist-era confiscations. In *Schlosser v. The Czech Republic*, for example, the Committee noted that it

has consistently held that not every distinction of differentiation in treatment amounts to discrimination. . . . The Committee considers that, in the present case, 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. . . merely because. . . it does not compensate the victims of injustices allegedly committed by earlier regimes.¹⁶⁴

No. 670/1995, 21 October 1998, UN Report of the HRC, Vol. II, GA Official Records, 54th Session, Supplement No. 40 (A/54/40) (“*Schlosser v. Czech Republic*”), para. 1 (alleging re Art. 12, 14, 26 and 27).

¹⁶⁰ A claim based on actions in 1945 would presumably be outside the Committee’s jurisdiction *ratione temporis*, as the ICCPR did not enter into force until 1976. In *Koutny v. Czech Republic*, for example, the Committee found that a claim based on a 1951 decision confirming a confiscation under Decree 108/1945 would be “outside the Committee’s competence *ratione temporis* and thus inadmissible. . . .” *Koutny v. Czech Republic* 6.2.

¹⁶¹ ICCPR, Art. 26 (“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. . . language. . . political or other opinion, national or social origin, property, birth or other status.”).

¹⁶² See, e.g., *Des Fours Walderode v. Czech Republic*, CCPR; Legal Opinion (Frowein, Sec. 7(32-3))(noting the case “is characterised by very specific facts[.]” since Des Fours Walderode had retained his citizenship and left the country after the 1948 cut-off). The 1991 Czech property restitution law as interpreted by the Committee must therefore allow the possibility of restitution for some Germans denaturalized after 1948, albeit on grounds indistinguishable from those raised by complainants who were never expelled or were ethnic Czechs. Cf. *Simunek et al. v. Czech Republic*, Views, Communication No. 516/1992, 19 July 1995, UN Doc. CCPR/C/54/D/516/1992; *Blažek, Hartman and Křížek v. Czech Republic*, Views, Communication No. 857/1999, 12 July 2001, UN Doc. CCPR/C/72/D/857/1999.

¹⁶³ See, e.g., *Adam v. Czech Republic*, Communication No. 586/1994, 23 July 1996, UN Doc. CCPR/C/57/D/586/1994, para. 12.4-8; *Simunek et al. v. Czech Republic*, Views, Communication No. 516/1992, 19 July 1995, UN Doc. CCPR/C/54/D/516/1992, para. 11.4-8.

¹⁶⁴ *Schlosser v. Czech Republic*, para. 6.5 (relying on *Drobeek v. Slovakia*, which at para. 6.5 uses the same language). See also *Malik v. Czech Republic*, para. 6.5.

The Legal Opinion, reviewing the Committee decisions, takes it as obvious that the Czech law may properly “limit[] restitution to people who *have shown loyalty* to Czechoslovakia. . . . 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.”¹⁶⁵

The Committee’s rationale therefore effectively explicitly rejects the core claim of Sudeten expellees, at least as it relates to the ICCPR: that they were victims of ethnic discrimination meriting contemporary restitution. The Committee has declared almost all Sudeten claims inadmissible.¹⁶⁶ The Committee’s limited objections to the restitution law do not constitute an objection to the expulsions, denationalizations or confiscations as such: at no point has the Committee suggested that failure to abolish the Decrees or make restitution to expellees as a class might violate Article 26 or any other norm, and the Czech Republic in fact has made no alterations to its laws in response to any decision of the Committee.¹⁶⁷

Individual members of the Committee disagreed with the decisions in several cases. In *Drobek v. Slovakia*,¹⁶⁸ for example – a case later relied upon directly by the same dissenters in several Czech cases¹⁶⁹ – two members suggested that the communication’s author had stated a claim of continuing discrimination in that Slovak authorities had excluded the pre-1945

¹⁶⁵ Legal Opinion (Frowein, Sec. 7 (36))(emphasis added).

¹⁶⁶ See, e.g., *Malik v. Czech Republic* (non-exhaustion of domestic remedies, failure to substantiate claims under Art. 14 and 26); *Schlosser v. Czech Republic* (non-exhaustion of domestic remedies, unsubstantiated claim under Art. 14, 26 and 27); *Koutny v. Czech Republic* (inadmissible *ratione temporis* and failure to exhaust domestic remedies); see also Legal Opinion (Frowein, Sec. 7 (31)).

¹⁶⁷ Legal Opinion (Bernitz, Sec. 6, para. 1).

¹⁶⁸ *Drobek v. Slovakia*, Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein.

confiscations from the post-communist property restitution regime.¹⁷⁰ The dissenters did not necessarily indicate agreement with the claim, only that they thought it admissible on its face.¹⁷¹ Still, the dissenting view indicates an alternative interpretation both as to the substantive complaint and the procedural availability of a mechanism to consider it. If this had been the preferred view, it would clearly have constituted indicia of an entirely different scope of human rights obligations touching ethnic discrimination and expulsion; in particular, it would have admitted a broader interpretation of continuing harm.

But this dissenting view was not the Committee's view, which reinforces the broader consensus that Sudeten claims, considered as a whole, do not sound in contemporary human rights norms. The existence of the dissents merely highlights the contours of that consensus. Asking "whether in the view of the [Committee] the Czech restitution legislation as regards confiscations under the [Decrees]. . .should be amended before accession[.]" Frowein locates the Committee's view in the broader legal-political consensus rejecting Sudeten claims:

There are decisive arguments against such a view. Nobody has so far argued that the Czech Republic should reconstitute all property confiscated under the Beneš-Decrees. . . . 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. . . . [T]his decision has been recently confirmed by the powers which were parties to the Potsdam agreements.¹⁷²

¹⁶⁹ See *Schlosser v. Czech Republic*, Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein (partly dissenting); *Malik v. Czech Republic*, Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein (partly dissenting).

¹⁷⁰ *Drobek v. Slovakia*, Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein.

¹⁷¹ The dissenters also noted that Slovakia had not responded to the allegation. *Drobek v. Slovakia*, Individual Opinion by Committee members Cecilia Medina Quiroga and Eckart Klein.

¹⁷² Legal Opinion (Frowein, Sec. 7(34-5)).

Other Adjudicative Instances: Whatever the Committee's part in defining customary law's content, international courts certainly play a prominent role. The International Court of Justice (ICJ) is the "principal judicial organ of the United Nations"¹⁷³ responsible for adjudicating treaty disputes, questions of international law, breaches of international obligations and reparation for such breaches;¹⁷⁴ it applies treaties, "international custom, as evidence of a general practice accepted as law" and "general principles of law recognized by civilized nations[.]"¹⁷⁵ Although its decisions bind only the parties,¹⁷⁶ the interpretative authority of the ICJ is widely accepted, and it would be difficult to imagine a robust consensus on the scope of a human rights norm that ran clearly counter to a ruling of the ICJ. The same is even truer within the European context regarding decisions of the European Court of Human Rights (ECHR),¹⁷⁷ the normative influence of which also extends beyond Europe.¹⁷⁸

The ECHR and ICJ have each adjudicated claims relating to the expulsions.¹⁷⁹ These cases had highly particular facts¹⁸⁰ and were decided on narrow jurisdictional grounds; both,

¹⁷³ Statute of the ICJ, Art. 1.

¹⁷⁴ See Statute of the ICJ, Art. 36 (2)(a-d).

¹⁷⁵ Statute of the ICJ, Art. 38 (1)(a-c), and at (d), "judicial decisions and the teaching of the most highly qualified publicists. . .as subsidiary means[.]"

¹⁷⁶ See Statute of the ICJ, Art. 59; see also Charter of the United Nations, Art. 94. The Court has jurisdiction subject to a declaration of the state involved. *Id.*, Art. 36 (1).

¹⁷⁷ The ECHR was created by the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (amended)("Convention"). On the ECHR's influence, see, e.g., Andrew Drzemczewski and Meyer Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, As Established by Protocol No. 11*, 15 HUM. RTS. L. J. 81, 82 (1994)(calling the Convention's achievements "quite staggering, the case-law of the [ECHR] exerting an ever deeper influence on the laws and social realities of the State parties.").

¹⁷⁸ See STEINER AND ALSTON 808 ("the jurisprudence of the Court. . .has been influential in the normative development of other parts of the international human rights system.").

¹⁷⁹ See *Liechtenstein v. Germany*, ICJ; *Prince Hans-Adam v. Germany*, ECHR; *Des Fours Walderode v. The Czech Republic*, Decision as to Admissibility, ECHR (Second Section), Application No. 40057/98, 4 March 2003 ("*Des Fours Walderode v. Czech Republic*, ECHR"); *Kammerlander v. The Czech Republic*, Partial Decision as to

however, reached decisions that effectively contracted the scope for Sudeten claims. In *Prince Hans-Adam II of Liechtenstein v. Germany*, for example, the ECHR decided that since the expropriation had occurred prior to the entry into force of the ECHR in 1953 and its Protocol I in 1954, “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.”¹⁸¹ The ICJ, though not confronting a similar restriction on its institutional lifespan, nonetheless also found it lacked jurisdiction *ratione temporis*: it determined that there was indeed a dispute, but that it had arisen “in the Settlement Convention¹⁸² and the Beneš Decrees[.]”¹⁸³ that is to say, prior to the entry into force in 1980 of the European Convention for the Peaceful Settlement of Disputes on which Liechtenstein based its claim.¹⁸⁴ Thus neither court reached the substantive questions implicated by Sudeten claims. This is not to say that they rejected those claims, but evidently they did not feel compelled, or able, to affirm them; these two courts’ judgments do not provide any support for a claim

Admissibility, ECHR (Second Section), Application No. 1972/04, 4 May 2004 (“*Kammerlander v. Czech Republic*”).

¹⁸⁰ Both courts have reviewed claims against Germany arising from the display in Cologne of a painting that had been property of the House of Liechtenstein but was seized under Decree 12/1945. See generally Andrea Gattini, *A Trojan Horse For Sudeten Claims? On Some Implications Of The Prince Of Liechtenstein v. Germany*, 13 E. J. INT’L L. 513 (September 2002); Bardo Fassbender, “Klageausschluss bei Enteignungen zu Reparationszwecken – Das Gemälde des Fürsten von Liechtenstein,” NEUE JURISTISCHE WOCHENSCHRIFT 1445 (1999).

¹⁸¹ See *Prince Hans-Adam v. Germany*, ECHR, at 85 (and finding, at 87, no violation of Protocol I, Art. 1).

¹⁸² Although it might not be immediately apparent given that Liechtenstein is not part of Germany, the Settlement Convention was thought relevant because property of the House of Liechtenstein in Czechoslovakia was deemed by the German courts to be ‘external German assets’ – and evidently, the Czechoslovak authorities who confiscated it in 1945 though so too. German courts “have always relied on the assessment of the expropriating State.” *Liechtenstein v. Germany*, ICJ, at 4.

¹⁸³ *Liechtenstein v. Germany*, ICJ, at 6.

¹⁸⁴ The European Convention for the Peaceful Settlement of Disputes, Art. 27(a) provides that “[t]he provisions of this Convention shall not apply to:

- (a) disputes relating to facts or situations prior to the entry into force of this Convention as between parties to the dispute.”

Liechtenstein v. Germany, ICJ, at 3.

of legal obligation on the Czech Republic to provide any form of restitution. Certainly the Legal Opinion relies on *Prince Hans-Adam II* to construct its argument that the Decrees do not violate any international or EU norms.¹⁸⁵

The ECHR has also considered two related property cases arising out of the expulsions. In *Des Fours Walderode v. Czech Republic*, the ECHR rejected a claim of continuing deprivation of property, holding *inter alia* that as the applicant had been deprived of his property before the entry into force of the Convention, “there is no question of a continuing violation of the Convention which could be imputable to the Czech Republic and could have effects on the temporal limitations of the competence of the Court. . .[and a]ccordingly the Court is not competent *ratione temporis* to examine the circumstances under which the applicant’s family was deprived of the property[.]”¹⁸⁶ and further that Des Fours Walderode had failed to demonstrate a claim to either “existing possessions” or a “legitimate expectation” of their recovery, as required under the Convention, and thus that the complaint was incompatible *ratione materiae* with the provisions of the Convention[.]”¹⁸⁷ In *Kammerlander v. Czech Republic*, the ECHR held it was not competent to adjudicate a complaint concerning the Czech

¹⁸⁵ Legal Opinion (Frowein, Sec. 6 (25)) (“[O]ne may see a confirmation in [the Court’s judgment] of the validity of the confiscation measures in the international legal order. . .[T]he judgment clearly confirms the view. . .that confiscations in 1945/46 do not raise an issue under the [Convention].”). The Legal Opinion was written prior to the ICJ’s decision in *Liechtenstein v. Germany*.

¹⁸⁶ *Des Fours Walderode v. Czech Republic*, ECHR (Sec. entitled “The Law,” para. 2). The Court’s reasoning relies on its finding in *Prince Hans-Adam v. Germany* and in *Malhous v. The Czech Republic*, Judgment, ECHR, Application No. 33071/96, 12 July 2001.

¹⁸⁷ *Des Fours Walderode v. Czech Republic*, ECHR (Sec. entitled “The Law,” para. 2)(discussing Convention, Art. 35 § 3-4 and Protocol 1, Art. 1). Cf. *Malhous v. The Czech Republic*, Judgment, ECHR, Application No. 33071/96, 12 July 2001 (finding discriminatory application of the post-communist restitution laws in regards to property confiscated in 1949, unrelated to the Decrees regime).

Republic's alleged failure to provide a remedy in response to the ICCPR Committee's views on the *Des Fours Walderode* communication.¹⁸⁸

Neither case suggests any scope for recognizing Sudeten claims; both cases reaffirm the ECHR's jurisdictional limits and its substantive jurisprudence on the definition of possessions in a way that effectively bars consideration of the great majority of the Sudeten claims.¹⁸⁹ This suggests the Court did not consider interpretations more amenable to those claims to be necessary or correct.

6. Legal Scholars and Publicists

International law recognizes the “teachings of the most highly qualified publicists of the various nations” as a subsidiary source of evidence for determining the rules of international law;¹⁹⁰ their views are therefore of greater legal relevance than those of mere individuals or advocacy groups. A publicist's view is subsidiary in the sense that its weight and value only surfaces when some other, otherwise authoritative body relies upon – acknowledges and legitimates – that view.¹⁹¹ On the other hand, publicists are instrumental in identifying the content and meaning of authoritative actors' statements and activities: without a publicist's

¹⁸⁸ *Kammerlander v. Czech Republic* (held admissible only as to a separate complaint of unreasonable delay in proceedings, inadmissible in all other respects). Kammerlander was the widow of Des Fours Walderode.

¹⁸⁹ The ECHR has rejected a considerable number of Sudeten claims principally for failure to exhaust domestic remedies. See “Elutasították 90 szudétánémet keresetét Csehország ellen,” MAGYAR RÁDIÓ ONLINE, 30 December 2005, 16:17, <http://64.233.179.104/search?q=cache:FFFdt3eLUuQJ:www.radio.hu>.

¹⁹⁰ Statute of the ICJ, Art. 38(1)(d).

¹⁹¹ The Legal Opinion occupies a hybrid position. It is technically just three noted scholars' views. However, its attachment to a recognized international body gives it a somewhat different character – making it in turn the object of publicists' arguments. Certainly other scholars assume it has a different value than a journal article and treat it accordingly, and therefore this Article does too.

subsidiary and derivative intervention, the scope or even existence of a customary rule might not be clear to states.

Scholars' views represent a greater diversity on the Sudeten controversy than those of states or international organizations, which as we have seen almost uniformly resists claims for restitution. Some scholars argue vigorously for the expellees' claims, especially the incompatibility of the amnesty provisions with human rights norms,¹⁹² while others argue equally vigorously against.¹⁹³ However, very few scholars have identified any extant or even nascent *legal obligation* to afford expellees restitution. Whatever the merits of any individual scholarly view, it is difficult to sustain an argument that the scholarly community's views as a whole provide evidence of an obligation in customary law. The most one could say is that there is not a consensus either way, and that alone would argue against other actors' relying on publicists' views to expand customary law to obligate the Czech Republic.

Other private actors: State actions and other analyses of Sudeten claims are located within a much broader social dialogue about expulsion, dispossession, restoration and remembrance. As noted above, such groups are well outside the classical conception of relevant actors in forming customary law. The only actors clearly calling for linking accession to restitution

¹⁹² See, e.g., DE ZAYAS; Dieter Blumenwitz, *Gutachten zur Legal Opinion on the Beneš-Decrees and the accession of the Czech Republic to the European Union*, <http://www.sbg.ac.at/whbib/templates/blumenwitz-gutachten%20z.%20frowein.htm> (28 December 2004); C. Tomuschat, A. VON BOGDANDY, P. MAVROIDIS, AND Y. MÉNY, *EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION* (2002), at 451, 470 *et seq.*, cited in *Legal Opinion* (Frowein, Sec. 5, footnote 14, and Sec. 9 (50) and footnote 42).

¹⁹³ See MS, "Czech News Agency Says Reports on Beneš Decrees Contradict One Another..." RFE/RL NEWSLINE, 3 October 2002, <http://www.rferl.org/newsline/2002/10/031002.asp> (discussing various scholars' views of the Legal Opinion both favoring and opposing the idea that the Decrees warrant criticism); BURCHER; Schiller, 401; Ignaz Seidl-Hohenveldern, *Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als angeblich 'deutsches' Eigentum*, *PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS* 410, 411 (1996).

were German expellee groups.¹⁹⁴ Human rights groups such as Amnesty International or Human Rights Watch and EU research or lobby groups have not addressed the issue in any significant fashion.¹⁹⁵

. . .

Although some of actors discussed above have questioned individual acts or excesses undertaken in the course of the expulsions, I have not found any authoritative, legally generative statement that the Sudeten expulsion, denaturalization or confiscation *under their total circumstances* were illegal or require apology, repeal or compensation today. On the contrary, almost all actors (and all traditionally identified as sources of customary international law) accept the expulsions as necessary and legitimate; at most, a few observers cabin the expulsions off as *sui generis*, but this seems unsatisfactory as a matter of method. The consensus of states, pan-European and international institutions, and other actors clearly and categorically rejects any claim to restitution. What then are the argumentative rationales of this consensus? What do they imply?

B. The Four Rationales of the Consensus – Why Rejection is Preferred

The consensus rejecting Sudeten claims centers on four rationales: three closely related ‘technical’ arguments about temporal and institutional limitations – the effects of time, subsequent state action, and institutional competence – and one argument relying on an entirely different moral and legal calculus.

¹⁹⁴ See, e.g., MS, “Sudeten Germans Call on Czech President to Hold Talks on Compensation,” RFE/RL NEWSLINE, Vol. 7, No. 77, Part II, 23 April 2003 (noting call by the *Sudetendeutsche Landsmannschaft* for Czech President Klaus to hold talks on compensation and to “give reconciliation a new chance”); TIME EUROPE (2002)(noting Association of Displaced Persons head Erika Steinbach’s call to Chancellor Schröder “to link the question of Czech E.U. entry to the abandonment of the Benes Decrees.”).

¹⁹⁵ Kozakova, “Benes Decrees Confirmed” (noting Pan-European Association chairman Otto Habsburg’s repeated criticism of the Beneš Decrees).

1. Antiquity

One line of argument relies on the passage of time to explain why Sudeten claims should fail today. The expulsions and confiscations occurred sixty years ago: any harm they caused has long since occurred and lacks continuing effect, and in any event new expectations have arisen around social circumstances, such as property rights and settlement patterns, that have changed over time.

Although some observers concede that Decrees with specific continuing effects would require revision – as we have seen, the Legal Opinion suggests that enforcement of *in absentia* convictions would violate EU norms – all define continuing harm in a way that excludes any effects from the original loss of property or citizenship or the expulsion itself.

For example, the Legal Opinion’s view is that expellees must not suffer additional, present-day disability after accession: expellees must have the same right to acquire property (including their own former property) or citizenship as any EU citizen; differentiation “might even give rise to legal challenge as . . .not [being] in line with the general constitutional principles on which the European Union has been established.”¹⁹⁶ But harm that has already been suffered cannot, on the Legal Opinion’s view, constitute the basis for a legal obligation. Likewise, for the Legal Opinion the fact that denaturalization operated at a specific time in the past and would not prevent anyone from keeping or acquiring citizenship now is dispositive of its analysis that the Decrees do not need to be repudiated.¹⁹⁷

¹⁹⁶ Legal Opinion (Frowein, Sec. 4(12)).

¹⁹⁷ Legal Opinion (Kingsland).

Similarly, the Czech Republic's view (joined by the EU's Commissioner for Enlargement) that the Decrees are 'extinct' follows this temporal argument.¹⁹⁸ As noted above, the Czech Parliament's April 2002 Resolution reaffirmed the "legal and property relations" arising from the Decrees¹⁹⁹ but also declared that the Decrees were not now applicable:²⁰⁰ although the Decrees remain in force, changing circumstances have stripped them of effect.²⁰¹ Sudeten claimants contend the expulsions continue to deny them the benefits of citizenship and use of their property, but the universally accepted Czech view is that those acts were discrete in time; since there will be no additional acts relying on the Decrees – no actor suggests that they could be invoked against the few remaining Germans²⁰² – they lie dormant. Of course, whatever 'extinction' means as a legal category, it is something short of repudiation, abolition, or supercession. International acceptance of the Czech view necessarily implies acceptance of the Decrees' validity; that view cannot be assimilated to a claim that the Decrees offend legal norms or that revision is obligatory. At most, acceptance locates legal obligation somewhere in a continuing effects debate.

¹⁹⁸ See "Czech Accession 'Should Not Be Hindered by Benes Decrees,'" ENLARGEMENT WEEKLY, 15 April 2002. http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_150402.htm (noting the Verheugen-Zeman Joint Statement that the Decrees "no longer produce legal effects. . .are not part of the accession negotiations and should have no bearing on them.").

¹⁹⁹ MS, "Czech Lower House Approves Resolution on Benes Decrees," RFE/RL NEWSLINE, Vol. 6, No. 77, Part II, 24 April 2002; *see also* MS, "Text of Czech Resolution on Benes Decrees Made Public," RFE/RL NEWSLINE, Vol. 6, No. 76, Part II, 23 April 2002 (noting that the draft resolution "rejects attempts to open issues connected with the end and with the results of World War II[,] and declares that property restitution is "the exclusive prerogative of Czech constitutional bodies.").

²⁰⁰ See MS, "Text of Czech Resolution on Benes Decrees Made Public," RFE/RL NEWSLINE, Vol. 6, No. 76, Part II, 23 April 2002.

²⁰¹ See MS, "EU Urges Calm In Czech-German Dispute Over Benes Decrees..." RFE/RL NEWSLINE, Vol. 6, No. 97, Part II, 24 May 2002 (quoting Zeman on 'extinction').

²⁰² "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." Legal Opinion (Kingsland).

The settled expectations of those benefiting from the Decrees are also invoked. For example, as noted, the Legal Opinion acknowledges that the amnesty for reprisals against expellees “still has legal effects[.]”²⁰³ but does not consider that the fundamental norms of the Union would require its repeal before accession.

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. . .²⁰⁴

Similarly, the frequent invocation by commentators and actors of the need to ‘move forward’ and not be held hostage to by-gone debates evinces both a belief that the passage of time can have a decisive legal effect and that the claims of new generations may have become significant in their own right. Underlying all these arguments about time and settled expectations is the sense that revision could destabilize the post-war order of Europe, from which all states and populations have benefited. This is clearly the logic invoked to defeat Sudeten claims that might require changes in that order.

The passage of time also allows space for the sole theme of condemnation evident in the sources: the notion that aspects of the expulsions may have been acceptable in the past, but would not be now. For example, the Zeman-Verheugen 2002 joint statement acknowledged that “[s]ome of these acts would not pass muster today if judged by current standards – but they belong to history[.]”²⁰⁵ However, this limited form of distancing does not approach blanket condemnation of the expulsions as such – the example cited here, for example,

²⁰³ Legal Opinion (Frowein, Sec. 10 (45)).

²⁰⁴ Legal Opinion (Frowein, Sec. 10 (52)). *See also* Legal Opinion (Bernitz, Sec. 8, para. 3) (“The very existence today of such a law. . . demonstrates [a] hesitation to clean up the past. . . . However. . . [it] would not be necessary, 56 years later, to link firm demands for repeal of the law to the Accession Treaty as a condition.”).

²⁰⁵ “Czech Accession ‘Should Not Be Hindered by Benes Decrees,’” ENLARGEMENT WEEKLY, 15 April 2002, http://europa.eu.int/comm/enlargement/docs/newsletter/weekly_150402.htm.

refers to ‘some of these acts,’ not the expulsions as such, just as the Czech-German Declaration does.²⁰⁶ More importantly, it also reinforces the sense that historical wrong does not require contemporary compensation.

For this temporally limiting view also converges with the Union’s forward-looking rhetoric, which disfavors claims from the past as being antithetical to the integrative project. Thus in intervening to oppose linkages between the Sudeten controversy and accession, Commissioner Verheugen declared that “[w]e should use the language of 2002, not of 1945[.]”²⁰⁷ while EU Commission President Romani Prodi declared that “[w]e should focus on the future. The EU was founded on the sense of [mutual] forgiveness, of opening a new era.”²⁰⁸ The Legal Opinion notes “the Union is based on fundamental values which are completely different from nationalistic ideologies of Europe of the past.”²⁰⁹ It is evident in consensus of the sources that this new era forecloses claims seen as arising from the other side of the epochal divide.

2. Subsequent state action

A second line of argument relies on subsequent state acts to foreclose any claims that survived the moment of expulsion. During the Cold War and 1990s, various bilateral and multilateral agreements between states affected the status of expellees; according to this line of argument, the collective effect of these agreements has terminated expellees’ claims or

²⁰⁶ 1997 Czech-German Declaration, at III (“The Czech side regrets that, by the forcible expulsion. . .much suffering and injustice was inflicted upon innocent people. . . . It particularly regrets the excesses. . .”).

²⁰⁷ MS, “EU Urges Calm in Czech-German Dispute over Benes Decrees...” RFE/RL NEWSLINE, Vol. 6, No. 97, Part II, 24 May 2002.

²⁰⁸ MS, “EU Urges Calm in Czech-German Dispute over Benes Decrees...” RFE/RL NEWSLINE, Vol. 6, No. 97, Part II, 24 May 2002.

estopped states from pursuing them. On this logic, the Sudeten Germans might have had valid claims at some point, but these claims have been progressively narrowed and ultimately terminated by such instruments as the 1945 Potsdam Declaration, the 1954 Settlement Convention, the 1973 German-Czechoslovak treaty, the 1990 final peace treaty, and the 1997 Czech-German Declaration. These state acts constitute the legal (rather than merely factual) termination of continuing effects that allow the consensus to dismiss Sudeten claims today.

The Czech Republic considers the 1997 Czech-German Declaration a definitive closure to the issue in law.²¹⁰ Similarly, MEP Phillip Whitehead criticized the expulsions' cruelties but also believed the Declaration foreclosed the matter:

The expulsions. . .decreed by the wartime Czechoslovak government, in conjunction with the three powers at Potsdam, were of their time. . . . The wrongs involved in something so indiscriminate, like those committed to a greater extent in the Reich Protectorate and by Hitlerite Germany generally, were the subject of the 1997 declaration. . .which offered mutual apologies, in the spirit that 'injustices inflicted in the past belong in the past'.²¹¹

At least one observer goes further. Kingsland argues that Germany is actually estopped from objecting to accession due to its reliance in *Prince Hans-Adam II of Liechtenstein v. Germany* on the 1954 Settlement Convention (barring Germany from objecting to disposition of seized

²⁰⁹ Legal Opinion (Bernitz, Sec. 3, para. 7).

²¹⁰ See, e.g., MS, "Czech Foreign Minister Rules out Negotiations on Benes Decrees," RFE/RL NEWSLINE, Vol. 7, No. 208, Part II, 3 November 2003, <http://www.tol.cz/look/wire/> ("Foreign Minister Cyril Svoboda. . .ruled out any political negotiations with Germany. . . . Svoboda said the government stands by the joint 1997 German-Czech declaration. . . . That declaration 'says we will not burden our. . .relations by issues of the past. It is possible to debate what happened, but in no way to negotiate,' he said[]").

²¹¹ Phillip Whitehead, MEP, "Czech Accession and the Benes Decrees," BCSA MAGAZINE, 4 April 2002, at <http://www.labmeps-emids.fsnet.co.uk/czechacc.htm> ("Whitehead, "Czech Accession and the Benes Decrees").

“German external assets”²¹²) as well as by the 1997 Declaration, which “extends [this] argument to cover the other Decrees[:]”²¹³

[T]he 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.²¹⁴

This is a far-reaching claim – in effect that Germany had an affirmative *obligation not to prevent* Czech accession.²¹⁵ But even arguments more squarely in the mainstream effectively assert that the various states with interests in the Sudeten question have in fact already disposed of and extinguished those claims. Of course, such estoppel arguments beg the question of what sort of rights are implicated by expellees’ claims. If those claims are purely a function of the treaty relations between Germany and the Czech Republic, for example, then those states can dispose of the claims as they see fit, and this is arguably what these and other states have done.

However, if expellees were thought to have a valid human rights claim – invoking a *ius cogens* peremptory norm, for example – then no mere bilateral or multilateral treaty could defeat it.²¹⁶ By saying that states’ official acts have terminated Sudeten claims, the consensus necessarily defines those claims as the sort that can be terminated; this separates them from

²¹² *Prince Hans-Adam v. Germany*, ECHR; see also Settlement Convention, Ch. 6, Art. 3(1). Presumably Kingsland’s argument would also draw this conclusion from Germany’s subsequent, similar and successful argument concerning the Settlement Convention in the closely related litigation against Lichtenstein before the ICJ, which was decided after Kingsland wrote. See *Liechtenstein v. Germany*, ICJ.

²¹³ Legal Opinion (Kingsland).

²¹⁴ Legal Opinion (Kingsland). I do not find other support for Kingsland’s view.

²¹⁵ Germany certainly maintained before the ECHR and ICJ that the Settlement Convention barred its courts from adjudicating claims concerning property seized under the Decrees.

²¹⁶ Vienna Conv. on the Law of Treaties (1969), UN doc. A/CONF.39/27, 8 ILM 679, Art. 53, 64. See RESTATEMENT 161 (Comment to §702, note n).

peremptory norms with special protection and rejects their status as human rights claims. This may to some degree be a tautology – states cannot opt out of fundamental human rights, but if states do in fact agree to terminate a claim, it must not have been a fundamental right – but this does seem to be the logic underlying the consensus’ reliance on prior state actions in rejecting Sudeten claims.

3. *Post facto* and institutional limitations on competence

A third line of argument relies on a theory of institutional competence to extinguish Sudeten claims. One variant of this argument says that review of the expulsions by European institutions such as the EU or ECHR that were created later in time would be *ultra vires*; this is not because state action has extinguished the claim but because these young institutions lack the formal competence to judge ancient events. In another variant, these institutions lack competence on constitutional grounds not necessarily defined by time.

As an example of the first variant, as noted above both the ICJ and the ECHR each found that they lacked jurisdiction *ratione temporis* over cases implicating the expulsions, with the ECHR noting that this also barred consideration of any “continuing effects produced by it up to the present date.”²¹⁷ Similarly, the European Union arguably cannot consider claims arising from acts and agreements predating its creation.²¹⁸ Not all actors assumed that the EU lacked temporal jurisdiction: as noted, above, the European Parliament’s 2001 Resolution welcomed “the Czech government’s willingness to scrutinise the laws and decrees

²¹⁷ See *Prince Hans-Adam v. Germany*, ECHR, at 85 (and finding, at 87, no violation of Protocol I, Art. 1).

²¹⁸ See EU Treaty, Art. 307 (“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession. . .shall not be affected by the provisions of this Treaty.”).

of the Beneš government. . .which [are] still on the statute books, to ascertain whether they run counter to EU law in force and the Copenhagen criteria[.]”²¹⁹ However, this claim of temporal non-competence evidently provided a compelling rationale for many actors considering whether or not there was any basis for Sudeten claims at the European level.

Another variant relies on claims about institutional non-competence not based on the passage of time. For example, since member states of the EU retain “clear national competence”²²⁰ over questions of citizenship,²²¹ the Legal Opinion considers that the expellees’ denaturalization “is not an issue which raises any problems in the context of the accession procedure.”²²² More broadly, Commissioner Verheugen sought to calm Czech fears about restitution by excluding such claims from Europe’s legal order:

[S]ections of Czech public opinion are still worried that people in the Czech Republic could still be driven out of their homes by some kind of lawsuit for repossession. The law as it stands makes that quite impossible and no-one in Europe would or could even change that. . . .²²³

Ultra vires arguments rely on a narrowing, technical view of actors’ legal obligations, but then this is precisely why they can powerfully limit actors’ scope of obligation, as they do in the Sudeten case. Of course, limits on the competence of the EU (or other international institutions) would not limit the competence of its member states, whose sovereignty and legal personality extend back to the period of the expulsions. Consequently, the member states’ individual decisions not to review the Decrees – that is, not to condition membership

²¹⁹ European Parliament Resolution, Pt. 41.

²²⁰ Legal Opinion (Frowein, Sec. 8 (41)).

²²¹ *See* EU Treaty, Art. 17.

²²² Legal Opinion (Frowein, Sec. 8(41)). However, there must be a temporal component in the Legal Opinion’s analysis, since it also notes that denaturalization on an ethnic basis would violate fundamental norms and therefore concern EU institutions if undertaken *today*.

²²³ Verheugen 2002 Speech.

on the Decrees' repeal or any other form of restitution – confirms the sense that Sudeten claims do not create any legal obligation.²²⁴

. . .

The three lines of argument discussed above seem closely related: both the passage of time itself and agreements that states subsequently undertake affect the sense of contemporary legal effect or obligation of past events, while particular institutions may not consider themselves competent to judge the past precisely because they were created after the events to be judged. In any event, actors often muster all three arguments in combination to reach the consensus conclusion that Sudeten claims have no merit and that approving the Czech Republic's accession raises no questions of legal obligation.²²⁵

4. “Cause and effect:” Retribution for collective guilt

There is a fourth rationale that is radically different in view and effect: Arguments rejecting any *contemporary* relevance for Sudeten claims frequently discuss Sudeten Germans' *historical* participation in Nazi occupation and atrocities and draws moral conclusions from that. Unlike the other three rationales which rely on the passage of time and subsequent events – standards which could eventually extinguish any claim – the references to collaboration supply a different rationale which separates this claim from others on moral grounds. This in turn requires, not that time should pass, but that it should be preserved.

²²⁴ See Verheugen 2002 Speech (“Laws and administrative practices in all EU Member States *must* be compatible with Community law. . . . If any country's laws fall short of what is required, that problem must be put right before accession. That goes not just for the Czech Republic, but for all countries.”).

²²⁵ See, e.g., Statement by the Ministry of Foreign Affairs Deputy Spokesperson (excerpt), Paris, 19 April 2002, <http://www.france.diplomatie.fr/actu/article.gb.asp?ART=24148> (calling the controversy “a very old matter[.]” noting that the Decrees “concern a period of history that European integration has aimed to supersede[.]” which because they predate the EU treaties “have no bearing now and cannot interfere with the continuation and completion of the country's membership negotiations[.]” and saying the 1997 Declaration “seeks to overcome historical disputes and focus on the future[. . .]. The enlargement process has been conceived in that same spirit. Its aim is. . . .to set the seal on the reunification of the European continent[.]”).

The consistently forward-looking pronouncements of actors in the consensus are often curiously paired with insistence on a precise historical chronology – as the German-Czech Declaration puts it, on “cause and effect in the sequence of events.”²²⁶ As Commissioner Verheugen declared in 2002,

[t]here is no sense in keeping scores of suffering and injustice on one side and setting them off against suffering and injustice on the other. Sense lies in recognising that human rights are universal, that injustice is injustice, everywhere, whoever it is done to, and that it should never be allowed to happen again. I am not trying to explain anything away here: not the historical context and not the sequence of cause and effect that is familiar to us all.²²⁷

Others have noted this sequence more bluntly: MEP Whitehead said the expulsions were “directed at a national minority that had thrown in its lot with the Third Reich[.]”²²⁸ while Prime Minister Zeman linked resistance to restitution or forgiveness today to Sudeten Germans’ treason against Czechoslovakia and complicity in genocide as Hitler’s “Fifth Column[.]”²²⁹ The Legal Opinion frames its discussion of Sudeten claims and Czech obligations by noting that “[i]t must also be kept in mind, *in the present context*, that Germany had started to forcibly transfer populations[.]”²³⁰ and declares that reprisals

were actions in reaction to what had happened to the Czechoslovak population by [*sic*] Germans between 1938 and 1945. Although most of the victims were innocent it cannot be overlooked that the violence committed

²²⁶ “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.” *1997 German-Czech Declaration*, I.

²²⁷ Verheugen 2002 Speech.

²²⁸ Whitehead, “Czech Accession and the Benes Decrees.”

²²⁹ Otmar Lahodynsky, “Populistischer Pro-Nazi-Politiker,” PROFIL, 21 January 2002 (interview with Prime Minister Milos Zeman)(author trans.). See TIME EUROPE (2002)(noting controversy surrounding Zeman’s interview with *Profil*).

²³⁰ Legal Opinion (Frowein, Sec. 5, footnote 9)(emphasis added).

against Germans at that time was in particular a reaction to what had happened during German occupation. . . .To quote [historian] Ian Kershaw[:]

‘The raw brutality with which the Germans had treated those whose countries. . .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.’²³¹

This is not quite right, since the ‘harvest’ occurred not just ‘during the last months’ but after the war, in peacetime; still, the important point is that this account sets the treatment of German civilians in the context of their collaborative behavior during the war. And why – or more precisely, why do so *now*? For now is when the Legal Opinion was written, while these events took place a half-century ago – surely, as the other rationales of the consensus view suggest, time and subsequent acts should render the precise causal sequence immaterial?

The relevance of such precise causal-temporal references in legal analysis of *contemporary* claims is unclear unless one recognizes that it is in fact a rationale of revenge and collective guilt. For time and causality are essential to revenge and guilt: one is guilty for something already done; one exacts revenge for wrongful acts already performed. Most sources commenting on the Sudeten claims resort explicitly to such causality – they link the Sudetens’ collaboration with the Nazis to their subsequent expulsion²³² – and therefore accept this rationale. This has implications for describing the real shape of the underlying legal-political rule because, obviously, this is a form of justification.

²³¹ Legal Opinion (Frowein, Sec. 10(54)(citing I. KERSHAW, HITLER 1936-1945, at 986 (2000) [apparently English translation from the German edition]).

²³² See, e.g., CTK, “Appeals for reconciliation,” 24 August 2005 (reporting President Klaus’ speech in March 2003 and his view that “it is necessary to respect the way historical events followed each other, or that the transfer was a reaction to the Nazi terror.”).

IV. A Modest Observation: Four Curious Implications of Rejecting Sudeten Claims

Es kann wohl nichtsagende geschriebene, nicht aber nichtsagende ungeschriebene Normen geben.

– *M. Sassòli*²³³

[M]an’s worst folly is a persistent attempt to adjust, smoothly, rationally, to the unthinkable.²³⁴

Both the consensus and its four rationales seem uncontroversial. No state or other relevant actor supported Sudeten claims, and the rationales they provided – it had been a long time, states had already disposed of the issue, Europe’s institutions and its very order preclude revisiting this matter, and the expulsions were after all a consequence of the Germans’ own conduct in the war – likewise receive broad support. There is simply no traction for Sudeten claims, which failed to deflect Czech accession in any way. Yet this very *absence* of effect implies several surprising things about the shape of our law.

A. Is There a Sudeten Corollary Limiting the Law of the Holocaust?

The accretion of judicial decisions, treaty commitments and customary law expressed in Nuremberg, the Genocide and Geneva Conventions and the Yugoslav and Rwanda Tribunals seems to confirm an iron rule prohibiting ethnic cleansing – a Law of the Holocaust. Yet that body of law had crystallized before the Sudeten controversy reached its decisive point in the early 21st century; what is the effect of rejecting Sudeten claims on this iron rule?

²³³ M. SASSÒLI, BEDEUTUNG EINER KODIFIKATION FÜR DAS ALLGEMEINE VÖLKERRECHT 187 (1990) (“There can be entirely meaningless written norms, but not meaningless unwritten norms.”)(author trans.).

²³⁴ “The Price of Survival,” TIME, 11 April 1969 (review of Kurt Vonnegut, SLAUGHTERHOUSE-FIVE, OR THE CHILDREN’S CRUSADE).

In his 2002 speech, Commissioner Verheugen linked the forward orientation of the Union, the ancientness of the Sudeten expulsions, and a curiously elliptical expression of causality in describing “how we deal with the burden of the past[:]”

The fact is: in today’s uniting Europe, expulsion, dispossession, oppression or discrimination as a political means are unthinkable. Anywhere. And under any circumstances. However, equally unthinkable is a repetition of the fascist terror which had preceded all this.”²³⁵

On its face, this rejects expulsion absolutely. Yet the formulation is more precise: total rejection – followed, strangely, by ‘however’ – is balanced against another ‘equally unthinkable’ event; the implication must be that if fascist terror or its equivalent *were* to repeat itself, then a righteous Europe’s response could be repeated as well.²³⁶

Indeed, most efforts to isolate the expulsions as products of their time deploy causal justifications that necessarily contemplate similar action in similar circumstances. For Whitehead, “[m]easures taken in response to a time of unparalleled evil are not applicable in the modern era of democratic resolution.”²³⁷ This seems to suggest that expulsions are illegitimate because democracies do not need them, yet the argument’s engine is the *absence* of ‘unparalleled evil.’²³⁸ Nor does it condemn the expulsions as such: there is none of the categorical rejection characterizing discussion of, say, the Holocaust or Japanese internments, and in cabining the expulsions as unique (‘unparalleled’), it necessarily reserves a potential response should history repeat. The seeming fixity of our resistance to expulsion

²³⁵ Verheugen 2002 Speech.

²³⁶ This immediately follows Verheugen’s aforementioned invocation of “cause and effect.”

²³⁷ Whitehead, “Czech Accession and the Benes Decrees.”

²³⁸ After all, two signatories of the Potsdam Declaration were democracies.

– its ‘unthinkability’ – is actually a function of the conflict preceding it: under sufficiently exigent circumstances, expulsion as a legal means would be thinkable.

At its narrowest, the Sudeten Corollary to the Law of the Holocaust holds that when a dictatorship engages in aggression and the most extreme depredations, other states (whether democratic or not) may engage in collective, ethnically determined expulsions and confiscations *after* the conflict – or may later defend their legal immunity if they do. Even this narrow postulate would limit the seemingly universal prohibition on expulsion suggested by the Law of the Holocaust.

The Corollary further suggests that states may shield themselves from liability for mass expulsions (or for failing to oppose them) by several devices: they may define the initial harm of expulsion as discrete and non-continuing; they may structure subsequent interactions through institutions with purely prospective competence; or they may simply wait for time to pass. Perhaps the Corollary’s ‘unthinkable potential’ – the fact that we reserve this option in law, but tend, with Verheugen, not to acknowledge it in advance of using it – necessitates denial of restitution: if it were acknowledged, the likely consequences of that potential would have to be calculated and discounted in the present. Denying restitution not only stabilizes geopolitics and lowers actors’ costs today – it lowers the costs, in a possible future, of exercising the option.

This claim is limited and precise. There are abundant indications that *renewed* use of the Decrees today would be incompatible with the European legal order, and likewise that ethnically based expulsions or confiscations are *generally* condemned as unacceptable; this

Article does not seek to argue otherwise.²³⁹ The technical turn – the determination that the Decrees are extinct or fall outside the EU’s competence – does have a certain legally generative effect. It is not trivial that rather than enthusiastically approving the Decrees, the EU has indicated that their reactivation in present circumstances would be incompatible with EU law. But this technical turn simply masks a moral and political – one might say constitutional – determination that itself is deeply and undeniably generative of the legal order.

And so this Article does argue that the broader question about whether or not ethnically discriminatory measures are available under specific and predictable circumstances has not been disposed of. On the contrary, the statements and actions of states and European institutions reveal a complex but clear conditionality: such measures are unacceptable *in the absence of exigent challenges to the European order*. Europe and its legal order have not rejected resort to ethnic cleansing under all circumstances; they have reserved this right – and an immunity from restitution after invoking it – in response to grave threats to that order. That is the true shape of the law.

B. How Do We Understand the Relationship of Sudeten and Holocaust Claims?

States have been subjected to various claims for restitution for past expulsions. Might not the consensus view (which defines continuing effects narrowly and excludes long-term effects of denaturalization or confiscation) limit the scope of restitution claims in other

²³⁹ See, e.g., Verheugen 2002 speech (“The presidential Decrees are no longer of legal consequence. . . . [They] are obsolete, extinct, dead law. . . . Any attempt to resurrect them as politically relevant or to use them in any way today can only bring trouble.”) While this acknowledges that the Decrees remain part of the legal system, clearly disapproval is there too. Certainly this Article does not argue that expulsion or ethnic discrimination could be casually undertaken today under just any circumstances. Readers who imagine this Article is making such an argument have assuredly misread its intention, and perhaps its proofs.

contexts? A technical, temporally-limited interpretation could eventually terminate claims by refugees in Sudan, the former Yugoslavia, or Palestine, for example; nothing in a technical interpretation allows reference to the nature of the claim or anything other than its ancientness. Either continuing effects analysis can extinguish any claim or we must have a theory as to why some claims merit greater protection against the effects of time.

Such a theory is available. It might be supposed that in observing the failure of Sudeten claims, we simply rely upon the temporal and jurisdictional rationales identified earlier. But this cannot be right, or at least not all; as also indicated earlier, there is a fourth, moral rationale. It is this rationale that in fact governs the decision, for other restitution claims subject to the same temporal and jurisdictional objections do in fact merit compensation. I speak of course about claims by the victims of Nazism. Technical objections raised against Sudeten claims do not operate with equal effect against victims of the Holocaust and Nazi aggression,²⁴⁰ who have received compensation,²⁴¹ restoration of property,²⁴² and official apologies.²⁴³

²⁴⁰ See, e.g., *Republic of Austria v. Altmann*, 124 S.Ct. 2240 (7 June 2004) (allowing suit by a Holocaust victim against Austria under the Foreign Sovereign Immunities Act for return of paintings seized in 1938); see also Charles H. Brower II, “*Republic of Austria v. Altmann*, 124 S.Ct. 2240. United States Supreme Court, June 7 2004,” in *International Decisions* (David D. Caron, ed.), 99 AJIL 236 (2005).

²⁴¹ See “U.S. Involvement in Claims by Victims of the German Holocaust or Their Heirs,” in Sean D. Murphy (ed.), *Contemporary Practice of the United States Relating to International Law*, 93 AJIL 879, 883-92 (1999) (“U.S. Involvement in Claims”); Saul Kagan, “An Outline,” REVISITING THE NATIONAL SOCIALIST LEGACY: COMING TO TERMS WITH FORCED LABOR, EXPROPRIATION, COMPENSATION AND RESTITUTION 20-21 (Oliver Rathkolb, ed.) (2004) (“Rathkolb”).

²⁴² See, e.g., *Republic of Austria v. Altmann*, 124 S.Ct. 2240 (finding for Altmann in dispute over several paintings by Klimt in the possession of the Belvedere Museum).

²⁴³ JOHN AUTHERS AND RICHARD WOLFFE, *THE VICTIM’S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (2002) (President Rau’s 1999 apology); Saul Kagan, “An Outline,” in Rathkolb 21 (noting Chancellor’s Adenauer’s 1951 “solemn declaration before the Bundestag assuming moral and legal responsibility”).

To be sure, most restitution for Nazism mobilizes political or moral claims that do not necessarily create law under strict models of customary law.²⁴⁴ At the same time, more expansive theories would readily identify the public-private funds established *ex gratia* by Germany, Austria and Switzerland to settle lawsuits (and the intense involvement of other states such as the U.S. in the negotiations) as indicia of legal obligation.²⁴⁵ In addition, some anti-Nazi claims are advanced in unambiguously legal modes: national tribunals – sources for constructing claims about customary law²⁴⁶ – have awarded judgments to Holocaust claimants relying variously on domestic law, international treaties and settlement arrangements, for example.²⁴⁷ Even judgments that limit Holocaust restoration are routinely crafted so as to reaffirm moral claims,²⁴⁸ and all such claims adumbrate a moral consensus beyond the legally practicable:

²⁴⁴ Cf. *North Sea Continental Shelf* 41 (“There are many international acts. . .which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”).

²⁴⁵ Germany’s creation of the ‘Foundation Remembrance, Responsibility and the Future’ to compensate victims of deportation and forced labor would conventionally be seen as a merely political act, but in *Ferrini v. Federal Republic of Germany* (Italian Court of Cassation, 11 March 2004), the court took this “as evidence that. . .the facts alleged by petitioners were not episodic events but part of an overall strategy pursued by the German Reich” (Andrea Bianchi, “Ferrini v. Federal Republic of Germany, Italian Court of Cassation, March 11, 2004,” *in International Decisions*, (David D. Caron, ed.), 99 AJIL 242) – turning a political fact into legal evidence to defeat a sovereign immunity claim. See *Ferrini v. Repubblica Federale di Germania* (Trib. Arezzo 3 Nov. 2000); Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” 17 July 2000, U.S.-FRG, 39 I.L.M. 1298 (2000).

²⁴⁶ “Judicial decision in the municipal sphere. . .provide prima facie evidence of the attitudes of states. . .and very often constitute the only available evidence of [their] practice.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 52 (2003) (“BROWNLIE”).

²⁴⁷ See, e.g., William Glaberson, “For Betrayal by Swiss Bank and Nazis, \$21 Million,” *NEW YORK TIMES*, 14 April 2005, <http://www.nytimes.com/2005/04/14/nyregion/14holocaust.html?th&emc=th> (discussing U.S. federal court award pursuant to the 1998 settlement to families whose Swiss trusts were expropriated in 1938).

²⁴⁸ See, e.g., Stephen A. Denburg, *Note: Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233, 234-235 (1998) (“Although Jews should be legally entitled to full restitution of all confiscated and converted properties, such a wholesale return would be unrealistic.”); Stuart E. Eizenstat, Under Secretary of State, U.S. Dep’t of State Press Release on Settlement of Class Action Suits (12 Aug. 1998), <http://secretary.state.gov/www/briefings/statements/1998/ps980812c.html> (the 1998 Washington Conference Principles on Nazi Confiscated Art, “while not legally binding represent a moral commitment among nations which all in the art world will have to take into account”).

In the scheme of the wrongs of the Holocaust, [plaintiff's lawyer] said. . .the theft of a sugar refinery near Vienna long ago was a small injustice. 'But now, 70 years later. . .this is one of the few wrongs you can actually remedy.'²⁴⁹

More broadly, universal repudiation of Nazism and the Holocaust, such as Germany's apologies, constitutes the legal matrix underlying the consensus that such behavior today would violate international law.²⁵⁰ It is at least plausible to suggest that Germany's acts of restitution for the crimes of Nazism – and other states' responses – constitute proof of a customary legal norm prohibiting such actions and requiring some form of restitution.

Thus although claims about the *extent* to which restitution for Nazism is a legal obligation are contested,²⁵¹ those claims exhibit an accepted core of reasonableness that Sudeten claims utterly lack. The expulsions have never been repudiated in terms even vaguely analogous to condemnation of the Holocaust – on the contrary, states explicitly accept the expulsions' legality and legitimacy. No one has ever been convicted for organizing the expulsions. No compensation has been paid, even *ex gratia*. No state has demanded the Decrees' repudiation, even as a political *quid pro quo*. By contrast, one can hardly imagine a state with

²⁴⁹ William Glaberson, "For Betrayal by Swiss Bank and Nazis, \$21 Million," NEW YORK TIMES, 14 April 2005, <http://www.nytimes.com/2005/04/14/nyregion/14holocaust.html?th&emc=th>.

²⁵⁰ Formal apologies or other acts of restitution can be *ex gratia*, but can also contribute to a claim in customary international law. See Mark Gibney and Erik Roxstrom, *The Status of State Apologies*, 23 HUMAN RTS. QUARTERLY 911, 915 (2001) ("Gibney and Roxstrom") ("Statements by high level officials – such as apologies – may under certain circumstances, constitute evidence of state practice and therefore 1) contribute to the formation of customary international law; 2) constitute a source of interpretation for. . .determining the content of obligations arising from treaty law; and 3) serve as a unilateral declaration that is at least binding on the state that issued the apology.").

²⁵¹ Claims by Nazi victims have often been defeated by technical-temporal objections – statutes of limitations, anti-seizure statutes, etc. See, e.g., *In the Matter of the Grand Jury Subpoena Duces Tecum &c. The People &c. v. The Museum of Modern Art*, 21 September 1999 (unreported 21 December 1999) (applying New York's anti-seizure statute to quash a subpoena for paintings on loan to the Met claimed as property stolen by the Nazis); *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cr. 1994) (denying jurisdiction and rejecting implied waiver of sovereign immunity for violation of *jus cogens* for FSIA purposes in suit for money damages by Holocaust survivor for slave labor; Wald, J., dissenting, found implicit waiver due to barbaric conduct). The U.S. subsequently intervened in the *Princz* matter, leading to the Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution (FRG-U.S.), 19 Sept. 1995, 35 I.L.M. 193 (1996). See U.S. Involvement in Claims 883-5 and n. 2.

explicitly anti-Jewish legislation, even in ‘extinct’ form, being a candidate for EU membership.²⁵²

What is the effect of this on the vitality of the rationales identified above? Even partial vindication of claims by Nazism’s victims vitiates the ‘ancientness’ objection to Sudeten claims – Holocaust claims are, of course, actually older.²⁵³ It must be something else that distinguishes the cases. That something, obviously, is a moral difference: the sense of obligation to Holocaust victims and the sense that expellees (that is, collaborators in Nazi evil²⁵⁴) have no claim. Any potential for *comparison* between Germans and their victims seldom surfaces – indeed the moral construction of the rule requires their incommensurateness.

This moral difference is *the* distinguishing element between the Sudeten and Holocaust cases. Yet precisely for that reason, the Corollary limits the restitution the Law of the Holocaust imposes for collective expulsions *in general*: restitution does not apply to expulsions carried out in righteous retribution,²⁵⁵ and would not apply to any future expulsion that could satisfactorily be described as belonging to that category.

²⁵² France has indicated that Turkey’s membership in the EU, an event which may not come to pass for 20 more years, might be contingent on admitting responsibility for the Armenian genocide, an act predating both the Holocaust and the German expulsions by 30 years. *See* “Turkey ‘must admit Armenia dead,’” BBC NEWS, 13 December 2004, 22:20 GMT, <http://news.bbc.co.uk/2/hi/europe/4092933.stm>.

²⁵³ The Holocaust ended no later than 8 May 1945, with the German capitulation. All save the earliest wild expulsions of Sudeten Germans occurred after that date; all ‘Potsdam’ expulsions occurred later.

²⁵⁴ *Cf.* Kathleen McLaughlin, “Allies Open Trial Of 20 Top Germans For Crimes Of War,” N.Y.T., 20 November 1945, A1, <http://www.nytimes.com/learning/general/onthisday/big/1120.html> (“Nuremberg, Germany, Nov. 20--Four of the world’s great powers sit in judgment today on twenty top Germans. . . . The twenty-first defendant, tacitly although not specifically named in the indictment, is the German nation that raised them to power and gloried in their might[]”).

²⁵⁵ For example, the fact that German expellees have the same right to acquire property after accession is one of the Legal Opinion’s core arguments against requiring restitution. Could a court decision rejecting Holocaust

The other rationales are therefore likely not controlling in any meaningful sense, or even particularly informative. In fact, it is this moral difference that allows us to see how the other rationales operate, and how the Sudeten case both is and is not *sui generis*: There is no ‘antiquity,’²⁵⁶ continuing effect, or other technical objection in general, since these rationales are only functions of the broader moral calculus we apply to an act of expulsion or its consequences:²⁵⁷ for morally approved claims, technical arguments may never apply, while importing a moral calculus ensures other, disfavored claims – such as those by the expelled Germans – never receive protection.²⁵⁸

C. What Are the Corollary’s Implications for Customary International Law?

Customary law is constructed on proofs that state actions were undertaken out of a sense of legal obligation – the concept of *opinio juris sive necessitatis*.²⁵⁹ So what is the consequence of

survivors’ claims to return of stolen art on grounds that they presently ‘have the same right to acquire the artworks’ possibly find expression? Something distinguishes the cases.

²⁵⁶ Cf. Council of Europe Parliamentary Assembly, Committee on Culture and Education, Draft Resolution on Looted Jewish Cultural Property, 29 September 1999 (*adopted in committee* 24 September 1999)(declaring expropriations illegal [Art. 3], and inviting member states’ parliaments to: “give immediate consideration to ways in which they may facilitate the return of looted Jewish cultural property” [Art 10], and change legislation to facilitate restitution [Art. 13] including by removing statutory limitations [Art. 13(a)]).

²⁵⁷ Even claims of *ultra vires* incapacity mask an underlying choice about when to reach back into the past and when not to: successful efforts to reverse Nazi-era seizures are themselves based on retrospective, postwar revisions. See, e.g., Flegenheimer Case (U.S. v. Italy), Decision of the Italian-U.S Conciliation Commission, 20 September 1958; 14 R.I.A.A. 327; 25 I.L.R. 91 (1958)(noting Italy’s obligation in the 1947 peace treaty to invalidate property transfers “result[ing] from force or duress exerted by Axis Governments” [15 September 1947, U.S.-Italy, Art. 78(3), 61. Stat. 1245, 49 UNTS 3]). In fact, much of the edifice of the postwar European order – the definitions of crimes at Nuremberg, the 1974 nullification of the Treaty of Munich, the assertion of Czechoslovakia’s territorial and political continuity – is a function of *post hoc* revision, which therefore begs the question, when do we revise and when do we not?

²⁵⁸ Cf. Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT’L L. 423, 461-2 (2004)(“[T]he amount of time required is a function of the international community’s moral evaluation of a claim. . .”)

²⁵⁹ See SHAW 80-4. See also Section III.A, above. Some scholars dispute the operative role of *opinio juris* and customary international law as a generative legal category. See Jack L. Goldsmith & Eric A. Posner, *THE LIMITS OF INTERNATIONAL LAW* (2005); but see George Norman and Joel P. Trachtman, *The Customary International Law*

consensus that an act is *not* obligatory? If states consistently demonstrate a belief that they are not under a particular obligation, then they are not.²⁶⁰ Doesn't the Sudeten controversy tend that way? Private actors claimed the Czech Republic was obliged to repudiate the Decrees and that other states were obliged not to associate with it until it did,²⁶¹ but those claims were rejected. This demonstrates definitively that there is *no* obligation. This has important consequences for describing the shape and content of customary law governing ethnic cleansing, because the lack of obligation indicates a zone of permission.²⁶²

It might be objected that states' *permissive* attitudes do not give evidence of *opinio juris*, the sense of obligation which customary law requires for states' actions to have the force of law.²⁶³ Yet this is precisely the point: Permitting is as much a function of law as proscribing, and when states act in a way that does *not* give rise to *opinio juris*, they establish proofs of permissibility that define the scope of other rules.²⁶⁴ In this case, the absence of *opinio juris* shows that states do not feel they have any obligation to reverse the effects of deportation or denaturalization under analogous circumstances.

Game, 99 A.J.I.L. 541, 569 (2005) ("Norman and Trachtman"). This Article is not concerned with debates about states' compliance with customary law, but rather effects on the *doctrinal* structure states formally acknowledge.

²⁶⁰ SHAW 84-6. *But see* Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 268-93, *cited in* Norman and Trachtman (arguing that *opinio juris* is sometimes not necessary).

²⁶¹ *Cf.* BROWNLIE 491 (states have a "duty of non-recognition" of other states' acts "if in the careful judgement of the individual state a situation has arisen the illegality of which is opposable to states in general[]").

²⁶² *See* MALANCZUK 39 ("[I]n the case of a permissive rule, *opinio iuris* means a conviction by states that a certain form of conduct is permitted by international law.") (emphasis original). Hohfeld's jural opposites 'privilege' and 'duty.' are instructive.

²⁶³ *See* SHAW 80-4.

²⁶⁴ *See* Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AJIL 828, 830 (1999) ("Decisions not to act are a part of state practice and *opinio juris*.").

Prior to the Sudeten controversy one might have speculated that the customary norm prohibiting expulsion was nearly total, yet in repudiating Sudeten groups' claims, states (and other potentially relevant actors) expressly rejected extension of the prohibition (or an obligation to make restitution) to the Sudeten case – and presumably therefore to similar cases. If a Sudeten Corollary has any generalizable value, it would exempt similar expulsions under similar circumstances from the general scope of prohibition.

Consider a counterfactual scenario: What if the EU or its member states had conditioned Czech accession on repudiation of the Decrees? Or, that following a refusal by the Czech Republic to give restitution, member states had explicitly voiced their disapproval, or had explicitly condemned the original expulsions? Any of these scenarios would have given rise to colorable claims about new customary rules repudiating expulsion and defeating any residual option to expel in the future; certainly scholars would have rushed to make such claims.²⁶⁵

One can always conjure stronger formulations of any rule, but this is not just a lexical game: the EU, members and candidates collectively advanced a highly consistent view that the expulsions were unrelated to accession; at every critical juncture, they rejected any obligation in respect of Sudeten claims. This rejection was emphatic and total; the counterfactual scenarios suggested above are clear but unrealized alternatives. Logically the clearest way to affirm the illegality of expulsion *in general* would be to repudiate *each instance* of expulsion and

²⁶⁵ Cf. efforts to identify legal norms from the EU's recognition criteria for successors to the Soviet Union and Yugoslavia. See, e.g., Otto Kimminich, "A 'Federal' Right of Self-Determination?," MODERN LAW OF SELF-DETERMINATION 83 (Christian Tomuschat, ed.)(1993); Patrick Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism," *id.*, at 101.

provide restitution, but that would have required the exact opposite of the actual outcome in the Sudeten case.

Like genocide, the crimes associated with ethnic cleansing are among the acts that scholars, states, and courts wish to see embedded in customary law because they are too important to our common humanity to be left to mere positivistic treaty-making²⁶⁶ or to any voluntaristic law-making process.²⁶⁷ Therefore, any indication that according to the mechanics of customary legal interpretation such acts are clearly *not* embedded is of significance for our efforts to map and determine the shape of that law.

The common intuition that Nazism's supporters and its victims occupy different moral positions – and the deeper sense that at a certain point we are morally justified in making categorical decisions about entire communities because of their *general* association with an evil regime – may be right, but it is also a definitional distinction. It excludes those two communities from common identity or common treatment. And, again, this is reasonable and right. It also means, necessarily, that deportation, denaturalization and confiscation done on an ethnic basis constitute 'ethnic cleansing' when applied to innocents, but are justifiable

²⁶⁶ See, e.g., RESTATEMENT 161 § 702 and Comment, para. n. ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones. . . systematic racial discrimination, or. . . a consistent pattern of gross violations of internationally recognized human rights" and that as *jus cogens* norms "an international agreement that violates them is void"). Cf. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946 (1990) ("Koskenniemi") ("Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect. . .").

²⁶⁷ Cf. Theodor Meron, "Customary Law," CRIMES OF WAR 113 ("Both scholarly and judicial sources have shown reluctance to reject as customary norms – because of contrary practice – rules whose content merits customary law status perhaps because of the recognition that humanitarian principles express basic community values and are essential for the preservation of public order.")

acts of state when applied, in limited and defined circumstances, to communities adjudged to have passed beyond some moral and legal pale.

And this is true today, notwithstanding 60 years of treaties and new institutions. It is not satisfactory to suppose that treaty-making and institution-building alone have made actions which were acceptable in 1945 illegal now. It is not satisfactory to suppose so while observing that even older Holocaust claims are nonetheless given different treatment – an observation which simply returns us to the claim of moral difference. And so, more fundamentally, it is not satisfactory because no one wishes to admit that our commitments against ethnic cleansing or genocide (whatever they are) could be effaced by a mere treaty or be otherwise subject to state consent;²⁶⁸ they are too deeply held, morally, to allow that. Law is based not only formal instantiations but on underlying, anterior moral sensibilities – this is the very rationale underlying customary law and human rights, after all.²⁶⁹

The very fact that our rejection of Sudeten claims is fundamentally moral rather than technical or legal should indicate to us that the occasion to apply such a distinction obtains, and will obtain, whenever the moral conditions arise, regardless of the formal legal structures erected atop that moral foundation. We profess an absolute legal rejection of ethnic

²⁶⁸ Cf. Louis Henkin, *Human Rights and State 'Sovereignty'*, GA. J. INT'L & COMP. L. 31, 37 (1995-6) (“[N]on-conventional human rights law. . . is ‘constitutional’ in a new sense. . . . [It] is not based on consent: at least, it does not honor or accept dissent, and it binds particular states regardless of their objection[]” and linking this development or claim to the concept of *jus cogens*).

²⁶⁹ Cf. Koskenniemi 1946 (the mechanics of customary law are “useless because it is really our certainty that genocide or torture is illegal that allows us to understand state behavior and to accept or reject its legal message, not state behavior itself. . . . [W]e are. . . compelled to admit that everything we know about norms which are embedded in [state] behavior is conditioned by an anterior – though at least in some respects largely shared – criterion of what is right and good for human life.”).

cleansing, but either we do not mean it, or we mean something narrower, and morally so, by the words ‘ethnic cleansing.’

If it were argued that there is a peremptory norm of general international law (a rule of *jus cogens*) prohibiting ‘ethnic cleansing’, as there is for genocide,²⁷⁰ this would not change the analysis or effect. Elevating the prohibition of ethnic cleansing or its underlying acts to the level of a *jus cogens* norm only replicates our concern with definition – what is included in the norm? – and simply highlights the moral difference between what is prohibited (population transfers like Nazi slave labor and Holocaust) and what is not (population transfers like the German expulsions).

Thus simply intoning that there is a human right or peremptory norm against expulsion is an insufficient inquiry into customary law: one must investigate the shape and content of norms through the cases in which they are – and are not – invoked. The Sudeten expulsions and the contemporary response are one such case: evidently, the prohibition of ‘expulsion’ does not mean the *kind* of expulsion undertaken after the war in the kinds of conditions then prevailing. Perhaps there is a lexical element after all: expulsions are prohibited, but then these were merely transfers.²⁷¹

D. Why Isn’t a Sudeten Corollary Acknowledged?

²⁷⁰ Case Concerning the Barcelona Traction, Light and Power Company, Ltd, (Belgium v. Spain), Second Phase, Judgment, ICJ Rep. 1970 3, paras. 33-4 (identifying prohibition of genocide among the “basic rights of the human person”).

²⁷¹ *Cf.* the arabesques of American policy distinguishing ‘genocide’ and ‘acts of genocide’ in Rwanda. *See* Diane Orentlicher, “Genocide,” CRIMES OF WAR 156.

Our law does not forbid ethnic cleansing full stop – it forbids ethnic cleansing except in defined cases following extreme communal violence which provides a moral justification. But why are those cases unacknowledged? If there is a corollary, why cabin it off as a *sui generis* ‘shipwreck on the law?’ There is of course the sheer awkwardness of admitting limits to our horror at ethnic cleansing or of advertising our determination to reserve the rights of vengeance. When that potential is acknowledged, it comes in surprising ways, such as Prime Minister Zeman’s suggestion during a trip to Israel “that his hosts break the deadlock with the Palestinians by adopting the method that was so ‘successful’ for the Czechs in 1945: expulsion.”²⁷² But this is a minor view; most actors do not openly acknowledge the generative potential of that method today. Whatever claim we can make based on observation of state action, we cannot simply assert that they *publicly* ‘approve of expulsion in limited circumstances.’

Indeed, if one assembled 50 statesmen or legal scholars and asked them if ethnic expulsions would be legal today under any circumstances, even after a major war, surely they would say ‘of course not.’²⁷³ Perhaps such a denial would mean that an expulsion option is not embedded in customary law.²⁷⁴ Yet we have seen how the contemporary consensus on rejecting claims for restitution demonstrates a continued (if implicit) commitment to the

²⁷² Jacques Rupnik, *The Other Central Europe*, 11 EAST EUR. CONST. REV. 68 (2002).

²⁷³ The Czech Foreign Ministry’s issued this statement prior to accession:

The Czech Republic is a legal state. Currently, this country has no legislative norms that would facilitate the expropriation of property without indemnification. . . . Naturally, it is equally impermissible to expel any group of either native or foreign inhabitants. . . .

Czech Foreign Ministry website. In June 2003, the Czech cabinet called the both the expulsions and German aggression preceding it “unacceptable from today’s point of view.” CTK Czech News Agency, “Strong words break calls for Czech-German reconciliation,” FINANCIAL TIMES INFO. LTD., 11 July 2005.

expulsion option which is in fact the observable position of relevant actors, even if do not say so when asked directly. Ask those same statesmen and scholars if the expulsions of the Germans were illegal *at the time* or deserve compensation *today*, and they would equally surely conclude that they were not and do not. They would be mirroring the actual policy positions of the EU, its member states, the Potsdam powers, international tribunals, and most other observers. So: Does the bare verbal denial that an act is possible or legal actually outweigh expressions of policy that indicate the contrary?

Although it is beyond the scope of this paper to develop a full critique on this point, there does appear to be a serious tension in contemporary customary law's reliance on 'state speech' to construct proofs of *opinio juris* and state action.²⁷⁵ To build legal prescriptions on bare verbal or textual claims while ignoring the mass of actions and public positions that contradict them risks creating an incredibly thin vision of customary law unhinged from reality, lacking in descriptive, let alone normative power. It is something like asking people their sexual history or how they would behave on a sinking ship: people will give certain kinds of predictable answers, but these may not actually predict anything and many not actually be true.

The role of moral revulsion or even embarrassment must be found somewhere in our model of customary law's formation, but nothing in its mechanisms appears to allow for such

²⁷⁴ Cf. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 34 (2003) ("Even massive abuses do not militate against assuming a customary rule as long as the responsible author seeks to hide and conceal its objectionable conduct. . .").

²⁷⁵ Cf. Norman and Trachtman ("Customary international law. . . is under attack as behaviorally epiphenomenal and doctrinally incoherent" but refuting the attack); Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5 (2003); see also Kelly, *Twilight*.

public scruple. Perhaps by refusing to observe the obvious, we show an unwillingness to concede its effect on legal obligation. Yet embarrassment presupposes something to be embarrassed about, and in the very act of not speaking about a thing – and knowing we do not speak about it – we make it real. The Sudeten Corollary shaped a reduction in the Law of the Holocaust's commitments in the moment the consensus rejected Sudeten claims that what they had suffered was a matter for human rights, for Europe, and for law.

Law looks for prohibition, and here, seeing none, it makes no mark but moves on. Yet it is not by opposing the expulsions, but precisely by observing how we *accept* their legality and rightness that we can clearly see the categorical problem and the hidden content in the law. Those few who believe the expulsions were entirely and essentially wrong (or that they deserve restitution today) readily see a contradiction between our commitments to 'never again' and our responses to the expulsions. But those of us who believe the expulsions justified – which is almost everyone – also have to reconcile that view with our general opposition to ethnic cleansing. Accepting the expulsions makes a definitional diminution of our commitment against ethnic cleansing and its effects inevitable; indeed, the more strongly and successfully we defend the legality and rightness of the expulsions and close the book on restitution, the more we must acknowledge a corollary limit to the general prohibition on ethnic cleansing and to our professed obligation to make its victims whole.

V. Finally: Looking Forward, What is Remembered

And it came to pass, when they had brought them forth abroad, that he said, Escape for thy life; look not behind thee. . .lest thou be consumed. . . .Then the Lord rained upon Sodom and upon Gomorrah brimstone and fire from

the Lord out of heaven. . . But his wife looked back from behind him, and she became a pillar of salt.²⁷⁶

The absence in the legal record reflects a moral consensus about the postwar order – a closing, not of history, but of reflection – and a quiet recognition that expulsion remains our potential policy. I do not mean to suggest the Corollary will swallow the rule against ethnic cleansing; on the contrary, it is an extraordinary exception and increasingly stands alone as the only instance of enforced movement of whole peoples we are still prepared to defend.²⁷⁷ Yet it is this very singularity in what otherwise appears so clear and uncontroversial a body of law – this fundamental intractability – that makes the Corollary significant. Although the German expulsions were the largest ever undertaken, they do not merit apology or compensation. Instead they are relied upon and defended, unabashedly and successfully – and by our successful attempts to explain why this one act of ethnic cleansing alone was in fact entirely reasonable and just, we only define and entrench the exception’s potential all the more.

And of necessity we do this in a manner hidden from our own sight: In our law, our morals, our history and our politics, we have found it useful to remember the lesson in what Hitler told his generals about the Armenians on the eve of war: that we build our future by consigning to casual oblivion events we in fact remember with full clarity, events for which

²⁷⁶ Gen. 19:17, 24, 26. *See also* Kurt Vonnegut, *SLAUGHTERHOUSE-FIVE, OR THE CHILDREN’S CRUSADE: A DUTY-DANCE WITH DEATH* (1969)(employing roughly the same passage with reference to Allied bombing of Germany).

²⁷⁷ *See* Gibney and Roxstrom 911 (“Within just the past few years there has been a spate of state apologies, as a number of governments have either acknowledged a previous wrong against some particular group, or else the apology has been transnational in scope as one state has acknowledged doing wrong to another state, but really to the people of this other country.”). Groups subjected to expulsion, appropriation or extermination have had claims recognized by formal apologies, reparations, return of property, or creation of special rights: victims of the Nazis, aboriginal Australians, Japanese-Americans, native Americans, First Nations in Canada, and inhabitants of Diego Garcia, for example. Claims by Armenians continue to be pressed in a variety of fora, while claims for reparations by black slaves in the Americas have had relatively little traction.

we will not apologize. It is a lesson that does not imply approval of the Nazis' particular moral vision, only acknowledgement of the strategic value in obliterating the ambiguities and obligations of memory.

Yet even this requires looking back. There is no valence to the anodyne proposition that 'Europe is forward-looking;' such vapidness could counsel for any policy.²⁷⁸ So it is fascinating to observe just how much, and how often, forward-looking Europe is itself intensely, intently focused on vindicating and preserving a particular vision of the past – on not succumbing, as one opponent of restitution notes, to the “danger of de-contextualizing the past.”²⁷⁹ Even attempts to simply brazen out a determined policy of forwardness give away the game that everyone must put a very well defined past out of mind: thus we find Verheugen, Janus-like, declaring that “[n]obody is questioning the European post-war settlement. The EU Treaties do not aim to revise this settlement but to build a new future.”²⁸⁰

Still, it is not by criticizing that focus but by accepting it that we observe it shapes the law: how our world and our future are built upon not apologizing for or even recognizing certain things. Any admonition to look only forward implies and requires a vision of what is behind;

²⁷⁸ Cf. Gibney and Roxstrom 938 (“[W]hat state apologies have so often missed is that they are as much about looking forward as they are about looking backward. . . . So what an apology should seek to accomplish is not merely to uncover the wrongs of the past, but to anticipate present and future wrongs as well.”) Cf. Jacques Rupnik, *The Other Central Europe*, 11 EAST EUR. CONST. REV. 68, 69 (2002) (noting the Sudeten controversy represents a “difficult and painful debate about history. . . that is becoming all the more necessary for the *sake of future reconciliation*. . . . In the thirties, the *bête noire* of Central Europe was ‘the order of Versailles.’ Today it would be Potsdam.”) (emphasis added).

²⁷⁹ “For a critical and enlightened debate about the past,” Gerolstein, 10 August 2003 (signed petition), <http://www.bohemistik.de/zentrumgb.html>. (“[T]here is the danger of de-contextualizing the past, thus breaking the causal relationship between the Nazi policies of radical nationalism and racial extermination on one hand and the flight and expulsion of ethnic Germans on the other hand.”).

Lot's wife turned because she could not believe without seeing for herself. Her punishment was suitably biblical, but in this age she is perhaps less object lesson than simply that most modern of heroes – a victim.

. . .

Looking back, what would we see, or change? Does it matter that Hitler may actually never have uttered that notorious sentence?²⁸¹ It is an indication of the Protean nature of the 'Armenian comment' that it is mobilized by every imaginable type of commentator on these issues: the United States Holocaust Museum²⁸² and Holocaust deniers,²⁸³ advocates for recognizing the Armenian Genocide²⁸⁴ and opponents of recognizing an Armenian genocide,²⁸⁵ mainstream scholars,²⁸⁶ members of Congress,²⁸⁷ and Mumia Abu-Jamal.²⁸⁸

²⁸⁰ Verheugen 2002 Speech.

²⁸¹ The quote originates in a misinterpretation, fabrication or truthful but uncorroborated document. Apparently a document recording a meeting in Obersalzberg on 22 August 1939 and including the statement was to be introduced into evidence at Nuremberg but was withdrawn, although copies were released to the press. Two other records of meetings that day introduced into evidence (USA-29 and USA-30) do not include the comment. An apparent reference to the document as L-3 or USA-28 appears in the record of the trials. See LOUIS LOCHNER, WHAT ABOUT GERMANY? 2 (1942); *Zweite Ansprache des Führers am 22. August 1939*, IMG Nürnberg 1014-PS, Beweisstück USA-30, <http://upload.wikimedia.org/wikipedia/commons/d/df/A-Hitler-08-22-1939-at-Obersalzberg-on-extermination-of-the-Armenians.pdf>, n. 1; see also "An Armenian Deception: 'Who Remembers the Armenians – Adolph Hitler,'" 17 THE ARMENIAN REPORTER, 2 August 1984; "The Armenian Quote," WIKIPEDIA, http://en.wikipedia.org/wiki/Armenian_quote (noting that "[i]n the absence of any means of either confirming or refuting the authenticity of the quote, and in light of the intense partisan passions surrounding both the Armenian genocide and the Holocaust, it is unlikely that this issue can ever be satisfactorily resolved[]").

²⁸² United States Holocaust Memorial Museum (website), <http://www.ushmm.org/research/library/index.php?content=faq/> (citing Lochner and noting that "[t]his particular language does not appear in any of the other primary source accounts of Hitler's speech.").

²⁸³ Comments noting the quotation's apparent inaccuracy are quite popular on Holocaust denial websites. See, e.g., Hannover, "News! The 'Who Remembers Armenians' Lie Debunked / forgery," THE REVISIONIST FORUM: HOLOCAUST REVISIONISM DISCUSSION, <http://www.yourforum.org/revforum/viewtopic.php?t=943> (linking to the "An Armenian Deception" article and including the tagline "If it can't happen as alleged, then it didn't."); Mark Weber, "The Nuremberg Trials and the Holocaust: Do the 'war crimes' trials prove extermination?," INSTITUTE FOR HISTORICAL REVIEW/JOURNAL FOR HISTORICAL REVIEW, http://www.ihr.org/jhr/v12/v12p167_Webera.html (calling the document referring to the quote "spurious").

²⁸⁴ Kevork B. Bardakjian, HITLER AND THE ARMENIAN GENOCIDE (1985).

²⁸⁵ Bruce Fein, "The Armenian Issue Revisited: An Armenian and Muslim Tragedy? Yes! Genocide? No!," ASSEMBLY OF TURKISH AMERICAN ASSOCIATIONS, <http://www.ataa.org/ataa/ref/armenian/fein.html>; <http://www.tallarmentale.com/hitler-quote.htm>.

Underlying these cacophonous, mutually exclusive mobilizations is a question of history and truth: Hitler either said, or did not say, this or something like it.²⁸⁹ Yet what does it matter? Customary law is built on proofs about states' actions and beliefs, but it does not require the factual bases underlying those actions and beliefs to be accurate in order to generate law. When actors in the conversation that is customary law – and it is a conversation, whether one admits only states or others to it – invoke a statement like the Armenian comment, assigning to it either a dispositive truth value or a falsity that implies its own dispositive counter-truth, they make claims that can sound in law. It is the legislative authority of the source and his belief that generate indicia of a legal norm. Historical truth is immaterial to that process, which is a question of perception – memory – and of evidence. Hitler's statement, while perhaps not technically true (perhaps not true, that is, that he ever said it), would nonetheless be legally generative if it were relied upon to indicate something about the past that we invoke with reference to the future – because the future is invariably the point towards which discussions of Nazism are directed.

And yet what is belief built upon, other than estimates of truth? Hitler did what we know he did, with the support of millions of Germans who participated in his horrors;²⁹⁰ those guilty

²⁸⁶ See, e.g., Diane Orentlicher, "Genocide," CRIMES OF WAR 156; Tina Rosenberg, *Tipping the Scales of Justice*, WAR CRIMES: THE LEGACY OF NUREMBERG 289 (Belinda Cooper, ed.) (1999).

²⁸⁷ See Heath W. Lowry, *The U.S. Congress and Adolf Hitler on the Armenians*, 3 POLITICAL COMMUNICATION AND PERSUASION (1985), reprinted in ARMENIAN ALLEGATIONS: MYTH AND REALITY 119-32 (1986), and ASSEMBLY OF TURKISH AMERICAN ASSOCIATIONS, http://www.ataa.org/ataa/ref/arm_uscongress/arm_uscongress.html (listing 22 US Senators and Congressmen who had variants of the Armenian comment read into the Congressional Record in support of an Armenian Martyrs' Day).

²⁸⁸ Mumia Abu-Jamal, "Hypothetical Holocausts?," PRISON RADIO, 1 October 2005, <http://www.prisonradio.org/WilliamBennett.htm>.

²⁸⁹ <http://www.tallarmeniantale.com/hitler-quote.htm> (noting variants).

²⁹⁰ See, e.g., Daniel J. Goldhagen, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

of evil deserve punishment, each in their measure, and the expulsion of 14 million Germans was only that and only just. That is a morally coherent judgment, and one which must of us, states and individuals alike, appear to hold. I think we all know that individual, commensurate punishment is not quite what happened – not quite what we did – but that is what we and our law say today, and who is to say it is wrong? Still, the reasons we give now are justifications not only for what we did then, but also for what we are prepared to do again under the right circumstances. What we say and the reasons we give shape our law whether we acknowledge it or not – this is the tension, indeed the flaw, in customary law's attempt to play belief and act against each other to the advantage of whatever norms law's glossators prefer.

One need not advocate a Sudeten Corollary oneself to observe that every relevant state and actor advocates it in practice, even though the text of this Corollary is nowhere to be read. And that may be all right: what we did to the Germans may have been justified – we certainly justify it today. The Corollary only suggests that, since it *was* justified, we can expect we will do it again as the occasion arises; the only puzzle is why we do not admit this. And so, observing that, here is the claim this Article makes: There is something troubling, not necessarily in the law we have, but in the way we make it. Denial and diminution of the expulsions' seriousness – remembering Sudetenland the way we do – have been both social result and source of law.

The mythology of human rights – by which I mean both its myth of origins and its mythic sense of purpose – imagines a movement arising out of the horrors of the Second World War and committed to a normative project that would protect human dignity and render

such wars unnecessary. What this origin myth ignores is that the Allies' war efforts and the expulsions were not constructed as derogations from our most sacred principles – they were the enforcement of those principles in response to terrible and clear affronts. The war and its aftermath were entirely consistent with the norms, aspirations and methods of human rights because they were an integral part of them. Our own principles confirm for us that were such evil to descend on us again, we would again use just such methods, and again say we were right in doing so. To dismiss or isolate expulsion as supreme necessity, as if necessity were not a legally cognizable category, is to deny the predictability of this 'sequence of cause and effect,' or to plead a kind of madness when it is obvious as a matter of history that this is not madness but intention, just as self-defense and vengeance are intended.

It is not therefore that the expulsions' true role is misunderstood – again, as if 'were we to understand rightly, we would recoil in horror and reject what we have done.' It is precisely because we do understand expulsion – understand it to be a measured and legitimate response to evil consistent with our moral commitments both then and now – that we accept it and in time, until the next time, ignore it as we do.

For who talks of the expulsion of the Germans? They do, of course; they remember, but how do we? The facts are well known to those who care to know; if the man on the street is ignorant of them, it is only because they are uninteresting, and that because they are universally accepted as the morally justified foundation of Europe's future. Certainly there is nothing in our discussion of the expulsions like the wholesale, unequivocal condemnation of the Holocaust with all its gravitational effect on legal argument. I am in no way equating these unique acts – but why is it necessary to add this disclaimer? Some laws only work if

hidden, but there is a cost to hiding things, to building a future by not looking back. It is surely a high price that – for fear of seeming to equate the victims of Fascism and of its opponents – it is all but impossible to speak of these things, or to remember Sudetenland any other way.