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# Jewish Property Restitution in the Czech Republic†

## INTRODUCTION

The restitution of expropriated property has often been used to redress wrongs committed by prior regimes.<sup>1</sup> Restitution of Jewish property was an integral part of the Federal Republic of Germany's (FRG) settlement talks with Israel after the fall of the Third Reich.<sup>2</sup> Similarly, in the aftermath of communism, many Eastern European countries have made it a priority to restitute private property previously confiscated by the state.<sup>3</sup> Until recently, the most significant of the Czech Republic's restitution laws allowed for the restitution of property nationalized after February 25, 1948,<sup>4</sup> the date the Communists seized power.<sup>5</sup> This cutoff date failed to address many Jewish claims because the Nazis seized most Jewish property in 1939 and never returned it to its rightful owners.<sup>6</sup> Instead, the Communist government that subsequently came to power confiscated the property a second time.<sup>7</sup> The Czech Republic's reluctance to return property seized before 1948 stemmed from the fear that it would lead to restitution claims from the approximately three million Sudeten Germans that Czechoslovakia expelled from the country and who, pursuant to the Benes Decrees of 1945–46, forfeited their property to the state.<sup>8</sup>

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† The Czech Republic and Slovakia became independent states on January 1, 1993.

<sup>1</sup> Josef Burger, *Politics of Restitution in Czechoslovakia*, 26 E. EUR. Q. 485, 485 (1992).

<sup>2</sup> Ronald W. Zweig, *Restitution of Property and Refugee Rehabilitation: Two Case Studies*, 6 J. REFUGEE STUD. 56, 59 (1993).

<sup>3</sup> Anna Gelpern, *The Laws and Politics of Reprivatization in East-Central Europe*, 14 U. PA. J. INT'L BUS. L. 315, 315 (1993). Since 1989, 11 Eastern European countries have undertaken some measure of privatization. *Id.*

<sup>4</sup> Law on Extrajudicial Rehabilitation, Feb. 22, 1991, available in WESTLAW, Int-Europe Database [hereinafter Second Restitution Law].

<sup>5</sup> *Four Years On, Jews No Closer to Getting Property Back*, CTK National News Wire, Apr. 29, 1994, available in LEXIS, World Library, Allwld File.

<sup>6</sup> *U.S. Jews Receive Letter from Klaus on Jewish Property Return*, CTK National News Wire, Apr. 11, 1994, available in LEXIS, World Library, Allwld File.

<sup>7</sup> *See id.*

<sup>8</sup> *Czech Jews to Get Back Property Seized by Nazis*, Reuters World Service, Apr. 30, 1994, available in LEXIS, World Library, Allwld File [hereinafter *Czech Jews*]. Benes Decrees No. 12/1945 of June

A recent amendment to the Czech Republic's restitution laws addresses the Jewish concern.<sup>9</sup> The law allows for the restitution of 202 former communally-owned Jewish properties, mostly synagogues, schools, and cemeteries, that the Nazis confiscated prior to 1948 and that remain in state hands today.<sup>10</sup> The law also provides for the return or recompense of private property to individuals or their heirs who lost such property under Germany's racial laws between 1939 and 1945.<sup>11</sup> The law passed only after the Czech government limited its scope to property confiscated for racial reasons,<sup>12</sup> effectively cutting off claims of the Sudeten Germans, who were expelled because of their nationality.<sup>13</sup> Opponents promise to challenge the validity of the new legislation before the Constitutional Court on the grounds that its racial exclusivity violates the Czech Constitution and the Charter of Fundamental Rights and Freedoms, as well as international conventions to which the Czech Republic has acceded.<sup>14</sup>

This Note examines Jewish property restitution in the Czech Republic. Part I of this Note discusses Nazi Germany's anti-Jewish legislation that led to the confiscation of Jewish property between 1933 and 1945. Part II looks at initial efforts of reparation made to Jewish survivors and Jewish communities and evaluates their successes and shortcomings. Part III addresses the forces behind property restitution in international law, and Part IV discusses the forces that shaped the property

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21, 1945 and No. 108/1945 of October 25, 1945, ordered the confiscation of property owned by Germans, Hungarians and persons disloyal to Czechoslovakia during World War II. Jeffrey J. Renzulli, Comment, *Claims of U.S. Nationals Under the Restitution Laws of Czechoslovakia*, 15 B.C. INT'L & COMP. L. REV. 165, 168 (1992).

<sup>9</sup> *Czech Jews*, *supra* note 8; LAURENCE WEINBAUM, INSTITUTE OF THE WORLD JEWISH CONGRESS, RIGHTING AN HISTORIC WRONG: RESTITUTION OF JEWISH PROPERTY IN CENTRAL AND EASTERN EUROPE REPORT 20 (1994). The amendment to the Second Restitution Law was passed by the Czech Parliament on April 29, 1994. It went into on effect July 1, 1994. *Id.* [hereinafter Amendment].

<sup>10</sup> *Czech Jews*, *supra* note 8. Jews are not permitted to claim formerly state-held property which was transferred to municipalities or sold-off in privatization projects. Jeremy Smith, *Czech Jews Protest Over Pace of Property Return*, Reuters World Service, Dec. 8, 1994, available in LEXIS, World Library, Allwld File. Despite government requests that municipalities voluntarily give back these properties to the Jewish communities, negotiations have been slow. *Communities Reluctance to Return Jews' Property Logical*, CTK National News Wire, June 9, 1994, available in LEXIS, World Library, Allwld File.

<sup>11</sup> *Czech Jews*, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> See Adrian Bridge, *Ethnic Germans Hail Czech Deal for Jews*, INDEPENDENT, Jan. 20, 1994, at 12, available in WESTLAW, Independnt Database.

<sup>14</sup> *Constitutional Court May Examine Jewish Property Restitution Bill Amendment*, BBC Summary of World Broadcasts, May 5, 1994, available in LEXIS, World Library, Allwld File.

restitution laws in the Czech Republic. Part V introduces the Czech Republic's restitution legislation and analyzes the recent Amendment to the Second Restitution Law, its conflict with various international declarations and domestic law, and discusses how the Czech Constitutional Court may adjudicate this issue. This Note concludes that the Amendment to the Second Restitution Law will stand despite its questionable constitutionality.

## I. ANTI-JEWISH LEGISLATION IN NAZI GERMANY

Despite the pervasive and centuries-old anti-semitism that existed in Germany,<sup>15</sup> all German citizens' property rights remained inviolable and constitutionally protected.<sup>16</sup> The failed German Revolution of 1848 produced the 1849 Constitution, which included the right to "free speech, equality before the law, and private property."<sup>17</sup> The 1919 Constitution of the Weimar Republic contained similar protections of private property rights.<sup>18</sup>

These constitutional guarantees provided little protection against German anti-semitism during the rise of the Third Reich.<sup>19</sup> German nationalism arose from the miserable conditions in Germany that followed World War I, and the German people made the Jews a scapegoat for their sufferings.<sup>20</sup> Despite the constitutional guarantees embodied in the Weimar Republic,<sup>21</sup> state and national legislatures enacted numerous anti-semitic bills into law.<sup>22</sup>

The National Socialist (Nazi) Party promoted two policies during its rise to political power in the Reich.<sup>23</sup> The first was the expansion of the German state to encompass the thirty million *Volksdeutsche*, people

<sup>15</sup> LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS* 23 (1975).

<sup>16</sup> Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative and International Legal Analysis*, 11 B.U. INT'L L.J. 243, 245 (1993).

<sup>17</sup> *Id.* The government was prohibited from expropriating property except if it was for the common good, and then only after fair compensation was made. *Id.*

<sup>18</sup> *Id.* at 246. "Property is guaranteed by the Constitution . . . [e]xpropriation may be effected only for the benefits of the common general community and upon the basis of law. It shall be accompanied by due compensation . . ." *Id.* (quoting the 1919 Weimar Constitution, article 153).

<sup>19</sup> See DAWIDOWICZ, *supra* note 15, at 46.

<sup>20</sup> See *id.* at 45-46.

<sup>21</sup> See text accompanying *supra* note 18.

<sup>22</sup> DAWIDOWICZ, *supra* note 15, at 46. Six months after the Weimar Constitution was enacted guaranteed equal rights for all citizens, the Nazi Party issued a platform asserting that Jews could never be regarded as citizens of the German state. *Id.*

<sup>23</sup> Doris L. Bergen, *The Nazi Concept of Volksdeutsche and the Exacerbation of Anti-Semitism in Eastern Europe*, 29 J. CONTEMP. HIST. 569, 570 (1994).

of Germanic culture and language that lived outside the borders of the Reich.<sup>24</sup> The Nazis sought to accomplish this goal by allowing the *Volksdeutsche* to acquire the real and personal property of racially “impure” races—the Jews, gypsies, and physically handicapped people—among others.<sup>25</sup> Regulations that enabled the *Volksdeutsche* to inherit the property of the racially impure races accomplished these dual policies, in effect making the *Volksdeutsche* the beneficiaries of genocide.<sup>26</sup>

Systematic legislation enacted during Hitler’s Chancellorship<sup>27</sup> resulted in the further expropriation of Jewish property.<sup>28</sup> The Enabling Act, a decree which empowered Hitler to pass laws without regard to their constitutionality, effectively abolished the constitutional protections of the Weimar Constitution.<sup>29</sup> Popular anti-semitic ideas soon received legal codification.<sup>30</sup> A widespread boycott of Jewish businesses<sup>31</sup> led to legislation which forced Jews to liquidate certain small, independently-owned businesses, or alternatively, transfer them to Aryan owners.<sup>32</sup> The Reich Citizenship Law stripped racially impure people of their citizenship and “legally” put Jews outside the protection of the German state.<sup>33</sup>

With the proliferation of these and many other anti-semitic laws, 40,000 Jewish firms nevertheless continued to do business in Germany as late as 1938.<sup>34</sup> Although laws that discriminated against Jews resulted in the transfer of many Jewish businesses to the German state, these laws did not result in the complete elimination of Jewish enterprises.<sup>35</sup> This was because large Jewish corporations that produced munitions and other necessary military supplies were indispensable to German remilitarization.<sup>36</sup>

<sup>24</sup> *Id.* at 569.

<sup>25</sup> *Id.* at 570.

<sup>26</sup> *Id.* at 571.

<sup>27</sup> DAWIDOWICZ, *supra* note 15, at 48.

<sup>28</sup> Martin E. Elling, *Privatization in Germany: A Model for Legal and Functional Analysis*, 25 VAND. J. TRANSNAT’L L. 581, 588 (1992).

<sup>29</sup> DAWIDOWICZ, *supra* note 15, at 51.

<sup>30</sup> *Id.* at 58.

<sup>31</sup> *Id.* at 54.

<sup>32</sup> Elling, *supra* note 28, at 589.

<sup>33</sup> See DAWIDOWICZ, *supra* note 15, at 67–68. A supplement to the Reich Citizenship Law declared that Jews were not subject to the protection of the courts. *Id.*

<sup>34</sup> See *id.* at 96.

<sup>35</sup> See *id.* at 96–97.

<sup>36</sup> *Id.* at 96.

The assassination of a German embassy employee by a Polish Jewish student ultimately sparked the large-scale expropriation of Jewish property.<sup>37</sup> In a plan orchestrated by Hitler and his subordinates, mobs set fire to synagogues and other Jewish institutions and destroyed over 7000 Jewish-owned businesses.<sup>38</sup> The German Government forced the Jewish people to pay for the damages that occurred, and indiscriminately levied a one billion mark fine on the entire Jewish population.<sup>39</sup> Thereafter, the passage of numerous decrees resulted in the confiscation of most remaining Jewish property.<sup>40</sup>

The expansion of the Reich into Eastern Europe meant the proliferation of anti-semitic legislation.<sup>41</sup> In Hungary, the local government passed anti-Jewish legislation in an attempt to pacify the Hungarian Nazi Party.<sup>42</sup> In March of 1939, the Czechoslovakian provinces of Bohemia and Moravia became protectorates of the Reich.<sup>43</sup> Hitler appointed the Reich Protector of Czechoslovakia who in turn became the leading political figure in the Protectorate.<sup>44</sup> A decree placed all Jews under German jurisdiction and, in conformity with German legislation, sanctioned the expropriation of Jewish property.<sup>45</sup>

## II. INITIAL EFFORTS AT REPARATION

### A. *Legal Issues*

The ancient belief that to the victor belong the spoils had historically governed the treatment of property during conflict.<sup>46</sup> Gradually, however, laws began to conform to Rousseau's belief that a state at war "was not allowed to confiscate, or destroy, without reason, private enemy property."<sup>47</sup> At the beginning of this century, the Fourth Hague Con-

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<sup>37</sup> See DAWIDOWICZ, *supra* note 15, at 99–100.

<sup>38</sup> *Id.* at 100–02.

<sup>39</sup> *Id.* at 103.

<sup>40</sup> Elling, *supra* note 28, at 589. The Decree on Use of Jewish Property forced the further sale of real and personal Jewish property. *Id.*

<sup>41</sup> See DAWIDOWICZ, *supra* note 15, at 376–83.

<sup>42</sup> *Id.* at 381. Jewish property could be expropriated with compensation. *Id.* Limits were placed on the percentage of Jews in certain businesses, and the ability of Hungarian Jews to retain their citizenship became increasingly difficult. *Id.*

<sup>43</sup> *Id.* at 375.

<sup>44</sup> DAWIDOWICZ, *supra* note 15, at 376.

<sup>45</sup> *Id.* at 376–77.

<sup>46</sup> NICHOLAS BALABKINS, WEST GERMAN REPARATIONS TO ISRAEL 19 (1971).

<sup>47</sup> *Id.*

vention of 1907 codified the principle of the inviolability of private property during war.<sup>48</sup> Nazi confiscation of Jewish property throughout Eastern Europe was a flagrant violation of these provisions of the Hague Convention to which Germany had acceded thirty years earlier.<sup>49</sup>

As early as 1940, Jewish leaders addressed the question of restitution and compensation of European Jewry for Nazi-confiscated property.<sup>50</sup> In January, 1943, the Allied powers agreed that Germany would be obligated to return all confiscated property.<sup>51</sup> As the collapse of the Third Reich became inevitable, Jewish and Zionist scholars began to advocate that Jews had a collective claim against Germany, and that the Jewish community in Palestine should be the beneficiary of such a claim,<sup>52</sup> in order to help resettle the hundreds of thousands of Jewish people that emigrated there during and immediately after the war.<sup>53</sup> In addition to collective indemnification claims, Holocaust victims demanded the restitution of confiscated property as well as monetary compensation for losses of liberty and property that they had suffered.<sup>54</sup>

The fact that the state of Israel did not exist at the time atrocities against the Jewish people were committed was a unique aspect of the reparations discussions.<sup>55</sup> The absence of an internationally recognized entity to advocate restitution claims for Jewish property was problematic because under international law, individuals cannot espouse claims against a foreign state.<sup>56</sup> An individual must submit a claim to his or her own state, which in turn may take up the claim against another

<sup>48</sup> HAGUE CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, OCT. 18, 1907, *reprinted in* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 100 (James Brown Scott, ed., 3d ed. 1918) [hereinafter HAGUE CONVENTION]. Article 46 declares that private property shall not be confiscated, while article 56 forbids the seizure or destruction of municipal property not utilized for military operations, such as institutions dedicated to religion, charity and education. *Id.*

<sup>49</sup> *See id.* at 130. The Hague Convention was ratified by Germany on November 27, 1909. *Id.*

<sup>50</sup> BALABKINS, *supra* note 46, at 81. The Institute of Jewish Affairs of the World Jewish Congress was established in March, 1941 to address Jewish hardships suffered during the war and possible remedies. *Id.* at 82.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Mary Reiko Osaka, *Japanese Americans and Central European Jews: A Comparison of Post-War Reparations Problems*, 5 HASTINGS INT'L & COMP. L. REV. 211, 220 (1981-82).

<sup>54</sup> BALABKINS, *supra* note 46, at 84.

<sup>55</sup> Osaka, *supra* note 53, at 214.

<sup>56</sup> Dr. Walter Schwartz, *Report on the Legislation of the Federal Republic of Germany for the Redress of Wrongs Suffered by Victims of National Socialist Persecution and Evaluation of its Implementation*, 8 CAN. COMMUNITY L.J. 151, 158 (1985).

state.<sup>57</sup> International law recognizes the state as the entity capable of prescribing laws and jurisdiction that allow for the co-existence of nations.<sup>58</sup> Certain fundamental characteristics are incident to statehood.<sup>59</sup> A state must possess a permanent population within a defined territory.<sup>60</sup> The most important criterion of statehood is independence, or the capacity to enter into relations with other states,<sup>61</sup> because it presupposes a centralized decision-making authority unique in the world community, cognizable by other nations.<sup>62</sup> The touchstone for acceptance as a state is recognition by other established states.<sup>63</sup> Although large numbers of Eastern European Jews emigrated to Palestine following the destruction of their Jewish communities,<sup>64</sup> Jews living in Palestine were a people without a nation and were thus not recognizable under international law.<sup>65</sup> Similarly, the presence of private Jewish organizations at the reparations negotiations, established to coordinate the claims of Jewish refugees in Palestine and in other Jewish diaspora communities throughout the world, was a departure from international law.<sup>66</sup>

Legal justification for the recognition of communities prior to statehood has been recognized in international law, however.<sup>67</sup> The concept of states in *status nascenti* recognizes that communities in control of a certain territory and having as its goal statehood may be considered states before actually becoming states, and that retroactive recognition may validate actions taken during such a transition period.<sup>68</sup> The Jewish community in Palestine possessed many characteristics of European

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<sup>57</sup> *Id.*

<sup>58</sup> IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 61–62 (3d ed. 1979).

<sup>59</sup> See generally *id.*, ch. IV. The 1987 Restatement defines a state as “an entity which has a defined territory and a permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT].

<sup>60</sup> BROWNLIE, *supra* note 58, at 75.

<sup>61</sup> *Id.* at 76.

<sup>62</sup> *Id.*

<sup>63</sup> See *id.* at 91.

<sup>64</sup> Osaka, *supra* note 53, at 220.

<sup>65</sup> BALABKINS, *supra* note 46, at 82.

<sup>66</sup> *Id.* at 150–51. The Conference on Jewish Material Claims Against Germany [hereinafter Conference on Material Claims] was established in 1951 and is comprised of 24 Jewish organizations throughout the world. Michael Z. Wise, *Diplomacy-Reparations*, THE ATLANTIC, Oct. 1993, at 32, 33. The Conference on Material Claims participated in the negotiations settlements concurrently with Israel. *Id.*

<sup>67</sup> See BROWNLIE, *supra* note 58, at 82.

<sup>68</sup> *Id.*



countries prior to the time Israel declared itself an independent state.<sup>69</sup> Jews had their own defense forces as well as administrative and other institutional structures, such as medical services, religious institutions and welfare organizations.<sup>70</sup>

Even if the Jewish community in Palestine could be considered a state before its formal recognition as one, no precedent existed in international law for collective claims that were being made to recover heirless and communal Jewish property.<sup>71</sup> Two out of every three European Jews did not survive the Holocaust,<sup>72</sup> and the survivors in German-occupied Eastern Europe often numbered only one in ten.<sup>73</sup> In many cases, the return of material assets to their rightful owners or heirs was impossible because entire Jewish families were often wiped out, leaving no survivors.<sup>74</sup> Furthermore, Jewish communities that could assume ownership of communally-owned property also ceased to exist.<sup>75</sup> A question arose as to who would be the beneficiary of the billions of dollars of Jewish property that rested in German hands.<sup>76</sup> According to U.S. laws of escheat, property that has no genuine claims to ownership reverts to the state in which the property is located.<sup>77</sup> Jewish leaders insisted that traditional inheritance laws must be abandoned and that heirless and communal property should not be allowed to revert to Germany and other Eastern European countries.<sup>78</sup>

American military authorities in the U.S. Zone of Occupation established legislation which addressed the issue of heirless and communal restitution.<sup>79</sup> Military Law No. 59 recognized communal restitution of heirless and communal property and named the Jewish Restitution Successor Organization (JRSO) as the beneficiary of these funds.<sup>80</sup> The JRSO was responsible for the distribution of these assets.<sup>81</sup> The French

<sup>69</sup> BALABKINS, *supra* note 46, at 219–20.

<sup>70</sup> *Id.* at 219.

<sup>71</sup> See Wise, *supra* note 66, at 33.

<sup>72</sup> DAWIDOWICZ, *supra* note 15, at xiv.

<sup>73</sup> *Id.* at 402. In Poland, 90% of the Jewish population was murdered. *Id.* The Czech protectorate, the Baltic countries and Austria had similar mortality rates. *Id.*

<sup>74</sup> Zweig, *supra* note 2, at 58.

<sup>75</sup> *Id.*

<sup>76</sup> Wise, *supra* note 66, at 33.

<sup>77</sup> UNIFORM PROBATE CODE § 3–914 (1993).

<sup>78</sup> BALABKINS, *supra* note 46, at 82–83.

<sup>79</sup> Zweig, *supra* note 2, at 58. Following the unconditional surrender of Germany, the Allied Powers divided Germany into four zones of occupation, with the United States, Britain, France, and the Soviet Union each given complete executive, legislative, and judicial authority in their respective zone. BALABKINS, *supra* note 46, at 46.

<sup>80</sup> Zweig, *supra* note 2, at 58.

<sup>81</sup> *Id.*

and British Zones subsequently adopted legislation that allowed beneficiary organizations to make heirless and communal restitution claims.<sup>82</sup> Collective restitution claims for the benefit of Jewish communities and for the state of Israel was *res nova* in international law.<sup>83</sup>

Germany's obligation to negotiate with Israel and with Jewish organizations was based, above all, on moral grounds.<sup>84</sup> Germany's new Chancellor, Konrad Adenauer, realized that acceptance of responsibility for the atrocities of the Third Reich was a necessary precondition for German re-acceptance into the international community.<sup>85</sup> Adenauer formulated the concept of *Wiedergutmachung* (to make good again),<sup>86</sup> premised upon a moral obligation to redress the Jewish people.<sup>87</sup> The *Bundestag* (German Parliament) adopted a resolution stating that claims of Israel and the Jewish people were of a moral nature and deserved separate consideration from the reparation claims of other countries.<sup>88</sup> The Jewish people, however, were morally opposed to any dialogue with the German people.<sup>89</sup> Many Jews felt that to accept compensation from the Germans for the massacre of their families would be accepting blood money.<sup>90</sup> Jewish leaders ultimately convinced their people that they had every right to reclaim their plundered property, and that in no way was payment to be equated with forgiveness.<sup>91</sup>

### B. *The Treaty of Luxembourg*

Germany and the State of Israel signed the Luxembourg Treaty on September 10, 1952.<sup>92</sup> It represented a precedent for collective claims, although Jewish leaders emphasized that no material compensation could ever atone for Germany's crimes.<sup>93</sup> The FRG paid \$714 million to the state of Israel to help resettle its emigrant population.<sup>94</sup> Addi-

<sup>82</sup> *Id.*

<sup>83</sup> BALABKINS, *supra* note 46, at 150.

<sup>84</sup> Osaka, *supra* note 53, at 219.

<sup>85</sup> Wise, *supra* note 66, at 33.

<sup>86</sup> *Id.* at 32.

<sup>87</sup> Osaka, *supra* note 53, at 218.

<sup>88</sup> BALABKINS, *supra* note 46, at 132.

<sup>89</sup> *Id.* at 92-93.

<sup>90</sup> Wise, *supra* note 66, at 33.

<sup>91</sup> *Id.* The Israeli government quoted biblical language in support of their position: "Hast thou killed and also taken possession?" *Id.* (quoting 1 *Kings* 21:19).

<sup>92</sup> Agreement Between Israel and the Federal Republic of West Germany, Sept. 10, 1952, 162 U.N.T.S. 205 [hereinafter *Luxembourg Treaty*].

<sup>93</sup> BALABKINS, *supra* note 46, at 154.

<sup>94</sup> Wise, *supra* note 66, at 33.

tionally, the FRG paid \$110 million to the Conference on Material Claims to help rebuild shattered Jewish communities and restore Jewish property throughout Eastern Europe.<sup>95</sup> The Luxembourg Treaty also called for monetary compensation to individual victims and their heirs for loss of life, liberty, property, and economic advancement.<sup>96</sup> Financial compensation to individuals, Jewish communities and the state of Israel comprised the majority of the reparation payments made by the FRG.<sup>97</sup> Monetary compensation will exceed \$70 billion dollars by the year 2030, when the last of the individuals entitled to payments is expected to have died.<sup>98</sup> At one point, more than 275,000 people were receiving annuity payments from the German government.<sup>99</sup>

### C. *Shortcomings of the Luxembourg Treaty*

Notwithstanding the revolutionary precedent of collective indemnification, the Luxembourg Treaty failed to compensate many Jewish victims.<sup>100</sup> It was impossible for the newly created West Germany to address the claims of all war victims.<sup>101</sup> Furthermore, a bankrupt FRG susceptible to Communist takeover was not in the best interest of the Allied Powers.<sup>102</sup> As a result, the Luxembourg Treaty limited beneficiaries of German reparations according to the principle of subjective-personal territoriality.<sup>103</sup> Victims excluded from compensation included individuals who were not German citizens and who remained in their country of origin after the war.<sup>104</sup> These individuals were to be compensated by their own nations, which in turn were to receive payments through negotiated bilateral accords with Bonn.<sup>105</sup>

These payments often never materialized because many Eastern European countries quickly came under the rule of a Communist government that refused to recognize the principle that nationalization of private property required compensation.<sup>106</sup> Germany subsequently

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See Zweig, *supra* note 2, at 59.

<sup>98</sup> Wise, *supra* note 66, at 32.

<sup>99</sup> *Id.* at 33.

<sup>100</sup> *Id.*

<sup>101</sup> Schwartz, *supra* note 56, at 171.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Wise, *supra* note 66, at 33. In other words, Eastern European Jews that had not emigrated to Israel.

<sup>105</sup> Schwartz, *supra* note 56, at 171–72.

<sup>106</sup> See *id.* at 172.

expanded the scope of their reparations in an attempt to include Jews from Eastern European countries who failed to receive compensation from their own governments.<sup>107</sup> This expansion of *Wiedergutmachung* to Eastern European Jews who could not rely on indemnification from their own governments was ineffective, however, because Jews living behind the Iron Curtain often were unable to file compensation claims prior to the 1965 deadline imposed by the Luxembourg Treaty.<sup>108</sup>

In contrast with the \$70 billion in monetary compensation paid by the FRG,<sup>109</sup> restitution of heirless and communal Jewish property equalled only \$300–400 million.<sup>110</sup> There are several explanations for this disparity. First, the Restitution Courts set up in the FRG pursuant to the laws of the occupational powers<sup>111</sup> had no jurisdiction to restitute property outside of its borders.<sup>112</sup> Jewish property confiscated by the Nazis throughout Eastern Europe could only be restituted by the various Communist governments of Eastern Europe.<sup>113</sup> Second, claimants who filed restitution claims in the FRG often opted for monetary compensation in instances where the Reich had destroyed their property.<sup>114</sup> This alternative proved desirable to many claimants who had no desire to return to Germany.<sup>115</sup> Lastly, there was an increase in political pressure towards negotiated cash settlements when German citizens began to have their own homes reclaimed by original Jewish owners.<sup>116</sup> The consequence was that there was little success in restituting property outside of the FRG,<sup>117</sup> and that within the FRG, there was a disposition towards cash settlements in lieu of property restitution.<sup>118</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> Wise, *supra* note 66, at 33. As a result of the large-scale emigration of Eastern European Jews to the West, the FRG agreed in 1980 to make one-time payments of \$3000 to individuals who missed the 1965 deadline. *Id.* A new accord negotiated by the Conference on Material Claims supplements this 1980 agreement. *Id.* at 32. Victims of the Holocaust that spent six months in a concentration camp or 18 months in a ghetto or in hiding and who have not received prior compensation will receive pensions of around \$300 a month, starting in 1995. *Id.* Additionally, uncompensated victims who fail to meet these criteria will receive one-time payments of \$3000. *Id.*

<sup>109</sup> See *supra* text accompanying note 98.

<sup>110</sup> Zweig, *supra* note 2, at 59.

<sup>111</sup> *Id.* at 58–59.

<sup>112</sup> Schwartz, *supra* note 56, at 154, 174.

<sup>113</sup> See *id.* at 174. The concept of territorial jurisdiction in international law holds that the nation-state has exclusive jurisdiction for anything arising within its borders. JOSEPH MODESTE SWEENEY, ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 84 (3d ed. 1988).

<sup>114</sup> Schwartz, *supra* note 56, at 154.

<sup>115</sup> *Id.* at 167–68.

<sup>116</sup> Zweig, *supra* note 2, at 59.

<sup>117</sup> See Schwartz, *supra* note 56, at 154.

<sup>118</sup> See *supra* text accompanying notes 114–16.

Czechoslovakia exemplifies the obstacles to property restitution outside the FRG. The Nazis expropriated substantial Czechoslovak property during World War II,<sup>119</sup> property which the Benes Decrees subsequently confiscated from the Germans.<sup>120</sup> Additional Benes decrees nationalized property considered essential to the national economy.<sup>121</sup> The Benes government considered these takings to be temporary and promised future compensation.<sup>122</sup> The Communists' ouster of the Benes government precluded the promised return of property.<sup>123</sup> The Communist government enacted Socialist legislation in Czechoslovakia that severely limited the private property rights of its citizens.<sup>124</sup> The failure of the Luxembourg Treaty to restitute property in Eastern Europe begs the question of whether a legal basis exists in international law to remedy the shortcomings of the Treaty.

### III. PROPERTY RESTITUTION IN INTERNATIONAL LAW

#### A. *Legal Basis for Restitution—Do the laws of expropriation apply?*

International laws of expropriation require a state to compensate non-nationals for takings of property within its territory.<sup>125</sup> There are two rationales to explain why international law protects only alien property. There is an implicit assumption that domestic legislation adequately protects nationals.<sup>126</sup> International law in this area ensures that foreign owners receive the same protections that nationals receive in their own country.<sup>127</sup> Furthermore, the sovereignty of a nation-state

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<sup>119</sup> *Four Years On, Jews No Closer to Getting Property Back*, *supra* note 5.

<sup>120</sup> *See supra* note 8 and accompanying text.

<sup>121</sup> Renzulli, *supra* note 8, at 167.

<sup>122</sup> *Id.* at 168–69.

<sup>123</sup> *Id.* at 169 n.29.

<sup>124</sup> George E. Glos, *The Czechoslovak Civil Code of 1964 and its 1982 Amendment Within the Framework of Czechoslovak Civil Law*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 215, 244 (1986). The Communist party of Czechoslovakia replaced existing law with laws modeled after the laws of the Soviet Union. *Id.* at 226–31. The Civil Code of Czechoslovakia, implemented in 1950, sought to abolish private property and make the state the exclusive owner of all property. *Id.* at 244. The result of 40 years of Communist rule in Czechoslovakia was the largest-scale nationalization in Eastern Europe. Gelpert, *supra* note 3, at 324.

<sup>125</sup> BROWNIE, *supra* note 58, at 533.

<sup>126</sup> *See id.* For example, the property rights of United States citizens are protected by the Fifth Amendment to the United States Constitution, which has been interpreted to provide full compensation for all takings. U.S. CONST. amend. V.; C.F. Amerasinghe, *Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice*, 41 INT'L & COMP. L.Q. 22, 31 n.40 (1992).

<sup>127</sup> BROWNIE, *supra* note 58, at 533.

is a fundamental principle in international law and demands the mutual respect of a state's domestic legislation.<sup>128</sup>

There are conflicting views as to the level of compensation required to compensate non-nationals for expropriations.<sup>129</sup> The view of the developed world has been that international law requires that adequate (full) compensation be paid by the expropriating state.<sup>130</sup> In contrast, many developing countries ascribe to the view that there is no international standard.<sup>131</sup> These countries assert that the developed nations of the world formulated the international standard to exploit less developed countries.<sup>132</sup> Developing countries maintain that compensation to non-nationals need only equal the compensation paid to nationals for expropriated property.<sup>133</sup> Thus, the level of compensation is entirely determined by the domestic law of the taking state.<sup>134</sup> While it remains difficult to articulate a uniform international standard of compensation for expropriation,<sup>135</sup> the reality in international law has been that most takings are resolved through negotiated lump-sum settlements between countries.<sup>136</sup> One commentator has noted that the

<sup>128</sup> SWEENEY, *supra* note 113, at 1393. The United States Supreme Court has held that the act of state doctrine requires that the "conduct of one independent government cannot be successfully questioned in the courts of another . . . for it rests at last upon the highest considerations of international comity and expediency." *Id.* at 390 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1917)).

<sup>129</sup> Annette D. Elinger, *Expropriation and Compensation: Claims to Property in East Germany in Light of German Unification*, 6 EMORY INT'L L. REV. 215, 276 (1992).

<sup>130</sup> Amerasinghe, *supra* note 126, at 23. A United Nations Resolution which held that appropriate compensation be paid according to the standards of international law supports the view that compensation for expropriation is governed by the principles of international law. United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources, U.N. GAOR, 17th Sess., at 3, Doc. A/RES/1803 (1962), *reprinted in* 2 I.L.M. 223. The United States supports this U.N. Resolution and requires that just compensation "[m]ust, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken . . ." RESTATEMENT, *supra* note 59, § 712(1).

<sup>131</sup> Amerasinghe, *supra* note 126, at 24.

<sup>132</sup> SWEENEY, *supra* note 113, at 1169 (quoting *Barcelona Traction and Power Co., Ltd. (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, at 244 (separate opinion of Judge Nervo)).

<sup>133</sup> Amerasinghe, *supra* note 126, at 24.

<sup>134</sup> *Id.* The Charter of Economic Rights and Duties of States adopted by the U.N. General Assembly advocates the position of the developing countries. Charter of Economic Rights and Duties of States, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3281 (1975), *reprinted in* 14 I.L.M. 251. Article 2.2(c) asserts that all states have the right "[t]o nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measure, *taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.*" *Id.* art. 2.2(c) (emphasis added).

<sup>135</sup> Elinger, *supra* note 129, at 249.

<sup>136</sup> *Id.* at 235-36. Lump-sum settlements involve the payment of a negotiated amount from the

level of compensation depends more on the financial capacity and goodwill of the expropriating state than any set legal standard.<sup>137</sup> Regardless of the appropriate level of compensation, the laws of expropriation have never been interpreted to require the restitution of expropriated property.<sup>138</sup> The international laws of expropriation thus do not reach the claims of Eastern European *nationals*, and assuming *arguendo* that nationals could seek redress in international law, compensation, not restitution, is the required form of payment.<sup>139</sup>

### B. *Other Bases for Property Restitution*

More than any international legal standard, political, economic, and moral forces have provided the impetus for restitution legislation.<sup>140</sup> Until recently, the German Democratic Republic (GDR) had never accepted legal responsibility for Nazi property expropriations that occurred within its territory.<sup>141</sup> The Joint Declaration of the governments of the FRG and the GDR on the Settlement of Open Property Questions (Joint Declaration) was instrumental in the unification of the FRG and the GDR.<sup>142</sup> It provided for the return of property expropriated by East Germany since its inception in 1949.<sup>143</sup> Additional legislation called for the restitution of property taken by the Nazis in East Germany from 1933–1945, if such property was taken for racial, religious, political, or ideological reasons.<sup>144</sup> This legislation was significant because international law did not require the German government to return property taken from its own citizens.<sup>145</sup>

A recent decision by the *Bundesverfassungsgericht* (German Constitutional Court)<sup>146</sup> illustrated that strong competing forces existed

expropriating state to the claimant state. *Id.* at 236. The claimant state then allocates the lump-sum to individual claimants. *Id.*

<sup>137</sup> *Id.* at 231 n.83.

<sup>138</sup> See Elinger, *supra* note 129, at 234.

<sup>139</sup> See *supra* text accompanying notes 125–38.

<sup>140</sup> See *infra* text accompanying notes 146–82.

<sup>141</sup> William Karl Wilburn, *Filing of U.S. Property Claims in Eastern Germany*, 25 INT'L LAW. 649, 658 (1991). The GDR did not officially acknowledge responsibility for Nazi offenses until 1990. Heslop & Roberto, *supra* note 16, at 258 n.93.

<sup>142</sup> Heslop & Roberto, *supra* note 16, at 248. The Unification Treaty incorporated the Joint Declaration. *Id.* at 256. The Joint Declaration sought to unify any existing discrepancies in property law that existed between the two Germans. *Id.* at 248.

<sup>143</sup> *Id.* at 249.

<sup>144</sup> Wilburn, *supra* note 141, at 658.

<sup>145</sup> See Heslop & Roberto, *supra* note 16, at 274; see also *supra* Part III.A.

<sup>146</sup> The *Bundesverfassungsgericht* is a tribunal with original jurisdiction over constitutional questions. Heslop & Roberto, *supra* note 16, at 263 n.113.

against property restitution within unified Germany.<sup>147</sup> The Joint Declaration specifically excluded the restitution of property expropriated by the Soviet military occupational forces prior to the establishment of the GDR.<sup>148</sup> In a decision in April, 1991, the *Bundesverfassungsgericht* ruled that although owners of land expropriated by the Soviet Union from 1945–1949 did not have a constitutional right to restitution, they were entitled to monetary compensation.<sup>149</sup> Notwithstanding the decision of the *Bundesverfassungsgericht*, there is much debate as to the constitutionality of this exclusionary provision of the Joint Declaration.<sup>150</sup>

The inviolability of expropriations from this period is better understood in a political context.<sup>151</sup> The exclusion of Soviet expropriations from restitution was a non-negotiable prerequisite of both the GDR and the Soviet Union to German reunification,<sup>152</sup> and where strong political reasons warrant, judicial deference to legislative acts is not uncommon.<sup>153</sup> In *Dames & Moore v. Reagan*, the United States Supreme Court held that certain instances required judicial deference, namely where important and sensitive foreign policy issues necessitated executive or legislative action.<sup>154</sup> Similarly, the need for swift resolution of

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<sup>147</sup> *Id.* at 263.

<sup>148</sup> *Id.* at 249–50.

<sup>149</sup> Dorothy Ames Jeffress, *Resolving Rival Claims on East German Property Upon German Unification*, 101 YALE L.J. 527, 540 (1991). The *Bundesverfassungsgericht* affirmed the constitutionality of this provision of the Joint Declaration in its decision on April 23, 1991. *Id.* Fourteen landowners who lost property during the Soviet Occupation claimed that to return land expropriated between 1933–1945 and 1949–1990, and not land expropriated from 1945–1949, violated the German constitutional guarantee of equality before the law. See Heslop & Roberto, *supra* note 16, at 263–64. The *Bundesverfassungsgericht* rejected these claims and upheld the constitutionality of the exclusion, holding that the German Republic was not responsible for the takings that occurred during this period because the expropriations under the Soviet Occupation were the work of a foreign sovereign power. *Id.* at 264.

<sup>150</sup> Jeffress, *supra* note 149, at 535 n.45; D.B. Southern, *The Land Question in East Germany*, 42 INT'L & COMP. L.Q. 690, 693 (1993).

<sup>151</sup> Heslop & Roberto, *supra* note 16, at 271.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> 453 U.S. 654 (1981). Petitioner Dames & Moore had certain contracts with the government of Iran that were terminated. *Id.* at 664. Petitioner claimed amounts due of more than \$3 million for services performed before termination of the contract. *Id.* Federal authorities seized property in the United States belonging to Iran upon an order of the District Court of California, to secure any judgment that might be entered against Iran. *Id.* at 665. As a condition to secure the release of American hostages being held in Iran, Presidents Reagan and Carter issued executive orders which terminated all claims and legal proceedings in United States courts involving claims against Iran and its state enterprises, and nullified all attachments and judgments obtained therein. *Id.* The Supreme Court held that the judiciary must in certain instances recognize the supremacy of the executive to dispose of valid international claims. See *id.* at 658.



outstanding property claims in East Germany mandated judicial deference by the *Bundesverfassungsgericht* with regard to the Joint Declaration's provision regarding the inviolability of Soviet expropriations.<sup>155</sup>

In addition to political pressures, the need to stimulate the economy of the former GDR resulted in exceptions to Germany's restitution program.<sup>156</sup> If restitution claims had been allowed for the 1945–1949 period, one-third of all land in the former East Germany would have been subject to restitution claims.<sup>157</sup> Such a wholesale transfer of ownership would have greatly destabilized the East German economy.<sup>158</sup> The September, 1990 Law on Special Investments (*Investitionsgesetz*) further limited restitution as it allowed for the disposal of property regardless of third-party claims, if the sale of the property helped to preserve or create new jobs.<sup>159</sup> The precedence of privatization measures over restitution underscored the need to encourage investment growth in East Germany.<sup>160</sup>

#### IV. PROPERTY RESTITUTION IN THE CZECH REPUBLIC

Political, moral, and economic forces drove the Czech Republic's Restitution Laws.<sup>161</sup> The November, 1989 Revolution ended forty-one years of Communist rule in Czechoslovakia,<sup>162</sup> where anti-Communist ideology was unrivaled in Eastern Europe, largely as a result of the Soviet Union's brutal repression of the 1968 Prague uprising.<sup>163</sup> The primary components in the transformation of the Czechoslovakia were the rejection of the principle of collective ownership and the movement towards a market economy.<sup>164</sup>

Property restitution to former owners and their heirs demonstrated the Czechoslovak government's determination to protect the property rights of individuals.<sup>165</sup> President Havel supported restitution on the

<sup>155</sup> See Heslop & Roberto, *supra* note 16, at 272.

<sup>156</sup> *Id.* at 260.

<sup>157</sup> *Id.* at 250.

<sup>158</sup> Nicholas Hancock & Hans-Dieter Schulz-Gebeltzig, *Recovering Expropriated Property in Eastern Germany*, 141 NEW L.J. 270, 277–78 (1991).

<sup>159</sup> Heslop & Roberto, *supra* note 16, at 260.

<sup>160</sup> See *id.* at 261.

<sup>161</sup> Vratislav Pechota, *Privatization and Foreign Investment in Czechoslovakia: The Legal Dimension*, 24 VAND. J. TRANSNAT'L L. 305, 308–09 (1991).

<sup>162</sup> Michael L. Neff, Comment, *Eastern Europe's Policy of Restitution of Property in the 1990's*, 10 DICK. J. INT'L L. 357, 368 (1992).

<sup>163</sup> Gelpert, *supra* note 3, at 323–24.

<sup>164</sup> Peter Martin, *Privatization: A Balance Sheet*, REP. E. EUR. 7 (Feb. 1, 1991).

<sup>165</sup> Neff, *supra* note 162, at 369–70.

moral ground that stolen property must be restituted to lift the taint of the Communist era from the country.<sup>166</sup> Only 3000 Jews remain in the Czech Republic, down from a pre-war population of 118,000.<sup>167</sup> The need for the restitution of formerly held Jewish property is acute, where without restitution, a leading rabbi in the Czech Republic predicted that "several Jewish communities would stop functioning for financial reasons and one of the last chances for the protection of Jewish cultural heritage would be jeopardized."<sup>168</sup>

Moral imperatives for restitution, however, are often confronted by practical impossibilities.<sup>169</sup> In Poland, for example, the pre-war Jewish population numbered in the millions and owned entire communities.<sup>170</sup> Forty-eight buildings in Prague today were formerly owned by the Jewish community.<sup>171</sup> In addition, many Czech citizens felt that to reconstitute property expropriated forty years ago would burden a generation not responsible for the expropriation.<sup>172</sup> The fear that restitution of property seized forty years ago would result in protracted and expensive litigation also created strong opposition to the restitution movement.<sup>173</sup>

Economic considerations were also instrumental in developing a framework for restitution within the Czech Republic.<sup>174</sup> Property restitution opponents argued that because restitution takes precedence over privatization,<sup>175</sup> extensive restitution would interfere with the ability to attract foreign capital.<sup>176</sup> Opponents feared that restitution would slow down privatization efforts instead of accelerating economic transformation to a market economy.<sup>177</sup> Another concern was the number of claimants entitled to submit restitution claims.<sup>178</sup> To accept claims from all 580,000 people who left the country between 1948 and 1990

<sup>166</sup> Pechota, *supra* note 161, at 308–09.

<sup>167</sup> *Czech Jews*, *supra* note 8.

<sup>168</sup> *Rabbi Thinks Property Should Be Returned to All Jews*, CTK National News Wire, Dec. 10, 1993, available in LEXIS, World Library, Allwld File.

<sup>169</sup> Diane Francis, *Who Owns What in Eastern Europe?*, FIN. POST, Sept. 8, 1993, at 11, available in WESTLAW, Finpost Database.

<sup>170</sup> *Id.*

<sup>171</sup> Marjorie Olster, *Jews Seek Redress for Nazi, Communist Plunder*, Reuter Library Report, Aug. 3, 1992, available in LEXIS, World Library, Allwld File.

<sup>172</sup> Pechota, *supra* note 161, at 309.

<sup>173</sup> Jan Machacek, *Privatization: More Than an Economic Goal*, E. EUR. REP. 56 (Jan.–Feb. 1992).

<sup>174</sup> *Id.* at 56.

<sup>175</sup> Pechota, *supra* note 161, at 312.

<sup>176</sup> Gelpert, *supra* note 3, at 325–26.

<sup>177</sup> *See id.*

<sup>178</sup> *See Jiri Pehe, The First Weeks of 1991: Problems Solved, Difficulties Ahead*, REP. E. EUR. 6 (Mar. 8, 1991).

would be far more costly than if the Czech government implemented citizenship and residency requirements for claimants.<sup>179</sup>

Czechoslovak legislators also faced enormous political pressure to establish the date of the Communist takeover as the cutoff date for restitution claims.<sup>180</sup> Such a date was desirable because it would preclude claims to property confiscated from the approximately three million Sudeten Germans in 1945 and 1946.<sup>181</sup> Such a cutoff date failed to address Jewish claims to property confiscated before the Communist takeover.<sup>182</sup>

## V. THE CZECH REPUBLIC'S RESTITUTION LAWS

The two primary laws that govern restitution in the Czech Republic reflect the political, economic, and moral considerations discussed above.<sup>183</sup> The Small Restitution Law of October 2, 1990, allowed for the restitution of predominantly small businesses that were forcibly expropriated by the state during the late 1950's.<sup>184</sup> The Small Restitution Law faced little opposition because the nationalizations of this period coincided with the most brutal post-war years in Czechoslovakia,<sup>185</sup> and because the property being restituted constituted only a small portion of the privately-owned property expropriated by the Communist regime.<sup>186</sup> The Small Restitution Law financially compensated individuals

<sup>179</sup> See *id.*

<sup>180</sup> Renzulli, *supra* note 8, at 180 n.119.

<sup>181</sup> Jeremy Smith, *Czech Government Accused of Stonewalling on Restitution*, Reuters World Service, Mar. 20, 1994, available in LEXIS, World Library, Allwld File.

<sup>182</sup> *Restitution Cut-Off Date Artificial*, CTK National News Wire, Mar. 29, 1994, available in LEXIS, World Library, Allwld File. The legal implications of allowing Jewish claims to cross over the 1948 deadline was recognized by Konrad Badeneuer, spokesman of the Sudeten Germans' Association: "If the [Czech] government recognizes that properties taken from the Jews as early as 1938 should be returned, it would have to accept the validity of our claims." Bridge, *supra* note 13, at 12.

<sup>183</sup> See *supra* part IV. The Czech Republic also enacted two privatization laws. Pechota, *supra* note 161, at 312-14. The Small Privatization Law went into effect on December 1, 1990 and concerned the auction of small businesses unclaimed by the Restitution Laws. *Id.* at 312. The Large Privatization Law became effective on April 1, 1991 and involved the privatization of some 3000 large state-owned enterprises through direct sale to Czech citizens, direct sale to foreign investors, auctions, and other methods. Machacek, *supra* note 173, at 57. An analysis of the privatization laws is beyond the scope of this Note.

<sup>184</sup> The Act on the Alleviation of Certain Property Injustices, No. 403/1990 Coll. of L., as amended by, Law of October 30, 1990, No. 458/1990, translated in CENTRAL & EASTERN EUROPEAN LEGISLATIVE MATERIALS (V. Pechota, ed. 1991) [hereinafter Small Restitution Law].

<sup>185</sup> Gelpert, *supra* note 3, at 327.

<sup>186</sup> Pechota, *supra* note 161, at 310.

in instances where the claimed property was irrevocably altered.<sup>187</sup> Foreigners and Czechs could submit claims provided that such claims had not been previously settled.<sup>188</sup>

After much debate, the Czech Parliament enacted the Second Restitution Law on February 21, 1991.<sup>189</sup> As the preamble makes clear, there existed a strong moral desire to redress past wrongs:

[t]he Federal Assembly of the Czech and Slovak Federal Republic, in an attempt to redress the results of certain property and other injustices arising in the period from 1948 to 1989, aware that these injustices cannot ever be fully compensated for, and desiring nevertheless to confirm its desire that such injustices never happen again, has resolved on the following law . . . .<sup>190</sup>

The Second Restitution Law concerned property expropriated by the Communist regime between February 25, 1948 and January 1, 1990.<sup>191</sup> Although the Second Restitution Law restituted an unprecedented amount of property (approximately \$10.7 billion),<sup>192</sup> several significant restrictions limited those entitled to submit claims. The former owner of the property, or the claimant who derived his or her right from such owner, must be a Czech citizen and a permanent resident.<sup>193</sup> In addition, claimants must be physical persons.<sup>194</sup> Such a provision excluded claims for communally-owned property such as churches and synagogues.<sup>195</sup> The law permitted financial compensation in lieu of restitution if the property was markedly devalued from its former condition.<sup>196</sup> Alternatively, if the claimed property substantially appreciated in value since its confiscation, the claimant could either request financial compensation from the government, or restitution of the property, in

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<sup>187</sup> Martin, *supra* note 164, at 9.

<sup>188</sup> *Id.* Many U.S. citizens were unable to submit claims for restitution because they had already received financial compensation through the Claims Agreement between the United States and Czechoslovakia in 1981. See Renzulli, *supra* note 8, at 176.

<sup>189</sup> Pechota, *supra* note 161, at 310.

<sup>190</sup> Second Restitution Law, *supra* note 4, pmbl.

<sup>191</sup> *Id.* art. 1(1). Property covered by the Small Restitution Law is excluded. See *id.* art. 1(3).

<sup>192</sup> Pehe, *supra* note 178, at 7.

<sup>193</sup> Second Restitution Law, *supra* note 4, art. 3(1).

<sup>194</sup> *Id.* art. 3(1).

<sup>195</sup> Pechota, *supra* note 161, at 311. Provisions for the return of such property were to be covered by future legislation and therefore were also exempted from the large-scale privatization of state-owned assets. *Id.* at 311 n.15.

<sup>196</sup> Second Restitution Law, *supra* note 4, art. 7(3).

which case the claimant must pay the current owner the difference between the original and present value of the property.<sup>197</sup>

The most significant limiting provision of the Second Restitution Law was the claims cutoff date of February 25, 1948.<sup>198</sup> Because the Nazi's confiscated most Jewish property during its occupation of Moravia and Bohemia, Jewish leaders deemed the cutoff date unacceptable.<sup>199</sup> Those opposed to an earlier cutoff date feared that the return of Jewish property expropriated before 1948 would lead to an avalanche of Sudeten German restitution claims.<sup>200</sup> This alarm motivated the Czech Parliament initially to reject two draft laws that would have returned Jewish property confiscated by the Nazis and nationalized by Czechoslovakia.<sup>201</sup>

Intense pressure eventually led the Czech Parliament to pass an amendment to the Second Restitution Law which sanctioned the restitution of 202 buildings of ritual significance owned by the Jewish community and confiscated during the Nazi occupation of Czechoslovakia.<sup>202</sup> In addition to allowing Jewish claims to pre-date the 1948 cutoff date, this new legislation allows for the restitution of communally-owned property, which contradicts a provision of the Second Restitution Law that permits only original owners or their heirs to submit claims.<sup>203</sup> The new legislation also entitles individuals to property restitution or monetary compensation.<sup>204</sup> Those entitled to submit claims under the Amendment are claimants who lost property under the racial laws enacted by Nazi Germany between 1939 and 1945 are entitled to submit claims.<sup>205</sup> Such a provision precludes Sudeten Ger-

<sup>197</sup> *Id.* art. 7(4). Financial compensation from the government consists of a maximum cash payment of 30,000 crowns, and if necessary, the issuing of securities which are not state bonds. *Id.* art. 13(5). The amount of financial compensation can be adjusted by government regulations. *Id.*

<sup>198</sup> *Id.* art. 1(1). On September 26, 1991, the Czechoslovak Parliament struck down article 2(3) of the Second Restitution Law, which would have allowed restitution to individuals that had property nationalized under the Benes decrees between 1945 and 1948. Second Restitution Law, *supra* note 4, art 2(3); Renzulli, *supra* note 8, at 180 n.117.

<sup>199</sup> Jeremy Smith, *Czech Jews Bitter Over Second Property Law Setback*, Reuters World Service, Mar. 24, 1994, available in LEXIS, World Library, Allwld File.

<sup>200</sup> *German Paper Comments on Czech Property Restitution Disputes*, CTK National News Wire, Jan. 27, 1994, available in LEXIS, World Library, Allwld File. Prime Minister Vaclav Klaus was skeptical on whether there was a legal solution that would allow Jewish claimants to cross the 1948 line, while excluding claims of Sudeten Germans. Bridge, *supra* note 13, at 12.

<sup>201</sup> Smith, *supra* note 199.

<sup>202</sup> *Czech Jews*, *supra* note 8.

<sup>203</sup> Compare WEINBAUM, *supra* note 9, at 19 with Second Restitution Law, *supra* note 4, art. 3.

<sup>204</sup> *Czech Jews*, *supra* note 8.

<sup>205</sup> *Id.*

mans from submitting claims because their expulsion from Czechoslovakia rested on their German nationality.<sup>206</sup> Despite pronouncements that the new law was an exception to the restitution laws and that it did not signal any intention to discuss Sudeten Germans claims,<sup>207</sup> the Amendment is likely to be challenged before the Czech Constitutional Court.<sup>208</sup>

#### A. *Analysis of the Recent Amendment to the Second Restitution Law*

Politicians have characterized the Amendment to the Second Restitution Law as being legally suspect.<sup>209</sup> Its racial exclusivity violates article 17 of the United Nations Declaration of Human Rights (Declaration), which declares that no one shall be arbitrarily deprived of their property.<sup>210</sup> A law which sanctions property to be returned to one group and not to others on the basis of race is discriminatory and contravenes the purpose of the Declaration, which recognizes the inherent equal and unalienable rights of all individuals.<sup>211</sup> The Amendment also violates non-discrimination provisions of the Declaration and the European Convention on Human Rights [Convention], which both affirm the right of every person to be free from racial discrimination.<sup>212</sup>

<sup>206</sup> See Bridge, *supra* note 13, at 12.

<sup>207</sup> See *id.* President Havel did propose that Czech citizenship would be granted to Sudeten Germans on a case-by-case basis, provided that the claimant agrees to relinquish German citizenship. Simon Pellar, *Old Resentments Weigh on New Start by Germans, Czechoslovaks*, Reuter Library Report, Feb. 26, 1992, available in LEXIS, World Library, Allwld File. Then-Chancellor Kohl dismissed the proposal. *Id.*

<sup>208</sup> *Constitutional Court May Examine Jewish Property Restitution Bill Amendment*, *supra* note 14. The Constitutional Court protects and interprets the Czech Constitution. George E. Glos, *The Constitution of the Czech Republic of 1992*, 21 HASTINGS CONST. L.Q. 1049, 1065 (1994). It rules on the constitutionality of laws and their provisions, and has the power to declare laws invalid if they conflict with either the Constitution or a binding international treaty on human rights and fundamental freedoms. *Id.* All decisions of the Czech Constitutional Court are binding on all government bodies and persons. *Id.*

<sup>209</sup> See *Constitutional Court May Examine Jewish Property Restitution Bill Amendment*, *supra* note 14.

<sup>210</sup> See Universal Declaration of Human Rights, G.A. Res. 71, U.N. GAOR, 3d Sess., art. 17, ¶ 2, U.N. Doc A/810 (1948) [hereinafter Declaration].

<sup>211</sup> See *id.* pmbl.

<sup>212</sup> See *id.* art. 2. ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. . . ."); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1953) [hereinafter Convention], art. 14 ("The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"). *Id.*

There is little argument that the racial exclusivity clause violates provisions of these international agreements.<sup>213</sup> Disagreement does exist as to the binding effect of international declarations on nations in general, and on the Czech Republic in particular.<sup>214</sup> Regardless of the binding force of these declarations, the Czech Republic has expressed a strong desire to respect the rights of citizens as pronounced in the Declaration.<sup>215</sup> Article 1(1) of the Second Restitution Law concerned the redressing of certain injustices “in conflict with the bases of a democratic society respecting the rights of citizens as expressed in the Charter of the United Nations, *the Universal Declaration of Human Rights*. . . .”<sup>216</sup> Furthermore, the Czech Bill of Rights explicitly asserts that “international agreements on human rights which the Czech Republic has ratified . . . are generally binding on its territory and take precedence over domestic law.”<sup>217</sup> Because the Czech Bill of Rights implicitly incorporates the principles of the European Convention on Human Rights,<sup>218</sup> there is a strong presumption that the Czech Republic has implicitly agreed to be bound by the principles of the Convention.<sup>219</sup>

According to the decision espoused by the European Court of Human Rights in the case of *Lithgow v. U.K.*,<sup>220</sup> the return of Jewish

<sup>213</sup> See *Constitutional Court May Examine Jewish Property Restitution Bill Amendment*, *supra* note 14.

<sup>214</sup> Compare R. Anthony Salgado, *Protection of Nationals' Rights to Property Under the European Convention on Human Rights: Lithgow v. United Kingdom*, 27 VA. J. INT'L L. 865, 882 (1987) (“the Universal Declaration of Human Rights is successful because it is not enforceable”) *with id.* at 910–11 n. 259:

The provisions of the Universal Declaration are admitted today as obligatory, both in the sense that they are considered general principles of international law, and as an interpretation of the Charter expressly and repeatedly accepted by the international community. . . . The Universal Declaration of Human Rights has been transformed from a moral standard to a document under which definitive rights and duties are imposed on States.

*Id.*

<sup>215</sup> See Second Restitution Law, *supra* note 4, art. 1(1).

<sup>216</sup> *Id.* (emphasis added).

<sup>217</sup> Czechoslovak Constitutional Law on Human Rights and Freedoms, Jan. 1, 1991, art. 2, translated in U.S. Dep't. of Commerce-Central & Eastern Europe Legal Texts, available in LEXIS, World Library, Allwld File [hereinafter Czech Bill of Rights].

<sup>218</sup> Lloyd Cutler & Herman Schwartz, *Constitutional Reform in the Czechoslovakia: E Duobus Unum*, 58 U. CHI. L. REV. 511, 531 (1991).

<sup>219</sup> See Czech Bill of Rights, *supra* note 217, art. 2.

<sup>220</sup> See *Lithgow v. United Kingdom*, 102 Eur. Ct. H.R. (ser. A) (1986), reprinted in 8 EUR. HUM. RTS. REP. 329 (1986).

property conditioned on race also violates Protocol No. 1 to the Convention.<sup>221</sup> *Lithgow* involved Great Britain's nationalization of plaintiffs' several interests under the Aircraft and Shipbuilding Act of 1977.<sup>222</sup> Plaintiff shareholders, who consisted entirely of British persons and corporations, alleged that the level of compensation was inadequate and violated Protocol No. 1 of the Convention.<sup>223</sup> The Court held that the general principles of international law referred to in Protocol No. 1 applied exclusively to non-nationals, and that consequently the British complainants could allege no violation of the Convention.<sup>224</sup>

The Court in *Lithgow* condoned disparate treatment of nationals on the grounds that nationals have means of protection not available to foreigners through a political voice in the decision to nationalize.<sup>225</sup> Although the Court reasoned that national governments should be given a "wide margin of appreciation" in determining when expropriations of nationals' property are justified and what, if any, level of compensation is reasonable, the Court implied that there are boundaries which if crossed would make the language of Protocol No. 1 applicable to nationals.<sup>226</sup>

In the Court's view, the language of Protocol No. 1 is applicable to nationals if a substantially disproportionate burden exists between the expropriation relative to the goals the national government sought to achieve through the expropriation.<sup>227</sup> In the Czech Republic, the Second Restitution Law imposed a substantial burden on all groups that had property expropriated before 1948 because it allowed none of them to submit claims for restitution.<sup>228</sup> The Amendment to the Second Restitution Law, which sanctions property restitution to nationals who lost such property on the basis of race, creates the substantially disproportionate burden alluded to in *Lithgow*.<sup>229</sup> Protocol No. 1 thus com-

<sup>221</sup> See Convention, *supra* note 212, Protocol No. 1, art. 1, [hereinafter Protocol No. 1] which provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of *international law*." *Id.* (emphasis added).

<sup>222</sup> *Lithgow*, *supra* note 220, at 329.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* For a thorough exposition of the facts and the decision rendered in this case, see Salgado, *supra* note 214.

<sup>225</sup> *Lithgow*, *supra* note 220, at 370.

<sup>226</sup> See *id.* at 372, 389-90.

<sup>227</sup> See Salgado, *supra* note 214, at 871 n.33.

<sup>228</sup> See Second Restitution Law, *supra* note 4, art. 1(1).

<sup>229</sup> See *supra* note 228 and accompanying text.



pels the Czech Republic to compensate all nationals whose property was expropriated without compensation, or to compensate none at all.<sup>230</sup>

In addition to violating international law, the racial exclusivity clause of the Amendment conflicts with several provisions of the Czech Bill of Rights, which makes the legislation unconstitutional *per se*.<sup>231</sup> Article 1 states that all citizens "are free and equal both in their dignity and in their rights."<sup>232</sup> Article 11(1) guarantees equal protection of property rights, while article 3(1) contains a non-discrimination clause similar to those contained in the Declaration and the Convention.<sup>233</sup> Legislation that condones racial discrimination violates all of these provisions.<sup>234</sup>

### B. *How Will the Constitutional Court Decide?*

Judicial independence from political pressure was an important goal in the establishment of the Czech Constitutional Court.<sup>235</sup> However, the appointment of judges for a term of years by the President with the consent of the Senate<sup>236</sup> has the potential to interfere with the autonomy of the judicial branch.<sup>237</sup> The Amendment to the Second Restitution Law was the result of tremendous economic and political pressure and has the potential to make it increasingly difficult for the Court to act independently on the issue.<sup>238</sup> Furthermore, the Amendment is bound to have a profound impact on Czech-German relations, and judicial deference in sensitive foreign policy areas is not uncommon.<sup>239</sup>

The recent decision of the Czech Constitutional Court holding that the residency requirement of the Second Restitution Act was unconstitutional, however, illustrates the independence and integrity of the Court.<sup>240</sup> A Czech citizen who resides abroad was given until May 1,

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<sup>230</sup> See Protocol No. 1, *supra* note 221.

<sup>231</sup> See Czech Bill of Rights, *supra* note 217, art. 1.

<sup>232</sup> *Id.* art. 1.

<sup>233</sup> See *id.* arts. 11(1), 3(1); *supra* note 212 and accompanying text.

<sup>234</sup> See Czech Bill of Rights, *supra* note 217, arts. 1, 3(1), 11(1).

<sup>235</sup> Cutler & Schwartz, *supra* note 218, at 539.

<sup>236</sup> See Glos, *supra* note 208, at 1065.

<sup>237</sup> See Cutler & Schwartz, *supra* note 218, at 539. In contrast, judges in the United States are appointed to serve for life, contingent upon good behavior. U.S. CONST., Art. III, § 1.

<sup>238</sup> See *supra* Part IV.

<sup>239</sup> See *supra* notes 153–55 and accompanying text.

<sup>240</sup> See *Constitutional Court Prolongs Restitution Claims Deadline*, CTK National News Wire, July 12, 1994, available in LEXIS, World Library, Allwld File [hereinafter *Constitutional Court*]. On

1995 to file a claim for restitution or compensation.<sup>241</sup> Despite the tremendous pressure to limit the number of claimants entitled to restitution,<sup>242</sup> the Constitutional Court enlarged the scope of individuals entitled to submit restitution claims.<sup>243</sup>

### CONCLUSION

In the words of Czech Premier Klaus, the Amendment to the Second Restitution Law is "very dangerous, unexpected and badly thought out."<sup>244</sup> The Amendment is violative of both international conventions and the Czech Constitution. The Constitutional Court has demonstrated its independence from political pressure and if the Amendment reaches the Court, it is likely to be struck down as unconstitutional. To avoid being unconstitutional under *Lithgow*, the Amendment would have to permit all citizens to submit restitution claims for expropriation that occurred before 1948. Such an alternative would be economic and political suicide for the Czech Republic and its leaders.

This Note has pointed out, however, that non-judicial considerations often outweigh legal obstacles. Recent comments by President Havel suggest that the Amendment to the Second Restitution Law concerning Jewish property will stand, despite its questionable constitutionality, because of the powerful moral, economic, and political forces that led to its passage.<sup>245</sup>

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July 11, 1994, the Court abolished the provision of the Second Restitution Act that conditioned restitution on permanent residency. *Id.*

<sup>241</sup> WEINBAUM, *supra* note 9, at 20.

<sup>242</sup> See *supra* notes 178–89 and accompanying text.

<sup>243</sup> See *Constitutional Court*, *supra* note 240. More than 100,000 Czech citizens escaped from Czechoslovakia after the Communists seized power in 1948. *Glos*, *supra* note 208, at 1057–58. Most were convicted in absentia and their properties were seized. *Id.* The deletion of the residency requirement entitles these individuals and other Czech nationals residing abroad to submit restitution claims if their property was expropriated. *Constitutional Court*, *supra* note 240. One government official estimates that if only a portion of those émigrés entitled to submit restitution claims do so, 60,000 new restitution claims could be filed. *Id.*

<sup>244</sup> *Klaus Comments on Government's Rejection of Jewish Property Restitution Bill*, BBC Summary of World Broadcasts, Mar. 29, 1994, available in LEXIS, World Library, Allwld File.

<sup>245</sup> In the latest of a series of rejections, Prime Minister Klaus ruled out making a blanket offer to return land to the Sudeten Germans. *Ethnic Germans Still Fight post-WWII Ousting - Seek Right of Return to Former Homelands, Apology, Compensation*, SAN DIEGO UNION-TRIBUNE, Aug. 31, 1995, at A24.