



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1961/2010

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

<i>Submitted by:</i>	X (not represented by counsel)
<i>Alleged victims:</i>	The author, Y, Z and A
<i>State party:</i>	Czech Republic
<i>Date of communication:</i>	4 January 2010
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 2 August 2010 (not issued in document form)
<i>Date of adoption of decision:</i>	2 April 2015
<i>Subject matter:</i>	Restitution of property
<i>Procedural issues:</i>	Substantiation of claims; <i>ratione materiae</i>
<i>Substantive issues:</i>	Fair trial; discrimination; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3) and 14 (1) (read alone and in conjunction with articles 2 (1) and 26)
<i>Articles of the Optional Protocol:</i>	2 and 3

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\* Reissued for technical reasons on 28 July 2015.

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## Annex

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

concerning

#### **Communication No. 1961/2010\*\***

*Submitted by:* X (not represented by counsel)  
*Alleged victims:* The author, Y, Z and A  
*State party:* Czech Republic  
*Date of communication:* 4 January 2010 (initial submission)

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

*Meeting* on 2 April 2015,

*Having concluded* its consideration of communication No. 1961/2010, submitted to the Human Rights Committee by X, on his own behalf and on behalf of Y, Z and A, under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

*Adopts* the following:

#### **Decision on admissibility**

1. The author of the communication, dated 4 January 2010,<sup>1</sup> is X, born on 20 October 1935. He submits the communication on behalf of himself, his mother, Y, and his siblings, Z and A, all of whom are German nationals.<sup>2</sup> The author claims that, since he, his mother and his siblings, as German nationals, are ineligible for compensation under Czech restitution laws for his father's knitwear factory, which was nationalized in 1945, they are the victims of a violation by the Czech Republic of their rights under articles 2 (3) and

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

The text of an individual opinion by Committee members Olivier de Frouville, Mauro Politi and Víctor Manuel Rodríguez-Rescia (partly dissenting) is appended to the present decision.

<sup>1</sup> The initial complaint was completed by a letter dated 5 July 2010.

<sup>2</sup> After the communication was registered, the author informed the Committee, in a submission dated 20 June 2013, that Y had died on 27 November 2012 and was succeeded by the other alleged victims.

14 (1), read alone and in conjunction with articles 2 (1) and 26, of the Covenant.<sup>3</sup> The author is not represented.

### **Factual background**

2.1 The author's father, J, owned a knitwear factory in Rožnov pod Radhoštěm, now part of the Czech Republic. He died on 9 March 1979, leaving as his heirs his widow, Y, and his children (the author, Z and A). In 1946, the factory was nationalized under Decree No. 100/1945, as it had more than 400 employees and belonged to a certain branch of the economy. Under article 8 of the Decree, the owner of nationalized property was entitled to compensation. However, article 7 of the Decree provided that no compensation would be paid to German nationals unless they proved that they had remained loyal to the Czechoslovak Republic, had never committed any offence against the Czech or Slovak nations and had either actively participated in the fight for the liberation of the country or suffered under Nazi or fascist terror. When the knitwear factory was nationalized, compensation was not paid, nor was it refused. In 1992, the company was privatized and now exists under the name S.

2.2 On 24 July 2003, the author and his family (mother and sisters) filed a civil lawsuit against S before the Vsetin District Court, claiming that they were the owners of the company and, alternately, that J was the owner of the company at the time of his death. This claim was based on the assumption that Decree No. 100/1945 had not been properly applied since the edict declaring the nationalization of the company had not been signed by the competent minister. The District Court, while acknowledging that the author and his family were indeed J's heirs and had a strong legal interest in making their claims, rejected the lawsuit on 20 September 2006 on the ground that the announcement of the company's nationalization in the *Official Gazette* sufficed for proper procedural application of the Decree. On 20 October 2006, the author and his family filed an appeal before the Regional Court in Ostrava, which, on 12 October 2007, confirmed the District Court's decision, but on a different basis. The Regional Court rejected the notion that the family had a strong legal interest in the case and based its decision on the Czech Constitutional Court Opinion of 1 November 2005 regarding property confiscated by the State prior to 1948. In that Opinion, the Court confirmed the applicability of the Czech restitution laws of 1991, according to which it is not possible to successfully claim rights over property confiscated before 25 February 1948 or to request mitigation or remedy for damage to property that was confiscated prior to that date.<sup>4</sup>

2.3 The author and his family filed an extraordinary appeal on points of law before the Supreme Court. The Supreme Court rejected the appeal on 24 March 2009, on the ground that the Regional Court had properly applied the law. On 29 June 2009, the author and his family filed a complaint before the Czech Constitutional Court. They argued, inter alia, that the Regional Court had denied their attorney the opportunity to verify whether the nationalization of the company had been completed in 1946 with no compensation awarded or whether the nationalization was still ongoing in 1946 pending a decision on whether compensation should be awarded to J (depending on whether J could be considered German under the terms of Decree No. 100/1945 or whether he would benefit from the exception under article 7 for those who had remained loyal to the Czech Republic during the Second

<sup>3</sup> The Optional Protocol entered into force for the Czech Republic on 1 January 1993, as a consequence of the notification by the Czech Republic of its succession to the international obligation of the Czech and Slovak Federal Republic, which had ratified the Optional Protocol in March 1991.

<sup>4</sup> The author does not specify which restitution law is at issue, but later refers to Act No. 87/1991, which was adopted on 21 January 1991 by the Czech and Slovak Federal Government and entered into force on 1 April 1991.

World War). On 2 September 2009, the Constitutional Court rejected the complaint as manifestly unfounded, ruling that it was bound by the provisions of the Constitutional Court Opinion of 2005.

### **The complaint**

3.1 The author asserts that the State party has violated his rights and those of his mother and sisters under article 14 (1) of the Covenant, read in conjunction with articles 2 (1) and 26. The author states that Act No. 87/1991 on extrajudicial rehabilitation, which provides for the restitution of property in certain cases, excludes the possibility of remedying injustices, including those against non-Czech nationals, committed before 25 February 1948 and decrees that assets obtained before that date are the property of the State and cannot be recovered through restitution claims made under general rules of civil procedure. The author argues that the Constitutional Court Opinion of 2005, which validated the citizenship and residence requirements set forth in Act No. 87/1991, has made it impossible for those who did not have Czechoslovakian nationality at the time of land confiscation (and their heirs) to claim restitution and compensation before the courts. The author submits that, since it issued the Opinion, the Constitutional Court has interpreted restitution laws in such a way as to render them “instruments of expropriation of such property as the State had usurped by physical occupation”. The author submits that the courts denied him and his family any chance to prove that the disputed property belonged to them. The author maintains that, as a consequence of the Constitutional Court’s interpretation, the restitution laws clearly discriminate against non-Czech nationals, since “an across-the-board expropriation took place in 1991 from which only certain properties were released to Czech citizens only”. The author states that the type of discrimination his family has encountered is entirely different from the concept of discrimination underlying the Committee’s jurisprudence in *Drobek v. Slovakia*.<sup>5</sup> Specifically, the author refers to the Committee’s finding in that case that “legislation adopted after the fall of the communist regime in Czechoslovakia to compensate the victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because it does not compensate the victims of injustices allegedly committed by earlier regimes”. In contrast, the author asserts that, in his case, the unlawful expropriation took place in 1991 and “the injustice was thus committed not by earlier regimes, but by the present one”. The author asserts that that expropriation in 1991, without any compensation for non-Czech victims, amounts to discriminatory treatment that is incompatible with the provisions of the Covenant.<sup>6</sup>

3.2 The author also argues that the State party violated article 14 (1) of the Covenant, read alone, in that the Czech courts effectively “discontinued” his family’s case. The author notes that, after he and his family brought a civil lawsuit against S in 2003, the Constitutional Court, in its Opinion of 2005, held that, under Act No. 87/1991, protection of property rights withheld before 25 February 1948 could not be pursued through common law procedures. The author argues that, as a consequence of the Constitutional Court

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<sup>5</sup> See communication No. 643/1995, *Drobek v. Slovakia*, decision of inadmissibility adopted on 14 July 1997, para. 6.5.

<sup>6</sup> The author asserts that, in communication No. 516/1992, *Simunek v. Czech Republic*, Views adopted on 19 July 1995, the Committee found that legislation requiring Czech citizenship for restitution or compensation was incompatible with the Covenant as such legislation “must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions” (see para. 11.6).

Opinion, his family was not allowed to introduce new evidence in the civil proceedings, which amounted to a discontinuance of their claims.<sup>7</sup>

3.3 The author asserts that he and his family are entitled to an effective and enforceable remedy under article 2 (3) (a) of the Covenant.<sup>8</sup> Specifically, the author requests compensation for the now-privatized S, to be calculated on the basis of the value of the assets (i.e. the land and the buildings) in 1991, plus interest. The author provides a valuation report from the privatization proceedings, which indicates that the amount in question is 36,290,055 Czech korunas, plus interest.<sup>9</sup>

3.4 Regarding the exhaustion of domestic remedies, the author notes that his family's civil lawsuit was reviewed by the Czech Supreme Court and the Czech Constitutional Court, with negative results. The author states that the matter in question has not been submitted for examination before another procedure of international investigation or settlement.

#### **State party's observations on admissibility and on the merits**

4.1 In its observations dated 28 January 2011 and 24 August 2012, the State party adds to the factual background of the communication. The State party observes that, during the proceedings before the District Court, the respondent (the private company S) commented on the lawsuit, noting that it was not the owner of some of the specified properties and that it was therefore not capable of being sued with respect to such properties. It also noted that it had acquired the other properties on the basis of a duly approved privatization project in 1992 and became their owner no later than on 8 December 1992. The company remarked that it had been using the properties in good faith as the owner for more than 10 years and that, therefore, even if there were legal defects in its ownership of the properties, it had acquired them by positive prescription upon expiration of the 10-year period. In response to S's submission, the author and the other alleged victims withdrew their claims relating to certain properties and simultaneously presented an additional claim seeking a declaration that J had owned the remaining properties on the day of his death. After a hearing, the District Court conceded that the claimants in general had a "legal interest" in the declaration of property ownership, within the meaning of section 80 (c) of the Rules of Civil Procedure, in that they were seeking a declaration of an ownership title that should be registered in the cadastre and, in the event of their success, the entry in the cadastre would be changed. However, the District Court also noted that the transfer of ownership of the knitwear factory from J to the State, which occurred on the date on which Decree No. 100/1945 entered into force, took place under legal regulations that form a part of the legal system and that those regulations could not come under court scrutiny. The District Court further found that, owing to the date on which the disputed real estate was transferred to S, the restitution regulations did not apply and civil proceedings could not expand or replace the scope of the restitution regulations. The District Court also stated that neither the nationality nor the citizenship of the claimants or their legal predecessor, nor their acts in the 1930s and 1940s were "decisive facts". In their appeal before the Constitutional

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<sup>7</sup> The author cites communication No. 547/93, *Mahuika v. New Zealand*, Views adopted on 27 October 2000: "It would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts."

<sup>8</sup> The author cites, inter alia, communication No. 747/1997, *Des Fours v. Czech Republic*, Views adopted on 30 October 2001, para. 9.2; communication No. 774/1997, *Brok v. Czech Republic*, Views adopted on 31 October 2001, para. 9; and communication No. 516/1992, *Simunek et al. v. Czech Republic*, Views adopted on 19 July 1995, para. 12.2.

<sup>9</sup> At current exchange rates, 36,290,055 Czech korunas is equivalent to approximately \$1.67 million.

Court, the author and his family stated that, in their view, the opinion of the Constitutional Court's plenum did not apply to their case. Moreover, they stated the following:

Decree No. 100/1945 was ... directed against business owners regardless of their nationality, citizenship or attitudes during occupation. The claimants agree with the decision of the Constitutional Court plenum that the current owners' ownership rights, which were acquired in good faith, should not be challenged without good reason. However, they hold the view that they have the right to demand compensation for nationalized assets and also for the ownership rights acquired as above, including, and in particular, in accordance with Decree No. 100/1945 subject to the correct application thereof; if such compensation was not determined and provided within the six-month time limit from the nationalization, such nationalization through *étatisation* has not yet been perfected.

4.2 The State party considers that the author and his family have failed to exhaust domestic remedies, in that they did not bring proceedings in which they could have raised their claim for compensation for the nationalized factory. The author and his family had, and still have, the opportunity to claim the disputed compensation from the Ministry of Finance, which is required by law to decide on petitions brought for compensation of property nationalized under Decree No. 100/1945.<sup>10</sup> The State party therefore considers that the author and his family have used the wrong procedure to raise their claims. Concerning the claim under article 14 (1) of the Covenant, read in conjunction with articles 2 (1) and 26, the author and his family could have brought a claim in ordinary courts asserting that the restitution laws were discriminatory in not allowing for restitution of properties prior to 1948, and were therefore unconstitutional, but did not do so. The author and his family could have lodged a constitutional appeal on the matter but did not do so.<sup>11</sup> In their constitutional appeal, filed on 1 July 2009, the author and his family did not formulate a plea on the discrimination issue. Regarding the author's argument that the Constitutional Court Opinion of 2005 changed the legal interpretation of the restitution laws, the State party notes that the author and his family waited until 2003 to bring their action, and considers that, had they raised their claim for a declaration of ownership in the first half of the 1990s, their prospects for success might have been brighter.

4.3 The State party further considers that the author's claim under article 14 (1), read alone, is inadmissible on the ground of lack of substantiation and is without merit. With regard to the author's argument that his family's case before the courts was discontinued, the State party considers that the proceedings were not formally discontinued and that, under the judicial interpretation of the applicable laws, the family did not meet the "substantive condition" requiring that they have a legal interest in bringing an action for a declaration of property ownership. The State party observes that the District Court and Regional Court both noted that the restitution laws were substantively and temporally limited so as to preclude the lawsuit brought by the author and his family. Moreover, the State party considers that S could not have been held to provide compensation for the nationalized property, as "no support for such interpretation exists in the domestic legal order, and the authors did not even point to any provisions going in [that] direction". The State party considers that the communication is based on the author's family's dissatisfaction with the court's rejection of their lawsuit and observes that in no case can the right to a fair trial imply a party's right to a favourable outcome. The State party considers that the author and his family were accorded a fair trial in that independent and impartial courts decided on their case; fair proceedings were held before those courts; and the authors

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<sup>10</sup> The State party cites Supreme Administrative Court resolution on case file 4/2006 of 24 July 2007.

<sup>11</sup> The State party cites communication No. 724/1996, *Mazurkiewiczova v. Czech Republic*, decision of inadmissibility adopted on 26 July 1999, para. 6.3.

had the opportunity to fully participate in the proceedings. The State party further considers that no laws were changed during those proceedings. Under section 80 of the Rules of Civil Procedure, a claim can be brought to seek a decision on, inter alia, a declaration as to whether a legal relationship or right exists. In its 2005 Opinion, the Constitutional Court clarified that, in order to have legal interest in bringing a claim under section 80 of the Rules of Civil Procedure, the claimant must have a “legitimate expectation”. The Court further stated :

The meaning and purpose of restitution legislation should not be circumvented by an action for a declaration of an ownership right. Nor is it possible to effectively seek, under general regulations, the protection of an ownership right the extinction of which occurred before 25 February 1948 while no separate piece of restitution legislation has laid down a method for mitigating or redressing this property injustice.

In its Opinion, the Constitutional Court did not issue any new rules concerning restitution legislation but, rather, interpreted the restitution laws that were already in place before the author and his family brought their lawsuit. The Court’s interpretation was not arbitrary in any way, nor does it constitute a denial of justice, especially taking into account the circumstances, in which the passage of time was an important factor. The State party notes that, under section 134 of the Civil Code, the possessor of an immovable asset shall become the owner of the asset if he or she has possessed the asset continuously for a period of 10 years and observes that the Constitutional Court added to its arguments that of “positive prescription” of the real estate for the benefit of S.<sup>12</sup>

4.4 The State party also considers that the author’s claim under article 14 (1) of the Covenant, read in conjunction with articles 2 (1) and 26, is inadmissible on the ground of lack of substantiation and is without merit. The State party notes that the present case differs from past cases considered by the Committee in which authors’ restitution claims were rejected on the ground of their failure to meet the restitution condition of permanent residence or citizenship. In the present case, the authors did not bring any restitution proceedings and their case does not fall within the scope of restitution laws. The factory was nationalized under Decree No. 100/1945 before the period of applicability of the restitution laws (i.e. before 1948). The Decree does not contain any criterion for nationalization that is based on nationality; rather, nationalization is determined by the line of business or the size of the company. In the present case, the factory was nationalized because it was a certain type of textile company that had more than 400 employees during the period specified in the Decree. However, under the Decree, compensation for nationalized property could not be awarded to German nationals, except if they met the conditions specified by the author in his communication (see para. 2.1). However, the author and his family have not initiated proceedings for compensation and their civil lawsuit for a declaration of property ownership against S cannot be used to award compensation. The State party therefore considers that the author and his family were not treated any differently from other persons whose property, or the property of their legal predecessors, was nationalized by Decree No. 100/1945 before 1948 without compensation. The State party refers to the Committee’s jurisprudence, finding that restitution legislation adopted in the former Czechoslovakia after the fall of the communist regime to compensate the victims of that regime does not appear to be prima facie discriminatory within the

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<sup>12</sup> The State party also notes that, in the case referred to by the author, communication No. 547/93, *Mahuika v. New Zealand* (see footnote 7), the Committee did not find a violation of article 14 (1) of the Covenant (see para. 9.10).

meaning of article 26 merely because it does not compensate the victims of injustices allegedly committed by earlier regimes.<sup>13</sup>

4.5 The State party also considers that it would run contrary to the principle of subsidiarity underlying the Optional Protocol if the Committee were to evaluate the issue of compensation for the nationalized property. The right to property is not safeguarded by the Covenant and the Committee lacks jurisdiction over claims based on the right to property, “even if they are hidden behind allegations of violations of other rights” in the Covenant. The Committee is not in a position to award compensation from a State party to the Covenant. The State party therefore considers that the author’s request for compensation falls outside the scope of the Committee’s competence.

#### **Author’s comments on the State party’s observations**

5.1 In his comments dated 14 March 2011, 15 September 2012 and 20 June 2013, on the issue of exhaustion of domestic remedies, the author asserts that he and his family pursued a lawsuit against S in order to increase their chances of success in obtaining compensation in future negotiations with the Government of the Czech Republic. The author argues that their chances of success would have been greatly improved if they had obtained a judgement stating that the property in question belonged to his family. The author further submits that it would have been pointless to attack the Decree itself and that the basis of his case was that the Decree was not properly applied in his family’s case (in that the signature of the Minister of Industry did not appear on the nationalization regulation). The author argues that he brought that specific claim before each court, including the Supreme Court. The author further asserts that his family was only able to bring a declaratory lawsuit, since Czech cadastral offices have been refusing to register property ownership titles on the basis of court decisions concerning the surrender of an asset. The author also describes as cynical the State party’s argument that he should have filed the claim in court before the issuance of the Constitutional Court Opinion of 2005, and maintains that his complaint is based precisely on the refusal of the domestic courts to examine the merits of the case on account of the Opinion itself.

5.2 Concerning his claim under article 14 (1) of the Covenant, considered alone, the author reiterates his assertion that the Constitutional Court Opinion of 2005 prevented any examination of the way in which the confiscation of the knitwear factory had been performed. The author therefore maintains that the Opinion prevented a fair hearing, since the author and his family could no longer challenge the District Court’s ruling that the absent signature was irrelevant.

5.3 As to his claim under article 14 (1) of the Covenant, considered in conjunction with articles 2 (1) and 26, the author asserts that the State party’s arguments are irrelevant. The author reiterates his argument that, in 1991, the State party effected an expropriation of the property in question and did not allow restitution for non-Czech or non-Slovak nationals, and that this constituted a “manifest act of discrimination”.

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<sup>13</sup> The State party cites, inter alia, communication No. 643/1995, *Drobek v. Slovakia* (see footnote 5), para. 6.5.



## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

6.2 The Committee notes, as required by article 5 (2) (a) of the Optional Protocol, that the matter is not being examined under any other international procedure of investigation or settlement.

6.3 The Committee notes the author's allegation under article 14 (1) of the Covenant, read in conjunction with articles 2 (1) and 26, that the Constitutional Court, in its 2005 Opinion, wrongly interpreted a 1991 restitution law that applies only to individuals whose property was confiscated after 1948 and thus excludes the possibility of obtaining compensation for property confiscated from ethnic Germans under a 1945 decree issued by the pre-communist regime.<sup>14</sup> The Committee observes that the allegation refers to a review of the application of domestic legislation by the Czech Constitutional Court. The Committee recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>15</sup>

6.4 In communication No. 516/1992, *Simunek et al. v. Czech Republic*, the Committee held that the application of the 1991 law violated the Covenant in that it excluded from its application individuals whose property was confiscated after 1948 simply because they were not nationals or residents of the country after the fall of the communist regime in 1989.<sup>16</sup> The present case differs from the views in the above case in that the author in the present case does not allege discriminatory treatment with respect to property confiscated after 1948. Rather, he contends that the interpretation of the 1991 law in the Constitutional Court Opinion of 2005 is discriminatory because the law does not also compensate victims, including non-Czech nationals, for the 1945 seizures decreed by the pre-communist regime. 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

<sup>14</sup> Specifically, the author states:

The gist of [the Constitutional Court's] Opinion is the contention that the restitution laws of 1991 legalized the property rights of the (Czech) State to assets that it had de facto acquired through confiscation, nationalization or by other means, irrespective of the fact that it would otherwise have been possible, in some cases, for the former owner to assert his property rights through the normal civil law procedures. And that Act No. 87/1991 on Extrajudicial Rehabilitation, by excluding in its preamble the possibility of remedying injustices committed before 25 February 1948, including injustices against German and Hungarian nationals, had decreed that assets thus obtained were property of the state and exempt from any claims made according to the general rules of civil procedure. The author is not asking the Committee to review the Constitutional Court's interpretation of the Act on Extra-Judicial Rehabilitation. On the contrary: he takes it at face value and criticizes the restitution laws' content in the shape which the Constitutional Court has given them. ... This interpretation of the restitution laws turns them into instruments of expropriation of such property as the state had usurped by physical occupation.

<sup>15</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26, and communication No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2.

<sup>16</sup> See communication No. 516/1992, *Simunek et al. v. Czech Republic* (see footnote 8).

appear to be prima facie discriminatory within the meaning of article 26 merely on the ground that, as the author contends, it does not compensate the victims of injustices allegedly committed by earlier regimes.<sup>17</sup> The Committee notes the author's assertion that this reasoning, which was also applied in the case of *Drobek v. Slovakia*, is misplaced in his case, because the injustice for which he seeks redress is the 1991 restitution law itself, which amounted to an "across-the-board expropriation" without compensation for non-Czech victims. However, the Committee observes that the 1991 law does not apply to the author and his family, because of the date on which their property was confiscated. The Committee thus observes that the property lies outside the scope of the challenged 1991 law owing to temporal restrictions that were applicable to all equally, as was the case in *Drobek v. Slovakia*. Accordingly, the Committee considers that the author has failed to present sufficient arguments to substantiate, for the purposes of admissibility, his claim under article 14 (1), in conjunction with articles 26 and 2 (1), that the issuance of the Constitutional Court Opinion was clearly arbitrary or amounted to a manifest error or denial of justice.

6.5 The Committee also takes note of the author's argument under article 14 (1), read alone, that his civil lawsuit against the private owner of the property in question was effectively discontinued upon the application of the Constitutional Court Opinion of 2005, such that he was unable to present new evidence before the courts concerning his claim that the property had not been properly nationalized given that the required signature was missing from the nationalization edict. The Committee notes that the author objects to the jurisprudence issued by the Constitutional Court but has not substantiated that the application of the jurisprudence in his case was arbitrary. The material before the Committee does not show that the judicial process in question was defective in that regard, and the author has failed to present sufficient arguments substantiating, for the purposes of admissibility, that the outcome of the civil lawsuit was unfair, within the meaning of article 14 (1) of the Covenant. This part of the communication is therefore also inadmissible under article 2 of the Optional Protocol.

6.6 Finally, the Committee notes the author's claim that he and his family are entitled to compensation for the nationalized property, under article 2 (3) of the Covenant. The Committee recalls that article 2 (3) can be invoked by individuals only in conjunction with other articles of the Covenant and cannot, in and of itself, give rise to a claim under the Optional Protocol.<sup>18</sup> The Committee further recalls that the right to property is not protected by the Covenant,<sup>19</sup> and considers that it is thus incompetent *ratione materiae* to consider any alleged violations of that right. The Committee therefore considers that it is precluded from examining this part of the communication by articles 2 and 3 of the Optional Protocol.<sup>20</sup>

7. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;
- (b) That this decision shall be transmitted to the State party and to the author of the communication.

<sup>17</sup> See communication No. 643/1995, *Drobek v. Slovakia* (see footnote 5).

<sup>18</sup> See, inter alia, communication No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility of 23 July 2012, para. 8.5.

<sup>19</sup> See communication No. 724/1996, *Mazurkiewiczova v. Czech Republic* (see footnote 11), para. 6.2, and communication No. 544/1993, *K.J.L. v. Finland*, decision of inadmissibility of 3 November 1993.

<sup>20</sup> In the light of its findings, the Committee does not deem it necessary for the purposes of admissibility to examine the State party's assertion that the authors did not exhaust domestic remedies.

## Appendix

[Original: French]

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

1. We concur with the conclusions drawn by the Committee in paragraphs 6.5 and 6.6 of its decision on the case involving X, Y, Z and A. The claims under article 14 of the Covenant, read alone, are manifestly ill-founded. The claim under article 2 (3), is inadmissible, as article 2 cannot be invoked individually but can be invoked only in conjunction with a right recognized in the Covenant.

2. We respectfully disagree, however, with the Committee's reasoning and conclusion in relation to the author's claim concerning the interpretation of Act No. 87/1991 made by the Constitutional Court in 2005. The claim made by the author is not clearly set out. In particular, we are not convinced that he was right to invoke article 14, read in conjunction with articles 2 (1) and 26. In our view, the problem has less to do with the Constitutional Court's interpretation of the 1991 Act than the time limit established under the Act, which restricts the right to restitution of property to property confiscated or expropriated after 1948. It would arguably have been better for the author to invoke article 26, as in the B and C case,<sup>a</sup> since his claim mainly relates to this time limit, the restatement of the law by the Constitutional Court and the discriminatory effects that he attributes to it. On this point, we agree with the Committee's rephrasing of the claim at the start of paragraph 6.4 and with the conclusion reached, namely that the jurisprudence in *Simunek et al. v. Czech Republic* is not applicable because the Simunek case involved individuals who fell within the temporal scope of the Act of 1991 but were being discriminated against under the Act on the ground of their nationality. It can be noted that, despite rephrasing the claim, the Committee repeats the author's original wording at the end of the paragraph to declare the allegation manifestly ill-founded. One might wonder why the Committee included a statement in paragraph 6.3 in which it "recalls that it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation in a particular case". In our opinion, the authors were not contesting the application of the law or the evaluation of the facts but, rather, the interpretation of the law, specifically the Constitutional Court's interpretation of the time limits laid down in the Act of 1991. It can also be noted that the Committee does not appear to think it necessary to respond to the State party's argument that the author's family has failed to exhaust domestic remedies (see para. 4.2), although that is not the key issue.

3. In declaring the author's claim inadmissible in paragraph 6.4, the Committee applied the same reasoning as in the case of *Drobek v. Slovakia*. It stated that "the 1991 law does not apply to the author and his family, because of the date on which their property was confiscated" and that "the property lies outside of the scope of the challenged 1991 law due to temporal restrictions that were applicable to all equally". In the Drobek case, the Committee had held that "in the present case, legislation adopted after the fall of the communist regime in Czechoslovakia to compensate victims of that regime does not appear prima facie discriminatory within the meaning of article 26 merely because, as the author

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<sup>a</sup> See communication No. 1967/2010, *B and C v. Czech Republic*, decision of inadmissibility adopted on 2 April 2015.

contends, it does not compensate the victims of injustices allegedly committed by earlier regimes” (see communication No. 643/1995, decision adopted on 14 July 1997, para. 6.5.).<sup>b</sup>

4. The Committee’s reasoning on this point seems to us open to criticism on two counts. As far as the form of the reasoning is concerned, there seems to be some confusion between the absence of a prima facie violation and manifestly ill-founded nature of the claim. While the existence of a violation might not be clearly apparent at first sight, that does not mean that the lack of a violation itself is clear or that the evidence provided by the author to substantiate his claim is so unconvincing that the claim must be declared manifestly ill-founded. However, in this case, the Committee is basing itself on this prima facie assessment to put a stop to the proceedings.

5. The substance of the reasoning is equally open to criticism, as the Committee is adopting an unusually narrow interpretation of article 26 by considering that the effects of a law are perceived only by persons who fall within its scope. At least since its Views in the case of *Althammer v. Austria*,<sup>c</sup> the Committee has acknowledged, however, that a violation of article 26 “can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate”. In other words, a law whose scope was limited *ratione temporis* or *ratione personae* may have discriminatory effects, whether or not they are intended by the law, against persons who do not fall within the scope of the Act. It seems to us, therefore, that in this case the Committee should have considered the need to look more closely at the issue of the effects of the 1991 Act and restatements of the Act by the national courts and thus accept the admissibility of the claim.

6. In the present case, the author’s father had seen his factory nationalized under Decree No. 100/1945. However, Act No. 87/1991 on extrajudicial rehabilitation provided for the return of property confiscated since 25 February 1948. It was therefore clear that the temporal scope of the Act excluded any claim for restitution for confiscations that occurred in 1945. Granted, the motive for nationalization was not in itself discriminatory, as, according to both the author and the State party, the criteria for nationalization were based on a factory’s importance and size (see paras. 2.1 and 4.4). However, while the owner of nationalized property is entitled to compensation under article 8 of the Decree, an exception to this rule is made in article 7, which provides that no compensation would be paid to German nationals, “unless they proved that they had remained loyal to the Czechoslovak Republic, never committed any offence against the Czech or Slovak nations, and either actively participated in the fight for the liberation of the country, or suffered under Nazi or fascist terror” (see para. 2.1). It is not clear from the factual background whether the author’s father had tried to take advantage of those exceptions (compare the author’s version in para. 2.1 with that of the State party in 4.4). What is known is that “compensation was neither paid nor refused” (see para. 2.1).

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<sup>b</sup> See, however, the individual opinion of Committee members Cecilia Medina Quiroga and Eckart Klein, who consider that the communication should have been declared admissible and reviewed on its merits:

The Committee has declared this communication inadmissible for lack of substantiation of the author’s claim. We do not agree with this decision. The author has given clear reasons why he thinks he is being discriminated against by the State party: this is not only because of the fact that Law No. 87/1991 applies only to property seized under the communist regime and not to the seizures decreed between 1945 and 1948 by the pre-communist regime; the author argues that the enactment of Law No. 87/1991 reflects the support by Slovakia of discrimination which individuals of German origin suffered immediately after the Second World War.

<sup>c</sup> See communication No. 998/2001, *Althammer et al. v. Austria*, Views adopted on 8 August 2003, para. 10.2. See also communication No. 976/2001, *Derksen v. Netherlands*, Views adopted on 1 April 2004, para. 9.3.

7. What is important to note, however, is that the Decree was one of more general measures, such as those considered not only in the Drobek case but also in the B and C case, which were aimed at confiscating the property of persons belonging to a national or ethnic group or at subjecting compensation for such confiscations to special conditions, as in the present case, while such conditions were not imposed on the rest of the population. The potential indirect effects of the 1991 Act and restatements of the Act must be considered by taking as a starting point the differences in treatment based on national or ethnic origin that arose in 1945. In setting a time limit — in an apparently neutral way — on any compensation for confiscations that occurred before 1948, has the law not brought about detrimental effects which “exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”?<sup>d</sup>

8. The following is a question that the Committee should have tried to answer in considering the merits of the communication and in calling on the parties to make themselves clear on the point: do the 1991 Act and restatements of the Act exclusively or disproportionately affect German nationals? If the Committee had reached such a conclusion, the State party would still have had the opportunity to show that a violation of the right to equality before the law of such a kind within the meaning of article 26 had a legitimate goal and was based on objective and reasonable grounds.

9. We believe that the Committee should have applied its jurisprudence and taken up the issues concerned on the merits instead of drawing a relatively formalistic conclusion that the 1991 Act did “not apply” to the author and his family.

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<sup>d</sup> See communication No. 998/2001, *Althammer et al. v. Austria* (see footnote c), para. 10.2.