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Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing

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Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing

TIMOTHY WILLIAM WATERS*

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I. TO BEGIN: SOMETHING UNINTERESTING, AND SOMETHING NEW

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

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

1. Adolf Hitler, Speech to General Staff, Obersalzberg (Aug. 22, 1939) I.M.T., Nuremberg, Doc. L-3 (US-28) in BRITISH DOCUMENTS ON FOREIGN AFFAIRS, Series F, Pt. II, vol. 3, No. 314, giving the original as “Wer redet heute noch von der Vernichtung der Armenier?”. See *infra* note 318 *et seq.*

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

For that is the law today, and the position of the powers that oversaw or acquiesced in the expulsion of fourteen million Germans from Eastern Europe after the Second World War, in which perhaps two million died and the eastern fourth of Germany was entirely depopulated—the largest single instance in history of what we now call ethnic cleansing.³ That position was recently tested in a controversy over the accession of the Czech Republic to the European Union, which was contested by Germans who had been expelled from what was once, to some, the Sudetenland. But that position, and our resolve, has been found as firm as ever.

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

2. Ministry of Foreign Affairs of the Czech Republic, The Presidential Decrees of 1940–1945, http://www.mzv.cz/_dokumenty/edekrety.html [hereinafter Czech Foreign Ministry Website] (last visited Sept. 18, 2006).

3. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. Doc. S/1994/674 (May 27, 1994) [hereinafter *UN Final Report*]. This report notes that “[t]he expression ‘ethnic cleansing’ is relatively new.... ‘[E]thnic cleansing’ means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.... carried out by means of [*inter alia*]... forcible removal, displacement and deportation of civilian population....” The expulsion of the Germans would seem to qualify.

II. AIMS OF THE ARTICLE

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

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

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

cisely because states and societies have *accepted* the expulsions. It is about how we will form law in the wake of great violence—about our plausible, even predictable response to the weight, and the lightness, of all that.

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

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

4. There is no specific international crime termed "ethnic cleansing." See Roger Cohen, *Ethnic Cleansing*, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 136 (Roy Gutman & David Rieff eds., 1999) [hereinafter CRIMES OF WAR]. Yet the acts that conventionally constitute ethnic cleansing—including persecution, extermination and deportation—are all war crimes or crimes against humanity. Cf. *UN Final Report*, *supra* note 3, pt. III.B. ("'Ethnic cleansing' is contrary to international law."). For convenience, this Article will use that term. In addition, while this Article frequently discusses the acts of property confiscation, denaturalization, and expulsion separately, it also in context often uses "expulsion" to represent the range of actions taken against Sudeten Germans after the war. Some scholars insist on a distinction between these three acts. See, e.g., Andrea Gattini, *A Trojan Horse for Sudeten Claims? On Some Implications of the Prince of Liechtenstein v. Germany*, 13 EUR. J. INT'L L. 513, 514, n.5 (2002) (criticizing several writers who adopt this view). These different acts indeed had discrete effects and could therefore elicit different legal analysis, but considering them together in context is probative of the broader questions this Article raises. Indeed, the decision to disaggregate these elements in this case, but not others, is itself representative of a worldview.

5. This Article uses "restitution" to identify a range of claims. Sudeten groups have variously called for a right to return, restoration of citizenship, property restitution or other compensation, or a formal apology. See, e.g., Jan Pauer, *Moral Political Dissent in German-Czech Relations*, 6

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

Throughout, this Article is a reflection on the responsibility of the present to order itself in light of the past. What is the proper moral and legal response to actions that implicate a bygone age and the suffering of another century? There is a hidden trick in law's response to memory that makes it seem profoundly irrational and unpredictable—but which

CZECH SOC. REV. 173 (Jiří Sirotek et al. trans., 1998). There are important distinctions among these claims, and arguably it would be best to discuss them separately. For the most part, however, these distinctions do not produce differences in the underlying debate about whether or not the Czech Republic had any obligation linked to EU accession. Some scholars and advocates use “reparations” to describe the broad range of responses to mass violence. Cf. PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 171 (2001) (reparations “encompasses a variety of types of redress, including restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition”); Amnesty International, *Still Waiting After 60 years: Justice for Survivors of Japan's Military Sexual Slavery System*, ASA 22/012/2005, ¶ 4.2.1 (Oct. 28, 2005), available at <http://web.amnesty.org/library/index/engasa220122005> (“Reparations can also serve to punish and deter.... Developing international norms on reparations have also seen the concept broaden to include important symbolic and future-oriented measures, very much linked to restorative justice.”). Reparations are defined to encompass restitution, compensation, rehabilitation, satisfaction including determination of the truth and of criminal liability, and guarantees of non-repetition. *Id.*; John Torpey, *Introduction: Politics and the Past*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (John Torpey ed., 2003) 3–5 (defining reparations and describing the term's wide use and acceptance). Other scholars and institutions employ the concept of “redress” with a similarly broad meaning. See U.N. Comm'n on Human Rights, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. E/CN.4/Res/2005/35 (Apr. 19, 2005) (discussing the definition of redress); Pierre d'Argent, *Wrongs of the Past, History of the Future?*, 17 EUR. J. INT'L L. 279, 286 (2006).

([In the leading human rights bodies] a refinement of the concepts of ‘victims’ and ‘reparations’ has occurred...leading to the development of the contemporary notion of ‘redress’. The scope of that notion has become very large, since it includes not only questions of restitution, reparation and compensation *sensu stricto*, but also the ways in which victims are treated, rehabilitated and their fate reported, their access to justice, and their right to know the truth through effective, prompt, thorough and impartial investigations.).

My choice of “restitution” is a convenience and is not intended to convey any difference in the range or relationship of possible claims. I could just as well have used “reparations.”

may be hard to justify if not kept hidden. It may be enough simply to describe the Sudeten Corollary in its fullness.

III. AN ATTEMPT AT AN UNCONTROVERSIAL HISTORICAL PRIMER

Denn da wir nun einmal die Resultate früherer Geschlechter sind, sind wir auch die Resultate ihrer Verirrungen, Leidenschaften und Irrthümer, ja Verbrechen; es ist nicht möglich sich ganz von dieser Kette zu lösen.

– *Friedrich Nietzsche*⁶

Although this is not an Article about the expulsions and does not rely on any particular history of the expulsions or their aftermath,⁷ some agreed background is necessary solely to locate us in the contemporary problem.⁸

A. *Czechoslovakia and Munich*

Speakers of German and Czech lived in Bohemia and Moravia for centuries under the dynastic rule of the Habsburgs. Whatever history one wishes to remember about the late Austro-Hungarian Empire and the

6. Friedrich Nietzsche, *Vom Nutzen und Nachtheil der Historie für das Leben*, UNZEITGEMÄSSE BETRACHTUNGEN, available at <http://www.geocities.com/thenietzschechannel/zeit2.htm#3>, translated in UNMODERN OBSERVATIONS 103 (William Arrowsmith ed., 1990), quoted in Torpey, *supra* note 5, at 2 (“For since we happen to be the products of earlier generations, we are also the products of their blunders, passions, and misunderstandings, indeed, of their crimes; it is impossible to free ourselves completely from this chain.”).

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

8. See generally ALFRED M. DE ZAYAS, NEMESIS AT POTSDAM: THE EXPULSION OF THE GERMANS FROM THE EAST (1989) (providing an authoritative survey of the expulsions and Cold War diplomacy up to 1989); TIMOTHY BURCHER, THE SUDETEN GERMAN QUESTION AND CZECHOSLOVAK-GERMAN RELATIONS SINCE 1989 (1996); Vladimír Handl, *German-Czech Relations: New ‘Normality’ and Lack of Empathy*, in 3 GERMAN FOREIGN POLICY IN DIALOGUE 21 (Marco Overhaus et al. eds., 2002), available at <http://www.deutsche-aussenpolitik.de/newsletter/issue8.pdf>; Jeffrey S. Kopstein, *The Politics of National Reconciliation: Memory and Institutions in German-Czech Relations Since 1989*, 3 NATIONALISM & ETHNIC POL. 57 (1997); WIKIPEDIA, *Expulsion of Germans after World War II*, http://en.wikipedia.org/wiki/Expulsion_of_Germans_after_World_War_II (last visited Sept. 18, 2006).

peoples living within it, the Empire's dissolution presented a political problem which, despite their disagreements about how to resolve it, almost all observers acknowledged: the presence of a large ethnic German population within the borders of the new Czechoslovak state. The very identification of "Sudetenland" as a political concept (as opposed to simply "areas in which Germans live")⁹ was practically synonymous with the failure of Czechoslovakia as a state project. Of course, there was nothing inevitable about Czechoslovakia's sharply divided ethnic politics, but then evidently multicultural harmony was not inevitable either.¹⁰

With the rise of Adolf Hitler, Sudeten Germans (as they had come to call themselves) gained a powerful ally¹¹ and their dissatisfactions with their position in Czechoslovakia became, if anything, more pronounced. Attempts to craft an internal solution failed to achieve a satisfactory outcome, and at the Munich Conference in 1938, Hitler demanded the annexation of the Sudetenland to Germany.¹² This was broadly supported by Sudeten Germans. The remainder of the Czech lands soon became a protectorate, occupied and absorbed into the Third Reich.¹³

B. *The Beneš Decrees*

The contemporary debate centers on the so-called Beneš Decrees. These were emergency decrees issued by Czechoslovak President Edward Beneš shortly after the end of the war,¹⁴ and confirmed with retro-

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

10. See, e.g., Roman Szporluk, *War by Other Means*, 44 *SLAVIC REV.* 20 (1985).

11. Jaroslav Kučera, *Between Wilhelmstraße and Thunovská: Financial Support from the Reich for the Sudeten-German Party, 1935-1938*, in *PRAGUE YEARBOOK OF CONTEMPORARY HISTORY* 1998 18, 33-34 (Derek Paton ed., 1999).

12. See Agreement for the Cession by Czechoslovakia to Germany of Sudeten German Territory, Sept. 29, 1938, 142 *BRITISH AND FOREIGN STATE PAPERS* 438 (1938), available at <http://web.jjay.cuny.edu/~jobrien/reference/ob66.html> [hereinafter *Treaty of Munich*] (concluded at Munich between Germany, Great Britain, France, and Italy).

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

14. See, Jochen A. Frowein, Ulf Bernitz & Lord Kingsland Q.C., *Legal Opinion on the Beneš-Decrees and the Accession of the Czech Republic to the European Union, Luxembourg*, 53-55 (Kingsland) (Eur. Parliament, Directorate-Gen. for Research, Working Paper No. 10-2002), avail-

active effect by the reconstituted National Assembly in a constitutional law in 1946.¹⁵

Beneš issued roughly 143 decrees, some fifteen of which relate to the status of ethnic Germans and Hungarians as well as individuals disloyal to Czechoslovakia.¹⁶ There is polemical controversy about what exactly the Decrees provided—expulsion is never authorized, for example¹⁷—but unquestionably, individual Decrees or other legislation provided for:¹⁸

- confiscation of ethnic Germans' and Hungarians' property without compensation;¹⁹
- loss of citizenship for ethnic Germans and Hungarians, with retroactive effect for those who had taken German or Hungarian citizenship, except those who had demonstrated loyalty to Czechoslovakia;²⁰

able at http://www.europarl.europa.eu/studies/benesdecrees/pdf/opinions_en.pdf [hereinafter *Legal Opinion*] (individual author indicated in parentheses); Christopher Kopper, *The London Czech Government and the Origins of the Expulsion of the Sudeten Germans*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE* 255–66 (Steven Béla Várdy, T. Hunt Tooley, & Agnes Huszár Várdy eds., 2003) (outlining the development of Czech proposals during the war years, including interim proposals to transfer territory to Germany).

15. *Legal Opinion*, *supra* note 14, at 7 (Frowein). Thus, the original Decrees have no legal force, but their *content* incorporated into Czechoslovak law is a different matter. In this Article, 'Decrees' generally means the incorporated legislation unless specified or clear from context. Quotations do not carry this proviso—it is by no means clear that all authors or actors understand the distinction.

16. See *Documentary Appendix*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 823–34 (cataloguing Czechoslovak constitutional and legal enactments affecting ethnic Germans and Hungarians in the immediate post-war period).

17. See, e.g., George Anthony, *What's Behind the Fuss over the Benes Decrees?* POSTMARK PRAGUE, available at <http://www.spectrezine.org/global/Benes.htm>. The Czech Republic's position is that the Decrees deal only with citizenship and property, and that the Powers conducted the expulsion. See Czech Foreign Ministry Website, *supra* note 2.

18. See *Legal Opinion*, *supra* note 14, at 8 (Frowein).

19. *Id.* at 8 (Frowein) (citing Pres. Decree No. 12 of June 21, 1945, on the Confiscation and Expedited Allocation of the Agricultural Property of Germans, Hungarians, Traitors and Enemies of the Czech and Slovak Nations; Pres. Decree No. 28 of July 20, 1945; Pres. Decree No. 108 of Oct. 25, 1945, on the Confiscation of Enemy Property and National Restoration Funds; and Pres. Decree 5 of May 19, 1945, invalidating certain property transactions during the occupation that arose out of racial or religious persecution as well as nationalizing enterprises owned by "persons unreliable to the state").

20. *Id.* at 8 (Frowein) (citing Pres. Decree No. 33 of Aug. 2, 1945, Concerning the Right to Czechoslovak Citizenship of Persons of German and Hungarian Nationality). Sudeten Germans had been granted citizenship in the Reich, but also notionally retained Czechoslovak citizenship. Charles A. Schiller, *Closing a Chapter of History: Germany's Right to Compensation for the Sudetenland*, 26 CASE W. RES. J. INT'L L. 401, 419 (1994). Unsurprisingly, the reassertion of Czechoslovakia's legal continuity meant that Sudeten Germans were, once again (or rather still), citizens—thus the need to denaturalize them.

- forced labor for those deprived of citizenship;²¹
- trial in absentia for disloyalty to Czechoslovakia during the occupation, with penalties including death and imprisonment;²²
- amnesty legalizing “[a]ny act committed between September 30, 1938 and October 28, 1945, the object of which was to aid the struggle for liberty of the Czechs and Slovaks or which represented just reprisals for actions of the occupation forces and their accomplices...even when such acts may otherwise be punishable by law.”²³

Controversy notwithstanding, on the core questions of loss of citizenship, confiscation, *and* expulsion, this formulation is defensible: any Czechoslovak proven to have collaborated could be stripped of citizenship, property and other civic protections, but ethnic Germans and Hungarians had to affirmatively prove that they had *not* collaborated. The Decrees deprived large numbers of ethnic Germans and Hungarians of Czechoslovak citizenship, expropriated their property, and provided for, facilitated, or confirmed their expulsion.²⁴ Certain of the relevant Decrees were repealed by the Czechoslovak legislature;²⁵ others never were, and their continuing validity and effect has been at the heart of the controversy.

21. Pres. Decree No. 71 of 1945, in *Legal Opinion*, *supra* note 14, at 53 (Kingsland) (applying to those deprived of citizenship under Decree 33).

22. Pres. Decree No. 16 of June 19, 1945, and Pres. Decree 137 of Oct. 27, 1945, in *Legal Opinion*, *supra* note 14, at 22 (Frowein). A “considerable number” of such convictions were secured. *Id.* These Decrees were repealed in 1948. *Opinion of the Legal Service of the European Parliament, Conclusions*, para. 171k, at 27, *cited in Legal Opinion*, *supra* note 14, at 22 (Frowein).

23. Provisional National Assembly Law No. 115 of 8 May 1946 Concerning the Legality of Actions Connected to the Struggle to Recover the Liberty of the Czechs and Slovaks, art. 1, *cited in Legal Opinion*, *supra* note 14, at 23 (Frowein). The Provisional National Assembly assumed legislative authority on Oct. 28, 1945. *Id.* at 11 (Frowein).

24. “[L]oss of citizenship for people who were forcibly transferred followed a clear logic. Unless they were deprived of the citizenship of the state from the territory of which they were transferred, they would, at least in theory, be able to claim reentry.” *Legal Opinion*, *supra* note 14, at 21 (Frowein).

25. Act 33/1948 of Mar. 25, 1948 (repealing Decree 16 of 1945); Act 87/1950 of Aug. 1, 1950 (repealing Decree 137 of 1945); Act 65/1966 of Jan. 1, 1966 (repealing Decree 71 of 1945). *Opinion of the European Parliament Legal Service*, ¶ 62, *cited in Legal Opinion*, *supra* note 14, at 63 (Kingsland).

C. *The Expulsions or Transfers*²⁶

Soviet forces occupied some Czech territory, and at the end of the war Czech partisans controlled other areas. Yet significant territory remained in German hands or was occupied by American forces at the cessation of hostilities in May, 1945, and very few Germans in those areas had fled (unlike those in eastern Germany). Czechoslovak authorities therefore took possession—after hostilities ended—of territories with a population of three million Germans, concentrated in the border regions.

The expulsions took place in several phases: so-called “wild” expulsions before the Potsdam Conference; sanctioned but unregulated expulsions in late 1945; and expulsions under a regulated regime from 1946 to 1950. Most were expelled into the Soviet sector, ultimately settling in the American sector, in the circumstances of extreme deprivation prevailing in postwar Germany. Estimates of the number who died en route—of exposure, starvation, malnutrition and direct violence—vary widely,²⁷ but the deportation was thorough. There were some three million Germans in Czechoslovakia in 1938; today there are 38,000 in the Czech Republic,²⁸ and just over 5,000 in Slovakia.²⁹

26. Terminology is freighted in this debate. In Czech, *odsun* is standard and in the former GDR *Umsiedlung*, whereas in the FRG it was more common to refer to *Aussiedlung* and *Vertreibung*. See, e.g., Scott Bruntstetter, *Escaping History: The Expulsion of the Sudeten Germans as a Leitmotif in German-Czech Relations*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 269, 276–77 (noting that *Vertreibung* implies illegality or illegitimacy, while *odsun* “suggests a more legitimate and legal removal,” and that the 1997 German-Czech Declaration refers to *vyhánění* instead of *vyhnění*, which would imply cruel expulsion, although both translate as *Vertreibung*). But in English, “expulsion” does not exclude a reading of legality and legitimacy; it is perfectly possible to refer to morally and legally acceptable *expulsions* or to immoral and illegal *transfers*. I use “expulsion” as a convenient word to describe the removal of persons from a territory against their will; the argument works with any other term.

27. Estimates range from 20,000 to 250,000 deaths among Sudeten Germans from violence or proximate causes during deportation. See P. Wallace, *Putting the Past to Rest: The Sudeten Question Is Still Causing Trouble in Central Europe*, *TIME EUROPE*, Mar. 18, 2002, available at <http://www.time.com/europe/magazine/article/0,13005,901020318-216394,00.html>. Sudeten sources favor the higher end, while Czech historians generally estimate 30,000 deaths attributable to the expulsions. Kopstein, *supra* note 8, at 77 n.15. See also *infra* note 31. The Czech-German Historical Commission could not agree on the number of Sudeten Germans killed in the expulsions. Bruntstetter, *supra* note 26, at 277 n.34.

28. Czech Census of March 2001, cited in *Legal Opinion*, *supra* note 14, at 30 (Frowein). As many as 200,000 Germans may have remained after the expulsions, but although loyal, antifascist Germans were exempted, they too were subjected to property confiscations and discrimination, and most emigrated. See *Czech Government Issues Apology to Ethnic Germans Who Actively Opposed Nazism but Were Persecuted After WWII*, ASSOCIATED PRESS, Aug. 23, 2005, <http://www.bhrg.org/mediaDetails.asp?ArticleID=455> [hereinafter *Czech Government Issues Apology*]. There were very few trials to establish loyalty during the period of expulsions. But see, e.g., Human Rights Comm., Commc’n No. 807/1998, *Koutny v. Czech Republic*, U.N. Doc.

Germans were also expelled from the eastern portions of Germany, Poland, the Soviet Union,³⁰ Yugoslavia, Hungary, and Romania—nearly fourteen million in all.³¹ Other peoples were expelled, too: Poles (to lands emptied of Germans), Ukrainians (to lands emptied of Poles), Hungarians,³² Romanians, etc.—in the tens of millions. And during the war, before all this, massive deportations had been carried out by the Nazis, leading to the extermination of Jews, Gypsies, Slavs, slave workers, and others,³³ and by the Stalinist regime, which internally deported Chechens, Meshketian Turks, Tatars, and other Soviet peoples. Such acts—especially those the occupying Germans committed—had prepared the way psychologically for the postwar expulsions,³⁴ although

CCPR/C/68/D/807/1998 (2000) [hereinafter *Koutny*] (noting a case of restored citizenship, although confiscated property was not returned); Human Rights Comm., Comm'n No. 823/1998, *Czernin v. Czech Republic*, U.N. Doc. CCPR/C/83/D/823/1998 (2005).

29. The smaller German population of Slovakia was also subject to the Decrees. See MS, *Slovakia Has Just One Vestige Left of German Minority Presence*, RADIO FREE EUR./RADIO LIBERTY, Nov. 25, 2003, <http://www.rferl.org/newsline/2003/11/3-cee/cee-251103.asp>.

30. This includes areas of Germany later annexed to Poland and the Soviet Union, including much of present-day western and northern Poland and Russia's Kaliningrad oblast. See, e.g., Tomasz Kamusella, *Ethnic Cleansing in Upper Silesia, 1944-1951*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 293–310; Gregor Thum, *Cleansed Memory: The New Polish Wrocław (Breslau) and the Expulsion of the Germans*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 333–58.

31. BUNDESMINISTERIUM FÜR VERTRIEBENE, FLÜCHTLINGE UND KRIEGSGESCHÄDIGTE, *DIE BETREUUNG* 8–9 (1966) (giving the German population in the affected areas at the war's end as 16.6 million; total expelled as 11.73 million, killed or missing in the expulsion process as 2.111 million; and remaining or returned as 2.717 million). These figures are contested in part because the proper assignment of cause of death is controversial. One source notes that “[a]n estimated 2 to 3 million died as a result of the expulsions.” Roy Gutman, *Deportation*, in *CRIMES OF WAR*, *supra* note 4, at 124. However, more recent estimates suggest much lower figures of deaths, perhaps no more than 500,000. See WIKIPEDIA, *Expulsion of Germans After World War II*, http://en.wikipedia.org/wiki/Expulsion_of_Germans_after_World_War_II (last visited Sept. 28, 2006) (discussing estimates).

32. The Beneš Decrees also sanctioned expulsion of Hungarians from southern Slovakia; approximately 80,000 Hungarians were expelled. Mária Géczi, *Prágai Szobor Benesnek A Bajor Miniszterelnök Csalódott*, MAGYAR RÁDIÓ ONLINE, May 16, 2005, http://www.radio.hu/index.php?cikk_id=136939. However, comprehensive expulsion was never attempted, and today Hungarians constitute around ten percent of Slovakia's population. See Róbert Barta, *The Hungarian-Slovak Population Exchange and Forced Resettlement in 1947*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 565–74; Edward Chászár, *Ethnic Cleansing in Slovakia: The Plight of the Hungarian Minority*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 559–64.

33. See Gutman, *supra* note 31, at 123.

34. See German-Czech Declaration on Mutual Relations and Their Future Development, F.R.G.-Czech Rep., art. II, Jan. 21, 1997, available at <http://www.mzv.cz/servis/soubor.asp?id=1873> [hereinafter 1997 German-Czech Declaration] (“The German side is also conscious of the fact that the National Socialist policy of violence towards the Czech people helped to prepare the ground for post-war flight, forcible expulsion and forced resettlement.”).

these latter were far larger and occurred in a time of peace, in the context of total victory.

D. The Potsdam Agreement

Whatever the Beneš Decrees provided, the victorious Powers sanctioned the population removals. At the first postwar conference in Potsdam in August, 1945, the United States, United Kingdom, and Soviet Union issued an Agreement providing for a process of ‘orderly and humane’ transfers of an unspecified portion of the German population.³⁵ As the Potsdam Agreement shows, the Powers knew the expulsions were occurring but did not object, instead considering them necessary and providing material support. Although the British and Americans expressed reservations about the manner and timing,³⁶ nothing in the Agreement they signed suggests any fundamental opposition to the expulsions as such, or any belief that the sovereigns (Czechoslovakia, Poland, and Hungary) then expelling Germans should be compelled to stop.³⁷

This much is evident, even uncontroversial, from the text of the Agreement. If in making a legal assessment we consider the broader context, we note that all the supposedly separate sovereigns whom the Agreement addressed were in fact under the influence of the Powers, and that expulsions were also carried out by forces controlled by the Soviet Union (and in Hungary, under the aegis of a Control Commission on which the western Allies were represented). The Powers were fully aware of this, and in signing the Agreement, had all this in mind. So, the lines of real power then prevailing suggest the Czechoslovaks were

35. See Report on the Tripartite Conference of Berlin, Babelsberg (Cäcilienhof), Aug. 2, 1945, in BUNDESMINISTER DES INNERN, DOKUMENTE ZUR DEUTSCHLANDPOLITIK: II REIHE, BAND I, DIE KONFERENZ VON POTSDAM 2121–22 (1992) [hereinafter Potsdam Agreement].

36. See DE ZAYAS, *supra* note 8, at 90–102.

37. See Alfred de Zayas, *Anglo-American Responsibility for the Expulsion of the Germans 1944–48*, in ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE, *supra* note 14, at 245–52 (noting strong U.S. and British opposition to the manner of expulsion and their sense that they were unable to prevent expulsions from Soviet-controlled areas). Other actors drew similar conclusions. See, e.g., 1 INT’L COMM. RED CROSS, REPORT ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 673–74, cited in *id.* at 252.

(Had it been borne in mind that the repatriation of some 1,500,000 Greeks from Asia Minor, after the first World War, had taken several years and required large-scale relief schemes, it would have been easy to foresee that the hurried transplanting of fourteen million human beings would raise a large number of problems from the humanitarian standpoint, especially in a Europe strewn with ruins and where starvation was rife.) Nothing in this actually criticizes the expulsions as such, only their “hurried” manner.

hardly acting in a fully independent fashion: Beneš signed the Decree stripping Germans and Hungarians of citizenship August 2, 1945—the same day the Potsdam Agreement was issued.³⁸

E. The Cold War

Little change in the political dispensation affecting expellees occurred during the Cold War. The Federal Republic of Germany (FRG) and the German Democratic Republic (GDR) regained sovereignty, although the Powers retained certain rights. In Czechoslovakia, where a Communist regime consolidated power in 1948, the content of the Decrees remained valid law, although after 1950 there was no further occasion for their application. Some, though not all, of the Decrees were rescinded over time.

The GDR recognized the expulsions as “irrevocable, just and final” in 1950,³⁹ but the FRG conducted a rejectionist policy, maintaining claims to occupied territory and representing expellees’ interests.⁴⁰ However, this support was largely domestic, for in 1954 the FRG signed the Settlement Convention, which provided an effective quitclaim against any past or future measures taken by France, Great Britain, the United States, or their allies “with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result

38. *Legal Opinion*, *supra* note 14, at 61 (Kingsland) (“The decree [on citizenship] was not signed by Beneš until the conclusion of the Potsdam Conference to ensure that it was in line with the Allies decision.”); *see also* Czech News Agency, *Czech Press Survey*, FIN. TIMES INFO., Apr. 9, 2002 (calling the Decrees “a practical reaction to decisions made in Potsdam”). Subsequent international agreements arguably obliged Czechoslovakia to seize expellees’ property. *See* Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of the Monetary Gold, art. 6(A), Jan. 14, 1946, 61 Stat. 3157, 555 U.N.T.S. 69 (“Each Signatory Government shall...hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control....”).

39. SUDETENDEUTSCHER RAT E.V., THE SUDETEN GERMAN PROBLEM IN INTERNATIONAL POLITICS 33 (1971) [hereinafter THE SUDETEN GERMAN PROBLEM].

40. *Id.* at 33 (reproducing the Bundestag Declaration of July 14, 1950 on Protection of Sudeten German Interests, protesting the decision of the GDR to recognize the expulsion of Sudeten and Carpathian Germans, and rejecting the authority of its “sham government” to conclude such an agreement).

The Prague Agreement is incompatible with the inalienable right of man to his homeland. The German Bundestag, therefore, solemnly protests against the surrender of the right to their homeland of those Germans from Czechoslovakia whose interests are now under the protection of the German Federal Republic, and declares the Prague Agreement to be null and void.

Id. The Allied High Commissioners also rejected the Prague Agreement. *Id.*

of the state or war.⁴¹ West Germany's *Ostpolitik* after 1969 led to a series of treaties and declarations with the states from which the expellees had been ejected, but not to returns. In 1973, the FRG and Czechoslovakia concluded a treaty nullifying the Treaty of Munich but preserving citizenship changes effected by Munich,⁴² mutually confirming Sudeten Germans' FRG citizenship, and, implicitly, their loss of Czechoslovak citizenship.

The Sudeten Germans, and the even larger populations of Germans expelled from other areas, integrated into the two Germanys.⁴³ Many expellees formed *Landsmannschaft* associations to press for recognition and compensation and less frequently, given the circumstances of the Cold War, for return or revision of the borders.⁴⁴ The expellees became

41. Convention on the Settlement of Matters Arising out of the War and the Occupation, ch. 6, arts. 3(1), 3(3), May 26, 1952, 6 U.S.T. 4117, at 223, *as amended* by Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954 (*entered into force* May 5, 1955) [hereinafter Settlement Convention] (providing that:

[n]o claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraphs 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments).

"German external assets" contemplated the property of ethnic Germans in other countries as well as German citizens. In any event, Sudeten Germans under the subsequently annulled wartime regime would have met either definition. Germany's renunciation of claims concerning property and assets did not affect its claims concerning sovereign control of territory administered by Poland and the Soviet Union, which remained outstanding pending a final peace treaty, but after the repudiation of the Munich agreement, there were territorial aspects of the expellee controversy regarding the Sudeten Germans. Cf. Felix Ermacora, *Aus dem Rechtsgutachten über die sudetendeutschen Fragen 1991*, Sudetendeutsche Landsmannschaft, http://www.sudeten.de/bas/content/a10_4_1.htm (last visited Sept. 28, 2006) ("Zu den sudetendeutschen Fragen gehört nicht die territoriale Frage; sie kann als durch den Prager Vertrag von 1973/74, der das Münchner Abkommen für nichtig erklärte, im Zusammenhalt mit dem Einigungswerk als gelöst angesehen werden.").

42. Treaty of Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic, art. II(2), Czech Rep.-F.R.G., Dec. 11, 1973, BGBl. II at 990, 13 I.L.M. 19 [hereinafter Treaty of Prague]; see also *Legal Opinion*, *supra* note 14, at 21 (Frowein).

43. See, e.g., DIE BETREUUNG, *supra* note 31, at 80 (showing expellees in each land as percentage of the population, ranging from 1.7 percent in Saarland to 27.2 percent in Schleswig-Holstein).

44. See, e.g., Charter of the German Expellees, in Documentary Appendix, *supra* note 16, at 835; Eichstätter Declaration of November 1949, cited in Maria Cornelia Raue, Doppelpunkt hinter der Geschichte: Die Prager Deutschlandpolitik 1990–1997, 66 (Jan. 29, 2001) (unpublished Ph.D. dissertation, Humboldt University, Berlin) (outlining Sudeten German goals including regaining lost territory), available at <http://dochostrz.hu-berlin.de/dissertationen/raue-maria-cornelia-2001-01-29/PDF/Raue.pdf>. Today, German irredentist sentiment is extremely marginal. Cf. MS, *German Irredentist Posters in Karlovy Vary*, RADIO FREE EUR./RADIO LIBERTY, Mar. 20, 2002, <http://www.rferl.org/newsline/2002/03/3-cee/cee-200302.asp> (noting appearance of posters in Prague and Karlovy Vary declaring, "The Sudetenland was German and will be German again").

an important political force on the right, with Sudeten Germans particularly strong in Bavaria and the conservative CDU/CSU.⁴⁵ However, expellees did not achieve recognition for any of their claims outside the West German context.⁴⁶

F. 1989 and the EU Accession Process

With Communism's collapse, Germany was reunited. A peace treaty signed in 1990 confirmed Polish and Soviet title to territories those countries had administered since the end of the war, but did not provide return of expellees or restitution.⁴⁷ The Final Treaty kept in effect the quitclaim provisions of the 1954 Settlement Convention concerning external German assets.⁴⁸

In 1992, Germany and the Czech and Slovak Federal Republics, both now free of Soviet influence, signed a Treaty on Good-Neighbourliness and Friendly Cooperation.⁴⁹ The Czech Republic enacted a property restitution law covering expropriations after 1948 but exempting Decree-related confiscations.⁵⁰ A Czech constitutional court decision subsequently reaffirmed the validity of the Decrees as a foundation of the state and its values,⁵¹ a view confirmed by the government.⁵² In 1993,

45. THE SUDETEN GERMAN PROBLEM, *supra* note 39, at 33–38 (reproducing texts of declarations made by various West German political parties and the Sudeten German Association).

46. *See generally* Bruntstetter, *supra* note 26, at 267–80 (describing postwar German-Czech relations and the position of the Sudeten expellees in German society).

47. Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186 [hereinafter Final Treaty]; Agreement between the Federal Republic of Germany and the Republic of Poland in Relation to the Ratification of the Border Between Them, F.R.G.-Pol., Nov. 14, 1990, 31 I.L.M. 1292. Germany's recognition of the transfer of territory undercut one of the expellee groups' standard arguments. *See* PHILLIP A. BÜHLER, THE ODER-NEISSE LINE: A REAPPRAISAL UNDER INTERNATIONAL LAW 135–36 (1990). The restoration of the pre-war border between Czechoslovakia and Germany had already been confirmed. *See* Treaty of Prague, *supra* note 42, art. II(2).

48. Exchange of Notes Concerning the Relations Convention and the Settlement Convention, Fr.-F.R.G.-U.K.-U.S., Sept. 28, 1990, 30 I.L.M. 454 (providing for the termination of the Settlement Convention simultaneously with the entry into force of the Final Treaty, but providing that Chapter 6, Articles 1 and 3—and therefore apparently Article 2 by incorporation—pertaining to the quitclaim “shall, however, remain in force”).

49. Vertrag zwischen der Bundesrepublik Deutschland und der Tschechischen und Slowakischen Föderativen Republik über gute Nachbarschaft und freundschaftliche Zusammenarbeit, Czech Rep.-F.R.G.-Slovak., Feb. 27, 1992, BGBl. II at 463.

50. *See* Keith B. Richburg, *Close to Joining EU, Czechs Confronted with Darker Past: Reparations Sought for Treatment of Ethnic Germans After WWII*, WASH. POST, Nov. 19, 2002, at A16.

51. *See* Finding No. 55/1995 of March 8, 1995, Dreithaler, Const. Ct. Czech Rep., Case No. Pl. US 14/94, nálež Ústavního soudu čj. 14 / 1994 / Sbírka nálezů a usnesení Ústavního soudu,

the Czech and Slovak Republics became separate states, with each maintaining the continuity of its legal system, including the Decrees.⁵³

Initially there were indications of rapprochement on the Sudeten question: in 1990 President Václav Havel and President Richard von Weizsäcker exchanged apologies on state visits.⁵⁴ However, relations soon turned tense, with Sudeten German groups in particular demanding limits on cooperation pending extensive reparations, a view at least indirectly supported by the German government.⁵⁵ In 1997, Germany and the Czech Republic signed an extremely cautiously worded Declaration in which, depending on one's view, the Czech side either does or does not apologize for aspects of the expulsions.⁵⁶ While the measure of apology may be ambiguous, the absence of obligation is clear:

Both sides agree that injustice inflicted in the past belongs in the past, and will therefore orient their relations towards the future.... [E]ach side remains committed to its legal system and respects the fact that the other side has a different legal position. Both sides therefore declare that they will not burden their relations with political and legal issues which stem from the past.⁵⁷

The Declaration created some joint commissions to support research and exchange, but not to endorse restitution to Sudeten expellees.⁵⁸ Thereafter, Czech politicians resisted calls for further gestures. Although public debate in Germany and Austria about how to remember the war

available at http://test.concourt.cz/angl_verze/doc/p-14-94.html [hereinafter *Dreithaler*] (considering in particular Decree 108/1945).

52. "[T]he debate surrounding the decrees, their potential declaration null and void from the very beginning or their amendment or repeal, in effect questions the very foundations of post-war Czechoslovak legislation." Czech Foreign Office, *Opinion on the Benes Decrees* at 9, in *Legal Opinion*, *supra* note 14, at 54 (Kingsland).

53. *Id.* at 9 (Frowein).

54. Bruntstetter, *supra* note 26, at 272–73.

55. Chancellor Helmut Kohl reportedly stated in 1993 that the Czech Republic's prospect for joining the European Union would be harmed if it did not negotiate with Sudeten groups. Patrick Macklem, *Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 EUR. J. INT'L L. 1, 17 (2005); see also Pauer, *supra* note 5, at 173–75 (discussing strains in the relationship in the early 1990s); Raue, *supra* note 44, at 123–52 (discussing the negotiations leading to the 1997 German-Czech Declaration),.

56. The Declaration uses the term *lituje* in Czech. 1997 German-Czech Declaration, *supra* note 34; WIKIPEDIA, Deutsch-Tschechische Erklärung, http://de.wikipedia.org/wiki/Benutzer:Nolanus/Deutsch-Tschechische_Erkl%C3%A4rung.

57. 1997 German-Czech Declaration, *supra* note 34, art. IV.

58. See *id.*, arts. VII–VIII.

has since intensified,⁵⁹ neither state pressed the matter in an official forum again.

In 1997, the EU entered accession negotiations with the Czech Republic. The Sudeten question, although peripheral to the process, proved a persistent and troubling issue, especially in relations with Germany and Austria.⁶⁰ In 2001 and 2002, the issue achieved prominence in elections in those states and Hungary, where right-wing parties called for repeal of the Decrees, but the controversy receded after all these parties lost at the polls.

Thus, when the Czech Republic became a full member of the EU on May 1, 2004, it had neither repudiated the Decrees nor engaged in any act of restitution. The Czech government has since issued an expression of appreciation to Germans who actively opposed Nazism, regretting that “some of these people did not receive the appreciation they deserved.”⁶¹ Although the controversy continues to surface, the impetus of the debate faded with the *fait accompli* of accession. So: what have consequences of that been for the shape of our law?

IV. THE CONSENSUS REJECTING SUDETEN CLAIMS AND ITS RATIONALES

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

59. See JÖRG FRIEDRICH, *DER BRAND: DEUTSCHLAND IM BOMBENKRIEG 1940–1945* (2002); GÜNTER GRASS, *IM KREBSGANG* (2002); VOLKER HAGE, *ZEUGEN DER ZERSTÖRUNG: DIE LITERATEN UND DER LUFTKRIEG: ESSAYS UND GESPRÄCHE* (2003); W.G. SEBALD, *ON THE NATURAL HISTORY OF DESTRUCTION* (Anthea Bell trans., 2003) (1999); Christoph Amend & Jens Jessen, *Kann man den Deutschen trauen?*, *DIE ZEIT*, Nr. 19, May 4, 2005, <http://www.zeit.de/2005/19/Titelei-trauen>; Jacques Rupnik, *The Other Central Europe*, 11 E. EUR. CONST. REV. 68, 69 (2002) (noting “a new German fascination with the ‘lost provinces’ of the East”).

60. Pavla Kozakova, *Benes Decrees Confirmed*, TOL, Apr. 30, 2002 (on file with author).

61. *Czech Government Issues Apology*, *supra* note 28 (noting the government's commitment of thirty million koruna to “document the fate of Sudeten German antifascists over the next couple of years,” but also citing Paroubek's response to concerns about expellees demanding compensation, that “[i]t's a gesture of appreciation and apology and it does not mean any risk for us”).

There is nothing to solve, but there is much to think about.

— O. Neff⁶²

A. *The Consensus for Rejection—The Views of Relevant Sources*

This section assesses the sources of legal argument about accession and the Sudeten controversy from 1997, when the EU opened negotiations, until accession in 2004. A number of actors weighed in: EU institutions, states and officials, international and domestic courts, scholars, activist groups, and individuals. These actors in turn produced or interpreted a variety of textual sources: treaties and agreements,⁶³ declarations,⁶⁴ officials' statements,⁶⁵ court judgments,⁶⁶ resolutions of the European Parliament⁶⁷ and the Legal Opinion commissioned by it, views of the ICCPR Human Rights Committee,⁶⁸ advocacy by non-governmental organizations,⁶⁹ and academic commentary⁷⁰—in short, all the materials from which claims about customary international law are constructed.⁷¹

62. O. Neff, *Dialog open na pevnou hranici*, Mladá Fronta Dnes, Mar. 26, 1993, quoted in BURCHER, *supra* note 8, at 1.

63. See, e.g., Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298.

64. See, e.g., 1997 German-Czech Declaration, *supra* note 34.

65. Günter Verheugen, Speech at the Faculty of Social Sciences at Charles University (Apr. 11, 2002) [hereinafter Verheugen Speech] (transcript available at <http://www.evropska-unie.cz/eng/speech.asp?id=1332>).

66. Such court judgments have been issued by both Czech and international tribunals. See *Dreithaler*, *supra* note 51; *Prince Hans-Adam II of Liechtenstein v. Germany*, App. No. 42527/98, 2001 EUR. CT. H.R. [hereinafter *Prince Hans-Adam*]; *Case Concerning Certain Property (Liechtenstein v. Germany)*, 2005 I.C.J. (Feb. 10) [hereinafter *Liechtenstein*], available at <http://www.icj-cij.org/icjwww/idocket/ila/ilaframe.htm>.

67. See, e.g., European Parliament Resolution on the Czech Republic's Application for Membership of the European Union and the State of Negotiations, COM (2000) 703 final (Sept. 5, 2001), 2002 O.J. (C 72 E) 181 [hereinafter European Parliament Resolution].

68. See, e.g., Human Rights Comm., Comm'n No. 747/1997, *Des Fours Walderode v. Czech Republic*, UN Doc. CCPR/C/73/D/747/1997 (2001) [hereinafter *Des Fours Walderode*].

69. Kozakova, *supra* note 60 ("Otto Habsburg, chairman of the Pan-European Association and a direct descendant of the last Austrian emperor, recently repeated his criticisms of the Benes decrees.").

70. MS, *Czech News Agency Says Reports on Benes Decrees Contradict One Another...*, RADIO FREE EUR./RADIO LIBERTY, Oct. 3 2002, <http://www.rferl.org/newsline/2002/10/031002.asp> [hereinafter MS, *Czech News Agency Says*] (discussing various scholars' views).

71. See PETER MALANCZUK, *AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 39–40 (7th ed. 1997) (listing newspaper reports of state actions, statements of government spokesmen, laws, judicial decisions, extracts from foreign ministry archives, writings of international lawyers, treaties, and non-binding resolutions and declarations as sources of customary in-

Depending on one's preferred theory of customary international law, greater or lesser priority might be given to these actors in deriving legal norms.⁷² The most dominant theories adopt a statist view of customary law's creation,⁷³ while a minority advocates identifying a broader range of actors in a dynamic conversation.⁷⁴ Still, regardless of one's approach,⁷⁵ the outcome in this instance is the same: *no* model of custom-

international law); W. Michael Reisman, The Harold D. Lasswell Memorial Lecture: International Lawmaking: A Process of Communication (Apr. 24, 1981) in 75 AM. SOC'Y INT'L L. PROC. 101, 107 (identifying "international and national officials, the elites of multinational enterprises, the media, many interest and pressure group leaders, and most human beings" as legal "communicators").

72. MALCOLM N. SHAW, INTERNATIONAL LAW 107 (5th ed. 2003) (noting "confusion between law-making, law-determining and law-evidencing...[in] methods"); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758-59 (2001); Anne-Marie Slaughter & Steven R. Ratner, *The Method Is the Message*, 93 AM. J. INT'L L. 410, 419 (1990) (discussing various approaches).

73. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (noting that customary law "results from a general and consistent practice of states followed by them from a sense of legal obligation"); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 16-28 (2d ed. 1997); Detlev F. Vagts, *International Relations Looks at Customary Law: A Traditionalist's Defence*, 15 EUR. J. INT'L L. 1031 (2004). For classic statements of customary law, see: *The Paquete Habana*, 175 U.S. 677 (1900); *North Sea Continental Shelf* (F.R.G. v. Den./F.R.G. v. Neth.) 1969 I.C.J. 4 (Feb. 20, 1969); *Case Concerning the Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Apr. 2000) (containing classic and recent statements of customary law). "The Court has, however, often been criticized for not doing the kind of systematic analysis of practice and *opinio juris* that...*North Sea Continental Shelf* recommended." W. MICHAEL REISMAN, MAHNOUSH H. ARSANJANI, SIEGFRIED WIESSNER & GAL S. WESTERMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 15 (2004); see also J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000) (criticizing lack of consistent norms for assessing state action and *opinio juris*).

74. See, e.g., Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988); Reisman, *supra* note 71, at 101 (criticizing law's "myth[ic]" reliance on traditional sources); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT'L L. 96, 101 (2001) (criticizing positivism for "its common focus on 'existing' rules, emanating solely from entities deemed equally 'sovereign,' [that] does not properly reflect the reality of how law is made, applied and changed"); Vagts, *supra* note 73, at 1032 (arguing for "break[ing] open the black boxes of nation-states and look[ing] at the interactions of the flesh and blood individuals involved" and affording a more active role to bureaucrats, officials, and judges in defining customary international law).

75. Some scholars argue forcefully that customary law is epiphenomenal. See generally JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). But see Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143 (2001); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 569 (2005) (refuting claims that customary international law is "behaviorally epiphenomenal and doctrinally incoherent"). This Article is not concerned with debates about causation in states' seeming compliance with customary law, but

ary law yields an outcome favorable to Sudeten claims. At the level of law-making authority, all of these actors reveal a decisive consensus around four core rationales for rejecting Sudeten claims. We will examine the views of some representative sources of customary law—the Czech Republic, EU states and institutions, the Legal Opinion, the Potsdam Powers, international adjudicative bodies, and the writings of publicists—before turning in sub-section B to the four underlying rationales for rejecting Sudeten claims that they share.

1. *The Czech Republic*

As successor to the state from whose territory the Sudeten Germans were expelled, the Czech Republic has a natural interest in any connection between the accession process and restitution.⁷⁶ Any indication that it believed itself to be under an obligation concerning restitution to the expellees could constitute powerful evidence for a claim of customary legal obligation.⁷⁷ However, the Czech Republic has consistently opposed any repeal of the Decrees or other form of restitution, and has rejected any connection between these matters and its accession to the EU.

For the Czech Republic's political organs, the 1997 German-Czech Declaration constitutes a definitive closure to the question of expellees' claims as a matter of law or inter-state relations.⁷⁸ In the Declaration, the Czech Republic defined its historic role in these terms:

The Czech side regrets that, by the forcible expulsion and forced resettlement of Sudeten Germans from the former Czechoslovakia after the war as well as by the expropriation and deprivation of citizenship, much suffering and injustice was inflicted upon innocent people, also in view of the fact that guilt was attributed collectively. It particularly regrets the excesses which were contrary to elementary humanitarian principles as well as legal norms

rather the effects on the *doctrinal* structure states formally acknowledge. For this Article's purposes it is sufficient to find a correlation between customary norms and states' actions, and thus a (possibly unexplained) predictability; all sides of the debate on customary law's effect suppose such a correlation, or they would have nothing to argue about.

76. Many of the issues discussed here would also apply to Slovakia as the other legal successor to Czechoslovakia. See *Legal Opinion*, *supra* note 14, at 40 (Bernitz). Poland also has related or parallel issues regarding postwar expulsions and relations with EU member states.

77. See SHAW, *supra* note 72, at 80–84 (discussing the concept of *opinio juris*—the role of states' sense of legal obligation in constructing customary law claims). See also *infra* Part IV.C.

78. See, e.g., MS, *Czech Foreign Minister Rules out Negotiations on Benes Decrees*, RADIO FREE EUR./RADIO LIBERTY, Nov. 3, 2003 [hereinafter MS, *Czech Foreign Minister*], <http://www.rferl.org/newsline/2003/11/031103.asp>.

existing at that time, and it furthermore regrets that Law No. 115 of 8 May 1946 made it possible to regard these excesses as not being illegal and that in consequence these acts were not punished.⁷⁹

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

In the run-up to elections in Germany, Austria, and Hungary in 2002, politicians in those countries increased their rhetorical assaults on the Decrees, and with them, opportunities for the Czech Republic to clarify its position.⁸⁰ Czech officials and politicians were nearly unanimous in resisting calls for restitution,⁸¹ with most opposing even symbolic gestures beyond those already made.⁸² More broadly, the Czech government insisted that the Decrees were not only compatible with a just legal order, but synonymous with it: "[T]he debate surrounding the decrees, their potential declaration null and void from the very beginning or their amendment or repeal, in effect questions the very foundations of post-war Czechoslovak legislation."⁸³

In April 2002, the Czech Parliament unanimously approved a joint

79. 1997 German-Czech Declaration, *supra* note 34, art. III.

80. For example, in response to then Prime Minister Viktor Orban's call for the repeal of the Decrees, the prime ministers of the Czech Republic, Poland and Slovakia cancelled a summit meeting. Representation of the European Commission in the Czech Republic, Benes Decrees "Should Be No Obstacle" (Mar. 18–25, 2002), <http://www.evropska-unie.cz/eng/article.asp?id=1310>.

81. See MS, ...*While Parties Agree on the Text of Envisaged Declaration*, RADIO FREE EUR./RADIO LIBERTY, Apr. 22, 2002, <http://www.rferl.org/newsline/2002/04/220402.asp> (noting broad agreement among Czech parties about the Decrees).

82. See BW, *Klaus Opposes Czech Compensation for Sudeten Germans*, RADIO FREE EUR./RADIO LIBERTY, Apr. 16, 2002, <http://www.rferl.org/newsline/2002/04/160402> (noting Klaus' rejection of "symbolic compensation" as an attempt to revise the postwar settlement; noting also a "Stop Nationalism" petition organized by Bishop Vaclav Maly to oppose political exploitation of the Decrees, and Klaus' criticism of it).

83. Czech Foreign Office, *Opinion on the Benes Decrees*, in *Legal Opinion*, *supra* note 14, at 54 (Kingsland); see also MS, *Czech Republic Submits Benes Decrees Assessment to European Parliament...*, RADIO FREE EUR./RADIO LIBERTY, Apr. 4, 2002, <http://www.rferl.org/newsline/2002/04/040402.asp> [hereinafter MS, *Czech Republic Submits*] (reporting on the Czech Republic's official assessment of the Decrees submitted to the European Parliament).

resolution declaring that the Decrees are part of the post-war settlement and the state's legal history, and that "legal and property relations" arising from them are "unquestionable, inviolable, and unchangeable,"⁸⁴ a view President Havel publicly supported.⁸⁵ Some Czech politicians interpreted the Resolution as the Czech Republic's final position on the matter; Vaclav Klaus of the Civic Democratic Party declared that he would advise his generally pro-EU party to oppose Czech membership if the EU itself did not give "legal guarantees" that the Decrees would not be questioned after accession.⁸⁶

The Resolution also noted, however, that the Decrees are not currently applicable, indicating that they "were implemented in the period after they had been issued and no new legal norms can be established on their basis today."⁸⁷ As the Resolution suggested by simultaneously defending the Decrees' inviolability and acknowledging their current non-applicability, the Czech position centered on the Decrees' lack of contemporary legal effect as the reason for their irrelevance in the accession process. In May 2002, for example, Prime Minister Zeman asserted that "[o]ur analysis shows there is no discrimination today" and that conse-

84. MS, *Czech Lower House Approves Resolution on Benes Decrees*, RADIO FREE EUR./RADIO LIBERTY, Apr. 24, 2002, <http://www.rferl.org/newsline/2002/04/240402.asp> [hereinafter MS, *Czech Lower House Approves Resolution*]; see also MS, *Text of Czech Resolution on Benes Decrees Made Public*, RADIO FREE EUR./RADIO LIBERTY, Apr. 23, 2002, <http://www.rferl.org/newsline/2002/04/230402.asp> [hereinafter MS, *Text of Czech Resolution*] (noting that the draft resolution "rejects attempts to open issues connected with the end and with the results of World War II," and declares that property restitution is "the exclusive prerogative of Czech constitutional bodies").

85. *President Havel Supports Parliament's Resolution on Benes Decrees*, RADIO PRAHA, Apr. 23, 2002, <http://www.radio.cz/en/news/27207>. Havel has on occasion expressed regret regarding the expulsions, and in particular for application of a collective guilt principle; his comments have "provoked a wave of protests on the Czech scene." CTK News Agency, *Appeals for Reconciliation Sometimes Give Way to Strong Words*, Aug. 24, 2005, available at LEXIS, News Library [hereinafter CTK, *Appeals for Reconciliation*]. In a letter to German President Richard von Weizsäcker in December 1989, Havel called the expulsions a "deeply immoral act," a comment he repeated on a visit to Germany in 1990. Bruntstetter, *supra* note 26, at 272-73; Macklem, *supra* note 55, at 17. Sudeten and Bavarian reaction was relatively hostile, however, with Sudeten leaders interpreting Havel's goodwill gesture as an admission of guilt and demanding monetary reparations. Pauer, *supra* note 5, at 173-75.

86. MS, *Czech Lower House Approves Resolution*, *supra* note 78; see also Kozakova, *supra* note 60. Neither the EU nor its member states ever gave such guarantees.

87. BBC Worldwide Monitoring, *The Czech Republic EU Entry/Postwar Decrees*, CENT. EUR./BALTIC MEDIA ROUNDUP ON EU-RELATED ISSUES 18-24 APR. 02, Apr. 25 2002, available at LEXIS, News Library (summarizing CTK News Agency reports); see MS, *Text of Czech Resolution*, *supra* note 84.

quently the Czech Republic considers the Decrees “extinct,”⁸⁸ an interpretation deriving from the 1995 *Dreithaler* ruling of the Czech Constitutional Court.⁸⁹ In a joint statement at that time, Zeman and EU Commissioner for Enlargement, Günter Verheugen, likewise declared that the “Decrees are not part of the Accession Negotiations and should have no bearing on them” because they “no longer produce legal effects.”⁹⁰

Thus, the official Czech position has been more nuanced than simply completely rejecting claims for restitution on any grounds. Official Czech pronouncements do not insist on the absolute righteousness of all actions at the time or their continued correctness without any scruple or modification. In addition, Czech politicians and observers have distinguished between legal and moral or political claims arising from the expulsions. Foreign Minister Cyril Svoboda noted in late 2002, that “[s]trictly from the legal point of view, we have no problems.... But we still have the problem of political or moral gestures.”⁹¹ Michael Zantovsky, Chair of the Foreign Affairs, Defense, and Security Committee of the Czech Senate, noted that:

There is no question of any official repeal of the decrees.... Legally, we're off the hook.... Morally, I think there is a sense that during the Second World War, atrocities were committed by the Nazis for which Germany and Austria took responsibility, and after the war, acts were committed by the newly liberated countries, including Czechoslovakia, which were morally indefensible, and that any decent person should say ‘I’m sorry’ for.⁹²

In 2002, then Labor and Social Affairs Minister Vladimir Spidla suggested compensation for expellees who had been active anti-fascists, a

88. MS, *EU Urges Calm in Czech-German Dispute over Benes Decrees*, RADIO FREE EUR/RADIO LIBERTY, May 24, 2002, <http://rferl.org/newsline/2002/05/3-CEE/cee-240502.asp?po=y> [hereinafter MS, *EU Urges Calm*].

89. *Legal Opinion*, *supra* note 14, at 15 (Frowein) (discussing the Czech Constitutional Court’s ruling in *Dreithaler* on Decree No. 108 of October 25, 1945). The Human Rights Committee has noted that “following the Court’s judgment...the Benes’ [*sic*] decrees have lost their constitutional status.” Human Rights Comm., Commc’n No. 669/1995, *Gerhard Malik v. Czech Republic*, UN Doc. CCPR/C/64/669/1995 (1998) [hereinafter *Malik*]. This seems to be at variance with Czech interpretations of the Court’s logic about “extinction.”

90. Press Statement, Miloš Zeman & Günter Verheugen (Apr. 11, 2002), *available at* <http://www.mzv.cz/wwwo/mzv/default.asp?id=11188&ido=1&idj=1&amb=1> [hereinafter Zeman-Verheugen Joint Statement].

91. Richburg, *supra* note 50, at A16 (quoting Foreign Minister Svoboda).

92. *Id.* (quoting Czech Senate Foreign Affairs, Defense, and Security Committee Chairman Zantovsky).

proposal supported by Zeman.⁹³

But these modifications are only partial. “Extinction” seems clearly different from complete repudiation or abrogation, and Czech pronouncements on extinction invariably insist on the continuity of the Decrees in the legal system. Indeed, extinction appears to be compatible with the absence of relevant *facts* as much as with *legal* inoperability.⁹⁴ The extinction argument may moderate Czech rejection of a restitution claim, but is still radically different from acknowledging an obligation vis-à-vis the expellees as a group, or from conceding any international or European aspect of the question.

As for moral and political arguments, by their very construction these do not give rise to a *legal* obligation. Frowein notes that “[i]n the German-Czech-Declaration of 1997 the Czech side regrets that the confiscations inflicted injustice upon innocent people but no consequences follow therefrom”⁹⁵—and the Czechs successfully resisted making any additional gesture in any event. In addition, although the comments by Svoboda, Zantovsky, and others might be construed as distancing the Czech Republic from the expulsions and thereby delegitimizing them, on a close reading, no official Czech position contemplated apology for the expulsions as such but only for excesses and crimes committed in the course of them. Nothing in the Czech view contemplated a fundamental revision of official memory of the expulsions as legal and legitimate, or any consequences for them in the present.⁹⁶

In the final months before accession, the Czech government maintained its position. In September 2003, for example, on the occasion of

93. CTK, *Appeals for Reconciliation*, *supra* note 85. Spidla suggested compensation would affect “several dozen” or “several hundred” people, while Zeman indicated it might apply to those Germans who had actively resisted or been placed in concentration camps. *Czech Politicians Don’t Rule out Compensation for Some Sudeten Germans*, CZECH BUS. NEWS, May 20, 2002 [hereinafter *Czech Politicians Don’t Rule out Compensation*].

94. That is to say, an absence of Germans rather than an absence of legal force. Cf. Dreithaler, *supra* note 51, at para. 35 (finding that Decree 108/1945 “has already accomplished its purposes and for a period of more than four decades has not created any further legal relations, so that it no longer has any constitutive character”). There is absolutely no suggestion in any of the sources, nor in this Article, that any Czech official believes the Decrees could be invoked against the remaining German population.

95. *Legal Opinion*, *supra* note 14, at 13 (Frowein).

96. Compare this view of Interior Minister Stanislav Gross:

In cases of obvious and provable injustice we are not against holding talks on these issues but it is impossible to link them with the issue of the deportation of Sudeten Germans...because we think that the deportation of Sudeten Germans after World War Two was a right solution and was adequate to that period.

Czech Politicians Don’t Rule out Compensation, *supra* note 93 (ellipsis in original).

Chancellor Gerhard Schröder's visit to Prague, Prime Minister Vladimir Spidla declared "disputes between the Czech Republic and Germany over the deportation of the Sudeten Germans after World War II are a thing of the past."⁹⁷ On November 2, 2003, Foreign Minister Svoboda

...ruled out any political negotiations with Germany on the expulsion from Czechoslovakia of the Sudeten Germans at the end of World War II.... Svoboda said the government stands by the joint 1997 German-Czech declaration aimed at the reconciliation of the two neighboring countries.... It is possible to debate what happened, but in no way to negotiate,' [Svoboda] said.⁹⁸

Thus, no institution of the Czech Republic had repudiated the Decrees or engaged in any other act of restitution by the time it became a member of the EU. Equally important, the Czech Republic had not in any fashion conceded the right of the EU or other member states to intervene in the matter, whether as a condition of accession or in any other way. To the degree any other relevant actor continued to press claims that the Czech Republic had an obligation to make restitution—and as we shall see, such claims were very few—it has consistently maintained a position as a persistent objector to those claims.⁹⁹

97. MS, *Czech Premier Says Relations with Germany 'Better Than Ever Before,'* RADIO FREE EUR./RADIO LIBERTY, Sept. 5, 2003, <http://www.rferl.org/newsline/2003/09/050903.asp> (paraphrasing Spidla).

98. MS, *Czech Foreign Minister, supra* note 78 (citing Svoboda's comments on TV Prima; insertion of "[Svoboda]" in original).

99. See, e.g., MS, *Sudeten Germans Call on Czech President to Hold Talks on Compensation,* RADIO FREE EUR./RADIO LIBERTY, Apr. 23, 2003, <http://www.rferl.org/newsline/2003/04/230403.asp> [hereinafter MS, *Sudeten Germans Call on Czech President*] (arguing that "Prague has consistently rejected efforts to orchestrate anything but token compensation for the expulsions"). In the run-up to accession, the Czech Foreign Ministry website included these comments:

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

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

Czech Foreign Ministry Website, *supra* note 2. See also Ambassador Sečka's Letter to the EP Foreign Committee Chairman, Ministry of Foreign Affairs of the Czech Republic, <http://www.czechembassy.org/www/mzv/?id=11097%20&ido=6569&idj=2&amb=1> (containing similar language, adding, *inter alia*, that "[t]he Czech Republic does not intend to re-open this historically closed distressful chapter of the European history at the European level. We assume that

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

The government of the Czech Republic expresses its profound appreciation to...German nationals living on the Czech territory before World War II who during the war remained faithful to the (then) Czechoslovak republic and actively participated in the struggle for its liberation, [and regrets that] some of these people did not receive the appreciation they deserved.¹⁰⁰

Even this formulation was highly contested within the Czech Republic,¹⁰¹ and any connection to compensation, revocation of the Decrees, or—most importantly for our question—to the treatment of the Sudeten Germans as a whole or a legal obligation to engage in restitution, has been rejected.¹⁰²

Domestic courts' jurisprudence also constitutes evidence of state practice, and various Czech courts have considered the expulsions. Some cases were heard during the 1940s and 1950s, but since the collapse of Communism and the institution of a restitution law for post-1948 confiscations, many Germans have petitioned for the return of property, or otherwise challenged the legality of the expulsions, denaturalizations and confiscations. In an early case, *Dreithaler*, the Court expressly considered one of the Decrees both as an artifact of Czech law

re-opening of this issue could have far more reaching negative impacts on the current structure of the European continent," and calling the Decrees "a long time ago closed [*sic*] event of our common European history.").

100. AP, *Czech Government Issues Apology*, *supra* note 28 (ellipsis in original).

101. In June 2005, in "an unusual admission for a left-wing leader," Paroubek wrote that recognition of anti-fascist Germans "should be a gesture by which the Czechs would show that they are aware of a certain historical responsibility for the mass resettlement of former Sudeten German fellow citizens under the principle of collective guilt that was understandable at the time but today is completely unacceptable." Dinah A. Spritzer, *Rethinking the Postwar Expulsions: WWII Commentaries Note the Fate of Former Czechoslovak Citizens*, THE PRAGUE POST, June 16, 2005, available at <http://www.praguepost.com/P03/2005/Art/0616/news7.php> (internal quotations omitted) (citing Paroubek's June 8, 2005, article in PRÁVO). President Vaclav Klaus termed the proposal "exceptionally dangerous" and commented that Paroubek "has completely gone out of his mind." CTK, *Appeals for Reconciliation*, *supra* note 85. Klaus also called the declaration "an empty gesture because...it is impossible to track down most of those the apology addresses, and in many respects they are part of a problematic group." Jan Velinger, *Government Apologises for Czech Victimization of Loyal, Anti-Nazi Sudeten Germans After WWII*, RADIO PRAHA, Aug. 7, 2005, <http://www.radio.cz/en/article/69979>.

102. See AP, *Czech Government Issues Apology*, *supra* note 28.

and in its international context.¹⁰³

Dreithaler petitioned under the restitution law¹⁰⁴ to regain confiscated property and have Decree 108/1945 declared void *ab initio* or annulled as unconstitutional, “undemocratic in character and purpose and inhumane in substance,”¹⁰⁵ and incompatible with the “legal canons of civilized European societies.”¹⁰⁶ The Court rejected these claims and reaffirmed the democratic values of the pre-war legal regime, as part of a civilized, European, international system:

[T]he Czechoslovak legal order would [not] have manifestly preferred the preeminence of the domestic legal order...irrespective of the requirements, in particular, of international law. For...the principle of the democratic legitimacy of the governmental system...lays stress on its links to the system of values, which also make up the foundation of the international legal order.

...[C]onvictions concerning the imperativeness of smashing the Nazi regime and of compensation...of the damages caused by that regime and the events of the war, were found in the value orientation which was formed during the Second World War and shortly thereafter. Thus, not even in this respect does Presidential Decree No. 108/1945...conflict with the ‘legal canons prevalent among civilized European societies in this century,’ rather it was a legal act that was a product of its era, supported by international consensus.¹⁰⁷

The Court also found that the means employed to defend those values, which the Court called “society’s lone supporting structure,” were a proportional response to past (and implicitly future) threats to Czech society. The Court denied that ethnic confiscations constituted an improper instance of collective guilt, because it denied that guilt was even being considered:

[N]o presumption of ‘guilt’ is concerned, not even for persons of German nationality, rather it is a presumption of ‘responsibility.’

103. See Mark Gillis, *Facing up to the Past: The Czech Constitutional Court's Decision on the Confiscation of Sudeten German Property*, 2 THE PARKER SCH. J. OF E. EUR. L. 709 (1995) (discussing *Dreithaler*); Raue, *supra* note 44, at 68–69, 128–30 (discussing *Dreithaler*).

104. Zákon č. 182/1993 Sb. § 74.

105. *Dreithaler*, *supra* note 51, at para. 3.

106. *Id.* at para. 2. The Regional Court had declared that the Decree was “a valid part of ‘our legal order.’” *Id.* (citing the Regional Court in Usti nad Labem, Liberec Branch, file no. 29 Co 647/93-30).

107. *Id.* at para. 9.

...[T]he category of 'responsibility' is a much broader concept than that of 'guilt', so that in this respect it has a far more extensive value, social, historical, as well as legal, dimension [T]he fact that Decree No. 108/1945...is based on the presumption of responsibility of persons having German nationality does not mean that it has a discriminatory nature; it does not represent a form of nationalistic revenge, rather it is merely a proportionate response to the aggression of Nazi Germany.¹⁰⁸

By insisting that the Decree was not a collective ethnic punishment, the Court may have implicitly acknowledged the illegitimacy of collective punishment, perhaps contributing to the formation of a customary norm outlawing it. But it also necessarily reaffirmed the state's right to confiscate property on grounds that materially distinguish between individuals by ethnicity, since the burden of proof was different for ethnic Germans and Hungarians than for Czechs and Slovaks:

Thus, even though the decree speaks in terms primarily of...German nationality,¹⁰⁹ in actuality this decree has a more general scope and can be considered as one of the documents reflecting the age-old conflict between democracy and totalitarianism.... [A] person was not considered an enemy, be he, for example, of German nationality, if he actively stood up in the defense of democracy or if he suffered under the totalitarian regime, whereas on the other side, one qualified as an enemy if, without regard to his nationality, he actively stood up against democracy.¹¹⁰

Even the Court's own formulation does not actually identify a non-ethnic rationale: A German was an enemy *unless* he actively *resisted* Nazism, while 'one'—that is, a Czech or Slovak—was an enemy *only if* he actively *supported* Nazism. A merely passive Czech or Slovak retained his property, while a merely passive German was subject to confiscation. And the Court later made it very clear that it did indeed think an expressly ethnic distinction reasonable:

[T]here does seem to exist after all a fundamental difference between the responsibility of the 'rest of the world' and that of the German nation, between the silence and passivity of some and the

108. *Id.* at paras. 23, 26.

109. Meaning "ethnicity."

110. *Dreithaler*, *supra* note 51, at para. 22.

silence and the active role played by others, a difference which has some significance for the burden of proof. For it was a considerable portion of the German nation which in myriad respects directly and consciously participated in the creation of the power structure in Nazi Germany, in the expansion of Nazi Germany into Czechoslovakia, and generally in Nazi aims and actions.¹¹¹

Finally, the Court noted as “determinative in the present case” that the Decree’s consistency with the Constitution or international treaties cannot be reviewed because it “no longer [has]...any constitutive character”¹¹² and extended this logic to the Decrees as a whole:

[T]he legislation...concern[s] what is in essence an already closed circle of problems and issues intimately connected with the wartime events and the economic renewal of the land. In addition, the normative acts from this period accomplished their purposes in the immediate post-war period, so that from a contemporary perspective they no longer have any current significance and already lack any further constitutive character.¹¹³

Here the Court developed what other Czech officials later referred to as the “extinction” thesis. Consistent with the general lines of the Czech position, the Court’s decision reaffirmed the centrality—if present inoperability—of the Decrees in the Czech legal order. And as a practical matter, in finding that the Decrees were not reviewable, it necessarily did not find that they violate any international obligation of the Czech Republic.

Czech courts have granted restitution in a small number of cases,¹¹⁴ in

111. *Id.* at para. 24. *Cf.* Gillis, *supra* note 103, at 720, cited in Alexander M. Karn, *Restitution and Retrodiction: Talking Back to the Past in Post-Communist East-Central Europe*, 7 n.10, available at <http://www.eucenter.scrippscol.edu/publications/papers/karn.pdf>

([T]he real problem consisted in the means for determining who were enemies and traitors: in the case of the Germans and Hungarians, they were presumed to be unless they could prove their loyalty, and other citizens were assumed to be loyal unless the state could prove otherwise [This represented] a clear example of discrimination on the basis of nationality...[but is] proportionate to the end of re-establishing a democracy.).

112. *Dreithaler*, *supra* note 51, at para. 34.

113. *Id.*

114. Including for *Dreithaler*. Shortly after the ruling on Decree 108/1945 was issued, the Constitutional Court held that a lower court had improperly dismissed a related claim for return of property because “the circumstances of the seizure of the Dreithaler house...were unclear” and may have occurred in 1949, and thus come under the restitution law. Judgment of June 22, 1995, Const. Ct. Czech Rep., Case No. IV. US 56/94, nálež Ústavního soudu čj. 56 / 1994 / Sbírka nálezu a usnesení Ústavního soudu, available at http://test.concourt.cz/angl_verze/doc/4-56-94.html; see Steve Kettle, *Sudeten German Wins Restitution Case in Czech Constitutional Court*,

extremely limited and highly particular circumstances.¹¹⁵ However, there is no suggestion that the fundamental lines of *Dreithaler* have been altered. Czech jurisprudence informs and confirms the message of Czech political actors: the Decrees remain part of the legal order, if no longer operative, and no restitution is required. On the contrary, that jurisprudence identifies the expulsions as consistent with and constitutive of the legitimate Czech and international order.

2. *European Union Member States and Institutions*

Several EU member states addressed the Sudeten controversy.¹¹⁶ As sovereign states, member states are core actors in customary law, possessing the standard tools for generating norms. Each of the then fifteen EU member states had to agree to the accession of the Czech Republic, and their decision to grant membership necessarily suggests a belief that the candidate respects the principles in the Treaty of European Union, including respect for human rights.¹¹⁷ Any member state could have vetoed accession if it believed the Czech Republic was in violation of EU law or fundamental human rights, or otherwise obliged to offer restitution. None did so, nor did any member lodge a formal demand for restitution, even when the Sudeten issue was explicitly raised in EU institutional fora. On the contrary, member states favored delinking the Sudeten controversy from the accession process. France, for example, consistently supported Czech membership, rejecting any claim that the

OMRI DAILY DIGEST, June 23, 1995, <http://www.mojozone.org/pub/news/950623.new> (noting that, despite being a German, Dreithaler had retained his citizenship after 1948); Chandler Rosenberger, *From Kokoschka to Modigliani: Czech-German Relations Today*, 20 INSTITUTE OF CURRENT WORLD AFFAIRS, Aug. 1994, available at <http://people.bu.edu/crr/ICWA%20for%20Web/Awakening.htm>.

115. See, e.g., MS, *Czech Supreme Court Makes Milestone Ruling in Restitution Controversy*, RADIO FREE EUR./RADIO LIBERTY, Sept. 12, 2003, <http://www.rferl.org/newsline/2003/09/3-CEE/cee-120903.asp?po=y> (noting that former nobleman Frantisek Oldrich Kinsky has received certain properties, but also that a Supreme Court ruling recognizing the precedence of restitution legislation over the Civil Code would have detrimental effects on lawsuits by other expellees); see also Marcia Christoff Kurapovna, *Revenge of Old Europe/Czech Policy Under Fire: Nobility Seeks to Win Back Seized Property*, INT'L HERALD TRIB., Dec. 9, 2003, available at http://www.ihl.com/articles/2003/12/09/empire_ed3_.php.

116. Great Britain is discussed below with the Potsdam Powers, but comments here apply to it, as well.

117. Only states that respect the Union's foundational principles—"liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law"—may apply for membership. Treaty Establishing the European Community arts. 6(1), 49, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by Treaty of Nice, Feb. 26, 2001, 2001 O.J. (C 80) 1 (Consolidated Version, Dec. 24, 2002, 2002 O.J. (C 325) 1) [hereinafter EU Treaty].

controversy was relevant to accession.¹¹⁸

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

Who in the year 2002 cannot distance himself from a political event that contradicts all norms of international law and questions the E.U. suitability of his country? Chancellor Schröder is urgently called upon to link the question of Czech E.U. entry to the abandonment of the Benes Decrees.¹¹⁹

Steinbach's views represented those of a powerful constituency within Germany, but not of a law-generating actor. Had her view been adopted by Germany, it would have constituted indicia of possible obligation in international law; Schröder, of course, did not at any point assert such a linkage.¹²⁰ Rather, Germany approved the Czech Republic's accession without requiring any restitution for Sudeten claims.

German politicians on the right linked strong objections to Czech membership to the Sudeten issue, and raised the matter in European institutions, yet even these advocates for Sudeten restitution limited the scope of their objections. For example, Edmund Stoiber, Prime Minister of Bavaria and candidate for Chancellor for the CDU/CSU in 2002, frequently condemned the expulsions and called for restitution,¹²¹ and yet he also advocated keeping calls for the repeal of the Decrees separate from accession. "For me these issues represent no condition for the admission of the Czech Republic to the EU, but the Czech Republic has to know that if it does not make a clear line, the theme will continue in Europe."¹²² And, of course, these were only the views of opposition

118. See, e.g., Statements Made by the Ministry of Foreign Affairs Deputy Spokesperson, Paris (excerpt), Apr. 19, 2002, <http://www.ambafrance-us.org/news/briefing/us190402.asp>.

119. Wallace, *supra* note 27.

120. Cf. MS, *Czech President Warns against 'Opening Sensitive Issues of the Past'...*, RADIO FREE EUR./RADIO LIBERTY, Oct. 30, 2003, <http://www.rferl.org/newsline/2003/10/301003.asp> (noting Chancellor Gerhard Schröder's comments in Bratislava that he "would welcome an official Czech apology," but that "the issue should not burden Czech-German relations").

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

122. *Czech Politicians Don't Rule out Compensation*, *supra* note 93 (quoting Stoiber at a Sudeten German rally in Nuremberg).

politicians, never those of the German state.¹²³

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

[W]ithin the accession process it would be difficult to ask for the repeal of the legislation concerned since Germany, the country most directly affected by these developments, did not insist that [the amnesty law] must be partly repealed in the negotiations leading to the Declaration of 1997. The Declaration is not a treaty. But it is a carefully worded text, negotiated in detail, which, on the basis of the principles of good faith and estoppel in international law, is of relevance in German-Czech relations.¹²⁴

As Kingsland notes, "[t]his agreement, at the very least, implies acceptance by Germany of the expropriation of property under the Benes Decrees,"¹²⁵ and the Declaration "indicates acceptance by Germany of the effects of Act 115/1945 [regarding amnesty for acts against expellees] and strongly implies that a repeal is not considered necessary by Germany."¹²⁶ Nor have German courts—which in any event are constrained by the Settlement Convention from considering most claims against seized assets¹²⁷—considered that Sudeten claims implicate any international obligations requiring revision.¹²⁸

Austria, the other state with a significant expellee population, had not raised the expellee issue in the same manner as Germany during the

123. Gattini, *supra* note 4, at 516 ("[T]he various governments of the Federal Republic of Germany have never officially supported the claims of the Vertriebenen [expelled].").

124. *Legal Opinion*, *supra* note 14, at 29 (Frowein). *Cf.* Gattini, *supra* note 4, at 516 (noting that the "[d]eclaration demonstrates the wish of the German federal government, if not to consider the issue closed once and for all, at least to commit itself not to make claims for itself or to lend support through diplomatic channels for claims made by its citizens").

125. *Legal Opinion*, *supra* note 14, at 59 (Kingsland).

126. *Id.* at 63 (Kingsland).

127. See discussion of Settlement Convention, *supra* note 41 and *infra* note 205.

128. See, e.g., Gattini, *supra* note 4, at 518 (discussing the German Federal Constitutional Court's rejection of a claim by Prince Hans Adam II of Liechtenstein of an alleged violation of the Grundgesetz, Article 25, "which guarantees that the public bodies of the Federal Republic shall observe customary international law," but also noting that the Court relied on the Settlement Convention, and did not reach the merits).

Cold War period. Nonetheless, in the late 1990s, the level of diplomatic dispute between Austria and the Czech Republic over the expulsions was even more heated—and after its own admission to the EU, Austria had the right to veto accession. However, although Austrian officials and politicians frequently expressed dissatisfaction with the Czech Republic's position,¹²⁹ Austria never declared that failure to repudiate the Decrees or to otherwise undertake restitution constituted a violation of any international or EU norm or a reason to oppose accession. Austria approved Czech accession without requiring any restitution for Sudeten claims.

Indeed, in both Germany and Austria—as well as in Hungary—rightist politicians raised the question of the expulsions and restitution, but felt constrained by their conceptions of the EU process to limit the scope of linkage between accession and restitution; whatever their sympathies, they were not prepared to insist on formal linkage.¹³⁰ In all three countries, those politicians sympathetic to restitution lost, and therefore did not form state policy in the run-up to accession and their objections remained peripheral and private.

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

Accession requires actions by the European Council, the European Commission, and the European Parliament.¹³¹ Before the Union could open accessions negotiations, the Council and Commission had to con-

129. See, e.g., MS, *Czech President Sends Mixed Signals in Vienna*, RADIO FREE EUR./RADIO LIBERTY, Apr. 24, 2003, <http://www.rferl.org/newsline/2003/04/3-CEE/cee-240403.asp> (noting Austrian President Thomas Klestil's statement that "the Sudeten German question had not yet been solved 'in a satisfactory manner'"). Austrian Chancellor Wolfgang Schüssel called on the Czech Republic to voluntarily compensate Sudeten expellees—implying that, his sympathies aside, he did not believe the Czech Republic was necessarily obliged to do so. Wallace, *supra* note 27. Jörg Haider, leader of the Freedom Party, called for abolition of the Decrees. See *id.*; see also Rob Cameron, *Freedom Party Furious over Benes Decrees Resolution*, RADIO PRAHA, Apr. 25, 2002, <http://www.radio.cz/en/article/27283>.

130. See Wallace, *supra* note 27 (quoting analyst Jonathan Stein, saying "Politicians are trying to show they are capable of defending national identity, but E.U. integration limits the scope of this to symbolic battles").

131. EU Treaty, *supra* note 117, art. 47(1)–(2).

firm that the Czech Republic had fulfilled the Copenhagen criteria as a minimum basis for membership.¹³² These criteria, though highly general, require candidates to guarantee basic human rights and respect for minorities.¹³³ Consequently, approval indirectly indicates EU institutions' (and member states') views on a candidate's compliance with human rights norms.

Thus, in declaring that the Czech Republic had met the criteria, the Commission necessarily implied either that the Decrees were no longer valid, or that they did not violate human rights norms.¹³⁴ The Commission and Council approved and later revised an Accession Partnership with the Czech Republic establishing the conditions for accession,¹³⁵ and none of these documents mentions the Sudeten issue or in any way conditions progress towards membership on restitution. The Council did not take any action in connection with the Sudeten controversy,¹³⁶ and later, during the controversy, Commissioner for Enlargement Verheugen declared the Czech Republic in compliance with EU law¹³⁷ and expressly disassociated the Sudeten issue from accession, noting: "[I]t is to be hoped that...the Czech Republic, Germany and Austria...can reach an understanding about how to deal with their own past.... It is also desirable for this to happen before the Czech Republic joins. But it is not a

132. *Id.* art. 47(1).

133. "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.... Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political...union." Presidency Conclusions, Copenhagen Europeans Council (June 21–22, 1993), EUR. COUNCIL DOC. SN 180/1/93 Rev 1, *available at* http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.

134. I do not mean to suggest that the Commission's determination was legalistic; accession is a highly political process. I only note the *absence* of any opinion that there might be a legal(istic) obstacle. As a thought experiment, imagine the Commission were to reject a candidate's application and specify human rights violations as the reason. This would surely constitute a datum in a claim that the applicant state was violating human rights. Any such posture is entirely absent in the Czech case.

135. *See* Commission Regulation 622/98, 1998 O.J. (L 85) 1 (EC) (revised 1999 and 2001).

136. *See* Reply to Written Question E-0574/02 by Nelly Maes (Verts/ALE) to the Council, 2002 O.J. (C 309 E) 29 (EC) (English, French original) (noting, in reply to an MEP question, that the Council "has not discussed the question whether the Beneš decrees in the Czech and Slovak Republics might be compatible with Community law"), *available at* <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce309/ce30920021212en00290029.pdf>.

137. "I no longer see any insurmountable barriers that would prevent negotiations from being concluded at the end of this year. ...The European Commission has always maintained the view that the legal order of the Czech Republic meets the Copenhagen accession criteria." Verheugen Speech, *supra* note 65 (adding "I say this quite deliberately, aware that only very recently, the past has cast a shadow over the accession negotiations").

condition.”¹³⁸

The European Parliament¹³⁹ was the only EU institution to evince even guarded support for Sudeten claims and for the view that restitution might be obligatory. In a Resolution of September 5, 2001, the European Parliament welcomed “the Czech government’s willingness to scrutinise the laws and decrees of the Beneš government, dating from 1945 and 1946 and which [are] still on the statute books, to ascertain whether they run counter to EU law in force and the Copenhagen criteria.”¹⁴⁰ This suggests Parliament believed the Decrees were still law and might violate EU norms, although it left the determination of this issue up to the Czech government. Parliament may have contemplated that the Decrees would have to be abolished if indeed they contradicted EU law, although the Resolution does not explicitly indicate this.

Outside the frame of the Resolution, individual MEPs took public positions on the controversy, inserting views in the official record and creating a legislative history relevant (in some models) to determining customary law. Some MEPs argued that failure to revoke the Decrees should bar the Czech Republic from membership:

[S]ome deputies of the European Parliament expressed the view that although controversy over the Benes decrees should not disrupt the accession process the Czech Republic should not be allowed to join the EU until it had revoked the decrees. [One MEP] said she hoped that the resolution which the Czech Parliament is planning to approve will not close the door to further negotiations.¹⁴¹

Even these MEPs were evidently concerned with minimizing the obstacles to accession. On balance, however, their view clearly prioritizes obligation, demoting a smooth accession process to the level of political preference.

However, other MEPs strongly opposed any linkage with accession. The Party of European Socialists (PES), while calling the Decrees “repressive,” also declared that they “are not part of the accession negotiations and should have no bearing on them,” and noted that “[t]he PES

138. *Id.*

139. The European Parliament must assent to accession by majority vote. EU Treaty, *supra* note 117, art. 47(1).

140. European Parliament Resolution, *supra* note 67, at 185, ¶ 41.

141. *EP Deputies Say Benes Decrees May be an Obstacle to Czech EU Accession*, RADIO PRAHA, Apr. 23, 2002, <http://www.radio.cz/en/news/27207>.

underlines once more that the enlargement of the EU is a forward-looking process that should not be hampered by reliving past battles. Our history should, of course, not be ignored but it must be put in the right context.”¹⁴²

The arguments individual MEPs raised give texture and complexity to the legislative history, though it is not clear that their views contribute much to the identification of customary legal norms. Even if they did, they would not alter the core assessment that in the end, despite the tentative concerns indicated in its Resolution, Parliament approved the Czech Republic’s accession without raising any objections that might have suggested a legal obligation on the Czech Republic, the member states, or the Union.

3. *The Legal Opinion*

Parliament took one other significant step that demonstrated it thought the Decrees might pose an obstacle to accession: it commissioned an external Legal Opinion on the Sudeten question.¹⁴³ The Presidency of the Parliament issued three recognized legal experts the following mandate:

- focus on today’s validity and legal effects of the so-called Beneš-Decrees and the restitution laws related to them, and on their status in the context of compliance with EU law, with the criteria of Copenhagen and international law relevant for accession;
- give due consideration to available legal opinions, in particular of the legal services of the European institutions; [and]
- indicate whether any action from the candidate countries concerned ought to be taken in view of their accession.¹⁴⁴

This mandate focused on the Decrees’ relationship to EU law in terms of Union competences but as the last part makes clear, the Legal Opinion was also intended to explore whether the Czech Republic needed to make changes before the member states and EU should, or even could, grant it membership. As one of the authors put it, “[t]he question to be

142. *PES Rejects Link between Benes Decrees and Czech EU Accession*, NEWSL. PARTY EUR. SOCIALISTS, Apr. 16, 2002 (on file with author) (quoting PES Vice-President Jan Marinus Wiersma and Parliamentary group vice-president Simon Murphy). Note that this exact phrase is used in the Verheugen Speech, *supra* note 65.

143. *Legal Opinion*, *supra* note 14.

144. *Id.* at 5 (Frowein).

considered is whether the Benes Decrees could prevent the accession of the Czech Republic to the European Union.”¹⁴⁵

The resultant Legal Opinion, with a brief set of Common Conclusions and a separate exposition by each author,¹⁴⁶ is not binding, but does represent the foremost legal scholarship on the matter, and carries the imprimatur of Parliament. For those who take a broad view of customary law’s formation, it is clearly of consequence—indeed, it is exactly the sort of document upon which customary law’s glossators often rely.

The Legal Opinion’s Common Conclusions are that:

1. The confiscation on the basis of the Benes-Decrees does not raise an issue under EU-law, which has no retroactive effect.
2. The Decrees on Citizenship are outside the competence of the EU.
3. The Czech system of restitution, although in some respects discriminatory...does not raise an issue under EU-Law.
4. It must be clarified during the accession procedure that criminal convictions on the basis of the Benes-Decrees cannot be enforced after accession.
5. A repeal of [the 1946 law] exempting “just reprisals” from criminal responsibility, does not seem to be mandatory in the context of accession. The reason is that individuals have relied on these provisions for over 50 years and as such have a legitimate expectation that they will not now be prosecuted for these actions. However, as we find this law repugnant to human Rights and all fundamental legal principles, we are of the opinion that the Czech Republic should formally recognise this.
6. We have based our opinions on the understanding that from accession all EU-citizens will have the same rights on the territory of the Czech Republic.¹⁴⁷

Although we will consider some complexities, the Common Conclusions largely reject the claim that the expulsions or their effects raise legal obstacles to accession. The *only* modification which the Conclusions consider mandatory—the only point on which the Czech legal system is incompatible with EU or human rights norms—is enforcement of *in absentia* criminal convictions. The Conclusions also note two points of

145. *Id.* at 53 (Kingsland).

146. Frowein’s is evidently the principal opinion, as, for example, Bernitz’s opinion is called “On the Study by Professor Dr Jochen A. Frowein.” *Id.* at 37 (Bernitz).

147. *Id.* at 1.

concern—"discriminatory" elements in the property restitution system, and the fundamental "repugnancy" of the criminal amnesties—but then confirm that these do *not* raise issues under EU law. Likewise, individual authors note that "[f]rom the viewpoint of modern standards of humanitarian law, this legislation and its application deserves harsh criticism [*sic*],"¹⁴⁸ and that "[i]t may be true that the expropriation of property...if done today, would probably constitute a breach of the European Convention on Human Rights,"¹⁴⁹ but the authors do not find any actual incompatibility with EU law.

The one issue on which the Legal Opinion finds a clear contradiction of EU norms concerns enforcement of *in absentia* convictions. Relying on ECHR rulings, the Opinion finds that "arrest and detention of people entering the Czech Republic, on the basis of *in absentia* convictions in summary procedures in 1945 or 1946, would run counter to...fundamental rights and rule of law guarantees."¹⁵⁰ It also suggests that this would violate EU norms on freedom of movement.¹⁵¹ The Opinion calls on the Czech government to investigate if any such possibility actually exists today: "It is therefore of importance to verify whether enforcement of these judgments is precluded.... This must be clarified during the accession procedure. Legal certainty requires that nobody should have any doubts here. The Czech Government must take a clear position. If necessary legislation must be enacted."¹⁵²

The Opinion suggests that "[t]his must be seen as a condition for accession"¹⁵³—a statement that is as much an admonition to the member states about their obligations in extending membership as it is to the Czech Republic about undertaking reforms.

The Legal Opinion also considers the amnesty granted for acts against Germans, which encompassed both wartime resistance and "just reprisals" against Nazis "and their accomplices" through October 28, 1945.¹⁵⁴ The Opinion notes that this amnesty, which it calls "unique" in

148. *Id.* at 42 (Bernitz).

149. *Id.* at 58 (Kingsland).

150. *Id.* at 22–23 & n.32 (Frowein) (referring to "Judgment of 12 February 1985, *Colozza v. Italy*, Series A, No. 89; Judgment of 13 February 2001, *Krombach v. France*, Application no. 29731/96; ECHR, Judgment of 11 July 2002, *Osui v. Italy*, Application no. 36534/97").

151. *Id.* at 47 n.1 (Bernitz) (discussing "C-348/96, *Donatella Calfa*, [1999] ECR I-11").

152. *Id.* at 23 (Frowein). Kingsland would allow retrials according to accepted procedure. *Id.* at 62–64 (Kingsland).

153. *Id.* at 23 n.2 (Frowein).

154. Law No. 115 of 1946, Czechoslovak Provisional National Assembly, *cited in Legal Opinion*, *supra* note 14, at 23 (Frowein).

postwar Europe for excusing reprisals,¹⁵⁵

still has legal effects [and]...has been used to exempt acts from criminal sanctions which violated elementary humanitarian principles as has been recognised in the German-Czech Declaration of 1997. Such a legislation is, applying the standards of Art. 6 TEU, a blatant violation of the guaranty of human rights, the rule of law and the obligation of the State to protect all individuals on its territory against violence.¹⁵⁶

Nonetheless, having asserted that the amnesty violates fundamental norms, the Opinion raises a "settled expectations" objection against exposing individuals to criminal prosecution fifty years after the fact. More precisely, the Opinion notes that settled expectations argue against making revocation of the amnesty an obligation of accession:

[I]t is very doubtful whether it could be argued that it is a necessity, under the fundamental principles applying for the Union, that people who have committed crimes more than 50 years ago should now stand trial after they have had the confidence throughout their life that they could not be prosecuted for such crimes.¹⁵⁷

Lastly, we may read some implied legal standards in the assumption that all EU citizens will have the same rights after accession—which suggests that deviation from that standard might violate EU norms—and in the comment that the confiscations occurred before the EU's creation in "the very special circumstances after World War II,"¹⁵⁸ which suggests that comparable confiscations might raise a legal issue if they happened today.

Taking all its arguments together, what the Legal Opinion clearly prohibits is any possibility that expellees could suffer any *additional* disability (such as having a lesser right to acquire Czech citizenship or property, or being subject a criminal charge) after accession. On the Opinion's view, therefore, an expelled German must have the same right

155. *Legal Opinion*, *supra* note 14, at 24–25 (Frowein).

156. *Id.* at 23–24 (Frowein).

157. *Id.* at 26–27 (Frowein). *See also id.* at 47 (Bernitz) ("The very existence today of such a law in the statute book demonstrates the same hesitation to clean up the past as does certain aspects of the restitution legislation of the 1990s.... However...[it] would not be necessary, 56 years later, to link firm demands for repeal of the law to the Accession Treaty as a condition.").

158. *Id.* at 13 (Frowein).

to acquire property as any other EU citizen.¹⁵⁹ Any differentiation “would be a fundamental breach with European Union traditions and might even give rise to legal challenge as a discriminating treaty provision not in line with the general constitutional principles on which the European Union has been established.”¹⁶⁰

However, this does not necessarily proscribe all present disability, broadly understood. Any claim that the original confiscations constitute a *continuing* harm that might violate EU norms is rejected:

[I]t is clear that the [confiscation] Decree [No. 108] was considered to have been validly adopted and having had the legal effect of transferring property originally held by those against whom the measures of confiscation were taken. Therefore, it has relevance for the present legal status of the property concerned in the Czech legal order.¹⁶¹

And the assumption of obligatory equality—“the understanding that from accession all European Union citizens have equal rights in the territory of the Czech Republic”¹⁶²—is a sub-text to the Opinion’s core finding, that “[t]he Czech accession to the European Union does not require the repeal of the Beneš-Decrees or other legislation....”¹⁶³ In reaching that view, the Opinion logically rejects any legal relationship between EU law and restitution of citizenship or property, while claims concerning the actual expulsion are not addressed at all.

The Legal Opinion declares that, owing to the supremacy of EU law, any Decrees incompatible with that law would be “automatically inapplicable,”¹⁶⁴ but it does not itself actually definitively identify any such

159. Provided, of course, he is also a citizen of another EU state—nothing in the Legal Opinion contemplates that the Czech Republic would need to treat expellees who are citizens of a non-member state equally on questions of citizenship, property, or admission to its territory. Thus, it is inaccurate to suppose, as the Legal Opinion apparently does, that EU law somehow cures any harm to expellees as a group—it only does so incidentally for expellees who happen also to be EU citizens, who are the real beneficiaries of this equality norm.

160. *Legal Opinion*, *supra* note 14, at 10 (Frowein).

161. *Id.* at 11 (Frowein).

162. *Id.* at 33 (Frowein).

163. *Id.* (Frowein).

164. Case 106/77, *Amministrazione della Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629, 3 C.M.L.R. 263, 283 (1978).

(“[I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures...render automatically inapplicable any conflicting provision of current national law....”).

Decrees. And since, as we have seen, no EU institution has ever asserted any incompatibility and no domestic Czech court has found any incompatibility,¹⁶⁵ the inference must be that the Decrees (that is, the set of legal norms rejecting restitution claims) are compatible with EU law and with the fundamental norms underlying that law. Even the one point which the non-binding Legal Opinion indicates might violate EU law—in *absentia* conviction—was not repealed prior to accession, and no objection was raised to this.

4. *The Potsdam Powers*

The states involved in the original expulsions rejected any link to accession. The Soviet Union, United States, and United Kingdom were all signatories to the Potsdam Agreement and were in actual and legal control of Germany and Austria during the expulsion period.¹⁶⁶ The Soviet Union was in effective control of much of Poland, Czechoslovakia and eastern Germany during the expulsions. The United States was in control of portions of western Bohemia at the end of the war. The United Kingdom was not in occupation of any expulsion source territory. Russia, as successor to the Soviet Union, is also an expulsion source country, being possessed of Kaliningrad *oblast*, formerly part of East Prussia, its title to which was confirmed in the 1990 peace treaty.¹⁶⁷

Of course, the Potsdam Powers' role and rights had been entirely extinguished by the 1990s, and therefore by the time the controversy arose they were in the same formal position as any other state. However, it is generally conceded that actors with an immediate stake in a controversy have greater salience in the construction of customary law, and to the degree the controversy involved the contemporary evaluation of historical actions, the views of the participants who were directly implicated carries the greatest weight.¹⁶⁸ Repudiation of the historical or contemporary effects of the Potsdam Agreement by its own signatories would surely have greater weight than that of any three states chosen at ran-

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

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

167. Final Treaty, *supra* note 47, art. 1, §§ 1, 3.

168. Recall the Czech Republic's formal position that the Potsdam powers authorized the expulsions. The *Dreithaler* Court repeatedly emphasizes that confiscation was “supported by international approval, in particular on the part of the western democracies, unambiguously expressed in the decisions of the Potsdam Conference.” *Dreithaler*, *supra* note 51, at para. 31.

dom.

After it came under attack from German, Austrian, and Hungarian politicians concerning the expulsions, the Czech Republic solicited reconfirmation of the Potsdam Agreement's validity from the three Powers.¹⁶⁹ At the time of the Czech Parliament's Resolution, British Prime Minister Tony Blair publicly supported the Czech position, declaring "the results of the war could not be brought into question."¹⁷⁰ At a press conference in Prague in April 2002, Blair reportedly "adhered to the British cabinet's stand of 1996 which declared World War II results unchangeable and the Potsdam conference...unchallengeable" and further indicated that the "decrees were an issue ensuing from the past, which should not influence the EU enlargement process."¹⁷¹ Russian President Vladimir Putin expressed clear support for the Czech position when Zeman visited him the following week.¹⁷² Shortly thereafter, United States Undersecretary of State Marc Grossman joined Blair's statement.¹⁷³

Presumably, a desire to reconfirm the postwar order and their own role in it, as well as a desire to ensure the smoothness of the accession process, led these states to prefer the Czech position over the potentially disruptive Sudeten claims. But whatever the reasons, none of the Potsdam Powers has ever repudiated its role in the expulsions or accepted

169. See *Legal Opinion*, *supra* note 14, at 19 (Frowein); see also NTIS, U.S. Dep't of Com., *Izvestiya Interviews Czech Premier Zeman on Russian Visit*, WORLD NEWS CONNECTION, Apr. 16, 2002 (quoting Zeman stating that "[i]n my opinion it is essential to get the support of all powers which signed the Potsdam treaty in 1945. That is not only in the interests of the Czech Republic, it is in the interests of these powers.").

170. Kozakova, *supra* note 60.

171. CTK News Agency, *Blair Tells Czech Premier Postwar Decrees No Obstacle to Czech EU Entry*, BBC INT'L REP. (EUR.), Apr. 8, 2002 (quoting Zeman as saying he "highly esteem[s]" Blair's reassertion of the 1996 cabinet declaration and "the validity of the Potsdam conference conclusions"); see also Czech News Agency, *Czech Press Survey*, FIN. TIMES INFO., Apr. 9, 2002 (surveying article of same date by Jan Kovarik in PRÁVO).

172. NTIS, U.S. Dep't of Com., *Czech PM Zeman Obtains Russian President's Assurance over Postwar Benes Decrees*, WORLD NEWS CONNECTION, Apr. 18, 2002 (reporting on Jan Horak, *Putin: War Results Cannot Be Changed*, PRÁVO); Czech News Agency, *Russia Fully Supports CzechRep's [sic] Position on Benes Decrees*, FIN. TIMES INFO., Apr. 17, 2002 (noting spokesman Sergei Prichodko quoting Putin as saying, "Attempts by some forces to reverse the results of World War Two and to question the laws issued in this respect are ungrounded and have nothing in common with reality").

173. CTK News Agency, *US Official Backs Blair's Standpoint on Czech Postwar Decrees*, BBC INT'L REP. (EUR.), Apr. 18, 2002; Czech News Agency, *U.S. Grossman Sides with Blair on Benes Decrees*, FIN. TIMES INFO., Apr. 18, 2002. I have found no text or report of the U.S. position being expressed at any higher or more definitive level, to which the Legal Opinion apparently alludes.

that the expulsions require restitution;¹⁷⁴ As the Czech Republic has consistently and persuasively argued, Article XIII of the Potsdam Agreement retains its unchallenged, quasi-constitutional role in the postwar European order.

5. *International Adjudicative Bodies*

The Human Rights Committee of the International Covenant on Civil and Political Rights¹⁷⁵ (the Committee), like similar international institutions, plays an important if subsidiary role in shaping international law. Its review of states' reports, as well as its interpretative function in generating General Comments, help define the content of human rights obligations.¹⁷⁶ In particular, its quasi-adjudicatory decisions in response to individual communications brought under the First Optional Protocol to the Covenant,¹⁷⁷ though not formally binding or enforceable, can establish "a duty to provide individual reparation and take preventive measures for the future,"¹⁷⁸ which in turn indicates the shape of legal norms.

The Committee has considered a number of individual communications relating to the Sudeten controversy, although these concerned not the expulsions as such¹⁷⁹ but post-communist Czech and Slovak property restitution laws from the early 1990s, which provided compensation for expropriations after 1948. That year marked the Communist seizure of power, but it also marked the end of the major phase of expulsions. As a date selected in the early 1990s to demarcate the legal and historical landscape, 1948 surely relates at least as much to that equally mo-

174. See de Zayas, *supra* note 37, at 245–52 (implying that U.S. and British governments have never acknowledged any wrongdoing in connection with Potsdam or the related Tehran and Yalta declarations).

175. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

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

177. Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 302.

178. Torkel Opsahl, *The Human Rights Committee*, in THE UNITED NATIONS AND HUMAN RIGHTS 422 (Philip Alston, ed., 1992) (noting that "as a source of case law, the material is less developed than in, for instance, the European system, because the Committee does not go to the same lengths in its published reasoning").

179. Consistent with its prior jurisprudence, the Committee has not considered itself competent *rationae temporis* to consider claims arising before the entry into force of the ICCPR, and it has been reticent to assess the legality of confiscations, especially as the ICCPR does not protect private property against confiscation as such. See Macklem, *supra* note 55, at 8–9.

mentous episode, and indeed the complaints brought before the Committee alleged discrimination on the grounds that the Czech (or Slovak) authorities had excluded them from compensation because of their German ethnicity.¹⁸⁰ Thus, the complaints did not technically concern the actual expulsions and confiscations, but decisions to deny compensation in 1991 and 1992.¹⁸¹

In certain of those cases the Committee found a violation of ICCPR Article 26,¹⁸² allowing a narrow class of expellees who had retained their citizenship after 1948 to claim recovery for confiscated property.¹⁸³ But the Committee based this view on its objection to the requirement in the legislation that claimants currently be Czech (or Slovak) citizens,¹⁸⁴ and it has never extended that logic to the massive denaturalizations prior to 1948. In no case has it found that it was discriminatory for the Czech Republic or Slovakia to limit restitution to the post-1948, communist-era confiscations.¹⁸⁵ In *Schlosser v. The Czech Republic*, for ex-

180. Various communications alleged violations of ICCPR, Articles 2, 12, 14, 17, 26, and 27. See, e.g., Human Rights Comm., Commc'n No. 643/1994, *Drobek v. Slovakia*, Individual Opinion by Committee Members Quiroga and Klein, ¶ 2, U.N. Doc. CCPR/C/60/D/643/1995 (1997) [hereinafter *Drobek*] (alleging violations of Article 26); Human Rights Comm., Commc'n No. 670/1995, *Schlosser v. The Czech Republic*, Decision on Admissibility, ¶ 1, U.N. Doc. CCPR/C/64/D/670/1995 (1998) [hereinafter *Schlosser*] (alleging violations of Articles 12, 14, 26 and 27).

181. A claim based on actions in 1945 would presumably be outside the Committee's jurisdiction *ratione temporis*, as the ICCPR did not enter into force until 1976. In *Koutny v. Czech Republic*, for example, the Committee found that a claim based on a 1951 decision confirming a confiscation under Decree 108/1945 would be "outside the Committee's competence *ratione temporis* and thus inadmissible." *Koutny*, *supra* note 28, at ¶ 6.2.

182. ICCPR, *supra* note 175, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race...language...political or other opinion, national or social origin, property, birth or other status.").

183. See, e.g., *Des Fours Walderode*, *supra* note 68; *Legal Opinion*, *supra* note 14, at 18 (Frowein) (noting the case "is characterised by very specific facts," since Des Fours Walderode had retained his citizenship and left the country after the 1948 cut-off). The 1991 Czech property restitution law as interpreted by the Committee must therefore allow the possibility of restitution for some Germans denaturalized after 1948, albeit on grounds indistinguishable from those raised by complainants who were never expelled or were ethnic Czechs. Cf. Human Rights Comm., Commc'n No. 516/1992, *Simunek v. Czech Republic*, UN Doc. CCPR/C/54/D/516/1992 (1995) [hereinafter *Simunek*]; Human Rights Comm., Commc'n No. 857/1999, *Blažek, Hartman, and Křížek v. Czech Republic*, UN Doc. CCPR/C/72/D/857/1999 (2001).

184. See, e.g., Human Rights Comm., Commc'n No. 586/1994, *Adam v. Czech Republic*, ¶¶ 12.4–12.8, UN Doc. CCPR/C/57/D/586/1994, (1996); *Simunek*, *supra* note 183, ¶¶ 11.4–11.8. See Macklem, *supra* note 55, at 10 (discussing the citizenship and equality aspects of these cases).

185. In fact, in 1994, the Czech Republic did amend its property restitution laws to extend a right of recovery back to 1938, but only covering confiscations for "racial" reasons. See Karn, *supra* note 111, at 4–5 (noting that the 1994 Restitution Act "was intended to settle Jewish claims

ample, the Committee noted that it

has consistently held that not every distinction or differentiation in treatment amounts to discrimination.... The Committee considers that, in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be *prima facie* discriminatory...merely because...it does not compensate the victims of injustices [allegedly committed by earlier regimes].¹⁸⁶

In reviewing the Committee decisions, the Legal Opinion considers it obvious that the Czech law may properly "limit restitution to people who *have shown loyalty* to Czechoslovakia.... It cannot be deduced from that view of the Committee that all others who do not fulfil [sic] the requirement of loyalty must have a right to restitution."¹⁸⁷

The Committee's rationale therefore effectively rejects the core claim of Sudeten expellees, at least as it relates to the ICCPR: that they were victims of ethnic discrimination meriting contemporary restitution. The Committee has declared almost all Sudeten claims inadmissible.¹⁸⁸ The Committee's limited objections to the restitution law do not constitute an objection to the expulsions, denationalizations or confiscations as such. At no point has the Committee suggested that failure to abolish the Decrees or make restitution to expellees as a class might violate Article 26 or any other norm, and the Czech Republic in fact has made no alterations to its laws in response to any decision of the Committee.¹⁸⁹

Individual members of the Committee disagreed with the decisions in several cases. In *Drobek v. Slovakia*,¹⁹⁰ for example—a case later relied upon directly by the same dissenters in several Czech cases¹⁹¹—two members suggested that the communication's author had stated a claim

without opening the door to competing claims made by the Sudeten Germans. Because the transfer of Germans after World War Two was undertaken in the interest of 'national' (as opposed to a 'racial') consideration...the Sudeten claims were precluded from consideration.").

186. *Schlosser*, *supra* note 180, ¶ 6.5 (relying on *Drobek v. Slovakia*, which at ¶ 6.5 uses the same language); *see also Malik*, *supra* note 89, ¶ 6.5.

187. *Legal Opinion*, *supra* note 14, at 20 (Frowein) (emphasis added).

188. *See, e.g., Koutny*, *supra* note 28 (noting inadmissibility *ratione temporis* and failure to exhaust domestic remedies); *Malik*, *supra* note 89 (noting non-exhaustion of domestic remedies and failure to substantiate claims under Articles 14 and 26); *Schlosser*, *supra* note 180 (noting non-exhaustion of domestic remedies and unsubstantiated claim under Articles 14, 26, and 27); *see also Legal Opinion*, *supra* note 14, at 18 (Frowein).

189. *Legal Opinion*, *supra* note 14, at 44 (Bernitz).

190. *Drobek*, *supra* note 180.

191. *See Schlosser*, *supra* note 180 (Quiroga & Klein, dissenting in part); *Malik*, *supra* note 89 (Quiroga & Klein, dissenting in part).

of continuing discrimination in that Slovak authorities had excluded the pre-1948 confiscations from the post-communist property restitution regime.¹⁹² The dissenters did not necessarily indicate agreement with the claim, only that they thought it admissible on its face.¹⁹³ Still, the dissenting view indicates an alternative interpretation both as to the substantive complaint and the procedural availability of a mechanism to consider it. If this had been the preferred view, it clearly would have constituted indicia of an entirely different scope of human rights obligations touching ethnic discrimination and expulsion. In particular, it would have admitted a broader interpretation of continuing harm.

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

There are decisive arguments against such a view. Nobody has so far argued that the Czech Republic should restitute all property confiscated under the Beneš-Decrees.... It is beyond question that this would exceed the financial and legal possibilities of any state in a comparable situation. But it would also raise an issue as to the background of the confiscation, i.e. the transfer of the German and Hungarian populations, confirmed at the Potsdam Conference.... [T]his decision has been recently confirmed by the powers which were parties to the Potsdam agreements.¹⁹⁴

Whatever the Committee's part in defining customary law's content, international courts certainly play a prominent role. The International Court of Justice (ICJ) is the "principal judicial organ of the United Nations,"¹⁹⁵ competent to adjudicate a variety of disputes about breaches of international obligations¹⁹⁶ to which it applies "international custom, as

192. *Drobek*, *supra* note 180, ¶ 1.

193. The dissenters also noted that Slovakia had not responded to the allegation. *Drobek*, *supra* note 180 (Quiroga & Klein, dissenting).

194. *Legal Opinion*, *supra* note 14, at 19 (Frowein).

195. Statute of the International Court of Justice, *supra* note 73, art. 1.

196. *See id.* art. 36(2)(a)–(d).

evidence of a general practice accepted as law.”¹⁹⁷ Although its decisions bind only the parties,¹⁹⁸ the ICJ’s interpretative authority is widely accepted,¹⁹⁹ and it would be difficult to imagine a robust consensus on the scope of an international norm that ran counter to a ruling of the ICJ. The same is even truer within the European context regarding decisions of the European Court of Human Rights (ECHR),²⁰⁰ the normative influence of which also extends beyond Europe.²⁰¹

The ECHR and ICJ have each adjudicated claims relating to the expulsions.²⁰² These cases all had highly particular facts²⁰³ and were decided on narrow jurisdictional grounds; both courts however, reached decisions that effectively contracted the scope for Sudeten claims. In *Prince Hans-Adam II of Liechtenstein v. Germany*, for example, the ECHR decided that since the expropriation had occurred prior to the entry into force of the ECHR in 1953 and its Protocol I in 1954, “the Court is not competent *ratione temporis* to examine the circumstances of the expropriation or the continuing effects produced by it up to the present

197. *Id.* art. 38(1)(a)–(d). Section (d) provides that “judicial decisions and the teaching of the most highly qualified publicists” shall serve “as subsidiary means for the determination of rules of law.” *Id.*

198. *Id.* art. 59; *see also* U.N. Charter art. 94, para. 1. The Court has jurisdiction subject to a declaration of the state involved. *Id.* art. 36(1), para. 3.

199. *See* Vagts, *supra* note 73, at 1033 (“As the ultimate arbiters of custom the judges of the International Court have the leeway to give a different weight to various factors in their analysis. They may approach the issue rather passively, requiring a strong showing of state practice before recognizing a rule. Or they may regard themselves as authorized to shape custom.”).

200. The ECHR was created by the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 2889 (amended) [hereinafter Convention]. On the ECHR’s influence, *see*, for example, Andrew Drzemczewski & Meyer Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11*, 15 HUM. RTS. L.J. 81, 82 (1994) (calling the Convention’s achievements “quite staggering, the case-law of the [ECHR] exerting an ever deeper influence on the laws and social realities of the State Parties”).

201. *See* STEINER & ALSTON, *supra* note 176, at 808 (“[T]he jurisprudence of the Court...has been influential in the normative development of other parts of the international human rights system.”).

202. *See* *Liechtenstein*, *supra* note 66; *Prince Hans-Adam*, *supra* note 66; *Des Fours Walderode v. The Czech Republic*, App. No. 40057/98, 2003 EUR. CT. H.R. (Decision as to Admissibility) [hereinafter *Des Fours Walderode* Admissibility]; *Kammerlander v. The Czech Republic*, App. No. 1972/04, 2004 EUR. CT. H.R., (Partial Decision as to Admissibility) [hereinafter *Kammerlander*].

203. Both courts have reviewed claims against Germany arising from the display in Cologne of a painting that had been property of the House of Liechtenstein but was seized under Decree 12/1945. *See generally* Bardo Fassbender, *Klageausschluss bei Enteignungen zu Reparationszwecken—Das Gemälde des Fürsten von Liechtenstein*, in NEUE JURISTISCHE WOCHENSCHRIFT 1445 (1999); Gattini, *supra* note 4.

date.”²⁰⁴ The ICJ, though not confronting a similar restriction on its institutional lifespan, nonetheless also found it lacked jurisdiction *ratione temporis*. It determined that there was indeed a dispute, but that it had arisen “in the Settlement Convention²⁰⁵ and the Beneš Decrees,”²⁰⁶ that is to say, prior to the entry into force in 1980 of the European Convention for the Peaceful Settlement of Disputes on which Liechtenstein based its claim.²⁰⁷ Thus, neither court reached the substantive questions implicated by Sudeten claims. This is not to say that they rejected those claims, but evidently they did not feel compelled, or able, to affirm or even consider them. Neither court’s judgments provide any support for a claim that the Czech Republic has a legal obligation to provide any form of restitution. Certainly the Legal Opinion relies on *Prince Hans-Adam II* in arguing that the Decrees do not violate any international or EU norms.²⁰⁸

204. See *Prince Hans-Adam*, *supra* note 66, ¶ 85 (finding also, at ¶ 87, no violation of Protocol I, art. 1).

205. Although it might not be immediately apparent given that Liechtenstein is not part of Germany, the Settlement Convention was thought relevant because property of the House of Liechtenstein in Czechoslovakia was deemed by the German courts to be “external German assets”—and evidently, the Czechoslovak authorities who confiscated it in 1945 though so, too. German courts “have always relied on the assessment of the expropriating State.” *Liechtenstein*, *supra* note 15, ¶ 21–22. In any event, the German ethnicity (*Volkszugehörigkeit*) as opposed to citizenship (*Staatsangehörigkeit*) of members of the House of Liechtenstein is clear. A decision of the Bratislava Administrative Tribunal of November 21, 1951, confirmed the valid application of Decree 12/1945 against Prince Franz Joseph II (then Prince of Liechtenstein) as his German nationality (ethnicity) was “a fact of common knowledge.” Blumenwitz, *Die tschechisch-liechtensteinischen Beziehungen: Ein anhaltender Konflikt im Mitteleuropa*, in Festschrift Hacker 347, 360 (1997), cited in Gattini, *supra* note 4, at 520 n.22 (noting also that “Prince Franz Joseph II had acknowledged himself as ‘German’ in the 1931 census”).

206. *Liechtenstein*, *supra* note 60, ¶ 52.

207. Article 27(a) of the European Convention for the Peaceful Settlement of Disputes provides that “[t]he provisions of this Convention shall not apply to: (a) disputes relating to facts or situations prior to the entry into force of this Convention as between parties to the dispute.” *Id.* ¶ 18.

208. *Legal Opinion*, *supra* note 14, at 16 (Frowein) (“[O]ne may see a confirmation in [the Court’s judgment] of the validity of the confiscation measures in the international legal order.... [T]he judgment clearly confirms the view...that confiscations in 1945/46 do not raise an issue under the [Convention].”). The Legal Opinion was written prior to the ICJ’s decision in *Liechtenstein v. Germany*. Relying in particular on *Brok v. Czech Republic*, Human Rights Comm., Comm’n No. 774/1997, UN Doc. CCPR/C/73/D/774/1997 (2001) (finding a violation of Art. 26 for failure to extend restitution to a man whose property had been confiscated by the Nazis and then nationalized after the war), and *Malik*, *supra* note 89 (refusing to find a violation of Art. 26 for excluding property seized under the Decrees), Prof. Macklem argues that the Committee is more prepared to evaluate the past than is the resolutely modernist ECHR. Macklem, *supra* note 55, at 12–13, 19–20. I think this is fair enough, although arguably in their jurisprudence concerning Sudeten claims both courts appear equally willing to “construct legal spaces for the expression of collective memory.” *Id.* at 13.

The ECHR has also considered two related Czech property cases arising out of the expulsions.²⁰⁹ In *Des Fours Walderode v. Czech Republic*, the ECHR rejected a claim of continuing deprivation of property, holding, *inter alia*, that because the applicant had been deprived of his property before the entry into force of the Convention,

there is no question of a continuing violation of the Convention which could be imputable to the Czech Republic and could have effects on the temporal limitations of the competence of the Court...[and a]ccordingly the Court is not competent *ratione temporis* to examine the circumstances under which the applicant's family was deprived of the property,²¹⁰

and further that *Des Fours Walderode* had failed to demonstrate a claim to either "existing possessions" or a "legitimate expectation" of their recovery, as required under the Convention, and thus that the complaint was "incompatible *ratione materiae* with the provisions of the Convention."²¹¹ In *Kammerlander v. Czech Republic*, the ECHR held it was not competent to adjudicate a complaint concerning the Czech Republic's alleged failure to provide a remedy in response to the ICCPR Committee's views on the *Des Fours Walderode* communication.²¹²

Neither case suggests any scope for recognizing Sudeten claims, and both cases reaffirm the ECHR's jurisdictional limits and its substantive jurisprudence on the definition of possessions in a way that effectively bars consideration of the vast majority of Sudeten claims.²¹³ This suggests the Court did not consider interpretations more amenable to those claims to be necessary or correct.

209. These two cases necessarily exhausted Czech domestic remedies prior to being heard under the ECHR, indicating that Czech courts either decided against them on the merits or rejected their claims on procedural grounds.

210. *Des Fours Walderode* Admissibility, *supra* note 202, ¶ 2 ("The Law"). The Court's reasoning relies on its finding in *Prince Hans-Adam*, *supra* note 66, and in *Malhous v. The Czech Republic*, App. No. 33071/96, 2001 EUR. CT. H.R. [hereinafter *Malhous*].

211. *Des Fours Walderode* Admissibility, *supra* note 202, ¶ 2 ("The Law") (discussing Convention, art. 35, §§ 3–4 and Protocol 1, art. 1). *Cf. Malhous*, *supra* note 210 (finding discriminatory application of the post-communist restitution laws in regards to property confiscated in 1949, unrelated to the Decrees regime).

212. *Kammerlander*, *supra* note 202 (holding admissible only as to a separate complaint of unreasonable delay in proceedings, inadmissible in all other respects). *Kammerlander* was the widow of *Des Fours Walderode*.

213. The ECHR has rejected a considerable number of Sudeten claims principally for failure to exhaust domestic remedies. See *Elutasították 90 Szudétánémet Keresetét Csehország Ellen*, MAGYAR RÁDÍÓ ONLINE, Dec. 30, 2005, http://www.english.radio.hu/index.php?cikk_id=164944.

6. Publicists

International law recognizes the “teachings of the most highly qualified publicists of the various nations” as a subsidiary source of evidence for determining the rules of international law.²¹⁴ Their views are therefore of greater legal relevance than those of mere individuals or advocacy groups. A publicist’s view is subsidiary in the sense that its weight and value only surfaces when some separate, otherwise authoritative body relies upon—acknowledges and legitimates—that view.²¹⁵ On the other hand, publicists are instrumental in identifying the content and meaning of authoritative actors’ statements and activities. Without a publicist’s subsidiary and derivative intervention, the scope or even existence of a customary rule might not be clear to states.²¹⁶

Scholars’ views represent a greater diversity on the Sudeten controversy than those of states or international organizations, which as we have seen almost uniformly resist claims for restitution. Some (especially German) scholars argue vigorously for the expellees’ claims, especially the incompatibility of the amnesty provisions with human rights norms,²¹⁷ while others argue equally vigorously against them²¹⁸ or adopt

214. Statute of the International Court of Justice, *supra* note 73, art. 38(1)(d).

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

216. Vagts, *supra* note 73, at 1035 (“It is the publicists who provide the lawyers involved in the process with the data about state practice and *opinio juris* that the actors need to judge the existence of the rule. And writers may nudge the rule in ways that they deem preferable.... Publicists have a general interest in expanding the field in which they officiate.”).

217. See, e.g., DE ZAYAS, *supra* note 8; FELIX ERMACORA, DIE SUDETENDEUTSCHEN FRAGEN: RECHTSGUTACHTEN (1992); C. TOMUSCHAT, EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION 451, 470 *et seq.* (A. Von Bogdandy et al. eds., 2002), cited in *Legal Opinion*, *supra* note 14, at 13 (Frowein); Dieter Blumenwitz, *Gutachten zur ‘Legal Opinion on the Beneš-Decrees and the Accession of the Czech Republic to the European Union’* (Dec. 28, 2004), available at <http://www.sbg.ac.at/whbib/templates/blumenwitz-gutachten%20z.%20frowein.htm> (criticizing the Legal Opinion’s findings); Dieter Blumenwitz, *Entfalten die Beneš-Dekrete und das Gesetz Nr. 115 vom 8. Mai 1946 (Straffreiheitsgesetz) noch heute eine diskriminierende Wirkung, die dem Völkerrecht und dem Recht der Europäischen Union entgegensteht?*, (Oct. 7, 2002), available at <http://www.sudeten.de/bas/down/Gutachten.pdf> (finding continuing effects of the Decrees); Christoph Pan & Beate Sibylle Pfeil, *Die Beneš-Dekrete und Ihre Gegenwärtigen Rechtswirkungen auf die Deutsche Minderheit in Tschechien* (Südtiroler Volksgruppen-Institut, Bozen/Bolzano, Italy) (Apr. 30, 2002), available at <http://www.sudeten.de/bas/down/Pan-Gutachten.pdf> (arguing for existence of continuing effects of the Decrees). See also Sudetendeutsche Landsmannschaft, http://www.sudeten.de/bas/content/a10_4.htm (linking to legal opinions by various scholars critiquing the Decrees and expulsions or their continuing effects).

a middle position.²¹⁹ However, very few scholars have identified any extant or even nascent *legal obligation* to afford expellees restitution.²²⁰ Whatever the merits of any individual scholarly view, it is difficult to sustain an argument that the scholarly community's views as a whole provide evidence of an obligation in customary law. The most one could say is that there is not a consensus either way, and that alone militates against other actors' relying on publicists' views to expand customary law to obligate the Czech Republic. Indeed, as we have seen, no state or adjudicative body has used publicists' arguments to support Sudeten claims, while many have used such arguments to reject those claims.

State actions and other analyses of Sudeten claims are located within a much broader social dialogue about expulsion, dispossession, restoration and remembrance.²²¹ As noted above, such groups are well outside the classical conception of relevant actors in forming customary law. The only actors clearly calling for linking accession to restitution were German expellee groups;²²² Czechs, for their part, remain as strongly supportive of the original expulsions as they are resistant to restitu-

218. See BURCHER, *supra* note 8; Schiller, *supra* note 20, at 401; Ignaz Seidl-Hohenveldern, *Völkerrechtswidrigkeit der Konfiskation eines Gemäldes aus der Sammlung des Fürsten von Liechtenstein als Angeblich 'Deutsches' Eigentum*, in PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 410, 411 (1996); MS, *Czech News Agency Says*, *supra* note 70 (discussing various scholars' views of the Legal Opinion both favoring and opposing the idea that the Decrees warrant criticism). Very few Czech scholars have questioned the fundamental validity of the Decrees or called for restitution.

219. Cf. Christian Tomuschat, *Die Vertreibung der Sudetendeutschen. Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und Deutschem Recht*, in 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 12 (1996) (resisting characterization of the expulsions as "genocide," but arguing that "es während der Vertreibung...zu einzelnen Akten des Völkermordes gekommen ist").

220. German legal scholars generally disagreed with the German courts' rationale that the seized property of the House of Liechtenstein should be considered "external German assets" under the Settlement Convention. See, e.g., Fassbender, *supra* note 203, at 1446; Seidl-Hohenveldern, *supra* note 218, at 411; see also Regional Court of Cologne, Oct. 10, 1995, 5 O 182/92, in PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 419 (1996). This by no means necessarily places all German academics in the position of uniformly criticizing the expulsions' illegality or of calling for restitution, however. In any event, academic critiques did not sway the German courts of any level to find for Liechtenstein.

221. Cf. Vagts, *supra* note 73, at 1035 ("[T]he general public may, on rare occasions, become concerned about an asserted violation of customary law.").

222. See, e.g., MS, *Sudeten Germans Call on Czech President*, *supra* note 99 (noting call by the *Sudetendeutsche Landsmannschaft* for Czech President Klaus to hold talks on compensation and to "give reconciliation a new chance"); Wallace, *supra* note 27 (noting Association of Displaced Persons head Erika Steinbach's call to Chancellor Schröder "to link the question of Czech E.U. entry to the abandonment of the Benes Decrees."). See also *Sudetendeutsche Landsmannschaft*, http://www.sudeten.de/bas/index_a.htm (last visited Sept. 28, 2006).

tion.²²³ Human rights groups such as Amnesty International or Human Rights Watch and EU research or lobby groups have not addressed the issue in any significant fashion.²²⁴

...

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

B. *The Four Rationales of the Consensus—Why Rejection Is Preferred*

We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion. The subterranean stream of Western history has finally come to the surface and usurped the dignity of our tradition.

— *Hannah Arendt*²²⁵

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

223. A 2005 poll found that fifty-four percent of Czechs agreed that the expulsions were “just,” and sixty-four percent agreed that the Decrees should “remain valid,” while only five percent agreed that the expulsions “call for an apology” (up from three percent in 1995). Spritzer, *supra* note 101 (citing CVVM polling agency).

224. Kozakova, *supra* note 60 (noting Pan-European Association chairman Otto Habsburg’s repeated criticism of the Beneš Decrees).

225. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951) ix, “Preface to the First Edition.”

1. *Antiquity*

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

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

For example, the Legal Opinion's view is that expellees must not suffer present-day disability after accession. Expellees must have the same right to acquire property (including their own former property) or citizenship as any EU citizen, and differentiation "might...not [be] in line with the [EU's] general constitutional principles."²²⁶ But harm that has already been suffered cannot, in the Legal Opinion's view, constitute the basis for a legal obligation. Likewise, for the Legal Opinion, the fact that denaturalization operated at a specific time in the past and would not prevent anyone from keeping or acquiring citizenship now is dispositive.²²⁷

Similarly, the Czech Republic's view (joined by the EU Enlargement Commissioner) that the Decrees are 'extinct' follows this temporal argument.²²⁸ As noted, the Czech Parliament's 2002 Resolution reaffirmed the "legal and property relations" arising from the Decrees,²²⁹ but also declared that the Decrees were not now applicable,²³⁰ since although they remain in force, changing circumstances have stripped them of ef-

226. *Legal Opinion*, *supra* note 14, at 10 (Frowein).

227. *Id.* at 51 *et seq.* (Kingsland).

228. See Representation of the European Commission in the Czech Republic, Czech Accession "Should Not Be Hindered by Benes Decrees" (Apr. 15–22, 2002), <http://www.evropska-unie.cz/eng/article.asp?id=1343> [hereinafter European Commission, *Czech Accession*] (noting the Verheugen-Zeman Joint Statement that the Decrees "no longer produce legal effects" and "are not part of the accession negotiations and should have no bearing on them").

229. MS, *Czech Lower House Approves Resolution*, *supra* note 84; see also MS, *Text of Czech Resolution*, *supra* note 84 (noting that the draft resolution "rejects attempts to open issues connected with the end and with the results of World War II," and declares that legislation on property restitution is "the exclusive prerogative of Czech constitutional bodies").

230. See MS, *Text of Czech Resolution*, *supra* note 78.

fect;²³¹ *Dreithaler* demonstrates (indeed anticipates) the same logic. Sudeten claimants contend they continue to be denied the benefits of citizenship and property, but the universally accepted Czech view is that those acts were discrete in time, and since there will be no additional acts relying on the Decrees, they lie dormant. Of course, whatever “extinction” means as a legal category, it is something short of repudiation, abolition, or supercession. International acceptance of the Czech view necessarily accepts the Decrees’ continuity and cannot be assimilated to a claim that the Decrees offend legal norms or that their revision is obligatory. At most, acceptance locates legal obligation somewhere in a continuing effects debate.

The settled expectations of those benefiting from the Decrees are also invoked. For example, the Legal Opinion acknowledges that the amnesty for reprisals against expellees “still has legal effects,”²³² but considers it “very doubtful” that EU fundamental principles would require “people who have committed crimes more than 50 years ago [to] now stand trial” in order to approve Czech accession.²³³

Similarly, the frequent invocation by various actors of the need to “move forward” and not be held hostage to by-gone debates evinces both a belief that the passage of time can have a decisive legal effect, and that the claims of new generations may have priority.²³⁴ Underlying all these arguments about time and settled expectations is the sense that revision could destabilize the post-war order of Europe from which all states and populations have benefited; this is certainly the logic invoked to defeat Sudeten claims that might require changes in that order.

Passage of time also allows space for the sole theme of disapproval evident in the sources: the notion that aspects of the expulsions may have been acceptable in the past but would not be now. For example, the Zeman-Verheugen Joint Statement acknowledged that “[s]ome of these acts would not pass muster today if judged by current standards—but they belong to history.”²³⁵ However, this limited form of distancing does

231. See MS, *EU Urges Calm*, *supra* note 88 (quoting Zeman that the Decree was “extinct”).

232. *Legal Opinion*, *supra* note 14, at 23 (Frowein).

233. *Id.* at 27 (Frowein). See also *id.* at 47 (Bernitz) (“The very existence today of such a law...demonstrates [a] hesitation to clean up the past.... However...[it] would not be necessary, 56 years later, to link firm demands for repeal of the law to the Accession Treaty as a condition.”).

234. The new generations would include, in particular, the two million Czechs who settled the depopulated territories. See, e.g., Eagle Glassheim, *Ethnic Cleansing, Communism, and Environmental Devastation in Czechoslovakia's Borderlands, 1945-1989*, 78 J. MOD. HIST. 65 (2006) (discussing resettlement of north Bohemia).

235. European Commission, *Czech Accession*, *supra* note 228.

not approach condemnation of the expulsions—the example cited here, for instance, refers to “some of these acts,” not the expulsions *as such*, and the German-Czech Declaration does the same.²³⁶ This view also reinforces the sense that historical wrong does not require contemporary compensation.

This temporally limiting view also converges with the Union’s forward-looking rhetoric, which disfavors claims from the past as antithetical to the integrative project. Thus, in opposing a linkage to accession, Commissioner Verheugen declared that “[w]e should use the language of 2002, not of 1945,”²³⁷ while EU Commission President Romani Prodi declared that “[w]e should focus on the future. The EU was founded on the sense of [mutual] forgiveness, of opening a new era.”²³⁸ The Legal Opinion notes that “the Union is based on fundamental values which are completely different from nationalistic ideologies of Europe of the past.”²³⁹ It is evident in consensus of the sources that this new era forecloses claims arising from the other side of the epochal divide.

2. *Subsequent State Action*

A second line of argument relies on subsequent state action to foreclose claims not terminated by time alone. According to this argument, during the Cold War and 1990s various bilateral and multilateral agreements affected the status of expellees, and the collective effect of these agreements has extinguished expellees’ claims or estopped states from pursuing them. On this logic, Sudeten claims might have been valid at some point but have been progressively narrowed and ultimately terminated by instruments such as the 1945 Potsdam Agreement, the 1954 Settlement Convention, the 1973 Treaty of Prague, the 1990 Final Treaty, and the 1997 German-Czech Declaration. These state acts constitute the legal (rather than merely factual) termination of continuing effects that allows the consensus to dismiss Sudeten claims today.

The Czech Republic considers the German-Czech Declaration a definitive closure to the issue in law.²⁴⁰ Similarly, MEP Phillip Whitehead criticized the expulsions’ cruelties but also believed the Declaration

236. 1997 German-Czech Declaration, *supra* note 34, art. III (“The Czech side regrets that, by the forcible expulsion...much suffering and injustice was inflicted upon innocent people.... It particularly regrets the excesses....”).

237. MS, *EU Urges Calm*, *supra* note 88.

238. *Id.*

239. *Legal Opinion*, *supra* note 14, at 42 (Bernitz).

240. *See, e.g.*, MS, *Czech Foreign Minister*, *supra* note 78.

foreclosed the matter:

The expulsions...decreed by the wartime Czechoslovak government, in conjunction with the three powers at Potsdam, were of their time....The wrongs involved in something so indiscriminate, like those committed to a greater extent in the Reich Protectorate and by Hitlerite Germany generally, were the subject of the 1997 declaration...which offered mutual apologies, in the spirit that 'injustices inflicted in the past belong in the past.'²⁴¹

At least one observer goes further. Kingsland argues that Germany is actually estopped from objecting to accession due to its reliance in *Prince Hans-Adam* on the 1954 Settlement Convention barring Germany from objecting to disposition of seized "German external assets"²⁴² as well as by the 1997 Declaration, which "extends [this] argument to cover the other Decrees."²⁴³

[T]he fundamental and underlying principle of the EU was the unification of Europe following World War II. Any attempt by Germany to preclude the Czech Republic from membership based on actions taken in the immediate aftermath of the war is clearly contrary to the whole basis on which the EU was founded and to its continuing aims and obligations.²⁴⁴

This is a far-reaching claim—in effect that Germany had an affirmative *obligation not to prevent* Czech accession.²⁴⁵ But even arguments squarely in the mainstream effectively assert that the states with interests in the Sudeten question have in fact already extinguished those claims.

Of course, an estoppel argument begs the question of what sort of rights are implicated by expellees' claims. If those claims are purely a function of the treaty relations between Germany and the Czech Republic, for example, then those states can dispose of the claims as they see fit, and this is arguably what these states have done. However, if expel-

241. Phillip Whitehead, *Czech Accession and the Benes Decrees*, BCSA REV. MAG., Apr. 4, 2002 (on file with author).

242. *Prince Hans-Adam*, *supra* note 66. See also Settlement Convention, *supra* note 41, ch. 6, art. 3(1). Presumably Kingsland's argument would also draw this conclusion from Germany's subsequent, similar and successful argument concerning the Settlement Convention in the closely related litigation against Lichtenstein before the ICJ, which was decided after Kingsland wrote. See *Liechtenstein*, *supra* note 66.

243. *Legal Opinion*, *supra* note 14, at 66 (Kingsland).

244. *Id.* at 67 (Kingsland). I do not find other support for Kingsland's view.

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

lees were thought to have a valid human rights claim—invoking a *jus cogens* peremptory norm, for example—then no mere bilateral or multilateral treaty could defeat it.²⁴⁶ By saying that states' official acts have terminated Sudeten claims, the consensus necessarily defines those claims as the sort that can be terminated. This separates them from peremptory norms with special protection and rejects their status as human rights claims or claims about international crimes.²⁴⁷ To some degree this may be a tautology—states cannot opt out of fundamental human rights, yet if states do in fact agree to terminate a claim, it must not have been a fundamental right—but this does seem to be the logic underlying the consensus' reliance on prior state action in rejecting Sudeten claims.

3. *Post Facto and Institutional Limitations on Competence*

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

As an example of the first variant, the ECHR and ICJ found they lacked jurisdiction *ratione temporis* over cases implicating the expulsions, with the ECHR noting that this also barred consideration of any "continuing effects produced by it up to the present date."²⁴⁸ Similarly, the EU arguably cannot consider claims arising from acts and agree-

246. Vienna Convention on the Law of Treaties, arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n. It is increasingly settled in international law that individuals have, in certain circumstances, direct claims against other states for restitution, and not only indirectly as beneficiaries of their own state's personality. Cf. Amnesty International, *supra* note 5, ¶¶ 7.1.4, 7.2 ("[S]tates have no authority to waive the individual right to reparations for their nationals through such treaties or agreements...international treaties seeking to waive reparations have no effect on the individual right to pursue claims."). But see d'Argent, *supra* note 5, at 288 (outlining a technical argument that states are not prohibited from renouncing claims arising from a peremptory norm).

247. Cf. Int'l L. Comm'n, *State Responsibility*, art. 41(2), UN Doc. A/CN.4 L.602/Rev.1 (Aug. 10, 2001) ("No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."), cited in Gattini, *supra* note 4, at 514 n.5 (criticizing its application to the Sudeten case).

248. See *Prince Hans-Adam*, *supra* note 66, at 32–33, 87 (finding no violation of Protocol I, art. 1).

ments predating its creation.²⁴⁹ Not all actors assumed that the EU totally lacked competence. As noted, the European Parliament's Resolution hinted that the Decrees might "run counter to EU law...and the Copenhagen criteria."²⁵⁰ However, claims of temporal non-competence provided a compelling rationale for many actors considering if there was any basis for Sudeten claims at the European level.

Another variant relies on claims about institutional non-competence *ratione materiae*. For example, since EU member states retain "clear national competence"²⁵¹ over questions of citizenship,²⁵² the Legal Opinion considers that denaturalization "is not an issue which raises any problems in the context of the accession procedure."²⁵³ More broadly, Commissioner Verheugen sought to calm Czech fears about restitution by excluding such claims from Europe's legal order: "[S]ections of Czech public opinion are still worried that people in the Czech Republic could still be driven out of their homes by some kind of lawsuit for repossession. The law as it stands makes that quite impossible and no-one in Europe would or could even change that...."²⁵⁴

Such *ultra vires* arguments rely on a narrowing, technical view of actors' legal obligations, but then this is precisely why they can powerfully limit claims of obligation, as they do in the Sudeten case. Of course, limits on the competence of the EU and other international institutions do not limit the competence of its member states, whose sovereignty and legal personality extend back to the period of the expulsions. Consequently, the member states' individual decisions not to condition membership on the Decrees' repeal or any other restitution confirms the sense that they do not believe Sudeten claims implicate any fundamental norms or create any legal obligation.²⁵⁵

249. See EU Treaty, *supra* note 117, art. 307 ("The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession...shall not be affected by the provisions of this Treaty.").

250. European Parliament Resolution, *supra* note 67, ¶ 41. As noted, the Parliament did leave the determination to the Czech government.

251. *Legal Opinion*, *supra* note 14, at 21 (Frowein).

252. See EU Treaty, *supra* note 117, art. 17.

253. *Legal Opinion*, *supra* note 14, at 22 (Frowein). However, there must be a temporal component in the Legal Opinion's analysis, since it also notes that denaturalization on an ethnic basis would violate fundamental norms and therefore concern EU institutions if undertaken *today*.

254. Verheugen Speech, *supra* note 65. Cf. MS, *Czech Republic Submits*, *supra* note 83 (noting Czech Ambassador to the European Union Libor Sečka's comments that "those Benes Decrees that are criticized in some countries deal with aspects that the current EU legislation does not cover at all, such as citizenship, expropriation, privatization, and nationalization").

255. See *id.* ("Laws and administrative practices in all EU Member States *must* be compatible with Community law.... If any country's laws fall short of what is required, that problem must be

The three lines of argument discussed above seem closely related: both the passage of time and states' agreements affect estimates of contemporary legal effect or obligation for past events, while particular institutions may not consider themselves competent to judge the past precisely because they were created after the events in question. In any event, actors often muster all three arguments in combination to reach the consensus conclusion that Sudeten claims have no merit and that the Czech Republic's accession raises no questions of legal obligation.²⁵⁶

4. "Cause and Effect": Retribution for Collective Guilt

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

The consistently forward-looking pronouncements of actors in the consensus are often curiously paired with insistence on a precise historical chronology—as the German-Czech Declaration puts it, on "cause and effect in the sequence of events."²⁵⁷ As Verheugen declared in 2002:

put right before accession. That goes not just for the Czech Republic, but for all countries.") (emphasis in original).

256. See, e.g., Daily Press Briefing, Statement by the Ministry of Foreign Affairs Deputy Spokesperson, Benes Decrees, Apr. 19, 2002, <http://www.info-france-usa.org/news/briefing/us190402.asp> (calling the controversy "a very old matter," noting that the Decrees "concern a period of history that European integration has aimed to supersede," and "have no bearing now and cannot interfere with the continuation and completion of the country's membership negotiations," because they predate the EU treaties, and saying that the 1997 Declaration "seeks to overcome historical disputes and focus on the future," that [t]he enlargement process has been conceived in that same spirit," and that [i]ts aim is...to set the seal on the reunification of the European continent").

257. "At the same time both sides are aware that their common path to the future requires a clear statement regarding their past which must not fail to recognize cause and effect in the sequence of events." 1997 German-Czech Declaration, *supra* note 34, art. I. Cf. JM, *Polish, German Presidents Call for 'Reevaluation' of 20th-Century Expulsions*, RADIO FREE EUR./RADIO LIBERTY, Oct. 30, 2003, <http://www.rferl.org/newsline/2003/10/301003.asp> ("Polish President Aleksander Kwasniewski and his German counterpart Johannes Rau called in a joint declaration...for a 'frank European dialogue' concerning mass expulsions in the last century.... 'The Europeans should together reevaluate and document all instances of displacement, flight, and expulsion that took place in the 20th century so that their causes, historical context, and consequences become clear to the public,' the declaration reads.")

There is no sense in keeping scores of suffering and injustice on one side and setting them off against suffering and injustice on the other. Sense lies in recognising that human rights are universal, that injustice is injustice, everywhere, whoever it is done to, and that it should not be allowed to happen again. I am not trying to explain anything away here: not the historical context and not the sequence of cause and effect that is familiar to us all.²⁵⁸

Others have noted this sequence more bluntly. MEP Whitehead said the expulsions were “directed at a national minority that had thrown in its lot with the Third Reich,”²⁵⁹ while Prime Minister Zeman based objections to restitution or forgiveness on Sudeten Germans’ treason against Czechoslovakia and complicity in genocide as Hitler’s “Fifth Column.”²⁶⁰ The *Dreithaler* decision comprehensively develops its analysis of the Decrees as a generalized response to “problems and issues intimately connected with the wartime events.”²⁶¹ The Legal Opinion frames its discussion of Sudeten claims and Czech obligations by noting that “[i]t must also be kept in mind, *in the present context*, that Germany had started to forcibly transfer populations,”²⁶² and declares that reprisals

were actions in reaction to what had happened to the Czechoslovak population by [*sic*] Germans between 1938 and 1945. Although most of the victims were innocent it cannot be overlooked that the violence committed against Germans at that time was in particular a reaction to what had happened during German occupation. To quote [historian] Ian Kershaw...:

“The raw brutality with which the Germans had treated those whose countries...they had occupied now backlashed against the whole German people. During the last months of the war the Germans harvested the storm of unlimited barbarity which

258. Verheugen Speech, *supra* note 65.

259. Whitehead, *supra* note 241.

260. Otmar Lahodynsky, *Populistischer Pro-Nazi-Politiker*, PROFIL, Jan. 21, 2002, translated by author (interview with Prime Minister Milos Zeman). See Wallace, *supra* note 27 (noting controversy surrounding Zeman’s interview with *Profil*).

261. *Dreithaler*, *supra* note 51, at para. 34 (noting elsewhere that [a]fter the period of the violent occupation by Nazi Germany, and as a consequence of the losses and blows that Czechoslovakia suffered thereby, no other route was left open to the Czechoslovak government leaders than to deal with the consequences of the Nazi occupation and the events of the war, to a certain degree at least).

262. *Legal Opinion*, *supra* note 14, at 11 n.2, 12 (Frowein) (emphasis added).

the Hitler regime had sowed.”²⁶³

This is not quite right, since the “harvest” occurred not just “during the last months” but after the war, in peacetime. Still, the point is that this account sets the treatment of German civilians in the context of their collaboration during the war. But why do this—or more precisely, why do this *now*? The Legal Opinion was written at the beginning of the twenty-first century while these events took place a half-century ago; surely, as the other rationales of the consensus suggest, time and subsequent acts should render the precise causal sequence immaterial?

The relevance of such precise causal-temporal references in legal analysis of *contemporary* claims is unclear unless one recognizes that it is in fact a rationale of revenge and collective guilt. Most sources commenting on the Sudeten claims resort explicitly to such causality—they link Sudeten collaboration to the subsequent expulsions²⁶⁴—and therefore accept this rationale. This has implications for describing the real shape of the underlying legal-political rule because, obviously, this is a form of justification.

V. A MODEST OBSERVATION: FOUR IMPLICATIONS OF REJECTING SUDETEN CLAIMS

...weil es wohl nichtssagende geschriebene, nicht aber nichtssagende ungeschriebene Normen geben kann.

– M. Sassòli²⁶⁵

263. IAN KERSHAW, *HITLER 1936-1945*, at 986 (2000), translated in *Legal Opinion*, *supra* note 14, at 28 n.2 (Frowein).

264. See, e.g., CTK, *Appeals for Reconciliation*, *supra* note 85 (reporting President Klaus’ speech in March, 2003 and his view that “it is necessary to respect the way historical events followed each other, or that the transfer was a reaction to the Nazi terror”). Even statements notionally in favor of Sudeten claims adopt this causal sequence. See, for example, the comments of Jose Ayala Lasso, High Commissioner for Human Rights, at a German expellee ceremony in Frankfurt:

There is no doubt that during the Nazi occupation the peoples of Central and Eastern Europe suffered enormous injustices that cannot be forgotten. Accordingly they had a legitimate claim for reparation. However, legitimate claims ought not to be enforced through collective punishment on the basis of general discrimination and without a determination of personal guilt.

Statement of the United Nations High Commissioner for Human Rights to the German Expellees at the Ceremony held at the Paulskirche, Frankfurt am Main, on 28 May 1995, on the Occasion of the Fiftieth Anniversary of the Expulsion of Ethnic Germans from Eastern and Central Europe, 1945-1948, in Documental Appendix, *supra* note 16, at 840.

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

[M]an's worst folly is a persistent attempt to adjust, smoothly, rationally, to the unthinkable.²⁶⁶

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

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

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

In his 2002 speech, Commissioner Verheugen linked the forward orientation of the Union, the ancientness of the Sudeten expulsions, and a curiously elliptical expression of causality in describing “how we deal with the burden of the past...[t]he fact is: in today's uniting Europe, expulsion, dispossession, oppression or discrimination as a political means are unthinkable. Anywhere. And under any circumstances. However, equally unthinkable is a repetition of the fascist terror which had preceded all this.”²⁶⁷ On its face, this rejects expulsion absolutely. Yet the formulation is more precise: total rejection—followed, strangely, by “however”—is balanced against another “equally unthinkable” event. The implication must be that if fascist terror or its equivalent *were* to repeat itself, then a righteous Europe's response could be repeated as

266. *The Price of Survival*, TIME, Apr. 11, 1969, at 108 (reviewing KURT VONNEGUT, SLAUGHTERHOUSE-FIVE, OR THE CHILDREN'S CRUSADE (1969)).

267. Verheugen Speech, *supra* note 65.

well.²⁶⁸

Indeed, most efforts to isolate the expulsions as products of their time deploy causal justifications that necessarily contemplate similar action in similar circumstances. For Whitehead, “[m]easures taken in response to a time of unparalleled evil are not applicable in the modern era of democratic resolution.”²⁶⁹ This seems to suggest that expulsions are illegitimate because democracies do not need them, yet the argument’s engine is the *absence* of “unparalleled evil.”²⁷⁰ Nor does it condemn the expulsions as such: there is none of the categorical rejection characterizing discussion of, say, the Holocaust or Japanese internments, and in cabining the expulsions as unique (“unparalleled”), it necessarily reserves a potential response should history repeat. The seeming fixity of our resistance to expulsion—its ‘unthinkability’—is actually a function of the conflict preceding it: under sufficiently exigent circumstances, expulsion as a legal means would be thinkable.²⁷¹

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

The Corollary further suggests that states may shield themselves from liability for mass expulsions (or for failing to oppose them) by several strategies: they may define the initial harm of expulsion as discrete and non-continuing; they may structure subsequent interactions through institutions with purely prospective competence; or they may simply wait for time to pass. Perhaps the Corollary’s “unthinkable potential”—the fact that we reserve this option in law, but tend, with Verheugen, not to acknowledge it in advance of using it—necessitates denial of restitution.

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

269. Whitehead, *supra* note 241.

270. After all, two signatories of the Potsdam Agreement were democracies.

271. In this light, the way in which proposals to expel Germans developed throughout the war, becoming increasingly ambitious in response to events and the logic of the war, is illuminating. Cf. Christopher Kopper, *The London Czech Government and the Origins of the Expulsion of the Sudeten Germans*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 255–66.) This path of deliberation shows—as has been frequently observed, more recently, in connection with the genocides in Rwanda and Yugoslavia—that such plans do not spring up spontaneously or at the last moment, but rather are the consequence of layered discussions. Were such an event to occur again, its enormity would bend the deliberative space around it to produce solutions of similar scope that would be considered reasonable under the circumstances.

If it were acknowledged, the likely consequences of that potential would have to be calculated and discounted in the present. Denying restitution not only stabilizes geopolitics and lowers actors' costs today—it lowers the costs, in a possible future, of exercising the option.

This claim is limited and precise. There are abundant indications that *renewed* use of the Decrees today would be incompatible with the European legal order, and that ethnically based expulsions or confiscations are *generally* condemned as unacceptable; this Article does not seek to argue otherwise.²⁷² The technical turn—the determination that the Decrees are extinct or outside the EU's competence—does have a certain legally generative effect; it is not trivial that rather than enthusiastically approving the Decrees, the EU has indicated that their reactivation in present circumstances would be incompatible with EU law. But this technical turn simply masks a moral and political—one might say constitutional—determination that itself is deeply and undeniably generative of the legal order.

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

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

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

272. See, e.g., Verheugen Speech, *supra* note 65 (“The presidential Decrees are no longer of legal consequence. ... [They] are obsolete, extinct, dead law.... Any attempt to resurrect them as politically relevant or to use them in any way today can only bring trouble.”) While this acknowledges that the Decrees remain part of the legal system, clearly disapproval is there, too. Certainly this Article does not argue that expulsion or ethnic discrimination could be casually undertaken today under just any circumstances. Readers who imagine this Article is making such an argument have assuredly misread its intention, and perhaps its proofs.

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

Such a theory is available. It might be supposed that in observing the failure of Sudeten claims, we simply rely upon the temporal and jurisdictional rationales identified earlier, but this cannot be right, or at least not the entire reason. As already indicated, there is a fourth, moral rationale. It is this rationale that distinguishes the Sudeten circumstances from the other restitution claims subject to the same temporal and jurisdictional objections that do merit compensation. I speak of course about claims by the victims of Nazism. Technical objections that defeat Sudeten claims do not operate with equal effect against victims of the Holocaust and Nazi aggression,²⁷³ who have received compensation,²⁷⁴ restoration of property,²⁷⁵ and official apologies.²⁷⁶

To be sure, most restitution for Nazism mobilizes political or moral claims that do not necessarily create law under strict models of customary law.²⁷⁷ At the same time, more expansive theories would readily

273. See, e.g., *Austria v. Altmann*, 541 U.S. 677 (2004) (allowing suit by a Holocaust victim against Austria under the Foreign Sovereign Immunities Act for return of paintings seized in 1938). See also Charles H. Brower II, *Republic of Austria v. Altmann*, 124 S.Ct. 2240, *United States Supreme Court*, June 7, 2004, 99 AM. J. INT'L L. 236 (2005).

274. See Saul Kagan, *An Outline*, in REVISITING THE NATIONAL SOCIALIST LEGACY: COMING TO TERMS WITH FORCED LABOR, EXPROPRIATION, COMPENSATION AND RESTITUTION 20–21 (Oliver Rathkolb ed., 2004); Sean D. Murphy, *U.S. Involvement in Claims by Victims of the German Holocaust or Their Heirs*, 93 AM. J. INT'L L. 879, 883–92 (1999).

275. See, e.g., *Altmann*, 541 U.S. 677 (finding for Altmann in dispute over several paintings by Klimt in the possession of the Belvedere Museum); see also Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, available at <http://www.nytimes.com/2006/06/19/arts/design/19klim.html?ei=5088&en=37eb32381038a749&ex=1308369600&partner=rssnyt&emc=rss&pagewanted=print>; Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1 (reviewing the case and the dispensation of the paintings).

276. JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* 381 (2002) (discussing President Rau's 1999 apology); Kagan, *supra* note 274, at 21 (noting Chancellor's Adenauer's 1951 "solemn declaration before the Bundestag assuming moral and legal responsibility").

277. Cf. *North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.)* 1969 I.C.J. 4, 44 (Feb. 20, 1969) ("There are many international acts...which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."). See Rainer Hofmann, *Compensation for Victims of War—German Practice after 1949 and Current Developments*, Remarks at the Meeting of the Japanese Society for Interna-

identify the public-private funds established *ex gratia* by Germany, Austria and Switzerland to settle lawsuits (and the intense involvement of other states such as the U.S. in the negotiations) as indicia of legal obligation.²⁷⁸ In addition, some anti-Nazi claims are advanced in unambiguously legal modes. For example, national tribunals—sources for constructing claims about customary law²⁷⁹—have awarded judgments to Holocaust claimants relying variously on domestic law, international treaties, and settlement arrangements.²⁸⁰ Even judgments that limit Holocaust restitution are routinely crafted so as to reaffirm moral

tional Law, (Oct. 8–9, 2005) at 6, (available at http://www.soc.nii.ac.jp/jsil/annual_documents/2005/2005_autumn/Hofmann.pdf)

[(Germany's treaty obligations for payments to individuals] "were acknowledged only insofar as they could be based on a pertinent piece of domestic German legislation. This approach reflected the—then—unchallenged position that individuals had no right, under international law, to individual claims for compensation. ... [T]he adoption of domestic German legislation to provide for the compensation for individual claims was seen as the fulfilment of a moral—and not a legal—obligation: Thus, the ensuing rights... were not considered as the domestic implementation of an existing general obligation under international law.... This understanding continued to prevail in the Federal Republic of Germany after 1970.").

278. Germany's creation of the Foundation "Remembrance, Responsibility and the Future" to compensate victims of deportation and forced labor would conventionally be seen as a merely political act, but in *Ferrini v. Federal Republic of Germany* (Italian Court of Cassation, Mar. 11, 2004), the court took this "as evidence that the facts alleged by petitioners were not episodic events but part of an overall strategy pursued by the German Reich." Andrea Bianchi, *Ferrini v. Federal Republic of Germany: Italian Court of Cassation, March 11, 2004*, 99 AM. J. INT'L L. 242, 243 (2005) (turning a political fact into legal evidence to defeat a sovereign immunity claim). See Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-FRG, July 17, 2000, 39 I.L.M. 1298; *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 3 nov. 2004, n.5044, Giust. Civ. 2004 II, 1191; Pasquale De Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EUR. J. INT'L L. 89 (2005); see also Hofmann, *supra* note 277, at 9 (discussing the Foundation "Remembrance, Responsibility and the Future" and noting that the law establishing the Foundation "aims at providing justice to the victims by acknowledging Germany's, as well as the companies', moral and political responsibility for their suffering—it does not, however, speak of any legal obligation to do so") (emphasis in original). Some authors also assert that non-state communities can attain effective legal personality that can affect the contours of legal indicia, as in the case of the Jewish organizations that negotiated for reparations from Germany as full parties alongside other states. See, e.g., Torpey, *supra* note 5, at 5 (noting that "the assault on the Jews eventually gave them a kind of legal standing in international law (quite apart from the existence of Israel), setting an important precedent for other groups to lay claim to a similar status").

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

280. See, e.g., William Glaberson, *For Betrayal by Swiss Bank and Nazis, \$21 Million*, N.Y. TIMES, Apr. 14, 2005 (discussing U.S. federal court award pursuant to the 1998 settlement to families whose Swiss trusts were expropriated in 1938).

claims,²⁸¹ and all such claims adumbrate a moral consensus beyond the legally practicable: "In the scheme of the wrongs of the Holocaust, [plaintiff's lawyer] said...the theft of a sugar refinery near Vienna long ago was a small injustice. 'But now, 70 years later...this is one of the few wrongs you can actually remedy.'"²⁸² More broadly, universal repudiation of Nazism and the Holocaust, such as Germany's apologies, constitutes the legal matrix underlying the consensus that such behavior today would violate international law.²⁸³ It is at least plausible to suggest that Germany's acts of restitution for the crimes of Nazism—and other states' responses—constitute proofs of a customary legal norm prohibiting such actions and requiring some form of restitution.

Thus, although the *extent* to which restitution for Nazism's crimes is a legal obligation is contested,²⁸⁴ such claims exhibit an accepted core of

281. See, e.g., Stephen A. Denburg, Note, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233, 234–35 (1998) ("Although Jews should be legally entitled to full restitution of all confiscated and converted properties, such a wholesale return would be unrealistic."); Press Release, Stuart E. Eizenstat, Under Secretary of State, U.S. Dep't of State, Settlement of Class Action Suits (Aug. 12, 1998) (*available at* <http://fcit.coedu.usf.edu/HOLOCAUST/resouRce/assets/concl2.htm>) (noting that the 1998 Washington Conference Principles on Nazi Confiscated Art, "while not legally binding represent a moral commitment among nations which all in the art world will have to take into account").

282. Glaberson, *supra* note 280. Plaintiff in the case was the same Maria Altmann who recovered in the Klimt paintings case noted above. See *In re Holocaust Assets Litig.*, Case No. CV96-4849 (Cl. Res. Trib. for Swiss Bank Account Cases, Apr. 13, 2005), <http://www.asil.org/ilib/2005/05/ilib050509.htm#j3> (reviewing the award to Altmann out of the fund established by a consortium of Swiss banks to settle claims arising from Nazi confiscations, pursuant to the settlement of class action litigation in U.S. District Court for the Eastern District of New York); see also KLIMT: ADELE'S LAST WILL (Dissidents/L'Express 2006) (viewed at the Neue Gallerie, New York, Sept. 2006) (including footage of the lawyer, Schoenberg, using very similar language with reference to the Klimt paintings).

283. Formal apologies or other acts of restitution can be *ex gratia*, but can also contribute to a claim in customary international law. See Mark Gibney & Erik Roxstrom, *The Status of State Apologies*, 23 HUM. RTS. Q. 911, 915 (2001)

("Statements by high level officials—such as apologies—may under certain circumstances, constitute evidence of state practice and therefore 1) contribute to the formation of customary international law; 2) constitute a source of interpretation for...determining the content of obligations arising from treaty law; and 3) serve as a unilateral declaration that is at least binding on the state that issued the apology.").

284. Claims by Nazi victims have often been defeated by technical-temporal objections—statutes of limitations, anti-seizure statutes, etc. See, e.g., *People v. Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, 93 N.Y.2d 729 (App. Ct. 1999) (applying New York's anti-seizure statute to quash a subpoena for paintings on loan to the Metropolitan Museum of Art claimed as property stolen by the Nazis). See also *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994) (denying jurisdiction and rejecting implied waiver of sovereign immunity for violation of *jus cogens* for FSIA purposes in suit for money damages by Holocaust survivor for slave labor; Wald, J., dissenting, found implicit waiver due to barbaric conduct). The U.S. subsequently intervened in the *Princz* matter, leading to the Agreement Concerning Final Benefits to Certain United States

reasonableness that Sudeten claims utterly lack. The expulsions have never been repudiated in terms even vaguely analogous to condemnation of the Holocaust—on the contrary, states accept the expulsions' legality and legitimacy. No one has ever been convicted for organizing the expulsions. No compensation has been paid, even *ex gratia*. No state has demanded the repudiation of the Decrees, even as a political *quid pro quo*. By contrast, one can hardly imagine a state with explicitly anti-Jewish legislation on the books, even in "extinct" form, being a candidate for EU membership.²⁸⁵

What is the effect of this on the rationales identified above? Even partial vindication of claims by Nazism's victims vitiates the "ancientness" objection to Sudeten claims—Holocaust claims are, of course, actually older.²⁸⁶ It must be something else that distinguishes the cases. That something, obviously, is a moral difference: the sense of obligation to Holocaust victims and the sense that expellees (considered collaborators in Nazi evil²⁸⁷) have no claim. Any potential for *comparison* between Germans and their victims seldom surfaces—indeed, the moral construction of the rule requires their incommensurateness.

This moral difference is *the* distinguishing element between the Sudeten and Holocaust cases. Yet precisely for that reason, the Corollary limits the restitution the Law of the Holocaust imposes for collective expulsions *in general*: restitution does not apply to expulsions carried out in

Nationals Who Were Victims of National Socialist Measures of Persecution, F.R.G.-U.S., Sept. 19, 1995, 35 I.L.M. 193 (1996). See Murphy, *supra* note 273, at 883–85 & n.2.

285. France has indicated that Turkey's membership in the EU, an event which may not come to pass for twenty more years, might be contingent on admitting responsibility for the Armenian genocide, an act that took place in 1915, predating both the Holocaust and the German expulsions by thirty years. See *Turkey 'Must Admit Armenia Dead'*, BBC NEWS, Dec. 13, 2004, <http://news.bbc.co.uk/2/hi/europe/4092933.stm>; *France in Armenia 'genocide' row*, BBC NEWS, Oct. 12, 2006, <http://news.bbc.co.uk/2/hi/europe/6043730.stm> (discussing passage by the lower house of the French Parliament of a bill criminalizing denial of the Armenian genocide, and noting that "France's President Chirac and Interior Minister Nicolas Sarkozy have both said Turkey will have to recognise the Armenian deaths as genocide before it joins the EU—though this is not the official EU position").

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

287. Cf. Kathleen McLaughlin, *Allies Open Trial of 20 Top Germans for Crimes of War*, N.Y. TIMES, Nov. 20, 1945, at A1 ("Nuremberg, Germany, Nov. 20—Four of the world's great powers sit in judgment today on twenty top Germans.... The twenty-first defendant, tacitly although not specifically named in the indictment, is the German nation that raised them to power and gloried in their might.").

righteous retribution,²⁸⁸ and would not apply to any future expulsion that could satisfactorily be described as belonging to that category.

The other rationales are therefore likely not controlling in any meaningful sense, or even particularly informative. In fact, it is this moral difference that allows us to see how the other rationales operate, and how the Sudeten case both is and is not *sui generis*. There is no general principle of “antiquity,”²⁸⁹ continuing effect, or other technical objection, since these rationales are only functions of the broader, anterior moral calculus we apply to an act of expulsion or its consequences:²⁹⁰ for morally approved claims, technical arguments may never apply, while importing a moral calculus ensures other, disfavored claims—such as those by the expelled Germans—never receive protection.²⁹¹

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

Customary law is constructed on proofs that state actions were under-

288. For example, the fact that German expellees have the same right to acquire property after accession is one of the Legal Opinion’s core arguments against requiring restitution. Could a court decision rejecting Holocaust survivors’ claims to return of stolen art on grounds that they presently “have the same right to acquire the artworks” possibly find expression? Something distinguishes the cases.

289. Cf. Council Draft Resolution on Looted Jewish Cultural Property, EUR. PARL. DOC. 8536 (Oct. 6, 1999) (declaring expropriations illegal, Article 3, and inviting member states’ parliaments to “give immediate consideration to ways in which they may be able to facilitate the return of looted Jewish cultural property,” Article 10, and to change legislation to facilitate restitution, Article 13, including by removing statutory limitations, Article 13(a)). Austria passed an Art Restitution Act, invalidating certain expropriations during the Nazi era, in 1998. KLIMT: ADELE’S LAST WILL *supra* note 282.

290. Even claims of *ultra vires* incapacity mask an underlying choice about when to reach back into the past and when not to: successful efforts to reverse Nazi-era seizures are themselves based on retrospective, postwar revisions. See, e.g., Flegenheimer Claim, 25 I.L.R. 91, 97 (It.-U.S. Conciliation Comm’n 1958) (noting Italy’s obligation in the 1947 peace treaty to invalidate property transfers “result[ing] from force or duress exerted by Axis Governments”). In fact, much of the edifice of the postwar European order—the definitions of crimes at Nuremberg, the 1974 nullification of the Treaty of Munich, the assertion of Czechoslovakia’s territorial and political continuity, post-communist property reforms and European Court of Human Rights review of communist expropriation cases from 1949—is a function of *post hoc* revision, which therefore begs the question, when do we revise and when do we not? Likewise, the final decision on EU membership is a political one, taken by the states for whatever reasons they choose; there are no competency restrictions on that, as the French position linking Turkish membership to recognition of the Armenian genocide indicates.

291. Cf. Timothy W. Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT’L L. 423, 461–62 (2004) (“[T]he amount of time required is a function of the international community’s moral evaluation of a claim....”).

taken out of a sense of legal obligation—the concept of *opinio juris sive necessitatis*.²⁹² So what is the consequence of consensus that an act is *not* obligatory? If states consistently demonstrate a belief that they are not under a particular obligation, then they are not.²⁹³ Doesn't the Sudeten controversy tend that way? Private actors claimed the Czech Republic was obliged to repudiate the Decrees and that other states were obliged to withhold accession until it did,²⁹⁴ but those claims were rejected, demonstrating that there is *no* obligation. That has important consequences for describing the shape and content of customary law governing ethnic cleansing, because any lack of obligation indicates a zone of permission.²⁹⁵

It might be objected that states' *permissive* attitudes do not give evidence of *opinio juris*, the sense of obligation which customary law requires for states' actions to have the force of law.²⁹⁶ Yet this is precisely the point: permitting is as much a function of law as proscribing, and when states act in a way that does *not* give rise to *opinio juris*, they establish proofs of permissibility that define the scope of other rules.²⁹⁷ In this case, the absence of *opinio juris* shows that states do not feel they have any obligation to reverse the effects of deportation or denaturalization under analogous circumstances. Prior to the Sudeten controversy one might have speculated that the norm prohibiting expulsion was nearly total, yet states (and other actors) expressly rejected extension of the prohibition (or the obligation to make restitution) to the Sudeten case—and presumably therefore to similar cases. If a Sudeten Corollary has any generalizable value, it would exempt similar expulsions under similar circumstances from the general scope of prohibition.

Consider a counterfactual scenario: what if the EU or its member

292. See SHAW, *supra* note 72, at 80–84. See also *supra*, pt. III.A. As noted, some scholars dispute the operative role of *opinio juris* and customary international law as a generative legal category. See e.g. GOLDSMITH & POSNER, *supra* note 75. But see Norman & Trachtman, *supra* note 75, at 569.

293. SHAW, *supra* note 72, at 84–86. But see Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS 155, 268–93, cited in Norman & Trachtman, *supra* note 75, at 544 (arguing that *opinio juris* is sometimes not necessary).

294. Cf. BROWNIE, *supra* note 270, at 491 (asserting that states have a “duty of non-recognition” of other states’ acts “if in the careful judgment of the individual state a situation has arisen the illegality of which is opposable to states in general”).

295. See MALANCZUK, *supra* note 71, at 44 (“[I]n the case of a permissive rule, *opinio juris* means a conviction by states that a certain form of conduct is permitted by international law.”) (emphasis in original). Hohfeld’s jural opposites ‘privilege’ and ‘duty’ are instructive.

296. See SHAW, *supra* note 72, at 80–84.

297. See Ruth Wedgewood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 830 (1999) (“Decisions not to act are a part of state practice and *opinio juris*.”).

states had conditioned Czech accession on repudiation of the Decrees? Or, following a refusal by the Czech Republic to give restitution, member states had explicitly voiced their disapproval, or had explicitly condemned the original expulsions? Any of these scenarios would have given rise to colorable claims about new customary rules repudiating expulsion and defeating any residual option to expel in the future. Certainly scholars would have rushed to make such claims.²⁹⁸

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

As with genocide, scholars, courts and states wish to have the crimes associated with ethnic cleansing embedded in customary law because they are too important to our common humanity to be left to mere positivistic treaty-making²⁹⁹ or to any voluntaristic law-making process.³⁰⁰ Therefore, any indication that according to the mechanics of customary legal interpretation such acts are clearly *not* embedded is of significance for our efforts to map and determine the shape of that law. The common

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

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

300. Cf. Theodor Meron, *Customary Law*, in CRIMES OF WAR, *supra* note 4, at 113 ("Both scholarly and judicial sources have shown reluctance to reject as customary norms—because of contrary practice—rules whose content merits customary law status perhaps because of the recognition that humanitarian principles express basic community values and are essential for the preservation of public order.").

intuition that Nazism's supporters and its victims occupy different moral positions—and the deeper sense that at some point we are morally justified in making categorical decisions about entire communities because of their *general* association with an evil regime³⁰¹—may be right, but it is also a definitional distinction. It excludes those two communities from common identity or common treatment, and again, this may be right and reasonable. It also means, necessarily, that deportation, denaturalization and confiscation done on an ethnic basis constitute “ethnic cleansing” when applied to innocents, but are justifiable acts of state when applied, in limited and defined circumstances, to communities adjudged to have passed beyond some moral and legal pale.

And this is true today, notwithstanding sixty years of treaties and new institutions. It is not satisfactory to suppose that treaty-making and institution-building alone have made actions which were acceptable in 1945 illegal now while also observing that even older Holocaust claims are nonetheless given different treatment—an observation which simply returns us to the claim of moral difference.³⁰² And so, more fundamen-

301. In this context, it is interesting to note that one of the *Dreithaler* petitioners invoked the Convention on the Rights of the Child. While temporal-technical objections could be brought to bear against such a claim, the Court does not resort to this; rather its substantive analysis of German “responsibility” simply does not consider the practical reality that confiscation, denaturalization, and expulsion affected not only adult Germans who actively or passively supported the Nazis, but children as well, many of whom are still alive. There is no accommodation for them in the Court’s categorical analysis of what it calls the “fundamental difference between the responsibility of the ‘rest of the world’ and that of the German nation, between the silence and passivity of some and the silence and the active role played by others,” *Dreithaler*, *supra* note 51 at para. 24, nor any consideration at all.

302. It is entirely possible to reconstitute, retrospectively, the legal and moral landscape of past times. At present there are active scholarly attempts to establish a theoretical basis for showing that slavery either always was illegal, or became illegal at a certain point, and that notwithstanding its historical variation, it should be declared retrospectively illegal. As a descriptive matter, *any* of these turns are retrospective revisions, since it would have come as a great shock to most actors in, say, 1700, that what they were doing was already illegal. See HUMAN RIGHTS IN DEVELOPMENT, YEARBOOK 2001, REPARATIONS: REDRESSING PAST WRONGS (George Ulrich & Louise Krabbe Boserup eds., 2003) (surveying developing arguments on reparations for slavery and colonialism); see also World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Aug. 31–Sept. 8, 2001, *Durban Declaration and Programme of Action*, ¶ 13 U.N. Doc. A/CONF.189/12. Cf. d’Argent, *supra* note 5, at 285 (surveying arguments about retrospective illegality and noting that:

In order to make a claim for reparation as a matter of law (as opposed to morality or politics), one would have to demonstrate the emergence of a new, presumably customary, rule affirming that slavery is now considered to have always been illegal. Without such a rule, nothing really distinguishes contemporary endorsements of responsibility from *ex gratia* promises.)

But the point here is this: if this could be done for slavery, colonialism, or any other past harm, it could be done for the Sudeten claims—and so the question is, again, why is it not?

tally, it is not satisfactory because no one wishes to admit that our commitments against ethnic cleansing or genocide (whatever they are) could be effaced by a mere treaty or be otherwise subject to state consent;³⁰³ they are too deeply held, morally, to allow that. Law is based not only on formal instantiations but on underlying, anterior moral sensibilities—this is the very rationale underlying customary law and human rights, after all.³⁰⁴

The very fact that our rejection of Sudeten claims is fundamentally moral rather than technical or legal should indicate to us that the occasion to apply such a distinction obtains, and will obtain, whenever the moral conditions arise, regardless of the formal legal structures erected atop that moral foundation. We profess an absolute legal rejection of ethnic cleansing, but either we do not mean it or we mean something morally narrower by the words “ethnic cleansing.”

If it were objected that there is a peremptory norm (a rule of *jus cogens*) prohibiting “ethnic cleansing,” as there is for genocide,³⁰⁵ this would not change the analysis or effect. Elevating the prohibition of ethnic cleansing to the level of a *jus cogens* norm only replicates our concern with definition—what is included in the norm?—and simply highlights the moral difference between what is prohibited (population transfers like Nazi slave labor and the Holocaust) and what is not (population transfers like the German expulsions).

Thus, simply intoning that there is a human right or peremptory norm against expulsion is an insufficient inquiry into customary law: one must investigate the shape and content of norms through the cases in which they are—and are not—invoked. The Sudeten expulsions and the contemporary response are one such case. Evidently, the prohibition of “expulsion” does not mean the *kind* of expulsion undertaken after the war in

303. Cf. Louis Henkin, *Human Rights and State 'Sovereignty,'* GA. J. INT'L & COMP. L. 31, 37 (1995–96) (“[N]on-conventional human rights law...is ‘constitutional,’ in a new sense.... [It] is not based on consent: at least, it does not honor or accept dissent, and it binds particular states regardless of their objection.”) The author links this development or claim to the concept of *jus cogens*. *Id.*

304. Cf. Koskeniemi, *supra* note 288, at 1952–53 (stating that the mechanics of customary law are

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

305. *Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (1962) (identifying prohibition of genocide among the “basic rights of the human person”).

the kinds of conditions then prevailing. Perhaps there is a lexical element after all: expulsions are prohibited, but then these were merely transfers.³⁰⁶

D. *Why Isn't a Sudeten Corollary Acknowledged?*

Our law does not forbid ethnic cleansing full stop—it forbids ethnic cleansing except in defined cases, following extreme communal violence which provides a moral justification. But why are those cases unacknowledged? If there is a corollary, why cabin it off as a *sui generis* “shipwreck on the law?” There is of course the sheer awkwardness of admitting limits to our horror at ethnic cleansing or of advertising our determination to reserve the rights of vengeance. When that potential is acknowledged, it comes in surprising ways, such as Prime Minister Zeman’s suggestion during a trip to Israel “that his hosts break the deadlock with the Palestinians by adopting the method that was so ‘successful’ for the Czechs in 1945: expulsion.”³⁰⁷ But this is a minor view, as most actors do not openly acknowledge the generative potential of that method today. Whatever claim we can make based on observing state action, we cannot simply assert that they *publicly* “approve of ethnic cleansing in limited circumstances.”

Indeed, if one assembled fifty statesmen or legal scholars and asked them if ethnic expulsions would be legal today under any circumstances, even after a major war, surely they would say “of course not.”³⁰⁸ Per-

306. Compare this to the arabesques of American policy distinguishing ‘genocide’ and ‘acts of genocide’ in Rwanda. See Diane Orentlicher, *Genocide*, in *CRIMES OF WAR*, *supra* note 4, at 156.

307. Rupnik, *supra* note 59, at 68. Zeman was speaking about the West Bank, but the differences from the broader Palestinian case are instructive. Palestinian refugees from 1948 have claims of roughly the same antiquity as the Germans, and probably no better chance of seeing those claims vindicated since Israel will probably never allow any meaningful return, but it is easy to find legally-generative support for Palestinian claims from a variety of relevant actors. This constructs Israel’s resistance as a violation of a reconfirmed norm rather than as behavior consistent with international norms. (Of course, there is fierce controversy over exactly what happened in 1948 and what laws or violations are at issue. The point, however, is that there *is* controversy, and with it persistent claims about Palestinian rights and Israeli obligations—compare the Sudeten case, in which there is near consensus that there is no obligation.) And if the international community eventually accedes in the face of Israeli recalcitrance, it may well construct an additional limit on the scope of our commitment concerning responses to expulsion.

308. See *supra* note 4. Cf. Alfred de Zayas, *Ethnic Cleansing 1945 and Today: Observations on Its Illegality and Implications*, in *ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE*, *supra* note 14, at 787–803 (arguing for the illegality of ethnic deportations both in 1945 and today, and noting, at page 789, that “the victorious Allies at Potsdam were not above international law and thus could not legalize criminal acts by common agreement. There is no doubt that the mass expulsion of Germans from their homelands...constituted ‘war crimes’ to the extent that they oc-

haps this denial proves that an expulsion option is not embedded in customary law,³⁰⁹ and yet we have seen how the consensus demonstrates a continued (if implicit) commitment to the expulsion option which is in fact the observable position of relevant actors, even if they do not say so when asked directly. Ask those same statesmen and scholars if the expulsions of the Germans were illegal *at the time*, or deserve compensation *today*, and most would equally surely conclude that they were not and do not, and in saying so they would be mirroring the actual positions of the EU, its member states, the Potsdam Powers, international tribunals, and most observers. So, does bare verbal denial that an act is possible or legal actually outweigh expressions of policy indicating the contrary?

Although it is beyond the scope of this paper to develop a full critique on this point, there does appear to be a serious tension in contemporary customary law's reliance on "state speech" to construct proofs of *opinio*

curred during wartime, and 'crimes against humanity,' whether committed during war or in peacetime").

The Czech Foreign Ministry issued this statement prior to accession: "The Czech Republic is a legal state. Currently, this country has no legislative norms that would facilitate the expropriation of property without indemnification.... Naturally, it is equally impermissible to expel any group of either native or foreign inhabitants...." Czech Foreign Ministry Website, *supra* note 2. In June, 2003, the Czech cabinet called both the expulsions and German aggression preceding it "unacceptable from today's point of view." CTK, Czech News Agency, *Strong Words Break Calls for Czech-German Reconciliation*, FIN. TIMES INFO., July 11, 2005.

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

Without question, the recent textual trend has been to expressly condemn and prohibit forced population transfers. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, (Dec. 16, 2005); U.N. Econ. & Soc. Council, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Draft Declaration on Population Transfer and the Implantation of Settlers*, U.N. Doc. E/CN.4/Sub.2/1997/23 (June 27, 1997) (prepared by Awn Shawkat Al-Khasawneh); Int'l Law Comm'n, *Draft Code on Crimes Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/L.53 (1996) (finding that deportation "implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State" and "a crime of this nature could be committed not only in time of armed conflict but also in time of peace"). In addition, the Fourth Geneva Convention and the Second Additional Protocol prohibit the evacuation of occupied territory or displacement of civilians, absent imperative military necessity. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 17, 1125 U.N.T.S. 609, *adopted* June 8, 1977 (*entered into force* Dec. 7, 1978).

juris and state action.³¹⁰ The Sudeten controversy presents a case in which states' *specific* words and actions very clearly lead in one direction, even though their *general* rhetoric goes in the other. Which one is more likely to predict the future shape of things? It is as if, unable to bear to let matters go in the direction our own methods take them, we seek to embed some moral ratchet in the law. Yet to build legal prescriptions on bare rhetorical claims while ignoring the mass of actions and policies that contradict them—to try to resolve the word-action problem decisively in favor of rhetoric over action—risks creating an incredibly thin vision of customary law, unhinged from reality, and lacking in descriptive, let alone normative, power. It is something like asking people their sexual history or how they would behave on a sinking ship: people will give certain kinds of predictable answers, but these may not actually predict anything and may not actually be true.

The role of moral revulsion or even embarrassment must be found somewhere in our model of customary law's formation, but nothing in its mechanisms appears to allow for such public scruple. Perhaps by refusing to observe the obvious, we show an unwillingness to concede its effect on legal obligation. Yet embarrassment presupposes something to be embarrassed about, and in the very act of not speaking about a thing—and knowing we do not speak about it—we make it real. The consensus shaped a corollary reduction in the Law of the Holocaust's prospective commitments the moment it rejected the core Sudeten claim: that what they had suffered is *also* a matter for human rights, for Europe, and for law.³¹¹

310. See, e.g., Norman & Trachtman, *supra* note 75, at 541 (noting that “[c]ustomary international law... is under attack as behaviorally epiphenomenal and doctrinally incoherent” but rejecting the bases for such an attack); Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5 (2003); see also Kelly, *supra* note 73.

311. One might object that none of this properly belongs in the realm of law, because law exists only in ordered societies. Yet the expulsions occurred in peacetime, and whatever the exigencies (including the altogether reasonable uncertainty about Europe's future political dispensation and Germany's role in it), there was sufficient order to refute the objection. If anything, the expulsions are remembered as the proximate means of reinforcing that restored order, as the Czech Constitutional Court makes explicit in *Dreithaler*. By the Court's reckoning, the “period of non-freedom” is defined as the period from September 30, 1938 (the day after the Munich Agreement) to May 4, 1945. *Dreithaler*, *supra* note 51, at para. 12 (interpreting Constitutional Decree of the President from Aug. 3, 1944, No. 11/1944, annex to the Interior Minister's Notice No. 30/1945, and Government Order No. 31/1945). Thus, the Decrees were legislated *after* the restoration of legal freedom. And indeed, any reading of the *Dreithaler* decision makes immediately clear how essential to the Czech jurisprudential self-conception is the idea that the period from 1945 to 1948 constituted the continuity of a rights-respecting, democratic sovereign state. Czech jurisprudence is very resistant to the claim that the Decrees were a function of extra-legal emergency. In any

Law looks for prohibition; seeing none, it makes no mark and moves on. Yet it is precisely by observing how we *accept* its legality and rightness that we can clearly see the categorical problem and the hidden content in the law. Those few—and they are few indeed—who believe the expulsions were entirely and essentially wrong readily see a contradiction between our commitments to “never again” and our contemporary responses to Sudeten claims. But those who believe the expulsions justified—which is almost all of us—also have to reconcile that view with our general opposition to ethnic cleansing. Rejecting restitution makes a definitional diminution of our commitment against ethnic cleansing and its effects inevitable. Indeed, the more strongly and successfully we defend the legality and rightness of the expulsions and close the book on restitution, the more we must acknowledge a corollary limit to the general prohibition on ethnic cleansing and to our professed obligation to make its victims whole in the future.

VI. FINALLY: LOOKING FORWARD, WHAT IS REMEMBERED

And it came to pass, when they had brought them forth abroad, that he said, Escape for thy life; look not behind thee...lest thou be consumed.... Then the Lord rained upon Sodom and upon Gomorrah brimstone and fire from the Lord out of heaven...But his wife looked back from behind him, and she became a pillar of salt.³¹²

The absence in the legal record reflects a moral consensus about the postwar order—a closing, not of history, but of reflection—and a quiet recognition that expulsion remains our potential policy. I do not mean to suggest the Corollary will swallow the rule against ethnic cleansing; on the contrary, it is an extraordinary exception that increasingly stands as the only instance of enforced movement of whole peoples we are still prepared to defend.³¹³ Yet it is this very singularity in what otherwise

event, to press the objection of “lawless times” too vigorously raises its own troubling problems: it brings into question other moments of legal ordering arising from the war, such as Nuremberg, and it simply begs the question of when and under what conditions our collective actions are governed by ordered law and when we are unrestrained. (Thanks to Marko Prelec for these points.)

312. *Genesis* 19:17, 24, 26 (King James). See also KURT VONNEGUT, *SLAUGHTERHOUSE-FIVE, OR THE CHILDREN'S CRUSADE: A DUTY-DANCE WITH DEATH* 16 (Vintage 2000) (1969) (employing roughly the same passage with reference to Allied bombing of Germany).

313. See Gibney & Roxstrom, *supra* note 283, at 911

(Within just the past few years there has been a spate of state apologies, as a number of governments have either acknowledged a previous wrong against some particular group,

appears so clear and uncontroversial a body of law—this fundamental intractability—that makes the Corollary significant. For we do defend them: although the German expulsions were the largest ever undertaken, they do not merit apology or compensation.³¹⁴ Instead, they are relied upon, unabashedly and successfully—and by our successful attempts to explain why this one act of ethnic cleansing alone was in fact entirely reasonable and just, we only define and entrench the exception's potential all the more.

Of necessity we do this in a manner hidden from our own sight. In our law, our morals, our history, and our politics, we have found it useful to remember the lesson in what Hitler told his generals about the Armenians on the eve of war: that we build our future by consigning to casual oblivion events we in fact remember with full clarity, events for which we will not apologize. It is a lesson that does not imply approval of the Nazis' particular moral vision, only acknowledgement of the strategic value in obliterating the ambiguities and obligations of memory.

Yet even this requires looking back. There is no valence to the anodyne proposition that "Europe is forward-looking;" such vapidty could

or else the apology has been transnational in scope as one state has acknowledged doing wrong to another state, but really to the people of this other country. (footnote omitted)).

Groups subjected to expulsion, appropriation, or extermination have had claims recognized by formal apologies, reparations, return of property, or creation of special rights: victims of the Nazis, aboriginal Australians, Japanese-Americans, Native Americans, First Nations in Canada, and inhabitants of Diego Garcia, for example. Claims by Armenians continue to be pressed in a variety of fora, while claims for reparations by descendants of black slaves in the Americas have had relatively little traction. *See d'Argent, supra* note 5, at 282

(Conditioned by the economics and politics of the period immediately following World War II, the post-war settlements were indeed mostly partial compared to the damages suffered....[F]ollowing the major geopolitical changes of the early 1990s, many individuals decided to challenge those settlements and claim reparations....All these claims...are instances of the same global phenomenon of elderly victims or their heirs contesting the old cosy interstate settlements or silence....Initiated in domestic courts...such claims, however, have rarely succeeded without some form of support by an influential state leading to a global out-of-court settlement.).

See also Torpey, *supra* note 5, at 2–3 ("Indeed, in view of the remarkable spread of demands to face up to the once subterra/anean past, one might well say that 'we are all Germans now' in the sense that all countries (and many other entities as well) that wish to be regarded as legitimate confront pressures to make amends for the more sordid aspects of their past and, often, to compensate victims of earlier wrongdoing.").

314. Indeed, the new rules against ethnic cleansing have been curiously constructed: that there is a near total absence of discussion of the German expulsions in the creation of these rules leaves open the interpretative window—by ethnic cleansing, do we really mean expulsions like those? It is at the least curious that, in constructing such a rule, we find ourselves condemning all such acts in modern history, except one.

counsel for any policy.³¹⁵ So it is fascinating to observe just how much forward-looking Europe is itself intensely, intently focused on vindicating and preserving a particular vision of history—on not succumbing, as one opponent of restitution notes, to the “danger of de-contextualizing the past.”³¹⁶ Even attempts to simply brazen out a determined policy of forwardness give away the game that everyone must put the same, very well defined past out of mind: thus we find Verheugen, Janus-like, declaring that “[n]obody is questioning the European post-war settlement. The EU Treaties do not aim to revise this settlement but to build a new future.”³¹⁷

Any admonition to look only forward implies and requires a vision of what is behind; Lot's wife turned because she could not believe without seeing for herself. Her punishment was suitably biblical, but in this age she is perhaps less an object lesson than simply that most modern of heroes—a victim.

Looking back, what would we see, or change? Does it matter that Hitler may actually never have uttered that notorious line?³¹⁸ It is an indica-

315. But see Gibney & Roxstrom, *supra* note 283, at 938 (“[W]hat state apologies have so often missed is that they are as much about looking forward as they are about looking backward.... So what an apology should seek to accomplish is not merely to uncover the wrongs of the past, but to anticipate present and future wrongs as well.”). Cf. Rupnik, *supra* note 59, at 69 (noting the Sudeten controversy represents a “difficult and painful debate about history...that is becoming all the more necessary for the *sake of future reconciliation*.... In the thirties, the *bête noire* of Central Europe was ‘the order of Versailles.’ Today it would be Potsdam.”) (emphasis added).

316. Petition Against a “Centre Against Expulsions,” For a Critical and Enlightened Debate About the Past (Aug. 10, 2003), <http://www.bohemistik.de/zentrumgb.html>. (“[T]here is the danger of de-contextualizing the past, thus breaking the causal relationship between the Nazi policies of radical nationalism and racial extermination on one hand and the flight and expulsion of ethnic Germans on the other hand.”). Cf. Macklem, *supra* note 55, at 19

[E]quality may require treating different pasts differently. It may require forgetting the treatment of ethnic Germans after the war because to remember suggests, wrongly, a moral equivalence with the horrors of the Holocaust. Forgetting is simultaneously an act of remembering, as it validates a collective Czech memory of ethnic Germans as complicit in the Nazi occupation and dismemberment of Czechoslovakia. But by remembering some pasts, international human rights law betrays its modernist aspirations and re-enters the history from which it seeks to escape.

317. Verheugen Speech, *supra* note 65.

318. The quote originates in a misinterpretation, a fabrication, or a truthful but uncorroborated document. Apparently, a document recording a meeting in Obersalzberg on August 22, 1939, and including the statement was to be introduced into evidence at Nuremberg but was withdrawn, although copies were released to the press. Two other records of meetings that day introduced into evidence (USA-29 and USA-30) do not include the comment. An apparent reference to the document as L-3 or USA-28 appears in the record of the trials. See LOUIS LOCHNER, WHAT ABOUT GERMANY? 2 (1942); *Zweite Ansprache des Führers am 22 August 1939*, IMG Nürnberg 1014-PS, Beweisstück USA-30, at n.1, <http://upload.wikimedia.org/wikipedia/commons/d/df/A-Hitler-08-22-1939-at-Obersalzberg-on-extermination-of-the-Armenians.pdf> (last visited Sept. 28, 2006);

tion of the Protean nature of his “Armenian comment” that it is mobilized by every imaginable type of commentator on these issues: the United States Holocaust Museum³¹⁹ and Holocaust deniers,³²⁰ advocates for recognizing the Armenian Genocide³²¹ and opponents of acknowledging Armenian massacres,³²² mainstream scholars,³²³ members of Congress,³²⁴ and Mumia Abu-Jamal.³²⁵ Underlying these cacophonous, mutually exclusive mobilizations is a question of history and truth: Hitler either said, or did not say, this or something like it.³²⁶ Yet what does it matter? Customary law is built on proofs about states’ actions and be-

see also *An Armenian Deception: ‘Who Remembers the Armenians—Adolph Hitler,’* 17 ARMENIAN REPORTER, Aug. 2, 1984, available at <http://www.atmg.org/ArmenianDeception.html>; WIKIPEDIA, *Armenian Quote*, http://en.wikipedia.org/wiki/Armenian_quote (last visited Sept. 28, 2006) (noting that “[i]n the absence of any means of either confirming or refuting the authenticity of the quote, and in light of the intense partisan passions surrounding both the Armenian genocide and the Holocaust, it is unlikely that this issue can ever be satisfactorily resolved”).

319. United States Holocaust Memorial Museum, Frequently Asked Questions...About the Museum, <http://www.ushmm.org/research/library/faq/details.php?topic=06#15> (last visited Sept. 28, 2006) (citing Lochner and noting that “[t]his particular language does not appear in any of the other primary source accounts of Hitler’s speech”).

320. Comments noting the quotation’s apparent inaccuracy are quite popular on Holocaust denial websites. See, e.g., Posting of Hannover to the CODOH Revisionist Forum: Holocaust Revisionism Discussion, *News! The ‘Who Remembers Armenians’ Lie Debunked/Forgery*, [HTTP://FORUM.CODOH.COM/VIEWTOPIC.PHP?T=943](http://forum.codoh.com/viewtopic.php?t=943) (last visited Sept. 28, 2006) (linking to the *An Armenian Deception* article and including the tagline “If it can’t happen as alleged, then it didn’t”); Mark Weber, *The Nuremberg Trials and the Holocaust: Do the ‘War Crimes’ Trials Prove Extermination?*, INST. HIST. REV./J. HIST. REV., http://www.ihr.org/jhr/v12/v12p167_Webera.html (last visited Sept. 28, 2006) (calling the document referring to the quote “spurious”).

321. See generally, KEVORK B. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* (1985).

322. Bruce Fein, *An Armenian and Muslim Tragedy? Yes! Genocide? No!*, Foreword to THE ARMENIAN ISSUE REVISITED, ASSEMBLY OF TURKISH AM. ASS’NS, <http://www.ataa.org/ataa/ref/armenian/fein.html> (last visited Sept. 28, 2006); *The Hitler Quote*, TALL ARMENIAN TALE: THE OTHER SIDE OF THE FALSIFIED GENOCIDE, <http://www.tallarmentale.com/hitler-quote.htm> (last visited Sept. 28, 2006); TÜRKKAYA ATAÖV, *HITLER AND THE “ARMENIAN QUESTION”/HITLER ET LA “QUESTION ARMENIENNE”* (1984).

323. See, e.g., Orentlicher, *supra* note 306, at 156; Tina Rosenberg, *Tipping the Scales of Justice*, in WAR CRIMES: THE LEGACY OF NUREMBERG 289 (Belinda Cooper ed., 1999).

324. See Heath W. Lowry, *The U.S. Congress and Adolf Hitler on the Armenians*, 3 POL. COMM. & PERSUASION (1985), reprinted in ARMENIAN ALLEGATIONS: MYTH AND REALITY 119–32 (Assembly of Turkish American Associations ed., 1986), available at http://www.ataa.org/ataa/ref/arm_uscongress/arm_uscongress.html (identifying twenty-two U.S. Senators and Congressmen who had variants of the Armenian comment read into the Congressional Record in support of Armenian Martyrs’ Day remembrances).

325. Mumia Abu-Jamal, *Hypothetical Holocausts?*, PRISON RADIO, Oct. 1, 2005, <http://www.prisonradio.org/WilliamBennett.htm>.

326. *The Hitler Quote*, *supra* note 322 (noting variants).

liefs, but it does not require the factual bases underlying those actions and beliefs to be accurate in order to generate law. When actors in the conversation that is customary law invoke a statement like the Armenian comment, assigning it value either as a dispositive truth or as a falsity implying an equally dispositive counter-truth, they make claims that can sound in law. It is the legislative authority of the source and its belief that generate indicia of a legal norm; historical truth is immaterial to that process, which is a question of perception—memory—not evidence. Hitler's statement, while perhaps not technically true (perhaps not true, that is, that he ever said it), would nonetheless be legally generative if relied upon to indicate something about the past that we invoke with reference to the future—because the future is invariably the point towards which discussions of Nazism are directed.

And yet, what is belief built upon, other than estimates of truth? Hitler did what we know he did, with the support of millions of Germans who participated in his horrors.³²⁷ Those guilty of evil deserve punishment, each in their measure, and by that logic the expulsion of fourteen million Germans was only that and only just; that is a morally coherent judgment, one which most of us, states and individuals alike, appear to hold. I think we all know that “individual, commensurate punishment” is not quite what happened—not quite what we did—but that is what we and our law say today, and who is to say it is wrong? Still, the reasons we give now are justifications not only for what we did then, but for what we are, under the right circumstances, prepared to do again. What we say and the reasons for it shape our law whether we acknowledge it or not; legal norms cannot be analyzed apart from underlying political and moral values. This is the tension, indeed the flaw, in customary law's attempt to play belief and act against each other to the advantage of whatever norms law's glossators prefer.

One need not personally advocate a Sudeten Corollary to observe that every relevant actor advocates it in practice, even though the text of this Corollary is nowhere to be read. And that may be all right. What we did to the Germans may have been justified—we certainly justify it today. (Or perhaps it is not right—in this article, as a matter of methodological commitment, I have chosen not to say what I think.) The Corollary only suggests that, since we *do* justify it, we can expect we will do it again as the occasion arises; the only puzzle is why we do not admit this. And so,

327. See, e.g., DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

observing that, here is the claim this Article makes: there is something troubling, not necessarily in the law we have, but in the way we make it. Denial and diminution of the expulsions' seriousness—remembering Sudetenland the way we do—have been both social result and source of law.

The mythology of human rights—by which I mean both its myth of origins and its mythic sense of purpose—imagines a movement arising out of the horrors of the Second World War, committed to a normative project that by protecting human dignity would render such wars unnecessary. What this origin myth ignores is that the Allies' war efforts and the expulsions were not derogations from our most sacred principles—they were the enforcement of those principles in response to terrible and clear affronts. The war and its aftermath were entirely consistent with the norms, aspirations, and methods of human rights because they were an integral part of them.³²⁸ Our own principles confirm that were such evil to descend on us again, we would again use just such methods, and again say we were right in doing so. To dismiss or isolate expulsion as supreme necessity, as if necessity were not a legally cognizable category, is to deny the predictability of this “sequence of cause and effect,” or to plead a kind of madness when it is obvious as a matter of history that this is not madness but intention, just as self-defense and vengeance are intended.

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

For who talks of the expulsion of the Germans? They do, of course; they remember. But how do we? The facts are well known to those who care to know. If the man on the street is ignorant of them, it is only because those facts are uninteresting, and because they are universally accepted as the justified foundation of Europe's future. Certainly there is nothing in our discussion of the expulsions like the wholesale, un-

328. As noted, the *Dreithaler* Court expressly grounded its refusal to overturn Decree 108/1945 on fundamental democratic and civilized principles, and stressed that these were found not only in the domestic legal order, but on anterior principles of the international order of which Czechoslovakia formed a part. *Dreithaler*, *supra* note 51. Thus, the Court effectively linked the reaffirmation of the Czechoslovak and international legal order to the expulsions, confiscations, and denaturalization effected by the Decrees.

equivocal condemnation of the Holocaust with all its gravitational effect on legal argument. I am in no way equating these unique acts—but why is it necessary to add this disclaimer? Some laws only work if hidden, but there is a cost to hiding things, to building a future by not looking back. It is surely a high price that—for fear of seeming to equate the victims of Fascism and of its opponents—it is all but impossible to speak of these things, or to remember Sudetenland any other way.

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