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**RYBNÁ 9, PRAHA 1:
RESTITUTION AND MEMORY IN
INTERNATIONAL HUMAN RIGHTS LAW**

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RYBNÁ 9, PRAHA 1:
RESTITUTION AND MEMORY IN
INTERNATIONAL HUMAN RIGHTS LAW

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Abstract^{*}

The history of Rybná 9, Praha 1—a building in the old city of Prague—illustrates how international human rights law, producing new forms of legal right and obligation, participates in the turbulence of modernity. With its capacity to remember the past through the discourse of human rights, international law engages and formalizes a politics of collective memory. This article explores the relationship between international human rights law and collective memory in the context of challenges to post-communist restitution initiatives in Central and Eastern Europe. Rybná 9 formed the basis of one such challenge before the United Nations Human Rights Committee. Other restitution cases have proceeded to the European Court of Human Rights. Whereas the Human Rights Committee is willing to remember certain pasts as a matter of equality, the European Court of Human Rights approaches equality with a modernist impulse to repudiate history. This divergence is especially acute when comparing how the field engages the collective memories of Jews and the Holocaust and those of Sudeten Germans after the war. International legal engagement with the politics of collective memory thereby reflects broader debates about the emergent nature of European citizenship.

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His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.

Walter Benjamin, *Illuminations*¹

INTRODUCTION

Rybná 9 is a nondescript, six-story building located in the heart of the old city of Prague. Adorning its dirty, stucco exterior is a large, burnished metal sign announcing that it houses the head office of Technomat, a state-owned company trading in pipes, radiators, and heaters. Although its sign still remains, Technomat is long gone, consigned to the dustbin of communism's history. Kooperativa Pojišťovna a.s., one of the largest insurance companies in the Czech Republic, is now the building's major tenant. Other occupants include a lawyer, a small management consulting firm, and several individuals living in flats interspersed among the top five floors.

Rybná 9's unassuming exterior hides a tumultuous social and legal history—one that reflects the twentieth century “storm” that, in Walter Benjamin's words, “we call progress.” It reveals the profound transformations that occurred in Europe as the continent endured the onslaught of national socialism and world war, the installation of communism and collective ownership, violent suppression of minority identity and opinion, and fitful post-communist engagements with liberal democratic politics. It illustrates how law, producing new forms of legal right and obligation, participates in the turbulence of modernity, and how international human rights law in particular establishes, shapes, and mediates the collective memories of religious, ethnic and cultural communities.

Before the Second World War, Rybná 9 was owned by the Brok family, who ran a textile business on the ground floor. They lived in the building, in a spacious, third-floor apartment, and rented the remaining flats to their employees and other tenants. As Nazi Germany began its genocidal reconfiguration of Europe in the 1930s, the Broks fled Czechoslovakia and emigrated to Canada. In 1939, Germany stripped Czechoslovakia of her resources, territory and sovereignty and introduced the Nazi legal order, including the 1935 Nuremberg laws depriving Jewish persons of the right to own property. Nazi authorities confiscated Rybná 9 and transferred title to the property to a Slovakian company.

After the war, Rybná 9 was nationalized by the short-lived, post-war National Front Czech government, treated as state property after 1948 by communist authorities of the Czechoslovak Socialist Republic, and then sold to an offshore holding company during the post-communist, liberal-democratic reforms of the 1990s. One of these reforms included a restitution initiative that returned property, taken by the Nazi and communist regimes, to their original owners.

¹ Walter Benjamin, *Illuminations* (1999) 249.

Rybná 9 fell outside the scope of the initiative. The Brok family took the Czech government to court, hoping to reacquire what was once their home. Eventually they filed a complaint before the United Nations Human Rights Committee. The Committee held that the Czech restitution initiative, by excluding Rybná 9, was in violation of the guarantee of equality enshrined in the International Covenant on Civil and Political Rights.

The decision of the Human Rights Committee in *Brok v. Czech Republic* was not the first time the Committee had examined the international legality of post-communist restitution. In earlier cases, it had held that a state, when redistributing property, could not arbitrarily rely on the legal status of dispossessed property owners to determine who is entitled to restitution.² In *Brok*, the Committee was asked a related but more fundamental question, namely, whether a restitution initiative can ignore the justice of the distribution of property in place before the establishment of communist rule.

The distribution of property in Czechoslovakia at the advent of communism—who owned what and why—was in no small measure the product of Nazi rule. Nazi authorities had seized and redistributed countless homes, farms and businesses from Czech citizens for purposes of war. The post-war government returned some but not all of these properties to their original owners. This distribution was also partly the result of the post-war treatment of ethnic Germans in Czechoslovakia. During the war, ethnic Germans living mostly in a region northeast of Prague known as Sudetenland generally were regarded by Czechs as complicit in Nazi oppression. In the war's aftermath, before the establishment of communist rule, the Czech government stripped ethnic Germans of their Czech citizenship, confiscated their property, and expelled approximately three million Sudetens from the country.

The Committee's treatment of the history of Rybná 9 stands in stark opposition to its approach to claims by Sudeten Germans that they too, in the name of equality, are entitled to property restitution from the Czech Republic.³ The Committee's treatment of Rybná 9 also differs dramatically from the approach of the European Court of Human Rights, which, generally speaking, refuses to entertain any equality claim under the European Convention on Human Rights relating to the scope of restitution initiatives in post-communist Europe.⁴ While the Human Rights Committee is willing to remember certain pasts as a matter of equality, the European Court of Human Rights approaches equality with a modernist impulse to repudiate history. International legal engagement with the politics of collective memory—international human rights law as memory—thereby reflects broader debates about the emergent nature of European citizenship.

² See *Simunek v. Czech Republic*, CCPR/C/54/D/516/1992, Decision of 31 July 1995 (residency); *Adam v. Czech Republic*, CCPR/C/57/D 586/1994, Decision of 23 July 1996 (citizenship).

³ See *Malik v. Czech Republic*, CCPR/C/D 669/1995, Decision of 21 October 1998.

⁴ See *Gratzinger and Gratzingerova v. Czech Republic*, 000397/94/98, Decision of 10 July 2002.

I.

By the end of 1938, about 150,000 Czechs—Jewish as well as ethnic Czechs and Germans—had fled the First Czechoslovak Republic to escape the wrath of Nazi supporters. Under German duress, Slovakia declared independence in 1939. What remained of Czechoslovakia became the Protectorate of Bohemia and Moravia under the direct control of the Third Reich, and the Nazi legal order took effect in the region.⁵ Czech political and cultural organizations were banned. Universities were closed. Throughout the country, the Gestapo torched synagogues, murdered Jews in the streets, and, in 1939 alone, arrested or sent to concentration camps approximately 10,000 people.⁶

The Broks fled Czechoslovakia in 1939, but their son, Robert, a young man in his mid-twenties, remained at Rybná 9 to run the family business. Although his parents left him a ticket to Canada, he delayed his departure, believing that national socialism would soon pass. The ticket expired, and Robert found himself wearing the Jewish Star. Nazi authorities thereafter confiscated Rybná 9, liquidated the Broks' business, and transferred title to the property to Matador Gumiwerke a.g., Prague, a local branch of Matador Bratislava, a Slovakian tire manufacturer associated with the Axis war effort. Rybná St. was assigned a German name, Fischmarkt, and Rybná 9 became known as Fischmarkt 9 for the remainder of the war.

By 1941, in charge of the Protectorate was Reinhard Heydrich, one of the chief architects of the “Final Solution.” Known as the hangman of Prague, Heydrich unleashed a reign of terror in the Protectorate. In the first week of tenure as Reich Protector, Heydrich arrested at least 6,000 people and, by the end of the year, executed more than 400. Heydrich was eventually assassinated in 1942 by Czech resistance fighters parachuted into Czech territory by British airplanes. His assassination only provoked the Nazis to unleash another shocking wave of terror, executing thousands and destroying entire villages whose residents the Germans believed provided assistance to the resistance.⁷

Of the 118,310 Jews in the Protectorate in 1939, 78,154 died at German hands.⁸ Most Czech and Moravian Jews, together with Jews from neighboring countries, were interned at Terezín. One of the most unusual of the concentration camps, Terezín—also known by its German name, Theresienstadt—was an 18th-century garrison town about 60 kilometers north of Prague. Heydrich forced its residents to leave in the early 1940s and turned the town into a model ghetto to camouflage the eventual extermination of European Jews. Used for propaganda purposes, Terezín served as the set for a number of films displaying the camp as a Jewish town, replete with concerts, sports events and local government.

⁵ Specifically, existing Czech laws continued to govern except to the extent they conflicted with the laws of the German Reich or any decrees of the German Protector of the region.

⁶ For detail on 1938-39, see Jürgen Tampke, *Czech-German Relations and the Politics of Central Europe: From Bohemia to the EU* (2003) 57-58.

⁷ Maria Dowling, *Czechoslovakia* (2002) 72.

⁸ Derek Sayer, *The Coasts of Bohemia: A Czech History* (trans. Alena Sayer) (1998) 227 and sources cited therein.

Robert Brok was transported to Terezín in March of 1943. For many Terezín was a brief stop before deportation to Auschwitz or one of the other killing centers. As Terezín's population began to grow, transport trains began taking residents to the east. The first deportation, of 2,000 Jews to Riga, took place in January 1942. In September of the same year, the camp reached its peak population of 53,004 people. There were more arrivals as deportations to the east—to camps in Poland and the Baltic states and, as of October 1942, to Treblinka and Auschwitz—continued. Of Terezín's 139,517 inhabitants between November 1941 and April 1945, 87,063 were transported to the east; 33,521 inhabitants died at the camp itself.⁹ Perhaps because of his age, Robert eluded deportation until the end of September of 1944. On 29 September, he was deported to Auschwitz.

At Auschwitz, those deemed unfit to work by Nazi authorities were sent to be killed in gas chambers whereas able-bodied prisoners like Robert were spared immediate death to form a huge pool of slave labor. Between 28 September and 28 October of 1944, continuing until the gas chambers in the east ceased to function, a total of 18,402 inmates had been transported from Terezín to Auschwitz. Only 1,574 of them survived until the end of the war.¹⁰ Most who survived had remained at Auschwitz or worked out of concentration camps in the region. Robert worked as a slave laborer at a stone quarry in Golosov until January of 1945, when he was shipped to a factory in Brnenec that Oskar Schindler established in the dying days of the war as a safe haven for Jewish concentration camp prisoners in Poland and elsewhere. Robert weighed a mere 45 kilograms when Brnenec was liberated by Soviet forces in 1945.

At the war's conclusion, Eduard Beneš, a leader of the Czech resistance, established a short-lived, representative government. He initially ruled by decree, until 28 October 1945, when legislative power was transferred to the provisional National Assembly. One of the Beneš decrees, as they became known, Decree No. 5, voided property transactions that occurred on the basis of racial or political persecution under the German Reich. Paragraph 3 of Decree No. 5 also instituted "national administration" of certain firms and factories operated by "persons unreliable to the state." Other decrees involved the nationalization of elements of the private sector. Decrees No. 100-103 nationalized certain industrial enterprises, banks, and insurance

⁹ Sayer, *The Coasts of Bohemia*, *supra*, at 227-28 and sources cited therein. Tampke, *Czech-German Relations*, *supra*, at 167, n. 114 and sources cited therein state that 33,419 died at Terezín and 86,934 were sent to extermination camps. Data from 15 March 1939 record 118,310 Jews living in Bohemia and Moravia. (According to the census of 1930 the number of Jews was 117,551.) Only 7,884 Jews were left in the Protectorate on 30 April 1945. Livia Rothkirchen, "The Jews of Bohemia and Moravia, 1938-1945," in Avigdor Dagan et al. (eds), *The Jews of Czechoslovakia*, vol. 3 (1984) at 60, 13 and 54 respectively. In Slovakia, in 1930, 136,737 Jews were living in Slovakia. After Slovakia had declared its independence in 1939, of its 136,000 Jews, 40,000 found themselves under the Hungarian rule. Thus, the census of 1938, which does not include the Jews who lived on the territory annexed to Hungary, records the number of 85,045. In June 1946 only 28,000 Jews survived in Slovakia. Among those were survivors of the Holocaust or returnees from abroad. Yeshayahu Jelinek, "The Jews in Slovakia: 1945-1949," *ibid* 531-550, at 531. Erich Kulka, "The Annihilation of Czechoslovak Jewry," *ibid* 262-328, at 262.

¹⁰ Vojtěch Blodig, *Terezín in the "Final Solution of the Jewish Question" 1941-1945* (trans. Jan Valeška & Lewis Paines) (2003) 36.

companies.¹¹ The nationalization decrees were not far-reaching, affecting only 17.4 percent of businesses, with most smaller enterprises remaining private.¹²

On his release from Terezín, Robert was immediately hospitalized. Six months later, when he had regained his health, Robert tried to regain ownership of Rybná 9. He relied on Decree No. 5, which voided property transactions that occurred on the basis of racial or political persecution under the German Reich. Robert learned from the Cadastre¹³ that title to Rybná 9 vested in Matador in May 1942 but that the property, and Matador, came under “national administration” by order of the Ministry of Industry on 2 August 1945¹⁴ and then was “nationalized” by Decree No. 100, in October 1945. He wrote to the Ministry, arguing that Decree No. 5 invalidated Matador’s 1942 acquisition of Rybná 9 because it had been acquired on the basis of racial or political persecution. He was initially successful. In February 1946, the Ministry, confirmed by the County Court, reinstated Robert’s parents as the rightful owners of Rybná 9.

The Ministry reversed itself three weeks later. It held that Decree No. 100 transferred title to the state as of January 1946.¹⁵ This decision was confirmed by the Land Court in August 1946¹⁶ and, after an appeal by Robert, by the Supreme Court in January 1947.¹⁷ The Court declared Matador to be the rightful owner of the property, holding that the company, including its assets and properties, had been nationalized by Decree No. 100, and therefore that Rybná 9 was “national property” excluded from the scope of Decree No. 5.

In May of 1946, elections were held in Czechoslovakia for the first time since the 1930s. The communist parties in the Czech and Slovakian territories received 40.1 and 30.3 percent of the vote, respectively, garnering them several key cabinet posts and the office of the Prime Minister itself.¹⁸ In 1948, the communist minister of the interior fired several non-communist police officials. He refused to comply with a government order to reinstate them and, as a result, several democratic ministers resigned. Instead of triggering a new election, the crisis enabled the Prime

¹¹ Decree No. 100/1945 Coll. of 27 October 1945 nationalized mines and certain industrial enterprises; Decree No. 101/1945 Coll. of 27 October 1945 nationalized certain enterprises in the food industry; Decree No. 102 nationalized banks; and Decree No. 103/1945 Coll. of 27 October 1945 nationalized private insurance companies.

¹² Dowling, *Czechoslovakia, supra*, at 82.

¹³ According to Czech law, title is established by an inscription by a court into a book known as the Cadastre, which serves as an official record. At the time of these transfers, the Cadastre was known as the Land Record Book.

¹⁴ Decision 156.803/45-II of 2 August 1945.

¹⁵ The timing of the three Ministry decisions is critical. First, in August 1945, the Ministry instituted “national administration” of Matador, pursuant to its decision (“vým•r”)156.803/45-II (2 August 1945) (registered in the Cadastre by the court of the first sitting (“Súd první stolice”) on 14 August 1945). Second, in February 1946, the Ministry decided in Mr. Brok’s favor: Ministry of Industry, decision II/2-7540/46 (19 February 1946) (registered in the Cadastre by the court of the first sitting on 21 February 1946). Third, on 7 March 1946, the Ministry decided by order 1252 that Decree No. 100 and the Government decree 6/1946 transferred title to the state *as of 1 January 1946*: According to Ministry order 1252 (“vyhláška”), Matador, národní podnik (“national enterprise”) in Bratislava, including the property on Rybná 9, was nationalized when the Decree 100 came into force on October 27, 1945. The property title was transferred as of 1 January, 1946. (Information is listed in Prague District Court Decision 26 C 49/95-18 of 20 November 1995, *infra* note 46 at 1-2.) On the strength of this last decision, Matador filed a complaint against the 21 February 1946 county court decision initially registering title in the Broks.

¹⁶ Land Court Decision RV 65/46-2 (7 August 1946): see *Robert Brok v. Technomat, s.p.*, Prague City Court Decision, *infra* note 46 at 2.

¹⁷ Supreme Court Decision RI 239/46 (31 January 1947), *ibid*, at 2.

¹⁸ Dowling, *Czechoslovakia, supra*, at 82-83.

Minister to name communist replacements. The new cabinet, as well as the Prime Minister, was now dedicated to the establishment of communist rule—in Ivan Klíma’s words, yet another “mutation of fanaticism” that defined Czechoslovakia’s fate for the remainder of the century.¹⁹

The new government moved swiftly and brutally to consolidate its power. It barred non-communist politicians and officials from government buildings, orchestrated show trials of prominent public figures, and forced tens of thousands of people into labor camps, confiscating their businesses and property. It prohibited children of bourgeois parents from attending high school or university. It required Catholic priests to take an oath of loyalty or face internment in a labor camp. It renamed bridges, streets and squares to erase the memory of Beneš and other national figures. It declared October 28—a public holiday commemorating Czechoslovak independence in 1918—to be a holiday celebrating the 1945 decree that nationalized industrial and financial enterprises.²⁰

After Robert failed to reacquire Rybná 9, Matador offered Robert a single room to rent in the building as a place to live. Matador had divided his family’s apartment into separate flats. Robert moved into his parents’ old bedroom on the third floor overlooking Rybná St., sharing a bathroom and kitchen with other residents of the building. This arrangement continued beyond the establishment of the Czechoslovak Socialist Republic in 1948. Several years later, the new communist government transferred title to Rybná 9 from Matador to Technomat, s.p.,²¹ a state-owned corporation.²²

Because of his bourgeois background, the communist authorities required Robert to perform unskilled work. Over the years, he dug ditches, found employment at farms outside of Prague, worked intermittently as a night watchman, and eventually secured a position as a doorman at a hotel across the street from his flat. For more than 40 years, until 1989, when communism in Central and Eastern Europe finally ran its course, Robert Brok rented a room from a state-owned corporation in the building that his parents used to own before it was confiscated by the Nazis.

II.

Contemporary international human rights law owes its existence in no small measure to the horrors of the Holocaust. The Universal Declaration of Human Rights, adopted three years after the Allied victory, together with the Charter of the United Nations, gave formal expression to the view that human rights possess international legal significance. These developments were followed in 1976 by the International Covenant on Civil and Political Rights, the International

¹⁹ Ivan Klíma, *The Spirit of Prague and Other Essays* (1993) (11th ed. translated by Paul Wilson 1994). 27.

²⁰ Sayer, *The Coasts of Bohemia*, *supra*, at 280.

²¹ “S.p.” is an abbreviation of “státní podnik,” which means “state enterprise.”

²² The Cadastre records transfer of title from Matador, národní podnik to Technomat národní podnik on 2 June 1954. Before this transfer, there appears to have been some confusion over the correct name of the (nationalized) entity holding title to Rybná 9. As a result of the Supreme Court’s decision, “Matador in Prag” was registered as owner in the Cadastre on 12 March 1947. On 2 April 1947, this was changed to “Matador Bratislava, národní podnik.” On 18 April 1947, this was changed to “Matador, národní podnik”: see inscription by the Prague Cadastre, *supra* note 14.

Covenant on Economic, Social and Cultural Rights, and, more recently, other specialized treaties addressing specific categories of international human rights.²³

International institutions responsible for the production, elaboration and enforcement of international human rights norms, including the U.N. Human Rights Committee—which heard the case involving Rybná 9—have been largely incapable of assessing the legality of coercive confiscation of private property. In no small measure, this was due to the establishment of communist rule in Central and Eastern Europe, where the legality of property confiscation lay beyond the province of international human rights law. The International Covenant on Civil and Political Rights achieved the requisite number of ratifications necessary to enter into force only in 1976, more than a quarter century after the wrenching reconfiguration of property relations accompanying the establishment of communist rule in the region. The Human Rights Committee typically regards claims relating to events occurring before the Covenant’s entry into force as inadmissible *ratione temporis*.²⁴

In *Somers v. Hungary*, for example, at issue was the failure of post-communist Hungary to return property confiscated in the 1950s because its owners were opponents of the communist party and “members of the local Jewish community with alleged ‘Zionist connections.’”²⁵ Consistent with the more general international legal principle of non-retroactivity of treaties,²⁶ the Committee held that a state assumes obligations under the Covenant only as of its date of entry into force for that state.²⁷

Even after 1976, when the Covenant entered into force in most Central and Eastern European states,²⁸ the Human Rights Committee was unwilling to entertain complaints relating to state actions occurring before a state became subject to the Optional Protocol. In *E. and A.K. v. Hungary*, for example, E. and his spouse, A.K., both of whom were Hungarian citizens, had their home confiscated in 1984 when E. accepted a promotion, contrary to the wishes of Hungarian authorities, in the International Labour Office in Geneva.²⁹ The Committee ruled the complaint inadmissible on the basis that it does not possess the jurisdiction to consider complaints which occurred before the entry into force of the Optional Protocol in Hungary.

²³ International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 U.N.T.S. 195, in force 1969, Convention on the Elimination of All Forms of Discrimination Against Women (1979), 1249 U.N.T.S. 14 in force 1981, Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, (1984) 1914 U.N.T.S. 519, in force 1987, Convention on the Rights of the Child, (1989)1577 U.N.T.S. 43, in force 1990.

²⁴ “By reason of time.”

²⁵ CCPR/C/57/D/566/1993. Decision of 29 July 1996, para. 2.3.

²⁶ See Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331, in force 1980, art. 28 (“unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party”).

²⁷ Para. 6.3.

²⁸ The former Czechoslovakia signed on the Covenant on October 7, 1968; in force on 23 December 1975; Hungary signed on 25 March 1969; in force on 23 March 1976; Poland signed on 2 March 1967; in force on 18 June 1977; Romania signed on 27 June 1968; in force on 23 March 1976; Bulgaria signed on 8 October 1968; entry in force on 23 March 1976; the former Yugoslavia signed on 8 August 1967; entry in force on 2 June 02 1971.

²⁹ CCPR/C/50/D/520/1992. Decision of 5 May 1992.

Compounding these procedural hurdles is the fact the Covenant does not substantively protect a right to property—a fact that has not escaped the notice of the Human Rights Committee. In *Somers*, the Committee made it clear that, because of the absence of a right to property in the Covenant, “there is no right, as such, to have (expropriated or nationalized) property restituted.”³⁰

The confiscation of private property implicates other rights protected by the Covenant, such as the right to privacy and the right to a family.³¹ But unless it can be shown that a violation continues after the entry into force of the Optional Protocol, the Committee regards the principle of non-retroactivity as governing. In *E. and A.K.*, the Committee held that a continuing violation exists only where there has been “an affirmation, after the entry into force of the Optional Protocol, by act or by clear affirmation, of the previous violations” by the state.³² An ongoing failure to compensate, in the Committee’s view, does not amount to an affirmation of a prior violation.³³

These procedural and substantive barriers made it virtually impossible for the field to assess the international legality of communist expropriation and nationalization of private property in Central and Eastern Europe—let alone reach back before communism’s establishment to assess the barbarous acts associated with national socialism. But international human rights law has begun to examine the international human rights dimensions of post-communist restitution initiatives that return nationalized property to their original owners. Because these initiatives are being introduced and administered after the entry into force of the Optional Protocol, complaints that they infringe rights protected in the International Covenant do not risk being held inadmissible *ratione temporis*.

The most significant Covenant right implicated by post-communist restitution initiatives is the right to equality. Article 26 of the Covenant declares that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” It further requires states to “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In *Somers*, although the Committee held that the Covenant did not protect a right to property, it also held that if a state decides to compensate property owners for prior acts of confiscation or nationalization, it must utilize “objective compensation criteria, ... applied equally and without discrimination.”³⁴ In light of the open-ended language of Article 26, restitution initiatives must pay close attention to the demands of distributive justice.

³⁰ CCPR/C/57/D/566/1993. Decision of 29 July 1996, para. 9.6.

³¹ Art. 17 protects an individual’s privacy, family, home or correspondence from “arbitrary or unlawful interference” and Art. 23 provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Art. 17 largely imposes negative obligations on state parties although they are under an obligation to enact legislation prohibiting privacy intrusion. Art. 23 imposes additional positive obligations for strengthening the institution of the family. See generally, Sarah Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (2000) 348-370 and 442-466.

³² *E. and A.K.*, *supra*, at para. 6.4.

³³ *Ibid*, at para. 6.6.

³⁴ *Somers*, CCPR/C/57/D/566/1993. Decision of 29 July 1996, para. 9.4.

The Human Rights Committee initially concerned itself with the distributive justice of measures that conditioned restitution or compensation on residency or citizenship. In *Simunek*, for example, the Committee concluded that the Covenant's equality guarantee prohibited the Czech government from arbitrarily distinguishing between residents and non-residents in the context of restitution.³⁵ To the extent that political persecution accounts for the departure of a Czech citizen, the Committee reasoned, "it would be incompatible with the Covenant" to require residency as a prerequisite of restitution.³⁶

The Committee reached a similar conclusion regarding the requirement of Czech citizenship itself. In *Adam*, at issue was whether Article 26 of the Covenant required the Czech government to restitute property to Australian-born children of a Czech citizen who fled the country after his property had been confiscated by the government in 1949.³⁷ The children inherited the property upon their father's death in 1985 but they were prevented from acquiring the property under the restitution initiative on account of their citizenship. As in *Simunek*, the Committee in *Adams* noted that "the State party itself is responsible for the departure" of the property owner.³⁸ It concluded that "the continued practice of non-restitution to non-citizens of the Czech Republic has had effects" on the children "that violate their rights under Article 26 of the Covenant."³⁹

III.

In 1973, Robert Brok met Dagmar Dvořáková. He was 57 and she was 24. Dagmar worked in a concert hall in Prague—they met in the cafeteria—and Robert invited her to a dance, then a concert, and they soon became a regular item. After a few holidays together, Dagmar's mother urged them to marry. Marry they did, and they had four children between 1975 and 1981. Dagmar repeatedly tried to persuade Robert to give up their room in Rybná 9, and eventually she was able to obtain a studio apartment for her family. Although Robert moved his family to the apartment, he continued to rent the room in Rybná 9. As he explained to Dagmar, "you can't plant an old tree in a new place."

Widely considered to be a leader among Central and Eastern European states in its swift success in post-communist economic transformation, Czechoslovakia engaged in rapid and dramatic privatization of state property in the 1990s. Privatization in Czechoslovakia was accomplished by a range of methods, including large-scale privatization, auctions for small-scale enterprises, a

³⁵ *Simunek*, CCPR/C/54/D 516/1992. Decision of 31 July 1995.

³⁶ *Ibid*, at para. 11.6.

³⁷ *Adam v. Czech Republic*, CCPR/C/57/D 586/1994 Decision of 23 July 1996. See also *Blazek et al. v. Czech Republic*, CCPR/C/72/D/857/1999. Decision of 9 August 2001, para. 5.8 ("[t]he Committee ... cannot conceive that the distinction on the grounds of citizenship can be considered reasonable in light of the fact that the loss of Czech citizenship was a function of [the authors'] presence in a State in which they were able to obtain refuge"); *Des Fours Walderode v. Czech Republic*, CCPR/C/73/D/747/1997. Decision of 2 November 2001, para. 8.4 ("a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently a discriminatory distinction between individuals who are equally victims of prior state confiscations ... further exacerbated by the retroactive operation of the impugned Law").

³⁸ Para. 12.6.

³⁹ Para. 12.8.

mass voucher system of distributing investment points for stock purchases, limited foreign sales, and restitution.⁴⁰

The Czech restitution initiative, “calling for the large scale return of property in kind to its original owners,” was regarded as “the most radical ... and broadest in scope” of those introduced in post-communist Central and Eastern Europe.⁴¹ Introduced in 1991⁴² and amended in 1994,⁴³ the initiative provides restitution or compensation to victims of illegal confiscation carried out for political reasons during the reign of the Czechoslovak Socialist Republic from 1948 to 1990.⁴⁴ The legislation also provides restitution or compensation to individuals whose property was confiscated for racial reasons by the Nazis during the Second World War if they were entitled to restitution or compensation under Beneš Decree No. 5.⁴⁵

During the post-communist market reforms in the Czech Republic, Technomat was liquidated, and Rybná 9 was sold to private investors. Consistent with the dramatic rent increases at the time, Robert’s rent for his room in Rybná 9 apparently skyrocketed, and he could no longer afford to lease his room. He applied to the Czech courts for restitution of Rybná 9, claiming that he was entitled to restitution under Decree No. 5 and therefore fell within the ambit of the restitution initiative.

In *Robert Brok v. Technomat, s.p.*,⁴⁶ the District Court recognized that Robert had a legal right to the property either under Decree No. 5 or Act 128/1946—both of which declared void some property transactions that occurred because of racial or political persecution under Nazi rule. But it also found that Matador had been nationalized according to Decree No. 100 in 1945⁴⁷ and its property transferred by the Ministry to Matador in 1946. According to the District Court, nationalization of Rybná 9 under Decree No. 100 prevented the possibility of its restitution under Decree No. 5. The Court held further that the subsequent transfer of the property from the state to Technomat also fell outside the scope of the restitution initiative. According to the Court, although this transfer occurred under communist rule, Rybná 9 had become state property before the period governed by the Czech restitution initiative.⁴⁸

⁴⁰ See generally Irene McMaster, “Privatization in Central and Eastern Europe: What Made the Czech Republic So Distinctive?” (European Policies Research Centre, University of Strathclyde, November 2001). See generally, Anna Gelpert, “The Laws and Politics of Reprivatization in East-Central Europe: A Comparison,” 14 U. Pa. Int’l Bus. L. 315 (1993).

⁴¹ Andrzej K. Kozminski, “Restitution of Private Property: Re-privatization in Central and Eastern Europe,” 30 *Communist and Post-Communist Studies* 95 (1997), at 99.

⁴² Act No. 87/1991 Coll. of 21 March 1991 on Extra Judicial Rehabilitation.

⁴³ Act No. 116/1994 Coll. of 29 April 1994 amending Act 87/1991 of 21 March 1991 on Extra Judicial Rehabilitation.

⁴⁴ Art. 1 (1) of Act No. 87/1991, *supra* note 42. (“The aim of this act is to mitigate the consequences of material and other damages arising from civil, labour or administrative acts that had been undertaken from February 25, 1948 to January 1, 1990”).

⁴⁵ Art. 1 (1) of Act No. 116/1994, *supra* note 43.

⁴⁶ *Robert Brok v. Technomat, s.p.*, District Court Decision 26 C 49/95 - 18 of 20 November 1995.

⁴⁷ Note that the property was first placed under “national administration” and then “nationalized.” See *ibid*, at 5-6, and *supra* notes 14 and 15.

⁴⁸ Art. 1 (1) of Act No. 87/1991, *supra* note 44.

On appeal, the Prague City Court confirmed the District Court's ruling and reasons.⁴⁹ The City Court added that Decree No. 5 invalidated a property transaction concluded after 29 September 1938 if made under pressure or racial or political persecution, but an "invalidity" had to be established by a relevant proceeding.⁵⁰ Because Robert failed to convince the Supreme Court in 1947 to invalidate the initial confiscation of Rybná 9, Matador held title to the property until its assets were nationalized by Decree No. 100, rendering Rybná 9 "national property" excluded from the scope of Decree No. 5.

A further appeal to the Constitutional Court, based on an alleged violation of the right to property, was unsuccessful.⁵¹ As in the courts below, Robert argued that he possessed title to Rybná 9 because Decree No. 5 invalidated its confiscation by the Nazis and its subsequent transfer to Matador. Because Matador never held title, Decree No. 100 could not have had the effect of nationalizing the property. The Court held that the constitutional right to property only protects existing property rights. It ruled that, because of the lower court rulings, Rybná 9 was no longer Robert's property and therefore the restitution law did not violate his right to property. Robert died shortly after the Constitutional Court's ruling, on September 17, 1997.

After Robert's death, Dagmar and their son, Evžen, took his case to the United Nations Human Rights Committee. By its decisions in *Simunek* and *Adam*, the Committee had made it clear that a restitution initiative cannot arbitrarily rely on the legal status of dispossessed property owners to determine who is entitled to restitution. Left unanswered were the broader temporal demands of distributive justice—whether a post-communist restitution initiative could ignore the justice of the distribution of property rights in place before the establishment of communist rule.

In *Brok v. Czech Republic*, the Committee stated that the International Covenant on Civil and Political Rights requires the Czech Republic to return Rybná 9 to Mrs. Broková.⁵² In its view, Czech restitution legislation denied her equal protection of the law as guaranteed by Article 26 of the Covenant. It reasoned that the restitution initiative arbitrarily distinguished between property owners, like Mrs. Broková, whose property was confiscated by the Nazi authorities and then nationalized immediately after the war, and property owners whose property was confiscated by the Nazis but not nationalized after the war. It called on the Czech government to transfer title to Mrs. Broková or compensate her for the value of the property.⁵³

IV.

The significance of international legal engagements with history such as *Simunek*, *Adam*, and *Brok* should not be underestimated. Until recently, an "archaeology of silence" structured the

⁴⁹ *Robert Brok v. Technomat, s.p.*, Prague City Court Decision, *supra* note 46.

⁵⁰ The Court also held that the aim of the 1990s restitution legislation was to mitigate the consequences of material and other injuries arising from civil, administrative and labor acts, with the exception of court decisions.

⁵¹ Constitutional Court Decision No. III.ÚS 132/96, Decision of 12 September 1996.

⁵² *Brok v. the Czech Republic*, CCPR/C/73/D/774/1997, Decision of 31 October 2001.

⁵³ Committee member Martin Scheinin partly concurred and partly dissented, arguing that whether Mr. Brok "is entitled to the restitution of his parent's property is an issue of domestic law" and that "the proper remedy ... is that the State secures to the widow a fresh possibility to have the restitution claim considered, without discrimination or arbitrariness."

field's relationship to its origins⁵⁴—an archaeology that accounts for the field's fearlessly modernist focus on the present and future at the expense of the past, and for its optimistic tendency to equate human rights with human progress. By beginning to engage and speak to the injustices of the Holocaust and communist rule, albeit mediated through assessments of underinclusive post-communist restitution measures, international human rights law is starting to cut against its own grain and construct legal spaces for the expression of collective memory.

Maurice Halbwachs was likely the first sociologist to emphasize that social processes participate in memory. He introduced the term “collective memory” to emphasize how social processes influence not only individual memories of significant events in one's life, but also a community's shared memories of the past.⁵⁵ Shared memories form the part of a fabric of beliefs of a community or society—beliefs relating to not only its past but its present identity and future aspirations. They provide social frameworks in which individual memory operates. In Pierre Nora's formulation, collective memory is “what remains of the past in the lived reality of groups, or what these groups make of the past.”⁵⁶

Acts of remembering thus are complex choices that instantiate the contours of a community's continuity with the past, and sustain its identity over time. But because groups cannot themselves remember,⁵⁷ and individuals increasingly move in and out of many different communities of identity, collective memory possesses temporal fragility. A group's collective identity is partly the product of collective memory, yet collective memory ultimately requires individual acts of remembering to sustain its continued existence. It is perhaps for this reason that a group seeks to sustain its collective identity by establishing what Nora calls “memorial sites”—he has in mind museums, statues, monuments and the like—that locate individual memories in history.

Law, too, participates in memorial consciousness. Law's memorial sites are comprised of principles, rules, and procedures that invest moments in history with normative significance.⁵⁸ Within these sites, law accesses the past in ways that treat history as a set of facts and memory as an imperfect means of verifying those facts. It does so because the law seeks to uphold rights and impose constraints on the exercise of public and private power, and the past is both a source of right as well as the location in which violations occur.

For example, whether one possesses a right to receive payment for the use and enjoyment of a commodity by another depends on whether the past reveals a promise of purchase or lease. Whether the Czech government is legally obligated under Czech restitution law to return Rybná 9 to the Brok family turns in part on whether the Beneš decrees transferred title back to the family in 1945. This question requires remembering the legal steps that Robert Brok took to try to reacquire Rybná 9. Memory, in law, operates as evidence of the truth of alleged past actions relevant to the determination of the existence of a legal right or obligation, which in turn determines whether it operates to constrain public or private power.

⁵⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (trans. Alan Sheridan) (1977).

⁵⁵ Maurice Halbwachs, *On Collective Memory* (edited, translated, and introduced by L. A. Coser) (1992); see also Edward Shils, *Tradition* (1981) at 50ff.

⁵⁶ Quoted in Jacques Le Goff, *History and Memory* (trans. S. Rendall & E. Claman) (1992) 95.

⁵⁷ Halbwachs, *On Collective Memory*, *supra*, at 22 (“[w]hile the collective memory endures and draws its base in a coherent body of people, it is individuals as group members who remember”).

⁵⁸ See J.F. Gaudreault-DesBiens, “Memories” (2003) 19 *Supreme Court Law Review* (2d Ser.) 219-265.

In treating memory as an imperfect means of verifying facts, law tends to regard memory as passive, representational and individual, instead of active, narrative and intersubjective.⁵⁹ But what makes a fragment of the past worth remembering—say, a promise to pay—is not simply that it establishes a legal right and corresponding duty. Its significance also lies in its relation to the future. The promise is remembered and the right enforced because a legal order seeks to maintain or produce a world in which people are held to their promises and protected by their rights. Law may regard memory in evidentiary terms but law itself is a form of memory. Law as memory, as opposed to memory in law, is a social enterprise that is thoroughly dialogical—an active, ongoing engagement with the past.

Law's capacity to memorialize the past is especially significant to a minority community facing social, political, and economic pressure to put aside its past, present, and future differences with the broader society in which it is located. Such differences are typically rooted in a distinctive identity that is sustained over time in part by shared memories. The constancy of a minority's collective memory is continually threatened by pressures emanating from the broader society to forget.⁶⁰ Its temporal fragility impairs the ability of a minority to maintain a collective sense of identity over time. Investing a minority's collective memory with legal significance strengthens its capacity to sustain its collective identity.

Collective memory possesses the potential to achieve legal significance as a justification of minority rights, which in turn require the broader society to remember a minority's past, respect its present collective identity, and accommodate its future aspirations. As illustrated by the jurisprudence on Article 26 of the Covenant, a minority's past can possess sufficient legal significance to require its remembrance in a non-discriminatory manner. In contrast, legal unwillingness to memorialize the collective memory of a minority community may authorize additional assimilative pressure from the broader society, rendering it more difficult for a minority to maintain its collective identity in the future.

With the Human Rights Committee's decision in *Brok*, the right to equality serves as an international legal memorial of wrongs, associated with Nazi Germany and communist rule, constructed on the social and legal history of Rybná 9. Unlike museums, statues and monuments, law's memorial sites possess the potential to rearrange the present to restore what we remember—through these sites—as fragments of the past. The potential of the right to equality to serve as a site to rearrange the present ownership of the property turns on the interpretation and application of the principles, rules and procedures with which it is constructed. It also turns on the legal status of the Covenant in Czech law. To date, the Czech government has refused to comply with the Committee's views in *Brok*, arguing that they are not legally binding.

⁵⁹ For critique, see Michael Lambek, "The Past Imperfect: Remembering as Moral Practice" in Antze and Michael Lambek (eds.), *Tense Past*, *supra*, at 235-254, at 238 (referring to law's tendency to "resituate memory ostensibly outside engaged experience and the give and take of social relations" as "nonsense").

⁶⁰ Jack Kugelmass, "Missions to the Past: Poland in Contemporary Jewish Thought and Deed" in Antze and Lambek (eds.), *Tense Past*, *supra*, 199-214, at 200 (collective "memory should be understood ... as a continual process of engagement and disengagement, of remembering and forgetting propelled in either direction by overarching social, political, and economic forces").

V.

Approximately 80 kilometers north of Prague is the Sudetenland, an area located within the Czech province of Bohemia in the vicinity of the Sudeten Mountains. In 1918, the Sudetenland was home to huge chemical works and lignite mines, as well as textile, china, and glass factories. It was also home to most of the roughly 3 million ethnic Germans in Czechoslovakia, who comprised about 23 percent of the population of the new country. It was in the Sudetenland where Robert Brok spent much of the Second World War, interned at Terezín, working as a day laborer in the fields and farms in the area.

Although it refers to the mountain range in the region, the term “Sudeten German” is a political—not geographic—term, and of relatively recent vintage.⁶¹ At the conclusion of the First World War, a Czech delegation that included Eduard Beneš successfully persuaded the Allies to include the region in the First Czechoslovak Republic.⁶² German subjects of the Habsburg monarchy had hoped the territory would become part of Germany or Austria after the war, but they suddenly found themselves constituting an ethnic minority in a sovereign Czechoslovakia.

They voiced their opposition quickly and loudly. Provincial governments in the region were announced and held out to be part of Austria until Czech troops quickly disabused the population of this notion, leading to several clashes and significant casualties. Relations were not improved by the government’s decision to dismiss almost 50% of German-speaking public servants to address the under-representation of Czech employees in the public service.

Control over the Sudetenland increasingly became a point of bitter contention between Germany and Czechoslovakia. In the 1930s, fueled by dire economic conditions, the Sudeten population began to pay increased attention to the anti-Semitic, anti-Czechoslovak, pro-German rhetoric of Konrad Henlein, who founded the Sudeten German Party, an offshoot of the German National Socialist party. Coupled with discriminatory actions of local Czechoslovak officials, the ensuing unrest caused the leaders of the western democracies to fear the possibility of war. The result was the infamous Munich Agreement of 30 September 1938, which sanctioned the annexation of the region into Germany, despite vociferous objections by Beneš, who had since become the President of the Republic. One week later, Beneš resigned, and established a government-in-exile in London until the end of the war. During this time, he convinced the Allies to renounce the Munich Accord and agree in principle to the resettlement of Germans after the war.⁶³

At the end of the war, the Nazis did not leave Czechoslovakia quietly. Accompanied by armed German civilians, SS units burned villages, and tortured and executed innocent men, women and children, while their airplanes overhead bombed Prague. After the country was liberated by Russian forces, retribution was brutal and swift. Spurred on by local governments, Czech civilians attacked, imprisoned and killed Germans throughout Bohemian and Moravian territory.

⁶¹ Tampke, *Czech-German Relations, supra*, at xiv.

⁶² This decision was validated by the 1919 Treaty of St. Germain. The decision to include Slovakia and Ruthenia in the territory of the Czechoslovak Republic was validated by the 1920 Treaty of Trianon.

⁶³ Tampke, *Czech-German Relations and the Politics of Central Europe, supra*, at 73-86, details the negotiations concerning resettlement.

The wave of lawlessness culminated in mass expulsion of much of the German population in Czechoslovakia.

Returning from London to assume the presidency of the Third Republic of Czechoslovakia, Beneš declared it “necessary ... to liquidate out especially uncompromisingly the Germans in the Czech lands Let our motto be: to definitively de-Germanize our homeland, culturally, economically, politically.”⁶⁴ A few months later, in the Potsdam Agreement, the Allies authorized the “orderly and humane” transfer of Germans from Poland, Czechoslovakia and Hungary. Beneš enacted three decrees—Decree No. 12, Decree No. 108, and constitutional Decree No. 33—permitting local authorities to confiscate property owned by Germans, Hungarians and persons not loyal to the Czech resistance during the war, stripping German citizens of their Czech citizenship, and authorizing the “transfer” of approximately one million Germans out of the country.⁶⁵ With the decrees, the expulsion of Germans proceeded in a less spontaneous and somewhat more humane manner. Its effect on the status and identity of German Czechs was nonetheless devastating. Whereas in 1930, the German population in Czech territory was 29.5 percent, Germans comprised merely 1.8 percent of the population in 1950.⁶⁶

The Velvet Revolution created a political and legal space for Sudeten Germans to press their case.⁶⁷ In 1990, on the 51st anniversary of the German invasion, Václav Havel issued an official apology to the German President during a state visit to Czechoslovakia. Some Sudeten German organizations began to assert Sudeten sovereignty. Bavaria, alone among the 16 German states, rudely refused to sign a friendship and cooperation treaty with Czechoslovakia. When Havel rejected compensation for the expulsions, the Sudeten-German Homeland Association replied that Czechs should not receive compensation for Nazi confiscations. The Chancellor of Germany raised the stakes in 1993, stating that a failure to negotiate with Sudeten Germans would jeopardize the Czech Republic’s chances of joining the European Union.

⁶⁴ Sayer, *The Coasts of Bohemia*, *supra*, at 241, and sources cited therein.

⁶⁵ Decree No. 12/1945 Coll. of 23 June 1945 Concerning the confiscation and expedited redistribution of agricultural properties of Germans, Hungarians, traitors and enemies of the Czech and Slovak nation; Decree No. 108/1945 Coll. of 30 October 1945 Concerning the Confiscation of Enemy Property and Funds of National Regeneration; Decree No. 33/1945 Coll. of 2 August 1945 Concerning the Right to Czechoslovak Citizenship of Persons of German and Hungarian Nationality. By Decree No. 33, Czechoslovak citizens of German or Hungarian nationality were stripped of their Czechoslovak citizenship. (Art. 1, paras 1 and 2). It exempted Germans and Hungarians who during the period of state emergency officially declared themselves to be Czechs or Slovaks (Art. 1, para 3). It also provided for an exemption if a claimant was loyal to the Czechoslovak Republic (Art. 2). The expulsion of the Sudeten Germans was authorized by a Government directive issued on 14 August 1945: *Komu sluší omluva: • eši a Sudetští Němci* (Dokumenty, fakta, svědectví) (Prague: Erika Publishing, 1992), at 96. (*Who Deserves an Apology: Czechs and Sudeten Germans (Documents, Facts and Testimonies)*). *Komu sluší omluva: Ěeši a Sudetští Němci* (Dokumenty, fakta, svědectví) (Prague: Erika Publishing, 1992), at 96.

⁶⁶ Sayer, *The Coasts of Bohemia*, *supra* at 242, and sources cited therein. There appears to be a consensus that approximately three million Germans were deported from Czechoslovakia in the three years after the war. Estimates of the death toll, however, vary dramatically. Sudeten German historians estimate the number to be approximately 250,000 whereas estimates by Czech historians are closer to 30,000: Jeffrey S. Kopstein, “The Politics of National Reconciliation: Memory and Institutions in German-Czech Relations since 1989” (1997) 3(2) *Nationalism & Ethnic Politics* 57-78, at 77, n. 15.

⁶⁷ For an excellent account of how the politics surrounding this issue in the 1990s illustrates how collective memory shapes ethnic relations, see Kopstein, “The Politics of National Reconciliation,” *ibid*.

Matters cooled with the signing of the Czech-German Declaration on Mutual Relations in 1997. Germany acknowledged its role in the dismantlement of Czechoslovakia in the 1930s and the subsequent atrocities committed during the war. The Czech Republic expressed its regret for the treatment of Germans immediately after the war. Both governments agreed not to burden their relations with legal challenges based on the past.⁶⁸

The 1997 Declaration could not prevent legal challenges by others, and these came swiftly. With the exception of those declared void by Beneš decrees, confiscations that occurred prior to the establishment of the Czechoslovak Socialist Republic in 1948 are not covered by the Czech Republic's restitution initiative. The Czech restitution initiative governs confiscations by Nazi and communist authorities but not confiscations of Sudeten German property that occurred under the Beneš regime. Sudeten Germans argued that it was unfair to return property confiscated by Nazis and communists but not Sudeten property confiscated in the 1940s.

In 1997, the U.N. Human Rights Committee, in *Malik v. Czech Republic*, was asked to determine whether the exclusion of confiscations of Sudeten German property between 1945 and 1948 constituted discrimination within the meaning of Article 26.⁶⁹ Mr. Malik and his family lived in the Sudetenland. In 1945, they were exiled from Czechoslovakia, their property confiscated, and their citizenship revoked. Mr. Malik argued that the expropriations, expatriations, and expulsions that occurred between 1945 and 1948 were based on status or ethnicity. He alleged it was discriminatory to provide restitution for Nazi and communist confiscations but not for confiscations of property owned by German Sudetens between 1945 and 1948.

The Committee held the complaint inadmissible, noting that "not every distinction or differentiation in treatment amounts to discrimination."⁷⁰ It was of the view that the restitution initiative "does not appear to be prima facie discriminatory ... merely because ... it does not compensate the victims of injustices committed in the period before the communist regime."⁷¹ Although the Committee did not offer any reasons for this conclusion, elsewhere it has held that differentiation in treatment is not discriminatory "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."⁷² *Malik* suggests that, in the Committee's view, reasonable and objective criteria inform the Czech Republic's decision not to provide restitution to Sudeten Germans whose lands were confiscated by Beneš decrees.

⁶⁸ For detail on Czech-German relations throughout the 1990s, see Tampke, *Czech-German Relations, supra*, at 138-155.

⁶⁹ *Malik v. Czech Republic*, CCPR/C/D 669/1995, Decision of 21 October 1998; *Malik* was not the Committee's first decision to hold that confiscations occurring between 1945 and 1948 did not implicate Art. 26. See *Drobek v. Czech Republic*, CCPR/C/D 643/1995, Decision of 14 July 1997 (property in Bratislava confiscated in 1945 by Beneš Decrees 12 and 108); see also *Schlosser v. Czech Republic*, CCPR/C/D 670/1995, Decision of 21 October 1998; *Koutny v. Czech Republic*, CCPR/D/C 807/1998, Decision of 20 March 2000.

⁷⁰ *Ibid.*, at para. 6.5.

⁷¹ *Ibid.* Two Committee members, Cecilia Medina and Eckhart Klein, dissented, arguing the complaint should have been declared admissible because the state had not responded to the allegations.

⁷² U.N. Human Rights Committee, General Comment no. 18 (37th session, 1989), UN Doc. HRI/GEN/1/Rev.3, at para. 13.

When placed against the Committee's other decisions on the discriminatory dimensions of the restitution initiative, *Malik* reveals a dramatic politics to the legal memorialization of collective identity—a politics that struggles with the profound question of which pasts merit remembering. Recall that, in *Simunek* and *Adam*, the Committee found the initiative discriminatory because it provided restitution to some but not other property seized by communist authorities. In *Brok*, the Committee found the initiative discriminatory because it provided restitution to some but not other property seized by the Nazis. But in *Malik*, the Committee refused to conclude that the initiative was discriminatory because it provides restitution to property seized by Nazi and communist authorities but not Sudeten German property seized during the Beneš regime. Of the myriad acts that produced the distribution of property rights in existence immediately before communist rule, this vision of equality requires assessing the justice of post-war nationalization of property confiscated by the Nazis but not the justice of post-war nationalization of Sudeten German property.

These decisions attribute international legal significance to certain pasts—pasts that are fundamental to the construction and maintenance of collective memory—but not others. Establishing that a past possesses legal significance in light of an international legal commitment to equality is contingent on a state's decision to recognize past injustice; equality in international human rights law does not demand supervision of confiscations that occur before a state accepts international obligations associated with the right. It possesses second-order significance: when a state attends to the past, the right to equality requires that selective remembering be based on reasonable and objective criteria. But despite the aspiration toward impartiality embedded in these criteria, the task of supervising selective remembering ultimately requires the field to compare and memorialize certain collective memories at the expense of others.

With this requirement, the jurisprudence of the Human Rights Committee suggests that equality rights are not solely modernist instruments that operate to organize the present in ways that conform to future aspiration. Equality also suggests that the justice of the present is a function of the justice of the past. Assessing the justice of a post-communist restitution initiative thus cannot ignore the history of the distribution of property rights in place before the establishment of communist rule.

Not all pasts need to be remembered in this history; equality 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.

VI.

The European Court of Human Rights has taken a dramatically different approach to the human rights dimensions of restitution measures aimed at communist and Nazi confiscation of property. Article 14 of the European Convention on Human Rights guarantees the nondiscriminatory enjoyment of rights and freedoms enshrined in the Convention. The European Court has long

held the guarantee to be ancillary in nature.⁷³ This approach regards Article 14 applicable only where the facts of a case reveal a violation or fall within the ambit of a right or freedom enshrined in the Convention. In such cases, the Court will permit differential treatment if it pursues a legitimate aim, possesses an objective justification, and evinces proportionality between means and end. Recently, the Court signaled that Article 14 in certain circumstances will also require differential treatment of “persons whose situations are significantly different.”⁷⁴

In a series of cases culminating in *Gratzinger and Gratzingerova v. Czech Republic*, the Court has determined that post-communist restitution initiatives do not implicate the Convention’s equality guarantee.⁷⁵ In *Gratzinger*, at issue was whether the Czech restitution initiative, by excluding from its scope communist confiscation of property owned by non-citizens, violates Article 14 of the Convention. Consistent with previous jurisprudence, the Court held that Article 14 has “no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the Convention.” The Court acknowledged that the Czech citizenship requirement violates the equality guarantee in the International Covenant on Civil and Political Rights, but it emphasized the different wording of the two guarantees. Since the initiative did not implicate other rights or freedoms guaranteed by the Convention, it could not amount to discrimination within the meaning of Article 14.

Notwithstanding textual differences between Article 14 of the European Convention and Article 26 of the International Covenant, the Court’s decision in *Gratzinger* is surprising. Unlike the International Covenant, the European Convention recognizes the right to property. Article 1 of Protocol 1 of the Convention guarantees that every person is “entitled to the peaceful enjoyment of his possessions.” Article 1 renders the Convention’s equality guarantee presumably relevant to an assessment of the underinclusiveness of restitution measures that protect the right of some individuals but not others to the peaceful enjoyment of their property.

But in *Gratzinger*, the Court held that Article 1 of Protocol 1 only protects “existing possessions”⁷⁶ or “assets ... in respect of which an applicant can argue that he has at least a ‘legitimate expectation’ that they will be realized.”⁷⁷ It held further that a “long-extinguished” property right could not be revived within the meaning of Article 1. Because title had long passed to communist authorities, *Gratzinger* could not claim a right to the property in question. Perhaps ironically, because of the limited reach of Article 1 of Protocol 1, the right to property constitutes a major stumbling block facing those seeking restitution through the European Convention on Human Rights.

⁷³ *Belgian Linguistics Case*, ECHR, Ser. A, No. 6, 1968: 89-90.

⁷⁴ *Thlimmenos v. Greece*, Application No. 34369/97, Judgment 6 April 2000, para. 44.

⁷⁵ *Gratzinger and Gratzingerova v. the Czech Republic*, *supra*.

⁷⁶ *Gratzinger and Gratzingerova v. the Czech Republic*, *supra*, at para. 69. See also *Van der Musselle v. Belgium*, 23 November 1983, Series A no. 70 23, at para. 48; *Brezný and Brezný v. Slovakia*, application no. 21131/93, Commission decision of 4 March 1996, Decisions and Reports 85; and *Malthous v. the Czech Republic* (dec.) [GC], no. 33071/96, EHCR 2000-XII; *Prince Hans-Adam II of Liechtenstein v. Germany*, ECHR, Judgment of 12 July 2001, Application No. 42527/98.

⁷⁷ *Gratzinger and Gratzingerova v. the Czech Republic*, para. 69. See also *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332, p. 21 para. 31; *Ouzounis and Others v. Greece*, no. 49144/99, 18 April 2002, para. 24.

In contrast to the jurisprudence of the Human Rights Committee, the European Court's restitution jurisprudence manifests the modernist impulse to repudiate Europe's "burden of the past."⁷⁸ This burden—that of the twentieth century—is perhaps heavier for Europe than other regions of the world,⁷⁹ and its repudiation requires a conception of equality as an instrument that calibrates present reality not to past wrong but to future aspiration. This conception's success depends on a leap of faith—that illuminating equality with the light of the future will alleviate the weight of history. The danger, of course, is that this leap of faith will prove to be misguided—that the burden of Europe's past will become heavier as it becomes cloaked in darkness, as "the history of countless places and objects which themselves have no power of memory is never heard, never described or passed along."⁸⁰ It is the danger that Europeans will not know who they are.

International human rights law, as embodied in the jurisprudence of the Human Rights Committee and the European Court of Human Rights, thus stakes out radically different positions on the extent to which the collective memories of religious, ethnic and cultural communities inform the equality rights of European citizens. According to the Human Rights Committee, the equality involves remembering certain pasts in efforts to promote just relations in the future. The European Court's conception of equality, at least in the context of post-communist reform initiatives, is to defer to member states in their calculations of the legal significance of certain pasts. In the context of property redistribution, its notion of equality is thoroughly modernist in orientation in its steadfast resistance to engage the past.

These two competing stances toward the normativity of the past reflect the contested nature of European identity itself. As European states embark on their historic process of economic and political unification, national identities hamper the capacity—and desire—of member states to ground unification in a collective social and cultural identity. The result is that "the European identity is a truncated identity, facing strong competition from an increasingly exclusive sense of national belonging and a major source of conflicting myths."⁸¹ European identity, by necessity, is—or will be—multicultural and multinational, perhaps greater but no less than the sum of its cultural and national pasts. But which pasts, which cultures, which nations will co-exist in a multicultural and multinational Europe?

By constructing memorial sites for religious, ethnic and cultural communities, international human rights law looks back on the catastrophe from which it arose to promote a strong multicultural Europe, one that remembers and projects into the future a plethora of majority and minority identities. But, regionally, the field promotes a distinctively modernist European identity—one that looks to the future to avoid reliving the wreckages of the past. The legal co-existence of these two competing stances toward the nature of equality and the normativity of the past reflects one of the many paradoxes inherent in the ongoing project of European citizenship.

⁷⁸ Hayden White, "The Burden of History" in White, *Tropics of Discourse: Essays in Cultural Criticism* (1978) 27-50.

⁷⁹ Le Goff, *History and Memory*, *supra*, at 2.

⁸⁰ W.G. Sebald, *Austerlitz* (2002) 24.

⁸¹ Elie Barnavi, "European identity and ways of promoting it" in Henry Cavanna (ed.), *Governance, Globalization and the European Union: Which Europe for Tomorrow?* (2002) 87-94, at 89.

POSTSCRIPT

In late 1997, the Czech Ministry of Industry and Commerce required the managing director of Technomat, s.p. to execute a contract of sale for the property on Rybná 9.⁸² It further required that the asking price be paid before the signing of the contract. Three weeks later, the managing director sold Rybná 9 to Technomat, s.r.o., a company without formal ties to the state enterprise of the same name.⁸³ No money passed hands; instead the sale was marked by a promissory bill of exchange for 28 million Czech crowns.⁸⁴ Six weeks later, in early 1998, Technomat, s.p. was placed in liquidation.⁸⁵

After several months, in a relatively restrained display of official impatience,⁸⁶ the liquidator sued Technomat, s.r.o. for failure to live up to its obligation to transfer the requisite funds. Technomat, s.r.o. quickly responded by incorporating a new company, Rybná 9, a.s., whose sole asset was the property in question.⁸⁷ One hundred percent of Rybná 9's shares were owned by Technomat, s.r.o.⁸⁸ Two of its corporate directors were also directors of Technomat s.r.o.⁸⁹ Its supervisory board appears to have included relatives of these two directors.⁹⁰

In late 2000, the District Court concluded that neither Technomat, s.r.o., nor Rybná 9, a.s., were the true owners of the property. As a result, the Czech Republic reacquired title and Technomat,

⁸² According to subs. 45(1) of the Act, state-owned enterprises could not undertake any transfers of their assets. (Act. No. 92/1991 Coll. Regulating Transfers of State Property to Other Persons of 22 March 1991). Subs. 45(2) recognizes that the government may grant an exemption to this rule. The Czech government in resolution 757 of 26 November 1997 granted such exception, and the Ministry issued its requirement to the managing director two days later: see Decision of the District Court, Prague 1, *Technomat, s. p. in liquidation v. Rybná 9, a.s.*, No. 11 C 109/1998 - 109, at 3-4.

⁸³ The contract concerning Rybná 9 was signed on 15 December 1997: see Decision of the District Court, *Technomat, s. p. in liquidation v. Rybná 9, a.s.*, *ibid*, at 3-4. The title of the Rybná 9 property was transferred from Technomat, s.r.o. to Rybná 9, a.s.; accordingly, the original respondent, Technomat, s.r.o., was replaced by Rybná 9, a.s. See also *infra* note 88 and accompanying text.

⁸⁴ The District Court concluded the respondent failed to fulfill the condition of a fully paid purchased price: *Technomat, s. p. in liquidation v. Rybná 9, a.s.*, *ibid*, at 4.

⁸⁵ According to the Czech Commercial registry, Technomat, s.p. has been in liquidation since 28 January 1998.

⁸⁶ After filing a petition with the Prague District Court on 9 September 1998, the proceedings were temporarily suspended because the petitioner (Technomat, s.p.) failed to pay court fees amounting to 1500 Czech crowns (approx. 50 US\$): see Prague City Court order 9 C 546/98 from December 29, 1998.

⁸⁷ It is unusual that a court preliminary ruling was not issued preventing Technomat, s.r.o. to further transfer the property title until final judgment was rendered.

⁸⁸ According to the Czech commercial registry, Rybná 9, a.s. was officially incorporated as of 5 January 1999. According to the Technomat, s.r.o. disclosure statement on capitalizing the property, signed on 7 July 1998, the value of the property was estimated at 60 million crowns. However, the signatures of the two directors on this statement were authenticated by a public notary 4 months later, on 11 November 1998. The disclosure statement was registered by the Prague Cadastre under the number V5-1354/99 on 19 January 1999. As is the case with title, incorporation of a company is established by inscription into the Commercial Registry.

⁸⁹ Ms. Dagmar Zemanová and Mr. Karel Hampeis. See certificates of incorporation in the Czech Commercial registry of Rybná 9, a.s., company identification No. 25724711, and of Technomat, s.r.o., company identification No. 25092227.

⁹⁰ Mr. Tomáš Zeman (Mr. Zeman listed the same permanent residence address as Ms. Zemanová: • S Armády 951/21, 16000 Praha 6) and Ms. Libuše Hampeisová. (Ms. Hampeisová listed the same permanent residence address as Mr. Hampeis: Stará Hu• 229, 262 02 P•fbram). See certificates of incorporation in the Czech Commercial registry of Rybná 9, a.s., company identification No. 25724711, and of Technomat, s.r.o., company identification No. 25092227.

s.p. in liquidation, was granted the right to use the property. But before the District Court's decision became effective,⁹¹ Rybná 9 sold the property for 40 million crowns to Mayfair Asset Management, s.r.o.⁹² The owner of Mayfair Asset Management, s.r.o. is an offshore holding company, Mayfair Asset Management, Ltd., based in the Dominican Republic.⁹³ Mayfair Asset Management, s.r.o. has a large office on the top floor of Rybná 9 itself.

The true ownership of Rybná 9 remains unclear, with the Czech Republic and Mayfair both claiming title.⁹⁴ As of this writing, the matter is before the same court that, in 1995, ruled that Mr. Brok failed to establish title to the property. The Broks are not party to the litigation. Dagmar's four children are attending university. Dagmar is working in a hospital cafeteria in Prague.

⁹¹ Judgment was rendered on 7 November 2000 but became effective only on 8 June 2001: Decision of the District Court for Prague 1, *Technomat, s. p. in liquidation v. Rybná 9, a.s.*, *supra* note 82. According to subs. 204 (1) of the Czech Civil Procedure Act, 99/1963 Coll. of 4 December 1963 as amended, any party can appeal within 15 days from receiving the judgment. According to subs. 159(1), if neither party exercises the right to appeal within the 15-day period, the judgment becomes effective, allowing parties to a dispute to extend the delivery and ultimately the enforceability of a court decision. The property was sold to Mayfair on 29 November 2000: contract of sale between Rybná 9, a.s. (seller) and Mayfair Asset Management, s.r.o. (buyer), registered by the Prague Cadastre under number V11- 32412/00 on 29 November 2000.

⁹² Contract of sale between Rybná 9, a.s. (seller) and Mayfair Asset Management, s.r.o. (buyer), *ibid.*

⁹³ Mayfair had been established only a few months (on July 7 2000) before it had bought the property from Rybná 9, a.s. on 29 November 2000: see certificate of incorporation in the Czech Commercial registry of Mayfair Asset Management, s.r.o., the company's identification No. 26187604.

⁹⁴ Both Mayfair Asset Management, s.r.o. and the Czech Republic are recognized by the Prague Cadastre as owners of the property (Record of the property title No. 108 from the Prague Cadastre as of 7 May 2003).