

# *Ex Post Facto* Problems of the Czech Citizenship Law



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A Report Prepared by the Staff of the  
Commission on Security and Cooperation in Europe

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## **ABOUT THE ORGANIZATION (OSCE)**

The Conference on Security and Cooperation in Europe, also known as the Helsinki process, traces its origin to the signing of the Helsinki Final Act in Finland on August 1, 1975, by the leaders of 33 European countries, the United States and Canada. Since then, its membership has expanded to 55, reflecting the breakup of the Soviet Union, Czechoslovakia, and Yugoslavia. (The Federal Republic of Yugoslavia, Serbia and Montenegro, has been suspended since 1992, leaving the number of countries fully participating at 54.) As of January 1, 1995, the formal name of the Helsinki process was changed to the Organization for Security and Cooperation in Europe (OSCE).

The OSCE is engaged in standard setting in fields including military security, economic and environmental cooperation, and human rights and humanitarian concerns. In addition, it undertakes a variety of preventive diplomacy initiatives designed to prevent, manage and resolve conflict within and among the participating States.

The OSCE has its main office in Vienna, Austria, where weekly meetings of permanent representatives are held. In addition, specialized seminars and meetings are convened in various locations and periodic consultations among Senior Officials, Ministers and Heads of State or Government are held.

## **ABOUT THE COMMISSION (CSCE)**

The Commission on Security and Cooperation in Europe (CSCE), also known as the Helsinki Commission, is a U.S. Government agency created in 1976 to monitor and encourage compliance with the agreements of the OSCE.

The Commission consists of nine members from the U.S. House of Representatives, nine members from the U.S. Senate, and one member each from the Departments of State, Defense and Commerce. The positions of Chair and Co-Chair are shared by the House and Senate and rotate every two years, when a new Congress convenes. A professional staff assists the Commissioners in their work.

To fulfill its mandate, the Commission gathers and disseminates information on Helsinki-related topics both to the U.S. Congress and the public by convening hearings, issuing reports reflecting the views of the Commission and/or its staff, and providing information about the activities of the Helsinki process and events in OSCE participating States.

At the same time, the Commission contributes its views to the general formulation of U.S. policy on the OSCE and takes part in its execution, including through Member and staff participation on U.S. Delegations to OSCE meetings as well as on certain OSCE bodies. Members of the Commission have regular contact with parliamentarians, government officials, representatives of non-governmental organizations, and private individuals from OSCE participating States.

**EX POST FACTO PROBLEMS OF THE CZECH CITIZENSHIP  
LAW**  
*September 1996*

This memorandum is part of a continuing series of reports prepared by the staff of the Commission on Security and Cooperation in Europe on human rights and democratization in the OSCE region. For additional information, please contact the Commission staff at (202) 225-1901.

**1. INTRODUCTION AND SCOPE OF MEMORANDUM**

When the Czechoslovak Federal Republic dissolved on January 1, 1993, the newly independent Czech Republic adopted a citizenship law that provided citizenship to only some of the former Czechoslovak citizens then resident in the Czech Republic. An undetermined number of people, including long-term residents and even some people born in the Czech Republic, have been left stateless or with an unclear legal status.<sup>(1)</sup> Almost all of these people belong to the Czech Republic's largest minority, Roma (Gypsies).

As a consequence, this law has been heavily criticized at meetings of the Organization for Security and Cooperation in Europe. In particular, the law presents numerous and serious questions regarding its conformity with international standards, such as those relating to recognition before the law (the status of orphans), equal protection before the law (different requirements for citizenship established for different classes of former Czechoslovak citizens), the right to a fair hearing (lack of adequate hearing procedures and opportunities for appeal), and actual or arbitrary discrimination (original intent of the law). Non-governmental organizations in the Czech Republic and abroad have heavily criticized the law both as drafted<sup>(2)</sup> and as applied.<sup>(3)</sup>

This memorandum examines one discrete aspect of the current Czech citizenship law: its conformity with the Czech Republic's international obligation to refrain from increasing criminal penalties after the crime in question was committed.<sup>(4)</sup>

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1. See paras. 6, 15, 74, and 84, *The Czech and Slovak Citizenship laws and the Problem of Statelessness*, Document prepared by the Office of the United Nations High Commissioner for Refugees, Regional Bureau for Europe, Division of International Protection, February 1996 (made public in April 1996 and published along with the "Position of the Czech Republic on the UNHCR Regional Bureau for Europe Document *The Czech and Slovak Citizenship Laws and the Problem of Statelessness*") (hereinafter UNHCR Report); and paras. 54 and 116, Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation and replies of the governments of the Czech republic and Slovakia, April 2, 1996 (hereinafter CoE Report).

2. See, in particular, *Roma in the Czech republic foreigners in their own land*, a report by Human Rights Watch /Helsinki (June 1996), at 19, describing the politically charged climate in which the law was drafted.

3. Ina Zoon, *A Need for Change in the Czech Citizenship Law*, November 21, 1994; Ina Zoon and Lucie Siroka, *The Non-Czech Czechs*, August 7, 1995; Ina Zoon, *Memorandum of the Tolerance Foundation's Equal Rights Program* submitted to the Ministry of the Interior of the Czech Republic, August 14, 1995 (reports prepared under the auspices of the Prague-based Tolerance Foundation, hereinafter Tolerance Foundation Reports).

4. For a general discussion of the situation in the Czech Republic, see *Human Rights and Democratization in the Czech Republic*, Prepared by the Staff of the Commission on Security and Cooperation in Europe (September 1994).

## 2. CONCLUSION

The Czech citizenship law attaches to past criminal acts a heavier penalty (i.e., loss of the option of Czech citizenship) than existed at the time that the crime was committed, in violation of article 11 (2) of the Universal Declaration on Human Rights, article 15 (1) of the International Covenant on Civil and Political Rights, and article 7 (1) of the European Convention on Human Rights. Principle X of the Helsinki Final Act requires OSCE participating States to fulfill in good faith their international legal obligations.

## 3. BACKGROUND

### *The 1969 Czech Citizenship Law*

Czechoslovakia was a voluntarily formed state. From the period of its original founding in 1918 until 1968, only one form of citizenship was recognized: Czechoslovak citizenship. After the Soviet invasion crushed the Prague Spring, however, a policy of so-called "normalization" was introduced. Among other things, this policy introduced a form of federalism, designed to appeal to Slovak nationalists and, it was hoped by the Communists, to blunt resistance to the harshly restrictive human rights policies of the post-Soviet invasion regime.

As part of this federalism, Czechoslovakia was transformed (on paper but not in practice) from a unitary state into a federation. In particular, the Czech and Slovak regions of the country were nominally converted into separate political and administrative units; and separate citizenship laws were passed in 1968-69 regulating the internal status of Czechoslovak citizens present in the country at that time.<sup>(5)</sup>

Under these laws, all Czechoslovak citizens were deemed also to be "Czechs" or "Slovaks" according to the place of their birth (applying on the sub-national level the principle of *jus soli*). For those born after the introduction of the 1968-69 laws, citizenship was subsequently determined by the status of one's parents (*jus sanguinis*).

Superficially, "Czech" or "Slovak" citizenship at the sub-national level was somewhat analogous to an American's identification as a resident of a particular state (e.g., New York versus California),<sup>(6)</sup> just as "Czechoslovak" citizenship was analogous to "American" citizenship. In substance, however, one's designation as a "Czech" or a "Slovak" (as opposed to a "Czechoslovak citizen") was devoid of any real meaning, as Czech officials have acknowledged;<sup>(7)</sup> at the international level, only "Czechoslovak" citizenship was recognized. Even internally, for purposes of official documentation, one's status as a "Czech" or "Slovak" was not recorded in passports, identification cards, or even minor official documents such as library cards; it was not recorded on national censuses; it had no relationship to any rights, privileges, or duties under Czechoslovak laws or regulations.

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5. Law No. 206 of the Slovak National Council, adopted Dec. 28, 1968 (hereinafter the 1968 Slovak Citizenship Law); Law No. 39 of the Czech National Council, adopted Sept. 29, 1969 (hereinafter the 1969 Czech Citizenship Law).

6. State "citizenship" in the United States, which is recorded on national censuses for federal administrative purposes, is tied to matters such as eligibility for in-state tuition for public universities, authority of the state for taxation purposes, and administration of social services.

7. References in this memorandum to the views of Czech officials or the Czech Government are based on 1) meetings in Washington between Members of the Commission and Czech officials; 2) staff interviews of Czech officials in Prague, Washington, and at OSCE meetings; 3) statements of Czech representatives at OSCE meetings; 4) correspondence between the Commission Chairman and Czech officials 5) the Czech response to the report of the CoE, *supra* note 1; and 4) the Czech response to the report of the UNHCR, *supra* note 1.

On the contrary, "[c]ivil, political, and social rights were linked to the place of residence in Czechoslovakia"<sup>(8)</sup>—not to one's nominal republic-level citizenship. Accordingly, the two republic-level legislatures were elected in 1992 by constituencies based on residency, not republic-level citizenship as determined by the 1968-69 laws. That is, someone who was a permanent resident in the Czech republic and deemed to be a Slovak under the 1968 law could *only* vote for representatives to the *Czech* National Council—not the *Slovak* National Council.<sup>(9)</sup>

### ***The 1992 Czech Citizenship Law***

In connection with the dissolution of the Czechoslovak state on January 1, 1993, the Czech and Slovak parliaments each adopted new citizenship laws.<sup>(10)</sup> For largely self-serving reasons,<sup>(11)</sup> the Slovak Republic adopted an inclusive law that made citizenship available to all former Czechoslovak citizens. The Czech Republic, in contrast, adopted a restrictive law that gave citizenship to a more limited category of Czech residents, in particular to those who were considered "Czechs" under the 1969 law regulating internal status. The reasoning of the Czech Government is that since there is no continuity of the Czechoslovak state, there is no continuity of legal obligations owed by the newly independent Czech Republic [or, presumably, by extension, by any of the other similarly situated newly independent states<sup>(12)</sup>] to those persons who have been permanent residents on the territory over which the country in question now exercises sovereignty; accordingly, the Czech Republic asserts that it is free to extend automatically citizenship to some of these people and to deny automatically citizenship to others.<sup>(13)</sup>

Specifically, under the 1992 Czech law, former Czechoslovak citizens who were not automatically deemed "Czechs" under the 1969 law could become naturalized citizens 1) by declaration, if they were emigres who fell outside the scope of the 1969 law, or 2) by application, provided they met a two-year residency requirement and had a clean criminal record for five years. In effect, this was an attempt to convert the 1969 law regulating internal status into a law that would require recognition at the international level.

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8. CoE Report, *supra* note 1, at para. 4; UNHCR Report, *id.* at para. 41.

9. By relying on the 1969 system of internal classification that had, even as a matter of domestic law, no meaningful significance, the 1992 law also presents the question of whether such a basis for determining citizenship is arbitrary, in violation of international standards regarding non-discrimination.

10. Law No. 40 of the Czech National Council, adopted Dec. 29, 1992 (effective Jan. 1, 1993); Law No. 40 of the Slovak National Council adopted on Jan. 19, 1993 (effective upon publication).

11. During 1992, at the very time Slovak leaders were pressing for their independence, they were simultaneously seeking to retain many of the benefits of their federal relationship with the Czechs. In particular, Slovak leaders sought, but did not get, an agreement that would permit Slovaks to hold dual Slovak and Czech citizenship.

12. Currently, there are 19 newly independent countries in the OSCE community (stemming from the dissolution of the Czechoslovak, Soviet, and Yugoslav federations), in addition to the three Baltic states which resumed their independence after 1990. The Czech Republic is the only one of the 19 to incorporate a criminal restriction as a means of restricting citizenship for former citizens of the predecessor state.

13. *See* the CoE Report, *supra* note 1, at paras. 31 and 109 of the Comments of the Czech Republic. Czech officials are quick to note that those deemed to be Slovaks may become naturalized Czech citizens under conditions that are easier to satisfy than the conditions which must be met by other would-be immigrants to the Czech Republic. *See* the 1969 Czech Citizenship Law, *supra* note 5 at 18. This is, of course, cold comfort to those who have suddenly found themselves stripped of citizenship in the only country they have ever known. Moreover, it stands in contrast to the relatively generous terms for naturalization which have been extended to so-called Volynya Czechs, ethnic Czechs from former Soviet republics. In recognition of the high priority placed on ethnicity by Czech parliamentarians, the Ministry of Interior may altogether waive the residency requirement for Volynya Czech applicants for Czech citizenship, even though these people may have never been to the Czech Republic and may lack a genuine and effective link with that country.

Although Czech officials have stated there will not be a mass deportation of former Czechoslovak citizens resident in the Czech Republic who have not obtained Czech citizenship under the 1992 law, such persons are subject to deportation at the discretion of the government. More to the point, the Council of Europe Report has confirmed that such deportations have, in fact, occurred.<sup>(14)</sup>

Those who do remain in the Czech Republic are not permitted to vote, to participate in economic privatization programs, or to serve in the government, military, police, or judiciary; citizenship must also be established before one can petition for redress against past official abuse or restitution of or compensation for the wrongful confiscation of property.

Significantly, both before and after 1968-69, many people within Czechoslovakia moved between the Czech and Slovak republics without regard to their internally designated status as "Czechs" or "Slovaks." In addition, between 1969 and 1992, one could apply to change one's status from either "Czech" to "Slovak" or vice versa as a mere formality, subject to virtually no conditions. Specifically, the condition imposed on former Czechoslovak citizens in connection with becoming a "naturalized" Czech citizen after 1992—a clean criminal record for five preceding years—did not exist prior to January 1, 1993.<sup>(15)</sup> Someone deemed to be a Slovak under the 1968 law—even someone who had committed a criminal act<sup>(16)</sup> in the five years preceding January 1, 1993—could become a Czech by mere declaration.

As a practical matter, it does not appear that many Czechoslovaks exercised the option to declare their choice of internal status since such an action then had no legal or administrative impact. But after January 1, 1993, "Slovak" offenders convicted during the preceding five-year period found themselves subjected to a new and severe penalty: they lost the option of declaring themselves to be "Czechs" at precisely the same moment their Czechoslovak citizenship ceased to exist at all. An amendment to the Czech Citizenship Law adopted in April 1996 permits, but does not require, the Ministry of Interior to waive the clean criminal record requirement and effectively retains the *ex post facto* increase of a criminal sanction.<sup>(17)</sup>

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14. CoE Report, *supra* note 1, at paras. 103-107. The mass deportation of aliens is, of course, prohibited by international law. *See, e.g.*, art. 6 (b), Charter of the International Military Tribunal (the Nuremberg Charter), established August 8, 1945 (setting forth the mandate for the post-World War II war crimes tribunals); art. 49, Geneva Convention Relative to the Protection of Civilian Persons in Time of War; art. 4, Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 22 (9), American Convention on Human Rights; art. 12 (5) African Charter on Human and Peoples' Rights. Nevertheless, it has probably not escaped the attention of European officials in a number of capitals that deporting aliens, one by one, is not, *per se*, a violation of international law.

15. The 1968 Slovak Citizenship Law, *supra* note 5, at 10, stipulated that those designated as "nationals of the Czech Socialist Republic" may be granted Slovak citizenship after residing in the Slovak republic for not less than two years; this residency requirement could be waived by the Ministry of the Interior of the Slovak Socialist Republic and there was no clean criminal record requirement. Significantly, the 1969 Czech Citizenship Law, *id.* at 10, had neither a clean criminal record nor a residency requirement, specifying only that an applicant report the Czech republic as his or her domicile at the time of application for citizenship.

16. This memorandum does not address the questions of 1) whether the 1992 law describes with adequate specificity the criminal acts that fall within its scope (i.e., whether, under Czech law, the phrase "intentional crime" has sufficient meaning or whether it is impermissibly vague) and 2) whether, assuming that the law is adequately specific, it is being implemented by local officials according to its terms (i.e., whether local officials implementing the law are denying citizenship applications based on a broader classification of crimes than those specified by law). For criticism of the Czech law on these bases, see Tolerance Foundation Reports, *supra* note 3.

17. Law No. 139 of the Czech National Council, adopted April 26, 1996.

#### 4. APPLICATION OF THE INTERNATIONAL *EX POST FACTO* STANDARDS TO THE CZECH CITIZENSHIP LAW

4.1. *The Czech Republic is obligated to implement its international human rights commitments.* The Czech Government has argued that, as a newly independent state, its right to establish citizenship criteria is a matter of unfettered discretion.<sup>(18)</sup> In fact, the right to determine one's nationals has been, historically, an expression of state sovereignty. Under modern legal standards, however, that right (like other sovereign rights) is circumscribed by the extent of any state's international human rights obligations.<sup>(19)</sup> In some Czech Government writings, this receives grudging acknowledgment: "In the case the successor State does not *expressis verbis* undertake a specific commitment, it is free to act at its own discretion."<sup>(20)</sup> In other words, where the successor State has expressly undertaken a specific commitment, it is obligated to implement that commitment.

As it stands, the Czech Republic, upon becoming independent, has expressly and freely undertaken a significant body of international human rights commitments. These include both politically binding agreements (e.g., the Universal Declaration on Human Rights, the Helsinki Accords) and legally binding agreements (e.g., the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms). Moreover, the Czech Constitution expressly provides that the Czech Republic's international legal commitments are self-executing, i.e., do not require the passage of implementing legislation and are therefore directly enforceable in Czech courts.<sup>(21)</sup>

Because the Czech Government has expressly committed itself to this body of obligations, it is not necessary to determine whether there is a continuity of obligation on the Czech Republic as a successor state stemming from the Czechoslovak Federal Republic's previous agreement to be bound. These standards are relevant to a broad range of questions surrounding the Czech citizenship law, including, but not limited to: the determination of the initial pool of candidates who automatically received citizenship, the nature of judicial review of citizenship applications, and instances of statelessness.

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18. "The successor State must respect *droit acquis*, i.e., namely rights of a civil (patrimonial) nature which existed under its predecessor. On the other hand, discontinuity is unavoidable in the sphere of public rights, including citizenship, the right to vote, the right to take up employment in public service and the right to hold public office. Public rights cannot be guaranteed upon succession because they represent the innermost 'hard core' of sovereignty of a new State and may be regulated only by the successor State." Para. 32, Reply of the Government of the Czech Republic, CoE Report, *supra* note 1. "We hold the stipulation of conditions for granting citizenship as an *exclusive* domain of national legislation" (emphasis added). Letter from Deputy Minister of Interior Martin Fendrych to Helsinki Commission Chairman Christopher H. Smith, June 30, 1996 (unofficial translation provided by the Ministry).

19. For example, Professor Orentlicher has characterized the international community's response to the citizenship questions in the Baltic states in light of their re-emergent independence after 1990: "While evincing deep concern about the humanitarian implications of the restrictive citizenship policies described above, these [international] delegations' legal conclusions *ostensibly* reaffirmed international law's broad indulgence of state discretion in respect of citizenship. As a matter of law, these reports concluded, determinations of citizenship remain today, as in the past, largely the province of sovereign prerogative. Yet this bottom-line conclusion was overwhelmed by the more resonant judgment pervading these reports: the postwar law of human rights has progressively, and indeed radically, diminished even this last great preserve of state privilege." Diane F. Orentlicher, *Citizenship and National Identity* (David Wippman ed., forthcoming), draft at 4.

20. In addition to those commitments undertaken *expressis verbis*, the Czech Republic would also be bound by the body of international human rights commitments that have become *jus cogens* (such as the prohibitions against genocide, apartheid, and slavery).

21. Article 10 of the 1992 Czech Constitution states: "The ratified and promulgated international treaties on human rights and fundamental freedoms, by which the Czech Republic is bound, shall be applicable as directly binding regulations, having priority before the law."

4.2. *In particular, the Czech Republic has explicitly and voluntarily assumed commitments that prohibit the ex post facto increase of criminal penalties.* The relevant standards are reproduced below.

4.3. *The denial of Czech citizenship to Slovaks based on their criminal record is a penal sanction.* Forfeiture of citizenship, banishment and exile are historically tools used as punishment. Moreover, the forfeiture of citizenship is traditionally regarded as a *severe* penalty, "not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever. . . ." <sup>(22)</sup> In the case at hand, the loss of citizenship serves the traditional functions of a punitive sanction: retribution and deterrence. And like many penal sanctions, this one is of a limited duration. Once a five-year period has lapsed without further conviction for an intentional crime, a Slovak may then be eligible for Czech citizenship; an additional conviction starts the clock ticking all over again, until the five-year term is "served."

On its face, the law might be construed as a vehicle to serve the arguable purpose of ridding the country of convicted offenders who are generally considered socially undesirable. But Czech officials have consistently stated that the law is not designed to *remove* this class of people denied Czech citizenship from the Czech Republic and that members of this class of people will not be deported solely for the reason that they have not obtained Czech citizenship. Furthermore, Czech officials have publicly maintained that their goal is, ultimately, to integrate into Czech society permanent resident Slovaks who are denied Czech citizenship under the current law, including by eventually making citizenship available to them. The stated positions of the Czech Government therefore eliminate this otherwise plausible (although, for other reasons not discussed here, not necessarily legal) rationale for the law.

The fact that no condition relating to past criminal activity was imposed on recipients of Czech citizenship under the 1992 law (i.e., those already deemed to be Czechs under the 1969 law as well as the exiles and emigres who fell outside the scope of the 1969 classification) does not negate the penal nature of this sanction when applied to a third class of former Czechoslovak citizens. It may, however, be highly relevant to questions of equal protection before the law and the discriminatory intent of the law. <sup>(23)</sup>

4.4. *Moreover, denaturalization as a criminal penalty is viewed as a contemptible form of punishment by the community of civilized nations.* The revocation of citizenship is generally strictly regulated and circumscribed in most OSCE countries. Frequently, denaturalization is permitted only in connection with serious crimes (such as the commission of fraud in connection with one's naturalization proceedings) or acts indicating "a severance of the link between the national and the country" in question (such as prolonged absence from the country or service in the military of a foreign country). <sup>(24)</sup> Many countries make no provision at all in law for the revocation of citizenship, or permit revocation only for naturalized citizens. <sup>(25)</sup>

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22. H. Arendt, *The Origins of Totalitarianism* 294 (1951).

23. Even assuming, which this memorandum does not, that it is permissible under international human rights law to use denaturalization as a criminal penalty, it would not be permissible to do so on an arbitrary and discriminatory basis.

24. *Citizenship in selected countries*, a report prepared by the Staff of the Law Library of the Library of Congress at the request of the Commission on Security and Cooperation in Europe (hereinafter LOC Report), at 6 (January 1992).

25. *Id.*

The United States Supreme Court, in consideration of denaturalization in the American context, described it as "the total destruction of the individual's status in organized society."<sup>(26)</sup> Moreover, when denaturalization was imposed as a penalty for criminal activity, the Court viewed it as "a form of punishment more primitive than torture."<sup>(27)</sup> And when the penal sanction of denaturalization renders someone stateless, the Court held that this sanction is so severe, that it constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.<sup>(28)</sup> Along similar lines, it is prohibited to withdraw German citizenship<sup>(29)</sup> or U.K. citizenship<sup>(30)</sup> if this would result in statelessness. The Portuguese Constitution also expressly provides that no penalty may involve the deprivation of nationality.<sup>(31)</sup>

Significantly, the post-Communist government of Czechoslovakia specifically provided that Czechoslovak citizenship is irrevocable, distancing itself from the previous regime's past practice of withdrawing citizenship as a form of political punishment.<sup>(32)</sup>

4.5. *Upon the creation of a new state, the denial of citizenship to one group of applicants from the class of people who formally had citizenship in the preceding state is the functional equivalent of revoking citizenship (denaturalization).*<sup>(33)</sup> Up to December 31, 1992, there was no such thing as "Czech citizenship" recognizable under international law; therefore, the prior existence of a local classification with that title is, for purposes of ensuring Czech conformity with international standards, irrelevant. At the moment of the initial creation of the Czech state, *no one* had Czech citizenship.

To determine who would be considered a Czech citizen for future purposes, the 1992 law created the following categories of Czechoslovak citizens: 1) those designated as Czechs under the 1969 law, for whom *no condition relating to past criminal record* was imposed; 2) those who lacked a designation under the 1969 law (i.e., exiles and emigres), for whom *no condition relating to past criminal record* was imposed; and 3) those designated as Slovaks under the 1969 law for whom, regardless of their actual place of birth, a condition relating to past criminal record was imposed.<sup>(34)</sup>

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26. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

27. *Id.*

28. *Id.* at 99-101.

29. LOC Report, *supra* note 24, at 38.

30. LOC Report, *supra* note 24, at 76.

31. Constitution of the Portuguese Republic, art. 30 (4) *reprinted in* *Constitutions of the World* (A. Blaustein & G. Flanz, eds., 1991).

32. LOC Report, *supra* note 24, at 30.

33. This memorandum does not discuss the related thesis that newly independent states may not deny citizenship to any applicant from the class of people who formally had citizenship in the preceding state and are permanent residents of the new state unless the basis for such a denial would also be consistent with international human rights law as a basis for the applicant's *denaturalization* by the preceding state. For a broader discussion of the obligations of successor states, see Francisco Villagran Kramer, Rapporteur, *State Succession and Its Impact on the Nationality of Natural and Legal Persons*, International Law Commission 47th session, UN doc. A/CN.4/L.514, July 11, 1995.

34. An additional requirement of two-years residence in the Czech Republic was required but is not discussed here. For criticism arguing that the residency requirement was not implemented in practice according to the letter of the law, see the Tolerance Foundation Reports, *supra* note 3. For the decision of the Czech Constitutional Court clarifying the residency requirement, see Constitutional Court Decision 207/1994 Coll. (Sept. 13, 1994) (information translation provided by the UNHCR).

For the first category, Czech citizenship was automatically bestowed; it appears that 1) the consent of the individuals concerned was assumed, and 2) the Czech parliament was unconcerned about possible criminality. For the second category, those desiring Czech citizenship could obtain it by declaration. This process ensured the express consent of the individual concerned—consent being required under international law for a state to extend its citizenship. Since this category of applicants by definition lived outside of the former Czechoslovakia and may have assumed the citizenship of another country, the declaration process also assured harmony regarding potential questions of dual citizenship.<sup>(35)</sup> Again, the Czech legislature appeared unconcerned about possible criminality. For the third category, citizenship is denied to individuals convicted of intentional crimes in the preceding five years.

Although many OSCE countries (including the United States) require that *prospective immigrants* meet specified conditions in order to become naturalized citizens, the Czech standard differs in that it applies *retroactively* to those who previously had the citizenship of the state which exercised sovereignty on the territory of what is now the Czech Republic, i.e., the state to which the Czech Republic is the successor.

4.6. *Therefore, the 1992 Czech citizenship law has the effect of attaching to past criminal acts (acts committed in the five years prior to January 1, 1993) a heavier penalty (the loss of the option of Czech citizenship) than the one that existed at the time the criminal act was committed in violation of the international standards set forth below.* The rationale for the international standard prohibiting *ex post facto* laws is that an individual must have notice of a prohibited form of behavior and its specific consequences in order to be held responsible for its infringement.

4.7. *Significantly, the right to be free from the ex post facto increase of a criminal penalty attaches to citizens and non-citizens alike.* Czech officials have implicitly argued that the right to be free from the *ex post facto* increase of criminal penalties applies only to those who are already Czech citizens. Moreover, they have defended that the Czech citizenship law does not impose the *ex post facto* sanction of loss of citizenship since, in their view, the loss of *Czechoslovak citizenship* results from the dissolution of the *Czechoslovak state itself*, and not from the Czech citizenship law *per se*. In addition, they argue, former Czechoslovaks who do not obtain Czech citizenship are also not denied citizenship because they have Slovak citizenship.

There are several flaws in this reasoning. First, this reasoning suggests that if the sanction in question is not the loss of Czech citizenship but merely the loss of an opportunity or option to become a Czech citizen, then there is no sanction. The standard under the law, however, is not whether the sanction takes one specific form or another, but whether it is punitive in nature. The reasoning of the U.S. Supreme Court, when similarly confronted with the question of whether the denaturalization at issue in *Trop v. Dulles*<sup>(36)</sup> was punitive, is informative. In that case, the Cabinet, upon recommending the legislation providing for denaturalization, specifically described it as "not a penal law."<sup>(37)</sup> Nevertheless, the Court argued that

35. This process of declaration, however, may be criticized on the following grounds: Not all individuals who had been Czechoslovak citizens but who fell outside the scope of the 1968-69 categorization had assumed the citizenship of another country. Therefore, upon the termination of the Czechoslovak state, and the termination of Czechoslovak citizenship, the failure of the Czech Republic to bestow citizenship automatically to such persons may have rendered some of them stateless.

36. *Supra* note 26.

37. *Id.* at 94.

"legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute."<sup>(38)</sup> And while a law may be considered non-penal "if it imposes a disability, not to punish, but to accomplish some other legitimate purpose,"<sup>(39)</sup> as discussed under section 3 above, the sanction in this instance is clearly punitive and Czech officials have been unable to present any other rationale for this provision of their citizenship law.<sup>(40)</sup>

Second, Czech officials have repeatedly argued that all former Czechoslovaks who apply for but are deemed ineligible to receive (post-1992) Czech citizenship are not rendered stateless, because they automatically receive Slovak citizenship. This is incorrect.

As Diane Orentlicher notes, "it has long been recognized that states may not *impose* their nationality through involuntary nationalization (though consent may be presumed in respect of certain types of automatic acquisition of citizenship, as for example, through marriage to a national)."<sup>(41)</sup> The rationale that buttresses this long-recognized principle has less to do with post-World War II ideals of individual freedom, and more to do with traditional notions of state sovereignty: the imposition of citizenship on foreign nationals would, historically, be seen as a challenge to the jurisdiction of the State whose nationals they are.<sup>(42)</sup> By extension, if the Slovak Republic has no right to claim residents of the Czech Republic as its own against their will (and, significantly, Slovak officials have denied that their law does anything more than make citizenship an *option* for such people), surely the *Czech* Government cannot impose *Slovak* citizenship on people against both the individuals' expressed desire (evidenced by their renunciation of any claim to Slovak citizenship and simultaneous request for Czech citizenship) and against the intent of the country whose citizenship the Czech Government purports to extend. Therefore, as a practical matter, the denial of Czech citizenship because of one's past criminal act has, in fact, resulted in the loss of *any* citizenship for some applicants.

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38. *Id.* at 97.

39. *Id.* at 95. The Supreme Court further elaborated: "A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance." *Id.* at 95.

40. In meetings with Commission staff, Czech officials have occasionally opined that the restrictive approach of the Czech citizenship law is necessary in order to avoid dual citizenship and/or to prevent large numbers of former Czechoslovaks from Slovakia from coming into the Czech Republic. See, e.g., Position of the Czech Republic on the UNHCR Regional Bureau for Europe Document, *supra* note 1, at 7. At best, however, such concerns represent mere drafting problems. All of the other 19 newly independent OSCE countries have been able to resolve dual citizenship and border concerns without resorting to an *ex post facto* criminal sanction.

41. Orentlicher, *supra* note 19, draft at 17.

42. With this in mind, some international observers are alarmed by the Soviet-style interpretation of law voiced by Czech officials—i.e., that citizenship may be attributed to people contrary to their expressed will and even in the face of the likelihood of conflicting state claims of jurisdiction. Indeed, the implications of permitting such an interpretation should not be underestimated; it is particularly informative to consider this interpretation of law with a view to the recent decision of the lower house of the Russian Duma to extend Russian citizenship to include *all* those persons who were born in an area recognized as Russian territory at the time of their birth. *State Duma Moves to Extend Citizenship*, Interfax in English (June 13, 1996). Translation by Foreign Broadcast Information Service. FBIS Daily Report—Central Eurasia, June 13, 1996 (FBIS-Sov-96-115; p. 36). The significance of this is that the Russian Soviet Federative Socialist Republic included, until 1954, the ethnically mixed region of Crimea—an area currently part of Ukraine and the site of sensitive OSCE conflict management efforts.

Finally, the right to be free from *ex post facto* increases of criminal penalties attaches to citizens and non-citizens alike under international law. Thus, even assuming that there is no automatic right for all former Czechoslovak citizens to become Czech citizens, or that there is no automatic right for all former Czechoslovak citizens resident in the Czech Republic to become Czech citizens (points which are not argued here but also not conceded), and that some conditions may be imposed in connection with the establishment of a new Czech citizenship in the aftermath of the dissolution of the Czechoslovak Federal Republic, *this particular condition*, acting to increase a penalty for a past criminal act, may not be imposed consistent with international law.

4.8. *The prohibition of the ex post facto increase of criminal penalties is non-derogable under any circumstances.*

## **5. RELEVANT INTERNATIONAL STANDARDS REGARDING *EX POST FACTO* LAWS (EMPHASIS ADDED) UNIVERSAL DECLARATION OF HUMAN RIGHTS**

11(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.*

### **International Covenant on Civil and Political Rights**

15(1) No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed.* If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

4(2) No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

### **European Convention on Human Rights and Fundamental Freedoms**

7(1) No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. *Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.*

15(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraphs 1) and 7 shall be made under this provision.

## Helsinki Final Act:

Principle X The participating States will fulfil in good faith their obligations under international law, both those arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are a party.

### 6. OTHER RELEVANT AGREEMENTS OR STATEMENTS

1. "In no case should new citizenship laws be drafted and implemented in such a way as to discriminate against legitimate claimants for citizenship, or even to withhold citizenship from possibly tens of thousands of life-long and long-term inhabitants of the state, most of whom are Roma. As a result, the status of these persons is essentially 'foreigner' in their own country. This would greatly undermine what I would consider to be in the long-term interest of the state: the unequivocal establishment of a loyal bond between the state and its inhabitants and the prospect that they would be able to participate fully in the political, economic, and social life of the state. I would strongly urge that the clearly negative impact of such legislation be considered, and that appropriate changes be made."—Max van der Stoep, *CSCE High Commissioner for National Minorities*, Seminar on Roma, jointly convened by the Council of Europe and the OSCE (CSCE), September 1994

2. "States shall ensure that, through the operation of national laws, all persons who were citizens of a predecessor State and who are permanently residing on the territory of a successor State, enjoy or be granted citizenship."—Section I, para. 15 (b), *Programme of Action*, adopted by the Regional Conference to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the countries of the Commonwealth of Independent States and relevant neighbouring States (the Conference on Migration), Geneva, May 30-31, 1996

3. "The OSCE Parliamentary Assembly . . .

31. *Recalls* the commitments under the 1992 Helsinki Document not to increase statelessness;

32. *Affirms* that citizenship may be only extended or bestowed by a State subject to the consent of the individual concerned,

33. *Calls* on the participating States to give equal rights to individuals as citizens, not as members of a particular national or ethnic group. Accordingly, they should ensure that all citizens be accorded equal respect and consideration in their constitutions, legislation and administration and that there be no subordination, explicit or implied, on the basis of ethnicity, national origin, race, or religion; further calls on the participating States to acknowledge that citizenship itself is based on a genuine and effective link between a population and a territory and should not be based on race or ethnicity and must be consistent with the state's international obligations in the field of human rights;

34. *Urges* that, upon a change in sovereignty, all persons who have a genuine and effective link with a new State should acquire the citizenship of that State.—*Ottawa Declaration of the OSCE Parliamentary Assembly*, July 8, 1995