INTERNATIONAL LAW AND DIPLOMATIC BARGAINING: A COMMENTARY ON THE SUDETEN GERMAN QUESTION

By James H. Wolfe

European international relations are in transition. The diplomatic permafrost of the Cold War is giving way to a search for adjustment through the institution of multilateral East-West conferences. References to the Congresses of Vienna (1815) and Berlin (1878) abound in an atmosphere of guarded optimism. Yet allusions to the homeostatic European state system of the 19th century are misleading, for the diplomatic style characteristic of a balance of power, whether during the Warring States period of ancient China or the Italian Renaissance, presupposes inter alia a community of belief encompassing the major decision-making elites. Fundamental to the functioning of a self-equilibrating international system is the institutionalization of values in the form of supranational norms and, whenever possible, organizations. The acceptance of these norms by participating governments is essential if the hopes surrounding multilateral Conference diplomacy are to be fulfilled. Conversely, failure to agree on specific rules of behavior, e.g., rebus sic stantibus as a fundament of treaty law, bodes ill for the successful outcome of a universal diplomatic effort.

Within the regional subsystem of East Central Europe international legal questions are of major importance, for those issues affecting the vital interests of the states in this area have since 1945 more often than not been couched in the language of legal rhetoric. The reliance on juridical reasoning to resolve disputes has the advantage of controlling the diplomatic dialogue between contending governments in the sense that this communication takes place through the manipulation of legal symbols. The restraints of legal terminology do mitigate the fervor of nationalistic passion at the Conference table, yet they also emphasize absolute values and thereby make agreement on the basis of a political compromise improbable. The primacy of the legal orientation structures the negotiations in terms of the rational application of juridical principles which, in turn, limits the bargaining capability of the negotiators. International law can be a two-edged sword, for while its application in crisis situations may rationalize the solution of the conflict in terms of universally accepted standards, a strictly legal approach can make a solution on a pragmatic basis improbable. In contemporary world politics few problems illustrate this proposition as clearly as the Sudeten German question.

The fundamental issues of the Sudeten German question as they have developed through West German and Czechoslovak efforts beginning with a trade
agreement in 1967 to achieve a reconciliation are twofold: the challenges to the validity of the Anglo-French-German-Italian Munich Agreement and to the legality of the expulsion of the Sudeten Germans from their Bohemian and Moravian homeland in 1945–6. Prominent in the background of both questions is the possibility of reparations claims and counterclaims which could be advanced by the governments involved. For both the Czech and German publics the financial undertone of these problems lacks the high level of salience intrinsic to their symbolic content. An agreed perspective on the past is indispensable to a viable understanding between Czechs and Germans, and both Prague and Bonn appear convinced that legal reasoning alone provides the most feasible means of reaching a mutually palatable historical consensus on which to build a political relationship for the 'seventies.

The Munich Agreement

Writing in 1942, the Czech jurist and historian Edvard Táborský presented four arguments for the invalidity ab initio of the quadripartite Munich Agreement (September 29, 1938) to bring about the transfer to Germany of Czechoslovakia's predominantly German areas — the Sudetenland. Assuredly, Táborský wrote from the perspective of the first Czechoslovak Republic (ČSR), but with minor modifications the legal scholars of today's Czechoslovak Socialist Republic (ČSSR) continue to rely on the same brief advanced by their conservative republican compatriot although their citations pointedly omit any mention of his name. The basic points in the Táborský argumentation are:

1) According to the constitution of 1920, the President of the Republic, Edvard Beneš, lacked the legal competence to authorize a cession of state territory in that he failed to secure the approval of Parliament for this act;

2) The Munich Agreement was concluded under duress, i.e., Prague was oppressed by a belief in the imminence of a German invasion, and accordingly the terms of the treaty are not binding;

3) The Anglo-French pledge to guarantee the territory of the ČSR in its new frontiers constituted an integral part of the Agreement, and the failure to uphold this commitment nullified the obligation of the Czechoslovak government to accept the territorial transfer; and

4) Finally the German military occupation of Bohemia and Moravia on March 15, 1939 as well as the simultaneous creation of a secessionist Slovak state occasioned the dismemberment of the ČSR and thereby repudiated the spirit and the letter of the Agreement.

Each of the preceding assertions would in itself be sufficient to invalidate the Munich Agreement ab initio; taken together they represent a seemingly convinc-

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ing case for denying legitimacy to the Great Power solution of a grievous minority problem through the modification of a frontier. Yet within the scope of international law several interpretations of an event are usually possible, and the jurisprudential dispute over the initial validity of the Munich Agreement is not an exception to this premise.

The most complex challenge to the legality of the Agreement is that stemming from the alleged lack of competence on the part of the President of the Republic to accept and implement in his executive capacity the multilateral proposal to cede the Sudetenland to Germany. Article 64 of the constitution did require the consultation and support of Parliament for treaties altering the territorial base of the state. President Beneš did secure the unanimous consent of the cabinet and of the leaders of the major parliamentary political parties for his accession to the Agreement. Táborský and contemporary critics of this diplomatic act argue that the constitutional requirement could only have been met by the passing of a formal parliamentary resolution in support of the Government's policy. The implications of this presumed lack of competence are hardly complimentary to the historical image of President Beneš, who was one of the founders of the Republic. It is difficult to accept the notion that the Chief of State violated his oath of office by acceding to the Munich Agreement without fulfilling his constitutional obligations. Hubert Ripka, a key member of the "fortress" as the President's closest circle of advisers was known, described in his memoirs the governmental decision-making process during this crisis, and his discussion reflects no doubt as to the constitutionality of the President's action. Informed Czech opinion on the subject of constitutional interpretation remains divided. However, it is notable that in the seven weeks which elapsed between the negotiations in Munich and the signing of the final Czechoslovak-German accord delimiting the new frontier (November 20, 1938), President Beneš's legal competence was not called into question either by any of the signatories of the Agreement or by the Assembly of the League of Nations, which lauded the peacemaking efforts of the Powers.

In an appeal to the theory of general principles of law as a basis for the contention that a transfer of state territory without parliamentary approval is invalid Táborský turned to an analysis of modern constitutions. He recognized that executive authority is sufficient to conclude multifarious international agreements in most states, yet he asserted that the constitutions of civilized regimes require legislative approval for the cession of national territory. Were this argumentation sound, each party to a treaty altering borders would be compelled to investigate the constitutional procedures of the other signatory and to confirm their observance. Diplomatically such a practice would soon prove to be destructive of all but the most routine international negotiations. Instead the balance of opinion among international lawyers supports a theory of confidence whereby each negotiating government accepts an article of faith that all other parties

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are competent within their own constitutional setting to make a commitment. Few would question the competence of a head of government and his foreign minister to conclude a treaty. Should doubt exist as to the authority of a diplomatic mission, e.g., spokesmen for a government in exile, the matter must be clarified prior to the fulfillment of the conditions of the treaty under consideration. Contemporary governments of emergent nations sometimes advance the argument that treaties delimiting their borders were concluded by colonial regimes incompetent to represent the interests of the peoples concerned. The question of historical justice notwithstanding, under international law a frontier agreement concluded and implemented within the spirit of the theory of confidence is valid and remains so until replaced by another agreement.

The second plea for the invalidation of the Munich Agreement — that it was brought about under pressure — illustrates the difficulty of arriving at a generally acceptable legal interpretation of a complex diplomatic event. International jurisprudence recognizes duress as a ground for the invalidation ab initio of a treaty whenever the representatives of a government have been placed under physical or psychic pressure to submit to a given set of terms. For example, the assent of Emil Hácha, who became President of the ČSR after Beneš’s resignation on October 5, 1938, to the dissolution of the Republic and the creation of the Protectorate of Bohemia and Moravia was extracted under such conditions of physical and emotional strain that it could not be regarded as legally binding.

Although he was avowedly presenting a case on behalf of the Czechoslovak Provisional Government, which was organized by Beneš in London on July 4, 1940, Táborský realistically and fairly concludes that „... the majority of international authorities would probably not regard the pressure which was exerted upon Czechoslovakia at Munich as sufficient to render that country’s acceptance of it as invalid.“ Notably, currently published opinions in the ČSSR do not support this conclusion. On September 29, 1972, Bohuš Chňoupek, the Foreign Minister of the ČSSR, addressed the General Assembly of the United Nations on the subject of the „Munich Diktat“ and described it as an illegal agreement concluded under a threat of aggression which ultimately led to World War II. Vaclav Kral, a leading historian, has cited the judgment of the International Military Tribunal at Nuremberg with reference to the charge of conspiracy to commit aggression as a reason for nullifying the Agreement. As

6 Táborský 32.
7 Rude pravo, September 30 (1972).
evidence of illegal pressure the international lawyer Václav Michal has referred not only to the threat of German invasion, but also to intervention on the part of the British and French ambassadors in Prague, who demanded at the height of the crisis that the Czechoslovak government either accept the proposal of uniting the Sudetenland with Germany or stand alone in the event of an attack. Jaroslav Žourek has written a detailed treatise in which he argued that the Munich Agreement merely served as a superficially legal camouflage for a war of aggression and therefore never possessed any valid international standing. Vladimír Kopal, Josef Mrázek, Alexander Ort, Antonín Šnejdárek, and Vladimír Soják have argued in support of their compatriots’ interpretation of the juridical concept of „duress“ as a cause for denying all legality to the settlement at Munich.

The historical background of the September crisis remains an object of scholarly disputation. In any international crisis all participants share the responsibility, albeit to varying degrees, for conflict. On May 20, 1938 the Czechoslovak army carried out a partial mobilization purportedly to counteract a concentration of German forces on the Republic’s borders. The British ambassador in Berlin reported, however, that there was no unusual German military activity in the direction of Czechoslovakia, and Prime Minister Neville Chamberlain disassociated himself from the bellicose implications of the Czechoslovak action. Despite this attitude of restraint the German Chancellor instructed his military high command on May 30 to prepare a plan for the use of force against the ČSR, and the proposed invasion received the code designation of „Operation Green“. The Anglo-French démarche in Prague of September 19 committed the Western Powers to a solution by cession. There exists reason to believe that this joint declaration was welcomed by Beneš, who received it as a way of resolving an internal as well as external political deadlock.

Unquestionably the political leadership in Prague felt itself threatened despite the Little Entente (1920), a collective defense pact supported by France, and an alliance with the Soviet Union (1935). Behind these treaties, which supplemented the collective security system of the League of Nations, stood a fully modernized Czechoslovak army of thirty-four divisions deployed in well developed de-

13 Michal 53, note 6.
fensive positions. Nevertheless, political pressures at home and abroad left Beneš little alternative but to accept the stipulations of Munich.¹⁴ That doubt exists as to the wisdom of this policy choice does not provide a legal argument for declaring the Munich Agreement void ab initio. Most international compacts requiring a transfer of territory from one state to another are negotiated by governments of unequal power and under conditions of stress, yet the new frontiers are held to be legally valid. In this respect the Munich Agreement is not exceptional.

The third argument Táborský propounds for the initial invalidity of the Munich Agreement hinges on the question of whether or not ancillary statements or understandings associated with a treaty are part of the diplomatic instrument itself. On September 19, the governments of France and Great Britain offered the Czechoslovak government a pledge of security for its new frontiers in exchange for the peaceful cession of the Sudetenland. This guarantee was confirmed in the form of a written declaration made after the signing of the Munich Agreement.¹⁵ Beneš probably acceded to the Munich Agreement in the belief that the Western Powers would uphold the Republic's territorial integrity. His faith proved deceptive; France and Great Britain limited their response to diplomatic protests on March 15, when the ČSR dissolved under the impact of the Slovak secessionist movement and Hitlerian action. If the Anglo-French commitment was intended as a part of the Agreement, then the latter was voided as result of the failure of these two signatories to fulfill their promise. If, however, the guarantee was given apart from the treaty, the original settlement was implemented in a legal and final form when the new German-Czechoslovak border was demarcated. Authorities dispute the binding character, if any, of letters, communiqués, and oral statements which invariably accompany the signing of international accords. Such addenda are typical of the art of obfuscation on which treaty negotiators often depend for their success.

The destruction of Czechoslovak territorial integrity through German military action in occupying Bohemia and Moravia less than six months after Munich constitutes Táborský’s fourth and most telling argument. Three days before the conference convened to assign the Sudetenland to Germany, Hitler declared in a public address that his interest was limited to the fate of the Sudeten Germans, and that he was prepared to offer a guarantee of the ČSR after the Czechs had successfully stabilized their relations with other ethnic minorities in the Republic.¹⁶ Nevertheless, following a Slovak separatist coup d'état in Bratislava, the German army entered Prague. In 1964, the Chancellor of the Federal Republic

¹⁶ Wir wollen gar keine Tschechen! In: Höfer 207—208.
of Germany, Ludwig Erhard, cited this act of force as a ground for abrogating ex nunc the Munich Agreement.\textsuperscript{17} Wartime declarations by the other signatories corroborate this interpretation.\textsuperscript{18}

The political circumstance of Hitlerian aggression did tear the Munich Agreement to shreds; but the initial negotiated settlement, however cynical the Great Power diplomacy, was consistent with the law of treaties.\textsuperscript{19} On June 5, 1945 the four wartime Allies issued a joint communiqué announcing their assumption of all governmental authority in Germany and leaving the question of that state's frontiers open for further discussion.\textsuperscript{20} In the Potsdam Agreement (August 2, 1945) the governments of the United States, Great Britain, and the Soviet Union identified the German frontiers as those of 1937 with the exception of Königsberg, which was formally annexed by the Soviet Union.\textsuperscript{21} To the extent that the Potsdam Agreement approximates a peace treaty for Germany, it also represents the point in time when the Sudetenland reverted to the Czechoslovak Republic. This point of view receives support in discrete judicial decisions. For example, the United States Military Tribunal in Nuremberg in its decisions of 1948—9 declined to consider the Sudetenland as occupied territory during World War II and by implication treated the area as a part of Germany prior to the end of hostilities.\textsuperscript{22} The French Court of Appeals in Paris recognized the initial validity of the Munich Agreement and the transfer of the Sudetenland.\textsuperscript{23} The tightly reasoned French approach to the validity question is representative of legal scholarship without political bias. Yet the question is so freighted with emotion that pragmatism in the nature of political bargaining rather than the absolutism of the law may provide the only realistic answer.

\textit{The Expulsion of the Sudeten Germans}

As early as 1942, Beneš wrote that the postwar political order in Central Europe would require the forced transfer of populations on a scale never before


\textsuperscript{19} Wright, Quincy: The Munich Settlement and International Law. American Journal of International Law (January 1939) 17—31.


\textsuperscript{22} Münch, Fritz: The Pseudo-Statal Regime. Central Europe Journal (December 1968) 370.

experienced in that region. He and other members of the Czechoslovak Provisional Government determined that as soon as practicable after the cessation of hostilities all persons regarded by the German government as its citizens would be deported from the newly reconstituted Czechoslovak state. In the view of the Czech émigrés a failure to carry out the expulsion, which also included the Hungarian communities on the southern slopes of the Carpathians as well as the German townships of Slovakia and Silesia, would perpetuate the minority problems which had so endangered the CSR in the interwar years. Undeniably the Sudeten Germans and their conationalists in other parts of the Republic had never been offered the opportunity of a plebiscite or any other systematic means of expressing their views. Nevertheless, it was this population, twenty-four per cent of the total, which had to bear collectively the brunt of the frustration and bitterness arising out six years of foreign governance. In the sixties prominent Czech intellectuals, both at home and abroad, castigated the expulsion as having been contrary to humanitarian and, depending upon the writer’s politics, Marxist principles. The rabid nationalism of 1945—6 did not allow for such tolerance. At Potsdam the Allies condoned the expulsion, which was already underway; it was completed under conditions occasioning an estimated loss of life among the Germans of Czechoslovakia of 241,000.

Closely related to the problem of the Munich Agreement is the question of whether or not the deportation of ethnic Germans and Hungarians from Czechoslovakia could be sanctioned within the precepts of international law. If not, the present Czechoslovak regime not only confronts the charge of historical responsibility for a manifold violation of human rights, but also faces the threat of claims for reparations as compensation for damages suffered by the deportees. The legal answer to the problem of culpability appears most readily ascertainable in the law of war, *jus in bello*. The humanistic tradition requiring the protection of individual human rights by placing limits on the use of the power of the state has always been a motivating force in the repeated efforts to mitigate the impact of war on civilian populations. Historically the law of war has served to define the rights of the individual when confronted with the *ultima ratio regnum* and therefore provides the most applicable legal standards for rendering a judgment on the mass deportations which occurred in Europe during and at the end of World War II. A survey of the writings of jurists, provisions of treaties, and judicial decisions is essential to the crystallization of the core issue: what are

24 Beneš, Edvard: The Organization of Postwar Europe. Foreign Affairs (January 1942) 238.
the limits imposed on the doctrine of military necessity by the obligation of belligerents to respect the rights of noncombatants?

The Greek chronicler Thucydides provided eloquent testimony to the savagery of ancient warfare in which no distinction existed between combatants and noncombatants. There was no law of war which shielded a conquered people in antiquity from the wrath of the conqueror. The modern development of a European state system and its obverse of an international balance of power introduced the concept of a limited war designed to achieve a specific foreign policy objective. Military force became the dynamic factor underlying the homeostatic process of action and reaction which regulated and preserved the international system. The maintenance of every major actor contributing to a stable equilibrium was a cardinal principle of European diplomacy until 1914. Of necessity the goals of war were restricted in that action on the battlefield was calculated to deter an aggressor and not to redraw the map of Europe. As a corollary of this theory of deterrence a body of international law came into being to circumscribe the scope of war.

The Spanish theologian Francisco de Victoria (1483—1546) wrote on the law of war against the background of the expeditions of the conquistadores in the New World and concluded that noncombatants are outside the scope of legitimate military action. Specifically, he forbade the killing of innocents, especially children. Although the children of Saracens might grow up to wage war against Christendom, they should still be spared when taken captive. Only as an unavoidable concomitant of a battlefield maneuver, such as bombarding a fortress, would no guilt attach to the slaying of the innocent. In this dictum the concept of military necessity, which was later applied to the war crimes trials of 1945—50, appears in its incipient form.

The Dutch legal philosopher Hugo Grotius (1583—1645) affirmed Victoria’s principles in his monumental work on the law of war and peace by expostulating that the sovereign could justifiably take the lives of enemy nationals, including women and children, only if success in battle demanded it. Those subjects of an enemy prince who had surrendered unconditionally had a right to their lives and well-being. Samuel von Pufendorf (1632—1694) went further than Grotius and asserted that natural law set definite restrictions on the extent to which damage can be done to an enemy in time of war, and he made military commanders responsible for the acts of their soldiery campaigning against an enemy. Consistent with this approach the Swiss jurist Emmerich de Vattel (1714—1767) admonished sovereigns that the rights of a conqueror are limited to justifiable

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self-defense vis-à-vis subdued enemy subjects, and accordingly he counseled an humanitarian approach to the governance of occupied territory.  

Among modern legal scholars, Christian Wolff (1679—1754) is quite possibly the most significant in a discussion of the concept of universal human rights as a means of attenuating the misery of war. Wolff agreed with Grotius that in armed conflict force could justifiably be used against all the subjects of the enemy sovereign, yet he quickly qualified this assertion by writing that the lives of those who had offered no resistance should not be threatened. In particular, a declaration of unconditional surrender terminates the state of war and with it the belligerent’s right to take the life of an enemy. Wolff concluded his discourse with the proscription of the death penalty for captured enemy subjects as a reprisal for a military or diplomatic defeat suffered at the hands of their ruler. This maxim is the antecedent of the modern prohibition in the law of war against the imposition of collective penalties, with the possible exception of a monetary fine, on the civilian population of an area under belligerent military occupation.

During the American Civil War (1861—65) Francis Lieber, who emigrated from Germany after the Revolution of 1848, served as legal adviser to President Abraham Lincoln. In this capacity Lieber wrote General Orders No. 100, a manual on the law of land warfare issued in 1863 for commanders in the field. The express purpose of the publication of these instructions was to protect, if possible, the civilian population from the excesses of war typical of an internecine civil conflict. Lieber began with the assumption that men at war do not cease to be ethical beings, and that they continue to remain morally responsible for their acts even in the heat of battle. The plea of military necessity does not justify an army’s wrecking vengeance on the civilians who come under its control in enemy territory. In summation, Lieber wrote, „... military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.“ Accordingly, he continued, „Private citizens are no longer murdered, enslaved, or carried off to distant parts.“ The prohibition of mass civilian internment and deportation was basic to Lincoln’s policy of reconciliation with the South, and Lieber’s code became a milestone in the evolution of legal norms designed to provide a minimal amount of security for noncombatants in a war zone.

The theory of limited war embodied in General Orders No. 100 received international recognition in the St. Petersburg Declaration (1868), which was adhered to by seventeen European governments. In order to provide a basis for outlawing the use of certain types of ammunition in battle, the signatories de-

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37 Ibidem 9.
clared *inter alia*, . . . that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.\(^{38}\) Six years later in Brussels fifteen European governments, but not the United States, negotiated a convention on the law of war which affirmed and expanded the St. Petersburg concept of the limitations on the use of armed force as an instrument for foreign policy. The Brussels Protocol (1874) stated:

It has been unanimously recognised that the progress of civilization should have the effect of alleviating, as much as possible, the calamities of war, and that the only legitimate object which States should endeavour to accomplish during war is to weaken the enemy without inflicting upon him useless sufferings.\(^{39}\)

As a precursor of subsequent conventions on the law of war the Brussels conference circumscribed the prerogatives of an occupying power in an enemy country by requiring that family rights, individual religious practices, and private property be respected.

In 1899, the representatives of the major European and American states assembled in the Hague to formulate a general agreement codifying the international norms of the law of war. The conferees determined that war is a condition of conflict among states and should be limited to armed combatants.\(^{40}\) At the second conference in the Dutch capital (1907) this principle became the basis of the Hague Regulations, a legal code governing warfare and specifying provisions for the protection of civilians in a combat zone.\(^{41}\) Although the Hague Regulations did not expressly forbid the mass deportation of civilians, the articles protecting family rights (46), outlawing general penalties (50), and requiring payment for requisitions (52) clearly preclude such reprisals as the forced transfer of a population from its homeland.\(^{42}\) The underlying assumption of these efforts to restrict the prerogatives of military government was that the individual civilian could be regarded as an enemy when he was openly bearing arms, and that otherwise his rights as a private person were to be protected.

During World War I, both the Central Powers and the Entente violated the Hague Regulations by deporting enemy civilians from their homelands as these came under military occupation. French authorities deported German citizens from Alsace-Lorraine; and the Tsarist government organized mass expulsions from East Prussia, East Galicia, and Bukowina. In 1916, the American Secretary of State, Robert Lansing, lodged a formal protest with the Imperial German Government over the often compulsory recruitment of Belgian workers for

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\(^{39}\) Brussels Conference of 1874. *Ibidem* 575.

\(^{40}\) Hall, William Edward: *A Treatise on International Law*. Oxford 1904, p. 64.


Although all governments sought to justify the deportations of noncombatants by pleading military necessity, the consensus of opinion among international lawyers after the war was that these forced removals contravened the spirit and intent of the Hague Regulations. As long as a civilian obeyed the lawful ordinances of an occupying power for the maintenance of public order and welfare, he had every right to expect the protection of his family and property. The indiscriminate expulsion of civilians from their homes was a form of general penalty and therefore illegal.

Despite transgressions, the experience of World War I reinforced the legal distinction between combatants and noncombatants by limiting the concept of military necessity to:

All direct destruction of life and limb of armed enemies, and of other persons whose destruction in incidentally unavoidable in the armed contests of war.

In this sense the expression "military necessity" refers to a situation in which a vital action against the enemy may entail civilian casualties. The example usually given is the sinking of an enemy merchantman. The overriding concern is that acts of war be held proportional to legitimate military ends. For example, although tactical and humanitarian considerations may require the temporary evacuation of enemy civilians from their homes, reprisals in the form of mass population transfers are illegal.

The deportations of World War II made the illegality of these acts the subject of war crimes trials, and two decisions rendered in 1948—49 illustrate the narrowly limited acceptability of an appeal to military necessity as a justification for violating family and property rights. The judicial reasoning in both cases clarifies the proscription in positive international law against the expulsion of ethnic groups from their homelands. In the first trial, that of General Lothar Rendulic before an American military court, the defendant was accused of having flouted the Hague Regulations by ordering the destruction of private property and the involuntary evacuation of the indigenous population from the Norwegian province of Finnmark in 1944. The defense was able to establish that General Rendulic anticipated a major Soviet offensive in his sector of the front and removed the civilian population from the presumed battle area as a

measure of safety. The court martial accepted this interpretation of military necessity and acquitted the defendant on the charge of unlawful deportation.\textsuperscript{49}

In the trial of Field Marshal Erich von Manstein before a British military court, the accusation of mass deportation to gain military advantage, rather than out of military necessity, was upheld; and the defendant convicted. The prosecution argued that the precedent of the Rendulic decision was inapplicable because the number of people involved was significantly greater, and because documentary evidence showed that the accused ordered the movement of civilians in 1943—44 in order to deny recruits and laborers to the Soviet army then advancing into the Ukraine.\textsuperscript{50}

The foregoing decisions place the notion of military necessity in perspective and confirm the obligation of army commanders to respect the rights of enemy communities which have come under their jurisdiction. The expulsion of the Sudeten Germans from their homeland in 1945—46 was undoubtedly not a matter of military necessity as defined in the Rendulic and von Manstein cases. At the end of hostilities on May 8, 1945 the Sudetenland was a part of Germany, and Czech authorities who assumed governmental functions in this border region were subject to the same Hague Regulations as applied to von Manstein. The legal condition of \textit{occupatio bellica} persisted at least until the signing of the Potsdam Agreement by which the Allies delimited Germany's frontiers to be essentially those of 1937 and thereby restored \textit{de jure} Czechoslovak sovereignty in the Sudetenland. Although at Potsdam the Allies approved a gradual and orderly transfer of the Sudeten Germans to the zones of military occupation into which Germany and Austria were then divided, the Western Powers never disavowed the humanitarian principles of the Hague Regulations and sought to mitigate the inhuman conditions of the expulsion. Nevertheless, the losses among the expellees offer mute testimony to the savagery of ethnic conflict in contemporary East Central Europe, and the legacy of this forced migration continues to oppress relations between Czechs and Germans.

Recognizing that the expulsion was completed after the restoration of Czechoslovak sovereignty in the Sudetenland, the historical reality is that the deportation was begun while the region was still a nominal part of Germany. Moreover, the decision to uproot the Sudeten Germans was made during a time of declared war and is censurable, for the International Military Tribunals in Nuremberg and Tokyo affirmed the principle that the intent to commit acts contravening the law of war is a punishable delict. The Czechoslovak government argues that the Sudeten Germans had collectively forfeited their claim to citizenship in the Republic and to the protection of its constitution. Even accepting this point of view, international law does not recognize denationalization


\textsuperscript{50} Great Britain, British Military Court at Hamburg. In re von Lewinski (called von Manstein). In: \textit{Lauterpacht: Annual Digest}: Year 1949, pp. 520—523.
as a justification for disestablishment through the expulsion of an ethnic minority.\textsuperscript{51}

Cicero's maxim \textit{inter arma leges silent} regrettably remains for many a greater truism than the ideal of limited war embodied in the Hague Regulations.\textsuperscript{52} Integral nationalism and its concomitant of a mass citizen army inspired with ideological fervor often undermine the efforts of jurists and professional soldiers to translate the laws and customs of war into viable rules of conduct. One of the founders of the realist school of modern diplomacy, Ludwig August von Rochau, summarized the dichotomy between law and behavior in 1869, when he wrote:

The art of statecraft is, as its name indicates, nothing but the art of success in achieving specific political goals ... All rational human activity is, according to its nature, aimed at success; and the rational goal of statecraft can be none other than the effective utilization of national resources to achieve political success. A middle class "do" or "don't" which ignores the principle of success, takes into account only consequences of good and evil, and clings to an unchallengeable dogma may in individual cases serve the cause of personal honor; but it has nothing in common with the meaning of politics.\textsuperscript{53}

The emissaries traveling between Bonn and Prague may do well to remember the principle of success in an awareness that pragmatic bargaining must complement legal reasoning if a Czech-German \textit{rapprochement} based on parity and mutual concessions is to be achieved.

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