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

James H. Wolfe

The diplomatic dialogue over the problems of a European *détente* is couched in the language of international law. Typical of the legal approach to negotiation is the West German-Czechoslovak effort to reach agreement on the validity of the Munich Agreement (1938) and the permissibility of the expulsion of the Sudeten Germans from their homeland (1945—46). As early as 1942, Professor Edvard Táborský argued that the Munich Agreement was void *ab initio* on the following grounds: the nonfulfillment of its conditions, the use of duress during the negotiations, an unconstitutional ratification on the part of Czechoslovakia, and finally Hitlerian aggression against the remainder of the Czechoslovak Republic (ČSR). Professor Otto Kimminich and others have challenged the cogency of these arguments, and they remain a source of perennial debate. Similarly, the deportation of over two million ethnic Germans from the ČSR contravened those laws of war which demand respect for the personal and property rights of noncombatants except in instances of critical military necessity, as exemplified in the court martial of General Lothar Rendulic (1948). The indiscriminate uprooting of an ethnic minority's subject to a condition of *occupatio bellica* violates the spirit, if not the letter, of the Hague Regulations

(1907). The Czechoslovak government denies the illegality of the expulsion with the result that the application of juridical principles alone to the problems which beset German-Czechoslovak relations will not overcome the cleavage between these nations. Accordingly, the best approach to a reconciliation between the two negotiating partners is one emphasizing the techniques of pragmatic diplomatic bargaining over an appeal exclusively to legal reasoning.