

Pragmatism and Reconciliation: Czech-German Political Relations, 1989 – 1997

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Abstract

This thesis charts the process of Czech-German political reconciliation between the years 1989 and 1997 asking, broadly, how Czech and German government representatives arrived at the 1997 Declaration on Mutual Relations and their Future Development. The argument focuses on two failed approaches to reconciliation. First, the search for historical truth in the belief that a shared normative assessment would itself dictate the necessary political and legal action, and second, the resort to legal argumentation in the context of international law. In 1989-1990, the foreign policy agendas of both Czechoslovak and German governments prioritised the speedy harmonisation of relations in a spirit of goodwill and optimism. However, a series of seemingly intractable legal disputes arose. Firstly, concerning calls for German compensation for Czech victims of Nazism, and secondly, calls from within the *Sudetendeutsche Landsmannschaft*, an organisation of German expellees, for the restitution of property and the right of return, supported by the German federal government. Both the Czechoslovak (later Czech) and German governments simultaneously utilised two competing legal paradigms reflecting the jurisprudential schools of legal positivism and natural law theory to both support their own arguments and refute those of the other, exhibiting a striking symmetry of self-interested bias. Czech and German representatives disputed the legal status of the Munich Agreement of 1938 (by which the Third Reich partitioned Czechoslovakia), and of the Beneš Decrees of 1945 (collectively sanctioning the deprivation of citizenship and expropriation of Sudeten German property). Their differing interpretations had implications either strengthening or undermining the Sudeten German restitution claim in the 1990s. Neither government sufficiently abided by the intellectual ground rules of a necessarily rational process of inter-state negotiation, preventing a legal resolution. Analysing Czech-German relations through the lens of ‘failed approaches’ highlights the triumph of pragmatism, with surprisingly durable results.

List of Abbreviations

CDU.....	Christlich Demokratische Union Deutschlands (Christian Democratic Union of Germany)
CSU.....	Christlich-Soziale Union in Bayern (Christian Social Union in Bavaria)
FDP.....	Freie Demokratische Partei (Free Democratic Party of Germany)
SdL.....	Sudetendeutsche Landsmannschaft (Sudeten German Homeland Association)
SdP.....	Sudetendeutsche Partei (Sudeten German Party)
SPD.....	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)

Introduction

The Failure of Approaches

On March 15, 1990, the fifty-first anniversary of Hitler's triumphant parade through Prague to the Castle, German President Richard von Weizsäcker arrived in the same courtyard at Czechoslovak President Václav Havel's invitation "not with tanks but just walking."¹ Alluding to Hitler's parade, Havel requested that Weizsäcker "take the same walk with me, peacefully."² Weizsäcker later recalled, "How could I say no?"³ Both statesmen delivered emotive speeches in the Castle's Vladislav Hall, demonstrating a shared reconciliatory political will. By 1995, however, Czech-German relations had deteriorated to such an extent that German parliamentarians worried about a "crisis" in the bilateral relationship.⁴ In 1994, a foreign policy adviser to the German Chancellor's office even described Germany's relationship with the Czech Republic as its "most difficult in all of East Europe," and the Czech-German Joint Historians' Commission characterised the period up to 1996 as a "community of conflict."⁵ This thesis asks why Czech-German relations between the years 1989 and 1997 proved so fractious despite such promising beginnings, broadly questioning how Czech and German state representatives arrived at the 1997 Declaration on Mutual Relations and their Future Development.

Mid-century Czech-German relations had been marked by bitter conflict. By the Munich Agreement of September 29, 1938, imposed upon Czechoslovakia under threat of force, the Third Reich annexed the western Czech borderlands (otherwise known as the

¹ Havel quoted in Michael Žantovský, *Havel: A Life* (London: Atlantic Books, 2014), 373.

² Ibid.

³ Richard von Weizsäcker, *From Weimar to the Wall: My Life in German Politics*, trans. Ruth Hein (New York: Broadway Books, 1999), 315.

⁴ Judith Renner, "Germany – Czech Republic: negotiating apologies," in *Apology and Reconciliation in International Relations: The Importance of Being Sorry*, eds. Christopher Daase et al. (London: Routledge, 2016), 92.

⁵ Interview with Richard Schäfers, Foreign Policy Adviser (East Central Europe) in the Chancellor's office in Bonn, 8 June 1994, quoted in Emil Nagengast, "Coming to terms with a 'European Identity': The Sudeten Germans between Bonn and Prague," *German Politics* 5, no. 1 (1996): 89; Czech-German Joint Historians' Commission, *Konfliktgemeinschaft, Katastrophe, Entspannung: Skizze einer Darstellung der deutsch-tschechischen Geschichte seit dem 19. Jahrhundert* (Munich: Oldenbourg, 1996).

Sudetenland) and the Nazi invasion of the balance of Czechoslovakia in March 1939 initiated a seven year period of brutal and exploitative occupation. The coexistence of Czechs and Germans in the Bohemian lands came to an end after Germany's defeat and the forced expulsion/transfer of the Sudeten German population, with its attendant loss and dislocation.⁶ Come 1989, emotional grievances stemming from pre-war, wartime and post-war events had yet to be addressed at the inter-state level due to the Cold War political divide, exacerbated by the hard-line grip of the Czechoslovak communist administration in the wake of the 1968 Prague Spring.⁷ In 1989 and 1990, the foreign policy agendas of both Czechoslovak and German administrations prioritised the harmonisation of relations in a spirit of goodwill and optimism. However, these efforts were stymied by a series of seemingly intractable legal disputes concerning German compensation for Czech victims of Nazism and calls from within the *Sudetendeutsche Landsmannschaft*, an organisation of German expellees, for the restitution of property and the right of return to Czechoslovakia.

This project addresses reconciliation between states. Studies in political reconciliation have proliferated since the 1990s; Christopher Daase, Stefan Engert and Judith Renner even describe an “age of apology.”⁸ Certainly the Czech-German reconciliation process occurred at a time when a number of societies were showing increasing interest in the salience of memory in everyday politics.⁹ Whether it be Tony Blair's 1997 apology for the potato famine in Ireland, Jacques Chirac admitting French responsibility in 1995 for the deportation of Jewish citizens during the Second World War, or the U.S. Congress debating an apology for slavery (eventually delivered in 2008),

⁶ J. Dejmek, “Historické kořeny tzv. Sudetoněmenckého problému v českých zemích do roku 1938,” in *Kauza tzv. Benešovy dekrety: Historické kořeny a souvislosti*, eds. J. Dejmek, J. Kuklík and J. Němeček (Prague: Historický ústav AV ČR, 1999), 7, cited in Krzysztof Bałon et al., “The Beneš Decrees: A Review of Positions,” *The Polish Foreign Affairs Digest* 2, no. 3 (2002): 14. The term ‘Sudeten Germans’ appeared in German-language journalism and literature in the early-twentieth century to describe the German-speaking peoples of the Czech lands. The term ‘*Deutsch-Böhmen*’ had been commonly used prior.

⁷ Lily Gardner Feldman, *Germany's Foreign Policy of Reconciliation: From Enmity to Amity* (New York: Rowman and Littlefield, 2012), 265.

⁸ Christopher Daase, Stefan Engert and Judith Renner, “Introduction: Guilt, apology and reconciliation in international relations,” in *Apology and Reconciliation in International Relations: The Importance of Being Sorry*, eds. Christopher Daase et al. (London: Routledge, 2016), 1.

⁹ Jeffrey S. Kopstein, “The Politics of National Reconciliation: Memory and Institutions in German-Czech Relations since 1989,” *Nationalism and Ethnic Politics* 3, no. 2 (1997): 75.

politicians appear to have accepted both the moral imperative and utility of addressing historical wrongdoing.¹⁰ I address one case study, explaining both the remarkable protraction of the Czech-German reconciliation process, and the reasons behind its peculiar resolution.

I chart the process of Czech-German reconciliation from the thematic perspective of ‘failed approaches’. Firstly, Czech and German representatives placed considerable confidence in the power of historical honesty as a means of producing political reconciliation, and come 1995 identified a lack of honesty as reconciliation’s key barrier. This thesis contends that the parties’ normative assessments in fact substantially coincided. Representatives searched for historical truth in the belief that a shared normative assessment of the past would itself dictate necessary political and legal action in the present. Rather than differing historical assessments, however, the parties’ disagreement stemmed from differing perceptions of the connection between moral recognition for past injustice on the one hand, and present-day legal rectification on the other.

Secondly, Czech and German representatives tried to resolve their disagreements through legal means. Czech and German representatives in the 1990s disputed the legal status of the Munich Agreement of 1938 and the Beneš Decrees of 1945 (the latter collectively sanctioning the deprivation of citizenship and expropriation of Sudeten German property), differing interpretations of which had implications either strengthening or undermining the Sudeten German restitution claim in the 1990s. However, both governments’ arguments suffered from internal inconsistencies. Both governments simultaneously utilised two competing legal paradigms reflecting the jurisprudential schools of legal positivism and natural law theory to both support their own arguments and refute those of the other, exhibiting a striking symmetry of hypocrisy in relations with each other. The stalemate was broken by the 1997 Declaration on Mutual Relations and their Future Development, which represented the triumph of pragmatism over a shared theoretical accord. Neither government achieved their primary negotiation aim; instead, both governments accepted their lack of substantive legal agreement and decided to leave the dispute behind them, directing their energies towards constructive future relations.

¹⁰ Daase, Engert and Renner, “Introduction,” 1; Kopstein, “The Politics of National Reconciliation,” 75.

The narrative of ‘failed approaches’ culminating in a pragmatic ‘agreement to disagree’ supplements a number of substantial literatures. The first ‘failed approach’ – assuming reconciliation as an automatic corollary of historical honesty – draws upon scholars working in the fields of political apology¹¹ and the politics of reconciliation.¹² Political apology is not the focus of this project, but the quest for historical truth is an integral prerequisite of any apology process, hence the field’s significance for my purpose. Scholars like Judith Renner and Jennifer Lind, for example, used the Czech-German case to analyse collective apology as a form of political bargaining, or to demonstrate the unexpected, negative social consequences of political apology; both issues of significance in the following pages.¹³ Many scholars of Czech-German relations have taken a narrative, analytical approach, employing theoretical frameworks from the fields of international relations and political science. These works in the politics of reconciliation include Jürgen Tampke’s monograph on Czech-German relations from “Bohemia to the EU,” and Ann Phillip’s multiple studies of German foreign policy in the wake of 1989 with a significant focus on the Czech Republic.¹⁴ Likewise, Claus Hofhansel’s, Karl Cordell’s and Stefan Wolff’s analyses of German multilateralism, and Lily Gardner Feldman’s comparative study of Germany’s “foreign policy of

¹¹ See Judith Renner, “‘I’m Sorry for Apologising’: Czech and German Apologies and their Perlocutionary Effects,” *Review of International Studies* 37, no. 4 (2011): 1579-1597; Jennifer Lind, *Sorry States: Apologies in International Politics* (Ithaca: Cornell University Press, 2008); Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (Cambridge: Cambridge University Press, 2009); Elazar Barkan and Alexander Karn, eds., *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford: Stanford University Press, 2006); Christopher Daase et al., eds., *Apology and Reconciliation in International Relations: The Importance of Being Sorry* (London: Routledge, 2016); Richard B. Bilder, “The Role of Apology in International Law and Diplomacy,” *Virginia Journal of International Law* 46, no 3 (2006): 437-473.

¹² See Gardner Feldman, *Germany’s Foreign Policy of Reconciliation*; Nagengast, “Coming to terms with a ‘European Identity’,” 81-100; Karl Cordell and Stefan Wolff, *Germany’s Foreign Policy Towards Poland and the Czech Republic: Ostpolitik Revisited* (New York: Routledge, 2005); Claus Hofhansel, *Multilateralism, German Foreign Policy and Central Europe* (New York: Routledge, 2005); Ann L. Phillips, *Power and Influence After the Cold War: Germany in East-Central Europe* (New York: Rowman and Littlefield, 2000), and “The Politics of Reconciliation Revisited: Germany and East-Central Europe,” *World Affairs* 163, no. 4 (2001): 171-191; Jürgen Tampke, *Czech-German Relations and the Politics of Central Europe, From Bohemia to the EU* (London: Palgrave Macmillan, 2002); Miroslav Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” *Czech Sociological Review* 6, no. 2 (1998): 149-172.

¹³ Renner, “Germany - Czech Republic: negotiating apologies,” 87-105; Renner, “I’m Sorry for Apologising,” 1579-1597; Lind, *Sorry States*.

¹⁴ Tampke, *Czech-German Relations*; Phillips, *Power and Influence*, and “The Politics of Reconciliation Revisited,” 171-191.

reconciliation,” to name just a few, form the indispensable backbone of any inquiry into Czech-German relations post-1989.¹⁵

The second ‘failed approach’ – disputing historic legal instruments in the context of international law – contributes to studies of collective memory construction¹⁶ and legal restitution,¹⁷ supplementing theoretical models where they fail to account for or explain facts peculiar to the Czech-German negotiation process. The Czech-German relationship provides rich material for scholars of collective memory. For example, Jill Stephenson, echoing Tony Judt, looked at the emergence of collective memory and public debate in Czechoslovakia and Germany in 1990 concerning “grievances that were rarely articulated, but certainly not forgotten, in the long years of political self-denial in the west and political repression in the east.”¹⁸ This thesis looks at the legal dimension of such grievances and the reasons why the legal dispute proved so intractable. Aleida Assmann’s construction of four models by which states might deal with a traumatic past, while omitting direct reference to the Czech-German context, also provides a useful theoretical

¹⁵ Cordell and Wolff, *Germany’s Foreign Policy Towards Poland and the Czech Republic*; Hofhansel, *Multilateralism*; Gardner Feldman, *Germany’s Foreign Policy of Reconciliation*.

¹⁶ See Jill Stephenson, “Anniversaries, Memory and the Neighbours: The ‘German Question’ in Recent History,” *German Politics* 5, no. 1 (1996): 43-57; Kopstein, “The Politics of National Reconciliation,” 57-78; Padraic Kenney, “Martyrs and Neighbours: Sources of Reconciliation in Central Europe,” *Common Knowledge* 13, no. 1 (2007): 149-196; Eagle Glassheim, “National Mythologies and Ethnic Cleansing: The Expulsion of Czechoslovak Germans in 1945,” *Central European History* 33, no. 4 (2000): 463-486; Tony Judt, “The Past is Another Country: Myth and Memory in Postwar Europe,” *Daedalus* 121, no. 4 (1992): 83-118; Robert G. Moeller, “Germans as Victims? Thoughts on a Post-Cold War History of World War II’s Legacies,” *History and Memory* 17, no. 1-2 (2005): 145-194; Bill Niven, “Implicit Equations in Constructions of German Suffering,” in *A Nation of Victims? Representations of German Wartime Suffering from 1945 to the Present*, eds. Helmut Schmitz (Amsterdam: Rodopi, 2007), 105-124; Jan Pauer, “Moral Political Dissent in German-Czech Relations,” *Czech Sociological Review* 6, no. 2 (1998): 173-186, and “The Problem of Ethical Norms and Values in the Czech-German Discussion,” *Perspectives* 12 (1999): 65-82.

¹⁷ See Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Baltimore: Johns Hopkins University Press, 2000); Patrick Macklem, “Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law,” *The European Journal of International Law* 16, no. 1 (2005): 1-23; Aviezer Tucker, “Restitution, Property Rights, and Justice,” *Public Affairs Quarterly* 9, no. 4 (1995): 345-361; Timothy W. Waters, “Remembering Sudetenland: On the Legal Construction of Ethnic Cleansing,” *Virginia Journal of International Law* 47, no. 1 (2006): 63-146; Charles A. Schiller, “Closing a Chapter of History: Germany’s Right to Compensation for the Sudetenland,” *Case Western Reserve Journal of International Law* 26, no. 2 (1994): 401-434.

¹⁸ Stephenson, “Anniversaries, Memory and the Neighbours,” 43. See Judt, “The Past is Another Country,” 83-118.

framework.¹⁹ Assmann's models of "dialogic forgetting" – forgetting, or imposed silence, as a pragmatic resource for containing the volatile force of memory – and "remembering in order to forget" – using remembrance as a tool to cleanse, purge and heal, ultimately in order to forge a new beginning – are both reflected in the Czech-German reconciliation process.²⁰

Assmann described "self-imposed dialogic silence" as a "model for peace designed and agreed upon by two parties that had engaged in violence in order to keep an explosive past at bay."²¹ Czech and German representatives moved away from a "dialogic forgetting" model with the fall of communism, characteristic of a plethora of European Cold War political relationships, into a "remembering in order to forget" model in 1989. Assmann pointed out that the last two decades of the twentieth century saw a general re-orientation from "politics of forgetting to new cultures of remembering."²² Assmann's concept of "remembering in order to forget" therefore provides a contrast to "dialogic forgetting": "remembering is not implemented to memorialise an event of the past into an indefinite future but is introduced as a therapeutic tool to ... reconcile."²³ Such a model utilises memory as a "means to an end, which is the forging of a new beginning."²⁴ Assmann qualified that "forget" in this context does not mean "erasure or wiping the slate clean," but rather the "urge to leave behind and go-beyond."²⁵ Czech and German representatives pursued a "remembering in order to forget" model between the years 1989 and 1996. However, remarkably, the 1997 Declaration represented a qualified return to "dialogic forgetting" in relation to certain key issues. In other spheres of cultural life, the 1997 Declaration represented a renewed commitment to remembrance as an end in itself.²⁶ In the context of inter-state negotiation, however, the two governments embraced the utility of a self-imposed, mutual 'silence' in relation to historical grievances. The Czech-German relationship in the 1990s demonstrates that a "remembering in order to

¹⁹ Aleida Assmann, "From Collective Violence to a Common Future: Four Models for Dealing with a Traumatic Past," in *Conflict, Memory Transfers and the Reshaping of Europe*, eds. Helena Gonçalves da Silva et al. (Newcastle: Cambridge Scholars Publishing, 2010), 8-23.

²⁰ Assmann, "From Collective Violence to a Common Future," 10, 14.

²¹ *Ibid.*, 10.

²² *Ibid.*, 11.

²³ *Ibid.*, 14.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, 13.

forget” reconciliatory model may face significant social and legal obstacles. Understanding these obstacles requires a shift across disciplines to legal restitution.

Studies of collective memory and legal restitution in the Czech-German context overlap significantly. Scholars have identified the institutional privileging of some collective memories over others (expropriations of Czech property under communist rule versus the expropriation of Sudeten German property in the immediate post-war period) and the often problematic reasoning employed to justify legal restitution in those privileged cases. Patrick Macklem maintained that “law, too, participates in memorial consciousness,” with law’s memorial sites comprised of “principles, rules and procedures that invest moments in history with normative significance.”²⁷ Macklem used the Czechoslovak context to compare cases taken to human rights tribunals by individuals excluded from post-communist restitution measures (including Sudeten Germans), concluding that while the “[United Nations] 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.”²⁸

Macklem analysed differing perceptions of legal significance through the lens of privileged collective memories: a fairly normative endeavour. By contrast, this thesis takes a non-normative approach, unpicking the theoretical tools and arguments employed by the parties contesting the question of restitution and the status of historic legal instruments, as opposed to commenting on the arguments’ perceived moral strengths and weaknesses. I question how state actors actually behaved towards one another: their competing priorities, normative and pragmatic, and the capacity for international law as a framework to exacerbate logical inconsistency. By elucidating the gap between studies of collective memory construction, the politics of reconciliation and legal restitution, this thesis provides an overlooked explanatory layer to a complex relationship.

The primary source material drawn upon consists of speeches and press releases of government representatives, treaties and joint declarations, legal instruments, court rulings and plenary debates, acquired via online databases, print volumes and archives, several of which are available in English. I neglect grass-roots reconciliation initiatives in order to focus on political elites. The importance of processes by which state representatives at the international level address past wrongdoing and attempt to reconcile

²⁷ Macklem, “Rybná 9, Praha 1,” 14.

²⁸ *Ibid.*, 1.

can hardly be overstated. Political rhetoric has its limitations, speakers are inevitably influenced by public relations considerations. However, the source material sheds light on the practical realities of inter-state negotiation, and is therefore valuable precisely because, rather than in spite of, the conflicting motivations underlying representatives' attempts to reconcile their communities' contested memories.

With regard to terminology, references to state representatives and the states themselves will be simplified for ease of reading despite the territorial and constitutional changes both countries underwent during my chosen time period: namely, the reunification of Germany in October 1990, and the dissolution of Czechoslovakia into the Czech Republic and Slovakia, respectively, in January 1993. Representatives are referred to as either German or Czech (as opposed to Czechoslovak) throughout the entire 1990s period. Where the state is named, Germany is referred to from 1989 onward (as opposed to West Germany until October 1990), but where the context predates 1989, I will refer to West Germany. Czechoslovakia is referred to prior to 1993, and the Czech Republic thereafter.

The chapters are ordered chronologically but contain a thematic break. Chapter one will provide an historical overview of Czech-German geopolitical relations from the founding of the first Czechoslovak Republic in 1918 through to the expulsion/transfer of the Sudeten German population in 1945-1946. The second chapter will recount developments from 1989 to 1992, a period which saw the gradual eclipsing of reconciliatory amity by mutual legal claims, but nevertheless culminated in the limited achievement of the 1992 Treaty on Good Neighbourly Relations and Friendly Cooperation. Chapter three continues the narrative of these two thematic trends – truth-telling efforts and mutual legal claims – from 1992 to 1996, shedding light on the misplaced confidence of state representatives in the power of mutual truth-telling, and detailing their contentious reparative expectations. Diverging from the chronological narrative of the previous chapters, chapter four investigates the background to the Czech-German legal dispute of the 1990s, revealing striking inconsistency in the legal arguments of both governments and demonstrating that the two governments had virtually no possibility of achieving legal resolution as a simple corollary of sharing a normative historical assessment. Chapter five concludes the chronological narrative of chapters one to three, explaining and analysing the pragmatic achievements of the 1997 Declaration on Mutual Relations and their Future Development.

Chapter One

An Attempt at an Uncontroversial Historical Preface

Ethnic Germans lost their status as members of a linguistic, administrative elite with the Austro-Hungarian Empire's dissolution in the final weeks of the First World War, and the founding of new territorially contiguous nation states in Central Europe.²⁹ Austria-Hungary's acceptance of U.S. President Woodrow Wilson's Fourteen Points as a basis of negotiations in the final weeks of the war presented an opportunity favourable to exile Czech and Slovak politicians Tomáš Garrigue Masaryk, Edvard Beneš and Milan Rastislav Štefánik, all of whom spent a number of years campaigning for the creation of an independent Czechoslovak state.³⁰ Wilson's programme popularised the theory of the right of nations to self-determination and on October 18, 1918, the Czechoslovak National Council in Prague received a note from Wilson recognising the existence of Czechoslovakia.³¹ On October 26 the Prague National Committee issued its first 'law': "The independent Czechoslovak state has come into being."³²

The claims of both Czechoslovak and German ethnic communities rested on Wilson's tenth point: "the nations of Austria-Hungary, whose position among the nations we wish to see safeguarded and assured, should be guaranteed the greatest possible freedom of autonomous development."³³ Both communities envisioned different solutions to the dissolution of the Austro-Hungarian Empire in Bohemia. German populations advocated dividing the Bohemian lands along ethnic lines, either incorporating the

²⁹ Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 23.

³⁰ Václav Houžvička, *Czechs and Germans, 1848-2004: The Sudeten Question and the Transformation of Central Europe*, trans. Anna Clare Bryson-Gustová (Prague: Karolinum Press, 2015), 102.

³¹ First introduced to European peace-making by Vladimir Lenin in the Treaty of Brest-Litovsk. Borislav Chernev, "The Brest-Litovsk Moment: Self-Determination Discourse in Eastern Europe before Wilsonianism," *Diplomacy & Statecraft* 22, no. 3 (2011): 369-387; Victor S. Mamatey, "The Establishment of the Republic," in *A History of the Czechoslovak Republic, 1918-1948*, eds. Victor S. Mamatey and Radomír Luža (Princeton: Princeton University Press, 1973), 25-26; Houžvička, *Czechs and Germans, 1848-2004*, 103.

³² Mamatey, "The Establishment of the Republic," 25-26; Houžvička, *Czechs and Germans, 1848-2004*, 103.

³³ "President Woodrow Wilson's Fourteen Points, 8 January 1918, X," The Avalon Project, accessed September 20, 2016, http://avalon.law.yale.edu/20th_century/wilson14.asp.

German-speaking territories into Austria or the entirety of the German-speaking territories of Central Europe into a single German state.³⁴ The Czechoslovak political elite, by contrast, wished to incorporate the Bohemian lands in their entirety into a new nationally-heterogeneous state, albeit with a Czechoslovak majority.³⁵ The Entente sided with the Czechoslovak claim but a significant proportion of the newly-created state's German minority vehemently objected, rejecting a 'Czechoslovak' civic identity.³⁶ As a result, irredentist claims by the Sudeten German community constituted a significant factor in Czechoslovak politics from the day of the state's inception.³⁷

As early as 1919, Allied diplomats expressed concern over the ethnic makeup of Czechoslovakia. Harold Nicholson, a member of the British delegation at the Paris Peace Conference, worried "about the future political complexion of the Czech State if they have to digest solid enemy electorates."³⁸ By the close of the Paris Peace Conference, Beneš and Karel Kramář had persuaded the Entente that the German areas were vital to Czechoslovakia's economic prosperity and strategic viability.³⁹ Furthermore, they argued, only a strong Czechoslovakia could quell the revival of German dominance in Central Europe.⁴⁰ The Allies assented, but not without reservation. British Prime Minister David

³⁴ Houžvička, *Czechs and Germans, 1848-2004*, 115.

³⁵ Ibid.

³⁶ J. Otter, *Das Los der Deutsch-Tschechischen Nachbarshaft* (Heršpice: HU Verlag, 1994), 129, cited in Cordell and Wolff, 25; Václav L. Beneš, "Czechoslovak Democracy and its Problems, 1918-1920," in *A History of the Czechoslovak Republic, 1918-1948*, eds. Victor S. Mamatey and Radomír Luža (Princeton: Princeton University Press, 1973), 39.

³⁷ As prefaced forcefully by Sudeten German regional governor Rudolf Lodgman von Auen (albeit, a man with revolutionary tendencies) in March 1919: "Incorporation into the Czech state is rejected by all Germans, and if the Czechs believe that it will be possible to hold down a whole nation of 3.5 million people and permanently force them into one state against their will, then they are definitely making a mistake. If the Entente assigns the *Deutscheböhmen* and Sudetens to the Czechs, then in the enslaved lands it will experience a German irredenta of such power that the Czechs will be amazed." Lodgman von Auen quoted in Roland J. Hoffman and Alois Harasko, *Odsun: Die Vertreibung der Sudetendeutschen* (Munich: Sudetendeutsches Archiv, 2000), 569, and Houžvička, *Czechs and Germans, 1848-2004*, 122.

³⁸ Harold Nicholson, *Peacemaking 1919* (Boston: Houghton Mifflin, 1938), 279.

³⁹ Carol Skalnik Leff, *The Czech and Slovak Republics* (London: Westview Press, 1997), 39; R.M. Douglas, *Orderly and Humane: The Expulsion of the Germans after the Second World War* (New Haven: Yale University Press, 2012), 8.

⁴⁰ Douglas, *Orderly and Humane*, 8.

Lloyd George noted the “hundreds of thousands of protesting Magyars and some millions of angry Germans” soon to comprise a significant portion of the Czechoslovak citizenry.⁴¹

The performance of the first Czechoslovak Republic with respect to its various ethnic and religious minorities is debated still; evaluations of policies and reforms, and their impetus, continue to vary greatly. Some historians hold that in political practice Czechoslovakia fulfilled the promises made in 1919 and 1920 only in part: prior to 1926, League of Nations guarantees concerning minority protection freely entered into by the Czechoslovak government were not strictly applied.⁴² Among other things, Sudeten Germans found themselves systematically excluded from the public service and the government embarked upon various strategies to reduce the influence of domestic German capital.⁴³ And yet, other historians have argued that the First Republic generally adhered to its commitments as laid down by the Treaty of Saint-Germain-en-Laye, pointing out that Czechoslovak minority policy had been among the most liberal in East Central-Europe, guaranteeing ethnic Germans autonomous schools, proportional political representation and the right to do official business in their own language.⁴⁴

The German-speaking areas of Bohemia and Moravia were impacted by the world depression to a greater degree than elsewhere in Czechoslovakia. The prominent Sudeten glass and textile industries suffered from particularly high unemployment levels.⁴⁵ By 1933, German-speakers accounted for two-thirds of Czechoslovakia’s unemployed.⁴⁶ As early as 1931, the average unemployment rate in Czechoslovakia was 11.07 per cent; by contrast, entirely German or no more than twenty per cent Czech areas recorded a rate of

⁴¹ Lloyd George quoted in Mary Heimann, *Czechoslovakia: The State that Failed* (New Haven: Yale University Press, 2009), 47.

⁴² Houžvička, *Czechs and Germans, 1848-2004*, 121, 180; Douglas, *Orderly and Humane*, 9; Czech-German Joint Historians’ Commission, *Konfliktgemeinschaft, Katastrophe, Entspannung*, 25; Jeremy King, *Budweisers into Czechs and Germans: A Local History of Bohemian Politics, 1848-1948* (Princeton: Princeton University Press, 2002), 161.

⁴³ See the Czech-German Joint Historians’ Commission, *Konfliktgemeinschaft, Katastrophe, Entspannung*, 25; King, *Budweisers into Czechs and Germans*, 161.

⁴⁴ See Glassheim, “National Mythologies and Ethnic Cleansing,” 469; Bałon et al., “The Beneš Decrees,” 19; Houžvička, 133-155; J.W. Bruegel, “The Germans in Pre-war Czechoslovakia,” in *A History of the Czechoslovak Republic, 1918-1948*, eds. Victor S. Mamatey and Radomír Luža (Princeton: Princeton University Press, 1973), 181-182; Stefan Wolff, *The German Question Since 1919: An Analysis with Key Documents* (Westport: Praeger, 2003), 36.

⁴⁵ Tampke, *Czech-German Relations*, 46.

⁴⁶ Patrick Crowhurst, *A History of Czechoslovakia Between the Wars: From Versailles to Hitler’s Invasion* (London: I.B. Tauris, 2015), 77.

19.2 per cent.⁴⁷ As elsewhere in Europe and around the world, the Republic's social security net failed to cope, resulting in considerable poverty.⁴⁸ When the Czechoslovak-based DNSAP's sister Nazi Party in Germany came to power in 1933 (German National Socialist Worker's Party), the Czechoslovak government banned the two German parties opposed to cooperation with the Prague government, the DNP (German National Party) and the DNSAP. A new party, the *Sudetendeutsche Heimatfront* (Sudeten German Home Front) emerged from factions within both parties under the leadership of Konrad Henlein, a hitherto obscure gymnastics teacher.⁴⁹ In 1935, the party changed its name to *Sudetendeutsche Partei* (Sudeten German Party, SdP).⁵⁰ The SdP received material and political assistance from the Third Reich from its inception, and in the parliamentary elections of May 1935, Henlein's party received the support of approximately sixty per cent of the German electorate, becoming the second largest group represented in the National Assembly in Prague (approximately fifteen per cent of the total vote).⁵¹ Among other things, the SdP demanded decentralisation of the Czechoslovak state structure and the granting of autonomous political rights for German-speaking areas in the western Czechoslovak borderlands.⁵²

By November 1937, Sudeten German proposal and Czechoslovak counterproposal had devolved into a deadlock. Later that month, Henlein declared to the German Foreign Minister Konstantin von Neurath that the SdP "desired nothing more ardently than the incorporation of Sudeten German territory, nay the whole Bohemian, Moravian, and Silesian area within the Reich."⁵³ At a conference with Hitler in Berlin on March 29,

⁴⁷ Crowhurst, *A History of Czechoslovakia*, 77-78.

⁴⁸ Nancy M. Wingfield, *Minority Politics in a Multinational State: The German Social Democratic Party, 1918-1938* (New York: Columbia University Press, 1989), 101-105; Ferdinand Seibt, *Deutschland und die Tschechen. Geschichte einer Nachbarschaft in der Mitte Europas* (Munich: Piper, 1993), 318-319; Czech-German Joint Historians' Commission, *Konfliktgemeinschaft, Katastrophe, Entspannung*, 35.

⁴⁹ Bruegel, "The Germans in Pre-war Czechoslovakia," 182; King, *Budweisers into Czechs and Germans*, 170.

⁵⁰ Milan Hauner, *Czechs and Germans: Yesterday and Today* (Washington D.C.: Woodrow Wilson International Centre for Scholars, 1991), 21-22; Balon et al., "The Beneš Decrees," 17.

⁵¹ R. Ströbinger, *Schicksalsjahre an der Moldau. Die Tschechoslowakei – Siebzig Jahre einer Republik* (Gernsbach: R. Katz C. Verlag, 1988), 415, cited in Balon et al., "The Beneš Decrees," 17; Glassheim, "National Mythologies and Ethnic Cleansing," 470; Wolff, *The German Question Since 1919*, 37; Schiller, "Closing a Chapter of History," 413-414.

⁵² Balon et al., "The Beneš Decrees," 17.

⁵³ Konrad Henlein to German Foreign Minister Konstantin von Neurath, November 19, 1937, *Documents on German Foreign Policy, 1918-1945, from the Archives of the German Foreign*

1938, Henlein received instruction to scuttle any compromise proposal by progressively broadening and increasing demands, thereby staying ahead of any offer the Czechoslovak government might make.⁵⁴

As the March conference demonstrates, by early 1938 the SdP had seen a convergence of interests with Hitler's campaign to annex the Sudetenland from Czechoslovakia; Henlein's platform accorded with the territorial eastward expansion agenda underlying Nazi geopolitics.⁵⁵ From the mid-1930s onward, Nazi foreign policy had aimed at the progressive isolation of Czechoslovakia in Central Europe by obstructing economic cooperation within the 'Little Entente' (the pre-war alliance of Czechoslovakia, Yugoslavia and Romania) and by disseminating propaganda among the Western European powers characterising Czechoslovakia as a tool of the Soviet Union and the oppressor of its ethnic German minority.⁵⁶

The SdP's platform of "*Heim ins Reich*" (home to the Reich) aided Hitler's utilisation of the German ethnic minorities as an instrument of his expansionist policy. Such policy aimed to create and/or stimulate situations in which the internal political problems posed by the ethnic German minorities in neighbouring states (with the support of the local German political apparatus) would ostensibly become irresolvable domestically, requiring international negotiation and intervention.⁵⁷ Prior to the outbreak of the Second World War in September 1939, both the *Anschluss* of Austria and the agitation in the Sudetenland represented the policy's successful realisation.

In the months leading up to the Munich Agreement of September 1938, the German foreign ministry elevated its claims of Sudeten German discrimination and mistreatment by the Czechoslovak government with the intent of persuading the French and British governments of the necessity of German intervention. With Henlein at the

Ministry, Series D, Vol. II (Washington D.C.: U.S. Department of State, 1957), 57, cited in Keith Eubank, "Munich," in *A History of the Czechoslovak Republic, 1918-1948*, eds. Victor S. Mamatey and Radomír Luža (Princeton: Princeton University Press, 1973), 242.

⁵⁴ "Conference on the Sudeten German Question in Berlin, 29 March 1938 (translation of document 2788-PS, Office of the US Chief Prosecutor)," in *Československo a norimberský proces* (Prague: Ministry of Information, 1946), 306-307, reproduced in Houžvička, *Czechs and Germans, 1848-2004*, 543-544.

⁵⁵ Glassheim, "National Mythologies and Ethnic Cleansing," 470; Bałon et al., "The Beneš Decrees, 18; Houžvička, *Czechs and Germans, 1848-2004*, 177; Schiller, "Closing a Chapter of History," 414.

⁵⁶ Nazi propaganda had symbolically branded Czechoslovakia the 'aircraft carrier of Bolshevism'. Houžvička, *Czechs and Germans, 1848-2004*, 177, 187-188.

⁵⁷ Houžvička, *Czechs and Germans, 1848-2004*, 175; Eubank, "Munich," 239-240.

helm, the SdP in Czechoslovakia promoted these efforts. In a speech to the Nazi Party Congress in Nuremberg on September 12, Hitler declared that the presence of 3.5 million Sudeten Germans in neighbouring Czechoslovakia “is not a matter of indifference to us, and I say that if these tortured creatures cannot obtain rights and assistance by themselves, they can obtain both from us.”⁵⁸

However, behind closed doors Hitler qualified that he would only engage with Czechoslovakia militarily “if I am firmly convinced ... that France will not march and hence England will not intervene either.”⁵⁹ The governments of Great Britain and France initially favoured appeasement in the face of Hitler’s “dynamic expansion.”⁶⁰ German assurances that each progressive step constituted the culmination of Hitler’s intent, and moreover, represented a just, humanitarian necessity, rendered appeasement policy attractive to domestic audiences in Great Britain and France.⁶¹

In mid-September 1938, British and French representatives advised Czechoslovak officials to concede German demands of Sudeten autonomy. Shortly thereafter, in response to an escalation of violence in the Sudetenland and a complete breakdown in Czechoslovak-Sudeten German negotiations, Hitler met with British Prime Minister Neville Chamberlain and demanded the Third Reich’s annexation of the Sudetenland under threat of war.⁶² The foreign ministries of Great Britain and France immediately attempted to negotiate a multilateral agreement that would justify their non-intervention. On September 19, Edvard Beneš, now Czechoslovak President, received a British-French communique declaring that both governments had been “forced to the conclusion that the preservation of peace and protection of the vital interests of Czechoslovakia can be effectively secured only if [the Sudetenland is] now ceded to the Reich.”⁶³ The text was delivered with the warning that any delay in affirmative response might result in a German invasion.⁶⁴

⁵⁸ “Herr Hitler’s Speech of September 12, 1938,” *Bulletin of International News* 15, no. 19 (1938): 9.

⁵⁹ Hitler quoted in J.W. Bruegel, *Czechoslovakia Before Munich: The German Minority Problem and British Appeasement Policy* (Cambridge: Cambridge University Press, 1973), 192.

⁶⁰ Bruegel, *Czechoslovakia Before Munich*, 176.

⁶¹ Ibid.

⁶² Eubank, “Munich,” 247-249.

⁶³ Reproduced in Houžvička, *Czechs and Germans, 1848-2004*, 231.

⁶⁴ Ibid.

Late on September 21, Czechoslovak Foreign Minister Kamil Krofta informed the British and French ambassadors that his government would accept the ultimatum.⁶⁵ Beneš declared to his cabinet and to the Czechoslovak General Staff, “I will not drive the nation to the slaughterhouse for this.”⁶⁶ However, to Chamberlain’s dismay, Hitler immediately increased his demand, claiming a much larger portion of the Czechoslovak border territories than initially agreed.⁶⁷ A breakthrough in negotiations occurred only on September 28 and 29, with Benito Mussolini’s proposal of a four-power conference in Munich.⁶⁸

The resultant Munich Agreement was brokered without Czechoslovak involvement. Chamberlain’s instructions to the British ambassador in Prague on September 30 are telling in this respect:

You should at once see President [Beneš] and on behalf of His Majesty’s Government urge acceptance of plan that has been worked out today after prolonged discussion with a view to avoiding conflict. You will appreciate that there is no time for argument: it must be plain acceptance.⁶⁹

As Václav Houžvička pointed out, such a categorical communication between two allied states is relatively extraordinary.⁷⁰ Late on September 30, the Czechoslovak government submitted to the agreement in protest. Krofta announced his government’s decision to a British and French audience: “... for us [this] is a disaster which we have not merited. ... I do not know whether your countries will benefit by these decisions which have been made at Munich, but we are certainly not the last: after us, there are others who will be affected and who will suffer.”⁷¹

⁶⁵ Tampke, *Czech-German Relations*, 54.

⁶⁶ Beneš quoted in King, *Budweisers into Czechs and Germans*, 175.

⁶⁷ Houžvička, *Czechs and Germans, 1848-2004*, 232; Eubank, “Munich,” 248.

⁶⁸ Houžvička, *Czechs and Germans, 1848-2004*, 234; Eubank, “Munich,” 249-250.

⁶⁹ Quoted in Houžvička, *Czechs and Germans, 1848-2004*, 234.

⁷⁰ *Ibid.*

⁷¹ Krofta quoted in Eubank, “Munich,” 251; Krystyna Marek, *Identity and Continuity of States in Public International Law* (Geneva: Librairie Droz, 1968), 283; John Wheeler-Bennett and Anthony Nicholls, *The Semblance of Peace: The Political Settlement after the Second World War* (London: Macmillan, 1972), 611; Hermann Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980), 103; Schiller, “Closing a Chapter of History,” 414.

On October 1, 1938 the Third Reich absorbed a territory of approximately 30,000 square kilometres, constituting one-fifth of Czechoslovakia's entire territory and a populace of approximately 3.5 million Germans and between 820,000 and 860,000 Czechs.⁷² The German administration immediately reconstituted the territory as a new province of the Third Reich, the *Reichsgau Sudetenland*, and between 120,000 to 160,000 Czechs residing in the Sudetenland were immediately expelled or fled to the interior.⁷³ According to Czech historians Václav Houžvička and Josef Bartoš, the alleged "remedy" provided by the Munich Agreement – a just means of settling a nationality conflict – "was thus entirely vitiated immediately as it was signed."⁷⁴ The Vienna Arbitration of November 2, 1938 divested Czechoslovakia of additional territory, apportioning the region of Těšínsko/Zaolží to Poland and significant territories in the south of Czechoslovakia to Hungary.⁷⁵

On March 15, 1939, Nazi Germany violated the Munich Agreement by launching an invasion of the balance of Czechoslovakia, establishing a pro-Nazi, semi-autonomous state in Slovakia and transforming the remaining Czech lands into the 'Protectorate of Bohemia and Moravia'.⁷⁶ Six months later, the governments of Great Britain and France declared war on Nazi Germany upon the *Wehrmacht's* invasion of Poland.

Hitler intended to exploit the Protectorate's human and material resources to the greatest degree without engaging in methods that would provoke extensive acts of sabotage or guerrilla warfare on the part of the Czech populace.⁷⁷ However, the Nazi

⁷² Tampke, *Czech-German Relations*, 58; Houžvička, *Czechs and Germans, 1848-2004*, 246; Bałon et al., "The Beneš Decrees," 18 (who put the number a bit lower at 700,000 Czechs).

⁷³ Tampke, *Czech-German Relations*, 58; Houžvička, *Czechs and Germans, 1848-2004*, 246; Marek, *Identity and Continuity of States*, 284-285.

⁷⁴ Josef Bartoš, *Okupované pohraničí a české obyvatelstvo, 1938-1945* (Prague: Svaz protifašistických bojovníků, 1986), 18-21, cited in Houžvička, *Czechs and Germans, 1848-2004*, 246.

⁷⁵ Bałon et al., "The Beneš Decrees," 18-19; Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government Proposals for Redress* (Clark: The Lawbook Exchange, 2005), 130.

⁷⁶ Theodor Prochazka, "The Second Republic, 1938-1939," in *A History of the Czechoslovak Republic, 1918-1948*, eds. Victor S. Mamatey and Radomír Luža (Princeton: Princeton University Press, 1973), 270; Timothy W. Ryback, "Dateline Sudetenland: Hostages to History," *Foreign Policy* 105 (1996-97): 168.

⁷⁷ Hitler's 'table conversations' on May 16 and 20 and July 4, 1942, quoted in Gerhard Ritter, ed., *Hitler's Tischgespräche im Führerhauptquartier, 1941/1942* (Bonn: Athenäum, 1951), 85, 91, 176-177, 288, and Gotthold Rhode, "The Protectorate of Bohemia and Moravia, 1939-1945," in *A*

occupation of the Protectorate did not follow the Western European model. The Nazis brutally suppressed the Czech intelligentsia and engaged thousands of Czechs in forced labour.⁷⁸ In June 1942, SS security chief and ‘Reich Protector’ Reinhard Heydrich died of wounds incurred during an assassination attempt coordinated by the Czech resistance and the British Special Operations Executive. Hitler initially proposed executing 10,000 Czechs in reprisal. Instead, the village of Lidice, twenty-two kilometres north-west of Prague and suspected of having links to the perpetrators, was destroyed. Every male between the ages of sixteen and sixty was executed; the women were deported to Ravensbrück concentration camp; young children considered suitable for ‘Aryanisation’ were put up for adoption across the Third Reich, and the remainder were murdered. Lidice’s buildings were levelled, the ground salted, and house pets slaughtered.⁷⁹ Had Nazi Germany won the war, a memorandum of August 1940 proposed deporting half of the Czech population eastward as a labour force and ‘Germanising’ the rest: “The goal of Reich policy in Bohemia and Moravia must be the complete Germanisation of the space and people.”⁸⁰ It is estimated that between 36,000 and 55,000 ethnic Czechs died directly or indirectly and the hands of the Nazi occupation forces.⁸¹

Nazi persecution of Jews in the Czech lands from October 1938 onward followed a pattern implemented elsewhere in German-occupied territories. By early November 1938, up to 17,000 of the Sudetenland’s 28,000 resident Jews had fled to the Czechoslovak interior.⁸² November saw pogroms against Jews who had remained: synagogues burned to the ground, stores plundered, and countless individuals abused and

History of the Czechoslovak Republic, 1918-1948, eds. Victor S. Mamatey and Radomír Luža (Princeton: Princeton University Press, 1973), 298.

⁷⁸ Rhode, “The Protectorate of Bohemia and Moravia,” 298; Hauner, *Czechs and Germans: Yesterday and Today*, 23.

⁷⁹ Ryback, “Dateline Sudetenland,” 138-139.

⁸⁰ “Memorandum on a Method for the Solution of the Czech Problem and the Future Ordering of Bohemian-Moravian Territory, prepared by K. von Neurath and K.H. Frank,” in *Chtěli nás vyhubit (dokumenty o nacistické vyhlazovací a germanizační politice v českých zemích v letech druhé světové války)* (Prague: Naše vojsko/SPB, 1961), 29-40, reproduced in Houžvička, *Czechs and Germans, 1848-2004*, 557-569.

⁸¹ Gregory Frumkin, *Population Changes in Europe since 1939* (New York: Augustus M. Kelley, 1951), 50, cited in Rhode, “The Protectorate of Bohemia and Moravia,” 319.

⁸² Jörg Osterloh, “Sudetenland,” in *The Greater German Reich and the Jews: Nazi Persecution Policies in the Annexed Territories, 1935-1945*, eds. Wolf Gruner and Jörg Osterloh, trans. Bernard Heise (New York: Berghahn, 2015), 76; Livia Rothkirchen, *The Jews of Bohemia and Moravia: Facing the Holocaust* (Lincoln: University of Nebraska Press, 2005), 78.

murdered.⁸³ In the same month, the Prague statistical office recorded just over 259,000 persons of Jewish faith residing in the truncated Czech state.⁸⁴ Between October 1938 and the end of July 1939, 20,000 Jews fled Czechoslovakia and the Protectorate, and in April 1940, those remaining in the Protectorate were expelled from their positions in government administration, law, education, pharmacies, the press and medicine.⁸⁵ From November 1941, thousands of Jews were deported from their places of residence to the newly established ghetto in the fortress-town of Terezín (Theresienstadt), and in May 1942 the Reich Main Security Office declared “the complete evacuation of the Jews from the Old Reich, the *Ostmark*, and the Protectorate.”⁸⁶ In June 1943, the last large deportation train of approximately 4,000 Jews left Prague.⁸⁷ Scholarship estimates that approximately 80,000 Jews from the Protectorate of Bohemia and Moravia lost their lives.⁸⁸ In total, approximately 265,000 Jews from all former Czechoslovak territories perished, accounting for more than three-quarters of all Czechoslovak victims of the German occupation.⁸⁹ The experiences of Czech Jews during the Holocaust is an area of rich scholarship, to which numerous monographs have been dedicated; this thesis provides only a superficial overview.⁹⁰

⁸³ Osterloh, “Sudetenland,” 76; Rothkirchen, *The Jews of Bohemia and Moravia*, 80-81.

⁸⁴ Wolf Gruner, “Protectorate of Bohemia and Moravia,” in *The Greater German Reich and the Jews: Nazi Persecution Policies in the Annexed Territories, 1935-1945*, eds. Wolf Gruner and Jörg Osterloh, trans. Bernard Heise (New York: Berghahn, 2015), 103.

⁸⁵ Arie Tartakower and Kurt R. Grossmann, *The Jewish Refugee* (New York: Institute of Jewish Affairs, 1944), 37; Moses Moskowitz, “The Jewish Situation in the Protectorate of Bohemia-Moravia,” *Jewish Social Studies* 4, no. 1 (1942): 26; Gruner, “Protectorate of Bohemia and Moravia,” 110, 113; Rothkirchen, *The Jews of Bohemia and Moravia*, 81.

⁸⁶ Gruner, “Protectorate of Bohemia and Moravia,” 118-119; Rothkirchen, *The Jews of Bohemia and Moravia*, 123-128.

⁸⁷ Gruner, “Protectorate of Bohemia and Moravia,” 120.

⁸⁸ *Ibid.*, 121.

⁸⁹ Miroslav Kárný, “Die tschechischen Opfer der deutschen Okkupation,” in *Der Weg in die Katastrophe: Deutsch-tschechoslowakische Beziehungen, 1938-1947*, eds. Detlef Brandes and Václav Kural (Munich: Klartext, 1994), 151-164, cited in Gruner, “Protectorate of Bohemia and Moravia,” 121.

⁹⁰ See Rothkirchen, *The Jews of Bohemia and Moravia*; Jan Láníček, *Czechs, Slovaks and the Jews, 1938-48: Beyond Idealisation and Condemnation* (Basingstoke: Palgrave Macmillan, 2013); Osterloh, “Sudetenland,” 68-98; Gruner, “Protectorate of Bohemia and Moravia,” 99-135; Saul S. Friedman, “Wannsee: The Saga of Czech Jewry,” in *A History of the Holocaust* (London: Vallentine Mitchell, 2004), 191-205; Martin Wein, *The History of the Jews in the Bohemian Lands* (Leiden: Brill, 2015); Moskowitz, “The Jewish Situation in the Protectorate of Bohemia-Moravia,” 17-44; Gerhard Jacoby, *Racial State: The German Nationalities Policy in the*

Edvard Beneš resigned from the Czechoslovak presidency on October 5, 1938 and left Czechoslovakia for London within the month.⁹¹ The outbreak of war on September 1, 1939 one year later provided Beneš with the stimulus and mandate to declare the creation of a National Committee for the representation of Czechoslovaks abroad.⁹² Throughout 1940 and 1941, Beneš consolidated his position among the Czech politicians in exile and by late 1940, in the wake of France's capitulation to Nazi Germany in June and the British Expeditionary Force's evacuation from Dunkirk in August, the British government agreed in principle to recognise the Council as a provisional government-in-exile.⁹³ Following the Soviet Union's entry into the war in June 1941, Beneš received formal British and Soviet recognition of the Czechoslovak provisional government in London.⁹⁴

The origin of the idea of the expulsion of the Sudeten German population has been a subject of ongoing controversy.⁹⁵ Historians disagree as to whether Beneš abandoned a more moderate post-war plan to cede territories to German self-government during the summer of 1940 and early 1941, or whether his expressions in this regard were mere diplomatic manoeuvring, disguising his real intent from the outset: to expel the Sudeten German population and create a homogenous Czech and Slovak state within pre-1938 borders.⁹⁶ Most historians adhere to the former interpretation. In the years 1940-1941, Beneš subscribed to a modified form of the Swiss federation model, with canton-like regions occupied by Sudeten Germans west of Czechoslovakia's key defence line.⁹⁷

Protectorate of Bohemia and Moravia (New York: Institute of Jewish Affairs of the American Jewish Congress, 1944).

⁹¹ Prochazka, "The Second Republic," 255; Tampke, *Czech-German Relations*, 73; Douglas, *Orderly and Humane*, 7-8.

⁹² Patrick Crowhurst, *Hitler and Czechoslovakia in World War II: Domination and Retaliation* (London: I.B. Tauris, 2013), 246; Tampke, *Czech-German Relations*, 75.

⁹³ Tampke, *Czech-German Relations*, 75; Benjamin Frommer, "Retribution as Legitimation: The Uses of Political Justice in Postwar Czechoslovakia," *Contemporary European History* 13, no. 4 (2004): 479.

⁹⁴ Tampke, *Czech-German Relations*, 75-76; Frommer, "Retribution as Legitimation," 479.

⁹⁵ Houžvička, *Czechs and Germans, 1848-2004*, 260. See 259-329 for extensive discussion.

⁹⁶ See Houžvička, *Czechs and Germans, 1848-2004*, 260, 270; Tampke, *Czech-German Relations*, 81; Václav Kural, *Místo společenství konflikt! Češi a Němci ve Velkoněmecké říši a cesta k odsunu, 1938-1945* (Prague: Ústav mezinárodních vztahů, 1994), 144; Francis Dostál Raška, *The Czechoslovak Exile Government in London and the Sudeten German Issue* (Prague: Karolinum Press, 2002), 49; Bałon et al., "The Beneš Decrees," 20.

⁹⁷ For example, see Bałon et al., "The Beneš Decrees," 20; Tampke, *Czech-German Relations*, 76; Vít Smetana, *In the Shadow of Munich: British Policy Toward Czechoslovakia from the*

The documentary evidence is compelling. In September 1939, Beneš was recorded dismissing plans for mass expulsion as “foolishness.”⁹⁸ Jürgen Tampke quoted Beneš in November 1940 as saying, “we must not hold on to an unrealistic hope, naively held by some, that it would be possible to get rid of or expel three million Germans.”⁹⁹ Furthermore, at the first meeting of the State Council on December 11, 1940, Beneš asserted: “We shall not abandon our citizens of any nationality ... I discussed this matter with some of our German politicians and I assume that the State Council will soon be even more complete with them.”¹⁰⁰ Beneš’s original plan would have created a nation of two distinct and internally homogenous parts – a Czech centre and outlying German region – where the latter’s secession from Czechoslovakia, should calls be voiced, would not compromise the industrial and defensive viability of the Czechoslovak state.¹⁰¹

However, the occupation of the Czech lands by the Third Reich, beginning on March 15, 1939, had rapidly diminished moderate positions on the “Sudeten German issue” within the Czechoslovak political elite in London, not to mention underground organisations active in the Protectorate.¹⁰² Heydrich’s terror and the destruction of Lidice in June 1942 also drove British political opinion, with successive backing from the Soviet and American governments, to develop in a more radical direction. The possibility of removing German populations from East-Central Europe was raised for the first time at the top political level by the British Foreign Minister Anthony Eden and Soviet Premier Josef Stalin at a meeting in Moscow in December 1941.¹⁰³ In July 1942, one month after the massacre at Lidice, the British War Cabinet agreed in principle to the transfer of the German-speaking populations.¹⁰⁴ In May 1943, Beneš received word from the Soviet

Endorsement to the Renunciation of the Munich Agreement, 1938-1942 (Prague: Karolinum Press, 2009), 274; Glassheim, “National Mythologies and Ethnic Cleansing,” 471-472; Crowhurst, *Hitler and Czechoslovakia in World War II*, 251; Milan Hauner, “Czechs and Germans Over the Centuries: An Historical Review,” *East Central Europe* 18, no. 1 (1991): 133; Houžvička, *Czechs and Germans, 1848-2004*, 284-330.

⁹⁸ Beneš quoted in Dostál Raška, *The Czechoslovak Exile Government*, 38-39, and Smetana, *In the Shadow of Munich*, 274.

⁹⁹ Beneš quoted in Tampke, *Czech-German Relations*, 76.

¹⁰⁰ Edvard Beneš, *Šest let exilu a druhé světové války* (Prague: Družstevní práce, 1946), 286, quoted in Dostál Raška, *The Czechoslovak Exile Government*, 44.

¹⁰¹ Tampke, *Czech-German Relations*, 76.

¹⁰² Bałon et al., “The Beneš Decrees,” 19-20; Dostál Raška, *The Czechoslovak Exile Government*, 49.

¹⁰³ Tampke, *Czech-German Relations*, 79.

¹⁰⁴ Ibid.; Dostál Raška, *The Czechoslovak Exile Government*, 59.

Foreign Minister, Vyacheslav Molotov, that the Soviet government had agreed to the transfer, and in discussions held by Beneš and U.S. President Franklin D. Roosevelt in the same month, Roosevelt too gave his consent to the transfer proposal.¹⁰⁵

Various historians have discussed the Allied powers' receptiveness to the notion of mass population transfer in the early 1940s.¹⁰⁶ In a 1992 study, Hans Lemberg sought to demonstrate that the idea had gained legitimacy in Europe and the United States prior to the Second World War, and in 2005, Houžvička argued that the post-war expulsion of the Sudeten Germans was "fully within the frame of reference of the Western Allies and their political culture, which considered the relocation and exchange of populations to be a legitimate way of solving ethnic conflicts."¹⁰⁷

By 1943, earlier models of post-war state reconstitution had yielded to a resolution in the form of the national homogenisation of Czechoslovakia, and thus the expulsion of the Sudeten German population.¹⁰⁸ By this time, regardless of his initial intentions, Beneš put his full support behind calls from within the internal Czechoslovak resistance movement and the British Foreign Office, with the support of the other Allied powers, advocating comprehensive and swift 'transfer' and 'resettlement' of the German population following the war's end.¹⁰⁹ However, as the war drew to a close in 1945, no plan for the operation's scope and logistics had been formulated. The Allies had agreed to the transfer in principle, but postponed firm commitment and advised the Beneš government not to act alone.¹¹⁰ A final decision on the matter was not taken until the Potsdam Conference of the leaders of the Allied powers in July and August 1945.

The historical literature on the expulsion of Germans from Czechoslovakia in the aftermath of the Second World War is contentious; even the terminology of the topic is

¹⁰⁵ Tampke, *Czech-German Relations*, 79; Dostál Raška, *The Czechoslovak Exile Government*, 64.

¹⁰⁶ See for example, Matthew Frank, *Making Minorities History: Population Transfer in Twentieth Century Europe* (Oxford: Oxford University Press, 2017).

¹⁰⁷ Hans Lemberg, "Ethnische Säuberung: Ein Mittel zur Lösung von Nationalitätenproblemen?" in *Mit unbestechlichem Blick ... Studien von Hans Lemberg zur Geschichte der böhmischen Länder und der Tschechoslowakei*, ed. Hans Lemberg (Munich: Oldenbourg, 1998), 377-396, cited in Houžvička, *Czechs and Germans, 1848-2004*, 299.

¹⁰⁸ Houžvička, *Czechs and Germans, 1848-2004*, 295.

¹⁰⁹ Hans Lemberg, "Die Entwicklung der Pläne für die Aussiedlung der Deutschen aus der Tschechoslowakei," in *Begegnung und Konflikte*, eds. J. Hoensch and H. Lemberg (Essen: Klartext, 2001), 185, cited in Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 35.

¹¹⁰ Tampke, *Czech-German Relations*, 81.

controversial.¹¹¹ In keeping with the author's aim of impartiality, this chapter has contained both the terms 'transfer' and 'expulsion', but readers should note the important political and moral implications of either usage. Additional terms sometimes employed to describe the event include repatriation, resettlement, displacement and ethnic cleansing.¹¹² As Tampke and others have described, the term 'transfer' (*Abschub*, *Odsun*) is usually used within Czechoslovakia and by émigré Czech historians, whereas German historians generally insist on the term 'expulsion' (*Vertreibung*, *vyhnaní*).¹¹³ The Czech-German Joint Historians' Commission, inaugurated in 1992, agreed upon the German terms '*Vertreibung und Aussiedlung*'. 'Expulsion' translates to either *Vertreibung* or *Ausweisung* in German, with the latter not quite as severe as the former. *Aussiedlung* can be translated into resettlement, which is also denoted by *Umsiedlung*.¹¹⁴

The expulsion of the German population from Czechoslovakia has been described by historians as taking place in three waves.¹¹⁵ The first wave occurred during the last weeks of the war, involving a German population of predominantly German exiles and supporters of the Protectorate regime fleeing from the approaching Red Army.¹¹⁶ The second wave of 'wild', spontaneous and chaotic expulsions occurred in the immediate post-war months.¹¹⁷ This "semi-anarchic" state of affairs saw a multitude of national militias, citizens' militias, revolutionary guards, partisans and Red Army soldiers forcing Germans out of their homes and west toward the German and Austrian borders.¹¹⁸ Authors

¹¹¹ Phillips, "The Politics of Reconciliation Revisited," 180.

¹¹² Susannah Eckersley, "Walking the Tightrope between Memory and Diplomacy? Addressing the Post-Second World War Expulsions of Germans in German Museums," in *Museums, Migration and Identity in Europe*, eds. Christopher Whitehead et al. (London: Routledge, 2015), 101-102.

¹¹³ Tampke, *Czech-German Relations*, 73; Samuel Salzborn, "The German Myth of a Victim Nation: (Re-)presenting Germans as Victims in the New Debate on their Flight and Expulsion from Eastern Europe," in *A Nation of Victims? Representations of German Wartime Suffering from 1945 to the Present*, ed. Helmut Schmitz (Amsterdam: Rodopi, 2007), 98-100. See also, Eckersley, "Walking the Tightrope between Memory and Diplomacy?" 101-102.

¹¹⁴ Tampke, *Czech-German Relations*, 73; Salzborn, "The German Myth of a Victim Nation," 98-100.

¹¹⁵ Bałon et al., "The Beneš Decrees," 21-22; Tampke, *Czech-German Relations*, 90-92; Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 35.

¹¹⁶ Pertti Ahonen et al., *People on the Move: Forced Population Movements in Europe in the Second World War and its Aftermath* (Oxford: Berg, 2008), 87; Bałon et al., "The Beneš Decrees," 22.

¹¹⁷ Bałon et al., "The Beneš Decrees," 22; Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 35.

¹¹⁸ Tampke, *Czech-German Relations*, 90; Alfred-Maurice de Zayas, *The German Expellees: Victims in War and Peace* (New York: St Martin's Press, 1993), 85-94.

have variously described this ‘wild’ expulsion with reference to “unbridled criminality,” recounting forced marches, massacres, rape, humiliation and plunder.¹¹⁹ According to Tampke, in the various internment camps for German nationals awaiting transfer, “literally catastrophic conditions prevailed.”¹²⁰

The motives underlying the ‘wild’ expulsion are contested. In a recent monograph, R.M. Douglas objected to the connotation of ‘wild’. He argued that the violent events of the late spring and summer of 1945 were misconstrued by foreign observers as a “spontaneous process from below” where in reality, “the so-called ‘wild expulsions’ were in almost every case carried out by troops, police, and militia, acting under orders and more often than not executing policies laid down at the highest levels.”¹²¹ According to Douglas, this ‘wild’ perception not only enabled the Allied governments to disclaim responsibility for the atrocities taking place, but supplied ostensible evidence for the proposition that German minorities must be removed from their places of residence in former-occupied territories lest wholesale massacres take place.¹²² Jeremy King, too, in a study of historic Bohemian politics, detailed the arrival of the Czechoslovak government-to-be in Košice in eastern Slovakia on April 4, 1945 and the government’s rapid and radical implementation of a program of ‘transfer’ sure to receive the official sanction of the Allied powers in due course.¹²³ Nevertheless, an impression of ‘expulsion from below’ is widespread among historians, with frequent reference to an uncontrollable civilian population and the absence of supervision by an appropriate international or state body.¹²⁴

¹¹⁹ Tampke, *Czech-German Relations*, 90; Cordell and Wolff, *Germany’s Foreign Policy Towards Poland and the Czech Republic*, 35; Glassheim, “National Mythologies and Ethnic Cleansing,” 463; Douglas, *Orderly and Humane*, 93-129; Zayas, *The German Expellees*, 85-94.

¹²⁰ Tampke, *Czech-German Relations*, 90.

¹²¹ Douglas, *Orderly and Humane*, 94.

¹²² *Ibid.*, 95.

¹²³ King, *Budweisers into Czechs and Germans*, 190-192.

¹²⁴ The ‘wild’ expulsions occurred “without the supervision of an appropriate international commission, the Red Cross or state bodies”: Balon et al., “The Beneš Decrees,” 22. By the time the Czechoslovak government-to-be arrived in Košice in eastern Slovakia on April 4, 1945, “the civilian population and resistance had begun to take matters into their own hands”: Cordell and Wolff, *Germany’s Foreign Policy Towards Poland and the Czech Republic*, 35. The ‘semi-anarchic’ state of affairs in immediate post-war Czechoslovakia left effective power with regional and local councils, and in the border regions with administrative councils, who haphazardly oversaw the expulsions: Tampke, *Czech-German Relations*, 90. “Though national and international influences contributed to the anti-German mood after the war, local conditions and popular mentalities were essential ingredients of the Czechoslovak expulsion fury in the summer

The third wave of expulsion, from January 1946 onward, refers to that wave of German migration that had legal basis in the Potsdam Conference of July-August 1945 and the resolutions of the Allied Control Council dated November 20, 1945.¹²⁵ The Allied leaders issued the Potsdam Communiqué on August 2 and Article XII sanctioned measures for the transfer of German populations:

The three Governments, having considered the question in all its aspects, recognise that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfer that shall take place should be effected in an orderly and humane manner.¹²⁶

Officially, Potsdam marked the end of the ‘wild’ expulsions. In reality, however, people were still forced across the borders to Austria and Germany, though in much reduced numbers, until the commencement of the “orderly” transfer in January 1946, at which time it is estimated that 730,000 people had already been expelled.¹²⁷ This third wave of expulsion is documented as having taken place under less chaotic conditions, with government policy becoming more consistent in calling for humane treatment of Germans awaiting transfer.¹²⁸ Tacit acknowledgement, albeit wholly unsympathetic, of the victimisation of Sudeten Germans was given when the Czechoslovak Provisional Assembly passed Ordinance 115/1946 on May 8, 1946, granting retrospective amnesty to

of 1945”: Glassheim, “National Mythologies and Ethnic Cleansing,” 464-465, 473. The expulsion’s “practical implementation lay primarily in the hands of local leaders”: Ahonen et al., *People on the Move*, 90. “The new government was unable to exercise any control. Into this vacuum came groups of vigilantes, who seized German property and possessions and ill-treated and killed their owners”: Crowhurst, *Hitler and Czechoslovakia in World War II*, 255-256.

¹²⁵ Bałon et al., “The Beneš Decrees,” 24; Houžvička, *Czechs and Germans, 1848-2004*, 268.

¹²⁶ The Berlin-Potsdam Conference, July 17-August 2, 1945, “XII. Orderly Transfer of German Populations,” The Avalon Project, accessed August 10, 2016, http://avalon.law.yale.edu/20th_century/decade17.asp.

¹²⁷ Bałon et al., “The Beneš Decrees,” 21; Tampke, *Czech-German Relations*, 91.

¹²⁸ Douglas, *Orderly and Humane*, 158-193; Ulrich Merten, *Forgotten Voices: The Expulsion of the Germans from Eastern Europe after World War II* (New Brunswick: Transaction Publishers, 2012), 162-163; Zayas, *The German Expellees*, 110-111; Glassheim, “National Mythologies and Ethnic Cleansing,” 475; K.E. Franzen, *Die Vertriebenen: Hitler’s letzte Opfer* (Berlin: Propylaen, 2001), 183, quoted in Tampke, *Czech-German Relations*, 92.

all those Czechs responsible for criminal acts committed during the phase of ‘wild’ expulsions.¹²⁹

On August 2, 1945, on the day of the Potsdam Agreement’s formal promulgation, Beneš signed Presidential Decree No. 33/1945, crucial in identifying groups of individuals within Czechoslovakia who were to be subject to expulsion. The Decree proclaimed that those individuals of German and Hungarian nationality who, in accordance with the laws of the foreign occupying powers, had obtained citizenship of the Third Reich or the Hungarian Kingdom would lose their Czechoslovak citizenship. Only those individuals who had demonstrated “loyalty” to the Czechoslovak state would be exempt: their citizenship status would revert, or as the case may be remain, Czechoslovak.¹³⁰ A series of further presidential decrees over the months prior and subsequent to the Potsdam Agreement – cumulatively known as the Beneš Decrees (although the term is contentious) – dispossessed all German landowners of their properties and confiscated German assets.¹³¹ Decrees no. 2/1945 and 5/1945 of February 1 and June 3, 1945, respectively, held that any kind of property transfers or dealings concerned with property rights were null and void if they had taken place after September 29, 1938 under pressure from the German occupation authorities.¹³² These decrees had the

¹²⁹ “Law concerning the legality of actions related to the fight for renewed freedom of the Czechs and Slovaks and the exemption of certain crimes from the statute of limitations (Law 115/1946 of 8 May 1946),” quoted in Louise Mallinder, *Amnesty, Human Rights, and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart Publishing, 2008), 138.

¹³⁰ “Decree of the President of the Republic on 2 August 1945 concerning regulating the national status of individuals of German and Hungarian nationality (No. 33/1945) (Dekret presidenta republiky ze dne 2. srpna 1945 o úpravě československého státního občanství osob národnosti německé a maďarské),” Parliament of the Czech Republic, Poslanecká sněmovna, accessed July 17, 2016, <http://www.psp.cz/docs/laws/dek/331945.html>.

¹³¹ Tampke, *Czech-German Relations*, 91; Pavel Winkler, “The Czechoslovak Presidential Decrees, 1940-1945,” *Perspectives* 4 (1994/95): 14-15. Winkler claimed that the term ‘Beneš Decrees’ is deliberately misleading, implying a certain individual autocracy on the part of Beneš, where in fact the Decrees were executed by a National Council and merely carried the formal title, ‘Presidential Decree’. “The misleading name began to be used in connection with criticism ... especially by the Sudeten German ‘*Landsmannschaft*’ ... That is how the term ... received a pejorative tinge.” However, mainstream scholarship since the 1990s, including official legal bodies, use the term and it has entered common usage.

¹³² “Decree of the President of the Republic of 19 May 1945 on the invalidity of certain property rights from the time of oppression and the national administration of property of Germans, Hungarians, traitors and collaborators and certain organisations and institutes (No. 5/1945) (Dekret presidenta republiky ze dne 19. května 1945 o neplatnosti některých majetkově-právních jednání z doby nesvobody a o národní správě majetkových hodnot Němců, Maďarů, zrádců a

additional effect of nullifying all Nazi confiscation measures. Decree No. 5/1945 imposed national administration on the property of persons of German or Hungarian nationality on account of their being “unreliable in relation to the state.”¹³³ Decree No. 108/1945 of October 25, 1945 converted the sequestration of property into outright confiscation, with the proviso that any individual who could prove that he or she “had remained loyal to the Czechoslovak Republic, had never committed any offense against the Czech and Slovak nations and either actively participated in the struggle for its liberation or suffered under Nazi or fascist terror,” would be exempt.¹³⁴

It is important to note that the legal basis of the repatriation and expropriation of Sudeten Germans was in fact selective: exceptions were made for those who had remained “loyal.” Yet, historians have questioned the effectiveness of these exemptions, which were made only for those who had actively fought the Nazis, those with close Czech or Slovak family ties and those who were deemed essential labour.¹³⁵ Over the course of 1946, the screening proceedings accompanying the issuance of Model B certificates (obtaining the status of antifascist) became increasingly restrictive and some certificates were cancelled and concessions suspended.¹³⁶ Even those with a consistently anti-fascist record were not always protected from expulsion, and nor were all of those who could have claimed exemption anxious to stay in Czechoslovakia.¹³⁷ A number of historians have noted the pressure on German antifascists to emigrate.¹³⁸

kolaborantů a některých organizací a ústavů),” Parlament České republiky, Poslanecká sněmovna, accessed July 17, 2016, <http://www.psp.cz/docs/laws/dek/51945.html>; Houžvička, *Czechs and Germans, 1848-2004*, 320-321.

¹³³ “Decree of the President of the Republic of 19 May 1945,” Parlament České republiky, Poslanecká sněmovna.

¹³⁴ “Decree of the President of the Republic of 25 October, 1945, on the confiscation of enemy property and the funds for national renewal (No. 108/1945) (dekret presidenta republiky ze dne 25. říjen 1945 o konfiskaci nepřátelského majetku a Fondech národní obnovy),” Parlament České republiky, Poslanecká sněmovna, accessed July 17, 2016, <http://www.psp.cz/docs/laws/dek/1081945.html>.

¹³⁵ Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 34; Houžvička, *Czechs and Germans, 1848-2004*, 313; Heimann, *Czechoslovakia*, 163.

¹³⁶ Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 34; Houžvička, *Czechs and Germans, 1848-2004*, 313.

¹³⁷ Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 32.

¹³⁸ Pascal Maeder, *Forging a New Heimat: Expellees in Post-War West Germany and Canada* (Göttingen: V&R Unipress, 2011), 71-73; King, *Budweisers into Czechs and Germans*, 198; Cordell and Wolff, *Germany's Foreign Policy Towards Poland and the Czech Republic*, 34; Houžvička, *Czechs and Germans, 1848-2004*, 313.

Overall estimates of the numbers of Germans expelled from Czechoslovakia between 1945 and 1949 diverge significantly. According to Tomáš Staněk, a total of 1,446,059 persons (including 53,187 people considered antifascist) were transferred to the American zone and 786,482 (including 42,989 antifascists) to the Soviet zone of occupation.¹³⁹ A group of Polish historians put the figure at closer to 2.6-2.7 million Germans expelled by the autumn of 1946.¹⁴⁰ Likewise, the number of people who perished during or as a result of the expulsions from Czechoslovakia continues to be debated. Various sources from within West Germany from the 1950s to the 1980s estimated that between 216,000 and 272,000 Sudeten Germans lost their lives.¹⁴¹ However, in his 1964 monograph émigré Czechoslovak historian Radomír Luža questioned the statistics used in these studies.¹⁴² As Tampke pointed out in 2002, more recent studies have estimated the number of people killed at a fraction of the figures initially advanced.¹⁴³ According to Czechoslovak files disclosed at the beginning of the 1990s, 20,000 to 40,000 individuals perished, and in 1996 the Czech-German Joint Historians' Commission agreed on a range of 19,000 to 30,000 deaths.¹⁴⁴

In February 1948, the Communist Party of Czechoslovakia seized power, albeit with the support of a large proportion of the population and in the absence of a Soviet military presence.¹⁴⁵ In May 1948, President Beneš refused to sign the new Czechoslovak

¹³⁹ Tomáš Staněk, *Odsun Němců z Československa 1945-1947* (Prague: Naše vojsko/Academia, 1991), cited in Houžvička, *Czechs and Germans, 1848-2004*, 326.

¹⁴⁰ Balon et al., "The Beneš Decrees," 22.

¹⁴¹ T. Schieder, *Die Vertreibung der Deutschen Bevölkerung aus der Tschechoslowakei, Teil IV / I der Reihe Dokumentation der Vertreibung der Deutschen aus Ost/Mitteleuropa* (Berlin: Heyne's Erben, 1957), A. Bohmann, *Das Sudetendeutschtum in Zahlen* (Munich: Sudetendeutscher Rat, 1959), Statistisches Bundesamt, *Die deutschen Vertreibungsverluste* (Wiesbaden: Kohlhammer, 1958), and G. Reichlung, *Die deutschen Vertriebenen in Zahlen* (Bonn: Kulturstiftung der deutschen Vertriebenen, 1986), quoted in Tampke, *Czech-German Relations*, 93.

¹⁴² Radomír Luža, *The Transfer of the Sudeten Germans: A Study of Czech-German Relations, 1933-1962* (London: Routledge and Kegan Paul, 1964), 293-300.

¹⁴³ Tampke, *Czech-German Relations*, 93.

¹⁴⁴ J. Kučera, *Odsunové ztráty sud ton meckého obyvatelstva. Problém jejich p esného vy islení* (Prague: FMZV, 1992), 32-33, quoted in Balon et al., "The Beneš Decrees," 21; Glassheim, "National Mythologies and Ethnic Cleansing," 463; Czech-German Joint Historians' Commission, *Konfliktgemeinschaft, Katastrophe, Entspannung*, 69.

¹⁴⁵ Karel Kaplan, *The Short March: The Communist Takeover in Czechoslovakia: 1945-1948* (London: C. Hurst and Company, 1987), vii; Norman Stone, "Introductory Essay," in *Czechoslovakia: Crossroads and Crises, 1918-88*, eds. Norman Stone and Eduard Strouhal (New York: Palgrave Macmillan, 1989), 6; Heimann, *Czechoslovakia*, 173-174.

constitution.¹⁴⁶ He resigned his office in June and died in September of the same year.¹⁴⁷ From 1948 to 1989, an absence of liberal democracy characterised Czechoslovak politics, punctuated by a process of liberalisation culminating in the Prague Spring of 1968 and followed by a period of regression.¹⁴⁸ The causes and consequences of the events of February 1948 remain an ongoing subject of research and debate, the complexities of which are not discussed in this thesis.¹⁴⁹ The ‘Velvet Revolution’ of 1989 and the end of the Cold War saw a return to liberal democracy in Czechoslovakia.

¹⁴⁶ Otto Ulc, “Czechoslovakia,” in *Communism in Eastern Europe*, ed. Teresa Rakowska-Harmstone, 2nd ed. (Bloomington: Indiana University Press, 1984), 117.

¹⁴⁷ Ibid.; Heimann, *Czechoslovakia*, 180, 183.

¹⁴⁸ Kaplan, *The Short March*, ix.

¹⁴⁹ Ibid., vii.

Chapter Two

From Euphoria to Disillusionment

The Czech-German relationship underwent profound change in the early 1990s, marked by two competing trends. On the one hand, a phase of dynamic bilateral rapprochement followed the collapse of communism, with sincere and recurring efforts by state representatives expressing a spirit of conciliation. The rhetoric of Czech and German officials between 1989 and 1997 reveals a mutual emphasis on confronting historical truths in the spirit of empathy and goodwill.¹⁵⁰ On the other hand, relations were marked by a series of seemingly intractable disputes, primarily legal in nature, which weakened tentative consensus regarding a normative assessment of the past. Negotiations for a new Czech-German treaty began in 1990, but in the wake of renewed calls for restitution by the Sudeten German expellees, the German government implicitly linked the issues of compensation for Czech victims of Nazism to some form of Sudeten German restitution from the Czechoslovak government.¹⁵¹ The 1992 Treaty on Good Neighbourly Relations and Friendly Cooperation failed to resolve these mutual claims.

This chapter will address the development of both trends from 1989 through to the signing of the Friendship Treaty in 1992. I begin with a brief overview of the transition in Czechoslovakia from communism to democracy in late-1989 and the unification of Germany in 1990, following with an examination of early efforts by Czech and German representatives to find common ground on the basis of a mutual commitment to historical honesty, and concluding with the parties' parallel inability to find a solution to the question of Sudeten German demands. Conflicting domestic and foreign policy priorities on the part of both governments led to a consolidation of both states' legal positions, and this period reveals the insufficiency of mutual historical recognition in the face of a burgeoning dispute over appropriate legal rectification.

¹⁵⁰ For example, Richard von Weizsäcker, "Ein Zeichen des Vertrauens: Ansprache aus Anlaß des 15. März 1939 im Wladislaw-Saal der Prager Burg (15. März 1990)," Deutsche Botschaft Prag, accessed April 5, 2016,

http://www.prag.diplo.de/Vertretung/prag/de/03/Seite__Weizsaecker.html.

¹⁵¹ Hofhansel, *Multilateralism*, 43; Phillips, *Power and Influence after the Cold War*, 82; Renner, "Germany – Czech Republic: negotiating apologies," 91.

In December 1989, the communist government of Czechoslovakia capitulated amid mass-protest, and in June 1990 two political movements – the Czech Civic Forum and its Slovak equivalent, Public Against Violence – combined to form a majority government under the presidency of former dissident playwright Václav Havel and the prime ministership of Marián Čalfa.¹⁵² Democratisation and privatisation measures were overseen by Havel and Čalfa initially, and by Havel and Czech Prime Minister Václav Klaus following the dissolution of Czechoslovakia into the Czech Republic and Slovakia in January 1993.¹⁵³ For President Havel, rapprochement with Germany represented a crucial step on the road to joining the “community of European nations.”¹⁵⁴ In collaboration with Foreign Minister Jiří Dienstbier, Havel immediately sought to capitalise on the fledgling 1989 solidarity by building close diplomatic ties with the reunifying German state.

Barely a hundred hours after his election as president in December 1989, Havel made his first visit abroad and the two city destinations he chose carried profoundly negative connotations for many Czechs.¹⁵⁵ Havel first touched down in Munich, where in 1938 representatives of Nazi Germany, fascist Italy and democratic France and Britain had agreed to strip the first Czechoslovak state of its border regions; Havel then visited Berlin, where six months after the Munich Agreement, Czechoslovak President Emil Hácha had been coerced into conceding the German occupation of the rest of his country, marking the beginning of a seven-year period of brutal and exploitative occupation.¹⁵⁶ When Havel arrived in Berlin on January 2 he immediately set protocol aside, asking the waiting journalists and photographers to understand that it was “more important to go and see the Berlin Wall than stand before a camera.”¹⁵⁷ In front of the Brandenburg Gate, Havel delivered a short speech outlining his vision of a new Europe without barbed-wire

¹⁵² Brad A. Helicher, “Klaus’s ‘Middle Game’: Repercussions of Privatisation and Democratisation in the Czech Republic,” in *Transitions to Capitalism and Democracy in Russia and Central Europe: Achievements, Problems, Prospects*, eds. M. Donald Hancock and John Logue (Westport: Praeger, 2000), 157. For discussion of the Civic Forum’s influence in Slovakia and the Public Against Violence’s gradual achievement of hegemony in Slovakia, see James Krapfl, “Civic Forum, Public Against Violence, and the Struggle for Slovakia,” *IDEAS Working Paper Series from REPEc* (2009).

¹⁵³ Helicher, “Klaus’s ‘Middle Game’,” 157-158.

¹⁵⁴ Žantovský, *Havel: A Life*, 447; Václav Havel, *To the Castle and Back*, trans. Paul Wilson (London: Portobello Books, 2008), 113.

¹⁵⁵ Renata Fritsch-Bournazel, *Europe and German Unification* (New York: Berg, 1992), 144.

¹⁵⁶ Weizsäcker, *From Weimar to the Wall*, 315.

¹⁵⁷ Havel quoted in Fritsch-Bournazel, *Europe and German Unification*, 145.

borders. In a gesture that affirmed the joint aspirations of Czechs and Germans, he explicitly thanked the citizens of the GDR for tearing down the Berlin Wall.¹⁵⁸

In Germany, Chancellor Helmut Kohl's West German CDU/CSU-FDP (Christian Democrat-Free Democrat) coalition cabinet oversaw unification from 1989 onward and post-communism reconciliation initiatives with Germany's Eastern neighbours. The Kohl administration, as illustrated by its slogan "United Fatherland – United Europe" (*Geeintes Vaterland – Vereinigtes Europa*), explicitly bound the reunification of Germany to the ideal of European integration.¹⁵⁹ Throughout the early 1990s Kohl continually reiterated a European identity characterised by existential notions of Europe's "shared destiny" (*Schicksalsgemeinschaft*).¹⁶⁰ "Rather than turning insular or nationalistic," Lily Gardner Feldman observed, "Germany proved its reliability and Europeanness by redoubling efforts for European integration."¹⁶¹

In the shared euphoria of 1989, Czech and German representatives embarked upon a new phase of relations characterised by optimism and goodwill: symbolic language and gesture marked the new relationship. This trend in the wake of the fall of communism finds reflection in Aleida Assmann's models of dealing with historic trauma, namely a move away from "dialogic forgetting" towards new forms of remembrance.¹⁶² In December 1989, the two Foreign Ministers, Jiří Dienstbier and Hans-Dietrich Genscher, cut the barbed wire at the border in Rozvadov/Waidhaus, and in January 1990 the new Czech ambassador to Bonn presented German officials with a book entitled *Lost History* (*Ztracené Dějiny*), detailing the historic German presence in Bohemia and Moravia.¹⁶³ In the same month, Dienstbier gave an interview to a German newspaper in which he declared: "In the joint European home, we now have the historic opportunity to remove

¹⁵⁸ Maria Cornelia Raue, "Doppelpunkt hinter der Geschichte: Die Prager Deutschlandpolitik 1990-1997," (PhD diss., Humboldt University of Berlin, 2001), 83; Fritsch-Bournazel, *Europe and German Unification*, 145.

¹⁵⁹ Lisbeth Aggestam, "Germany," in *The Foreign Policies of European Union Member States*, eds. Ian Manners and Richard G. Whitman (Manchester: Manchester University Press, 2000), 67; Philip H. Gordon, "The Normalisation of German Foreign Policy," *Orbis* 38, no. 2 (1994): 227. The evolution of West German foreign policy since 1945 had been "distinct in its overriding emphasis on multilateral actions as opposed to national independence."

¹⁶⁰ Aggestam, "Germany," 67.

¹⁶¹ Gardner Feldman, *Germany's Foreign Policy of Reconciliation*, 44.

¹⁶² Assmann, "From Collective Violence to a Common Future," 10, 14.

¹⁶³ Ryback, "Dateline Sudetenland," 171; Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 154.

the last taboos and to announce reconciliation [with the Sudeten Germans].”¹⁶⁴ In February, Dienstbier and Genscher established the Czech-German Joint Historians’ Commission to “investigate relations between the two peoples throughout modern history and to seek explanations for events of the catastrophic decade from the mid-1930s to the mid-1940s.”¹⁶⁵

Havel’s presidential efforts in Berlin in January 1990 succeeded an even more controversial contribution to the development of Czech-German relations two months prior. In a personal letter to German President Richard von Weizsäcker in November 1989, he had confronted the ultrasensitive Czech taboo: “the guilt of our country over three million of its own citizens of German nationality who were expelled from their homes.”¹⁶⁶ Havel wrote, “I personally, like many of my friends, condemn the postwar expulsion of Germans, which has always struck me as a deeply immoral act.”¹⁶⁷ Havel had yet to be elected president of Czechoslovakia at the time, but given the letter’s close proximity to his election the media construed the gesture as an official declaration.¹⁶⁸ In any case, Havel would later express very similar sentiments in his capacity as president.¹⁶⁹

Dienstbier immediately lent his support to the principle, declaring in December 1989: “Just as the Germans have – often successfully – tried to admit the National Socialist injustice committed to our people, so are we morally obliged to talk about the acts that have been committed to innocent German women and children in the year 1945 in the area around Znojmo, south of Brno and in many other regions.”¹⁷⁰ Havel’s and Dienstbier’s efforts reflected the largely positive attitude of the new Czechoslovak

¹⁶⁴ “Historic Chance for Reconciliation,” *Neue Kronen-Zeitung*, 13 January 1990, quoted in Nagengast, “Coming to Terms with a ‘European Identity’,” 88.

¹⁶⁵ Tampke, *Czech-German Relations*, 144.

¹⁶⁶ Havel quoted in Hauner, *Czechs and Germans: Yesterday and Today*, 1.

¹⁶⁷ Ibid.

¹⁶⁸ Historians have even misreported the chronology of events, placing Havel’s letter shortly after his election to the presidency. In Tampke’s study of Czech-German relations, for example, “Shortly after his election to the Presidency, Havel wrote a letter to the German President, Richard von Weizsäcker in which he stated that he personally ... condemned the expulsion of the Germans after the war.” *Czech-German Relations*, 142.

¹⁶⁹ For example, on the occasion of Weizsäcker’s visit to Prague in March 1990, Václav Havel, *The Art of the Impossible: Politics as Morality in Practice, Speeches and Writings, 1990-1996*, trans. Paul Wilson (New York: Alfred A. Knopf, 1997), 21-28.

¹⁷⁰ Dienstbier quoted in Judith Renner, “Czech Republic – Germany: a pioneer apology,” in *Apology and Reconciliation in International Relations: The Importance of Being Sorry*, eds. Christopher Daase et al. (London: Routledge, 2016), 110-111.

representatives towards their German counterparts.¹⁷¹ An unorthodox approach to the ‘German question’ had evolved within the Czech intellectual opposition during the two decades of ‘normalisation’ following the Prague Spring of 1968, and the dissident group *Charter 77*, to which many new foreign policy makers belonged, had declared its unequivocal support for German reunification in its Prague Appeal of 1985.¹⁷² These unorthodox thinkers, not least Havel himself, inherited the reins of state power in 1989 and launched the new Czechoslovak state on wholly new geopolitical principles.¹⁷³

Czech-German reconciliation initiatives reached their high-watermark in early 1990 on the occasion of Weizsäcker’s visit to Prague on March 15, the fifty-first anniversary of the Nazi invasion. In the Vladislav Hall of Prague Castle, both statesmen delivered conciliatory speeches on the Czech-German past and expressed hope regarding their future relations.¹⁷⁴ Havel began his speech with a series of juxtapositions. With respect to the German invasion of March 1939, Havel declared, “A herald of war burst in here. A herald of crudeness. A herald of lies. A herald of pride and evil, lawlessness and cruelty. A mass murderer burst in here. A murderer of nations.” In Weizsäcker, Havel extolled a different kind of guest:

Our guest is a representative of German democracy. A herald of peace. A herald of decency. A herald of truth. A herald of humanity. A bearer of the news that violence may never again prevail over freedom, lies over truth, and evil over human life. A man who said that nothing may be forgotten, because memory is the source of belief in redemption.¹⁷⁵

Weizsäcker, in turn, declared that he was overwhelmed by the “trust that you, ladies and gentlemen, have granted us Germans with this reception.” He assured his audience that “countless of my compatriots share my joy,” and that “everyone at home understands the

¹⁷¹ Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 153; Houžvička, *Czechs and Germans, 1848-2004*, 395.

¹⁷² Ibid.

¹⁷³ Hauner, *Czechs and Germans: Yesterday and Today*, 3.

¹⁷⁴ Houžvička, *Czechs and Germans, 1848-2004*, 396.

¹⁷⁵ Havel, *The Art of the Impossible*, 22.

deep symbolism of this peace step.”¹⁷⁶ Weizsäcker, on behalf of the German nation, took it “with conviction.”¹⁷⁷

Havel and Weizsäcker perceived a need to “face up to the past.”¹⁷⁸ Indeed, the speeches and declarations of Czech and German state representatives between 1989 and 1992 reveal that the parties considered reconciliation to be accomplishable on the basis of an open acknowledgement of difficult historical truths.¹⁷⁹ The parallel to Assmann’s model of “remembering in order to forget” is aptly demonstrated by the shared desire on the part of Czech and German representatives to “face up to the past” in order to draw a “thick line [under it]” (*Schlussstrich, tlustá čára*).¹⁸⁰ This is not to suggest, however, that political expediency overrode empathetic and conciliatory motivations. In his Prague speech, Weizsäcker declared, “If we truly wish to interact in peace and freedom, then we need sincerity with one another ... we wish to tell the story as it was, and to face its consequences as conscientiously as possible.”¹⁸¹ Weizsäcker recalled the “occupying army” that marched into Czechoslovakia fifty-one years prior, marking the “beginning of a six year period of occupation and oppression. Heavy injustice was inflicted by Germans on your country and its people.”¹⁸² Similar German acknowledgements and commitments would follow.¹⁸³

A symbiotic desire to acknowledge Czechoslovak wrongdoing for its part and to reciprocate Weizsäcker’s commitment to truth marked Havel’s Prague speech:

¹⁷⁶ Weizsäcker, “Ein Zeichen des Vertrauens,” Deutsche Botschaft Prag.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.; Havel, *The Art of the Impossible*, 23.

¹⁷⁹ Stanisław Tyszk, “Two Concepts of Victimhood: Property Restitution in the Czech Republic and Poland after 1989,” in *Memory and Change in Europe: Eastern Perspectives*, eds. Małgorzata Pakier and Joanna Wawrzyniak (New York: Berghahn, 2015), 161; Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 151, 166; Renner, “Germany – Czech Republic: negotiating apologies,” 93; Raue, “Doppelpunkt hinter der Geschichte,” 130.

¹⁸⁰ Assmann, “From Collective Violence to a Common Future,” 13-15; Tyszk, “Two Concepts of Victimhood,” 161; Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 151, 166; Renner, “Germany – Czech Republic: negotiating apologies,” 93; Raue, “Doppelpunkt hinter der Geschichte,” 130.

¹⁸¹ Weizsäcker, “Ein Zeichen des Vertrauens,” Deutsche Botschaft Prag.

¹⁸² Ibid.

¹⁸³ Two years later, during the 1992 Friendship Treaty’s ratification debate, CDU politicians Helmut Sauer and Bernhard Jacoda similarly asserted, “The future will show that an honest friendship between our peoples can only be achieved on the basis of historical truth.” Deutscher Bundestag, Wahlperiode 12, Plenarprotokoll 12/93, 20 May 1992, 7687.

We agree that the basic prerequisite for a genuine friendship between our nations is truth, a truth that is always expressed, no matter how hard. Our guest has already spoken hard truths about the pain that the world in general, and we in particular, have suffered as a result of the Germans, or, more precisely, the forbear of present-day Germans. Have we, too, managed to say everything that ought to be said from our side? I am not sure.¹⁸⁴

Havel followed by condemning the expulsion of the Sudeten German population in harsh terms: while intending to clear the way for historical justice, “we [instead] hurt many innocent people, most of all women and children.”¹⁸⁵ Havel suggested that his fellow Czechs extend a friendly welcome to those Sudeten German expellees who come to “bow before the graves of their ancestors” and to visit the places of their birth.¹⁸⁶

However, while government representatives believed that facing up to the historical truth would itself create a shared common ground dictating necessary action in the present, the commitment to truthfulness alone proved insufficient. Legal claims from within both Czechoslovakia and Germany emerged in 1990, and ran parallel to the reconciliatory efforts described above. As of 1989, Czech victims of forced labour under Nazism had yet to receive any monetary compensation from the West German government, and the newly democratic Czechoslovak government raised the issue afresh in 1990.¹⁸⁷ Three consecutive German restitution schemes since 1945, totalling approximately 100 billion DM, had provided compensation to more than 500,000 Western victims. Victims from Eastern Europe, however, had been excluded from these programmes due to factors related to the Cold War.¹⁸⁸

In addition, legal claims against the Czechoslovak government arose within Germany. Despite Weizsäcker’s 1985 appeal to the Sudeten German expellees that “the dictate of understanding” be placed “above conflicting legal claims,” property claims

¹⁸⁴ Havel, *The Art of the Impossible*, 23.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid., 24.

¹⁸⁷ Renner, “Germany – Czech Republic: negotiating apologies,” 91; Raue, “Doppelpunkt hinter der Geschichte,” 126-130.

¹⁸⁸ Phillips, *Power and Influence after the Cold War*, 74-79, and “The Politics of Reconciliation Revisited,” 176, 189; Renner, “Germany – Czech Republic: negotiating apologies,” 91, 102-103; Jörg Fisch, “From Weakening an Enemy to Strengthening an Ally: The United States and German Reparations,” in *The United States and Germany in the Era of the Cold War, 1945-1990: 1945-1968*, ed. Detlef Junker, Vol. 1 (Washington D.C.: German Historical Institute, 2004), 274.

were brought by the *Sudetendeutsche Landsmannschaft* in response to the Czechoslovak Assembly passing the Law on Extrajudicial Rehabilitation in February 1991, intended to remedy politically motivated injustices under communist rule.¹⁸⁹ The statute strictly bracketed admissible claims to expropriations that took place between February 25, 1948 (the date of the communist takeover) and January 1, 1990, thus excluding the restitution of property taken from Jews by the Nazis during the war and Sudeten German property seized by the Czechoslovak government between 1945 and 1948.¹⁹⁰ The vast majority of post-1989 Czechoslovak politicians supported the return of confiscated Jewish property and a number of amendments were introduced to facilitate such a return.¹⁹¹ However, the Chamber of Deputies vacillated on the details, protracting amendment debates to the point of a political crisis in the spring of 1994.¹⁹² Between 1992 and 1994 a number of draft amendments were introduced but concerns over the introduction of exceptions to the 1948 cut-off date, on the grounds that such amendments could set an undesirable precedent, delayed progress.¹⁹³ Eventually Czech Prime Minister Klaus declared the return of Jewish property by government decree, but additional amendments were not passed until 1994.¹⁹⁴ The law forbade the return of property that had already been privatised; in such cases, eligible persons could request financial compensation.¹⁹⁵ By comparison, the Sudeten German issue was relatively uncontroversial within Czechoslovakia: all major Czech parties rejected the return of Sudeten German property.¹⁹⁶

By the late-1940s, Sudeten German expellees had formed a cohesive and highly influential interest group in Germany. Based primarily in Bavaria and Württemberg, the

¹⁸⁹ Paulina Bren, "Czech Restitution Laws Rekindle Sudeten Germans' Grievances," *RFE/RL Research Report* 3, no. 2 (14 January 1994): 17; Istvan Pogony, *Righting Wrongs in Eastern Europe* (Manchester: Manchester University Press, 1997), 151; "Speech by President Richard von Weizsäcker during the Ceremony Commemorating the 40th Anniversary of the End of War in Europe and of National Socialist Tyranny, on 8 May 1985 at the Bundestag, Bonn," Der Bundespräsident, accessed March 23, 2016, http://www.bundespraesident.de/SharedDocs/Reden/DE/Richard-von-Weizsaecker/Reden/1985/05/19850508_Rede.html.

¹⁹⁰ Pogony, *Righting Wrongs in Eastern Europe*, 151.

¹⁹¹ Jiří Pehe, "Legal Difficulties Beset the Czech Restitution Process," *RFE/RL Research Report* 3, no. 28 (15 July 1994): 7; Barkan, *The Guilt of Nations*, 149.

¹⁹² Pehe, "Legal Difficulties Beset the Czech Restitution Process," 7, 9.

¹⁹³ *Ibid.*, 9; Barkan, *The Guilt of Nations*, 149.

¹⁹⁴ Pehe, "Legal Difficulties Beset the Czech Restitution Process," 9.

¹⁹⁵ *Ibid.*, 10.

¹⁹⁶ *Ibid.*, 7, 9.

Sudetendeutsche Landsmannschaft (SdL) formed to fulfil the role of a government-in-exile.¹⁹⁷ In 1954, the governing Christian Social Union (CSU) in Bavaria (sister party to the federal CDU), had proclaimed patronage over the Sudeten Germans, and a short time later declared the Sudeten Germans to be Bavaria's 'fourth tribe' (*Bayerns Vierter Stamm*).¹⁹⁸ A grateful Sudeten German electorate lent its support to the CSU, and as of 1990 remained a stronghold of the conservative coalition.¹⁹⁹

The Czechoslovak ambassador to Germany attended the annual Sudeten German Whitsuntide meeting in Munich in January 1990, where SdL Chairman Franz Neubauer thanked Havel for his rejection of the thesis of collective guilt and his condemnation of the expulsions.²⁰⁰ Nonetheless, Neubauer reiterated the SdL's demands for restitution and the right of resettlement.²⁰¹ Other Sudeten spokesmen demanded unlimited sovereignty for Sudeten Germans in the Czechoslovak borderlands, and some went so far as to reject "any claims on the Sudetenland by a Czechoslovak state."²⁰² Again in May 1991, Neubauer insisted that the Czechoslovak government compensate the Sudeten Germans for their loss of property, repeal the Beneš Decrees, allow Sudeten Germans to return to Czechoslovakia should they wish, and additionally permit them to hold dual Czech and German citizenship.²⁰³

With a direct link via the CSU into the ruling coalition in Bonn, the SdL was instrumental in framing a federal government policy towards Czechoslovakia after 1989 that associated the question of monetary compensation for Czech victims of Nazism with similar claims for Czech concessions in relation to Sudeten German property restitution.²⁰⁴ Reliable estimates of the value of confiscated Sudeten German property do

¹⁹⁷ Phillips, "The Politics of Reconciliation Revisited," 186-187; Houžvička, *Czechs and Germans, 1848-2004*, 331, 348-349.

¹⁹⁸ Tampke, *Czech-German Relations*, 171.

¹⁹⁹ Hofhansel, *Multilateralism*, 44; Tampke, *Czech-German Relations*, 171; Pauer, "Moral Political Dissent in Czech-German Relations," 174.

²⁰⁰ Tampke, *Czech-German Relations*, 144.

²⁰¹ *Ibid.*

²⁰² H. Hochfelder, "Über die Ziele sudetendeutscher Politik," and R. Schnürch, "Konsequenzen sudetendeutscher Heimatpolitik," in *Die Sudetendeutsche und ihre Heimat. Erbe-Auftag-Ziel*, ed. R. Eibicht (Wesseding: Gesamtdeutscher Verlag, 1991), 50-59, 83, quoted in Tampke, *Czech-German Relations*, 144.

²⁰³ Peter Martin, "New Law on Land Privatization Passed," *Report on Eastern Europe* 29 (19 July 1991): 12; Bren, "Czech Restitution Laws Rekindle Sudeten Germans' Grievances," 21.

²⁰⁴ Nagengast, "Coming to terms with a 'European Identity'," 87; Ryback, "Dateline Sudetenland," 172; Phillips, "The Politics of Reconciliation Revisited," 186-187; Renner,

not exist, but as of 1978 the SdL claimed that the “current replacement cost standard” of the confiscated Sudeten German assets amounted to 53.3 billion US dollars or 130 billion DM.²⁰⁵ In the face of the Czechoslovak government’s refusal to consider Sudeten German restitution, German government representatives accused their Czech counterparts of perpetuating a cycle of “injustice and counter-injustice.”²⁰⁶

Czech officials countered the allegation by qualifying that the Czech claim for individual compensation invoked a legal obligation long-since accepted by the German government, and did not extend to “billing” Germany for the myriad injustices and deprivations suffered by the Czechs under Nazi occupation. Quoting Czechoslovak Prime Minister Čalfa, Czech Prime Minister Petr Pithart emphasised the distinction in 1991, “The country’s fundamental stance on Czechoslovak-German relations [cannot] be extended to ownership demands. There would be no end to it. We could go further back in history and extenuate all the wrongs, bill the Germans for everything that they have done to us, and we would end up sending bills to each other for ever after.”²⁰⁷ Havel would forcefully expand on Pithart and Čalfa’s theme in 1995.

Despite a reconciliatory intent and mutual commitment to truth-telling expressed at the inter-governmental level, the SdL, rather than interpreting his 1989 letter as a symbolic appeal for reconciliation, saw in Havel’s words a Czech admission of guilt for the expulsions with significant legal implications.²⁰⁸ Judith Renner observed that the “conflict solving performance of [Havel’s 1989 letter] was exceeded by the unintended social consequences.”²⁰⁹ Havel’s acknowledgement of injustice emboldened the SdL, with the support of the governing CDU, to press their demands for property restitution.²¹⁰ In response, the Czech voting public came to regard reconciliation efforts as increasingly

“Germany – Czech Republic: negotiating apologies,” 91; Raue, “Doppelpunkt hinter der Geschichte,” 96-98.

²⁰⁵ Bren, “Czech Restitution Laws Rekindle Sudeten Germans’ Grievances,” 22; Pehe, “Legal Difficulties Beset the Czech Restitution Process,” 11; “Letter from Walter Becher (President of the *Sudetendeutsche Landsmannschaft*) to the President of the United States, regarding Czechoslovakia’s gold deposits in the USA as indemnification for refugees and expellees from Czechoslovakia, 27 January 1978,” *Auswärtiges Amt, Politisches Archiv*, B 42 (ZA), 132791.

²⁰⁶ “Regierungserklärung zu den deutsche-tschechischen Beziehungen, abgegeben von Bundesaußenminister Klaus Kinkel vor dem Deutschen Bundestag in Bonn am 17. März 1995,” *Auswärtiges Amt*, Mitteilungen für die Presse Nr. 1016/95, 17. März, 1995.

²⁰⁷ Pithart quoted in Martin, “New Law on Land Privatization Passed,” 12.

²⁰⁸ Houžvička, *Czechs and Germans, 1848-2004*, 396.

²⁰⁹ Renner, “I’m sorry for apologising,” 1579.

²¹⁰ Nagengast, “Coming to terms with a ‘European Identity’,” 88-89.

one-sided and developed an intolerance to perceived concessions to Germany.²¹¹ The viability of Assmann's model, "remembering in order to forget," thus requires qualification. Remembrance may have significant, unforeseen social and legal ramifications.

A number of Czech commentators argue that Havel's letter of 1989 was not met with an equivalent German gesture.²¹² In Houžvička's estimation, this lack of reciprocation confirmed traditional Czech fears that the German government was "playing dishonestly for the time needed to ratchet up demands."²¹³ The impression likely stemmed from the German government's refusal of a series of Czechoslovak offers. For example, in 1991 Havel had proposed that in return for the German government's settlement of Czechoslovak claims in relation to the Nazi occupation, the writing off of Czechoslovak trade debts to the former GDR and a loan of two billion crowns, his government would be willing to negotiate the return of those Sudeten Germans wishing to re-settle in Czechoslovakia (including participation in the post-communism coupon privatisation scheme).²¹⁴ A report surfaced in 1992 alleging that the German government had been informed of Havel's offer too late for it to be adopted; however, according to Havel, the Kohl administration simply refused the proposal.²¹⁵ In a 2005 interview, Havel recalled,

It clearly seemed too audacious for them, and so I suspect that Chancellor Kohl let the whole matter subside rather than sweeping it off the table once and for all. Sometimes it's advantageous to keep certain problems alive by doing nothing about them, because you never know when they might prove useful.²¹⁶

²¹¹ By the end of 1990, only three political parties supported Havel's gesture: the Slovak Christian Democratic Movement, the Slovak Democratic Party and the Beer Lovers' Party. The satirical Beer Lovers' aside, both parties were notably Slovak. Czech political parties unanimously disapproved. See Phillips, *Power and Influence after the Cold War*, 83; Nagengast, "Coming to terms with a 'European Identity'," 89; Tampke, *Czech-German Relations*, 144.

²¹² Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 154; Houžvička, *Czechs and Germans, 1848-2004*, 396.

²¹³ Houžvička, *Czechs and Germans, 1848-2004*, 396.

²¹⁴ Ibid., 398; Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 156; Bren, "Czech Restitution Laws Rekindle Sudeten Germans' Grievances," 21.

²¹⁵ Bren, "Czech Restitution Laws Rekindle Sudeten Germans' Grievances," 21.

²¹⁶ Havel, *To the Castle and Back*, 139-140.

Historian Ann Phillips described the CDU's linkage of Czech compensation and Sudeten German restitution claims as a perfect example of how "domestic politics could modify a general foreign policy line."²¹⁷ During the latter half of 1991, Chancellor Kohl repeatedly postponed the signing of the Friendship Treaty, further angering Czech negotiators over the German government's refusal to formally discard Sudeten German claims.²¹⁸ Despite the Kohl administration's agenda of rapprochement, Czech negotiators found themselves increasingly confronted by the SdL's apparent influence over the CSU, actively supported by the CDU at the federal level.²¹⁹

It is important to note that German government motivations for linking Czech compensation to Sudeten German property restitution in the early 1990s were diverse, incorporating tactical political manoeuvrings in addition to moral indignation on behalf of the Sudeten German expellees. In negotiations for the 1992 Treaty, Czechoslovak officials proposed that the German government formally renounce Sudeten German property claims in return for the Czechoslovak government forsaking its claim to outstanding war reparations.²²⁰ However, German officials declined, ostensibly due to a provision of German domestic law rendering the federal government liable for individual claims against another state that the government had formally relinquished via treaty, and the incalculable financial risks that this would entail.²²¹ In fact, by declining the offer while continuing to demand Czech consideration of the Sudeten German claim, and blocking Czech compensation until such restitution be considered, the German government effectively signalled its resistance to further war reparations claims, an issue of relevance to a number of Central and South-Eastern European countries.²²² In the interest of strengthening the West German economy, the 1953 London Agreement on External German Debts, imposed by the Western Allied powers, had postponed the

²¹⁷ "Bittere Gefühle," *Der Spiegel*, 1 May 1995, cited in Phillips, "The Politics of Reconciliation Revisited," 185. See also, Nagengast, "Coming to terms with a 'European Identity'," 91; Pauer, "Moral Political Dissent in German-Czech Relations," 175.

²¹⁸ Nagengast, "Coming to terms with a 'European Identity'," 92.

²¹⁹ Houžvička, *Czechs and Germans, 1848-2004*, 396.

²²⁰ Peter E. Quint, *The Imperfect Union: Constitutional Structures of German Unification* (Princeton: Princeton University Press, 1997), 284; Andrew Cottey, *East-Central Europe After the Cold War: Poland, the Czech Republic, Slovakia and Hungary in Search of Security* (Basingstoke: Palgrave Macmillan, 1995), 70.

²²¹ Phillips, *Power and Influence after the Cold War*, 83; Pauer, "Moral Political Dissent in German-Czech Relations," 174; Quint, *The Imperfect Union*, 284.

²²² Pauer, "Moral Political Dissent in German-Czech Relations," 174.

question of German war reparations to neighbouring European countries indefinitely, declaring, “The question of reparations will be ... regulated by the peace treaty.”²²³ However, the 1990 ‘2+4’ Treaty on the Final Settlement with Respect to Germany omitted any reference to reparations and thus tacitly abandoned the issue.²²⁴ German officials may well have embraced Sudeten German property claims in an attempt to stave off a precedent-setting agreement which would have encouraged other Central and South-Eastern European claimants. In addition, the CDU maintained the very important appearance, domestically, of defending a core constituency.

Historians have questioned the seriousness of the German government’s intent, in fact, to seek Czech restitution for the Sudeten German expellees. Political theorist Emil Nagengast labelled the CDU’s conflicting foreign and domestic policy priorities in the early 1990s the “real irony” in Czech-German relations: Czech officials had mistakenly assumed German policy makers would formulate priorities in a “traditional, realist manner.”²²⁵ In Nagengast’s view, Czech politicians and the populace at large became preoccupied with an issue that was marginal in German politics and over-estimated the influence of the SdL, as demonstrated by Robert Eggleston’s observation in 1998: “about eighty per cent of Czechs recognise the name of the expellee’s spokesman, Franz Neubauer, while in Germany it is doubtful whether his name is known to five per cent of the population.”²²⁶ Nevertheless, Miroslav Kunštát observed that the “reluctant approach of the relevant German politicians towards questions arising out of the past, which often bordered on opportunistic jostling, did ... contribute ... to an undeniable worsening of the atmosphere of relations between the two countries.”²²⁷ Echoing Nagengast, political analyst Jan Pauer asserted that the German government in the early 1990s “neither intended to unilaterally revise the post-war order in Europe, nor aimed to launch an offensive on the compensation issue.”²²⁸ However, given their prevarications, Pauer did observe that the German government’s “real intentions were ... difficult to decipher.”²²⁹

²²³ Fisch, “From Weakening an Enemy to Strengthening an Ally,” 274.

²²⁴ Ibid.

²²⁵ Emil Nagengast, “The Beneš Decrees and EU Enlargement,” *Journal of European Integration* 25, no. 4 (2003): 336.

²²⁶ Roland Eggleston, “Germany: the Sudeten problem lingers,” *RFE/RL Research Report* (10 August 1998), cited in Nagengast, “The Beneš Decrees and EU Enlargement,” 336.

²²⁷ Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 160.

²²⁸ Pauer, “Moral Political Dissent in German-Czech Relations,” 175.

²²⁹ Ibid.

By 1992, disagreement over mutual legal claims facilitated by conflicting foreign and domestic policy priorities had quelled the idealistic spirit of 1989. Remembering the past had not enabled the desired “leaving behind” and “going beyond” suggested by Assmann’s model, “remembering in order to forget.”²³⁰ Despite reference in the 1992 Friendship Treaty’s preamble to the “many victims of tyranny, war and persecution and the heavy suffering inflicted on many innocent people,” the treaty explicitly left open the issues of compensation and property restitution in two adjoining letters signed by Foreign Ministers Genscher and Dienstbier, reflecting the parties’ inability to reach agreement.²³¹ The next chapter will elaborate on the growing legal dispute, notwithstanding representatives’ continued confidence in the power of mutual truth-telling as a means of achieving political reconciliation.

²³⁰ Assmann, “From Collective Violence to a Common Future,” 14.

²³¹ Agreement on Good Neighbourly Relations and Friendly Cooperation, Czechoslovakia–Germany 1900 UNTS 27 (signed 27 February 1992); Renner, “Germany – Czech Republic: negotiating apologies,” 91.

Chapter Three

The Escalation of Legal Conflict

After the signing of the 1992 Friendship Treaty, legal consolidation sparked by the SdL's reaction to Havel's 1989 letter intensified. By March 1995, heightened Czech fears of an avalanche of Sudeten German legal claims led the Czech Constitutional Court to release a ruling in which the Justices departed from earlier (and later) Czech moral condemnations of the Sudeten German expropriations, creating inconsistency in the Czech position and triggering a fiercely negative German response. The Court's ruling represented a divergence in the Czech legal position that posed a significant obstacle to reconciliation. Nevertheless, despite the deterioration of relations on the legal front, Czech and German officials continued throughout this period to appeal to truth-telling as a means of achieving reconciliation and became increasingly frustrated, respectively, by the perceived disingenuousness of the other side. Having pursued reconciliation in a manner reflecting Assmann's "remembering in order to forget" model, the parties attributed failure to the inadequacies of the other side's remembrance.²³²

In June 1995, Chancellor Kohl asserted, "On the basis of mutual truthfulness, we are capable of securing a good future for the peoples of both countries," and in December of the same year, Weizsäcker repeated the same commitment to truthfulness expressed five years earlier in Prague.²³³ German representatives throughout this period frequently accompanied references to the power of truth-telling with recognition of Germany's responsibility for triggering the chain of historical events culminating in the expulsion of the Sudeten German population. Upon signing the 1992 Friendship Treaty, Kohl acknowledged the cause and effect of events in the shared Czech-German past, declaring: "We Germans know and shall not forget that the expulsion was preceded by a horrific

²³² Assmann, "From Collective Violence to a Common Future," 13-15.

²³³ "1. Juni 1995: Erklärung der Bundesregierung, abgegeben in der 41. Sitzung des Deutschen Bundestag (Helmut Kohl)," *Bulletin des Presse- und Informationsamts der Bundesregierung*, Nr. 45, 2. Juni 1995; Richard von Weizsäcker, "Verständigung in der Mitte Europas. Vortrag von Dr. Richard von Weizsäcker," in *Gespräche mit dem Nachbarn*, ed. Pavel Klenner (Prague: Karls Universität, 1997), 233. "An open discussion about the past is essential for peace among neighbours. It is the best protection against the temptation to repress historical developments, to exploit history for present purposes, and to distort to pure falsehood. 'Lie is the companion of violence'. It is important to heed Thomas G. Masaryk's admonition for our friends' sake."

injustice, committed by the occupation and by an aggressive war on the part of the German side, directed against the Czech and Slovak nations.”²³⁴ In December 1995, Weizsäcker, having ended his presidential term but remained active in CDU politics, repeated and expanded upon Kohl’s acknowledgement of causality:

The expulsion of Germans from Czechoslovakia was the consequence of the capitulation of the democracies against the dictatorship in Munich in 1938, and the violent occupation of your country in the spring of 1939. This aggression stripped the young Czechoslovak Republic of its sovereignty, engaged it in the Second World War, the consequence of which was a forty-year period of suffering, during which the country was deprived of its freedom and self-determination.²³⁵

In a Bundestag debate on Czech-German relations in early 1996, coalition FDP (Free Democrat) representative Ulrich Irmer (active in Czech-German negotiations on behalf of the federal government), declared, “We must be aware of the past, the guilt on both sides, and neither must we forget the sequence, the causality.”²³⁶

During this period, however, both sides increasingly expressed distrust in the historical honesty of the other party. German officials blamed the failure of Czech-German reconciliation on an insufficient Czech willingness to acknowledge past wrongdoing. In March 1995, German Foreign Minister Klaus Kinkel justified his government’s support for the SdL’s linkage of Czech compensation and Sudeten German property restitution claims with a striking metaphor:

Victims of severe Nazi injustice still live in the Czech Republic today. We owe these people justice and satisfaction. Accordingly, we will act as we have done so in similar cases, and we know that time is pressing. However, another injustice

²³⁴ Speech by Helmut Kohl in Prague, 1992, *Československá zahraniční politika 1992* (Dokumenty No. 2), 157, quoted in Pauer, “The Problem of Ethical Norms and Values in the Czech-German Discussion,” 73.

²³⁵ Weizsäcker, “Verständigung in der Mitte Europas,” 235.

²³⁶ Deutscher Bundestag, Wahlperiode 13, Plenarprotokoll 13/82, 31 January 1996, 7199.

has also been committed. If we wish to heal, we must dress the entire wound, not only a part of it.²³⁷

Similarly, in June 1995, Kohl declared:

German guilt is not diminished one iota by the injustice of the expulsion, but nor does German guilt itself diminish the injustice of the expulsion. The expellees and refugees have a right to acknowledgement, that we do not close our eyes to the tragedy of their personal destinies, and that we name the tragedy a wrong committed.²³⁸

In December of the same year, Weizsäcker too implied that the Czech government had been insufficiently forthcoming: “It is not enough, however, to listen to each other with respect. Rather, each side must learn not to deny wrongdoing, but to call it by name. These are the moral and spiritual requirements of healing the wounds of the past.”²³⁹

Similar expressions of frustration emerged from the Czech government. Despite German recognition of cause and effect in the shared past, Czech officials perceived the German government’s blocking of Czech compensation until Sudeten German restitution be considered, as implying a moral equivalence between the suffering of Czechs under Nazi occupation and the Sudeten German expellees in the post-war period. In the Czech government’s view, the equation frequently found in official German rhetoric – “a vicious cycle of injustice and counter-injustice” – obliterated too many moral differences.²⁴⁰ Thus,

²³⁷ “Regierungserklärung zu den deutsche-tschechischen Beziehungen, abgegeben von Bundesaußenminister Klaus Kinkel vor dem Deutschen Bundestag in Bonn am 17. März 1995,” *Auswärtiges Amt*.

²³⁸ “1. Juni 1995: Erklärung der Bundesregierung, abgegeben in der 41. Sitzung des Deutschen Bundestag (Helmut Kohl),” *Bulletin des Presse- und Informationsamts der Bundesregierung*.

²³⁹ Weizsäcker, “Verständigung in der Mitte Europas,” 233.

²⁴⁰ Pauer, “Moral Political Dissent in German-Czech Relations,” 179; “Regierungserklärung zu den deutsche-tschechischen Beziehungen, abgegeben von Bundesaußenminister Klaus Kinkel vor dem Deutschen Bundestag in Bonn am 17. März 1995,” *Auswärtiges Amt*: “What Germans once did to the Czechs and what the Sudeten Germans later had to suffer at the hands of Czechs, should not obstruct our joint future ... Our common goal must be to break the vicious cycle of injustice and counter-injustice, charges of debt and counter-claims!”; “1. Juni 1995: Erklärung der Bundesregierung, abgegeben in der 41. Sitzung des Deutschen Bundestag (Helmut Kohl),” *Bulletin des Presse- und Informationsamts der Bundesregierung*: “However, we must strongly disagree with those who see in the memory of the expellees’ and refugees’ suffering an act of petty account-balancing or an expression of revanchism”; “Chancellor Dr. Helmut Kohl to the

Czech officials perceived a need to emphasise the moral difference between an aggressor and a victim who adopts an aggressor's methods.²⁴¹ In 1995, President Havel qualified Czech responsibility for the expulsions by declaring, "for the sake of truth, that we allowed ourselves to become infected by the treacherous virus of the ethnic concept of guilt and punishment, but that it was not we who brought that virus, at least not in its modern, destructive form, into this country."²⁴²

These ongoing differences led some commentators to question the feasibility of agreeing upon a shared historical assessment, attributing the failure of reconciliation to the nebulous nature of 'truth' itself. In 1995 Kurt Biedenkopf, Prime Minister of the German state of Saxony, declared that he could not find any consensus on the theme of truth despite Weizsäcker's and Havel's proclamations. He deconstructed the assertion that "reconciliation begins with the truth," and concluded, in light of representatives' lingering dissatisfaction with the process, that "objective historical truths, which are unconditional, do not exist in human knowledge."²⁴³ In Biedenkopf's view, the key to reconciliation and lasting neighbourly coexistence lay in a willingness to concede other peoples their 'history' or 'historical interpretation': "These different interpretations are not incompatible ... as long as we do not perceive them as final historical truths but rather as a 'crystallisation of viewpoints'. ... In a practical sense, this means: From my point of view I am right, but this does not mean that you are not right."²⁴⁴ However, Biedenkopf's thoughtful distinction between subjective and objective truths and the necessity of a certain flexibility, while salient, did not in itself present a solution to the ongoing legal dispute.

Throughout the early 1990s, Czech officials argued that their legal claim represented equality of treatment with West European recipients and did not constitute an attempt to monetise the quantum of suffering. In February 1995, Havel forcefully

German Bundestag, 30.01.1997 (excerpts)," Evangelische Kirche in Deutschland, accessed May 25, 2016, https://www.ekd.de/EKD-Texte/tschechen_1998_tschechen3.html: "Grief is not an act of petty off-setting."

²⁴¹ Pauer, "Moral Political Dissent in German-Czech Relations," 179.

²⁴² Václav Havel, "Czechs and Germans on the Way to Good Neighbourship," *Perspectives* 4 (1994/95): 7.

²⁴³ Kurt Biedenkopf, "Dimensionen der Zukunft: Das historische und das neue Europa. Vortrag von Prof. Dr. Kurt Biedenkopf," in *Gespräche mit dem Nachbarn*, ed. Pavel Klener (Prague: Karls Universität, 1997), 87.

²⁴⁴ *Ibid.*, 88-89.

expanded upon Čalfa and Pithart's 1991 theme, in which they condemned the cycle of sending 'bills' for past injustices:

If there is a debt in the form of compensation for the surviving victims of the Nazi tyranny, let it be paid. But no sum of money in any currency will ever recompense all that we or our ancestors had to go through because of Nazism. There is no compensation for the tens of thousands murdered or tortured to death, or for the moral, political and economic losses that we had to suffer as a result of Munich, the Nazi occupation, the war and all its political consequences. And we are not so foolish to send the present generation of the democratic Germany bills for all the wrongs committed long ago by some of their fathers, grandfathers or great-grandfathers ... Consequently, we find all demands for either material or other reparations from us for the post-war population transfer to be even more absurd. ... Representatives of the democratic Germany long ago publically admitted the German guilt for Nazism, without attempting the impossible, that is, to return history to somewhere before World War II.²⁴⁵

Havel thus distinguished the Czech compensation claim from restitution in the broader sense, reiterating the importance of acknowledging uncomfortable historical truths without attempting to "change the past."²⁴⁶

The Czech government's inconsistent policy regarding direct dialogue with the SdL in the early to mid-1990s reflected increasing anxiety. In early 1990, Czech officials had yet to rule out direct talks with the SdL but resisted the latter's insistence on direct involvement in bilateral negotiations. Following a meeting between Czechoslovak Prime Minister Čalfa and SdL Chairman Neubauer in Munich in the summer of 1990, Čalfa asserted that his government would no longer deal directly with the SdL.²⁴⁷ In mid-1993, however, the Czech government again offered to enter into a dialogue following the SdL's traditional Whitsuntide meeting, but three days later retracted the offer, arguing that the speeches of SdL representatives had rendered dialogue impossible.²⁴⁸ The German government continued to push for some form of dialogue as a minimum, but come 1997

²⁴⁵ Havel, "Czechs and Germans on the Way to Good Neighbourship," 9-

²⁴⁶ Ibid., 10.

²⁴⁷ Ryback, "Dateline Sudetenland," 171.

²⁴⁸ Pauer, "Moral Political Dissent in German-Czech Relations," 176; Bren, "Czech Restitution Laws Rekindle Sudeten Germans' Grievances," 21.

Czech representatives had refused to engage in any direct discussion with the SdL, insisting that governments negotiate with other governments, not with groups.²⁴⁹

By 1995, the Czech government had hardened its legal position considerably. Havel's and Dienstbier's admissions of the expulsion's injustice aside, Czech policy makers, perhaps still smarting from the SdL's bellicose reaction to Havel's 1989 letter, objected to any action that might, however tenuously, undermine the Beneš Decrees' legitimacy.²⁵⁰

Tensions peaked in March 1995 when the Czech Constitutional Court released a ruling on the constitutionality of Beneš Decree No. 108/1945 of August 2, 1945 (on the Confiscation of Enemy Property and the Funds of National Renewal). The Court justified its decision to reaffirm Decree No. 108 by declaring the German people collectively responsible for crimes committed under Nazism, eliciting an unsurprisingly negative German response. Kinkel's, Kohl's and Weizsäcker's critical statements came shortly after.

Before continuing with an account of the Court's reasoning, a brief diversion into jurisprudential theory will help to explain one of the ruling's more notable features, namely the Court's inclusion of a moral assessment of the past and the perceived 'justice' of the Beneš Decrees as an integral component of its judgement. This overlap between morality and procedural legality is understandable when viewed in light of the natural law theory of law (hereafter, natural law theory), an influential strand of continental European, English and American jurisprudence.²⁵¹ Like its rival jurisprudential theory, legal positivism, natural law theory recognises the necessity of procedural requirements in defining law; in other words, that law has an official quality and is promulgated in accordance with a recognised procedure.²⁵² However, legal positivism traditionally sees

²⁴⁹ Nagengast, "The Beneš Decrees and EU Enlargement," 338; Phillips, *Power and Influence after the Cold War*, 83.

²⁵⁰ Pauer, "Moral Political Dissent in German-Czech Relations," 184.

²⁵¹ The extra 'of law' qualification distinguishes natural law theories as they pertain to law from natural law theories of morality generally. From here on, I will refer to natural law theory and omit the 'of law' as assumed.

²⁵² See H.L.A. Hart's famous defence and qualification of Austin's legal positivism, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 593-629. For other definitions of positivism's broad tenets, see Mark Bennett, "Legal Positivism and the Rule of Law: the Hartian Response to Fuller's Challenge," (PhD diss., University of Toronto, 2013), 3-4; Kenneth Einar Himma, "Positivism, Naturalism, and the Obligation to Obey Law," *The Southern Journal of Philosophy* 36 (1998): 145-147; Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism," *European Journal of*

these procedural characteristics as sufficiently constitutive of law as such; in the words of John Austin, “The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.”²⁵³ By contrast, natural law theory suggests that a rule or norm must conform to fundamental notions of justice. Therefore, brutal, discriminatory laws do not attain the status of law in any real sense, but are acts of mere violence, even if undertaken under the guise of ‘law’ and promulgated in accordance with the appropriate procedure.²⁵⁴

Legal positivism and natural law theory each encompass an enormous diversity of qualifying and overlapping viewpoints, the complexities of which are beyond the scope of this thesis. Simple definitions need not be misleading, so long as the reader notes the

International Law 12, no. 2 (2001): 279-281; Tony Honoré, “The Necessary Connection between Law and Morality,” *Oxford Journal of Legal Studies* 22, no. 3 (2002): 489-490.

²⁵³ John Austin, *The Province of Jurisprudence Determined* (1832), ed. W.E. Rumble (Cambridge: Cambridge University Press, 1995), 157.

²⁵⁴ The modern natural law theory of law, insofar as it asserts that there is something legally deficient about an unjust law, has much of its intellectual foundation in the works of Thomas Aquinas: “Every human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law,” ST I-11, Q. 95, Obj. 4, *On Law, Morality, and Politics*, eds. William P. Baumgarth and Richard J. Regan (Indianapolis: Hackett Publishing, 1988), 59. Prominent seventeenth and eighteenth-century English jurists, Edward Coke and William Blackstone, developed the concept within the common law. Coke defined natural law as “that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction,” and asserted, “the law of nature is part of the law of England.” Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed. Steve Sheppard, Vol. 1 (Indianapolis: Liberty Fund, 2003), 195-197. Likewise, Blackstone asserted, “This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.” William Blackstone, *Commentaries on the Law of England* (1899) (Chicago: The University of Chicago Press, 1979), 41. In his recent treatise on the historic influence of natural law theory, R.H. Helmholz argued that early English, continental European and American jurisprudence understood and applied natural law theory remarkably consistently. R.H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge: Harvard University Press, 2015). Consider, for example, Article 7 of the Austrian Civil Code of 1811 (applicable to the Bohemian lands): “If a doubt remains, the case must be decided by applying natural legal principles, having given mature consideration to the carefully gathered circumstances.” Horst Klaus Lücke, “The European Natural Law Codes: The Age of Reason and the Powers of Government,” *University of Queensland Law Journal* 31, no. 1 (2012): 30. For twentieth century discussion of what the natural law theory of law purports to include and exclude, see Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) and John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

enormous ‘iceberg’ of debate and qualification beneath. The Czech and German representatives to which I refer were not jurisprudential theorists, and it is not suggested here that they directly invoked jurisprudential theory. Nevertheless, the basic tenets and assumptions underlying legal positivism and natural law theory are strikingly evident in the legal arguments utilised by the parties in the 1990s.

Returning to the Czech Constitutional Court, the petitioner, Sudeten German Rudolf Dreithaler reflected the natural law perspective by arguing that the Beneš Decrees, among other things, “violated the legal canons of civilised European societies,” and could not be considered acts of law, “but of force, that is to say, ... they lack any legal character whatsoever.”²⁵⁵ Dreithaler additionally questioned the legislative authority of the Czechoslovak government-in-exile with arguments of a positivist character, which were considered and dismissed by the Court. Dreithaler’s arguments conformed overwhelmingly to the German government’s position on the Beneš Decrees.²⁵⁶ The lengthy argument developed by the Justices in repudiating Dreithaler’s normative attack revealed that the Court implicitly accepted the wider, morally-imbued natural law conception of law.

The Court (on behalf of the Czech Parliamentary Chamber of Deputies) framed Decree No. 108/1945 as having imposed a rebuttable presumption of collective responsibility: in 1945, German nationals residing in the Czech lands had been free to ‘rebut’ the presumption (and thus retain their property) by proving that he/she had remained loyal to the Czechoslovak Republic and had opposed Nazism.²⁵⁷

The Court justified the reversal of the presumption of innocence for the Sudeten German population by rhetorically questioning:

to what extent and in what sense were the representatives of the Nazi movement alone responsible for the gas chambers, concentration camps, mass extermination, degradation, butchery and dehumanisation of millions, or along with them does everyone who profited in silence from this movement, who carried out its orders, and who put up no resistance to them also bear joint responsibility for these phenomena. It can hardly be seen as a black-and-white

²⁵⁵ Decision of the Czech Constitutional Court, “1995/03/08 - Pl. ÚS 14/94: Beneš Decrees,” Ústavní soud České republiky, accessed June 24, 2016, <http://www.usoud.cz/en/decisions/19950308-pl-us-1494-benes-decrees-1/>.

²⁵⁶ See chap. 4, n. 281-286.

²⁵⁷ Decision of the Czech Constitutional Court, “1995/03/08 - Pl. ÚS 14/94: Beneš Decrees.”

issue in which the representatives of Nazism are assigned exclusive responsibility and all others lack any responsibility at all.²⁵⁸

The Court asserted that the pre-war German minority in Czechoslovakia had borne a collective responsibility, in the lead-up to the Munich Agreement, to reject totalitarianism and exhibit their loyalty to the principles of liberal democracy embodied by the Czechoslovak Republic, and ought to have “given to this fidelity the status of a fundamental political principle.”²⁵⁹ Having failed at this charge however, and having contributed to immense destruction and suffering thereby, Decree No. 108/1945 merely imposed a sanction commensurate to the damage caused.²⁶⁰ The Court made a distinction between retributive decrees, requiring evidence of individual guilt, from confiscatory decrees, imposing, where natural persons were concerned, the rebuttable presumption of responsibility. Sanction (in the context of responsibility, justifiable in relation to the collective) and punishment (in the context of guilt, pertaining only to the individual) were thus distinguished. Therefore, the presumption of responsibility for persons of German nationality did not represent a form of nationalistic revenge on the basis of collective guilt, the Court claimed:

rather it is merely a proportional response to the aggression of Nazi Germany, a response which set as its political and economic aim at least to alleviate the consequences of the occupation, to forestall any possible return of totalitarianism, and to strengthen societal and moral consciousness by confirmation of the principle that a sanction should always be tied to the violation of any sort of obligation.²⁶¹

The Court held the category of responsibility to be wider than guilt, possessing “an extensive value, social, historical as well as legal dimension.” Responsibility in this context arose out of a “person’s neglect to make a contribution to the structuring of power relations, his failure, during the struggle for power, to act in the service of right.”²⁶² Passive omission within a group was therefore sufficient, in the Court’s eyes, to justify

²⁵⁸ Decision of the Czech Constitutional Court, “1995/03/08 - Pl. ÚS 14/94: Beneš Decrees.”

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

the imputation of responsibility. The Czech press praised the ruling as a “triumph of justice” and an expression of “democratic values.”²⁶³

The Court’s ruling represented the culmination of an increasingly defensive Czech response to the CDU’s linkage of Czech compensation for victims of Nazism and Sudeten German property claims. The perceived threat of a plethora of Sudeten German demands for restitution, championed to an unclear extent by the CDU at the bilateral level, led Czech politicians and jurists to express conflicting normative assessments of the expulsions and expropriations. Strictly speaking, the judgement concerned only Decree No. 108 relating to property expropriations, and furthermore concerned only the legality of the Decree itself, not the manner of its implementation. However, the Court’s rationale transcended the specificity of the ruling, and therein lay its political impact. In the context of the broader philosophical debate as to the validity of collective accountability, the Court’s ruling departed from previous and later official Czech acknowledgements of wrongdoing.

Consider the contrast between the Court’s judgement and President Havel’s claim five years prior, that the expulsions and expropriations had constituted collective “retribution that went beyond the rule of law,” and his reference to the Czech “assumption that we were clearing the way for historical justice,” while in fact, “we hurt many innocent people.”²⁶⁴ When Weizsäcker visited Prague in March 1990, Havel had not only elaborated on Weizsäcker’s rejection of collective guilt (*Kollektivschuld, kolektivní vina*), but explicitly extended his condemnation to any form of collective German responsibility (*kollektive Verantwortung, kolektivní odpovědnost*). Havel had said:

We accepted in just, as well as exaggerated, indignation the principle of collective guilt. Instead of giving all those who betrayed this state a proper trial, we drove them out of the country and punished them with the kind of retribution that went beyond the rule of law, it was revenge. Moreover, we did not expel these people on the basis of demonstrable individual guilt but simply because they belonged to a certain nation. ... to accept the idea of collective guilt and collective responsibility means directly or unwittingly to weaken the guilt and responsibility of individuals. And that is very dangerous.²⁶⁵

²⁶³ Ryback, “Dateline Sudetenland,” 174.

²⁶⁴ Havel, *The Art of the Impossible*, 23.

²⁶⁵ *Ibid.*, 23, 26.

One month prior to the Court's ruling, Havel had revised his position insofar as the legality issue was concerned, "we do not have the slightest intention to annul legal acts lawfully approved by our parliament years ago," but Havel's extant moral dissent created inconsistency: "my own critical opinion [of the expulsions] is widely known."²⁶⁶ Having warded off calls for the Beneš Decrees' annulment, Havel nevertheless declared, "As far as the transfer of the German population is concerned, we must ... face the uncomfortable truth, regardless of any crazy conclusions anyone might arrive at."²⁶⁷

To further complicate matters, Czech representatives deviated from the Court's reasoning after the fact. In November 1995, Czech Foreign Minister Josef Zieleniec asserted:

Refusing to admit that there were victims and wrongs on both sides would be deliberately short-sighted. ... let us admit that the collective understanding of liability and retribution, whether based on membership of a particular race or particular people, will always expose many innocent people to injustice and set new rounds of injustice into motion.²⁶⁸

Zieleniec's admission is hard to reconcile with the Court's defence of Beneš Decree No. 108. Where the Justices had restricted themselves to the vocabulary of civil, non-criminal proceedings in order to ward off the accusation of applying collective guilt ('responsibility', 'obligation', 'damage' and 'sanction'), Zieleniec's reference to 'retribution' and 'injustice' carried connotations of punishment and guilt. The Court's and the government's defence of the Beneš Decrees' legality coincided, but their views as to the justice of the expropriations diverged.

The Court also justified the expropriation of property on the grounds of restoring and safe-guarding the principles of liberal democracy, whereas Havel and successive Foreign Ministers Dienstbier and Zieleniec had expressed their scepticism of this function. As émigré Czech political analyst Jan Pauer put it:

²⁶⁶ Havel, "Czechs and Germans on the Way to Good Neighbourship," 7, 10.

²⁶⁷ *Ibid.*, 10.

²⁶⁸ Josef Zieleniec, "Tschechen und Deutsche – Nachbarn im sich einigenden Europa. Vortrag von Josef Zieleniec, Minister für Auswärtige Angelegenheiten der Tschechischen Republik," in *Gespräche mit dem Nachbarn*, ed. Pavel Klener (Prague: Karls Universität, 1997), 213.

It is possible to agree with the Constitutional Court that the decrees were not a wanton act with respect to their legal form, and that they were sufficiently legitimated after the fact by Parliament, but it is difficult to agree that they represent a sanction that served to “secure the functions and the spirit of human rights and freedoms.”²⁶⁹

Indeed, it would be very difficult to argue that the Court produced a transferable precedent on the matter of collective liability. Inter-state practice indicates that some form of collective responsibility exists in customary international law, for example, the imposition of economic sanctions or the payment of reparations by one state to another out of tax revenue. But the collective sanction defended by the Czech Constitutional Court – reversing the presumption of innocence and expropriating property – is comparatively extreme.

Despite characterising the Beneš Decrees as safeguarding the legitimate aims of a democratic, law-based state, the Justices qualified that the post-war expropriations cannot be judged in the light of international human rights conventions adopted since 1945. The Court claimed that while “it is true” that historic legal instruments must “pass muster” with respect to present-day values, this assessment, “with the advantage of hindsight, may not be merely the present passing judgment upon the past.”²⁷⁰ Having implicitly accepted the validity of a wider natural law conception of law, the Court attempted to qualify, somewhat unsatisfactorily, the parameters of its normative defence.

In Pauer’s view, the Court’s recognition that human rights law had advanced significantly since 1945 while nevertheless defending the moral integrity of the Decrees introduced an inconsistency in its reasoning. Pauer asserted that there is an “essential moral difference between a state which recognises that it is prepared, in an extreme situation, to override norms that it otherwise upholds and a state that will not do so. This is precisely the point at which a democratic country must prove its interest in not allowing [itself] to follow the motto ‘my country, right or wrong’.”²⁷¹ In other words, the Court failed to convincingly qualify its normative justification of the Beneš Decrees with appeal to historical realities. Indeed, Pauer questioned “whether a realistic alternative to collective punishment existed, given the civilisatory breach caused by the Nazis’ racist

²⁶⁹ Pauer, “Moral Political Dissent in German-Czech Relations,” 185.

²⁷⁰ Decision of the Czech Constitutional Court, “1995/03/08 - Pl. ÚS 14/94: Beneš Decrees.”

²⁷¹ Pauer, “Moral Political Dissent in German-Czech Relations,” 183.

war of extermination and their occupation and *Umvolkungspolitik*.”²⁷² Nevertheless, as Pauer pointed out, “the argumentation laid out by the Czech Constitutional Court is hardly adequate for satisfying one’s sense of justice.”²⁷³ Certainly the Court placed itself in a difficult position by affirming the natural law conception of law. The Justices struggled to reconcile their claim that Decree No. 108 had reflected the legitimate aims of a democratic, law-based state with their effective admission that the Beneš Decrees had been a necessary product of their time. Whatever the intricacies of its reasoning, the Court’s final conclusion, coupled with the divergent views of government representatives, hardly promoted Czech-German reconciliation come 1995.

German politicians, deliberately or not, refrained from engaging with the Constitutional Court’s reasoning, particularly its distinction between collective responsibility and collective guilt. Foreign Minister Kinkel addressed the Bundestag on Czech-German relations eight days after the Court released its ruling expressing his “shock,” declaring, “There is no collective guilt ... I will openly say that the verdict of the Czech Constitutional Court regarding the legal validity of Beneš Decree No. 108 concerns us.”²⁷⁴ The German government’s objection to the ruling is hardly remarkable, but rather than directly attacking the Court’s denial of the attribution of collective guilt – reasoning certainly not immune to challenge – Kinkel condemned the Court for applying the concept deliberately. In December 1995, Weizsäcker too ignored the Court’s disavowal of collective guilt and levelled the allegation regardless: “[the Decrees] were immoral because they were based on collective guilt ... That is why we were greatly alarmed by this year’s decision in the Brno Court.”²⁷⁵ The parameters of collective responsibility and collective guilt in legal and philosophical debate are obscure, and German representatives may have deliberately avoided engaging in the finer details of an abstract philosophical controversy. Disputing the Court’s distinction would likely have achieved very little; after all, it makes no tangible difference to the lives of individuals whether a legal body retrospectively classifies the expropriation of property as a sanction in response to an unfulfilled responsibility or a punishment in response to a charge of guilt.

²⁷² Pauer, “Moral Political Dissent in German-Czech Relations,” 182.

²⁷³ *Ibid.*, 185.

²⁷⁴ “Regierungserklärung zu den deutsche-tschechischen Beziehungen, abgegeben von Bundesaußenminister Klaus Kinkel vor dem Deutschen Bundestag in Bonn am 17. März 1995,” *Auswärtiges Amt*.

²⁷⁵ Weizsäcker, “Verständigung in der Mitte Europas,” 235.

The ‘truth-as-reconciliation’ approach, reflected by Assmann’s model, “remembering in order to forget,” failed to bring about Czech-German resolution in the 1990s, and tensions were exacerbated by the Constitutional Court’s ruling.²⁷⁶ Throughout this period, inter-state negotiations included ongoing attempts to reach agreement via legal analysis. The question remains, however, why this legal approach also failed to produce resolution. The next chapter will examine the legal argumentation more closely, looking at the disputed status of the Beneš Decrees of 1945 and the Munich Agreement of 1938. The status of these two historic instruments had significant implications either supporting or undermining the Sudeten German restitution claim in the 1990s. Both governments claimed the benefit engendered by legality, and legal argumentation effectively became a proxy for a moral, political debate about the past.

²⁷⁶ Assmann, “From Collective Violence to a Common Future,” 13-15.

Chapter Four

Inconsistency in Legal Argumentation

Further to the German government's linkage of Czech and Sudeten German claims, German representatives from 1992 to 1996 denounced the Beneš Decrees as unlawful. Czech representatives responded by attempting to separate the issue of moral injustice from that of material restitution, recognising the moral significance of the expulsions and expropriations but defending their legal basis and denying any practical, legal ramifications stemming from such moral recognition. The primary point of contention between the two governments hinged on the status of the Beneš Decrees; while the German government's attempt to undermine the Potsdam Agreement of 1945 alarmed Czech officials, the original signatories to the Agreement (the United States, Britain and the then-Russian Federation) considered its legality sacrosanct.²⁷⁷

This chapter moves away from the narrative account provided in the previous two chapters and supplements with a legal analysis of the time-period as a whole, shedding light on the failure of the legal approach to Czech-German reconciliation. Two interacting factors contributed to this failure: first, intellectual inconsistencies in the arguments of both governments, and second, the inherent ambiguities of international law. This chapter will begin by looking at the German government's approach to the Beneš Decrees in the 1990s and continue with a contrast to its approach to the Munich Agreement from the

²⁷⁷ In 1992, CDU politicians Sauer and Jagoda argued that "a lasting pacification of Europe and a happy future in freedom and justice for all men," would not be achieved by "cementing the unjust border with Poland ... nor as concerns the Czech and Slovak Federal Republic, by falsifying the decisions of Yalta and Potsdam with regard to the criminal expulsion of the Sudeten Germans," and in 1996, German Foreign Minister Kinkel told the *Frankfurter Allgemeine Zeitung* that the Potsdam Agreement had been a mere political statement with no legal bearing on the expulsion of the Sudeten Germans. Deutscher Bundestag, Wahlperiode 12, Plenarprotokoll 12/93, 20 May 1992, 7686; "C.G.: Kinkel wehrt sich gegen die Vorwürfe aus Prag," *Frankfurter Allgemeine Zeitung*, 18.01.1996, cited in Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 165. The U.S. State Department released a statement in 1996 in response to an official Czech request: "The decisions made at Potsdam by the Governments of the United States, United Kingdom and the then-Soviet Union in July/August of 1945 were soundly based in international law. ... The conclusions of Potsdam are historical fact and the United States is confident that no country wishes to call them into question." USA Embassy at Prague, Press guidance, 7.2.1996, quoted in Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 165.

1960s onward, in order to highlight the striking asymmetry of its arguments in opposition to and defence of these instruments. The Czech government's approach to the Beneš Decrees and the Munich Agreement will then be canvassed in order to demonstrate the similarities and differences between both governments' legal arguments.

First, an observation regarding the fluidity of international law and its relevance to inter-state negotiation. A political dispute with a prominent legal factor, as Anthony D'Amato pointed out, is "subject to a certain amount of intelligent manipulation."²⁷⁸ Manipulation is hardly an exclusive feature of legal disputes, politicians will seek an interpretation that serves their state's interests whatever the subject matter, legal or not, but arguably international law as a framework increases the capacity for manipulation. In the Czech-German case, representatives contested the legality of historic instruments with indirect reference to jurisprudential theory – legal positivism and natural law theory – debating the essential qualities of legality itself. Where the positivist thesis explains legal validity in terms that make no necessary reference to the content of law, natural law theory claims that the existence of law is necessarily determined by its content: law has a purpose, and that is to secure justice.²⁷⁹ The capacity here for intelligent manipulation was immense. Where in the course of negotiations a state cannot alter the material facts, for example, by changing "the amount of tonnage of its natural resources," it might, where facts on the ground are made superfluous by the ambiguity of international law, "restructure international expectations by changing international law," or, as the case may be, asserting one interpretation over the other.²⁸⁰ One effect of international law's chameleon-like qualities is that intellectual inconsistency is harder to recognise. This effect is aggravated by the popular conception of law as an abstract body of formulations to which officials might apply an algorithm and find the correct solution.

A broader look at relations prior to the fall of communism, particularly those negotiations in the early 1970s between West Germany and Czechoslovakia with regard to the validity of the Munich Agreement of 1938, greatly informs any analysis of the Czech-German legal dispute in the 1990s. Czechoslovak-German negotiations in the lead-up to the 1973 Treaty of Prague (formally establishing relations between the German

²⁷⁸ Anthony D'Amato, "The Relation of Jurisprudential Theories to International Politics and Law," *Washington & Lee Law Review* 27 (1970): 274.

²⁷⁹ See chap. 3, n. 252-254 for an overview of positivism and natural law theory.

²⁸⁰ D'Amato, "The Relation of Jurisprudential Theories to International Politics and Law," 274-275.

Federal Republic and Czechoslovak Socialist Republic) reveal that the German government too had separated the principle of moral recognition from legal rectification. Likewise, prior Czechoslovak legal reasoning regarding the alleged invalidity of the Munich Agreement clashed with the Czech government's later defence of the Beneš Decrees in the 1990s.

Successive German governments from 1949 onward held the position that "the expulsion of Germans from Czechoslovakia and the confiscation of German property without compensation had been a breach of international law."²⁸¹ During the 1992 Friendship Treaty's ratification debate, CDU politicians Helmut Sauer and Bernhard Jagoda, themselves the children of Silesian expellees, criticised the Czechoslovak government for refusing to

withdraw and abolish presidential decrees that violate international law and human rights, namely the 1945 decrees of Dr. Beneš, who even in 1943 hatched schemes for the mass expulsion of the Germans, and became the primary instigator of calls to destroy the civilian population.²⁸²

In 1996, German Finance Minister Theo Waigel declared that the Beneš Decrees were "documents from an epoch marked by hatred, resentment and vengeance. They belong neither in the European legal landscape, nor in our vision of European cooperation among free peoples."²⁸³ The primary German repudiation of the Beneš Decrees rested on their alleged attribution of collective German guilt. In March 1995, Kinkel declared, "Indiscriminate judgements will inevitably fail. There is no collective guilt."²⁸⁴ In December of the same year, Weizsäcker asserted that the Beneš Decrees "were based on the collective guilt of an entire national group," and thus they "were no legal acts but

²⁸¹ Deutscher Bundestag, Wahlperiode 12, Drucksache 12/2623, quoted in Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 158. Again in 1993, Foreign Minister Kinkel repeated that "the Federal Government has never recognized the unjust expulsion and expropriation of German assets after the war." "Rede des Bundesministers des Auswärtigen, Dr. Klaus Kinkel, 04. September 1993," *Friedrich-Naumann-Stiftung, Archiv des Liberalismus*, Federal Democratic Party (FDP) Holdings, N89-84, 68.

²⁸² Deutscher Bundestag, Wahlperiode 12, Plenarprotokoll 12/93, 20 May 1992, 7686.

²⁸³ Timothy Ryback, "Dateline Sudetenland," 162-163.

²⁸⁴ "Regierungserklärung zu den deutsche-tschechischen Beziehungen, abgegeben von Bundesaußenminister Klaus Kinkel vor dem Deutschen Bundestag in Bonn am 17. März 1995," *Auswärtiges Amt*.

were a supplementary act of war.”²⁸⁵ According to Weizsäcker, “guilt, like innocence, is always personal and never collective.”²⁸⁶

German representatives in the 1990s, taking the natural law perspective, considered the legality of the Beneš Decrees to be fundamentally undermined by injustice: their premise of collective guilt. Furthermore, by challenging the legality of the Beneš Decrees, the German government insisted upon a logical progression: legal rectification ought to follow moral recognition. In a written statement released in May 1992 in relation to the Friendship Treaty’s ratification, Sauer and Jagoda asserted:

the victims of flight and expulsion are right to be bitterly disappointed when, after confessions of guilt and injustice on behalf of both the German and Czechoslovak side, the responsible governments do not now implement the legal and political implications of that moral recognition.²⁸⁷

The implication being, unlike their Czech counterparts in relation to the expulsion of the Sudeten Germans, German representatives acknowledged the injustice and illegality of forced labour under Nazism and were prepared to compensate. Hence, the German government insisted in the early 1990s that any movement on the issue of Czech compensation be met with a reciprocal Czech gesture toward the Sudeten Germans.

However, by 1989, the West German government had already set a precedent for the strategy adopted by the Czech Republic in the face of calls for the Beneš Decrees’ annulment. From the 1960s through to the 1990s, German representatives had seen no necessary contradiction in classifying the Munich Agreement as legally binding (thus precluding any revisionist legal steps), while simultaneously conceding its illegitimacy according to present-day legal and moral principles, adopting overtly positivist legal reasoning in doing so. German officials claimed both that the Munich Agreement had fulfilled the positive requirements of law (in the manner of its promulgation), and in addition, defended the Agreement with reference to legal practicalities. Certainly according to German officials, the Munich Agreement’s injustice had no bearing on the matter of its legality. Moreover, the legal status of the Munich Agreement had a direct bearing on the Sudeten German property claim in the 1990s, as I will now explain.

²⁸⁵ Weizsäcker, “Verständigung in der Mitte Europas,” 235.

²⁸⁶ *Ibid.*

²⁸⁷ Deutscher Bundestag, Wahlperiode 12, Plenarprotokoll 12/93, 20 May 1992, 7686.

West German representatives from the mid-1960s onward claimed that Hitler's invasion of Czechoslovakia proper in March 1939 had nullified the Munich Agreement, but maintained the legitimacy (and persistence) of all legal consequences arising out of its first six months of operation.²⁸⁸ The German government resisted declaring the Munich Agreement invalid from the outset due to the theoretical risk of extensive Czechoslovak compensation demands for damage inflicted during the years of Nazi occupation, and for the impact such a declaration would have on the citizenship of the Sudeten German population.²⁸⁹ If the Munich Agreement had been valid at the time of signature, the November 1938 Reich Citizenship Law effectively granted all German inhabitants of the *Reichsgau Sudetenland* German citizenship, an enduring legal consequence despite Hitler's later repudiation of the Agreement.²⁹⁰ The Czechoslovak position, on the other hand, maintained that the Munich Agreement had been null and void from the beginning.²⁹¹ Thus the November 1938 legislation granting Reich citizenship to the Sudeten Germans had no legal effect, they remained Czechoslovak citizens.

The German interpretation granted the Sudeten Germans an international legal claim, as German citizens, to compensation from the Czechoslovak government for property expropriation occurring at the war's end, and also protected Sudeten Germans from charges of treachery under Czech domestic law.²⁹² In 1992, Theo Waigel assured the SdL that his party was the "lawyer for your legitimate petitions."²⁹³ However, if the Sudeten Germans had been Czechoslovak citizens for the duration of the war, the German

²⁸⁸ In legal terms, 'ex nunc' (invalid from now on). Mosler, *The International Society as a Legal Community*, 103; Tampke, *Czech-German Relations*, 134; Schiller, "Closing a Chapter of History," 411; Hans W. Baade, "Nullity and Avoidance in Public International Law: A Preliminary Survey and A Theoretical Orientation," *Indiana Law Journal* 39, no. 3 (1964): 507.

²⁸⁸ Robert W. Dean, "Bonn-Prague Relations: The Politics of Reconciliation," *The World Today* 29, no. 4 (1973): 154.

²⁸⁹ Tampke, *Czech-German Relations*, 153.

²⁹⁰ Dean, "Bonn-Prague Relations," 154.

²⁹¹ In legal terms, 'ex tunc' (invalid from the outset). Dean, "Bonn-Prague Relations," 154; Mosler, *The International Society as a Legal Community*, 103; Tampke, *Czech-German Relations*, 133-134.

²⁹² Gardner Feldman, *Germany's Foreign Policy of Reconciliation*, 269; Hofhansel, *Multilateralism*, 37; Dean, "Bonn-Prague Relations," 154-155; Raue, "Doppelpunkt hinter der Geschichte," 61.

²⁹³ Interview with Waigel, "Vehemente Rufe nach dem 'Recht auf Heimat'," *Süddeutsche Zeitung*, June 9, 1992, quoted in Nagengast, "Coming to terms with a 'European Identity'," 87.

government had no legal authority to represent their claims at the international negotiating table.²⁹⁴

The Czechoslovak position directly reversed the German interpretation: as Czechoslovak citizens as opposed to German citizens, the Sudeten Germans had no international legal claim to restitution or compensation and were liable to accusations of treason.²⁹⁵ The Czechoslovak government claimed the prerogative of stripping the Sudeten Germans of their Czechoslovak citizenship via Beneš Decree No. 33/1945 of August 2, 1945 on account of their “unreliability” (unless the individual could prove otherwise), a legal euphemism for treachery.²⁹⁶ International law acknowledges the authority of a state to confiscate the property of its own citizens or of stateless persons: “the legal adjustment is left entirely to the jurisdiction of the state where the property is situated.”²⁹⁷ The German interpretation of the Munich Agreement therefore undercut a significant premise of the Beneš Decrees: the Czechoslovak citizenship of the Sudeten Germans as of 1945. Thus, the disputed status of the Munich Agreement had always been inextricably intertwined with the disputed legitimacy of the Beneš Decrees.

German representatives defended the Munich Agreement’s promulgation with positivist legal reasoning, claiming firstly, that the Munich Agreement had not been a pact of detriment to a third party (as the Czechoslovak government maintained) because the actual agreement of cession had been reached via an exchange of notes between Britain, France and Czechoslovakia between 19 and 21 of September 1938.²⁹⁸ Secondly, an international pact retains validity regardless of whether it infringes the domestic constitutional law of a participating party (Czechoslovak officials argued that the Czechoslovak Constitution required parliament to legitimise border changes, and such a procedure did not occur).²⁹⁹ And thirdly, German officials questioned whether duress of

²⁹⁴ See Schiller, “Closing a Chapter of History,” 403. “Deeply rooted in classical international law is the notion that sovereign states are the only proper subjects of the international legal order. A fundamental attribute of a sovereign state is the power to determine the rights and obligations of its own citizens through its municipal law.”

²⁹⁵ Gardner Feldman, *Germany’s Foreign Policy of Reconciliation*, 269.

²⁹⁶ Winkler, “The Czechoslovak Presidential Decrees, 1940-1945,” 20-18.

²⁹⁷ *Ibid.*, 20-21.

²⁹⁸ Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 149-150; Hofhansel, *Multilateralism*, 29; Wheeler-Bennett and Nicholls, *The Semblance of Peace*, 612; Tampke, *Czech-German Relations*, 134; R. Gerald Hughes, “The Ghosts of Appeasement: Britain and the Legacy of the Munich Agreement,” *Journal of Contemporary History* 48, no. 4 (2013): 704.

²⁹⁹ Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 149-150; Hofhansel, *Multilateralism*, 29; Wheeler-Bennett and Nicholls, *The Semblance of Peace*, 612; Gerald

threatened violence rendered a treaty unlawful in 1938; the Vienna Convention on treaty law, codifying various aspects of customary law and prohibiting duress, only came into force in 1969.³⁰⁰

German officials also relied on pragmatic reasoning, claiming that to declare the Munich Agreement void from its inception would create enormous legal difficulties. Firstly, in relation to civil acts contracted under German law by Sudeten Germans during the war (such as land ownership, marriage and divorce), and secondly due to the “impossibility” of erasing a complex multilateral agreement through a bilateral treaty, such as the Czechoslovak government desired in negotiations preceding the 1973 Treaty of Prague.³⁰¹ The second claim stemmed from the fact that the Munich Agreement’s signatories had included the governments of Great Britain, France and Italy. While French and Italian authorities had declared the Munich Agreement invalid from the outset as early as the 1940s, British diplomats had contacted German officials on a number of occasions throughout 1972 to register their objection to any such declaration.³⁰² The German government’s fairly legitimate excuse in this respect terminated in 1992, however, when British Prime Minister John Major visited Czechoslovakia and initialled a declaration affirming the Czechoslovak interpretation.³⁰³ The German government nevertheless maintained its position on the Munich Agreement’s initial validity in the 1992 Friendship Treaty. In fact, one condition of Havel’s 1991 offer to negotiate the

Hughes, “The Ghosts of Appeasement,” 704; Tampke, *Czech-German Relations*, 134; Schiller, “Closing a Chapter of History,” 412-413.

³⁰⁰ Ibid.

³⁰¹ Stuart S. Malawer, *Imposed Treaties and International Law* (New York: Hein Publishers, 1977), 101; Schiller, “Closing a Chapter of History,” 411; Mosler, *The International Society as a Legal Community*, 103; Hofhansel, *Multilateralism*, 36.

³⁰² “In the British view the Munich Agreement had undoubtedly been a valid agreement until 1939, and however one evaluated Neville Chamberlain’s policies one should not question his good intentions.” Hofhansel, *Multilateralism*, 36; Marek, *Identity and Continuity of States*, 321-322; Ladislav Cabada and Šárka Waisová, *Czechoslovakia and the Czech Republic in World Politics* (New York: Lexington Books, 2011), 43: “After the fall of the fascist regime, the Italian government also disavowed the Munich Agreement and Viennese arbitration.” Marjorie M. Whiteman (ed.), “The Munich Agreement and Teschen,” Department of State Publication 7737, *Digest of International Law* 3 (1964): 159: “the French National Committee, rejecting the agreements signed in Munich on September 29, 1938, solemnly declare that they consider these agreements as null and void as also all acts accomplished in the application or in consequence of these agreements.”

³⁰³ P. , M H M P , *The Times*, 28 May 1992; “Munich Agreement torn up by Major,” *The Independent*, 28 May 1992, cited in Gerald Hughes, “The Ghosts of Appeasement,” 715.

return and resettlement of Sudeten Germans (alongside participation in the coupon privatisation scheme), which the German government declined, had been the German government's recognition of the Munich Agreement's invalidity from the outset.³⁰⁴

Just as Czech officials had attempted to separate moral recognition from the question of material restitution in the 1990s, successive German representatives from the mid-1960s onward openly conceded the Munich Agreement's moral indefensibility, even as they defended its initial legality. In 1969, SPD (Social Democrat) Chancellor Willy Brandt acknowledged that the Munich Agreement had been "unjust from the outset," and in February 1973, Brandt announced to the Bundestag that, "It is now well-known that we distance ourselves politically and morally from the policy – from Hitler's policy of aggression – that led to the Munich Agreement."³⁰⁵ The 1973 Treaty of Prague recognised in its preamble that "the Munich Agreement of 29 September 1938 was imposed on the Czechoslovak Republic by the National Socialist regime under the threat of force."³⁰⁶

The Kohl government of the 1990s maintained the same position. Recall Weizsäcker's condemnation of the Munich Agreement's coercive nature in 1995: "the capitulation of the democracies against the dictatorship in Munich in 1938."³⁰⁷ While the 1997 Czech-German Declaration contained no revision of the Munich Agreement's status, it nevertheless acknowledged "Germany's responsibility for its role in a historical development, which led to the 1938 Munich Agreement, the flight and forcible expulsion of people from the Czech border area and the forcible breakup and occupation of the Czechoslovak Republic."³⁰⁸ In a speech to the Czech Chamber of Deputies marking the 1997 Declaration's signing, German President Roman Herzog (having succeeded Weizsäcker in 1995) proclaimed: "We have a responsibility to ensure that policies such as

³⁰⁴ Houžvička, *Czechs and Germans, 1848-2004*, 398; Bren, "Czech Restitution Laws Rekindle Sudeten Germans' Grievances," 21.

³⁰⁵ Brandt quoted in Gerald Hughes, "The Ghosts of Appeasement," 707-708; "Rede von Bundeskanzler Brandt am. 15 Februar 1973 (Auszüge)," in *40 Jahre Aussenpolitik der Bundesrepublik Deutschland: Eine Dokumentation* (Bonn: Auswärtiges Amt, 1989), 272, quoted in Gerald Hughes, "The Ghosts of Appeasement," 709.

³⁰⁶ "The Treaty of Prague (11 December 1973)," United States Department of State Publication 9446, Documents on Germany 1944-1985, accessed March 20, 2016, http://www.cvce.eu/obj/the_treaty_of_prague_11_december_1973-en-0714c937-28b6-452a-86d2-ed164f64fcae.html; Tampke, 135.

³⁰⁷ Weizsäcker, "Verständigung in der Mitte Europas," 235.

³⁰⁸ Ibid.; "German-Czech Declaration on Mutual Relations and Their Future Development," Deutscher Bundestag, accessed 22 March, 2016, www.bundestag.de/kulturundgeschichte/geschichte/gastredner/havel/havel2/244732.

the Munich Agreement of 1938 and the forcible breakup and occupation of the Czechoslovak Republic never again occur. It is our responsibility to oppose tyranny and injustice wherever they occur.”³⁰⁹ Herzog’s final sentence in particular is a striking moral condemnation considering his government’s legal defence of the Munich Agreement.

Successive German representatives from the 1960s to the 1990s had thus simultaneously utilised two conflicting legal paradigms to both support their own arguments (in relation to the Munich Agreement) and refute those of their Czech counterparts (in relation to the Beneš Decrees). The inconsistency is glaring. The Munich Agreement had been unjust, but its legality could not be challenged in light of its fulfilment of the positive requirements of law, in addition to compelling pragmatic reasons. The Beneš Decrees had also been unjust, but in accordance with natural law reasoning, German representatives held that their legality must be rejected.

Czech legal argumentation was also inconsistent, exhibiting strong similarities to German tactics by interpreting the link between injustice and legality differently depending on whether the aim was to repudiate or uphold the legal instrument in question. Czech officials also vacillated between adoption of natural law reasoning on the one hand, and disregard of it in preference to positivist and pragmatic arguments on the other. The Czech approach differed from that of the German government, however, given that the Constitutional Court’s alternative view, at least with respect to the justice of the property expropriations, qualified Czech recognition of the moral injustice of the Beneš Decrees. The fact remains, however, that repeated acknowledgements of the injustice implicit in the Beneš Decrees as a whole and in their implementation were given by Czech representatives at the highest level both before and after the Court’s decision. Czech officials were therefore inconsistent by disregarding the implications of this condemnation for the legal status of the Beneš Decrees, while insisting upon an application of natural law reasoning with regard to the Munich Agreement.

Like their German counterparts, Czech legal experts relied upon pragmatic reasoning, stressing that the Beneš Decrees had been the product of specific conditions after the Second World War and remained an integral component of the Czech legal

³⁰⁹ Roman Herzog, “Europa ist eine Gemeinschaft des Friedens, der Freiheit und der Demokratie: Rede vor dem Tschechischen Parlament auf der Prager Burg am 29. April 1997,” in *Demokratie als Friedensstrategie: Reden und Beiträge des Bundespräsidenten*, ed. Dieter S. Lutz (Baden-Baden: Nomos Verlagsgesellschaft, 1997), 127.

order.³¹⁰ Their abolition, they argued, would lead to legal chaos: the Beneš Decrees played an irreplaceable role in maintaining the legal continuity of the Czechoslovak state during the war years.³¹¹ Havel qualified that his own critical stance towards the Beneš Decrees did “not mean that these old legal documents can today be annulled or revoked,” alluding to the “post-war European order.”³¹² One Czech legal interpretation suggested that to rescind the Beneš Decrees could indirectly lead to a revision of the Potsdam Agreement, with significant consequences for post-war boundaries throughout much of Europe.³¹³ Pavel Winkler pointed out that the vast majority of Beneš Decrees dealt with uninteresting matters (for example, a Decree which determines the leave of professional soldiers), “and yet, the decrees are questioned and attacked *in toto*.”³¹⁴ In 1995, the Czech Constitutional Court ruled that the Beneš Decrees lacked any “constitutive character” for present purposes; having long-since fulfilled their function, they would establish no new legal relations.³¹⁵ Therefore, the Czech legal position echoed the German legal interpretation of the Munich Agreement: the legal consequences and relations established at the time of the instruments’ promulgation persisted, although the instruments themselves had long-since ceased to have any effect. Havel intertwined positivist legal reasoning with his reference to pragmatic realities: “we do not have the slightest intention either to turn back history or to annul legal acts lawfully approved by our parliament years ago – acts on which whole layers of subsequent actions have since been piled up.”³¹⁶

The comparison continues. Just as German officials attacked the Beneš Decrees for their alleged attribution of collective guilt (maintaining their consequent illegality), Czech officials likewise repudiated the Munich Agreement with natural law reasoning. In early 1995, Havel maintained that the Munich Agreement had not merely been “an unjust

³¹⁰ Pehe, “Legal Difficulties Beset the Czech Restitution Process,” 12; Winkler, “The Czechoslovak Presidential Decrees, 1940-1945,” 14.

³¹¹ Winkler, “The Czechoslovak Presidential Decrees, 1940-1945,” 14.

³¹² Havel quoted in Winkler, “The Czechoslovak Presidential Decrees, 1940-1945,” 21; Havel, “Czechs and Germans on the Way to Good Neighbourship,” 9.

³¹³ Interview with Václav Kural, Institute for International Relations, Prague, 19 June 1995, cited in Phillips, *Power and Influence after the Cold War*, 84.

³¹⁴ Winkler, “The Czechoslovak Presidential Decrees, 1940-1945,” 16-17. See also 17-23. The Czech negotiation delegation supported and drew upon Winkler’s legal analysis. Interview with Dr. Alexandr Vondra, former First Deputy Minister of Foreign Affairs to the Czech Republic and member of the Czech negotiations 1995-1996 on 22.10.1998, cited in Raue, “Doppelpunkt hinter der Geschichte,” 71, footnote 43

³¹⁵ Decision of the Czech Constitutional Court, “1995/03/08 - Pl. ÚS 14/94: Beneš Decrees.”

³¹⁶ Havel, “Czechs and Germans on the Way to Good Neighbourship,” 10.

solution to a disputable minority issue,” but rather a crucial confrontation between democracy and Nazi dictatorship: a “declaration of war, in no uncertain terms and at an international level, upon human freedom and dignity.”³¹⁷ One month later, the Justices of the Czech Constitutional Court emphasised that the Czech-German conflict in 1938 “had ended catastrophically for the Czechoslovak Republic with the Munich Agreement,” and had represented a critical clash between democracy and totalitarianism, a final, failed stand against the tyranny of Nazi Germany that might have prevented the Second World War or at least drastically altered its course.³¹⁸ As early as 1947, leading Czech experts had maintained that “the Munich Agreement was not an Agreement in the sense of international law, but a plain dictate imposed upon Czechoslovakia.”³¹⁹

Czech officials also utilised positivist arguments. Czech officials repudiated the Munich Agreement on the grounds that it had been a pact of detriment to a third party and therefore inadmissible in international law; had failed to implement border changes in the Constitutionally-sanctioned manner; and had been imposed in contravention of customary international law and treaties to which all parties had been signatories.³²⁰ However, Havel’s and the Court’s proclamations indicated a wider, morally-imbued conception of legal validity than the proceduralism advocated by legal positivism. According to Czech officials, not only had the Munich Agreement failed to live up to the positive requirements of law, but its aggressive and coercive nature rendered it defunct from the outset.

Both governments followed a similar pattern in relation to the legal instrument they wished to defend: conceding the instrument’s injustice but insisting that its manner of promulgation had fulfilled the positive requirements of law, and moreover, to declare the instrument devoid of legal effect would create enormous practical difficulties. The German government alluded to civil uncertainties and claimed its hands were tied due to

³¹⁷ Havel, “Czechs and Germans on the Way to Good Neighbourship,” 8.

³¹⁸ Decision of the Czech Constitutional Court, “1995/03/08 - Pl. ÚS 14/94: Beneš Decrees.”

³¹⁹ Professors L. Vošta and A. Hobza in Karel Zajíček ed., *Český národ soudí: K. H. Franka* (Prague: Ministerstvo informatiky, 1947), 185.

³²⁰ For example, the Locarno Treaties of 1925 and the Kellogg-Briand Pact of 1928 renouncing the use of military aggression as a means of resolving inter-governmental disputes. As for the development of customary international law, Charles A. Schiller compellingly cited the Third Reich’s rejection of the Treaty of Versailles’s legal validity on account of its ‘imposed’ and ‘dictated’ nature. Lemkin, *Axis Rule in Occupied Europe*, 132; Schiller, “Closing a Chapter of History,” 412-413; Tampke, *Czech-German Relations*, 134; Raue, “Doppelpunkt hinter der Geschichte,” 71; Renner, “German – Czech Republic: negotiating apologies,” 90.

the multilateral nature of the Munich Agreement, and the Czech government argued that to declare the Beneš Decrees devoid of legality would create a constitutional crisis, undermining the continuity of the Czechoslovak state and indeed, the entire post-war European order. On the one hand, an ostensibly regretful German reference to practical realities, and on the other hand, a tacit Czech allusion to the extra-legal implications of the Second World War's exceptional savagery. Whereas, in relation to the legal instrument the governments wished to repudiate, representatives insisted that a normative assessment of the instrument's content rendered it invalid. In addition to the positive requirements of law, morality and justice had become the law's essential legitimising qualities.

The German government's inconsistency had a particularly frustrating impact upon Czech-German reconciliation in the 1990s. In 1973, and again in 1992, Czechoslovak representatives had effectively conceded the German government its interpretation of the Munich Agreement. Remarkably, the 1973 Treaty of Prague permitted both Czechoslovak 'invalid from the outset' and German 'invalid from March 1939 onward' interpretations, and the 1992 Friendship Treaty affirmed the dual interpretation. While Article One of the 1973 Treaty declared the Munich Agreement *nichtig* in the German version and *nulitný* in the Czech (invalid, null or void), Article Two dictated the Treaty's practical, 'invalid from March 1939 onward', effect. The Treaty would have no bearing on the "legal effects on natural or legal persons of the law as applied in the period between 30 September 1938 and 9 May 1945," nor on the "nationality of living or deceased persons."³²¹ Both parties were protected (and frustrated) by a provision stating the Treaty would not "constitute any legal basis for material claims."³²² However, the Treaty did not itself eliminate the possibility of material claims in future, and neither did the 1992 Friendship Treaty. By calling for the Beneš Decrees' annulment in the early-1990s and re-igniting the question of Sudeten German material claims, the German government implicitly refused the Czech government a *quid pro quo*.

While by 1994 the Czech-German dispute had adopted an unmistakably legal framework, the flexibility and ambiguity of international law dictated that any agreement would only be reached via political compromise. The material stakes were equivalent:

³²¹ "The Treaty of Prague (11 December 1973)," United States Department of State Publication 9446, Documents on Germany 1944-1985.

³²² Ibid.; Tampke, *Czech-German Relations*, 135; Mosler, *The International Society as a Legal Community*, 104.

just as the Beneš Decrees' illegality, if successfully argued, would strengthen the claims of the Sudeten Germans to restitution, so would the Munich Agreement's illegality from the outset entitle the Czech government to bring a new set of claims for damage inflicted during the years of Nazi occupation (a claim quite separate from war reparations, and from the Czech compensation claim for victims of Nazism).³²³ Czech representatives in the early 1990s likely expected their German counterparts to make a similar concession by relinquishing Sudeten German property claims and implicitly accepting a dual interpretation of the Beneš Decrees, and if not via treaty (given a provision of German law rendering the federal government liable for individual claims relinquished in an international agreement), then at least at the level of bilateral negotiations.³²⁴ Instead, as we saw in chapters two and three, the German government linked the issue of Sudeten German property claims to the Czech compensation claim for victims of Nazism, declaring that movement would have to be reciprocal.

At the beginning of this chapter, I suggested that international law as framework increases the capacity for "intelligent manipulation" in inter-state negotiations.³²⁵ Given the ambiguity of international law with respect to the legal instruments in question, both the Czech and German governments claimed the benefit of legality, selectively employing two conflicting intellectual strategies. This thesis does not provide an explanation as to why representatives failed to address their inconsistencies, but I suggest that the extent to which legal argumentation engages in subtle distinction, coupled with international law's somewhat misleading status as an external "regulatory regime," or "impartial system of rules," increased the capacity for confusion and inconsistency.³²⁶ Self-serving bias on the part of both government's representatives undoubtedly played a key role. The 1997 Declaration on Mutual Relations and their Future Development represented a radically pragmatic approach to the conflicts described above.

³²³ Tampke, *Czech-German Relations*, 153.

³²⁴ For discussion of this provision of German law, see Phillips, *Power and Influence after the Cold War*, 83; Pauer, "Moral Political Dissent in German-Czech Relations," 174; Quint, *The Imperfect Union*, 284.

³²⁵ D'Amato, "The Relation of Jurisprudential Theories to International Politics and Law," 274.

³²⁶ See Christian Reus-Smit, "Introduction," in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge: Cambridge University Press, 2004), 1.

Chapter Five

Embracing Legal Contradiction

The 1997 Declaration on Mutual Relations and their Future Development ended the deadlock in Czech-German relations. Officials and secondary scholars alike perceived the Declaration to be a truth-telling watershed, despite the text achieving little more in this respect than encapsulating prior acknowledgements in a succinct bilateral agreement. The Declaration effectively ended the legal dispute, but did so at the expense of legal resolution. Instead of establishing a substantive accord, the Declaration represented a pragmatic agreement to set aside legal disputes arising out of the past.

Czech Foreign Minister Zieleniec had suggested the idea of a declaration in March 1995, and received expressions of support from both within the German government coalition and the German opposition.³²⁷ However, by January 1996 negotiation sessions had ended in deep disagreement.³²⁸ In 2007, former Czech negotiator Alexandr Vondra recalled German Foreign Minister Kinkel's hasty departure from a negotiation session that had taken place in a makeshift room in 1996. Kinkel rose to leave in protest but the door jammed; in his anger Kinkel attempted to break down the door, and the entire prefabricated wall collapsed on top of him.³²⁹ The anecdote aptly reflects the fractious state of Czech-German political relations in 1996. Zieleniec called a press conference in Prague in January 1996, criticising German negotiators for complicating the negotiations by demanding a re-wording of the text evaluating the past. On January 18 Kinkel rejected the accusation, criticising the Czech party's inflexibility and reaffirming his government's commitment to the Sudeten German expellees.³³⁰

During the spring of 1996, the parties finally achieved a compromise and Kinkel and Zieleniec signed a protocol in December 1996.³³¹ The Bundestag approved the

³²⁷ Vladimír Handl, "The Czech-German Declaration on Reconciliation," *Perspectives* 9 (1997-98): 55.

³²⁸ *Ibid.*, 56.

³²⁹ Aleksandr Vondra, "Jednání o deklaraci bylo složité," in *Česko-německá deklarace: Deset let poté*, ed. Marek Loužek (Prague: Centrum pro ekonomiku a politiku, 2007), 12.

³³⁰ Handl, "The Czech-German Declaration on Reconciliation," 56.

³³¹ *Ibid.*, 56-57.

Declaration with 578 votes for, twenty against, and twenty-three abstaining. In the Czech Republic, the Chamber of Deputies approved the Declaration by 131 votes to fifty-nine.³³²

The Declaration, signed on January 27, 1997, contained mutual condemnations and expressions of regret for wartime and immediate post-war events. Article I reads: “Both sides are aware that their common path to the future requires a clear statement regarding their past which must not fail to recognise cause and effect in the sequence of events.”³³³ The German provision contained:

The German side acknowledges Germany’s responsibility for its role in a historical development, which led to the 1938 Munich Agreement, the flight and forcible expulsion of people from the Czech border area and the forcible breakup and occupation of the Czechoslovak Republic. It regrets the suffering and injustice inflicted upon the Czech people through National Socialist crimes committed by Germans. The German side pays tribute to the victims of National Socialist tyranny and to those who resisted it. The German side is also conscious of the fact that the National Socialist policy of violence towards the Czech people helped to prepare the ground for post-war flight, forcible expulsion and forced resettlement.³³⁴

Vladimir Handl described the German provision as carrying a sense of completion in German foreign policy, closing the last chapter of German *Ostpolitik*.³³⁵

Commentators have mistakenly claimed that the German provision represented a radical reinterpretation of the past. Political analyst Judith Renner asserted: “the German statement of regret ... represents a reinterpretation of the German past, in that it addresses the ‘causal chain of history’ and acknowledges that the Munich Agreement together with the National Socialist invasion and despotism had prepared the ground for the subsequent expulsions of the Sudeten Germans.”³³⁶ Renner referred to Jan Pauer’s claim that the question of ‘cause and effect’ in the common history of both countries had been one of the most difficult and frequently discussed questions in Czech-German relations.³³⁷

³³² Handl, “The Czech-German Declaration on Reconciliation,” 57.

³³³ “German-Czech Declaration on Mutual Relations and Their Future Development,” Deutscher Bundestag.

³³⁴ Ibid.

³³⁵ Handl, “The Czech-German Declaration on Reconciliation,” 59.

³³⁶ Renner, “Germany – Czech Republic: negotiating apologies,” 95.

³³⁷ Ibid.; Pauer, “Moral Political Dissent in German-Czech Relations,” 177-178.

According to Renner, prior to 1997 this issue had been “utterly controversial in the German-Czech debate on their common past.”³³⁸ Similarly, Miroslav Kunštát asserted that by the 1997 Declaration, the German government, “for the first time, officially recognised a causal connection between the events of 1938/39 and those of 1945/46.”³³⁹

However, German representatives had acknowledged causality in the shared Czech-German past in the years prior to the 1997 Declaration. As we saw in chapter three, German politicians throughout the early 1990s recognised Germany’s responsibility for triggering a chain of historical events culminating in the expulsion of the Sudeten German population. Indeed, even prior to the fall of communism, Weizsäcker had recommended that the suffering of Germans in the post-war period be remembered in its historical context:

Nobody will, because of that liberation, forget the grave suffering that only started for many people on 8 May. But we must not regard the end of the war as the cause of flight, expulsion and deprivation of freedom. The cause goes back to the start of the tyranny that brought about war. We must not separate 8 May 1945 from 30 January 1933.³⁴⁰

Certainly Czech representatives objected to the German government’s repeated reference to a cycle of “injustice and counter-injustice,” perceiving an inference of moral equivalence. However, the German government’s suggestion that ‘two wrongs do not make a right’ did not, in itself, deny the causal sequence of events, although the secondary authors mentioned above may have taken this interpretation. Thus, the 1997 Declaration crystallised the German acknowledgement of causality in a bilateral agreement but contained little that German representatives had not already admitted in an official context.

With regard to the differing normative assessments of Czech officials and the Constitutional Court, the Czech provision of the Declaration represented the last word, ostensibly smoothing over any inconsistencies:

³³⁸ Renner, “Germany – Czech Republic: negotiating apologies,” 95.

³³⁹ Kunštát, “Czech-German Relations after the Fall of the Iron Curtain,” 167.

³⁴⁰ “Speech by President Richard von Weizsäcker during the Ceremony Commemorating the 40th Anniversary of the End of War in Europe and of National Socialist Tyranny, on 8 May 1985 at the Bundestag, Bonn,” Der Bundespräsident.

The Czech side regrets that, by the forcible expulsion and forced resettlement of Sudeten Germans from the former Czechoslovakia after the war as well as by the expropriation and deprivation of citizenship, much suffering and injustice was inflicted upon innocent people.³⁴¹

The Declaration thus formally qualified, for political purposes, the Czech Constitutional Court's assessment of the expropriation's justice. The Declaration did not represent a full re-evaluation however: the Court had been tasked with assessing Decree No. 108's legality, not the manner of its actual implementation. In 1997, the Czech government again formally acknowledged that the process had had its flaws, inflicting suffering and injustice upon innocent people. Thus, in this respect, the Declaration reflected little that Czech representatives such as Havel, Dienstbier and Zieleniec had not already admitted in an official capacity.

Remarkably, having acknowledged suffering and injustice, the Czech provision continued by declaring that "guilt was attributed collectively."³⁴² At first glance, the provision appears to contradict the Constitutional Court's distinction of collective guilt and collective responsibility. However, the provision referred exclusively to the 'wild' expulsions prior to the Decrees taking effect. In addition, the Czech provision explicitly regretted the 'excesses' that were committed during the wave of 'wild' expulsions:

excesses which were contrary to elementary humanitarian principles as well as legal norms existing at that time, and furthermore regrets that Law No. 115 of 8 May 1945 made it possible to regard these excesses as not being illegal and that in consequence these acts were not punished.³⁴³

Beyond the reference to Law No. 115, the Czech provision contained no expression of distance from the Beneš Decrees as such, and certainly no concession that the Beneš Decrees themselves had attributed guilt collectively. The Declaration's content with respect to mutual legal claims, detailed below, reassured Czech negotiators that such admissions, particularly its recognition of the moral indefensibility of Law No. 115,

³⁴¹ "German-Czech Declaration on Mutual Relations and Their Future Development," Deutscher Bundestag.

³⁴² Ibid.

³⁴³ Ibid.

would not undermine the Beneš Decrees' legal legitimacy, as had been feared in the years 1992 to 1996.³⁴⁴

The Declaration enabled both the Czech and German governments to retain their own legal interpretation of the Beneš Decrees, in much the same way that the 1973 Treaty of Prague and 1992 Friendship Treaty had enabled a dual interpretation of the Munich Agreement. In 1973, West German State Secretary Paul Frank had observed that the only method by which the two governments could reach agreement was "to find the kind of wording that allows both sides to retain their own legal conception."³⁴⁵ Frank's observation held true in 1997. The 1997 Declaration's most remarkable aspect, and arguably its most remarkable achievement, is its plain abandonment of the legal disagreement. Article IV reads:

Both sides agree that injustice inflicted in the past belongs in the past, and will therefore orient their relations towards the future. Precisely because they remain conscious of the tragic chapters of their history, they are determined to give priority to understanding and mutual agreement in the development of their relations, while each side remains committed to its legal system and respects the fact that the other side has a different legal position. Both sides therefore declare that they will not burden their relations with political and legal issues which stem from the past.³⁴⁶

By the above provision, both governments expressed an exhausted will to turn over a new leaf, agreeing to set aside the dispute indefinitely.

Neither government achieved its primary aim in the Declaration. Czech negotiators did not obtain individual compensation for Czech victims of Nazism, and the Declaration established no dialogue between the Czech government and the SdL, let alone any amendment to the Beneš Decrees.³⁴⁷ The Declaration did, however, establish a 'Fund for the Future' to finance shared projects intended to ease suffering arising out of

³⁴⁴ Havel's, Dienstbier's and Zieleniec's admissions of the expulsion's injustice aside, Czech policy makers in the early 1990s objected to any action that might, however tenuously, undermine the Beneš Decrees' legitimacy. Pauer, "Moral Political Dissent in German-Czech Relations," 184.

³⁴⁵ Frank quoted in Houžvička, *Czechs and Germans, 1848-2004*, 357.

³⁴⁶ "German-Czech Declaration on Mutual Relations and Their Future Development, 21 January 1997," Deutscher Bundestag.

³⁴⁷ Phillips, *Power and Influence after the Cold War*, 75; Renner, "Germany – Czech Republic: negotiating apologies," 97.

the past, and the Declaration explicitly stated that Czech victims of Nazism were to be the projects' primary beneficiaries.³⁴⁸ Significantly, the German government contributed 140 million DM to the fund while the Czech government committed itself to 440 million Crowns (around 20 million DM) over a four-year period.³⁴⁹ Thus, come 1997 the German government made the greater concession, both in its acceptance of the Czech government's unwillingness to engage with the SdL and in its financial contribution many times greater than that of the Czech government.

Czech and German officials represented the Declaration to be a truth-telling breakthrough. In April 1997, during an address to the Bundestag, Havel announced that the Declaration had finally liberated both politicians and historians to tell the truth about the past, and "by liberating the historians we have done infinitely more: we have contributed to the freedom of all our fellow citizens. Because only a society which is allowed to know the truth about its own history is a truly free society."³⁵⁰ During an address to the Czech Chamber of Deputies in the same month, German President Herzog proclaimed in response to the Declaration, "To live free and united, with the prospect of friendly neighbourly coexistence in a united Europe, is worth the effort of seeking the whole and undivided truth!"³⁵¹ Possibly Havel and Herzog intended these glowing assessments to win the support of their home constituencies for a bilateral agreement which in reality offered little significantly new historical understanding, and instead involved major concessions in relation to the original expectations of both parties at the outset of reconciliation negotiations in 1990.

The SdL vehemently opposed the Declaration. Shortly after its signature, chairman Neubauer complained (accurately) that:

The expulsions are not regretted. If it was said that expulsions will be outlawed once and for all – this would be different. However, only the suffering and the injustice which was caused for innocent people during the expulsions is regretted.

³⁴⁸ "German-Czech Declaration on Mutual Relations and Their Future Development, 21 January 1997," Deutscher Bundestag.

³⁴⁹ Renner, "Germany – Czech Republic: negotiating apologies," 96-97.

³⁵⁰ Václav Havel, "Address of the President of the Czech Republic Václav Havel before the Bundestag," Václav Havel, accessed March 20, 2016, http://www.vaclavhavel.cz/showtrans.php?cat=projevy&val=158_aj_projevy.html&typ=HTML.

³⁵¹ Herzog, "Europa ist eine Gemeinschaft des Friedens, der Freiheit und der Demokratie," 125-126.

The expulsion as such is not regretted, as both sides agree that each remains committed to its own legal order.³⁵²

Furthermore, the Declaration gave rise to understandable protest from the Federation of Jewish Communities in the Czech Republic on account of the Holocaust's inadequate reflection in the text.³⁵³ The reactions of Jewish communities in the Czech Republic to the political processes detailed in this thesis demand separate treatment; a brief comment on the Declaration's non-provision for individual compensation in this context will have to suffice here. Jewish concentration camp survivors protested that because of their advanced age, many would not live long enough to benefit from the Future Fund's time-consuming construction of nursing homes.³⁵⁴ In January 1998, the Jewish Claims Conference and the German government responded by announcing that the Claims Conference would set up a fund to assist Jewish Holocaust survivors, to which the German government would contribute 200 million DM.³⁵⁵ Thus the German government made an exception to the Declaration's non-provision of individual compensation in the case of elderly Jewish survivors of the Holocaust residing in the Czech Republic.³⁵⁶

The Declaration by no means marked a full stop to antagonism in the Czech-German relationship, but relations at the inter-governmental level progressed relatively smoothly after 1997. At a Czech-German forum in December 1998, deputy German Foreign Minister Günther Verheugen affirmed the Declaration, stating that his government would not press expellee property claims in negotiations with the Czech Republic.³⁵⁷ In March 1999, Czech Prime Minister Miloš Zeman and German Chancellor Gerhard Schröder reiterated the position, and affirmed that the Czech Republic would not launch any new claims against Germany.³⁵⁸ Angela Merkel, shortly after becoming

³⁵² Neubauer quoted in *Süddeutsche Zeitung*, 11 December 1996, 7, cited in Renner, "Czech Republic – Germany: a pioneer apology," 118.

³⁵³ Pauer, "The Problem of Ethical Norms and Values in the Czech-German Discourse," 67.

³⁵⁴ Hofhansel, *Multilateralism*, 63.

³⁵⁵ Ibid.

³⁵⁶ For a discussion of Jewish restitution in post-communist Czechoslovakia, see Barkan, *The Guilt of Nations*, 148-156.

³⁵⁷ Phillips, "The Politics of Reconciliation Revisited," 182.

³⁵⁸ Roger Cohen, "Germany Tries to Adjust as All Its Neighbours Become Friends," *The New York Times*, 14 March 1999.

German Chancellor and during Czech Prime Minister Jiří Paroubek's December 2005 visit to Berlin, repeated her predecessors' statements.³⁵⁹

The SdL did not accept the Declaration quietly, turning its full efforts to the European Parliament, believing that the criteria for European Union enlargement would require the Czech Republic to annul the Beneš Decrees.³⁶⁰ Germany had expressed its support for the accession of the Czech Republic and Slovakia to the EU in the 1992 Friendship Treaty, and reiterated its support with respect to the Czech Republic in the 1997 Declaration.³⁶¹ In June 2001 Verheugen, having left German domestic politics to fulfil the role of European Commissioner for Enlargement, countered the SdL's demands for a link between the annulment of the Beneš Decrees and Czech membership to the EU: "I have to disappoint anyone who believes that old accounts can be settled in the process of the EU's easterly enlargement."³⁶² Nevertheless, the European Parliament released a statement in November 2001 in which it "[welcomed] the Czech government's willingness to scrutinise the laws and decrees of the Beneš government, dating from 1945 and 1946 and which are still on the statute books, to ascertain whether they run counter to EU law in force and the Copenhagen criteria."³⁶³

The question of the Beneš Decrees as they pertained to Czech entry to the EU intensified in 2002, culminating in the commission of a formal legal opinion on the Beneš Decrees and their effect on Czech accession, in which three prominent legal experts from Germany, Sweden and the United Kingdom unanimously declared that they posed no obstacle.³⁶⁴ According to Verheugen, only "second-tier officials in Germany and Austria" sought to link the Beneš Decrees to EU enlargement: "Not a single member state – government of a member state – has raised the issue of the presidential decrees in the context of the accession negotiations. Never."³⁶⁵ The SdL had lost much of its political

³⁵⁹ Gardner Feldman, *Germany's Foreign Policy of Reconciliation*, 275.

³⁶⁰ Nagengast, "The Beneš Decrees and EU Enlargement," 338.

³⁶¹ Agreement on Good Neighbourly Relations and Friendly Cooperation, Czechoslovakia–Germany 1900 UNTS 27 (signed 27 February 1992); "German-Czech Declaration on Mutual Relations and Their Future Development, 21 January 1997," Deutscher Bundestag.

³⁶² Verheugen quoted in Nagengast, "The Beneš Decrees and EU Enlargement," 340.

³⁶³ EU Delegation to the EU-Czech Republic Joint Parliamentary Committee quoted in Nagengast, "The Beneš Decrees and EU Enlargement," 340.

³⁶⁴ Directorate-General for Research, *Legal Opinion on the Beneš-Decrees and the accession of the Czech Republic to the European Union, prepared by Prof. Dr. Jochen A. Froweign, Prof. Dr. Ulf Bernitz, and the Rt. Hon. Lord Kingsland Q.C.* (Luxembourg: European Parliament, 2002).

³⁶⁵ Verheugen quoted in Nagengast, "The Beneš Decrees and EU Enlargement," 341.

influence when a Social Democrat/Green coalition won a majority in the German federal elections in September 1998.

Even so, election year rhetoric in Germany, Austria, Hungary and the Czech Republic in 2002 witnessed populist politicians stoking anti-Sudeten German sentiment in the Czech Republic.³⁶⁶ The tables turned once more in 2005, when the Czech Republic released an official apology to those Sudeten Germans who had been “active opponents of Nazism who suffered ... wrongs as a result of measures applied in Czechoslovakia after the end of World War II against the so-called enemy population.”³⁶⁷ The Czech government additionally approved 30 million crowns to be invested in documenting the history and fates of Sudeten German resistance fighters.³⁶⁸

Both governments celebrated the tenth anniversary of the Declaration’s signature with a Czech exhibition in the German Foreign Office, and a podium discussion in the Czech Embassy in Berlin entitled ‘Good Neighbours, Czechs and Germans 10 Years After the Signature of the Czech-German Declaration’.³⁶⁹ The Declaration had established the Czech-German Future Fund for a period of ten years, but both governments committed to extending the Fund in 2007, and again in 2017.³⁷⁰ As of 2015, the Future Fund had provided 50 million euros to over 9000 projects.³⁷¹

³⁶⁶ Prime Minister Zeman, for example, accused the pre-war Sudeten German population of having been Hitler’s “fifth column” and declared that they “should be happy they were only ‘transferred’.” Quoted in Nagengast, “The Beneš Decrees and EU Enlargement,” 340.

³⁶⁷ “Information on the Declaration by the government of the Czech Republic to active opponents of Nazism,” Ministerstvo zahraničních věcí České republiky, accessed March 1, 2017, http://www.mzv.cz/jnp/en/foreign_relations/archiv/second_world_war_and_its_impact/documents/der_zweite_weltkrieg_und_seine/information_zur_erklarung_der_regierung.html.

³⁶⁸ Renner, “Czech Republic – Germany: a pioneer apology,” 120.

³⁶⁹ Gardner Feldman, *Germany’s Foreign Policy of Reconciliation*, 297; Ministry of Foreign Affairs of the Czech Republic, *Report on the Foreign Policy of the Czech Republic between January 2007 and December 2007* (Prague: Ministry of Foreign Affairs of the Czech Republic, 2008), 146.

³⁷⁰ “Relations Between Czechs and Germans Considerably Warmer Ten Years After the Czech-German Declaration,” Radio Praha, January 26, 2007, accessed March 5, 2017, <http://www.radio.cz/en/section/curaffrs/relations-between-germans-and-czechs-considerably-warmer-ten-years-after-czech-german-declaration>; “Ein Beispiel für Europa – Prag feiert 20 Jahre deutsch-tschechische Erklärung,” Radio Praha, January 31, 2017, accessed March 5, 2017, <http://www.radio.cz/de/rubrik/tagesecho/ein-beispiel-fuer-europa-prag-feiert-20-jahre-deutsch-tschechische-erklaerung>.

³⁷¹ “Czech-German Fund Supports 169 Projects,” Prague Daily Monitor, December 22, 2016, accessed March 5, 2017, <http://www.praguemonitor.com/2016/12/22/czech-german-fund-supports-169-projects>.

In February 2015, the SdL formally relinquished any territorial claim on the Sudetenland, as well as claims for monetary restitution from the Czech government.³⁷² In addition, the SdL's National Assembly formally recognised Sudeten German responsibility for the "persecution and murder of Sudeten Germans and Czechs who were hated by the Nazi regime, as well as for the Holocaust of the Jews in Bohemia, Moravia and Silesia."³⁷³ The SdL declared its intent to take on a "stronger role as a connector in German-Czech dialogue," and the move was welcomed by Czech Foreign Minister Lubomir Zaoralek.³⁷⁴

On the Declaration's very recent twentieth anniversary, the governments released a joint statement in which they declared, "the Czech-German Declaration ... was the crucial breakthrough in the two countries' relations, which had previously been significantly overshadowed by topics related to the past, and forms the foundation of our bilateral relations."³⁷⁵ In January 2017, Czech Prime Minister Bohuslav Sobotka announced that relations between the Czech Republic and Germany were their best in modern history.³⁷⁶

The success of the 1997 Declaration, twenty years on, testifies to the unexpected durability of deliberate avoidance in the context of inter-state relations. In the case of the Czech-German bilateral relationship, shelving a substantively unresolved problem proved a remarkably effective solution. In 1997, General Secretary of the Council of Europe Daniel Tarschys described the Declaration as "a stimulus for those who have not yet managed to throw off the chains of history and return to the society of democratic European nations."³⁷⁷ The quality of Czech-German relations post-1997 vindicates

³⁷² "Sudeten Germans give up 'right to homeland'," *The Local*, March 2, 2015, accessed March 20, 2017, <https://www.thelocal.de/20150302/world-war-2-history-sudeten-germans-give-up-right-to-homeland>.

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ "Declaration on the 20th anniversary of the German-Czech Declaration of 21 January 1997 on Mutual Relations and their Future Development, 25.01.2017," *Auswärtiges Amt*, accessed March 6, 2017,

http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2017/170125_gemErkl_CZE.html?nn=391274.

³⁷⁶ "PM Sobotka: Czech-German Declaration installed trust," *Prague Daily Monitor*, 31 January, 2017, accessed March 4, 2017, <http://www.praguemonitor.com/2017/01/31/pm-sobotka-czech-german-declaration-installed-trust>.

³⁷⁷ Council of Europe, press release, 22.1.1997, quoted in Kunštát, "Czech-German Relations after the Fall of the Iron Curtain," 170.

Tarschy's commentary. During German President Johannes Rau's visit to Prague in 2002, Havel even observed, "As a result of this twelve-year process [since 1990], relations between our two countries are excellent."³⁷⁸

As discussed earlier, Aleida Assmann's models of dealing with a traumatic past are discernable in the Czech-German process. Czech and German representatives transitioned between "dialogic forgetting" during the Cold War period, to attempted "remembering in order to forget" between 1989 to 1996, and then back to a qualified form of "dialogic forgetting" in 1997. This is not to suggest that the Declaration marked a return to pre-1989 modes of communication on the shared past. The idea of 'silence' as a pragmatic solution to outstanding grievances is nevertheless reflected in the Declaration's joint assertion that "injustice inflicted in the past belongs in the past."³⁷⁹ In other spheres of cultural life, supported by both governments, the 1997 Declaration represented a commitment reflecting another of Assmann's models, "remembering in order to never forget": "the aim of such a pact is to transform the *asymmetric* experience of violence into *symmetric* forms of remembering."³⁸⁰ Grass-roots reconciliation initiatives between Czechs and Sudeten Germans provide evidence of such a model.³⁸¹ However, both governments stipulated that such remembrance would not interfere with the process of inter-state negotiation.

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This thesis aimed to shed new light on the process of Czech-German political reconciliation between the years 1989 and 1997; it asked, broadly, how Czech and German representatives arrived at the 1997 Declaration on Mutual Relations and their Future Development. Focusing on two failed approaches to reconciliation, it sought to explain how and why the parties resorted to a pragmatic solution in the 1997 Declaration.

³⁷⁸ Deutsche Botschaft Prag, "Gemeinsame Pressekonferenz von Bundespräsident Johannes Rau und Präsident Havel am 5. Juni 2002 auf der Burg," Prague, June 5, 2002, quoted in Gardner Feldman, *Germany's Foreign Policy of Reconciliation*, 266.

³⁷⁹ "German-Czech Declaration on Mutual Relations and Their Future Development, 21 January 1997," Deutscher Bundestag.

³⁸⁰ Assmann, "From Collective Violence to a Common Future," 13.

³⁸¹ For example, Robert Tait, "The Germans and Czechs trying to deal with ghosts of the past," *The Guardian*, November 11, 2016.

The first failed approach to reconciliation concerns the parties' misplaced conviction that facing up to the historical truth would itself create a shared theoretical understanding dictating necessary legal action in the present. Czech and German representatives in the 1990s mistakenly identified the importance of historical honesty – an open reckoning with the past – as the definitive key to reconciliation, where instead, and independently of such a reckoning, the impediment lay with the parties' differing perceptions of the past's present-day legal significance. The quest for truth-telling in this context highlights obstacles to Assmann's model, "remembering in order to forget." Indeed, such a model may prove insufficient as a means of dealing with a traumatic past. Remembrance – a collective casting of the mind back and empathising with the suffering of a former enemy – may be substantially achieved while the appropriate present-day material response to that recognition remains overwhelmingly complex and unclear.

Czech and German representatives shared a genuine reconciliatory intent in the early 1990s and a commitment to historical truthfulness that went beyond mere political window-dressing. However, burgeoning legal claims obscured the achievements of officials of this respect and generated a defensive regression in the Czech Republic. In March 1995, the Czech Constitutional Court defended the Beneš Decrees' attribution of collective German responsibility, thereby taking a provocative stance in a complex philosophical debate: the extent to which liability may be attributed and a sanction imposed upon members of a collective in the absence of established individual guilt. And yet, as Jan Pauer pointed out, the Court faced the unenviable task of providing legal justification for exceptional events that had occurred in the wake of exceptional events, and about which numerous legal theorists since 1945 have asserted tacit, singular exceptions.³⁸² The Court's ruling nevertheless produced a situation of inconsistency between the Czech Republic's normatively-imbued legal position and the formal admissions of wrongdoing on the part of government representatives.

³⁸² See for example, Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo," *European Journal of International Law* 21, no. 4 (2010): 1085-1102. "When the international criminal tribunals were convened in Nuremberg and Tokyo in the mid-1940s, the response from lawyers was mixed. Some believed that the Second World War was an exceptional event requiring special legal remedies, and commended the tribunals for advancing international law. Others condemned them for their legal shortcomings and maintained that some of the charges were retroactive and selectively applied. Since then, successive generations of commentators have interpreted the tribunals in their own ways, shaped by the conflicts and political concerns of their own times."

Despite the Czech Constitutional Court's ruling, the normative, historical assessments of Czech and German state representatives prior to the 1997 Declaration coincided to a greater extent than the officials themselves acknowledged, a misevaluation shared by secondary scholars. German criticisms in 1995 discounted the many acknowledgements of Czech wrongdoing expressed by representatives in the years prior to and following the Constitutional Court's ruling. In addition, a number of secondary authors incorrectly claimed that the German provision of the Declaration represented a significant elaboration on previous German admissions with respect to historical causality. Both Czech and German officials perceived the 1997 Declaration to be the final culmination of truth-telling efforts (prior efforts having been insufficient), but in reality the Declaration achieved something quite different: an agreement to disagree over legal interpretation.

The second failed approach to reconciliation concerns intellectual inconsistency in legal argumentation. German representatives in the early 1990s insisted upon a logical progression between moral recognition for past injustice and legal restitution for the Sudeten German expellees. As a result, the German government initiated the linkage of Czech compensation and Sudeten German property claims. In a study of collective memory and property restitution in human rights law, Patrick Macklem asserted, "Establishing that a past possesses legal significance ... is contingent on a state's decision to recognise past injustice."³⁸³ Recognition of past injustice may be a necessary precursor if the question of legal rectification is to receive a hearing, but it is not sufficient. A state may recognise past injustice, and by extension the injustice of an event's underlying legal basis, yet still maintain the legitimacy of that legal basis, thus denying present-day legal rectification.

The German government's rejection of the Beneš Decrees' legality prior to 1997 rested upon a normative assessment: the injustice of the Decrees, particularly their alleged reliance on the concept of collective guilt. However, this stance directly contradicted the German government's policy towards the Munich Agreement, one of acknowledging injustice while simultaneously maintaining legal validity. These two incompatible approaches reflected a well-known divergence in jurisprudential theory represented by the schools of legal positivism and natural law theory.

³⁸³ Macklem, "Rybná 9, Praha 1," 18-19.

The Czech government also exhibited inconsistency in its defence of the Beneš Decrees' legality on the one hand, and its normative rejection of the Munich Agreement on the other, reflecting a selective and thus inconsistent approach to historic legal instruments. Indeed, both governments followed a similar pattern in relation to the instruments they wished to defend and reject. In the 1990s, Czech-German legal argumentation effectively became a surrogate for a moral, political debate about the past.

In light of the Czechoslovak government's concessions regarding the Munich Agreement in 1973 and 1992, the German government's refusal to accept a similar dual legal interpretation of the Beneš Decrees had a particularly frustrating impact upon Czech-German reconciliation in the 1990s. German officials may have been more concerned with placating a significant domestic constituency in the form of the SdL than actually persuading their Czech counterparts to adopt the German legal interpretation. This would explain representatives' unwillingness to recognise the hypocrisy of demanding one legal interpretation in one context only to reverse the logical underpinnings of that demand in order to adopt the opposite legal interpretation in a second context. By 1997, however, the CDU's foreign policy priority of reconciliation with the Czech Republic outweighed the domestic priority embodied by the SdL.

A mutual commitment to giving "priority to understanding and mutual agreement" in future relations, expressed in the 1997 Declaration, is striking for its effective absence from Czech-German relations prior to 1997.³⁸⁴ Both the Czech and German governments in the 1990s ostensibly committed to a principled approach, jointly seeking a common interpretation of historical events on normative and legal grounds. However, neither government sufficiently abided by the intellectual ground rules required by such a process, and a unanimous theoretical resolution, resolving all outstanding legal issues arising out the shared past, proved illusive.

The flexibility of international law, particularly its exceptional capacity for "intelligent manipulation," both facilitated and aggravated the parties' inconsistency. Not only did ongoing tension between positivist and natural law conceptions in the development of international law contribute to the parties' disagreement as to appropriate legal action, but the existing law itself was unsettled, enabling both governments to claim

³⁸⁴ "German-Czech Declaration on Mutual Relations and Their Future Development, 21 January 1997," Deutscher Bundestag.

the benefit engendered by legality.³⁸⁵ These intellectual inconsistencies persisted due to a variety of reasons, not least the law's preoccupation with abstruse distinction and representatives' self-interested bias.

The Czech-German reconciliation process culminated in the 'success' of the 1997 Declaration, and analysing Czech-German political relations through the lens of 'failed approaches' highlights the triumph of pragmatism. Prior to 1989, the 1973 Treaty of Prague had represented a pragmatic 'agreement to disagree' rather than a theoretical accord, enabling dual legal interpretations of the Munich Agreement. The collapse of communism in East-Central Europe in 1989 sparked an almost euphoric desire for political reconciliation on both sides of the Czech-German border, evidenced, for example, by Weizsäcker's and Havel's speeches in Prague in March 1990. The year 1989 thus saw a rejuvenated intent to achieve reconciliation based on joint historical and legal interpretations of the difficult past. Come 1996, however, the attempt to reconcile differing legal interpretations of key legal instruments had demonstrably failed. In the face of the failed legal approach, both governments reverted to the tried-and-tested method established by their predecessors in 1973: resolution by embracing legal contradiction. By the 1997 Declaration, both governments agreed to cease burdening their bilateral relations with "issues which stem from the past" and to orient their relations towards the future.³⁸⁶

³⁸⁵ This tension between legal positivism and natural law theory in the development of international law is discussed in a variety of contexts; see for example, Prabhakar Singh, "From 'Narcissistic' Positive International Law to 'Universal' Natural International Law: The Dialectics of 'Absentee Colonialism'," *African Journal of International and Comparative Law* 16, no. 1 (2008): 57.

³⁸⁶ "German-Czech Declaration on Mutual Relations and Their Future Development, 21 January 1997," Deutscher Bundestag.

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