

## THE MUNICH PACT OF 1938: ADR STRATEGIES FOR OUR TIME?

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### INTRODUCTION

Fresh off the peace agreement that was negotiated at Munich on September 29, 1938,<sup>1</sup> British Prime Minister Neville Chamberlain<sup>2</sup> proclaimed to the crowd assembled at No. 10 Downing Street:<sup>3</sup> “My good friends, for the second time in our history, a British Prime Minister has returned from Germany bringing peace with honor.<sup>4</sup> I believe it is peace for our time. . . Go home and get a nice quiet sleep. . .”<sup>5</sup> Instead of “a nice quiet sleep,” Britain and the continent of Europe were plunged into six years of devastating world war when Adolf Hitler<sup>6</sup> invaded Poland on September 1, 1939, thus forcing Britain and France to declare war on Germany.<sup>7</sup>

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<sup>1</sup> See THE MUNICH PACT [hereinafter “THE PACT”], September 29, 1938, available at <http://www.yale.edu/lawweb/avalon/imt/document/munich1.html> (last visited Apr. 6, 2004). Pursuant to the Pact, Britain and France, on behalf of Czechoslovakia, ceded four zones of territory, known as the Sudetenland, which contained several million ethnic Germans, to Nazi Germany. See *id.*

<sup>2</sup> Chamberlain was Prime Minister of Great Britain from 1937-1940, <http://www.spartacus.schoolnet.co.uk/PRchamberlain.htm> (last visited Nov. 14, 2002).

<sup>3</sup> The traditional residence of Britain’s Prime Minister.

<sup>4</sup> See TELFORD TAYLOR [hereinafter “T. TAYLOR”], *MUNICH: THE PRICE OF PEACE* 64 (Garden City, New York: Doubleday and Co., Inc., 1979) (“In July 1878, after signing [with Bismarck and the representatives of Russia, Turkey and Austria-Hungary] the Treaty of Berlin, which concluded the Russo-Turkish War, ‘Dizzy’ [Benjamin Disraeli, Lord Beaconsfield] returned triumphantly to London, bringing what he called, ‘peace with honour.’”). Neville Chamberlain’s proclamation of “Peace with Honour” was opposed by future Prime Minister Winston Churchill, who remarked, “[Y]ou were given the choice between war and dishonor. You chose dishonor and you will have war.” Thomas L. Friedman, *Axis of Appeasement*, N.Y. TIMES, March 18, 2004, at A33.

<sup>5</sup> At <http://www.quotesandsayings.com/nevillesp.htm> (last visited Nov. 14, 2002).

<sup>6</sup> Hitler was Chancellor and “Führer” of Germany from 1933-1945, available at <http://www.spartacus.schoolnet.co.uk/GERhitler.htm> (last visited Feb. 2, 2003).

<sup>7</sup> World War II began on September 1, 1939, when Germany invaded Poland without a declaration of war. Britain and France declared war on Germany on September 3, 1939. available at <http://www.infoplease.com/ce6/history/A0862008.html> (last visited Nov. 14, 2002).

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A world war was exactly what Chamberlain was trying to avoid when he, along with Edouard Daladier,<sup>8</sup> Adolf Hitler and Benito Mussolini<sup>9</sup> reached a negotiated settlement at Munich. In the hopes of appeasing Hitler's European ambitions, Czechoslovakia, which was unrepresented at Munich,<sup>10</sup> was forced to cede four zones of northern territory containing three million ethnic Germans, better known as the Sudetenland, to Nazi Germany.<sup>11</sup>

The Munich Pact (the "Pact") has come to be viewed as the gold standard of appeasement—the policy where territorial concessions were made by Britain and France to Adolf Hitler with the hope that Hitler's bellicose ambitions could be "appeased."<sup>12</sup> However, the Pact also serves as a fascinating case study of how various forms of proto-dispute resolution, including two rounds of negotiations and two mediations, did not lead to a lasting settlement for peace in Europe. Instead, the Munich Pact led to a short and morally hollow peace.<sup>13</sup> In this sense, the Munich Pact is an example of negotiation and mediation "gone wrong."<sup>14</sup> Although

<sup>8</sup> Daladier was the Prime Minister of France from 1938-1940; *available at* <http://www.angelfire.com/ct/ww2europe.bios.htm> (last visited Nov. 14, 2002).

<sup>9</sup> Benito Mussolini was the "Duce" of Italy from 1922-1943 and of the short-lived Republic of Salo from 1943-1945. *available at* <http://www.spartacus.schoolnet.co.uk/2WWmussolini.htm> (last visited Feb. 2, 2003).

<sup>10</sup> See T. TAYLOR, *supra* note 4, at 1. Czechoslovakia's lack of representation during negotiations concerning its very sovereignty will be discussed *infra* Part II.

<sup>11</sup> See THE MUNICH PACT, *supra* note 1.

<sup>12</sup> See ALAN BULLOCK, *HITLER AND STALIN* 622 (London: Fontana Press, 2d ed. 1991). The policy of appeasement, as conceived by Neville Chamberlain, Prime Minister during Germany's annexation of Austria in 1938 and during the Munich Negotiations, took into consideration that:

Germany had been badly treated by the Allies after it was defeated in the First World War. [Chamberlain] therefore thought that the German government had genuine grievances and that these needed to be addressed. He also thought that by agreeing to some of the demands being made by Adolf Hitler of Germany and Benito Mussolini of Italy, he could avoid a European war. . .

*at* <http://www.spartacus.schoolnet.co.uk/2WWappeasement.htm> (last visited Nov. 15, 2002). A more detailed definition of appeasement described this putative form of ADR as:

A popular and defensible policy as pursued by the British governments from about 1920 to the rise of Hitler in Germany and was rooted in two beliefs: that Versailles had been unjust to the Germans, especially in its reparations clauses; and that France was pursuing a selfish and ultimately self-defeating policy of revenge and predominance which was inimical to the establishment of a genuine peace. Such a peace they believed, could be brought about only through conciliation and cooperation . . .

DWIGHT E. LEE, *ed.*, *Munich: Blunder, Plot, or Tragic Necessity?* vii (Lexington, Mass: D.C. Heath and Co., 1970) (internal citations omitted).

<sup>13</sup> See *supra* note 7 (describing the outbreak of World War II); see also *infra* note 130 (describing the German breach of the Munich Pact).

<sup>14</sup> See, e.g., A.J.P. TAYLOR [hereinafter "A. TAYLOR"], *THE ORIGINS OF THE SECOND WORLD WAR* 236 (London: Penguin Books, 1963). Professor Taylor asserts:

the Pact had the trappings of legitimate negotiation and mediation which were meant to supercede the Versailles Treaty<sup>15</sup> and to satisfy the claim of self-determination of Czech Germans,<sup>16</sup> it was, in

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[A]ppeasement. . . [had] turned into capitulation, on Chamberlain's own showing. Hitler drew the lesson that threats were his most potent weapon. The temptation to boast of Munich as a triumph of force was too great to be resisted. Hitler no longer expected to make gains by parading his grievances against Versailles; he expected to make them by playing on British and French fears. Thus he confirmed the suspicions of those who attacked Munich as craven surrender. . .

*Id.* The "fears" held by the British and French were not for the sovereignty of Czechoslovakia, but for:

The Luftwaffe. . . the psychological spearhead of German power. Colonel Charles A. Lindbergh, the famed "Lone Eagle" of the first nonstop New York-to-Paris flight, spread reports of the Luftwaffe's invincibility in the highest circles of London and Paris. It was the fear of carnage and panic in those cities, more than any other one factor, which caused the French and British air staffs to advise that war should be avoided at almost any cost.

T. TAYLOR, *supra* note 4, at xv.

<sup>15</sup> THE VERSAILLES TREATY [hereinafter "VERSAILLES"], available at <http://www.yale.edu/lawweb/avalon/imt/document/partviii-partx.htm> (last visited Mar. 14, 2004), which concluded World War I between Germany and the Allies, was signed on June 28, 1919. The treaty imposed exceedingly severe economic, military and territorial penalties on Germany. *See id.* The Versailles Treaty and the Munich Pact are interrelated settlements that bore heavily on the outbreak of World War II. In the Versailles Treaty, the Allies, such as Britain and France, "over punish[ed] the defeated party (Germany) by providing less than the proportion the defeated party believe[d] it deserve[d] given its relative power may simply postpone conflict until the state can again prepare for war." *See also* Alexandra Guisinger, *War Termination and Outcomes*, Center for Comparative Research at Yale University, at <http://www.yale.edu/ccr/guisinger.doc>, at 7 (last visited Mar. 2, 2003). The tables were turned in Munich, as "settlements which overly compensated the victor (Germany), in terms of offering additional power to the winner, may lead to further conflict since increased power can lead to an increase in expectations of gaining policy preferences and thus further attempts to revise the status quo." *Id.* at 6. The Versailles Treaty and the Munich Pact both demonstrate how when there is an imbalance in bargaining power and also a lack of good faith, even prototypical forms of ADR cannot create lasting resolutions that satisfy both sides. Therefore, one may query whether ADR strategies would also have a leveling effect on parties to litigation, or whether the outcome of a mediation or negotiation would be the same as in court when a party is insurmountably powerful.

<sup>16</sup> *See* LEE, *supra* note 12, at 54. The problem with Czechoslovakia was "that Czechoslovakia was not just Czechoslovakia, but 'Czecho-Germano-Polono-Magyar-Rutheno-Roumano-Slovakia.' Its boundaries had been drawn by the Treaty of Versailles in defiance of the doctrine of self-determination. . . . Benes had won the day by promising the Peace Conference to organize the minorities on a cantonal system analogous to that of Switzerland. The promise was not fulfilled." *Id.* Despite the legitimate problems of minority representation in Czechoslovakia, the "Sudeten Crisis," which centered on "injustices suffered by Sudeten Germans—real exaggerated or invented" was precipitated by acts of the Nazi Party in Czechoslovakia and by the German press. BULLOCK, *supra* note 12, at 621. *See also* T. TAYLOR, *supra* note 4, at 378 (arguing that the focus of the Sudeten Crisis, however, was that Hitler was threatening to invade Czechoslovakia in order to bring three million Sudeten Germans "into the Reich" and away from the alleged 'atrocities' commit-

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fact, the product of terribly flawed uses of alternative dispute resolution (“ADR”) strategies.

Given the noble, but naive premise of appeasement, The Pact could be viewed as a nascent form of international ADR, where negotiation and mediation were employed instead of resorting to war.<sup>17</sup> However, neither a fair nor a lasting “resolution” emerged from the policy of appeasement because, “[t]hey [Chamberlain and Daladier] imagined that there was a ‘solution’ of the Sudeten German problem and that negotiations would produce it. In fact the problem was insoluble in terms of compromise, and every step in negotiations only made this clearer”<sup>18</sup> Although Professor Taylor’s<sup>19</sup> position that the Munich Crisis was “insoluble” is not wholeheartedly adopted herein, this Note questions whether a compromise can be reached between democracies and dictatorships by employing methods associated with ADR, or whether even attempting to resolve international territorial disputes in a nonviolent manner is a gravely misguided act destined to fail.

This Note will focus on the Munich Pact<sup>20</sup> in five parts. Part I will discuss and analyze the seemingly legitimate aspects of the Munich Negotiations. However, the positive aspects that can be drawn from Part I are sharply contrasted with the unprincipled elements from the Munich Negotiations in Part II. Part III will contrast Mussolini’s role as a “mediator” at Munich with President Jimmy Carter’s role as a mediator at Camp David. Part IV will

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ted against them by the Czech government). Czechoslovakia, a democratic concoction of ethnicities, was allied with Western Europe in the following contradictory manner:

The Anglo-French entente and the Eastern alliances did not supplement each other; they cancelled out. France could act offensively, to aid Poland or Czechoslovakia, only with British support; but this support would be given only if she (France) acted defensively, to protect herself, not distant countries in Eastern Europe. This deadlock was not created by conditions in the nineteen thirties. It existed implicitly from the first moment, and no one, British or French, ever found a way out.

A. TAYLOR, *supra* note 14, at 64.

<sup>17</sup> The Munich Pact was the development of four flawed uses of ADR methods. In August 1938, there was a British mediation conducted by Lord Runciman. *See infra* note 99 (discussing the Runciman mediation). Runciman’s efforts were followed by two rounds of negotiations between Hitler and Chamberlain. Both negotiating sessions took place in Germany, not on neutral ground. On September 15, 1938, Chamberlain flew to Berchtesgaden “in a bid to avert war by talks with Hitler.” BULLOCK, *supra* note 12, at 633. The second round of pre-Munich talks was at Godesberg on September 22, 1938. *See id* at 637. Both Berchtesgaden and Godesberg will be analyzed *infra* Part II. The Munich Pact itself will be discussed *infra* Parts I, IIC and III.

<sup>18</sup> A. TAYLOR, *supra* note 14, at 195.

<sup>19</sup> Professor A.J.P Taylor, 1906-1990, was a famed British historian.

<sup>20</sup> *See supra* note 17 and accompanying text (describing the use of negotiation and mediation to arrive at the Munich Pact).

focus on why the various forms of ADR that led to the Munich Pact—both negotiation and mediation—did not help achieve a lasting and fair settlement, but instead, a disastrous result.<sup>21</sup> Part V will conclude with how ADR is commonly believed to be a favorable development in the law, but it nonetheless has the potential to be manipulated and distorted in the service of evil, while maintaining a “legitimate” or “legal” standing.

## I. PRINCIPLED ASPECTS OF THE NEGOTIATING PROCESS

### A. ADR Instead of War

Before examining what made Munich a case study of ineffective negotiation and compromised mediation, it is important to focus on the aspects that gave Munich a superficially legitimate gloss. On its face, the Munich Conference had several diplomatic elements that we currently associate with ADR.<sup>22</sup> Instead of going to war over the “Sudeten Crisis,”<sup>23</sup> Hitler agreed to meet and negotiate with Chamberlain at Berchtesgaden and Godesberg [the “Munich Negotiations”], before the eventual four-power conference at Munich.<sup>24</sup> Hitler’s “agreement about the need to negotiate”<sup>25</sup> was considered an important first step in defusing the Sudeten Crisis.

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<sup>21</sup> See discussion *infra* Parts IIA, IIB, IIC.

<sup>22</sup> See <http://www.law.cornell.edu/topics/adr.html> (last visited Nov. 16, 2002) (explaining how “Alternative Dispute Resolution (“ADR”) refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation.”). Negotiation is also considered a form of ADR. Negotiation is an important method of ADR because it functions as: “a way for parties to . . . confer in order to satisfy their mutual needs. Technique is of secondary importance. Of primary importance is listening, communicating and being comfortable with compromise. Negotiating is about persons of differing requirements finding common ground on which to effect a transaction—any kind of transaction.” Joe Borgatti, *Negotiating As We Knew It Before It Gave Way To Law Suits*, Analytic Technologies, at <http://www.analytictech.com/mb021/negotiat.htm> (last visited Mar 1, 2003), at 1. See also THOMAS R. COLOSI, ON AND OFF THE RECORD: COLOSI ON NEGOTIATION 4 (Dubuque, Iowa: The American Arbitration Association, 1993) (defining negotiation as, “an opportunity for the parties and/or disputants to exchange commitments and promises through which they can resolve their dispute and reach agreement.”).

<sup>23</sup> See *supra* note 16 and accompanying text (explaining the problem of self-determination of the amalgamated ethnicities in Czechoslovakia, which was used by the Nazi-controlled Sudeten Party to create an international crisis).

<sup>24</sup> See BULLOCK, *supra* note 12, at 633, 637.

<sup>25</sup> DEAN G. PRUITT, NEGOTIATION BEHAVIOR 14 (New York: Academic Press, 1981).

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By convincing Hitler to come to the negotiating table at Berchtesgaden, Chamberlain accomplished one of the goals of Article 12 of the League of Nations Charter (“Article 12”).<sup>26</sup> Although negotiation was not an explicitly mandated ADR method in Article 12, it was at least consistent with the idea of peaceful conflict resolution articulated in Article 12.<sup>27</sup> Therefore, an international dispute of grave importance was being submitted to a form of ADR, rather than leading to war. That Germany, which was no longer a member nation of the League of Nations,<sup>28</sup> seemed to be pursuing some form of peaceful dispute resolution could also be viewed in an encouraging light. Therefore, although the Sudeten Crisis had not been submitted to the League of Nations for a nonviolent resolution, at the outset of the Munich Negotiations it appeared that the League’s pacific philosophy was adhered to nonetheless.<sup>29</sup>

Indeed, Hitler’s demand to annex Czech territory in order to “repatriate” Sudeten Germans who were supposedly demanding to

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<sup>26</sup> In accordance with Article 12 of the League of Nations Covenant, “[T]he Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council.” LEAGUE OF NATIONS COVENANT art. 12 [hereinafter “THE COVENANT”], available at <http://www.yale.edu/lawweb/avalon/leagcov.htm> (last visited Nov. 14, 2002). While the outbreak of World War II proved that neither the League of Nations nor Article 12 was a truly effective means of resolving international disputes in a peaceful manner, the principles of international ADR enunciated in Article 12 would later be enshrined in Article 33 of the United Nations Charter in 1948. Article 33 states, “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice,” U.N. CHARTER art. 33, available at <http://www.un.org/aboutun/charter/index.html> (last visited Nov. 15, 2002).

<sup>27</sup> Negotiation is also a form of conflict resolution, since the roots of conflict are often examined and rectified during negotiation. See PRUITT, *supra* note 25, at 6.

<sup>28</sup> See T. TAYLOR, *supra* note 4, at 94, 154. Hitler withdrew Germany from the League of Nations on October 14, 1933. The withdrawal was Hitler’s first major act of foreign policy as Chancellor of Germany. Since the League of Nations was established to prevent war, Germany’s withdrawal was interpreted as a hostile act against the collective security of Europe. See *id.*

<sup>29</sup> The League of Nations’ commitment to non-violence was stated in the preamble of its Covenant, whereby:

The High Contracting Parties, in order to promote international co-operation and to achieve international peace and security . . . by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, Agree to this Covenant of the League of Nations.

THE COVENANT, *supra* note 26, preamble.

be part of Germany,<sup>30</sup> when taken out of the context of his previous disturbing international actions,<sup>31</sup> would qualify as a legitimate “objective standard”<sup>32</sup> for negotiation. It was more than reasonable that Germany would want to revise the Versailles Treaty of 1919, which had saddled the country with enormous reparations and second-class status.<sup>33</sup> Nor was it unreasonable that Germany would support the claims of three million Germans who desired the lofty principle of self-determination that was promised at Versailles, but never actually granted.<sup>34</sup> Nonetheless, these “objective standards” cannot be understood outside of the context of Germany’s ominous international actions.<sup>35</sup> In fact, Hitler’s allegedly legitimate claims concerning the Sudeten population were only a

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<sup>30</sup> See *supra* note 16 and accompanying text (explaining how the Allied Powers of Britain, America, France and Italy created the multinational and democratic state of Czechoslovakia at the expense of the self-determination of several European peoples, with self-determination being recognized as an ethnically distinct people’s right to their own self-governed nation).

<sup>31</sup> Macgregor Duncan, ‘Munich’: Reassessing the Diplomatic Value of Appeasement (2002) (unpublished final paper for graduate coursework in international diplomacy, Princeton University), at <http://www.wws.princeton.edu/~cases/papers/appeasement.html> (last visited Mar. 1, 2003) at 3. In trying to find a peaceful solution to the Sudeten Crisis, Chamberlain and Deladier were working with the knowledge that:

[W]ithin the space of six months following Hitler’s rise to power in 1933, Germany abruptly withdrew from disarmament negotiations in Geneva and from membership in the League of Nations. In March 1935, Hitler announced the existence of a German air force, reintroduced universal conscription, and revealed plans for a German army of twelve corps and thirty-six divisions. A year later, in March 1936, between 35,000 and 50,000 German troops reentered the Rhineland. All of these provocative acts stood in blatant violation of the Versailles Treaty. . .

*Id.*

<sup>32</sup> An objective standard is “right in terms of being fair, legal and honorable.” ROGER FISHER ET AL., *GETTING TO YES* 78 (New York: Penguin Books, 1991) *Cf.* Interview with Hal Abramson, Professor, Benjamin N. Cardozo School of Law (May 3, 2003) (discussing how although “objective standards” are the safeguard to good negotiation, they can be manipulated, or simply pretextual, as was the case with Hitler’s advocacy of Sudeten self-determination).

<sup>33</sup> See *VERSAILLES*, *supra* note 15, at art. 235 (fine), Annex IV, 2(a) and (b) (specific reparations). It is difficult to argue that Germany was not a humiliated country after World War I. The Versailles Treaty, in addition to imposing a 20,000,000,000 mark fine on Germany, even contained provisions where Germany was compelled to surrender machinery, equipment, and even livestock to France and Belgium in order to make reparations. *See id.*

<sup>34</sup> See *supra* note 16; *see also supra* note 28 and accompanying text (discussing the problem of self-determination in an ethnically diverse Czechoslovakia).

<sup>35</sup> See Duncan, *supra* note 31, at 3 (describing the overtly hostile international actions of Nazi Germany prior to the Munich Pact in 1938).

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pretext to further his undeniably “subjective” goal of vanquishing Czechoslovakia by force.<sup>36</sup>

### B. Chamberlain—Patience and Trust

British Prime Minister Neville Chamberlain unfortunately believed<sup>37</sup> that Hitler’s intransigence on behalf of the Sudetens created a basis for a principled negotiation.<sup>38</sup> While history has adopted a dismal view of Chamberlain’s performance during the Munich Negotiations,<sup>39</sup> there were aspects of his negotiation strat-

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<sup>36</sup> On May 30, 1938, Hitler had proclaimed to his General Staff that, “[I]t is my unalterable decision to smash Czechoslovakia by military action in the near future. . .its execution must be assured by 1 October 1938 at the latest.” BULLOCK, *supra* note 12, at 621, 625. Hitler was obsessed with destroying Czechoslovakia because it was a product of the hated Versailles Treaty and because:

The Bohemian quadrilateral was a natural defensive position, possession of which Bismarck had described as the key to the mastery of Central Europe. . .The Czech army, a first-class force, equipped by the famous Skoda armament works and with frontier defenses comparable with the French Maginot Line in strength, was a factor which had to be eliminated before Germany could move eastwards as Hitler planned.

*Id.* at 621. Between September 15 and September 30, 1938, Hitler used ADR to forestall war until it became convenient for his troops to march. Despite any superficial pretensions, the Sudeten Crisis and its concomitant self-determination argument were never “objective criteria” upon which legitimate negotiations could be based, but instead were pretexts for military “objectives” that Hitler wished to achieve. *See id.*

<sup>37</sup> *See* FISHER, *supra* note 32, at 11 (describing “principled negotiation” as negotiation that leads to “a wise outcome reached efficiently and amicably.”). A principled agreement is one based on principle, not pressure. This distinction is an essential one in understanding exactly what kind of agreement was really reached at Munich. On the one hand, there is an argument that Chamberlain and Deladier were trying to reach a negotiated settlement based on principle: “[T]heir motives were of the highest. They wished to prevent a European war; they also wished to achieve a settlement more in accordance with the great principle of self-determination than that made in 1919.” A. TAYLOR, *supra* note 14, at 195. On the other hand, we have the high-mindedness of appeasement sharply contradicted by the fact that “both the British and French governments were driven to near panic by the prospect of war.” *Id.* at 207.

<sup>38</sup> *See* A. TAYLOR, *supra* note 14, at 217 (“[Chamberlain] went armed only with the prejudice of most Englishmen against ‘Versailles,’ and the firm conviction that Hitler would become pacific if German national grievances were met.”).

<sup>39</sup> *See* LEE, *supra* note 12, at ix. In attempting to discern why Britain and France somehow believed that ADR techniques could stop Hitler in light of his previous militaristic international gestures, Dwight Lee wrote:

Three general answers may be identified: (1) The British and French governments blundered; (2) They deliberately planned or plotted the Munich settlement in order to turn Hitler eastward towards Soviet Russia; or (3) They had no other choice but to yield, of ‘tragic necessity,’ to Hitler’s demands because they were too weak to risk war.

*Id.*

egy with Hitler that have found some accord with the writings of negotiation theorists.<sup>40</sup> When Hitler and Chamberlain met each other for the first time at Berchtesgaden, Chamberlain reacted initially with surprise, but also with patience and understanding, to Hitler's vitriolic tirades against Czechoslovakia.<sup>41</sup> By not growing defensive or ceasing to listen during Hitler's tirades, Chamberlain showed the Führer that he was still focused on resolving the problem at hand and was not taking Hitler's rants personally.<sup>42</sup> By remaining in the negotiations after Hitler had adopted an aggressive and combative position, specifically Hitler's intention to go to war over the Sudeten Crisis unless a suitable agreement was quickly reached,<sup>43</sup> Chamberlain showed a willingness to "see the situation as the other side sees it, [which] as difficult as it may be, is one of the most important skills a negotiator can possess."<sup>44</sup>

Indeed, even Chamberlain's decision to negotiate on Hitler's own turf (Berchtesgaden, Godesberg and Munich), at the advanced age of seventy, was a positive negotiating technique because, "contrary to the accepted wisdom, it is sometimes advantageous to accept an offer to meet on the other side's turf. It may put them at ease, making them more open to your suggestions."<sup>45</sup> While it is debatable whether Chamberlain's official visits to Germany were "advantageous," it is difficult to ignore the initia-

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<sup>40</sup> This paper will focus primarily on the writings of Roger Fisher, Chester Karras, Thomas Colosi and Dean Pruitt.

<sup>41</sup> See A. TAYLOR, *supra* note 14, at 217 ("Chamberlain was taken aback at the ranting with which Hitler always opened negotiations; but he remained faithful to his policy of appeasement.").

<sup>42</sup> See FISHER, *supra* note 32, at 54. Chamberlain was trying "to separate people from the problem." Chamberlain's patience and courtesy in negotiating with a belligerent Hitler follows the exhortation of Fisher to negotiators to "[L]isten to them [opposing negotiator] with respect, show them courtesy, express your appreciation for their time and effort, emphasize your concern with meeting their basic needs." *Id.* This method of patient negotiation in the face of adversity, however, is not meant to be extended to such an extent that an unfair agreement results because, "premature commitment to a demand or a denial . . . is anathema to constructive settlement negotiations, in or out of mediation." Ed Ahrens, *Keep Those Feet Out of Concrete*, at <http://www.mediate.com/articles/ahrens4.cfm> (last visited, Nov. 20, 2002).

<sup>43</sup> See BULLOCK, *supra* note 12, at 621.

<sup>44</sup> FISHER, *supra* note 32, at 23. See also COLOSI, *supra* note 22, at 97 (describing the "idealist" negotiator, such as Chamberlain, as one who "demonstrates empathetic and receptive behavior to others, even opponents. . . While the idealist does not ask for reciprocity, there is some expectation that the other side will at least be interested in hearing the other points of contention.").

<sup>45</sup> See FISHER, *supra* note 32, at 135. Cf. CHESTER L. KARRAS, *THE NEGOTIATING GAME 10* (New York: HarperBusiness, 1992) (describing Chamberlain's flight to Berchtesgaden in a less flattering light: "On September 15, the aged Prime Minister of Great Britain

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tive the elderly Chamberlain showed by flying to the heart of Germany<sup>46</sup> to meet Hitler in order to dissuade him from invading Czechoslovakia.

At the heart of Chamberlain's negotiating strategy was the desire to establish a level of trust between himself and Hitler so the two leaders might create an alternative to another European war.<sup>47</sup> While trusting Hitler would prove to be a grave error in the Munich Negotiations, something is to be said for Chamberlain's determination to create an agreement based on a mutual trust with an exceedingly difficult opposing party.<sup>48</sup>

### C. Chamberlain's Previous Negotiating Experience

If negotiating experience had as much consequence on the Munich Negotiations as the threat of force, Chamberlain would have easily prevailed because he was a more experienced negotiator than Hitler.<sup>49</sup> The very titles Chamberlain and Hitler held were

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made a grueling journey to meet Hitler deep in eastern Germany. Hitler had refused to meet him halfway.”).

<sup>46</sup> See KARRAS, *supra* note 45, at 10. In fact, Hitler never had to leave Germany to acquire the Sudetenland.

<sup>47</sup> See T. TAYLOR, *supra* note 4, at 743. After Berchtesgaden, Chamberlain confided to his sister that, “I had established a certain confidence, which was my aim, and on my side, in spite of hardness and ruthlessness I thought I saw in his [Hitler's] face, I got the impression that here was a man who could be relied upon to keep his word.” Chamberlain's naïve belief that Hitler could be trusted, though out of touch with reality, does find resonance in negotiating theory, because “[T]rust is essential for effective negotiations in all settings, even those involving elements of competition and aggression,” Robert S. Adler and Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 82 (2000). *But see* COLOSI, *supra* note 22, at 8. Colosi warns negotiators that,

[b]y trust, I do not necessarily mean some fuzzy kind of feeling that leaves us vulnerable to the exploitation of others. I mean being able to rely on the other party's behavior and to be counted on by it in turn. This kind of trust derives from one's reliability and leads directly to credibility.

*Id.* See also Interview with Hal Abramson, *supra* note 32 (May 3, 2003) (describing President Ronald Reagan's approach to negotiating with Soviet Russia as “Trust, but verify.”).

<sup>48</sup> See FISHER, *supra* note 32, at 132. Insisting that trust for trust's sake does not make sound negotiation. Fisher warns that, “unless you have good reason to trust somebody, don't. This does not mean calling him a liar; rather it means making the negotiations independent of trust.” However, Chamberlain seemed determined to establish trust with Hitler, even though he had excellent reasons to mistrust the Führer. *See id.*

<sup>49</sup> See KEITH FEILING, *THE LIFE OF NEVILLE CHAMBERLAIN* 201-02 (London: Macmillan & Co. Ltd., 1946). Chamberlain's prior negotiating experience was not conducted on an international level, but instead in the domestic sphere, especially financial policy. During his tenure as Chancellor of the Exchequer, Chamberlain's acumen for business negotia-

indicative of how much negotiating their respective jobs entailed. Coming from a democratic and parliamentary form of government, negotiation was an essential requirement of Chamberlain's position.<sup>50</sup> However, while Chamberlain was Prime Minister of Great Britain, Adolf Hitler held the title of "Führer" in Nazi Germany.<sup>51</sup> As Führer, Hitler mercilessly ruled Germany as a dictator.<sup>52</sup> Although dictators may have occasion to negotiate, their rule is perpetuated by orders, terror and propaganda.<sup>53</sup> Indeed, the Munich Negotiations also serve as an important case study of how one should or should not negotiate with dictators.<sup>54</sup> It has been sug-

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tions enabled him to prevent the "flight from the pound" in 1931, and thus stabilized Britain's currency during the worst years of the Depression. This business-like approach would prove to be a serious disadvantage in negotiations with Hitler because, despite Chamberlain's optimistic assessment, Hitler was not someone with whom a reasonable negotiator could "do business." *Id.*

<sup>50</sup> See *supra* note 2 (containing biographical information on Neville Chamberlain).

<sup>51</sup> See BULLOCK, *supra* note 12, at 363 (describing Hitler's consolidation of power from 1933-34).

<sup>52</sup> At <http://www.wikipedia.org/wiki/Dictatorship> (last visited Feb. 2, 2003). A dictatorship is

[a] government headed by a dictator. Originally a legitimate military office in the Roman Republic, the dictator was given his powers by the Senate. The dictator had absolute power, but for a limited time. In the twentieth century, the term *dictatorship* has come to mean a government in which absolute power is concentrated in the hands of a dictator and sometimes his cronies. Dictators are still often elected to the highest governmental office. Hitler was *Reichskanzler*, or Reich Chancellor, Stalin was Premier of the Soviet Union, and many Latin American dictators have held the title of President, but wield extraordinary, often non-constitutional powers. Still other modern dictators seize power in a military coup d'état, and are supported by the military.

*Id.*

<sup>53</sup> See generally BULLOCK, *supra* note 12 (comparing the dictatorships of Adolf Hitler and Josef Stalin).

<sup>54</sup> See Gene Sharp, *From Dictatorship to Democracy* (1993) (unpublished dissertation as scholar-in-residence, Albert Einstein Institution), at <http://www.hermanos.org/non-violence/dictodem.html> (last visited Feb. 2, 2003). Gene Sharp, a noted professor of non-violence and civil disobedience, writes that, "negotiations are a very useful tool in resolving certain types of issues and conflicts and should not be neglected or rejected when they are appropriate." *Id.* at 9. The use of qualified language such as "certain types" and "appropriate" leads to the inference that there are situations where negotiations are in fact inappropriate. Professor Sharp asserts that negotiating with dictators is indeed such a situation where negotiations should not be pursued. Negotiations are an especially inappropriate means of dealing with dictators because, "when the issues at stake are fundamental, affecting religious principles, issues of human freedom, or the whole future development of the society, negotiations do not provide a way of reaching a mutually satisfactory solution. On some basic issues there should be no compromise." *Id.* Czech sovereignty can certainly be viewed as an example of an issue that lends itself poorly to negotiations, especially in negotiations from which they were excluded. Though the exact territorial dimensions of Czechoslovakia are not "fundamental" in nature, the notion of self-determination, of a people being allowed to make important decisions for themselves, should fit under Sharp's defini-

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gested that leaders such as Chamberlain and Deladier should have been wary of “the offer by a dictator of ‘peace’ through negotiations” because as a dictator who can act unilaterally, Hitler could have “at [his] own initiative without any bargaining”<sup>55</sup> either halted or commenced military actions.

By the time Hitler and Chamberlain met, Hitler ruled Germany for twelve years by instituting the “Führer Principle”<sup>56</sup> into every aspect of German life. Thus it is apparent that Hitler was Chamberlain’s junior, both in years and in terms of negotiating experience. Given this wide disparity between Chamberlain and Hitler’s negotiating experience, one might expect that it was Chamberlain who possessed the initial advantages when the Munich Negotiations commenced at Berchtesgaden.<sup>57</sup> However, it can also be argued that Chamberlain put himself at a great disadvantage by entering into negotiations with Hitler. Even though Hitler was Chamberlain’s junior in negotiating, Chamberlain’s supposed advantages would be of little assistance because he was blinded by Hitler’s mere participation in negotiations and did not realize the

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tion of “fundamental.” It should not go unnoted that Hitler was promoting the self-determination of the Sudeten Germans at the expense of Czech self-determination. *See also infra* Part V (discussing the problematic nature of negotiations between democracies and dictatorships).

<sup>55</sup> *Id.* at 9.

<sup>56</sup> *See* BULLOCK, *supra* note 12, at 1158. Bullock defines “Führerprinzip” as:

Literally, leadership principle, the basic organizational pattern of the Nazi party, subsequently transferred to the state: the Führer who was responsible to no one else but himself and his sense of mission. All members of the party, later of the German people, owed him unquestioning obedience and loyalty.

*Id.*; *See also* Nuremberg Trial Proceedings Vol. 1, Indictment: Count One (1945), available at <http://www.yale.edu/lawweb/avalon/imt/proc/count1.htm> (last visited Nov. 20, 2002).

<sup>57</sup> *See* Duncan, *supra* note 31, at 11. The very fact that Hitler had to negotiate for the Sudetenland instead of invading Czechoslovakia as planned in “Operation Green,” lends support to the interpretation that,

Hitler himself viewed the result of Munich as a ‘crushing defeat,’ one in which he abandoned his true goal—which was to seize Prague by force—in the face of British pressure. As Andrei Francois Poncet, the French Ambassador in Berlin, noted, ‘Hitler did not at all believe that he had, at Munich, achieved a success. He felt, on the contrary, that he renounced his original objective, that he had compromised and capitulated.’

*Id.* This Note emphasizes that the power disparities at Munich were strongly in Hitler’s favor. Nonetheless, it is also possible that Hitler was not powerful enough to reject the settlement that was negotiated at Munich. However, to assert that ADR was triumphant at Munich would be misleading since Hitler would seize all of what was left of Czechoslovakia six months after Munich in March of 1939. *See also infra* note 133 (discussing how the Munich Pact was breached after six months).

negotiations themselves were a trap<sup>58</sup>—laid only to advance Hitler's agenda of conquest.

## II. UNPRINCIPLED ASPECTS OF THE NEGOTIATING PROCESS

### A. Berchtesgaden

A more critical appraisal of the Munich Pact and the negotiations that preceded it reveal that it was an example of ADR gone horribly wrong. Although the fate of Czechoslovakia was at stake, its representatives were not invited to the Munich Negotiations, or the Munich Conference.<sup>59</sup> Indeed, Germany predicated its own presence at the negotiating table on the understanding that Czechoslovakia would be excluded.<sup>60</sup> At the conclusion of the Munich

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<sup>58</sup> See SHARP, *supra* note 54, at 9 (suggesting that Chamberlain should have been “wary of the traps which may be deliberately built into a negotiations process by [dictators such as Hitler].”). Had Chamberlain been a less timid negotiator, he might have taken the offensive by creating doubt in Hitler's mind as to the strength and certainty of his position. See COLOSI, *supra* note 22, at 11. However, since France had declared it would not honor its alliance obligations to Czechoslovakia, Chamberlain could not play a two-way game where he would assure Hitler of Britain's desire for peace, but intimate that no such assurances could be made on France's behalf and *vice versa*. See, e.g., A. TAYLOR, *supra* note 14, at 216.

<sup>59</sup> See Jolyon Naegele, *Czech Republic: Past Imperfect—64 Years Later, Munich ‘Betrayal’ Still Defines Thought* (Part 5), at <http://www.rferl.org/nca/features/2002/07/19072002162449.asp> 1 (“To this day, Czechs fear their affairs will again be resolved without their participation, a concern summed up by the phrase, ‘[A]bout us, without us.’”). See also Charles A. Schiller, *Closing a Chapter of History: Germany's Right to Compensation for the Sudetenland*, 26 CASE W. RES. J. INT'L L. 401, 414-15 (1994). Schiller writes that,

The Munich Four Power agreement was signed without Czechoslovakia's participation. Czechoslovakia abided by the decision on September 30, 1938, in the following statement by Foreign Minister Kamil Krofta: ‘The President and the Government submit to the conditions of the Munich Agreement which has come into being without Czechoslovakia and against her’. . . [T]he language of the treaty itself is much more representative of one party imposing its will upon another as opposed to most treaties where the parties mutual intent to be bound is reflected in more cooperative language.

*Id.* at 414-15. Despite the fact that Czechoslovakia was categorically excluded from three different negotiations that would determine its very survival, it was nonetheless expected to approve whatever was agreed. See *id.*

<sup>60</sup> See BULLOCK, *supra* note 12, at 625, 640. Cf. COLOSI, *supra* note 22, at 6 (“Successful negotiation of even seemingly trivial concerns is essential to the outcome of any negotiation because it is during the preliminary process, or ‘ground rules negotiations,’ that each side literally trains the other side as to how it negotiates.”). The omission of Czechoslovakia is a glaring example of how failures in the “ground rules” negotiations phase led to further failures in the substantive phase of negotiations.

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Negotiations, Britain and France, after negotiating with Germany over Czechoslovakia's sovereignty, then presented the results to the excluded Czechoslovakian representatives expecting their quick assent to the beginning of the destruction of Czech sovereignty.<sup>61</sup> This obvious unfairness has prompted one author to dub the agreement as "the Munich Dictate."<sup>62</sup> When the most interested party was purposely excluded in order to facilitate the "negotiations," the exact antithesis of Fisher's "principled negotiation."<sup>63</sup> was achieved. The exclusion of Czechoslovakia from negotiations, which concerned its very existence, is the first, but unfortunately not the last unprincipled element of the Munich Negotiations that effectively tarnishes the superficial gloss discussed in Part I.

The next troubling aspect of the Munich Negotiations was the concession dynamic<sup>64</sup> between Hitler and Chamberlain at Berchtesgaden and Godesberg. The elements of negotiation theory between the four powers at Munich will not be discussed precisely because "the main principle of surrender had already been accepted"<sup>65</sup> by Britain and France. At Berchtesgaden, on September

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<sup>61</sup> See A. TAYLOR, *supra* note 14, at 229. Professor Taylor vividly described the scene where the Munich Agreement was "presented" to the Czechoslovakian representatives:

[They] had been waiting in the ante-room, hoping to raise practical difficulties. They were denied a hearing. At 2 a.m. they were summoned to Chamberlain and Deladier, and shown the agreement. Deladier made it clear that 'this was a sentence without right of appeal and without possibility of modification.' Czechoslovakia must accept by 5 p.m. or take the consequences.

*Id.* When one of the primary negotiators at Munich, Daladier, referred to his own negotiated settlement, as a "sentence," it is apparent that unprincipled negotiation had occurred. Daladier's grim assessment of his efforts contrasted sharply with that of Chamberlain, who declared himself "tired, but pleasantly tired." *Id.* When that statement and Chamberlain's address are considered together, it appears that Chamberlain was convinced, despite the overwhelming contrary evidence, that he had partaken in a principled negotiating session that would create an enduring European peace. See *id.*

<sup>62</sup> Blanka Kudej, *Legal History of Czechoslovakia: From Its Creation in 1918 to Its Peaceful Separation in 1992*, 24 INT'L J. LEGAL INFO. 71, 73 (1996).

<sup>63</sup> FISHER, *supra* note 32, at 28. Fisher asserts that, "the feeling of participation in the process is perhaps the single most important factor in determining whether a negotiator accepts a proposal." *Id.* During the negotiations leading up to Munich, Czechoslovakian representatives experienced no such "feeling of participation," but instead the sting of exclusion. Instead, it would seem that Munich was the model of unprincipled negotiation. See *supra* notes 59-61 and accompanying text (discussing the exclusion of Czech officials from attending either negotiations or mediations that concerned the fate of Czech sovereignty).

<sup>64</sup> See PRUITT, *supra* note 25, at 20-22 (defining a concession dynamic as a system that analyzes how negotiating parties interact after one has agreed to grant a concession. The character of a concession dynamic is linked to whether the negotiators have adopted "soft" or "hard" stances).

<sup>65</sup> LEE, *supra* note 12, at 51.

15, 1938, there were arguably still opportunities for legitimate negotiations to occur. The topic of negotiation between the two leaders was the issue of the German minorities in Czechoslovakia.<sup>66</sup> The concept of self-determination, when taken in the most positive light, could be considered an “objective criteria” upon which legitimate negotiations could occur.<sup>67</sup> Nonetheless, Chamberlain almost immediately accepted Hitler’s proposal that certain areas of Czechoslovakia were to be ceded to Germany.<sup>68</sup>

Having agreed to this “solution” without making a concerted effort to propose alternatives,<sup>69</sup> such as implementing a cantonal system<sup>70</sup> or submitting the matter to the League of Nations,<sup>71</sup> Chamberlain insisted that the areas to be ceded should be those “in which 80 percent of the total population was German.”<sup>72</sup> Hitler countered this attempt to limit the cession to eighty percent by demanding that cession occur, “in every place where there was a majority for Germany, the territory in question would have to go to Germany.”<sup>73</sup> Although agreeing to fifty-one percent instead of eighty percent might have seemed like an easy concession to make at the time, Chamberlain drastically misunderstood the importance of this concession.<sup>74</sup> Chamberlain was also rebuffed in an attempt to bring the Czechs into the talks because Hitler found the Czechs

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<sup>66</sup> See BULLOCK, *supra* note 12, at 633.

<sup>67</sup> See discussion *supra* Part IB.

<sup>68</sup> See KARRAS, *supra* note 45, at 10 (“Hitler opened the conference [Berchtesgaden] by abusing Chamberlain and by making outrageously large demands for territory, to which the leader of the Western world *immediately agreed.*”) (emphasis added in original).

<sup>69</sup> See BULLOCK, *supra* note 12, at 633. Chamberlain had attempted, to discuss ways of settling the Sudeten problem—by a transfer of populations as well as a redrawing of frontiers—was met by Hitler’s insistence that ‘All this seems to be academic; the thing has got to be settled at once. . . I am prepared to risk world war rather than allow it to drag on.’

*Id.* Chamberlain responded to this by acceding to Hitler’s demands for transfer. *See id.*

<sup>70</sup> See LEE, *supra* note 12, at 54. The idea of granting ethnic minorities within Czechoslovakia semi-autonomy through the establishment of a cantonal system, such as was used in eighteenth century Switzerland, was a proposed alternative to German occupation during the negotiations. *See id.*

<sup>71</sup> Had the Sudeten question been submitted to the League of Nations, the matter would have been dealt with by either judicial trial or arbitration. *See THE COVENANT, supra* note 26, at art. 12. An unfavorable ruling by a League arbitrator of tribunal would have placed Hitler in a less favorable position than if the Sudeten Crisis remained in negotiations. *See generally id.* Hitler retained greater flexibility in the negotiation process because nothing was binding and he could terminate the meetings at any time.

<sup>72</sup> T. TAYLOR, *supra* note 4, at 741.

<sup>73</sup> *Id.*

<sup>74</sup> *See id.* (“[A]lthough Chamberlain probably did not realize it at the time, the change from an 80 to a 51 per cent [sic] basis would mean that nearly twice as much territory and a third more population would be ceded to Germany.”). Chamberlain’s unfamiliarity with

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to be “cruel and cowards at heart.”<sup>75</sup> Neville Chamberlain’s negotiating stance raises the question whether he was genuinely interested in making counterproposals to Hitler’s demand for German occupation, or whether he was going through the motions in order to extricate Britain from a difficult situation.

In terms of negotiating theory, an intricate type of exchange took place during the Munich Negotiations. Hitler took an aggressively “hard” stance, and Chamberlain took a “soft” one.<sup>76</sup> Although Chamberlain might have believed that his “soft tactics” would lead to “coordinative behavior,”<sup>77</sup> he was actually conforming to the game of “competitive behavior,”<sup>78</sup> which was in accord with Hitler’s “hard” tactics. In this “hard/soft” exchange, as

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Czechoslovakia’s ethnic population to territory ratio is a grave reminder to parties involved in ADR processes to know the facts.

<sup>75</sup> See *id.* at 742. It is interesting to note how the previously “objective criteria” of Sudeten self-determination had quickly transformed into the highly subjective criteria of Hitler’s lifelong hatred against the Czech people as the operating rationale for Nazi absorption of the Sudetenland.

<sup>76</sup> See FISHER, *supra* note 32, at xviii (contrasting the differences between a “hard” and a “soft” negotiator as when: “The hard negotiator sees any situation as a contest of wills in which the side that takes the more extreme positions and holds out longer fares better. On the other hand, “the soft negotiator wants to avoid personal conflict and so makes concessions readily in order to reach agreement.”). Despite the good faith approach taken by “soft” negotiators, their strategy is often undermined by the fact that they are “so concerned about the possibility of damaging their relationship with the other party that they concede their goals practically at the first sign of conflict.” NEIL H. KATZ AND JOHN W. LAWYER, *COMMUNICATION AND CONFLICT RESOLUTION* (Dubuque, Iowa: Kendall/Hunt Publishing Co., 1992) at 95. Hitler showed the characteristics of a “hard” bargainer (aggressiveness and competitiveness) because he had set a high level of aspiration, whereby, he saw himself “as powerful and as having access to a potent set of competitive tactics [and]. . . expect[ed] large concessions. . . and [made] few concession of [his] own.” PRUITT, *supra* note 25, at 22.

<sup>77</sup> PRUITT, *supra* note 25, at 15 (defining “coordinative behavior” as the “search of a mutually acceptable solution. . . Examples. . . are a proposal for a possible compromise, participation in a problem-solving discussion [or] a unilateral tension-reducing initiative.”). Coordinative behavior is exemplified by the tactics of the “soft” negotiator, such as Chamberlain. A prime example of coordinate behavior that Chamberlain displayed at Berchtesgaden was his determination to establish trust between himself and Hitler. Putting trust in the context of coordinative behavior, Pruitt comments that, “[T]rust is defined in this context, as a belief that the other party is also ready for coordination. Trust is necessary because coordinative behavior always lays one open. . . to the possibility of being exploited.” *Id.* at 16. *But see* COLOSI, *supra* note 22, at 6 (warning negotiators of trusting for emotional reasons when a more sober outlook on trust is appropriate for successful negotiations).

<sup>78</sup> See PRUITT, *supra* note 25, at 15. In contrast to “coordinative behavior,” “competitive behavior” urges a negotiator to “stand firm and employ pressure tactics in an effort to persuade the other party to concede.” *Id.* The “hard” negotiator will engage in “competitive behavior,” as Hitler did.

typified by Berchtesgaden, Hitler made large demands and ceded little to nothing, whereas Chamberlain would make large, fast concessions in the hope of reaching a peaceful settlement.<sup>79</sup> From this perspective, Berchtesgaden was never a question of “getting to yes,” but only of deciding upon what type of “yes” would be agreed.<sup>80</sup>

The critical flaw of Chamberlain’s tactics at Berchtesgaden—that of throwing concessions at Hitler’s intransigence,<sup>81</sup>—came back to haunt him at Godesberg, where Hitler and Chamberlain met for a second time to continue talks over the Sudeten Crisis.<sup>82</sup> After Berchtesgaden, Britain and France had convinced Czechoslovakia to agree to transferring lands to Germany.<sup>83</sup> Hitler insisted that “such a solution was no longer practicable: the Sudetenland must be occupied by German troops immediately.”<sup>84</sup>

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<sup>79</sup> See T. TAYLOR, *supra* note 4, at 742. At Berchtesgaden, Hitler demanded the transfer of Czech territory to Germany, using a simple majority standard, while only conceding that he would delay a military strike that he was unable to make until October 1 at the earliest. He also “conceded” that talks could continue after Chamberlain had presented Hitler’s demands to France, Czechoslovakia and the House of Commons. *See id.*

<sup>80</sup> *See id.* at 56 (“[T]he [Czech] decision to yield is. . . more understandable in that the basic concession—to cede to Germany a large part of the Sudetenland—had already been made after Chamberlain’s trip to Berchtesgaden.”).

<sup>81</sup> See FISHER, *supra* note 32, at 21 (cautioning negotiators to not “try to solve [negotiating problems] with substantive concessions.”). Although Chamberlain’s strategy of, “[having] lower initial demands and [granting] faster concessions. . . made agreement more likely and more rapidly reached. . . What probably happens in this case is that very fast movement encourages the other party to expect further large concessions, discouraging the other form making his own concessions.” PRUITT, *supra* note 25, at 20. The hypothetical described by Pruitt is entirely applicable to the Berchtesgaden negotiations between Chamberlain and Hitler. Once Chamberlain quickly agreed that Czech territory would be surrendered, Hitler was in the driver’s seat from thereon, as will be seen in the discussion of Godesberg and Munich itself. Any concessions Hitler made after Berchtesgaden were either disingenuous or insignificant, such as “stopping” a military action that was still in its preparatory stages. *See* T. TAYLOR, *supra* note 4, at 816-18.

<sup>82</sup> *See* A. TAYLOR, *supra* note 14, at 222-23.

<sup>83</sup> *See* discussion *supra* Part IIA (describing how Chamberlain quickly agreed that territory must be ceded to Germany).

<sup>84</sup> BULLOCK, *supra* note 12, at 637. Hitler’s newest demand of immediate German military occupation was premised on the alleged massacre of ethnic Germans by “blood-thirsty” Czechs. This was, of course, a complete fabrication, and Chamberlain knew no such massacres were occurring. *See id.* That Hitler rejected the type of annexation agreed upon in Berchtesgaden did not necessarily mean that his demands at Godesberg were *prima facie* outrageous. For one party in a negotiation to reject or demand changes to a tentative agreement does not mark a watershed moment in the history of negotiation. Were Chamberlain and Hitler simply businessmen negotiating a merger, the proposal and rejection of ideas would be standard. However, it is almost impossible to separate Hitler’s negotiating tactics from the millions of lives that were lost due to his twelve years in power. *See id.* at 1086-87 (estimating the casualties sustained during World War II to be approxi-

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Having agreed to all of Hitler's demands at Berchtesgaden, Chamberlain was in no position to refuse the Führer's demands at Godesberg two weeks later, because as in Berchtesgaden, refusal could mean the end of negotiations, with the strong possibility of the outbreak of a European war.<sup>85</sup>

### B. Godesberg

Since Chamberlain had previously conceded that Czech territory would be surrendered to Germany, while only receiving a supposed delay of German military action in return, in the second round of negotiations at Godesberg, he became trapped in a "freefall,"<sup>86</sup> also known as negotiating against one's self. If Chamberlain had hoped that his willingness to make concessions would prompt Hitler to reciprocate,<sup>87</sup> he was mistaken.<sup>88</sup> The "freefall" in which Chamberlain found himself was a direct result of the "mismatching"<sup>89</sup> between his "soft" position and Hitler's "hard" stance. Chamberlain's desperate attempt to present a "yesable proposition"<sup>90</sup> demonstrated to Hitler that the Prime Minister of Britain lacked firmness and could be taken advantage of in negotiations.<sup>91</sup>

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mately forty million, which includes the Holocaust). Indeed, if one were to take a completely neutral view of Hitler's negotiating methods, it might appear that he did nothing wrong in trying to take advantage of Chamberlain's "soft" stance and acquire as much land in as swift a manner as possible.

<sup>85</sup> See Kudej, *supra* note 62, at 71.

<sup>86</sup> See Adler, *supra* note 47, at 76 (defining a "freefall" as when "one's adversary, without offering anything in return, insists that one keep sweetening the deal."). There is unfortunately some logic to the "freefall" in which Chamberlain found himself at Godesberg. Once Chamberlain made the critical concession of giving up land to Germany in exchange for peace, it would be absurd for him to go to war over the manner in which the land would be surrendered. This dilemma is endemic to situations where land is traded for promised peace.

<sup>87</sup> See PRUITT, *supra* note 25, at 19 (detailing that concessions ordinarily result from the belief that they will hasten agreement, prevent the other party from leaving the negotiation, or encourage the other to make reciprocal demands).

<sup>88</sup> See KARRAS, *supra* note 45, at 10 (discussing how Hitler, in fact, raised his demands at Godesberg).

<sup>89</sup> PRUITT, *supra* note 25, at 33 (according to Pruitt, "mismatching" occurs when "one demands more when the other's demands are smaller and concedes faster to the extent the other fails to concede.").

<sup>90</sup> FISHER, *supra* note 32, at 79.

<sup>91</sup> See PRUITT, *supra* note 25, at 37. Had Chamberlain shown firmness at Berchtesgaden, he might have strengthened "the motive [on Hitler's part] to seek coordination since it implies that competitive behavior is infeasible. A firm. . . [negotiator]. . . cannot easily

One might ask whether Chamberlain should have used “matching”<sup>92</sup> tactics in order to create a more fair settlement. Unlike the passive principle of “mismatching,” “matching” can be far more aggressive.<sup>93</sup> To assert that Chamberlain should have adopted one stance or another may be to indulge in hindsight. But it can be convincingly argued that instead of trying to negotiate in the language of “sweet reasonableness,”<sup>94</sup> Chamberlain should have tried to “decouple [his] concessions from any implication of future weakness—to try to persuade the other [Hitler] that these moves [were] not a sample of things to come.”<sup>95</sup>

If Chamberlain had been more forceful in focusing the direction of negotiations on the issue of self-determination of the Sudeten Germans<sup>96</sup> and the Czechs, as opposed to being so grateful that Hitler merely agreed to meet him, perhaps a fundamentally fair

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be pushed around. Hence one must adopt a different approach if agreement is to be reached, for example, coordinative behavior.” *Id.*

<sup>92</sup> *Id.* at 33 (defining matching behavior as when “one demands more rapidly the faster the other [grants] concessions”). For Chamberlain, a “matching response” could have been demanding that a fact-finding commission be empowered to draw new boundaries before any sort of German occupation of the Sudetenland were to occur. Another “matching” response to Hitler’s demands could have been that an international force would supervise the German occupation.

<sup>93</sup> See Adler, *supra* note 47, at 59 (arguing that, “if one deals with an aggressive negotiator, one needs to be able to respond aggressively; if bargaining with a cooperative bargainer, one needs to adopt a cooperative mode.”). Where Adler and Silverstein endorse the “matching” technique, Pruitt objects to it on the grounds that “matching” creates “vicious circles. . .with A’s competitive behavior eliciting competitive behavior from B.” See also PRUITT, *supra* note 25, at 82.

<sup>94</sup> T. TAYLOR, *supra* note 4, at 65. Indeed, Chamberlain’s policy of appeasement as a form nascent ADR “rested on the dogma that Hitler was acting in good faith; he could not repudiate this dogma without accepting [the] arguments in favour [sic] of resistance.” See A. TAYLOR, *supra* note 14, at 219. This lends credence to the notion that perhaps appeasement could have worked as ADR, but that Chamberlain was the wrong man to be negotiating because, “there was at any rate no positive evidence whatsoever to lend colour [sic] to Chamberlain’s startlingly unconvincing and in truth utterly mistaken belief in the innocence of Hitler’s intentions in the face of abundant indications. . . that Hitler’s character was demonic and his purpose sinister. . . “ LEE, *supra* note 12, at 67.

One of the reasons Chamberlain thought Hitler was sincere was what Adler terms the “Madman’s Advantage.” See Adler, *supra* note 47, at 96. Adler describes this negotiating phenomenon: “Anger may work because parties see angry opponents as being particularly sincere and committed on the points that have triggered their temper loss. Facing such strong feelings, the parties may seek to accommodate them by making concessions that they otherwise might not have made.” *Id.* at 95-96. See, e.g., BULLOCK, *supra* note 12 at 385 (quoting Frederick Wilhelm Nietzsche, “Men believe in the truth of all that is seen to be strongly believed in.”).

<sup>95</sup> PRUITT, *supra* note 25, at 74-75.

<sup>96</sup> See *supra* note 16 and accompanying text (explaining the principle and context of Sudeten self-determination).

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solution could have emerged. The only result of the two unprincipled rounds of negotiations between Hitler and Chamberlain was the Godesberg Ultimatum, which demanded that German troops occupy marked off areas of Czechoslovakia by October 1, 1938, or face German invasion.<sup>97</sup> The sole concession that Chamberlain could wrest from Hitler at Godesberg was a seventy-two hour delay of Germany's proposed invasion from September 27, 1938 to October 1, 1938.<sup>98</sup>

C. Munich: Mussolini as Mediator<sup>99</sup>

As the first of October drew near, Czechoslovakia had yet to

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<sup>97</sup> See BULLOCK, *supra* note 12, at 637-39. The Godesberg Ultimatum drastically altered the terms agreed to at Berchtesgaden. At Berchtesgaden, Hitler and Chamberlain agreed that four zones of Czech territory would be ceded to Germany, with plebiscites to determine when or if Germany would govern. The Godesberg Ultimatum changed the timing and manner: immediate German military occupation replaced plebiscites to be held at an indeterminate time. See also T. TAYLOR, *supra* note 4, 7-8.

<sup>98</sup> See BULLOCK, *supra* note 12, at 816 (detailing how Hitler boasted to Chamberlain that he was "one of the few" to whom he had ever made such a concession). This was yet another moment of characteristic mendacity for Hitler—since the German army was not prepared to launch an offensive until October 1, 1938. *Id.* Hitler was also playing to Chamberlain's vanity, since he realized that Chamberlain thought of himself as a masterful negotiator. See also FEILING, *supra* note 49, at 201-02 (using the stabilization of the pound in 1931 as an example of a Chamberlain negotiating success).

<sup>99</sup> See T. TAYLOR, *supra* note 4, at 403-09, 734-36, 748-49. Mussolini was not the first person to attempt to mediate the Sudeten Crisis. On August 3, 1938, in an effort to expedite the negotiations between the Prague government and the Sudeten party, Great Britain sent Lord Runciman, a sixty-eight year old shipping magnate and former President of the Trade Board, to act as a mediator between the Czech government and members of the Sudeten Party. See *id.* at 403-405. Although Runciman was supposed to be a neutral party, it was apparent to all involved that he was an agent of the British government. Of the three weeks Runciman spent in Prague, he did very little mediating and returned with the confusing and ultimately unhelpful report which concluded that, "Czechoslovakia could not continue to exist as at present, and the Czechs were 'responsible for most of the trouble,' but the two sides had been close to agreement, which had failed because of the 'close connection between the Sudeten Germans and Berlin.'" *Id.* at 748-49. The only concrete result of the Runciman mission was that the Sudeten problem was now an international problem, not merely a domestic one. See LEE, *supra* note 12, at ix.

Given the numerous attempts of trying to resolve the Sudeten Crisis through international ADR—two mediations and two rounds of negotiations, it should be surprising that such an unfair settlement was arrived at. At Munich, ADR methods did not matter since Hitler was intent on destroying Czechoslovakia in one way or another, whether through diplomacy or war. Although all parties, including Hitler, were willing to engage in ADR strategies, at no time was a principled form of ADR being conducted, only the pantomime of it. This leaves the disturbing question of whether Britain and France

accept the Godesberg Ultimatum.<sup>100</sup> With Europe on the verge of another cataclysmic war,<sup>101</sup> Mussolini, at the behest of Britain,<sup>102</sup> convinced Hitler to attend a four-power conference at Munich, where Mussolini would act as mediator between Hitler, Chamberlain and Deladier in order to resolve the Sudeten Crisis.<sup>103</sup> Since little negotiation occurred at Munich, it is both instructive and dismaying to analyze Mussolini's role as a mediator at the Munich Conference.<sup>104</sup> While the idea of Mussolini serving as a mediator might seem absurd, there were actually a few reasons favoring Mussolini's role as mediator at Munich. First, Mussolini "was the only participant able to speak the others' languages."<sup>105</sup> Since the ability to communicate is an essential part of mediation, Mussolini's linguistic abilities should not be overlooked. Mussolini was also Hitler's senior in political affairs, having been in power since 1922, and was, therefore, more accustomed to international conferences.<sup>106</sup>

Despite any positive factors favoring Mussolini's role as a mediator, he was decidedly unqualified to serve as the one "who can make a truly objective evaluation and act as agent of reality."<sup>107</sup>

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should have instead resorted to use of force against Germany. This issue will be addressed *infra* Part IV.

<sup>100</sup> See *supra* note 97 and accompanying text (describing the Godesberg Ultimatum). See also A. TAYLOR, *supra* note 14, at 227.

<sup>101</sup> See <http://www.spartacus.schoolnet.co.uk/FWWstatistics.htm> (last visited Feb. 2, 2003) (explaining that the First World War, which lasted from 1914 to 1918, took place mostly in Belgium and France, was fought between the Allied Powers such as Britain, France, the United States and Russia against the Central Powers: Germany, Austria-Hungary and the Ottoman Empire. Eight and a half million lives were lost in this war. It was called the "Great War" because it was thought to be the war to end all wars. The havoc and death caused by World War I were important factors in Chamberlain's thinking during the Munich negotiations).

<sup>102</sup> See A. TAYLOR, *supra* note 14, at 227 (describing how Chamberlain lobbied Mussolini to mediate between the Allies and Hitler in the hopes of resolving the Sudeten Crisis).

<sup>103</sup> See BULLOCK, *supra* note 12, at 640.

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> See [http://gi.grolier.com/wwii/wwii\\_mussolini.html](http://gi.grolier.com/wwii/wwii_mussolini.html) (last visited Nov. 14, 2002) (describing Mussolini's regime).

<sup>107</sup> Bennett J. Picker, *How to Best Aid Negotiation By Breaking Down Barriers*, at <http://www.mediate.com/articles/picker.cfm> (last visited Nov. 14, 2002). The level of Mussolini's unsuitability to fill the role of mediator could be arrived at from the most perfunctory evaluation of qualities needed to be a mediator. In Frequently Asked Questions about ADR, Jeffrey D. Senger writes that experience, education/training and possible bias are crucial factors that must be taken under consideration. See Jeffrey D. Senger, *Frequently Asked Questions about ADR*, United States Attorneys' Bulletin, Nov. 2000, at 10. Not only did Mussolini have no experience or training of any kind in art of mediation, but his bias towards Hitler was also obvious, as they were both Fascist dictators with similar agen-

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As a mediator, Mussolini should have possessed the requisite objectivity and fairness that could have helped “to equalize the parties’ power.”<sup>108</sup> Instead of “discourag[ing] raw power plays. . . and deceptive ploys,”<sup>109</sup> Mussolini indulged in a highly deceptive ploy by passing off a German-authored memorandum as his own.<sup>110</sup> The chance for peace therefore rested on a duplicitous situation where Hitler was effectively asked to accept his own proposals.<sup>111</sup> Mussolini, far from being a mediator, was in fact on Hitler’s side of the negotiating table.<sup>112</sup> Hitler proceeded to accept Mussolini’s “proposal” and the surrender was complete.<sup>113</sup> Munich was not a testament to the importance of ADR techniques in resolving international disputes, but instead illustrated Hitler’s manipulation of negotiation and mediation in order to achieve his own illegitimate aims.

### III. MEDIATION AT MUNICH AND CAMP DAVID— WAGING PEACE?

Mussolini’s shameful performance as a mediator, as well as Lord Runciman’s<sup>114</sup> ineffective previous attempt to mediate the Sudeten Crisis, serve as examples in which the task of international

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das. *See supra* note 99 (noting that Mussolini was no more unqualified to mediate than Lord Runciman had been to mediate. Where Britain has tried to use its own agent to mediate the Sudeten issue, Hitler was now merely doing the same by having Mussolini act as mediator).

<sup>108</sup> Adler, *supra* note 47, at 104 (stressing the importance of fair, neutral mediator, especially in negotiations where one party has a stronger position, whether real or perceived, than another).

<sup>109</sup> *Id.*

<sup>110</sup> *See* T. TAYLOR, *supra* note 4, at 20. The memo allegedly authored by Mussolini was in fact written by Hermann Goering, Baron Constantin von Neurath and Ernst von Weizsaecker. The memo was very similar to the Godesberg proposals: Germany would occupy four border districts between October 1 and October 7; further territories would be ceded and plebiscites would be held to determine final borders between Germany and what was left of Czechoslovakia. *See id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* at 3. Mussolini had made it plain and public that, so far as the Sudeten issue was concerned, Italy was firmly aligned with Germany. *See id.* Thanks to Mussolini’s brand of mediation, instead of a principled outcome a confidence game was perpetrated, where the Axis outwitted the Allies using the Allied ADR methods. In this way, Mussolini essentially “hustled” Britain and France from his position as a mediator.

<sup>113</sup> *See id.* at 9.

<sup>114</sup> The English shipping magnate and former President of the Trade Board who had unsuccessfully attempted to mediate the Sudeten Crisis during August of 1938. *See supra* note 99 and accompanying text.

mediation was not properly executed. These ineffective attempts at mediation compare unfavorably with President Jimmy Carter's role as mediator in the Camp David Accords.<sup>115</sup> Much like Britain, France and Germany, Israel and Egypt had been involved in several wars against each other.<sup>116</sup> The task of mediating between these bitter enemies fell to Jimmy Carter.<sup>117</sup> However, unlike Mussolini, Carter was not a double agent for either side.<sup>118</sup> Where the previous negotiations between Hitler and Chamberlain essentially ensured the outcome of the Munich Conference, no such certainty existed at Camp David. In fact, after three days of face-to-face negotiations between Israel and Egypt, the talks were in danger of breaking down.<sup>119</sup>

Carter's bold and creative initiatives to keep the Camp David talks alive stand in sharp contrast to Mussolini's conduct as a puppet-mediator for Hitler.<sup>120</sup> One of Carter's most innovative strategies, "to separate the Sinai issue from the more difficult Palestinian

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<sup>115</sup> Camp David, the traditional weekend house of the President, was the site for a series of peace talks between Israel and Egypt between September 5-17, 1978. Camp David Accords, September 17, 1978, at <http://www.mfa.gov.il/mfa/go.asp?MFAH00ie0> (last visited Feb. 2, 2003). The United States, represented by President Jimmy Carter, was the mediator between Menachim Begin, the Prime Minister of Israel and Anwar Sadat, the President of Egypt. *Id.* The peace talks centered around two principal issues: "The first [issue] dealt with the future of the Sinai and peace between Israel and Egypt. . . The second [issue] was a framework agreement establishing the format for the conduct of negotiations for the establishment of an autonomy regime in the West Bank and Gaza." *Id.*

<sup>116</sup> Just as Britain and France had fought Germany twenty years before the Munich Pact in World War I, Israel and Egypt had fought four wars (1948, 1956, 1967 and 1973) against each other since Israel's inception in 1948. *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> Although the United States had provided critical support to Israel in the 1973 War, Carter was not viewed as an Israeli agent because, "Sadat, the Egyptian President, was his very close friend and had the biggest commitment to the peace process. Begin, the Israeli Prime Minister, was the most resistant within the Israeli delegation." James Laue, A Conversation on Peacemaking with Jimmy Carter, at [www.colorado.edu/conflict/peace/example/acon7268.htm](http://www.colorado.edu/conflict/peace/example/acon7268.htm) (last visited Feb. 2, 2003).

<sup>119</sup> *Id.* (describing how "[T]he two leaders were not ready to face each other directly; their views were too incompatible. While they spent the first three days working Jimmy Carter in a small room in his cabin, for the last ten days the two leaders did not see each other at all. Negotiations took on a form of indirect mediation. After a single document was created, Jimmy Carter spent time with each of the leaders separately revising the document."). *See also* People & Events: Peace Talks at Camp David, September 1978, at [http://www.pbs.org/wgbh/amex/carter/peopleevents/e\\_peace.html](http://www.pbs.org/wgbh/amex/carter/peopleevents/e_peace.html) (last visited Feb. 2, 2003) (commenting on how, "Rather than giv[ing] up, Carter came up with a bold change of strategy; if they [Begin and Sadat] couldn't talk to each other, the two leaders would have to work through him. From then, the U.S would not merely play mediator, but would be an active participant in a pair of bilateral negotiations.").

<sup>120</sup> *See supra* note 112 and accompanying text (describing Mussolini's biased position during the Munich Conference).

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issue, and instead produce two documents,”<sup>121</sup> was a tactic that might have served Chamberlain well. Although Mussolini should have been contemplating strategies similar to those formulated by President Carter, it is more likely that Chamberlain would have had to suggest more creative mediation methods, since Mussolini was Hitler’s pawn.<sup>122</sup> Had Chamberlain not been so pleased by the mere occurrence of negotiations,<sup>123</sup> perhaps he would have been more skeptical about having Mussolini serve as mediator.<sup>124</sup>

In addition, the separation of issues would have been an excellent strategy at Munich because there were several issues that had become intermingled, including: the treatment of the Sudeten minority by the Czech government, Germany’s desire to aid the Sudetens with military force, and the system of European alliances that obligated Britain to aid France, which in turn was bound to help Czechoslovakia.<sup>125</sup> If Mussolini had been as creative a mediator as Carter, each issue might have been addressed *ad seriatim*, with the Czech government agreeing to grant autonomy concessions to the Sudetens and a possible reevaluation of the alliance system which had led to a world war only twenty years earlier.<sup>126</sup> Issue separation had been one of the key elements to Carter’s success at Camp David.<sup>127</sup> The conflict between Israel and Egypt became more manageable once the issues of Israel returning the Sinai

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<sup>121</sup> People & Events: Peace Talks at Camp David, September 1978, *supra* note 119.

<sup>122</sup> See T. TAYLOR, *supra* note 4, at 3.

<sup>123</sup> See Duncan, *supra* note 31, at 6 (arguing that the very occurrence of negotiations was significant to Chamberlain because, “he believed that an important principle had been won: that territorial changes in Europe should be negotiated rather than forced”). This was a naïve belief on Chamberlain’s part. The Sudeten Crisis was “a” territorial change that was being negotiated—to assume that Hitler would submit to negotiations every time he demanded more territory was putting far too much faith on the effect of ADR on a dictator’s ambitions. Chamberlain’s belief in the power of negotiating with dictators also overlooked the fact that the League of Nations was supposed to resolve disputes between nations, not hastily assembled conferences of democratic leaders and dictators. See THE COVENANT, *supra* note 26, at art. 12.

<sup>124</sup> See <http://www.worldwar2database.com/html/czech.htm> (last visited Mar. 2, 2004). (“Chamberlain was a man who did not comprehend the circumstances in which he lived. The world was changing far more rapidly than he could handle.”).

<sup>125</sup> See *supra* note 16 and accompanying text (explaining Czechoslovakia’s allegiance system with Western Europe).

<sup>126</sup> World War I was fought between 1914 and 1918. The Allied leaders at Munich were well aware that barely a generation had passed since the most destructive war in history. See [http://www.pvhs.chico.k12.ca.us/~bsilva/projects/great\\_war/causes.htm](http://www.pvhs.chico.k12.ca.us/~bsilva/projects/great_war/causes.htm) (last visited Feb. 3, 2003).

<sup>127</sup> See People & Events: Peace Talks at Camp David, September 1978, *supra* note 119. By separating the issues, President Carter was able to help Israel and Egypt reach an historic peace settlement whereby,

and the creation of a Palestinian state were dealt with separately.<sup>128</sup> As a mediator, Mussolini failed to separate the issues of Sudeten self-determination and Germany's desire for greater recognition in Europe.<sup>129</sup> Separated, each question might have been effectively resolved, but taken together, these issues were a mediator's nightmare. The Pact, and its subsequent breach only six months later,<sup>130</sup> confirmed the folly of Mussolini's mediation tactics had he been an impartial mediator.

The critical difference between the Carter and Mussolini mediations was that while Carter was "waging peace" and using all his power as a negotiator to reach a peace settlement between two historic enemies,<sup>131</sup> Mussolini was merely aiding and abetting one of the parties in his own mediation. Although neither Carter's nor Mussolini's mediations led to lasting peace arrangements, Carter genuinely attempted to fulfill his duty as a mediator.<sup>132</sup> The troubling legacy of mediation and negotiation at Munich and Camp David, nonetheless, raises serious questions about whether ADR is an appropriate method for resolving potentially dangerous territorial disputes between democracies and dictatorships.<sup>133</sup> While Nazi Germany and Egypt reaped substantial benefits without having to

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The first [document] would be a peace treaty between Egypt and Israel, in which the Israelis would return the Sinai territory in exchange for diplomatic recognition, access to the Suez Canal, and restrictions on the Egyptian military presence on its border. The second document would lay out the principles for future negotiations in the area, based on the idea that Israel would grant autonomy to the Palestinians in exchange for peace with its Arab neighbors.

*Id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *supra* note 15 and accompanying text (discussing Germany's status as a defeated country in post-World War I Europe).

<sup>130</sup> At <http://www.otr.com/munich.html> (last visited Feb. 3, 2003) ("[B]y March 15, 1939, through manipulations of the weakened Czech government, Hitler would peacefully occupy all of the country. Later that year, Hitler would invade Poland and Britain and France would declare war on Germany.").

<sup>131</sup> See *supra* note 116 (explaining the historic enmity between Israel and Egypt).

<sup>132</sup> See *supra* note 130 and accompanying text. Just as the Munich Pact did not lead to a substantive European peace, even President Carter's Nobel Prize-winning efforts at mediation have not resolved the conflicts besetting the Middle East.

<sup>133</sup> In *The Folly of Appeasement: Munich, Camp David and Oslo*, retired U.S. Army Colonel Irving Kett, noted that Munich and Camp David, "all involve[d] the transfer of strategic territories from democratic states and in each case the agreements are made under duress, with the dictatorial regimes promising to mend their brutal ways and enter into an era of peaceful, cooperative existence with their democratic neighbors." Ret. Col. Irving Kett, *The Folly of Appeasement: Munich, Camp David, and Oslo*, at <http://www.afsi.org/OUTPOST/98MAR/mar8.htm> (last visited Mar. 2, 2003). Cf. discussion *infra* Part V (discussing the United States' preemptive war against Iraq, which reversed the trend of dictatorships starting wars, not democracies).

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genuinely abstain from militant behavior, Czechoslovakia and Israel were forced to surrender important territories in the name of ADR.<sup>134</sup> These results lead to the question whether ADR is perhaps better suited to resolving legal disputes rather than matters of international significance.

## IV. WHY ADR DID NOT WORK

## A. No “BATNA”

The Munich Negotiations did not have to be a flawed form of proto-ADR. Flaws within the negotiation emerged because Chamberlain’s irremediably “soft” stance was based on his lack of a best alternative to a negotiated agreement, also known as a “BATNA.”<sup>135</sup> BATNA is a key element to engaging in principled

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<sup>134</sup> See Kett, *supra* note 133. Despite the two rounds of negotiations and two different mediations concerning the Sudeten Crisis, “on March 14, [1939], Germany seized the rump Czechoslovakia. While this terminated Western optimism concerning Hitler’s intentions, the [A]llies made no move to save the Czechs.” *Id.* Just as Germany blatantly violated the Munich Pact, Egypt has not honored many important resolutions set forth in the Camp David Accords. While Israel surrendered “an area three times the size of Israel, including Gaza, Judea, Samaria and the Golan Heights, with a defensive barrier, the Suez Canal, and a 150 kilometer wide buffer against an Egyptian invasion,” Egypt,

[N]ot only failed to carry out most of the positive clauses of the Camp David Accords, but. . . Egyptian military threats against Israel resumed in 1987 when Defense Minister General Abu Ghazzala stated that Egypt’s ‘principal and sole enemy’ was Israel and that together with Syria, Egypt would achieve a crushing victory over the Jewish state. On January 23rd, 1995, General Amin al-Huwedi, the former Minister of War and Military Intelligence, declared: ‘War is inevitable—the efforts and the agreements now taking place are not building peace; they are agreements leading to war.

*Id.* at 9-10.

<sup>135</sup> FISHER, *supra* note 32, at 100. Since Chamberlain did not possess a BATNA, one could then wonder whether he could have formulated a “mutually prominent alternative.” PRUITT, *supra* note 25, at 57. According to Pruitt, a mutually prominent alternative must possess two key characteristics:

First, it must stand out in both parties’ thinking, either because it embodies some standard of fairness or reasonableness or because it enjoys perceptual ‘uniqueness, simplicity, precedent or some rationale that makes it qualitatively differentiable from the continuum of possible alternatives’. . . Second, the alternative must become the object of *convergent expectations*. Each bargainer must know that the alternative is prominent to the other party. . . Such an alternative becomes a fallback position to which each party can become credibly committed. . .

*Id.* at 57-58.

It is important to note that where a BATNA can make a negotiator feel comfortable enough to leave the negotiating table, a mutually prominent alternative is a solution that exists within

negotiation.<sup>136</sup> If a principled negotiator does not have a BATNA, then he has no choice but to reach an agreement during the negotiation, even if the agreement is repellant to him.<sup>137</sup> This was the exact situation in which Neville Chamberlain and Edouard De-ladrier found themselves at Munich. They were negotiating for negotiation's sake because, at the heart of Britain and France's desire for peace was their fear of war—neither possessed the arms nor the national unity to fight Germany.<sup>138</sup> If the outcome at Munich was to be principled, the unfortunate fact is that Chamberlain would have had to bluff<sup>139</sup> or have been willing to walk away as early as

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the negotiations, not outside of them. For Chamberlain, a mutually prominent alternative was just as difficult to find as a BATNA because he was caught in a “mismatching” pattern where he was unilaterally conceding to Hitler's growing demands. Chamberlain found himself in this unenviable situation because his BATNA was to risk open war, whereas, as long as he stayed at the negotiating table, even if giving away large concessions, there was still a chance he could achieve something other than war. Interview with Professor Hal Abramson, *supra* note 32 (May 3, 2003).

<sup>136</sup> See FISHER, *supra* note 32, at 100 (defining a negotiator's BATNA as “the standard against which any proposed agreement should be measured. That is the only standard which can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.”).

<sup>137</sup> See *id.* at 101 (arguing that “in most circumstances, however, the greater danger is that you are too committed to reaching agreement. Not having developed any alternative to a negotiated solution, you are unduly pessimistic about what would happen if negotiations broke off.”).

<sup>138</sup> See T. TAYLOR, *supra* note 4, at 822. Although Chamberlain asserted the importance of resolving the Sudeten question in a peaceful manner in order to spare Europe another catastrophic war, he contradicted this position when he said to his colleagues that they “should not think that he was making any attempt to disguise the fact that, if [Britain] now possessed a superior force to Germany, we should probably be considering [the Godesberg] proposals in a very different spirit.” *Id.* With that statement, Chamberlain discredited the notion that appeasement was ever a legitimate form of ADR. Instead, it was a tactic to accommodate a militant Germany while buying time for Britain and France to rearm for an inevitable conflict with Nazi Germany. See *id.* Indeed, during the Munich Conference, “already under development were the Halifax and Lancaster heavy bombers that were intended as Britain's prime offensive weapon in the event of a continental war.” *Id.* at 61. Perhaps there was logic to Chamberlain's claim that he had helped achieve peace for our time, since “our time” could have meant as long as it took Britain to rearm for another world war. In this way, negotiation and mediation were used to temporarily resolve a conflict so that Britain could better prepare for a heavily anticipated renewal of conflict.

<sup>139</sup> Although Chamberlain may have perceived that Britain and France's position *vis á vis* Germany was so weak that any sort of principled attempt to resist Hitler's demands might seem to be “bluffing,” there is evidence that Chamberlain was not in as weak a position as he thought. Such factors in favor of the Allied position included:

A million Czechs were ready to fight from strong mountain fortresses. . . The French were prepared to place 100 divisions in the field. . . Anti-Nazi generals in Germany were prepared to destroy Hitler if the Allies would commit themselves to resist the Czech takeover. . . British and French public opinion were stiffening against Ger-

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Berchtesgaden and/or as late as Munich without a negotiated agreement since Hitler was unwilling to make substantive concessions to Britain, France or Czechoslovakia.<sup>140</sup>

Another problem with Munich Negotiations was that Chamberlain's "soft" stance was predicated upon yielding to pressure, and not to principle.<sup>141</sup> The principle of self-determination was really a pretext by which Hitler made his sinister agenda the center of negotiations purportedly aimed at liberating the Sudetens.<sup>142</sup> However, Chamberlain followed this dishonest strategy by using the principle of appeasement as a pretext for ceding territory to Hitler.<sup>143</sup> The imminent threat of war motivated Britain and France to barter away<sup>144</sup> the Sudetenland, not their adherence to the principles underpinning various ADR processes.

Ironically, where Chamberlain and Deladier had neither a BATNA during the Munich Negotiations, Hitler had a BATNA all along.<sup>145</sup> That the Sudetenland was ceded to Hitler through negoti-

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many's outrageous demands. . . The British fleet, largest in the world, was fully mobilized for action. . . President Roosevelt pledged aid to the Allies.

KARRAS, *supra* note 45, at 9. Given this information, it would appear that Chamberlain would not have been bluffing at all, but instead showing the strength of his position. *See also* COLOSI, *supra* note 22, at 6 (emphasizing the importance of creating doubt in the mind of the opposing negotiator as the key to good negotiation).

<sup>140</sup> *See* discussion *supra* Part II.

<sup>141</sup> *See* FISHER, *supra* note 32, at 83 (urging negotiators to base their agreements, on principle, not pressure. When principle is observed as the criterion for negotiation, standards such as fairness, efficiency and scientific merit come to bear and the result is a wise and fair agreement). It is difficult to characterize the Munich Pact as one based on any sort of principle when pressure was so clearly the guiding logic of the agreement.

<sup>142</sup> *See supra* note 36 and accompanying text (detailing the pretextual nature of Hitler's "concern" for the Sudeten Germans).

<sup>143</sup> *See* T. TAYLOR, *supra* note 4, at 822 (noting how Chamberlain was, in fact, substituting pressure for principle. Although there was much rhetoric emanating from Chamberlain about the importance of "peace for our time," the surrender of the Sudetenland had less to do with Chamberlain's abiding belief in peaceful conflict resolution, than with his fear of a German bombardment of Britain).

<sup>144</sup> *See generally* THE PACT, *supra* note 1.

<sup>145</sup> *See* BULLOCK, *supra* note 12, at 639. As the self-imposed deadline of September 28, 1938 approached,

Hitler decided against running the risk of a general war and turned to negotiation instead. It may be that he had always intended to do this, after he had pushed up his terms for settlement by exploiting the fear of war. It is more likely however, that he had kept it as an alternative, intending to make up his mind which course to follow only at the last moment.

*Id.* For Hitler, the Munich Negotiations themselves were a BATNA since he had nothing to lose by hearing what the Allied powers would offer him in order to satisfy his alleged "last territorial claim in Europe." *Id.* at 638.

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ations was a victory for him;<sup>146</sup> Hitler had peacefully annexed a strategically important area to the Reich without having to abide by his self-imposed deadline of commencing hostilities that might have led to the demise of his regime.<sup>147</sup>

### B. Lack of Good Faith—On Both Sides

Whereas Hitler only made slight pretensions to negotiating in good faith, Chamberlain imagined himself doing an admirable deed, even though he was negotiating with just as much bad faith as Hitler.<sup>148</sup> While Hitler was clear that he intended to use force,<sup>149</sup> Chamberlain was less forthright with Czechoslovakia, the nation that he was supposed to be representing, because he was content to sacrifice Czech sovereignty in order to spare British subjects the wrath of a possible German bombardment.<sup>150</sup> It is no secret that Hitler was never negotiating in good faith at Munich, but it is more startling to understand that neither was Chamberlain, who was allegedly trying to create an agreement based on the loftiest of principles.<sup>151</sup>

### C. War Instead of ADR?

The attempt to use ADR to resolve the “Sudeten Crisis” was fraught with problems from start to finish. There were two mediations and two rounds of negotiations<sup>152</sup> and the net result of these

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<sup>146</sup> *But see* Duncan, *supra* note 31, at 11 (arguing that Hitler viewed the negotiation process that led to the Munich Pact as a defeat that robbed him of the chance to seize Czechoslovakia by force).

<sup>147</sup> *See* BULLOCK, *supra* note 12, at 639.

<sup>148</sup> *See* T. TAYLOR, *supra* note 4, at 44 (describing how Chamberlain and Daladier had extremely different attitudes towards their part in the Munich Pact—“Chamberlain . . . insisted on behaving as if they were all doing the Lord’s work when everyone knew it was high way robbery. Daladier, in contrast, assumed an attitude of “*Merde!*” mixed with “*Tant pis,*” which was at least more pragmatic and certainly less sanctimonious.”).

<sup>149</sup> *See* BULLOCK, *supra* note 12, at 621, 625.

<sup>150</sup> *See id.* at 625.

<sup>151</sup> Chamberlain and Daladier were indeed “deep[ly] committed to principle,” however that principle was a painful and unjust peace so that both Britain and France would be better prepared to break the peace when the time was more suitable. *See generally* Robert D. Benjamin, Terry Waite: A Study In Authenticity, at <http://www.mediate.com/articles/benjamin7.cfm> (last visited Nov. 20, 2002).

<sup>152</sup> *See supra* note 17 (describing the nascent forms of ADR that led to the Pact).

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instances of international ADR was manifestly unjust. In fact, as the Munich Negotiations progressed, they became more and more unfair. At first, there was well-intentioned talk of self-determination and peaceful conflict resolution.<sup>153</sup> By the conclusion of the Munich Negotiations, only surrender had been accomplished,<sup>154</sup> devoid of any principles that might be the theoretical framework of an ADR process such as mediation or negotiation. The failure of ADR in the Munich Negotiations begs the disturbing question of whether Britain and France should have considered declaring war on Germany if it had attacked Czechoslovakia as promised by Hitler, and whether proto-ADR was the right method to handle this Crisis in 1938.

The Munich Pact seems to support the proposition that ADR for the sake of ADR is a mistaken premise that can lead to results almost as undesirable as war itself.<sup>155</sup> The outcome of Munich was especially disturbing from an ADR point of view because the various forms of ADR that were employed to handle the Sudeten Crisis—negotiation and mediation—should have had a leveling effect whereby the power differentials existing between parties would have been minimized, if not eliminated.<sup>156</sup> Instead, ADR was used as a weapon to force Czechoslovakia, a weaker democracy, to make concessions to Germany, a far stronger dictatorship. This was accomplished with the help of Britain and France, two stronger countries who believed that they were too weak to help Czechoslo-

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<sup>153</sup> See Section IA (discussing Hitler's purportedly legitimate aims in demanding the annexation of the Sudetenland).

<sup>154</sup> See *supra* note 14 and accompanying text (depicting the Pact as a surrender).

<sup>155</sup> See Kudej, *supra* note 62, at 4 (describing how the dismembered Czechoslovakia, whose borders were supposed to be guaranteed by Britain and France in accordance with the Munich Pact, was occupied by Germany on March, 15, 1939, six months after "peace in our time" had been declared from the balcony of No. 10 Downing Street. Instead of getting a chance to fight for their sovereignty, the Czechs were gradually deprived of it through compromised negotiation and mediation and finally, German aggression).

<sup>156</sup> See Adler, *supra* note 47, at 103.

[M]ediation is 'facilitated negotiation.' In mediation, the parties retain the right to make their own decisions, but look to a mediator to help move the disputants to an agreement. . . . Although mediation occupies a central role in various 'alternative dispute resolution' commentaries, our focus lies in its ability to moderate power disparities in negotiations. Given that the parties typically are not bound to anything proposed in mediation, one might assume that power shifts are unlikely to occur in this process.

*Id.* The Adler excerpt has an unfortunate ring of truth to it—there were no power shifts during Mussolini's tenure as mediator at Munich. Hitler started in the more powerful position and concluded the mediation/negotiation in the same position. So too did Mussolini "facilitate" the negotiation by presenting the German terms as his own, a ploy which deceived Chamberlain and Daladier.

vakia.<sup>157</sup> Was “compromised ADR” a better option than war for Czechoslovakia and would war not have been a more honest form of conflict resolution when all of the utilized forms of proto-ADR were dishonestly used against Czechoslovakia?

## V. CONCLUSION

Adolf Hitler used two legitimate forms of ADR—negotiation and mediation—to serve his evil purposes during the Munich Negotiations and the eventual Pact. That ADR can be manipulated by brutal dictatorships at the expense of democracies is quite alarming, especially in an atmosphere where ADR is gaining greater ascendancy as a means of resolving wide-ranging disputes. If any of the historical actors involved had been negotiating in a principled manner or in good faith, the Munich conference could have been a stellar example of ADR before its time. Instead, Munich was surrender and injustice veiled in the guise of ADR.

The assertion that ADR was the inappropriate strategy for dealing with dictators such as Hitler still resonates. The present situations in Iran<sup>158</sup> and North Korea<sup>159</sup> beg the question whether ADR strategies can resolve disputes that could lead to war. No coherent policy has emerged for these potentially nuclear countries, but negotiations might be a starting point. The situation leading up to the eventual American/Allied victory in Iraq bears a striking resemblance to Munich. Even as the disarmament debate had begun in the United Nations (“U.N.”), the United States and Britain were committing troops to the Persian Gulf. The Second Gulf War raised the question of whether powerful U.N. members, such as the United States and Britain, are sincere about using U.N.-approved methods of dispute resolution, or whether they have intended to invade from the start of the crisis.<sup>160</sup>

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<sup>157</sup> See KARRAS, *supra* note 45, at 9 (arguing that the Allied notion of “weakness” is strongly contradicted by the fact that France could deploy 100 divisions against Germany and Britain had the world’s finest navy).

<sup>158</sup> See Reuters, *Iran Vows to Speed Up Nuclear Cooperation with U.N.*, N.Y. TIMES, April 6, 2004, available at [www.nytimes.com/reuters/news/news-iran-nuclear.html](http://www.nytimes.com/reuters/news/news-iran-nuclear.html) (last visited Apr. 6, 2004).

<sup>159</sup> See Joseph Kahn, *North Korea Rejects U.S. Demand to Scrap Its Nuclear Programs*, N.Y. TIMES, March 28, 2004, at 11.

<sup>160</sup> Bob Woodward wrote that the America’s plan to invade Iraq can be traced back to January 2002. Bob Woodward, *Attack Was 48 Hours Old When It Began*, available at <http://www.washingtonpost.com/wp-dyn/articles/A12215-2003Mar22.html> (last visited Mar. 23, 2003).

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The United States' decision to invade Iraq without Security Council approval had serious ADR implications. The current position of the U.N. finds itself in bears all too similar a resemblance to that of the League of Nations after the Munich Pact. In both instances, an important international decision in the form of war or peace was reached outside the auspices of the principal body meant to enforce ADR on an international scale at the time. Has American and British action against Iraq signaled the demise of the United Nations in the same manner that Munich was the death knell of the League of Nations?<sup>161</sup>

A less pessimistic interpretation might be that by invading Iraq, the United States and Britain sought to avoid, "[t]he cardinal failure of the security environment between the world wars, a situation which left like-minded, democratic nations unable to come together and oppose aggression early, before the aggressor could act to destroy those nations one by one."<sup>162</sup> While it remains unclear whether the successful outcome of Operation Iraqi Freedom has dealt an insurmountable blow to the U.N.'s ability to resolve inter-nation disputes, it could demonstrate that the ADR-approved strategies utilized by the U.N. are inappropriate for dealing with dictators such as Saddam Hussein, just as ADR methods were ineffective in removing the menace of Hitler. This raises the question whether the United States has used military force against weaker countries such as Afghanistan and Iraq in the hopes of opening negotiations with stronger nations, such as Iran and North Korea. One of the many lingering questions of this war will be whether ADR can be applied on the international scale in the most crucial of situations, or whether it is a more limited process which is best confined to preventing possible lawsuits from going to court.

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<sup>161</sup> See Dan Goure, *First Casualties? NATO, the U.N.*, at <http://www.msnbc.com/news/887795.asp?0cv=CB10> (last visited Mar. 23, 2003) (arguing that the coalition invasion of Iraq has put the future of the United Nations in doubt).

<sup>162</sup> *Id.*