

RESOLVING HOLOCAUST CLAIMS AT THE END OF THE 20TH CENTURY: THE UNITED STATES GOVERNMENT'S ROLE

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I will focus on the role the U.S. Government has played in the past few years in the resolution of a number of Holocaust-related disputes.

These recent efforts should be seen as a continuation of a more than half-century initiative by the United States to secure a measure of justice to victims of the Holocaust and their heirs. As early as 1945, Washington instructed General Eisenhower, the Commander in Chief of United States Occupation Forces, to ensure that stolen property was impounded and prompt measures for restitution instituted. In 1947, the United States military government issued restitution decrees on which German authorities modeled German restitution laws after West Germany was established in 1949. The 1952 Transition Agreement required Germany to maintain the restitution system established under Allied legislation and led to the establishment of the German system for compensating victims of Nazi persecution.

The United States played a similar role in post-war Austria as it played in Germany. The Allied Occupation forces insisted that the newly-formed Austrian Government enact legislation providing for the restitution of property illegally transferred during the Nazi era in Austria. Thus, between 1946-49, Austria passed seven—albeit not comprehensive—restitution laws. In the 1955 State Treaty, the United States subsequently demanded that Austria commit to the restitution of any remaining Jewish property that had not been restituted. A 1959 exchange of notes between the United States and Austria led to the establishment of a compensation

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fund in Vienna to provide payments to Holocaust victims for banking and certain other property claims.

Largely because of the enormity of the crimes committed and amount of property plundered during the Nazi era, however, the above measures, although significant, left gaps. Moreover, neither the measures nor the United States' diplomatic interventions resulted in the waiver of the victims' rights to pursue their claims in United States courts. Although a few such people did choose to file lawsuits in the United States in the years following the war, such suits were few and far between. By the 1990s, however, this started to change, and these suits became an irritant in the United States' relations with a number of European governments.

To some degree, the United States' recent initiatives have been triggered by the filing of such suits against European governments and companies. As a result, these efforts involved the twin goals of securing compensation or restitution for Holocaust victims and helping achieve the dismissal of the lawsuits. During this period the United States has used a variety of different methods to achieve both of these goals.

The September 1995, Princz Agreement was the first of these endeavors. After years of unsuccessful attempts to secure compensation from Germany for his suffering in a concentration camp, Hugo Princz sued the German Government in United States court. After the suit was dismissed in view of Germany's sovereign immunity, Mr. Princz then sued German companies. Simultaneously, Mr. Princz lobbied Congress to pass legislation to remove sovereign immunity from the German Government for Holocaust suits. The House of Representatives' passage of such a bill got the German Government's attention, and shortly thereafter the German Chancellor and President Clinton agreed to negotiate a traditional claims settlement agreement covering Princz and comparable claimants. The German Government, not wanting to deal with further litigation in United States court on these issues, insisted that such an agreement finally resolve all such claims. Thus, under its terms, the Germans made a lump sum (some \$20 million) payment that provided compensation essentially to concentration camp survivors who were United States citizens at the time of their internment and the United States waived all claims against Germany in that category. The Department of Justice's Foreign Claims Settlement Commission bore responsibility for distributing this money.

The United States used entirely different approaches to address subsequent major Holocaust-era related disputes. I will very briefly address the Swiss bank settlement and then turn to the agreements the United States negotiated with Germany, Austria, and France.

In the fall of 1997, the question arose of what role, if any, the State Department should play in resolving the class action lawsuits that had

recently been brought against three major Swiss banks alleging wrongdoing during the Holocaust. Our initial reaction was that this was litigation between private parties and that litigation should proceed without United States involvement. However, we soon changed our mind after the counsel for both sides requested the Department's help in resolving the dispute. We decided that our interest in getting payments to Holocaust victims and in getting rid of the lawsuits (thereby removing an irritant in our relationship with Switzerland) justified our involvement.

During these negotiations the United States Government acted as a facilitator and mediator and was intimately involved in all aspects of the process. The product was a \$1.25 billion class action settlement that was finally approved by the court in November 2000. Unlike the Prinz Agreement, where the United States not only provided the Germans with the claims waiver to address their concerns about future lawsuits but bore sole responsibility for distributing the compensation as well, under the Swiss bank settlement—a traditional class action settlement—the United States had no role to play in its implementation.

Our role in the series of negotiations between late 1998 and January 2001 that culminated in agreements—one with Germany, two with Austria, and one with France—which have led to the establishment of four foundations that will distribute some \$6 billion to Holocaust victims and their heirs was significantly different from previous ones. As the structure of the French and both Austrian negotiations and agreements were largely modeled on the one with Germany, in the interest of time, I will focus on the German one.

The talks arose in the context of both a series of class action lawsuits brought by Holocaust victims—both United States and foreign nationals—against German companies for asserting primarily Nazi-era forced and slave labor, banking and insurance claims, and an announcement by the German companies of their intention to establish a foundation to address their moral responsibility for the wrongs committed by German companies during the Nazi era.

To dispose of the lawsuits, the companies wanted the United States to conclude an executive agreement with Germany extinguishing all Nazi-era claims against German companies in United States courts. For a number of reasons, however, we declined. First, under customary international law we could have only have extinguished claims of those who were nationals at the time the claims arose. Second, customary international law does not address a government's ability to settle the claims against private entities, such as companies. Third, no United States law precedent existed for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to by treaty).

In early 1999, around the same time that the Germans announced their intention to create a foundation to pay former forced and slave laborers, they asked Stuart Eizenstat, then an Undersecretary of State, to help them find a way to dispose of the lawsuits in favor of this foundation. Soon thereafter the plaintiffs' attorneys asked for his help in facilitating an out-of-court resolution to the lawsuits. The Governments of Belarus, the Czech Republic, Israel, Poland, Russia, and Ukraine, which represented the vast majority of surviving forced and slave laborers, were eager to participate in any such negotiations. In addition, the Conference on Jewish Material Claims Against Germany, an umbrella Jewish organization that was established after the war to negotiate with Germany for compensation and restitution for Holocaust victims, rightly felt that it had to be included as well. This mix of negotiating partners was novel—government representatives, private attorneys, and a non-governmental organization—and was replicated in the Austrian and French negotiations.

The negotiations addressed four key issues: how much money the Germans would contribute to the foundation; how the money would be divided among the victims; the structure of the foundation; and a suitable mechanism to achieve the dismissal of all pending and future Nazi era lawsuits against German companies. I will briefly address the last two.

With respect to the last one, with the United States unwilling to enter into a claims settlement agreement and the German companies not prepared to enter into a traditional class action settlement (believing it would give lawsuits, which they viewed as lacking merit, both status and legitimacy), there was no available mechanism to guarantee that the companies would never again be sued in United States courts for Nazi-era wrongs. The German companies' lawyers, however, came up with an alternative concept, which was accepted. If all of the participants in the negotiations agreed on the parameters of the foundation, the participating plaintiffs' attorneys would seek to dismiss the pending lawsuits and the United States would file statements of interest in those and all future Nazi era lawsuits against German companies in United States courts. The United States would say that it would be in the United States' foreign policy interest for the foundation to be the exclusive remedy and forum for resolving such claims. Because the companies wanted the United States' commitment to file such statements of interest memorialized in an executive agreement, the United States assumed a different role than it had in prior Holocaust claims issues: negotiating an executive agreement. This turned out to be a quite unusual agreement.

Although the United States refused to discuss the actual text of the Statement, as the companies requested, it did agree to negotiate the "elements" of such a filing and attach this "elements paper" as an annex to

the agreement. The Justice Department, including the Solicitor General himself, was deeply involved, since the agreement would commit the United States to positions in all levels of United States courts. Eventually, after almost a year of heated discussions over the content of this annex with Eizenstat and Justice and State Department lawyers, it took letters from the President, his National Security Adviser, and White House Counsel to the Germans to resolve this issue. The involvement of so many different parts of the United States Government in addressing the consequences of the Holocaust, as well as negotiating the text of an executive agreement with private parties, *i.e.*, the companies, was unprecedented.

As the foundation negotiations progressed, there was a fundamental shift in approach. Rather than create a private foundation, for a number of reasons the German Government and companies decided to create a public one established under German law. This change in course led to the United States' engaging in another unprecedented role: negotiating with the Germans an annex to the executive agreement setting forth the elements of the Foundation that would be incorporated in the German law. We essentially began discussing drafts of this German law, and Eizenstat even testified before the Bundestag concerning what the United States felt needed to be included in the law. These discussions were further complicated by the need to include the victims' representatives in them. After all, the United States was only going to lend its support to a foundation that received the broad support of the victims' representatives.

Thus, in the German Foundation talks, the United States Government assumed a variety of roles, including those of a facilitator among disparate parties, a treaty negotiator, and the role of pressing a foreign government on internal law matters—roles it later assumed in negotiations with the Austrians and the French.

Let me conclude with some observations. Will the complex German Foundation arrangement and the multifaceted role played by the United States serve as precedents beyond the Austrian and French cases? The confluence of a number of circumstances in these cases enabled us to achieve the results we did achieve. First, all parties to the disputes asked the United States to help find a resolution. Second, a senior United States Government official, Stuart Eizenstat, was willing to expend the time and energy to convince initially reluctant State and Justice Departments to become involved. Third, largely because of his clout in the Clinton Administration, Eizenstat was able to get the White House to weigh in at crucial moments to break impasses that threatened to derail the negotiations. Fourth, the substance of the disputes, elderly Holocaust survivors seeking a measure of justice in the last few years of the lives,

coincided with the United States' policy objectives. Finally, there were no pre-existing treaty documents to impose legal constraints on the type of role the United States could assume.

There may be future disputes involving foreign companies or governments where some of these circumstances are replicated. However, I am skeptical that there will be any such disputes where all will be replicated.