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**Keynote Address—
The Role of the United States
Government In Recent Holocaust
Claims Resolution**

By
Ronald J. Bettauer*

I am honored to have been asked to deliver the keynote address to the 2001 Riesenfeld Symposium. Berkeley hired Steve, Stefan Riesenfeld, and he came to California, just before the Holocaust. Steve had such a long and wonderful career. The Office of the Legal Advisor had a close connection to, and deep affection for, Steve. He served as Counselor on International Law in our office in 1980 and remained a consultant to our Office from then until his death two years ago. Personally, I would always feel free to call him and discuss a problem with him. While I headed our International Claims Office, I asked him to help us on one of the cases before the Iran-United States Claims Tribunal, which he gladly did.

This year's symposium deals with World War II Reparations and Restitution. This is a field in which we have seen amazing developments in just the last few years. Many of the participants in this symposium have played a role in those developments. The United States Government has been centrally involved. An extraordinary amount of effort has been expended to help achieve successful results.

At the outset, let me make one general comment, which I'm sure will be a theme running through this symposium: how striking it is that now, 50 years after the Holocaust, these matters have come to the fore and we have seen a series of settlements of Holocaust era claims. A confluence of factors seems to

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have resulted in this—a recognition that there can be no adequate compensation to victims of the Holocaust, the desire to provide those victims at least some measure of justice and closure in their lifetimes, the reunification of Germany, the fall of the Soviet Union—these and other factors surely were in play. But I will leave these factors to others to analyze further and focus today on how the U.S. Government came to be involved in a number of the key settlements, and what its role was.

This is, I think, an interesting story—one that is hard for outsiders to know. Since our role was so fundamental, I thought that today I would talk about the U.S. Government's role in three of the Holocaust settlements: the 1995 so-called "Princz" agreement; the Swiss bank settlement; and the German Foundation for payments to forced and slave laborers and other victims of the Nazi era.

I do not propose to describe each of these settlements in any detail. The texts in question are public. The Princz agreement can be found in the January 1996 issue of *International Legal Materials*; the Swiss bank settlement can be found at its web site (www.swissbankclaims.com), and the texts and documents related to the German Foundation can be found on the State Department's web site (www.state.gov/www/regions/eur/holocaust/germanfound.html). Much has already been written about the settlements, and they have been described both in press statements and in court filings in great detail. I will, however, talk about them as examples of three types of roles that the U.S. Government has played.

Let me start by pointing out that for two centuries the U.S. Government has concluded claims settlement agreements on behalf of its nationals. Under the customary international law of state responsibility and diplomatic protection, in certain circumstances the Government has the right to "espouse" and settle the claims of nationals. Under international law, a government may espouse the claim of one of its nationals against another government if the claim was owned by one of its nationals at the time it arose and continuously thereafter until it is espoused, if the claim involves a breach attributable to the foreign government of an international obligation, and if the national has first exhausted local remedies in the foreign nation. If these requirements are met, a government has discretion to espouse a claim; even a claim that is eligible for espousal may not be espoused for foreign policy reasons. The authority of the Executive Branch of the U.S. Government - the President and the Secretary of State - to exercise the espousal power on a discretionary basis has consistently been upheld by U.S. courts.

In dealing with the Princz matter, we followed the traditional legal claims settlement framework, and dealt with espousable claims. But the Swiss and German matters depart from this framework widely and move into uncharted areas. These settlements dealt with much broader categories of claimants, worldwide, and new negotiation frameworks for the U.S. Government.

The Princz Agreement between Germany and the United States of September 1995—formally titled the "Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution"—is, as I noted, a claims settlement agreement in the traditional

mold. This agreement was a lump sum settlement with Germany that provided compensation to certain U.S. citizens who were victims of Nazi persecution, essentially concentration camp survivors, in return for waiver of all claims against Germany in that category. Similar agreements were concluded between Germany and other countries in the 1960s, many of which are included in the two-volume compilation of claims agreements edited by Richard Lillich and others.¹

This particular agreement had a unique background. For many years Hugo Prinz, a Holocaust concentration camp survivor, had sought compensation from Germany, and the U.S. Government had urged the German Government to settle with Mr. Prinz. U.S. officials asserted to the German Government that Mr. Prinz's case was unique. Mr. Prinz sued the German Government in U.S. federal court, but the suit was dismissed in view of Germany's sovereign immunity. Then, Mr. Prinz sued German companies. At the same time, Mr. Prinz's congressional supporters pressed U.S. legislation to remove sovereign immunity from the German Government for Holocaust suits, and in 1994 the House of Representatives passed such a bill. This situation warranted serious attention by the two Governments, and the German Chancellor and U.S. President agreed in March 1995 that a claims settlement agreement covering Mr. Prinz and comparable claimants should be concluded.

At this point, the United States embarked on a claims settlement negotiation with Germany. This was a traditional government-to-government negotiation. I led a U.S. Government team to meetings in Bonn with a German Government team led by a German deputy legal adviser. The German Government had in mind the model of the agreements it had concluded with other governments, and wanted to have a settlement that finally resolved any future potential claims. Both governments wished to conclude an agreement as a matter of great urgency before the issue was further complicated. We wanted a resolution that would dispose of any future congressional threats to German sovereign immunity.

We in the State Department did not, however, believe it would be just to settle all claims that were comparable to Mr. Prinz's without a thorough program to locate all claimants who might qualify. Under the framework of a traditional claims settlement, the United States would "espouse" all the claims in the category covered by the agreement, that is, take over those claims as U.S. claims against the foreign government. We would settle the claims for an appropriate lump sum payment from the German Government and we would take responsibility for distribution of the payments to individual beneficiaries.

Since all claims in the categories covered by the settlement would be cut off, we wanted to be sure that we had located everyone. By the time the U.S. and

1. DAVID J. BEDERMAN, RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995 (Procedural Aspects of International Law, Series No. 23, 1999). DAVID J. BEDERMAN, RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (Procedural Aspects of International Law, Series No. 12, 1975).

German Governments held negotiations in May 1995, we knew of a small number of other persons who, like Mr. Princz, had survived concentration camps, had been U.S. citizens at the time, and had never received any significant payment from Germany. To allow time for the United States to locate additional persons covered by the agreement, the two Governments agreed to negotiate an additional lump sum after two years. Thus, under the agreement, it was only upon payment of the second lump sum that all claims in the category of claims covered by the agreement were considered fully and finally settled. Agreement on this framework was reached with exceptional speed: a second round of negotiations was held in August 1995, and the agreement was brought into force in September 1995. We agreed on a 3 million DM settlement for known victims in 1995, and agreed on an additional 34.5 million DM settlement for additional victims in 1999, for a total of over \$20 million.

Although this agreement followed the traditional mode of claims settlement agreements, it was challenged in U.S. federal court. One claimant not covered by the agreement sued to try to force the U.S. Government to present his claim to Germany, although the claim had been found not to fall under the agreement. A ruling favorable to the claimant by the district court was summarily reversed in a per curiam opinion of the D.C. Circuit Court of Appeals in *Miller v. Albright*, which held that the court was not entitled to force the Secretary of State to adopt a certain position in negotiations, i.e., to mandate an espousal of the claim, usurping the executive's conduct of foreign affairs.²

In sum, in the Princz case, we see an example of the traditional U.S. Government role. It took up the claims of its citizens—persons who had been citizens at the time the claim arose—in accordance with practice long sanctioned by both U.S. and international law. The U.S. Government then had control of the claims, and could settle them as it deemed appropriate, without any requirement to consult the claimants involved.

The subsequent Holocaust claims talks departed sharply from this established precedent. The Swiss bank settlement was a traditional class action settlement; but what was different was the U.S. Government involvement in bringing it about. The German Foundation arrangements, on the other hand, were unprecedented.

Let me first turn to the Swiss bank settlement.

By 1997, class action suits had been brought against the three major Swiss banks, "UBS", Credit Suisse and "SBC". These class actions involved a wide series of allegations of wrongdoing by the banks during the Holocaust, such as failure to return dormant accounts, looting assets, and profiting from slave labor. In the fall of 1997, the question arose as to whether the State Department should play any role in this litigation. Our initial reaction was that this was litigation in U.S. courts by private parties against other private parties, and that we should let the litigation proceed.

2. *Miller v. Albright*, 1998 U.S. App. LEXIS 30885 (D.C. Cir. 1998).

Soon, however, both the counsel for the plaintiffs and for the defendants approached the Department and asked for help in resolving the matter. We decided that we had legitimate interests in becoming involved in this litigation—both in assisting in getting payments to victims of the Holocaust, and in removing an irritant from our relationship with Switzerland.

Stuart Eizenstat, at that time the Under Secretary of State for Economic Affairs, led the U.S. team, including members from the State and Justice Departments. Our interlocutors were attorneys for the defendant banks and for plaintiffs. We normally met in the State Department, although we kicked off the meetings in Zurich at a meeting with the CEOs of the three banks, and held one session in New York as well. The U.S. Government acted as a facilitator and a mediator.

All parties usually met together, but there were also many side consultations. First, the parties discussed the structure of a possible settlement. Each side set forth its propositions on what the claims were and what should be covered, and on how the settlement should be structured. We went into rather great detail, and had many intensive meetings. The U.S. team would draw out each side and look for areas of compromise. There were sometimes rather heated discussions, and even temporary breakdowns.

At a certain point, the parties seemed to reach an agreement on structure. We moved next to the discussion of the settlement amount. This was so difficult and sensitive that the parties thought it necessary for the U.S. Government to take on even a greater role. We essentially had proximity talks. Counsel for each side occupied different rooms. We would hear a detailed presentation from one side of the basis for its view on financial claims—and probe that presentation for clarifications and support. Then we would go to the other side's room and do the same. We would also convey to one side the other's presentation and probe for comments.

When we received settlement figure proposals, we did not report one side's proposal to the other side—for initially, that could have resulted in a complete breakdown in the talks. Rather, we pressed each side repeatedly to bring the proposals closer together. At a certain point, both sides thought it would be best for us to develop a detailed proposal which showed not a single settlement figure, but rather a settlement range. Our initial range proposal was roundly rejected by both sides, and we went on to produce a few more such proposals until the U.S. Government-mediated talks broke down in the summer of 1998.

The talks were revived by the judge before whom the consolidated class actions were pending, Judge Korman, and a deal was struck that was reduced to writing and signed at the beginning of 1999. It is interesting that the final \$1.25 billion class action settlement adopted the concept of, and was within the range of, the initial U.S. Government proposal.

So, the Swiss bank settlement talks are something quite different than the U.S. Government's traditional claims settlement role. Here, the Government settled no claims on behalf of its nationals. The lawsuit settlement does, however, cover claims of U.S. citizens, but not necessarily only those who were citizens at

the time their claims arose (as would be required under customary international law of espousal). It also covers worldwide classes of persons who had been Holocaust victims, no matter what their nationality.

While a State Department-led mediation of a lawsuit is rather unconventional, the skills used were not dissimilar to skills used in certain international negotiations.

There appeared to be no precedent for the U.S. role in helping achieve the Swiss bank class action settlement. Yet the settlement was still, in the end, a traditional class action settlement, and our role, in the end, that of a mediator.

Our role in the German Foundation matter was even more complicated. We were involved as facilitators and mediators, helping develop an unconventional and unprecedented arrangement. The arrangement involved an executive agreement between the United States and Germany, but not a claims settlement agreement. It involved dismissals of class action lawsuits, but no class action settlement.

By way of background, this arose from a series of class action lawsuits that were brought by Holocaust victims—both U.S. nationals and foreign nationals—against German companies, primarily for compensation for slave and forced labor, but also for a broad range of other wrongs committed during the Nazi era and World War II.

German companies initially thought that the U.S. Government could take care of the whole matter by concluding an executive agreement with Germany settling these claims. However, customary international law of state responsibility and diplomatic protection would only cover claims of persons who were nationals of the espousing government at the time they arose, and, furthermore, did not speak to the espousal and settlement of claims against private entities, such as foreign companies. Moreover, there was no precedent in U.S. law for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to by treaty), and thus such a method could be subject to serious challenge. Therefore, despite lengthy discussions—beginning with a session I had with German company and Government lawyers in Bonn in November 1998—the State Department declined to enter into a traditional claims settlement negotiation.

In January 1999, a U.S. Government team headed by Stu Eizenstat visited Bonn. At this point the German Government and German companies requested the United States Government become involved—as their partner—in developing a solution. The plaintiffs' attorneys also asked that we take on this facilitation role.

Thus, beginning in January 1999, the United States Government became co-facilitator of the talks, working with the German Government. Eizenstat headed the U.S. effort. The German Chancellor first appointed Chancellery Minister Hombach, and then former Finance Minister Lambsdorff, to be the other co-facilitator.

During an initial phase, all parties paid much attention to how the talks were to be structured. After much discussion, we included in the talks the Gov-

ernments of Israel, Russia, Poland, Ukraine, the Czech Republic and Belarus, as well as those of Germany and the United States. In addition, we included lawyers and other representatives of the defendant German companies and lawyers for each of the major plaintiff groups. Finally, we included the Conference on Jewish Material Claims Against Germany, an organization representing Jewish groups worldwide and given special status under German postwar legislation, to ensure the participation of appropriate organizational leaders and Holocaust survivors. This mix of negotiating partners was novel—government representatives, private attorneys, company representatives and an NGO. Since different participants were deemed to have interests in different claims, initially a fairly complex “wiring diagram” was prepared to structure the talks into various working groups, with the idea that the U.S. and German co-facilitators would co-chair a steering committee.

Very quickly the “wiring diagram” and carefully articulated group structure fell by the wayside. All participants seemed to be interested in all matters at stake in the negotiations. In the end, at each of the dozen major negotiating sessions we had relatively short opening and closing “plenary” meetings, involving all the approximately 60 participants, while working groups and informal consultations occurred between these plenary meetings. There were also myriad intersessional informal meetings and consultations. In addition, a legal working group was established that met both intersessionally and in conjunction with plenary meetings. All these meetings were open-door, in that any participant in the process could attend any of the formal working group sessions. And the U.S. and German Governments co-chaired all the formal meetings.

During these meetings, the German companies made it clear that they would not agree to follow the Swiss bank precedent and negotiate a class action settlement. They viewed such a settlement as giving the lawsuits status and legitimacy. Rather, they were willing to establish a foundation to make payments to victims on what they considered an *ex gratia* basis. Indeed, in February 1999, the companies and German Government announced that they would establish an industry foundation for this purpose. For a substantial period thereafter, the negotiations focused on the parameters of such a foundation, and how, if there were agreement on acceptable parameters, an arrangement could be found to provide the companies “legal peace” in the United States.

For many reasons, no one contemplated the enactment of a statute seeking to oust U.S. courts from jurisdiction over these cases. Having excluded the options of a claims settlement agreement and of a class action settlement, it became clear that no available mechanism could completely guarantee that German companies and the German Government would never again be subject to lawsuits in the United States arising out of World War II and the Nazi era. An alternative idea was developed. If an acceptable arrangement was negotiated, the participating attorneys would seek to arrange for dismissal of the pending lawsuits, and the United States would file statements of interests in those lawsuits and in all future lawsuits with claims against German companies arising out of World War II and the Nazi era stating the United States position that it would be

in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims.

This approach resulted in another permutation of the U.S. Government role. The German companies and Government wanted a binding commitment from the United States to file such statements of interest. Thus, in addition to facilitating discussions between all participants, the U.S. and German Governments became direct parties to the negotiation of an executive agreement. This agreement was not to be a claims settlement agreement—no claims would be espoused or settled—but one under which the United States undertook the then-unprecedented commitment of filing a statement of interest in its courts in a certain category of cases, no matter when any such case might in the future be brought. There were many rounds of talks to work out the text of the agreement and its annexes, and in the last months of the talks there was intense focus on the nature of the commitments and what the United States would be prepared to say in its statements of interest. The Justice Department was deeply involved. The Solicitor General participated personally, since the agreement would commit the United States to positions in appellate courts and the Supreme Court. This too was unprecedented.

At another point in the negotiations, there was another fundamental shift in approach. As noted, the focus was initially on developing the parameters for a private Foundation funded by German companies. But this created problems. First, it became clear that to achieve adequate funding to resolve the matter, both the German Government and the German companies would need to contribute. Second, the private Foundation would only cover wrongs of the German companies. Certain categories of laborers, however, had worked for German state companies; after 50 years, many of the victims might not know what kind of company they had worked for. These problems were overcome with a German decision to combine the private and federal Foundations and create one Foundation under German law.

This move had a major impact on the negotiations and our role in the negotiations. The United States Government now focused on negotiating with the Germans an annex to the executive agreement setting forth the parameters of the Foundation to be created by the new German law, and in due course began detailed discussions with the German Government about drafts of this law. The paper setting forth the parameters of the earlier proposed private Foundation was dropped, but we sought to incorporate the fundamental compromises and understandings that had been achieved in that context into the annex to the executive agreement under negotiation between Germany and the United States and into the proposal for a German law that the German Government was developing. While other participants commented on this annex and the draft law, the U.S. Government lawyers were the primary interlocutors in the talks with the Germans. At one point, Stu Eizenstat even testified on the law before the German Bundestag.

This was a unique role for the U.S. Government. It is unusual, and perhaps unprecedented, for the U.S. Government to be involved in a detailed discussion

of the exact terms of a proposed internal law of another country. This was needed here, however, since the German law—and the annex to the executive agreement concerning it—set the essential parameters for the Foundation that was being established by this complex negotiation among the governments, attorneys, German companies and the Conference on Jewish Material Claims against Germany.

As the negotiations came to a conclusion, we needed a document indicating what further steps it was agreed each participant would take. It would not have been appropriate to have an international agreement between individual lawyers, private companies, an NGO and sovereign states. We therefore developed a document that set forth political rather than legal commitments—that is, undertakings that various participants “will” take various steps, rather than legal commitments that they “shall” do so. At this phase, we were once again involved in a negotiation with all the participants on the text of what became the “joint statement.” This document set forth the undertakings of each party as to the steps it would take. This final aspect of the arrangement was more akin to a resolution that an international organization adopts. But this was not a negotiation in an international organization.

The “joint statement” was crucial from another, and perhaps more important, perspective. In December 1999, after much negotiation, agreement was reached on the 10 billion DM capped settlement amount. But no one wanted to leave the agreement at that, since the Swiss bank settlement did not result in prompt payments in major part because there had been no agreement on how to allocate the funds. Thus, from December to March 2000, the participants in the German Foundation talks had the difficult task of negotiating how the 10 billion DM would be allocated. A chart attached to the joint statement reflected the resulting agreement on allocation, with all participants declaring their agreement to the distribution plan. Each participant signed the document in July 2000, at the same ceremony at which the executive agreement was signed. As a result, as you all surely are aware, the major portion of the funds will go to seven partner organizations to make payments to former slave and forced laborers, but funds are also reserved for property claims, insurance, and a future fund.

Thus, in the German Foundation talks, the United States Government played both the roles of a facilitator and mediator among disparate parties, and, in a manner of speaking, of a treaty negotiator with another government. It played the role of a government pressing another government on internal law matters, and the role of a government engaged in a multilateral negotiation of a final document of a “conference.” The combination of roles, the interaction of the parties to the negotiation, the series of issues addressed, the variety of documents in which the final deal was reflected—all these were unique and unprecedented.

Let me wrap this up with a number of observations.

Clearly, the United States will engage in claims settlement negotiations in the future; that is a traditional function, well-established in U.S. and international law, which serves to remove irritants from relations with other countries

and to benefit U.S. citizens. Do the Swiss bank settlement and German Foundation arrangement serve as precedents for a U.S. Government facilitation role? Obviously, the latter has served as a precedent for similar (but not identical) Holocaust arrangements with Austria and France. (My colleague Mr. Rosand will address the Austrian settlement during this symposium.) In both the Austrian and French cases, all the parties to the dispute requested that the United States Government assist in fashioning arrangements taking the German Foundation settlement as a point of departure.

Beyond that, there may be future disputes that are between private parties, some of which are foreign, where all the parties request the U.S. Government to become involved to facilitate a negotiated resolution. Where the dispute is in the form of private litigation in U.S. courts, it is important that all parties to the dispute request U.S. Government involvement as a facilitator. Whether the U.S. Government agrees to facilitate the resolution of such disputes, will be, I think, a case-by-case decision, based on a judgement of the United States government interests involved in the circumstances presented. In the Swiss case, as I mentioned, we concluded that our involvement was in the U.S. interest because it would remove an irritant from relations with an important country and because it would bring a measure of justice to certain claimants. In the German case, we concluded that we had similar interests—again, bringing a measure of justice to Holocaust victims as promptly as possible and removing an irritant from relations with an important ally. Those sorts of interests could well arise in a future case.

Thank you.