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Restitution Negotiations - The Role of Diplomacy

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Restitution Negotiations— The Role of Diplomacy

Remarks By
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Ladies and Gentlemen,

This symposium, Fifty Years in the Making: World War II Reparation and Restitution Claims, is a welcome opportunity to examine and assess the topic from an academic distance and free from partisan approaches. To look into the issues of reparations and restitutions from a mere legal point of view could be misleading and obscure one's view. Aspects of civil, criminal and international law, as well as human rights, are mixed together with economics, history and international and public relations, and all of them are subject to the eternal moral question: What is justice, what is a fair retribution?

It is thus significant and should not come as a surprise that solutions were considered and finally achieved with the instruments of diplomacy in a multidisciplinary effort. Isolated lawsuits or bilateral government to government negotiations, carried out without considering economic, social, historic, and, above all, human aspects and their interactions could not and cannot bring lasting results.

The recent agreement on restitutions, signed by Austria, the United States, representatives of the claimants, and individual lawyers on January 17, 2001 in Washington, D.C., together with the previous agreement of October 24, 2000 on Slave and Forced Labor, is a good example, and can serve as a case study of how multilayered the whole issue is.

The language of the "Exchange of Notes Between the Austrian Federal Government and the Government of the United States of America," as well as the introductory provisions of the "Joint Statement," embrace all the historic and legal aspects of Austria's past, and her efforts toward restitution measures after World War II.

To fully understand the bearing and importance of the January 17 agreement, one should examine its various elements. I shall briefly endeavor to guide you through this maze without creating too much confusion. I begin with historic facts and their legal consequences as far as reparations, slave and forced labor, and restitutions are concerned.

- Austria became part of Germany in March of 1938 through an act of aggression and violation of international law and of various bilateral and

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multilateral agreements. Germany was eager to create the appearance of legality, but it is a fact that the so-called *Anschluß* was also in violation of Austrian constitutional law.

- The international community, which in the beginning was stunned and accepted the incorporation of Austria into the German Reich, soon changed its attitude. Churchill declared already in 1940, and Roosevelt and Stalin followed suit in 1941, that it was one of their aims to liberate Austria, long before the Moscow Declaration in November 1943 stipulated this goal formally.
- After 1945 Austria thus was treated as a liberated, and not an enemy country. However, the Moscow Declaration stipulated Austria's responsibility for atrocities perpetrated by her citizens until 1945. Indeed, there is no distinction between Austrian and German individuals in this aspect, and Austria as well as Germany have carried out their respective de-nazification measures after the end of World War II.

As a consequence of the Allied Powers' policy that Austria was liberated, reparations were not demanded. (Art. 21 of the State Treaty 1955). Reparations in general are payments and compensations for violations of international law . . . are part of Peace Treaties between victors and defeated countries.

Slave and forced labor of civilians of an occupied country has been a violation of international law since the Hague Convention of 1907 (Art. 52). At the time of the Austrian State Treaty, the question of slave and forced labor was not discussed, as most of the victims had returned behind the Iron Curtain and could not be reached. The Soviet Union did not show interest in pursuing their claims due to obvious reasons.

Since Austria was treated as a liberated country and had not been able to act on her own between 1938 and 1945, the international community did not hold it responsible for the deportation of foreign civilians and their exploitation as enslaved and forced laborers. Yet, Austria has now agreed to establish a fund to compensate surviving foreign laborers who had been forced to work on the territory of today's Austria.

Here we have the first example of the fact that a single-discipline approach to a problem—in this case the strict application of international law—leads nowhere. More than 50 years have passed since the deportation of enslaved and forced laborers. Whereas Austria obtained its freedom from occupation by the Allied Powers in 1955 in the State Treaty, which explicitly states that Austria does not have to pay reparations, no peace treaty was ever concluded with Germany and the question of compensation for slave and forced labor thus was never dealt with. It took the lifting of the Iron Curtain, the reunification of both Germanies, and the substitution of the Soviet Union by independent successor states open to democracy to focus on the question of slave and forced labor.

Much has changed since 1955 inside Austria as well. Whereas immediately after WW II the Moscow Declaration of 1943 and Austria's role as a first victim of Hitler's aggression made nation building a matter of utmost and vital

importance for Austria, today's Austria, self-assured as a nation of its own, was looking at the question of slave and forced labor not with cold legal logic, but rather with an acceptance of a moral obligation to people who in many cases had been victimized a second time through communist rule. Some of the former communist countries, where most slave laborers presently live, will join the European Union sooner or later, and thus come even closer to Austria.

Nevertheless, the agreements with the East European nations and the United States, as well as the Austrian Federal Law carrying out those compensation payments, make it clear that, due to the existence of Act 21 of the State Treaty, no claim can be levied successfully against the Republic of Austria. The payments are therefore of a voluntary nature.

The explanation of Austria's readiness would, however, be incomplete without giving credit to another aspect which had an important impact—the role of American law which by its nature knows different and much wider-reaching possibilities than European tort laws. Class action suits, malpractice and product liability suits are carried out in a quite different way in the United States than they are in Europe. Law in Europe was historically handed down to the citizens by the top authorities: emperors, kings and other rulers. Whereas the sovereign—today the people—hands down the law to society, courts simply interpret and execute the laws; they do not create them. Here in the United States, however, you do not only have the tradition of common and case law, but law originates historically from the consensus of basically equal and free citizens. The role of courts and judges more often than in Europe is that of an arbiter who brings about settlements, rather than hands out verdicts. The cultural approach towards lawsuits is also different in the United States and in Europe, where everyone is still a bit afraid of the authorities and courts. Whereas European tradition is one of regulation, yours is one of litigation. To be sued in Europe still evokes a certain bad feeling as if one's honor is at stake. This is even more true in the Far East. In the United States, however, lawsuits are handled more businesslike and matter-of-factly.

With intensified business and economic links with the United States, private European enterprises, banks, and other entities are more exposed than ever before to lawsuits in the United States. This is even true when a business transaction with the United States is carried out by state owned enterprises, since in such cases states and governments cannot claim immunity from jurisdiction.

The prospect of lingering and costly lawsuits with clashes of European and American standards (such as: questions of forum shopping; questions regarding which law governs a case; different statutes of limitations; differences regarding the appointment of judges; a different role for juries; different ceilings for indemnities and—last but not least—different rules for the reimbursement of lawyers) have enhanced, or, if you will, created, the basis for the readiness of European banks and enterprises to enter into settlement negotiations in the United States. Nevertheless, absent the United States government's decision to participate in the negotiations as a moderator, enhancer and party, no result would have been achieved. The engagement of the United States government to

bring an enduring legal peace by "certifying" the results of the negotiations as being fair and adequate was the bridge that closed the gap between diverging and sometimes emotionally exacerbated arguments. Only through this mix of legal agreements, considerations of historic facts, negotiations of acceptable amounts, and political and intra-cultural sensibility, can one understand and appreciate what has been achieved. For example, in the case of slave and forced labor, both the Republic of Austria and Austrian businesses pay equal shares into a common fund.

The question of restitution for stolen Jewish property was dealt with by separate negotiations. The comments I made before regarding compensation for slave and forced labor also hold true for restitutions. However, what made the settlement more difficult and remarkable were the more complicated background, the more intense emotions, the higher degree of moral shame and responsibility on the Austrian side, as well as the greater influence of public opinion which has been mobilized sometimes to a degree of exaggeration and unfairness on both sides of the Atlantic.

From a strictly legal standpoint, Austria had already fulfilled her obligations by adopting restitution laws and by setting up funds under the provisions of the State Treaty. This has been acknowledged by the United States and the Claims Conference in 1961. It was clear to both sides, however, that there had been gaps and shortcomings which were regarded as negligible then, but which had to be remedied with growing insight and growing awareness, including among nations that had not been perpetrators of Nazi crimes themselves, but had in some way benefited from Nazi expropriations. This feeling of necessary reassessment grew with the determination of the second and third generations of victims who pursued these deficiencies with even deeper emotions than the generation of their parents. Historic commissions had been set up in various countries including the United States, France, the Netherlands and, of course, in Austria to examine these deficiencies in detail. One result of these efforts was an educative and healing process for all parties involved.

In Austria for instance, the process of understanding what had happened two generations ago—also at the hands of Austrian perpetrators—had never faded, but has receded gradually in the public memory. Now it became known what had been left out in the past, but also what Austria had done as a reborn state since 1945 to make restitutions and compensations with her then-limited resources. We should not forget that Austria was at the time one of the main recipients and beneficiaries of urgently needed help under the Marshall Plan. Austria's past efforts, therefore, deserve credit, and should not be belittled and vilified.

What had been lacking in the past, apart from closing some obvious gaps, was general sensitivity for the true victims of the Nazi atrocities. The suffering from the war and struggle for reconstruction and independence was accompanied by a mostly legalistic approach in dealing with the atrocities and looting of properties on a case by case basis. The multilayered complexity which I noted

earlier was neglected. As a result, the society at large did not develop a general attitude of seeking atonement of what had been done to the Jews.

The legal and historic truth that the Republic of Austria had lost her independence in 1938 when Austria fell victim to Nazi Germany, a truth which had to be stressed again and again to remind the Allied Powers to live up to their promises to liberate Austria did not help to bring about such insights and sincere compassion among the public at large.

The agreement of January 17, 2001 is able to remedy this deficiency. It compensates for loss and damage to leased apartments and household goods, expands existing pension rights, and includes insurance claims and makes allowances for the restitution in kind of properties which have not been returned yet. The respective Austrian Federal Law was adopted unanimously by all political parties in the Austrian parliament. As in the case of compensation for slave and forced labor, the funds come from the Austrian Government as well as Austrian businesses. Enduring legal closure is also part of the agreement since the US administration has agreed to provide Austria with the best possible protection against further claims.

"Niemals vergessen"—never forget—is the most important lesson to be learned from the past. But never forget should not mean never forgive. Forgiveness and reconciliation are the ultimate goals to which we all should aspire. These goals transcend legal questions and claims.

I can tell you from my experience in the short time since January 17, 2001 that I feel relieved, and free to reach out to the Jewish communities in a far better way than before. When I point out what Austria has done and explain, for example, that Austria has continuously had a working Holocaust education program for almost 30 years, I no longer receive rejection and reproach that my stories are nothing else but fig leaves for restitution payments that are long overdue. The results of the January 17, 2001 agreement are the basis for a lasting reconciliation and a better future. The earlier settlements may have been an illusion. Let us work together so that the recent ones live up to our expectations.