

Remembrance, Responsibility and the Future
Fulfilling the Promise of Justice through Dignified Payments

Ambassador J.D. Bindenagel

U.S. Department of State

Industrie und Handelskammer, Munich, September 22, 2000

Dr. Hipp, Herr Gibowski, Generalkonsul Boehme, members of the Chamber, ladies and gentlemen. Thank you for inviting me here today to discuss the importance of the German Foundation: Remembrance, Responsibility and Future.

It is always a pleasure to return to Munich, my first duty station while serving in the U.S. Third Infantry Division was in Wuerzburg during the Cold War. Ten years ago I was the deputy U.S. ambassador (Gesandter) in East Berlin and was present (ich war dabei) as the Germans in East Berlin achieved what President Reagan asked of Gorbachev; they tore down the Berlin Wall. These events a decade ago unleashed many forces that not only led to unification of Germany, but also created the opportunity to reach out to the "double victims", those who were trapped by the Cold War behind the Iron Curtain.

I would like to address several contributions this new foundation has and will make:

- To the reconciliation with victims of National Socialism
- To the common commitment of the United States and Germany to human rights and the inviolability of human dignity
- To legal peace for German industry from crimes arising out of the National Socialist era
- To the debate on a new diplomacy

The German Government led the way in the early 1990's with its agreements for humanitarian payments to survivors and needy victims in Central and Eastern Europe. Now German companies, joined by the German Government, have taken the initiative to create this new foundation and bring some justice to surviving victims in their lifetimes.

Reconciliation with surviving victims of National Socialism

The Foundation will:

- Receive half of the money from the German Government and half from German industry.
- Distribute 10 billion marks to benefit former forced and slave laborers and other victims of German industry during the Nazi era and create a Future Fund.
- Make possible legal peace for German companies for crimes of the National Socialist era by paying over a million potential beneficiaries, the majority from Central and Eastern Europe.

But the real meaning of the Foundation transcends this brief summary of statistics. It is truly a creation of historic importance and vision. However, it was not created overnight, but was

forged in over a year of intense negotiation among multiple parties and nations, all of which made critically important contributions to the Foundation's final form.

The Role of Germany

In late 1998, faced with numerous class action lawsuits brought in U.S. courts by former slave and forced laborers of the Nazi era -- and the fact that U.S. banking and insurance regulators were investigating some German companies with licenses in the U.S. for possible failure to fulfill contracted obligations from that time -- several large German companies took the initiative.

Led by Henning Schulte-Noelle, Rolf Breuer and Juergen Schrempp, a German Enterprises Initiative was born. Dr. Manfred Gentz became the spokesman and creator of the vision of reconciliation between German companies and former slave and forced laborers. They proposed to create a Foundation that would make voluntary payments to some Nazi victims. Initially, the goals of the Foundation were quite limited. Given the small amount of funding proposed, and the narrow definition of the potential beneficiaries, the Foundation initially appeared to some detractors only to be an effort to deal with some of the practical public relations and specific legal problems that these individual companies faced in the U.S. On the contrary the proposal by the German companies sued in the United States was a critical first step to justice for nearly a million people.

In suggesting that the impetus for the Foundation was practical in nature, I am not saying that the German companies who proposed it were indifferent to the moral dimensions of the issue. Not at all, as a matter of fact, during the eighteen-month-long negotiation that created the Foundation, German industry representatives worked hard to ensure that the Foundation would do far more than simply arrange for checks to be passed out. For example, adequate capitalization of the Future Fund -- the Foundation's entity for long term social and educational programs -- was an "idée fixe" of German Company representatives.

The Foundation as it is today with its greatly increased benefits package, expanded eligibility criteria, and permanent social and educational "Future Fund" would not have been possible had it not been for the personal involvement of Chancellor Gerhard Schroeder. Certainly, there were vitally important practical issues at stake: class action lawsuits in U.S. courts threatened some German companies with years of litigation and possibly large damage judgments, American insurance and bank regulators were considering whether to revoke operating licenses of those companies found to have unfulfilled obligations contracted during the Holocaust years, adverse publicity threatened serious damage to Germany's reputation for corporate "good citizenship", there was the possibility of potentially serious disruptions of trade between two of the world's great trading partners, and, of course, the potential for political fallout -- both domestic and international -- that would result from any of the above.

Chancellor Schroeder understood the issue in its broadest terms. There was certainly a pressing need to take action to deal with practical, tangible, and important issues. But, there was more. There was an issue of justice needing to be served:

- Here was the last large grouping of Nazi victims for whom no prior German program of assistance or recognition existed.
- Here was an opportunity to break with previous German government attitudes toward the victims of German industry during the Nazi era.
- Here was an opportunity to begin the new century with a tangible reaffirmation of the underlying moral and humanitarian precepts of Germany's post-war democracy.

The Chancellor not only applauded the Foundation initiative, he pledged to contribute half of its capital, and made its creation and its funding a moral responsibility of the German government.

The Chancellor gave earnest of his determination to see justice done for former slave and forced laborers by appointing Graf Lambsdorff as his personal representative for this issue, a man who commands the greatest respect in both the United States and in Germany. The German Bundestag participated in the negotiations and drafted the legislation to create and fund the new foundation.

In 1998, the German Government also asked the U.S. government if it would consider providing its "good offices" to organize a negotiation that would create and define the Foundation. This was a daunting task as those presenting the victims of Nazi industry were a large and diverse group: five governments from Central and Eastern Europe, some 30 law firms representing various plaintiffs, the Conference on Jewish Material Claims Against Germany, and the state of Israel.

The U.S. Role: Our common commitment to human rights and the inviolability of human dignity

The policy of the United States with regard to this German effort to assist Holocaust survivors, survivors of slave and forced labor and other victims of National Socialism is motivated by two fundamental concerns -- justice and urgency. We all know that no amount of money can compensate for the suffering of the victims; but the United States and Germany are bound together by our common commitment to human dignity. This Foundation, which the United States has supported from its inception, will bring a measure of justice to survivors and will honor and respect the suffering experienced by them.

Although the U.S. was never a direct party to any of the class-action lawsuits (Sammelklage), given the importance of the issue to U.S.-German relations and its humanitarian aspects, the U.S. government accepted the Chancellor's request to join the effort. The U.S. effort was brilliantly led by Deputy Secretary Eizenstat, and involved over a year and a half of work by dedicated staffs in the Departments of State, Justice and Treasury, and also the engagement of the most senior levels in the White House.

The U.S. role was simply that of a "facilitator". We engaged and have continued to engage with foreign governments, with corporations, and with international and national non-governmental organizations to assist in the success of this effort. However, we were never in a position to decide the outcome of the talks. Only the parties to the negotiations could do that. But, what we could do -- and did do -- was create a process that held out the hope and expectation of an agreement -- a Foundation -- that would be more than just about money. How did we do this?

Firstly, Secretary Eizenstat insisted on inclusiveness. By that I mean that this was not to be a bilateral U.S. - Germany negotiation. All major representatives of the victims would have to be included from the beginning. That meant over one hundred lawyers, large national delegations, and the senior leadership of the Conference on Jewish Material Claims Against Germany.

The inclusion of delegations from five Central and Eastern European countries was especially important to us. Just as the U.S. chose to be the most ardent supporter of German democracy and unification in the past, so the U.S. is today the most active sponsor of the development of democracy and free markets in Central and Eastern Europe. Europe "whole and free" is, today, a fact. But, to keep it so, we understand that the youthful democracies and economies of Central and Eastern Europe must be a success. As Central Europe's most prosperous and dynamic democracy, Germany will always be vital to the region. We cannot expect that the countries of Central and Eastern Europe will develop economically and politically at the pace we all hope without a comprehensive, and ongoing effort at reconciliation with Germany.

Secondly, Secretary Eizenstat insisted on openness. There would be no secret deals behind closed doors. Consistent with confidentiality and the proper running of a negotiation, both Secretary Eizenstat and Count Lambsdorff made themselves repeatedly available for candid

sessions with the press. All of the basic documents produced during the negotiations were made public, especially through special web sites on the Internet. We wanted to ensure that the very large group of potential Foundation beneficiaries world-wide, as well as the many, many others vitally interest in their cause, would have complete access to primary documents of relevance.

Finally, Secretary Eizenstat sought early agreement on a set of allocation principles. These he proposed as general guides to the discussions. Briefly these were:

- Slave and Forced labor shall have the highest priority in allocating Foundation funds. Payments shall include an inclusive category for personal injury and other cases, including but not limited to, medical experimentation, mothers of "Kinderheim" cases as well as all other personal injury cases directly involving German companies.
- An allocation shall be made for "Aryanized" property claims against German companies and for heirless, humanitarian, and insurance claims.
- An allocation shall be made for the Future Fund for projects of tolerance, taking into account the heirs of forced labor.
- Decisions on allocations are made recognizing that the Foundation provides a potential remedy for any possible claim against German companies arising out of the Nazi era.
- The United States strongly supports the efforts of the victims' groups to reach agreement on a fair and equitable allocation that can be set into the German law.
- Following these Eizenstat principles we ensured an equitable balance between competing requirements for the limited funds available.

As difficult as this allocation negotiation was, we knew that settling accounts with the injustices that took place over fifty years ago profoundly affects all who fell victim to the experience. These principles, I am pleased to say, represent the core of what the parties eventually agreed upon.

Legal peace for German industry from crimes arising out of the National Socialist era

With the July 17 agreement reached in Berlin, the enactment of the Bundestag approved legislation and the exchange of diplomatic notes bringing the U.S. German Executive Agreement into force, the United States agreed to file statements of interest in lawsuits filed in the United States asserting claims against German firms for crimes arising out of the National Socialist era.

Such intervention by the United States is unprecedented and the statement of interest will inform the court 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 and that the dismissal of such cases would be in our foreign policy interests. In addition the United States has agreed to use its "best efforts", in a manner it considers appropriate, to achieve an all-embracing and enduring legal peace with state and local governments.

What we have achieved is unique. This agreement is an outgrowth of U.S. policy of fostering voluntary cooperation between the victims' groups and the German Government and German companies to bring expeditious justice to the greatest number of survivors.

The debate on a new diplomacy: Working Toward Achieving Justice

The Holocaust in general, and the specific wrongs committed by German industry in particular, were so horrible in fact, so pervasive in impact and so injurious to human rights as

to challenge the concept of obtaining justice. How can justice be done for so many, for such suffering, and over such a prolonged period of time? Money cannot compensate. It is too crass a commodity of exchange, and, in any event, there is not enough of it. Words are not enough. They need something tangible to give them solidity.

We have also seen in this process a new role for plaintiffs' attorneys in diplomacy. Writing in the latest edition of *Foreign Affairs* magazine, Anne-Marie Slaughter and David Bosco assert that "U.S. courts have become a venue of choice for such suits [Holocaust survivor] because they offer plaintiffs the benefits of procedural mechanisms . . . not to mention the prospect of unparalleled media coverage and U.S. Government involvement." The authors go on to name this "Plaintiffs' Diplomacy". Indeed they argue that class-action suits against corporations for violations of international law are likely to complicate diplomatic relations and generate pressure on governments from powerful corporations. The jury is out on this thesis, but the new German Foundation will undoubtedly set the standard of measure as we go forward.

For former slave and forced laborers, and other victims of German industry, the mechanism for providing some form of meaningful "justice" is the Foundation. It is not perfect. It will not satisfy everyone. It can never "compensate" for the past. But, it does have what I believe fair minded people will agree are the elements of justice. It is, perhaps not so much justice "obtained" as it is justice "pursued". These key elements are:

Humanitarian Assistance: The Foundation will provide assistance to aging victims at a time of their greatest need. The vast number of beneficiaries are in their late 70's or early 80's. Many are in poor health and in financial distress. Despite the very large number of potential beneficiaries, the DM 10 billion capitalization of the Foundation will ensure that these payments meet the minimal test of being "dignified" for each category of beneficiary. This humanitarian "gesture" will be of measurable help to hundreds of thousands of survivors, far beyond what litigation could have served.

Recognition of Injustice and Suffering: To add to the "financial gesture", the Foundation itself which is intended to be an organization that will continue well after the last check is sent to the last victim -- represents recognition of the injustice and suffering these victims sustained during the Nazi era. On December 17, in Berlin, and in the presence of Holocaust survivors and senior representatives from Central and Eastern Europe, President Rau made clear this key aspect of the Foundation. He said the following:

"I know that for many it is not really money that matters. What they want is for their suffering to be recognized as suffering, and for the injustices done to them to be named injustices. I pay tribute to all who were subjected to slave and forced labor under German rule and, in the name of the German people, beg forgiveness."

President Rau's apology provides assurance to many that the last word on the Holocaust and the Nazi era will not be about money.

Programs for the Future Rooted in the Lessons of the Past: When the last check has been mailed to a survivor, the Foundation, in the form of the Future Fund, will live on in perpetuity. Endowed by DM 700 million, it is charged with designing programs that fight injustice, racism, and intolerance, create ongoing social programs in the memory of those who have died, and launch educational programs to ensure that the memory of what happened is not lost.

Reconciliation Among Nations: Germany and the countries of Central and Eastern Europe have worked hard over the past decade to deal with the residue of the Nazi era, and to forge a network of linkages for the future. The Foundation builds on these efforts. It is, arguably, the most important, tangible example of this joint commitment. Germany and countries of Central and Eastern Europe came together, with U.S. support, for a year of some of the most painful negotiations I have been a party to. It could not be otherwise, given the searing history of the Nazi era and of the Holocaust. But, the results -- indeed aided by the process itself -- were part of the healing.

Conclusion

In sum, all of these specific elements are integral to the charter and operation of the Foundation. They are designed to address directly, and in cooperation with other economic and political programs Germany has undertaken in the past, the humane and moral obligation Germany has as a result of the Nazi era. As the Foundation's own name so aptly categorizes these essential elements, they are truly, "Remembrance"... "Responsibility"... "and the Future".

Thank you.