

INTERNATIONAL ADVOCATE FOR PEACE AWARD ACCEPTANCE SPEECH

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I feel very much at home here because I was here three or four year ago at a symposium at the law school—a panel with Adam Durshowitz and Erwin Cogler, who was then Administer of Justice of Canada, and others. I have also received an honorary doctorate from Yeshiva University, and I feel very much at home here. I just met Dean Dillard and Professor Love, but I have some longtime friends here: Professor Weisberg, who I will talk about in a moment, is one of the heroes of this whole episode; Eric Pan, your professor of Commercial and International Law, was one of our great associates at Covington Burling who had the good judgment not to fill out any more time sheets and to actually teach. And so it is really a particular pleasure to be here. And Jordan [Walerstein], thank you very much for everything you have done; I am very honored to receive the award, especially from the entity that is giving it to me in light of the past recipients.

I want to talk more broadly about conflict resolution and I will put my negotiation of Holocaust restitution in that context. I start

¹ We honor Ambassador Stuart E. Eizenstat for his commitment to international peace building. For over a decade and a half, Ambassador Eizenstat devoted his energy to public service in three U.S. administrations. He served President Carter as chief White House domestic policy adviser. From 1993–2001, he served as U.S. Ambassador to the European Union, Under Secretary of Commerce for International Trade, Under Secretary of State for Economic, Business and Agricultural Affairs, and Deputy Secretary of the Treasury in the Clinton Administration. Currently, he heads the international practice of Covington & Burling, LLP and focuses his peace-building expertise on international trade problems and business disputes with the U.S. and foreign governments.

During the Clinton Administration, Ambassador Eizenstat had a prominent role in the development of key international initiatives, including the negotiations of the TransAtlantic Agenda with the European Union, the development of the TransAtlantic Business Dialogue (TABCD) among European and U.S. CEOs; the negotiation of the Japan Port Agreement with the Japanese government; and the negotiation of the Kyoto Protocol on global warming, where he led the U.S. delegation.

Much of the interest in providing belated justice for victims of the Holocaust and other victims of Nazi tyranny during World War II was the result of his leadership in the Clinton Administration as Special Representative of the President and Secretary of State on Holocaust-Era Issues. He successfully negotiated major agreements with the Swiss, Germans, Austrians, French, and other European countries, covering restitution of property, payment for slave and forced laborers, recovery of looted art, bank accounts, and payment of insurance policies. His acclaimed book on these events entitled “Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II” has been translated into four languages.

with the sort of provocative question: in this war-torn period in which we live, with conflict all over the news; with the end of the Cold War unleashing tremendous forces which had been suppressed of nationalism, ethnic conflict, Islamic radicalism; with genocides that have occurred since the Holocaust from Cambodia and more recently Rwanda, from the Congo to the former Yugoslavia; with the rise of non-state terrorist actors— Hamas, Al Qaeda, Taliban, all bent on destroying the established order and replacing it with some type of Islamic, Califate and Sharia law; with nation states like Iran and North Korea, which disregard international law and specific U.N. Security Counsel resolutions; is there in fact any progress we have made on conflict resolution? And I want to suggest that there actually has been progress, notwithstanding the points that I have just made. And let me enumerate those and then put the Holocaust negotiations into that broader context.

The first is that there are places where the established order—an imperfect and I would say an immoral order—have been peacefully changed without bloodshed. South Africa is a good example. In part, that occurred because the international community, through U.N. sanctions, isolated South Africa and made the cost of maintaining Apartheid minority rule higher than the benefit. But, beyond that, the 1994 election of Nelson Mandela was also a peaceful transition to what could have been a bloodbath of retribution for decades and decades of oppression. It did not happen for several reasons. One, because of Mandela himself at twenty-seven years on Robben Island coming out without bitterness and hostility but with a sense of generosity and a largeness of purpose, which is a model for all of us. In addition, because there was created, ironically headed by Judge Goldstone—more on that in a moment—a special commission to formulate with one of the partners at our firm, Chuck Ruff, and they came up with a set of election laws which everyone felt was just, and set down principles so that property belonging to white farmers, for example, could not be confiscated. And then last, and perhaps most significant, was Mandela's notion of creating a Truth and Reconciliation Commission, which is a form of alternative dispute resolution in which those who had been victimized during the Apartheid era could come and present their complaints and problems and what had happened to them, and those who perpetrated them could come before the same commission, admit to what they had done and get total amnesty. And

it began a process of reconciliation, which really is a model, and it can be starkly compared, for example, to Zimbabwe today.

Second, we are developing concepts of international human rights law and institutions to enforce them, which I think will both prevent conflicts and bring those who cause them to justice when they occur. There were several people in the Administration who were instrumental in helping negotiate the Rome Treaty creating the International Criminal Court. While I was not one, I was enlisted by the leaders in the Administration to help encourage the President, which I did, to sign the treaty over the objection of our military. It was never submitted to the Senate, but a series of ad hoc international tribunals have had a very important role in conflict resolution. For example, the Balkan Tribunal was the first international tribunal since Nuremburg in which the concept of wars against humanity were elaborated and given a modern focus. Nuremburg was itself a tremendous breakthrough, created by and at the leadership of President Truman and interestingly the Secretary of Defense Henry Stimson at the time, and over the objection of the great Winston Churchill whose basic notion was: let's just put all these Nazi leaders against the wall and shoot them the way they shot Jews, Slaves, Jahova's Witnesses, Gypsies and others. And the Balkan Tribunal was a landmark because it created a prosecutor; it created a series of judges as we had at Nuremburg; and the American intelligence agencies—which often do not share information with their own government—shared information with the Balkan Tribunal that made it possible to try and convict those guilty of the ethnic cleansing during the Balkan wars, and also lead to many acquittals. The Rwanda Tribunal followed thereafter, and now there is an effort to activate a Darfur tribunal. All of these create a certain momentum. They demonstrate that people can get a fair trial internationally under a combination of customary international law, human rights law, and an evolving body of jurisdiction.

That leads me to the Goldstone report. This was not a tribunal. It was not a process by which evidence was introduced on both sides with witnesses to testify and judges making objective decisions. And that perhaps was its great flaw. Ironically it was the same Justice Goldstone who was involved in creating the commission in South Africa and who was the first prosecutor in the Balkan tribunal. I believe that Israel made two mistakes with respect to the creation of this tribunal after the Gaza wars. And let us remember that the Gaza wars were occasioned by three years of rocket attacks against civilians following a complete, total pullout

from Gaza by Israel. The first mistake was not cooperating with the commission itself, for good and sufficient reason from Israel's standpoint for reasons that I will mention. And the second was not following the recommendation as of yet—they are still in internal debate within the government—to do their own civilian review to backup the international review.

The Goldstone report was, in my opinion, unfair in a variety of ways. First, because it accepted a mandate from the U.N. Human Rights Council, which had a long record of unfairness toward Israel. Indeed, some two-thirds of its resolutions have been against Israel at over twenty, and not one against any country in Africa like, for example, Zimbabwe or Sudan. In addition, several of the members of the commission were, in my opinion, already prejudging, so they should not have been allowed to continue. By their own writing, they had indicated before the fact-finder that they believed Israel had acted improperly and illegally in the Gaza war, and the notion that they could stay on and be objective passes imagination. The report itself was also highly one-sided. It failed to recognize properly the provocations. Perhaps one of the most salient problems was the notion of finding that Israel had consciously targeted civilians for destruction rather than that being a side effect of any war, and that Israel had used disproportionate force. The great failing was not to recognize that we live in a world in which your generation is going to face one conflict after another, and we have an asymmetrical situation. We are seeing it today in Pakistan and Afghanistan; we had it in Iraq; we had it in Lebanon; we have it in Gaza and in the West Bank; where you have non-state actors who feel no compulsion to abide by international law and embed themselves amongst civilians and then taunt and tempt nation states to react. Goldstone would have done a benefit for the whole issue of conflict resolution had he actively and honestly looked at how one conducts asymmetrical warfare against terrorist groups that embed themselves amongst civilians, rather than look at this as if it were two armies fighting each other on an open plane like World War II.

The third process which leads me to be more positive about conflict resolution is the very process of globalization itself, by which I mean the increased integration and mutual self dependence of countries on each other's economies and the rapid instantaneous transfer of capital, trade, goods and services across national boundaries, obliterating national boundaries at the push of a button. And I want to suggest to you—and I could give you an

entirely separate speech on how globalization creates inequalities; how it created conflict; how Al Qaeda uses the same websites to motivate and recruit terrorists—but that, on balance, globalization is a positive in conflict resolution. Let me give you some examples of why.

First, one of the lessons that I have learned as Ambassador in the European Union was to see the degree to which the integration of the economies of former bitter enemies, in particular France and Germany, who had gone to war three times in one hundred years. By integrating their economies, by creating a common market, by now creating a common currency—as someone said to me when I asked a French diplomat as they were just about to create the Euro, I said, “How is it possible that the French are going to give up the French Franc which is such a symbol of French sovereignty?” and he said, “You do not understand; Germany cannot go to war against its own currency”—and so by integrating Europe, now east and west, for the first time in history, you create such an interlocked relationship that conflict becomes almost impossible, or the conflict that occurs is at the margins on trade issues and fiscal policy and not on military.

To take that to a current situation, the differences between China and the U.S., the U.S. the superpower but China the emerging superpower, will not be, in my opinion, anything like the Cold War standoff between the U.S. and the Soviet Union, in which only mutually assured nuclear destruction prevented a conflict between two competing ideologies. Because the Chinese and American economies are bound at the hip like Siamese twins, unwanted perhaps, but one dependent on the other—China dependent on the U.S. to be the importer of its goods, and the U.S. dependent on China to buy its debt. The notion of military conflict of anything like the Cold War era is unthinkable. Now, for sure, we have major conflicts with China: on currency valuation; on whether it is going to do enough on Iran with sanctions; on its leadership in respect to getting tough on North Korea. But the notion of the kind of conflictual situation that we had during my maturation between the Soviet Union and the U.S., between N.A.T.O. and the east block, is very unlikely to occur because globalization has bound these two great powers together in ways which make them inseparable.

In addition, globalization, I believe, will be a great conflict resolution device because of the very technologies which power it: the digital era; computers; mobile smart phones—we just reached a point in the United States in which more mobile than fixed-line

phones have been sold, and there are more users of mobile phones in developing countries than there are in developed countries; they have skipped over the whole landline history—and it has empowered individuals. It has created social networks. And I ask you, without being able to answer it myself: if we had video cameras and smart phones and all of the digital devices that exist today, would the Holocaust have been possible? Would Kristallnacht? Would the massive deportations have been possible? Look at what has happened in Iran. The whole opposition, albeit now highly suppressed, showed to the world what a criminal dictatorship exists there by the power of YouTube; by seeing this twenty six-year-old young lady killed brutally by the police and broadcasting it to the entire world; by seeing the suppression that was going to occur. The Internet is a tremendous empowering device that allows individuals to try to resolve conflicts, and I believe it makes the suppression of human rights not impossible, but more difficult. Would Darfur have occurred if the people in Darfur were not so dirt poor that they could not afford to have cell phones or computers? Indeed, when Darfur was at its peak, this was still a technology in the development stage.

In addition, we have created a series of international institutions—which again I could give you a separate speech on their imperfections—which are conflict resolution institutions. For example, with the World Trade Organization, which had in its predecessor the General Agreement on Tariffs and Trade (G.A.T.T.), countries could bring each other to the G.A.T.T. for trade disputes, but it was totally voluntary as to whether the losing country would obey the mandate. This is no longer the case. When a three-judge panel makes a decision that a particular trade issue violates W.T.O. law, it is binding on the countries. Every country from China to the smallest country can bring a case and can be sued, and in every single case it must abide by that decision. This is a conflict resolution process that takes the edge off of many trade disputes. It creates much less protectionism than would otherwise exist.

I was involved very much in developing under the auspices of the Organization for Economic Cooperation and Development (OECD), which, by the way, Israel is poised to join this sort of club of elite democracies this very year. I negotiated during the Clinton Administration the Anti-Corruption and Anti-Bribery Treaty, now binding thirty countries and making it illegal to bribe a foreign official to contract for a commercial purpose. Before that, believe it or not, not only could you do it, but in France and Germany the bribe

was tax-deductible. And now we have a body that has created a treaty which has been incorporated into the domestic law of all of these countries, and it makes bribery illegal.

There is something called the Financial Action Task Force with close to thirty countries that established—and I was very much involved with—a set of anti-money laundering principles which require the creation of financial intelligence units which say to banks: “Know your customer; ask questions about who you are dealing with; know the ultimate owner of the bank account.” We had a process, which we called the name-in-chain process, and there were a half dozen governments from Israel to Russia, to Lichtenstein, to Panama, which did not come up to that standard. Once they were named and the spotlight was shined on them, within six months to one year they had come into compliance. We now have a body of law that makes it more difficult for money launderers and terrorist groups to use money laundering to hide their assets.

The International Atomic Energy Agency (IAEA) is another institution. It is a U.N. body which investigates suspect countries in terms of their nuclear programs. I believe that had the IAEA been permitted to complete its work under Hans Blix in Iraq, we would have avoided the Iraq war looking for weapons of mass destruction that did not exist. Its increasingly penetrating and negative findings about Iran’s unwillingness to disclose its nuclear facilities, its hiding of data, and its flaunting of three U.N. resolutions on uranium enrichment, has created a context in which within the next few weeks we will have a fourth, and hopefully, a more abiding resolution. Now, again, I could give you a speech on how sanctions have holes in them, and there will have to be, and I think there will be, a follow-up to the U.N. sanctions where the European Union and the U.S. will put in place tougher financial regulations. But the point is: here is an international effort and an international body that is investigating suspicious nuclear programs and shining the spotlight on those that do not comply.

I would suggest to you that the great recession of 2008-2009, from which we are just emerging, is a perfect example of both globalization and the resolution of a problem. This is a problem that started with mortgages in suburbia in the United States and metastasized around the world to cause fifty million people to be out of work. But, it also led to the creation of a new G-20 institution that now includes a whole group of countries which were excluded before—the great emerging countries: China, India, Brazil,

South Africa and the others—and it coordinated a series of domestic stimulus programs without which, if you were not in a depression, your parents would be because we would have had a repeat of the Great Depression of the 1930s.

Now, again, I am going to give you an example—Professor Love, you mentioned Copenhagen—I was the chief U.S. negotiator for the Kyoto protocols. Kyoto and Copenhagen point out the limitations of global governance, the fact that we still have not developed the type of institutional framework to really address emerging international problems like global warming. When I negotiated Kyoto, for example, the Chinese, Indians and the G-77 said, “It is your problem, developed world. You created it. Do not look to us for a solution.” And Copenhagen was little better; it was really a total disaster. You cannot get 190 countries that have to agree unanimously on something; you are going to have to create smaller bodies, like the G-20, to try to come together on these types of problems.

I want to conclude with the Holocaust negotiations, and even here I want to put this into context because the Holocaust negotiations were alternative dispute resolution processes. First of all, there is now a whole series of hundreds of bilateral investment treaties between governments, and regional agreements, like the Central America Free Trade Agreement, which incorporate mandatory arbitration for investment disputes. If Hugo Chavez goes out and wants to nationalize a U.S. oil company’s property, you do not have to go to a Venezuelan court where you would not stand a chance of success. Instead, you go to an established international arbitral group established under the World Bank through the ICSID (International Centre for Settlement of Investment Disputes) process where you can get an enforceable judgment. Indeed I am one of three arbitrators on this first case brought under this process under the Central American Free Trade Agreement, where a U.S. railway company alleges that its property was taken improperly by the government of Guatemala. Obviously I cannot talk about the details or the judgment because we have not come to that yet.

Now let me close with what I guess I received the award for, which is not Kyoto, the OECD agreement on bribery or other things. The Holocaust was not only the greatest genocide in history. It was also the greatest theft in history. The Nazis were insistent not only with killing the Jews and others, but stripping away every scintilla of their personality and their acquisitions, all of their

homes and businesses, artifacts, menorahs, candle sticks, gold teeth—they were melted down into disguised gold bars and then sent to the Swiss national bank, which converted them into hard currency to finance the war, and artworks—600,000 pieces of art were taken, of which we still do not know where at least 100,000 are at this point. To its great credit, in 1951 the German government and the Israeli government created the Conference on Jewish Material Claims against Germany, or the Jewish Claims Conference. I just came back from Berlin as a volunteer unpaid special negotiator, where we negotiated an additional \$152 million from the Germans with an emphasis on homecare for elderly, poor survivors. There are 500,000 Holocaust survivors around the world, half of whom live in poverty. And over one-third of those survivors live in New York City. Can you imagine? In this great city, in this great country, we have allowed people who lived the worst of hell in their young life to live in poverty in their declining years. That is one of the things we worked on with the German government, and the German government has paid over \$100 billion to victims since 1951. This is the first time that a country has paid for the damage it caused in its own war. But this, as I indicated, is a pittance compared to the need. During the time I was Ambassador to the EU, then under Secretary of Commerce, then under Secretary of State, and then Deputy Treasurer's Secretary, I had a second role which was Special Representative to the President and Secretary of State on Holocaust era issues, and I wrote a book called *Imperfect Justice* about this; imperfect because there is no justice that can be done; imperfect as well because it was belated, because many of those who could have been helped had already passed away. It was nevertheless historic. It represented \$8 billion in recovery; the return of thousands of pieces of art; the payments of thousands of unpaid insurance policies. But it was also historic because it was the first time in any conflict in which private corporations were held accountable for their participation and collaboration in a war effort. Most of the money we got, of the \$8 billion, came not from governments but from private companies like German slave labor employers, like insurance companies that had denied coverage after the war on the grounds that premiums were unpaid while people were in Auschwitz. And so holding private companies accountable was very important.

Now there were two aspects to my involvement. The first I will summarize briefly and then the second I will go into a little more detail because it fits so well into this context. The first was as

an advocate for the U.S. government to the governments of central and eastern Europe, the new emerging democracies after the end of the Cold War and the implosion of communism, to return the communally-owned property—Christian and Jewish, Catholic and Protestant—that had been confiscated by the Nazis and then nationalized by the communists. And we were able to return and are still in the process of returning thousands of churches and synagogues, schools and community centers, and even cemeteries, so that these newly emerging religious communities that could not practice their religions during the Nazi era nor the communist era can now have the infrastructure to rebuild, albeit in tragically smaller numbers, their religious communities.

But the second component is the one I want to close with, and that is, serving as a U.S. government representative as a sort of mediator, a special negotiator, a catalyst to settle a set of class-action lawsuits which were brought against Swiss banks, German and Austrian slave labor companies, insurance companies, and French banks permits me to say, and I will describe what I mean in each of these, that had those lawsuits gone to term, very few, if any, would have succeeded because of jurisdictional problems, statutes of limitation, lack of evidence after sixty years under Federal Rules of Evidence, etc. So we created, in effect, an alternative dispute process tailored to each of these cases.

With respect to Swiss banks, I read in the *Wall Street Journal* in August of 1995 a front page story talking about hidden bank accounts that had never been returned by the Swiss banks after the war. I took the article to a Swiss bank association in Basel, Switzerland and I said “Is there any truth to this?” Response: “Yes, we created an ombudsman. We looked at every account between 1933 and 1945 in all of our banks, and there are 750 of these accounts worth \$32 million.” Well, five years later, after we appointed Paul Volcker, the head of commission, who charged the Swiss banks \$200 million in audit fees, there were 54,000 possible accounts, of which 21,000 were almost certain accounts that were never returned by the Swiss banks after the war, and the settlement there was \$1.25 billion. And under Judge Edward R. Korman and the Eastern District of New York, the last of those amounts is being allocated. But there were two aspects to them. There was a claims process where people could say my grandfather, my aunt, my uncle, etc., had an account, and they would then go through a regular claims process with a special master. And, there is what we coined “Rough Justice.” And this is the point that I want to leave with

you: Rough Justice meant that we could not match everyone up. And so a substantial amount of that \$1.25 billion simply went to Holocaust victims who were poor based on a formula that the judge determined.

We did something similar with the German slave labor negotiations where I was able to facilitate a dismissal of the class actions and obtain a settlement of 10 billion deutschmarks or \$5 billion. And this was Rough Justice at its roughest. Most of that money went to pay those who were slave laborers in concentration camps who were being worked to death by Germans—mostly but not entirely Jews, and those who were forced laborers, mostly Slavs, Poles, Eastern Europeans, who were not being worked to death but were certainly working under brutal circumstances. It turns out there are 1.66 million of these people, of whom about 200,000 are Jews. Now if we had to have a trial-like process to resolve their claims it would never have worked; everybody would have been dead ten times over. So we created a Rough Justice concept. If you were in a concentration camp, and all you had to do was show you were in a particular camp, Buchenwald, Birkenau, etc., you got \$7,500 whether you were there a day, a week, a month, or three years. If you were a forced laborer in a work camp, you got \$2,500. So people were not getting a munificent sum, but they were getting some concept of repayment. We did the same with the Austrians as well. We created an alternative dispute resolution process called ICHEIC, the International Commission on Holocaust Era Insurance Claims, chaired by former Secretary of State, where people could come with insurance claims, and if they had any evidence, or if they simply said I think my grandfather had a policy that AXA or Winterthur or Alliance wrote, the companies were obligated to do their own research through their own archives under loose rules of evidence, much more flexible than in court, and thousands of policies have been paid worth over \$350 million.

In Richard's work with the French, French banks had done something similar to what Swiss banks had done. We reached a \$25 million settlement there which had a claims part and a "rough justice" part, a sort of equity part, where you did not have to make the sort of proof that you would in court. And Richard was really critical in getting that done. We created for Austria a special claims process for property, with a cap, not enough, but again an efficient claims process and a "rough justice" process. And as the Dean said, I negotiated something called the Washington Principles on Art, the principle being that if a museum or auction house

had any painting that went through European hands between 1933 and 1945, they had to research the provenance of that, and an alternative dispute process would be set up to try to facilitate claims. Hundreds of paintings have been returned. Philippe de Montebello, then the head of the Metropolitan Museum who worked with us during the 1997 conference, said the art world will never be the same again. Sotheby's and Christie's now have one fulltime person who does nothing but search Holocaust era provenance. There is a search engine that connects sixty—now one hundred—U.S. museums, so that if you think you have a claim, your grandparents, whatever, you give the name of the painting, it goes through this search museum and then museums search it. Now, that process has lost a lot of momentum, and I am getting back into it now because too often the museums are now saying “We are not going to give it back.” There is a technical defense, like the statute of limitations, and we are trying to create an alternative commission to negate the use of those technical defenses. But, again, alternative dispute processes.

So let me close with this simple thought. And that is, the twenty-first century is going to be an incredible century of dynamism and of conflict. But it will also be full of efforts to find creative ways of resolving conflict. I think progress is being made in halting ways, in imperfect ways, in sometimes maddening ways, but progress is being made to both reduce areas of conflict, to mitigate the conflicts that do occur, and then to develop alternative processes when the conflict does occur. You will all be the ones who will have to take that baton in your hands and go the next step. But I think we have begun to lay the foundation for a twenty-first century in which conflict resolution and alternative dispute processes will not be at the fringe of the legal system, but will be at the center of international dispute resolution.

Thank you very much.