

Reparations and Legal Succession – What Happens When the Victims Are Gone?

*Norbert Wühler**

When reparations are considered and when a reparation mechanism is being designed, the focus is normally on the victims who have suffered directly from the crimes perpetrated. The one situation where the range of beneficiaries is typically extended beyond direct victims is when murder is one of the crimes committed: in that case, family members of and others close to the murder victims are often included in the reparation mechanism. The focus on direct victims is understandable when a conflict is recent and the crimes occurred in the immediate past. However, when more time has lapsed between the crimes and the creation of a reparation mechanism, more of the “original” victims will have passed away before the start of reparations and the question becomes more acute to what extent their family members or other legal successors should be included.

Intuitively, one might support the inclusion of legal successors to the largest extent possible, and this is often what at least the family members expect and demand. The broad extension of reparation benefits also to legal successors of deceased victims will, however, affect the amount of reparation available to both surviving victims and their legal successors, especially in programmes that come long after a conflict or crime. This then requires the balancing of the respective needs and interests, in particular in the typical situation where the resources that are available for a reparation mechanism are limited. Here are two examples to illustrate this. In the negotiations of a Palestinian-Israeli peace agreement, reparations for Palestinian refugees displaced in 1948 were always considered a key component. While the number of survivors of the approximately 700,000 displaced at the time is by now quite limited, estimates of their descendants today range from 5 to 7 million. In this case, the inclusion of descendants would not only have a huge impact on the scope of the programme as a whole, but also on the extent of reparations available for surviving victims. The German programme for the compensation of forced labourers under the Nazi regime set up in the year 2000 faced a similar challenge. The large sum of 5 billion Euros available in that programme allowed the payment of compensation to some 1.65 million beneficiaries. The majority of these payments went to survi-

* Dr., Chair, WIPO Appeal Board; former Director of IOM Reparation Programmes.

vors. Only where a survivor passed away after filing a claim with the programme but before receiving the compensation, his or her legal successors received this amount. Had the programme included the legal successors of all forced labourers deceased since the Second World War, the number of beneficiaries under the programme would have been in the tens of millions, and the individual compensation would have been reduced to “miniscule” amounts.

While these two examples are extreme in terms of the numbers of the people concerned and the resources available or required, the issue of the inclusion of legal successors arises for practically every reparation programme. The questions that need to be addressed include the following:

- Should legal successors of a deceased “original” victim be eligible to reparations?
- When would a legal successor become eligible? Whenever a victim has died? Or only when the victim has died after filing a claim but before receiving the reparation/s?
- Which reparation/s should a legal successor receive? Type and scope?
- Which legal successor/s should be eligible? Family members? Other (closely connected) persons?
- Should eligibility be determined pursuant to national inheritance law/s? Or according to general principles? Or based on a “self-contained regime”?
- How should the (potentially discriminatory) status of women under national inheritance law/s be addressed?
- How can legal successors participate in the programme?
- What evidence is required to prove a legal successor’s eligibility?
- How will the reparations be delivered to legal successors?

Different reparation mechanisms have given different answers to these questions, considering factors such as: the number of victims and legal successors; the types of reparations; whether the claimants and their legal successors were based in one country or spread over a number of countries; and whether the programme was administered nationally or internationally. In addition to the applicable legal framework, they took into account the political, cultural, religious and social contexts in which the reparation mechanism was placed.¹

As an example of a reparation mechanism dealing with real property claims, the Kosovo Property Claims Commission (KPCC) set up in 2007 under the United Nations Interim Administration in Kosovo (UNMIK) –

¹ For a comparison of the legal successor regimes of several reparation mechanisms, see *N. Wühler/H. Niebergall* (eds.), *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, 2008, 103 et seq.

and later continued under the European Union Rule of Law Mission in Kosovo (EULEX) – had to decide claims brought by legal successors of deceased property right holders. Such claims could be filed by family household members of the initial right holder. They included the spouse, children and other persons whom the property right holder was obliged to support in accordance with the applicable law, or the persons who were obliged to support the property right holder in accordance with the applicable law, regardless of whether or not the person resided in the property together with the property right holder.² The KPCC determined that, under the applicable domestic law, this definition covered, in addition to spouses and children, parents, brothers, sisters, grandparents and grandchildren of the property right holder. Where there was not sufficient evidence to establish that the legal successor was an heir to the claimed property, the KPCC found that it had no jurisdiction to resolve issues relating to inheritance. In such a case, the KPCC confirmed the property right in favour of the deceased. This decision was without prejudice to the determination by the competent court as to how the heirs would succeed to the property right of the deceased property right holder.

The Iraq Property Claims Commission (IPCC), which dealt with real property claims arising out of violations committed by the *Saddam* regime, also determined the eligibility of legal successors of the initial property owners based on Iraqi civil law. Different than the KPCC, however, the IPCC itself decided issues of inheritance in individual cases by application of Iraqi civil procedure law.

In the context of its reparations mandate, the International Criminal Court (ICC) also addressed the question which family members or other persons close to victims should be entitled to reparations. In the case of *The Prosecutor v. Germain Katanga*, the Trial Chamber II made two findings in this respect. Absent specific provisions in the applicable law, it first considered that it was not competent to adjudge matters which were the province of Congolese national law and it was therefore not in a position to make a finding of succession to family property.³ Concerning the eligibility of family members of murdered victims, the Chamber referred to a judgement of the Inter-American Court, which held in *Aloeboetoe et al. v. Suriname (Reparations and Costs)*, 10.9.1993, para. 76, that

² Section 1 of UNMIK Direction 2007/5.

³ *The Prosecutor v. Germain Katanga*, Trial Chamber II, Order for Reparations, ICC-01/04-01/07-3728 (2017), para. 107.

“[i]t can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child”.

The Chamber then recalled that the concept of “family” was to be understood in relation to the relevant family and social structures, in the case before it those of the Democratic Republic of Congo. In the specific circumstances of the case, the Chamber regarded the loss of a family member as a traumatic experience entailing psychological suffering and that it was of little consequence whether the relative was near or distant.⁴

Two widely differing approaches to the question which law should govern the eligibility of legal successors are represented, respectively, by the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) and the German Forced Labour Compensation Programme (GFLCP). In 1997, the CRT was established to resolve claims to accounts opened prior to or during the Second World War by non-Swiss nationals or residents that were dormant since 1945. The vast majority of the claims were brought by legal successors of the original account holders who were usually two generations apart from them and who resided in two or more different jurisdictions. For the decision on the inheritance rights, the CRT applied the pertinent national law pursuant to conflict of law rules, mostly the law with which the matter in dispute had the closest connection.⁵ As the basic rule, the CRT applied the law of the country in which the account holder had his or her last domicile. If the account holder was not a national of the country of his or her last domicile, then the law of the country of his or her citizenship was applied. Once the applicable national law on inheritance had been determined, this law then had to be applied to the facts of the individual case. Due to the international composition of its membership and staff, the CRT could research some of these national laws itself. For the majority of the 70 national laws it applied, however, the CRT obtained expert opinions from the Swiss Federal Institute of Comparable Law. This procedure not only made the CRT process complex and lengthy. It also resulted in the CRT spending about half as much for administrative costs as it paid out in compensation to some 9,000 claimants.

A very different approach was used by the GFLCP. The approximately 2.4 million claimants participating in this programme resided in almost 90 countries around the world. While the number of eligible legal successors was “only” about ten percent of the total, to apply the “CRT approach” would still have been very complex, time-consuming and costly for the pro-

⁴ *Germain Katanga* (note 3), para. 121.

⁵ CRT Rules of Procedure, Art. 16.

gramme. For these reasons, the GFLCP established a “self-contained regime” of inheritance rules specifically for the programme.⁶ Under the German Foundation Act, the law governing the programme, spouses and children on the first level, grandchildren on the second or siblings on the third level were considered to be eligible heirs. If no family member on one of these three levels existed, heirs under a will were eligible. As long as one or more heirs existed at a higher level, they excluded heirs at the lower level.⁷ With this much simpler rule of eligibility of legal successors, the review of death and inheritance evidence from some 90 countries, the collection and registration of large numbers of family members, and the payment of compensation to several members within a family still posed significant challenges. Nevertheless, these were manageable, compared to the difficulties that the application of the “CRT approach” would have entailed.

An even more limited approach to compensation for family members was used by the United Nations Compensation Commission (UNCC). In its first decision, the UNCC Governing Council set out the following definition of what would constitute a “family” for purposes of eligibility and payment of UNCC compensation: awards for death in category “B” and for departure in category “A” were limited to any one family which was defined as consisting of the victim and his or her spouse, children and parents.⁸ This definition of a “family” was also used to delineate who within a deceased claimant’s family could share in the distribution of a UNCC award: where a successful claimant died prior to receiving the compensation payment, the proceeds of the award could only be distributed by the deceased claimant’s government to his or her spouse, children or parents. This limitation had a significant impact on the distribution of award proceeds in many claimant countries, including in particular Kuwait.⁹ Under Kuwaiti domestic laws and customs, female spouses did not officially join the families of their husbands, but remained a part of their own parents’ households. For UNCC payment purposes, however, a female spouse shared equally in the distribution of a deceased husband’s award proceeds along with their children and her husband’s parents. In contrast to this, any brothers or sisters of the deceased claimant who may have been supported in part or totally by the claimant were not eligible to receive any portion of the award. De-

⁶ See *G. Saathoff/U. Gerlant/F. Mieth/N. Wübler* (eds.), *The German Compensation Program for Forced Labour: Practice and Experiences*, 2017, 36, 97 and 110.

⁷ Law on the Creation of a Foundation “Responsibility, Remembrance and Future” (German Foundation Act) of 2.8.2000, German Federal Law Gazette (BGBl.) 2000-I, 236, section 13.

⁸ UNCC Governing Council decision 1, para. 13.

⁹ For details, see *N. Wübler/H. Niebergall* (note 1), 106 et seq.

spite numerous requests from Kuwait and other affected countries to expand the definition of “family” to include other individuals who had received support from the deceased claimant, all the Commissioner Panels of the UNCC applied the Governing Council’s narrow definition.

The examples described above show a wide range of approaches to how reparation programmes treat family members and other legal successors in terms of eligibility to participate, receive reparations, be restituted property and share in the distribution of compensation payments. There are many factors that determine the choice of the approach, not only legal ones, and a number of different interests need to be balanced. Whatever the approach, the issue should be addressed early on in the design and establishment of a reparation mechanism and the implications of the choice should be considered carefully.