CHAPTER 10:
LEGAL CLOSURE

This chapter contains:

- Why was legal closure so important?
- Measures adopted to ensure legal closure
- Was legal closure achieved?

INTRODUCTION: PAINFUL, BUT UNAVOIDABLE

"Legal closure" is about settling, for good, potential or actual claims arising from a specific historical injustice through a designated claims program and thereby preventing future claims or legal action. In general, this can relate to resolving claims and counter-claims. In the context of a compensation program for serious human rights violations, it will usually be focused on protecting those responsible for human rights violations and eventually funding the program against future lawsuits. This may be considered particularly problematic in the case of programs that do not provide for full compensation, as it conflicts with the expectations — and, depending on the actual circumstances, also with the material rights — of the victims of the human rights violations. However, in cases where the money for a reparations program comes from the side of those responsible for the human rights violations, legal closure usually constitutes a necessary component of the negotiated solution without which there would be no such solution. Finally, it may be understandable that stakeholders of those responsible for violations would not agree to pay for the same violations again in the future. It is important to underline, however, that this legal closure does not relate to aspects of criminal responsibility of individuals for the crimes committed.

In the case of the forced labor compensation program, legal closure was a major interest of the German side, both for the government and for German companies. The commitment on the part of the German side to establish the EVZ Foundation and pay significant amounts of money into the Foundation's funds had been motivated, at least partly, by the expectation to settle for good the lawsuits pending against the German State and German enterprises before courts elsewhere (particularly in the US) and to ensure protection from future lawsuits. It was decided already during the negotiations that every claimant of the compensation program would have to waive any claims outside the program against German companies in any matter connected to Nazi-era injustice and against the German State for forced labor and property damage. It was also agreed that all cases pending before US courts would be withdrawn and terminated before the program would start. None of the provisions on legal closure related to eventual criminal responsibility of individuals involved.

This chapter explains the motivations of the German State and companies for seeking legal closure and how this was implemented in the program. It also discusses to what extent legal closure has in fact been achieved.

WHY WAS LEGAL CLOSURE SO IMPORTANT?

Even though legal closure is a frequent component in compensation programs, it may seem surprising that this was still so important in the case of forced labor such a long time after the crimes took place. Indeed, for several decades, no legal action that had been initiated in Germany against the German State or German companies concerning forced labor had been

successful. However, when the so-called class action lawsuits were launched in US courts in the 1990s, the legal situation was less clear. Also, the sheer number of these lawsuits in the United States created an economic and political pressure irrespective of the actual prospect for success of the lawsuits. By participating in the negotiations for a compensation program, German companies sought to settle these cases. Moreover, both the respective companies as well as the German State sought protection against lawsuits that concerned Nazi injustice addressed under the program in any future proceedings.

There were many reasons why lawsuits for compensation of forced labor had remained unsuccessful in German courts until the end of the 1990s:

- Lawsuits were turned down by German courts with the argument that they came too late, citing a three-year deadline under German law for claiming compensation of damages caused by a violation of certain personal rights.
- Some victims of forced labor lacked an addressee of a claim if the company in question no longer existed.
- In the opinion of some courts, there was no contract between companies and forced laborers; consequently, a claim a company could not be based on the violation of a contract or on a contractual obligation to pay wages.
- Claims against the German State were refused for the reason that state immunity shields states from being sued before courts of other states.
- Finally, there were problems of proving in a lawsuit the fact of having carried out forced labor in cases in which former victims did not avail of any documentary evidence.

However, in the US, the legal situation was more difficult to assess. First, it was argued that for certain violations, such as crimes against humanity, there should be no time limitation under civil or public law. Also, rules on state immunity had started eroding with respect to atrocities such as torture or crimes against humanity, at least in the criminal law sphere. And, regarding the lack of documentary evidence, courts were potentially willing to accept personal statements as sufficient proof.

Perhaps more important than the legal risks for German companies, the class action proceedings in the US developed their potential for creating significant public pressure irrespective of the prospect for success of the claims. Coverage in the media on companies fighting with sophisticated legal arguments against legal responsibility for atrocities in which they had clearly been involved

impacted negatively on their reputation and amounted to an economic threat. At the same time, high fees for lawyers constituted a relevant economic consideration given that defense in class actions is very costly.

These factors not only contributed to the readiness of German companies, and ultimately the German State, to take financial responsibility and negotiate for a compensation program, but underlined their interest in "legal closure"— namely the protection from all future claims in these and similar matters.

MEASURES ADOPTED TO ENSURE LEGAL CLOSURE

A number of measures were adopted to ensure protection from future lawsuits. Given the fact that the US had been the forum of the class action lawsuits (i.e. a court system where respective legal action was admissible in the courts), some of the measures pursuing legal closure were directly related to this forum. Other measures aimed at legal closure in Germany, and yet others were designed to avoid the possibility of legal action anywhere in the world.

Measures related to the forum of the United States of America

With respect to legal actions in the United States, three elements had to be distinguished: the stated position of the US regarding reparation claims; the protection of Germany and respective companies against legal action brought by individuals in US courts; and the settlement of claims pending before US courts at the time of the negotiations.

Regarding the first element, in the "US-German Agreement" the US affirms that "(t)he United States will not raise any reparations claims against the Federal Republic of Germany." This statement contains a binding waiver of any eventual reparations claims by the United States. The wording of the rest of the intergovernmental agreement does not give rise to any doubts in this respect.

With a view to the second element — legal action brought by individuals in US courts — the US Government offered to "take appropriate steps to oppose any challenge to the sovereign immunity" in cases where such a matter would be brought before US courts. This was a statement of the legal position of the US that Germany is entitled to immunity before US courts with regard to acts committed during the Second World War. In addition, the US Government undertook to issue a Statement of Interest in any case in a US court involving claims against Germany, Austria, or German or Austrian companies that involved or related to the subjects covered under the respective compensation programs. A Statement of Interest would then make the following points:

- The respective compensation program was designated as the exclusive forum which provided for a fair and equitable resolution for all issues addressed under the program; and

- The dismissal of the lawsuit would be in the foreign policy interests of the US and therefore was recommended on any valid legal ground.[1]

That said, a Statement of Interest does not provide an absolute protection against future legal action in its field of application since it does not constitute an independent legal basis for the dismissal of the respective lawsuit.[2]

As a third element, in order to secure protection against the class action lawsuits that were pending before US courts at the time of the negotiations, it was agreed that the US Government would urge the courts to dismiss these cases. This dismissal would then be the condition for the financial contribution of German companies as well as the beginning of payments.

The point in time when the contribution on part of the German companies was due was regulated by the following provision made in the "Joint Statement":

> Assuming the request for a transfer referred to in paragraph (e) is granted, the DM 5 billion contribution of German companies shall be due and payable to the Foundation and payments from the Foundation shall begin once all lawsuits against German companies arising out of the National Socialist era and World War II pending in U.S. courts including those listed in Annex C and D are finally dismissed with prejudice by the courts. (Joint Statement, Section 4.d)

Another point mentioned in the quoted subsection of the Joint Statement was to begin payments only once legal closure in the US had been established. To this end, the Foundation Law set out the establishment of "sufficient legal peace for German companies" as a legal requirement before the first monies could be transferred to partner organizations for payments to eligible

1 See Annex 3: US-German Agreement, Annex B; see also Agreement between the United States of America and Austria, Federal Ministry of Foreign Affairs of the Republic of Austria, No 2140.02/0044e-BdSB/2001, Annex B, Wien, 23 January 2001. With regard to the latter, it remained somewhat unclear whether based on the reference made to the intergovernmental agreement on forced labor it could be expected that the US Government would issue a Statement of Interest in the respective cases.

2 This would have only been possible on the basis of an amendment of US federal law or on the basis of a bilateral treaty under international law by inserting a compulsory reason for inadmissibility in such cases. There were hardly any prospects for obtaining the necessary approval in this respect given the fact that this would have required a two-thirds majority in the US Senate.

victims.[3] A certain political flexibility was maintained by empowering the German Federal Parliament (Bundestag) to establish whether "sufficient legal peace" had been achieved. Therefore, it remained possible to declare a situation of "sufficient legal peace" and start with payments even if not all of the lawsuits pending in US courts had been dismissed. Arguably, this was only possible leaving aside the agreement reached in the Joint Statement according to which the beginning of payments would depend on the dismissal of all pending claims listed in the annexes of the Joint Statement.

In any event, the room for political maneuver was limited. The contribution of the German companies was still dependent upon the dismissal of all lawsuits. Moreover, the entire project had been achieved in a joint effort by German political bodies and German companies. It was therefore regarded as relevant criterion that the "Foundation Initiative of the German Industry," which represented the interests of German companies during the negotiations, would agree that "sufficient legal closure" had been established. Consequently, the German Parliament only made its statement on legal closure once this agreement had been given by the "Foundation Initiative of the German Industry".

A deadlock arose after a judge, in one of the lawsuits pending before US courts, refused dismissal of the case as long as the EVZ Foundation had not been fully funded, while German companies argued that they would only transfer their money to the EVZ Foundation once all lawsuits were dismissed. The way out of this deadlock was that leading German companies publicly issued a guarantee for any eventually lacking amount towards the share of the Foundation Initiative of the German Industry of approximately 2.6 billion Euros that needed to be raised. However, the responsible judge still refused to dismiss the case. She also was left unimpressed with the — non-binding — Statement of Interest that had been issued by the US Government, and the obstacle constitute by this case still pending was only removed by a decision of the Court of Appeals. This delayed the start of the compensation payments from January to June 2001.

This situation demonstrates that relying on a legally weak instrument such as a Statement of Interest may cause unwarranted delays. If legal closure is part of the deal — which will often be the case in compensation programs — clear-cut legal rules and binding instruments may be more desirable to avoid subsequent disputes and delays to the detriment of all concerned. In the case of the EVZ Foundation, the delays described could have been avoided if the US side had agreed to introduce a legally binding reason for the dismissal of lawsuits concerning claims covered by the Foundation Law. At the same time, a legally binding obligation of specific German companies with respect to the financial contribution due on part of the Foundation Initiative of the German Industry also would have served to avoid controversies and delays in the process.

3 See Annex 1: Foundation Law, Section 17 (2).

Measures related to the forum of Germany: Designation of the compensation program as the exclusive forum for forced labor claims

Within the reach of German jurisdiction, the German legislator established clear rules to exclude future lawsuits. Accordingly, the protection of public bodies and German companies was further reinforced in the German Foundation Law by making the compensation program the exclusive remedy and forum for claims relating to Nazi injustice apart from already existing norms granting compensation in specific legislation.[4] Before the Foundation Law had entered into force, it had been unlikely that any legal action stood a chance of success, but full certainty had not been achieved. In view of a number of legal actions pending before German courts it was considered necessary by the German legislator to exclude any claims based on forced labor from other fora.[5]

A legal problem could have been found in this context in view of the protection of private property under the German Constitution (Section 14 of the German Basic Law). This protection could have been seen to include the right to receive compensation for forced labor the pursuit of which could not have been excluded. In an earlier case, the Federal Constitutional Court had endorsed the transfer of legal claims under private law into legal claims against an adequately financed fund in a judgment concerning a foundation for children who had been born with a handicap caused by a certain medicine.[6] The reasoning of this judgment was considered all the more valid in the case of forced laborers since only their aspirations and unconfirmed legal claims were addressed in the Foundation Law rather than existing and enforceable legal claims. The German Federal Constitutional Court confirmed the compatibility of the Foundation Law with the German Constitution in 2004.[7] In particular, the "social function" of the EVZ Foundation was emphasized which made claims independent from the continued existence of the company for which the forced labor had been performed.[8]

4 See Annex 1: Foundation Law, Section 16 (1).

5 See explanations on Section 16 (1) of the draft of the Foundation Law, Register of the German Parliament, BT-Drs 14/3206, http://dipbt.bundestag.de/doc/btd/14/032/1403206.pdf (accessed 13 March 2017).

6 See court decision on the "Law on the Creation of a Foundation *'Hilfswerk für behinderte Kinder'*" (German Federal Law Gazette, Year 1971, Part I, no 131, page 2018) of the German Federal Constitutional Court, BVerfGE 42, 263, 295 et seqq., 8 July 1976).

7 See court decision on the "Constitutionality of the Exclusion of Claims by the Foundation Law" of the German Federal Constitutional Court, BVerfGE 112, 93–117, 7 December 2004.

8 See BVerfGE 112, 93–117; see also the Explanatory Report of the Foundation Law, Register of the German Parliament, BT-Drs 14/3206, explanation on Section 16 (1).

Using similar arguments in assessing a violation of the right to property under the European Convention of Human Rights and its First Protocol, the European Court of Human Rights found in its negative admissibility decision in the case *Poznanski v Germany* that the EVZ Foundation scheme did not upset the fair balance to be struck between the protection of individual property and the "substantial public [interest] in setting up the Foundation Law to deal with all compensation claims for forced labour".[9]

Measures related to any forum in the world: Collection of waivers

On the level of the individual claimants, legal closure was achieved with the requirement to sign a waiver of any additional claims as a condition for payment. Such a waiver could be used as a defense by companies who were sued anywhere in the world: whenever and wherever legal action would be initiated by a claimant in the German program who had signed a waiver *and* who had received a payment, this waiver could be used to seek the rejection of a claim based on forced labor through such a legal action. While such a rejection would not be guaranteed but depended on the acceptance of the waiver by the respective court, it would make the rejection by the court very likely.

When filing a claim, applicants had to sign a statement that, with the receipt of a compensation payment, they renounced irrevocably any future claims outside the forum of the German compensation program. The Foundation Law (Section 16 (2)) specified that in the case of German companies the waiver was effective for any forms of compensation related to the Second World War, while against the German State, it only concerned claims related to forced labor and to property damages. The waiver only became effective upon receipt of the compensation payment and thereby did not apply to persons who were not found eligible. The Foundation Law did not limit the waiver to the types of damages addressed under the law but spoke more generally about waiving all claims against German companies arising "in connection with National Socialist injustice" and concerning forced labor and property damages against the German State.[10]

The definition of "German companies" in the respective laws was rather broad. Since the waiver excluded any claims against such companies it was crucial how these companies were defined if any protection outside Germany was to be achieved. Therefore, the term "German company" was not limited to those companies that had their seat within the borders of the German Reich of 1937 or that are now registered in the Federal Republic of Germany, but also included so-called "mother" companies, whether in Germany or abroad. Moreover, it also covered those companies abroad, where a stakeholder with shares of at least 25 percent had its seat or was registered in Germany.[11]

9 *Poznanski and Others v. Germany.* Judgment, European Court of Human Rights, HUDOC 25101/05, 3 July 2007; see also Matti Pellonpää, "Due Process in Mass Claims Proceedings and Article 6 of the ECHR," in *The Protection of Human Rights at the Beginning of the 21st Century,* ed. Jürgen Bröhmer (Baden-Baden: Nomos, 2012), 91–122.

10 See Annex 1, Foundation Law, Section 16 (2).

11 Ibid., Section 12 (2).

The administration of the waivers caused considerable organizational efforts. In particular, waivers had to be collected by the partner organizations together with the claim forms and transferred to Germany for archiving. In the claims process, this had to take place before the second installment payment was effected in order to secure proper administration of the waivers. The waiver documents first kept in the German Federal Archive and later with a private firm, so that they can be identified and presented in case of any new lawsuit being initiated. Finally, a separate report was issued for the German parliament that detailed the status of legal closure.[12]

Signing a waiver as part of application claim often caused very negative reactions on part of the applicants since they had to declare a forfeiture of what they considered their legitimate entitlement when they did not even know what they would get in return.

WAS LEGAL CLOSURE ACHIEVED?

The US court cases listed in the Annexes to the Joint Statement on the EVZ Foundation were finally dismissed. The consent to the withdrawal of the lawsuits was conditional on the full funding of the EVZ Foundation, a condition that was fulfilled some time after its establishment.

Also, with regard to claims covered by the Foundation Law, legal protection against further claims appears to be effective. There is no case known where a payment under the Foundation Law was not considered "sufficient," and where a court granted additional payments.

However, there is no guarantee of comprehensive protection against parallel or future litigation. In particular, cases concerning Nazi injustices that were not covered by the Foundation Law kept being litigated. Moreover, state immunity for cases involving serious human rights violations or grave breaches of international humanitarian law is eroding in state practice. In Italy, Germany was denied immunity against such litigation for compensation in the *Ferrini Case,* by the Italian Corte di Cassazione in 2004, concerning a former forced laborer (a so-called IMI) who was not eligible under the program criteria [13], and in subsequent decisions by Italian courts in 2008. In the resulting case brought by Germany against Italy before the International Court of Justice, the latter held that jurisdictional immunity of Germany was

12 See "11th Report of the Federal Government of Germany on the Status of Legal Closure for German Companies in the Context of the Foundation "Remembrance, Responsibility and Future," Register of the German Parliament, BT-Drs 17/1398, http://dipbt.bundestag.de/dip21/btd/17/013/1701398.pdf (accessed 13 March 2017).

13 *Ferrini c. Republica Federale di Germania.* Judgement, Italian Supreme Court of Cassation (Riv. Dir. Int. 87 (2004) 539), 11 March 2004.

to prevail.[14] Also, litigation in Greece showed that protection against claims related to the Second World War may not necessarily be provided by the provisions for legal closure of the Foundation Law. In a case concerning a massacre by German troops in the village of Distomo, the Greek courts, including the Supreme Court, decided that Germany owed an overall amount of more than 28 million Euros to the descendants of the victims. A massacre by German armed forces was not an act falling under a waiver under the compensation program. Moreover, the Greek Supreme Court denied state immunity to Germany. However, enforcement was only possible with the consent of the Greek Minister of Justice, which was refused several times.

SUMMARY

The German Foundation scheme relied on multiple layers for securing legal closure. While some of these layers proved to be watertight, others were less reliable. In particular, the obligation of the US Government to issue a Statement of Interest in individual court proceedings in order to exclude the United States providing a forum for claims against German companies resulted in producing delays in the start of payments because of its non-binding character. Apart from these caveats, the measures adopted with a view to legal closure seem to have worked by and large. Of course, legal action related to situations not covered by the Foundation Law could not be argued against with the help of the instruments on legal closure. Some legal action was faced by Germany in Italy and Greece related to situations not covered by the Foundation Law and thereby beyond the reach of a waiver.

Without providing for mechanisms aimed at legal closure, it would probably have been impossible to motivate the German State and German companies to establish the EVZ Foundation and commit to granting the respective funds. This will be similar in other situations as well. The central question is whether legal closure is acceptable in a situation where a reparations program addresses atrocities of the severity and scope such as those under the Foundation Law. Taking into account the uncertainties regarding the existence of individual rights to compensation as well as the prospect of ever realizing any such rights, the Foundation scheme may indeed seem "acceptable." Also, the large number of victims of forced labor which was reached through the program in contrast to probably a much more limited number of claimants potentially benefitting from any successful court proceedings speaks in favor of acceptability of the EVZ Foundation scheme in return for legal closure. A "fair" balance, however, may be difficult to find, given the seriousness of atrocities covered and the time which had elapsed since their commission.

14 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening).* Judgement, I.C.J. Reports 2012, pg. 99 para. 107, 3 February 2012. http://www.icj-cij.org/docket/files/143/16883.pdf (accessed 21 March 2017).

LESSONS LEARNED

- It is important to realize that without legal closure, German companies (and the German State) would not have paid for the compensation program.

- Ideally, legal closure provisions should balance the interests of victims in the payment of compensation and of those responsible for human rights violations and potentially funding a program in protection against future monetary law suits. While victims may have an interest in being able to pursue all options of litigation with the aim of achieving comprehensive compensation also beyond a designated program, the funding side has an interest in excluding additional claims and further court action.

- Legal closure must not be equated with moral closure and thereby with a notion that atrocities committed in the past were made good by the payment program and cannot be a matter of a moral debt anymore. Legal closure on compensation claims also does not affect criminal responsibility for the crimes involved.

- The farther a reparations program is away from comprehensive compensation or restoration of victims' rights, the more critical the fairness of legal closure has to be assessed.

- The waiver as an instrument of legal closure should not go beyond the scope of situations covered by the reparations program. For situations not covered in the respective program, claimants cannot be expected to waive their right to legal action.

- Legal closure should not be granted in situations where there is no guarantee for full funding. In turn, funding should not be granted before potentially agreed guarantees for legal closure reliably can become effective.

- Asking applicants to waive their rights before knowing about their eligibility and the respective amount imposes a high burden and has highly emotional components. This has been balanced out to a certain extent by partner organizations in their direct dialogue with applicants when submitting their applications in person. In a huge program like that of the forced labor compensation program, this has limitations in view of the sheer number of applicants.